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THE RIGHT TO PRIVACY IN AMERICAN HISTORY

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CHAPTER I

"THE CIRCUMSTANCES OF THE TIMES":

Privacy in the Early Nineteenth Century

A Prologue

...the infidelities of the post office and the circumstances of the times are against my writing fully and freely, whilst my own dispositions are as much against mysteries, innuendoes and half-confidences. I know not which mortifies me most, that I should fear to write what I think, or my country bear such a state of things.¹

- Thomas Jefferson, 1798

The right to privacy began to be numbered among American civil liberties at the close of the last century. Before that time, Americans did talk about privacy, did expect it in their everyday dealings, and did take measures to prevent or punish its invasion. These were rarely legal measures, however, and usually worked on the local, community level. Two perennial foes of privacy, the eavesdropper and the gossip-monger, found their place in the new American society and were dealt with in time-honored fashion. New invaders of privacy in the early nineteenth century, postmasters and census-takers, differed little from the eavesdroppers and gossips, except in their unique access to the personal lives of every member of the community. They were handled, too, in much the same way, by the application of community sanctions and public chastisement, with some help from the law. Not until the last quarter of the century did fears arise of sinister, organized invasions of privacy on a national scale, against which a legal right had to be interposed. Not until the next century, moreover, did electronic extensions of eavesdropping and gossip test the mettle of the new right to privacy.

In that simpler, unwired and unamplified American setting, eavesdropping required physical presence, close enough to hear the conversation going on.² The word still reflected its literal meaning, to stand within the drip from the eaves of a house to listen secretly.³ "Spying" or "peeping" was a different offense, for, according to an early Pennsylvania court decision, "to constitute eavesdropping, there must be a listening or hearkening of the discourse."⁴ In the eyes of the law, this invasion of privacy constituted physical intrusion ("hanging about the dwelling place of another"), interception ("hearing tattle"), and divulgence ("repeating it to the disturbance of the neighborhood").⁵ Expectations of personal privacy must naturally have varied

with physical location. Homes, shops, taverns, fields, and streets all represented different likelihoods that an interested listener would be within ear-shot. Two obvious means of assuring confidentiality were thus to conduct one's conversation where no undetected third party could hear it or in a language that an eavesdropper would not be expected to know.

In the small communities of early nineteenth-century America, informal sanctions usually sufficed for cases of eavesdropping. An eavesdropper close enough to listen was close enough to be caught. "Such offenders were not often prosecuted," wrote David Flaherty of colonial New England's practice, "since the matter could be handled in a more practical and perhaps more satisfying manner by the person who discovered the culprit."⁶ Consider the fate of Paul Pry, imported from London in 1825 to become a popular comic character of the New York stage for fifty years.⁷ In so far as a three-act farce is representative of prevailing attitudes toward inquisitive invasions of privacy, Pry's forced exit through a window at the end of this discovery scene makes Flaherty's point for the nineteenth century as well as for the seventeenth:

Colonel Hardy.	"And what were you doing there?"
Paul Pry.	"Eh! why, to tell you the truth, I heard a talking here; and as I could not make out what the meaning of it all was, and one is naturally anxious to know, you know; I just took the liberty to put my ear to the keyhole, then I put my eye...."
Colonel Hardy.	"So then you confess that you have been eavesdropping about my house. Not content with coming inside perpetually to see what is going forward, you must go peeping, and peeping about outside. Harkye, Mr. Pry, you are a busy, meddling, curious, impertinent,—"8

Poor Paul Pry never understood why people resented his kind attention to their affairs.

Communities added internal restraints to external remedies, making the primary nonlegal protection against eavesdropping the lack of good manners it

evidenced.⁹ These social sanctions against village Paul Pry's appeared in another example of nineteenth century popular culture, a dime novel appropriately titled The Eavesdropper. "I felt," said the invisible narrator, "that eavesdropping was not quite an honorable practice...; but when one has once taken to it...it is somehow very difficult to give up."¹⁰ The less scrupulous intruder, when not immediately caught and dealt with at the scene, was deemed a common nuisance and turned over to the law.

The crime of eavesdropping appeared in England and made the Atlantic crossing when colonies and later states adopted the common law wholesale.¹¹ As long ago as 1361, the Justices of the Peace Act had provided for the binding over of eavesdroppers and peeping Toms on good behavior.¹² Sir William Blackstone, the leading legal authority for nineteenth century England and America, gave the offense its classic formulation:

Eaves-droppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, and presentable at the court-leet, or are indictable at the sessions, and punishable by fine and finding sureties for their good behaviour.¹³

Early in the nineteenth century, some American courts applied this portion of the criminal common law, but the number of cases reported is tiny. A Pennsylvania court announced its reasons for prosecuting eavesdroppers, beginning with a familiar appeal to privacy values: "Every man's house is his castle, where no man has a right to intrude for any purpose whatever. No man has a right to pry into your secrecy in your own house. There are very few families where even the truth would not be very unpleasant to be told all over the country."¹⁴

On the Tennessee frontier in 1808, an accused eavesdropper insisted that the English law did not apply to the new nation's democratic situation.

It was not "consistent with our mode of living," nor "conformable to the principles of our government," his counsel argued. But the judge found the eavesdropping indictment consistent with "the situation of any society whatever," and upheld it.¹⁵ Although another indictment was successful in the same state as late as 1859, eavesdropping, a legal writer concluded, "never occupied much space in the law, and it has nearly faded from the legal horizon."¹⁶

Gossip, another invasion of privacy, was a popular pastime in early nineteenth-century America. "In England," wrote a British visitor by way of comparison, "every one appears to find full employment in his own concerns;--here, it would seem that the people are restless until they know every person's business."¹⁷ Doubtless this traveller underestimated the native curiosity of his own countrymen, but probably he had not been exposed to such interrogation in his less democratic, more deferential homeland.¹⁸ At any rate, many other English and European visitors to the United States made the same observation.¹⁹ The influence of social democracy has usually been called upon to explain the prevalence of curiosity and gossip about which so many foreign travellers complained. Other factors in early nineteenth-century American society, however, moderated its impact on privacy. Geographical isolation on the sparsely-settled continent made distant neighbors welcome the occasional Ichabod Crane, "carrying the whole budget of local gossip from house to house," and surrender up a bit of their own personal news in return.²⁰ Then too, the constant westward movement of individuals and families out of their communities and into new ones held out at least the promise of "starting over" beyond the reach of local resources of gossip.²¹

Writing near the end of the century, E.L. Godkin described the limits of ordinary gossip in this earlier period, before the advent of prying journalism:

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. It did not reach, or but rarely reached, those who knew nothing of him. It did not make his name, or his walk, or his conversation familiar to strangers. And what is more to the purpose, it spared him the pain or mortification of knowing that he was gossiped about. A man seldom heard of oral gossip about him which simply made him ridiculous, or trespassed on his lawful privacy, but made no positive attack on his reputation. His peace and comfort were, therefore, but slightly affected by it.²²

Contemporaries of Godkin addressing the issue of privacy also contrasted this long-tolerated "personal gossip" or "street gossip" with a more insidious and powerful newcomer, the sensational press.²³

Communities in the early nineteenth century could contain the problem of gossip, in most cases, without invoking the majesty of the law. Edward Bloustein has recently painted a reassuring picture of neighborly understanding in that era:

Resources of isolation, retribution, retraction and correction were very often available against the gossip... Gossip arose and circulated among neighbors, some of whom would know and love or sympathize with the person talked about. Moreover, there was a degree of mutual interdependence among neighbors which generated tolerance and tended to mitigate the harshness of the whispered disclosure.²⁴

Gossip "about private lives was often liable to be discounted, softened, and put aside," Bloustein adds, or "was never quite believed" in the first place. But against the incorrigible gossip-monger, victims could have recourse to the law of defamation. Said an outraged character to Paul Pry's companion, the "Village Gossip," by the same playwright: "Mrs. Tinderly! hold your tongue, you scandalous old devil, or I'll have you before a magistrate, and punished for defamation."²⁵

Another possible remedy, listed with eavesdropping by Blackstone, was barratry, the nagging of scolds.²⁶ This sanction applied only against women,

and a colorful woman named Ann Royall fell afoul of the law of common scolds in Washington D.C. in 1829.²⁷ Royall was indicted for "being an evil-disposed person, a common slanderer and disturber of the peace and happiness of her quiet and honest neighbors." Specifically, the indictment found that she, "in the presence and hearing of divers good citizens of the said county, did falsely and maliciously slander and abuse divers good citizens of the said county, to the common nuisance of the good citizens...." In the federal circuit court, Chief Judge William Cranch found fault with the terms "common slanderer" and "common brawler" in the lengthy charge, but upheld the indictment of Royall as a "common scold," the one nuisance that Blackstone and other English writers on the law had mentioned.²⁸ But by adhering so literally to the terminology of the past, Judge Cranch found himself in a legal corner, for the only punishment Blackstone meted out to a "communis barratrix" was the ancient ducking-stool, clearly an anachronism and probably a cruel and unusual punishment barred by the constitution.²⁹ Through the application of much Law Latin and linguistic erudition, Cranch modernized the penalty to a fine and security for good behavior.³⁰ His judicial initiative went unappreciated, however, because as was the case with eavesdropping, common-law criminal proceedings fell into disuse as the nineteenth century wore on. The perennial intrusions of gossip and eavesdropping were handled outside of court in small-town America, setting the pattern for local invasions of privacy in the early post office and census.

In early colonial America there was no institutionalized postal service. Letters were usually carried by friends on their journeys, without fixed charges. Mail from England, if not claimed from a ship's captain on arrival, was left in a tavern or coffee house until finally picked up.³¹ From this

practice arose the custom of leaving letters to England in the tavern instead of entrusting them directly to a ship's officer. Then letters sent within the colonies were also left on a table or in a bag in this public place.³² Communication had acquired an impersonal character--the hands that carried one's private correspondence were not those of a paid messenger or personal friend, but of an unknown person who had to be implicitly trusted. Both regularity and confidentiality of the unorganized post suffered while no authority was specifically charged with responsibility for it. In the general scarcity of news, especially from overseas, local gossips might ransack the open letter bag.³³ Business rivals also threatened "the correspondencies and secrets of Merchants," as several Bostonians complained in a petition for a colonial postal service.³⁴

The British government took over the colonial American post in 1710 and imposed regulation on it. The Post Office Act of that year, reiterating a Proclamation of 1663, provided that "No person or persons shall presume wittingly, willingly, or knowingly, to open, detain, or delay, or cause, procure, permit, or suffer to be opened, detained, or delayed, any letter or letters, packet or packets."³⁵ This provision outlawed all but official tampering with the mails, authorized by a secretary of state. Still it did not persuade all the colonists to use the government's postal service. High rates of postage to subsidize official communications of the Empire, were thought by many to be another illegal tax imposed without their consent.³⁶ Although private carrying of letters was forbidden, colonists continued to avail themselves of the free services of occasional travellers and merchant sea captains, with all the threat to privacy that implied.³⁷

To be sure, correspondents could take some steps on their own to ensure a degree of confidentiality for information communicated by letter:

Most writers sealed their letters with wax, although such seals could easily be broken or could fall apart in transit. ...Many correspondents also wrapped a blank sheet around very important letters before sealing them to prevent reading through the paper....Others employed codes, shorthand, or nicknames when writing to friends, particularly on political topics.³⁸

In addition, a higher illiteracy rate in colonial and early national America meant fewer potential interceptors of the mails, but also meant a denial of privacy to those who could not write their own letters but relied on public scribes.³⁹

Before independence, the greater problem seemed to be official tampering with private correspondence. An early precedent was set by the governor of the Pilgrim colony at Plymouth Plantation, who in 1624 seized and opened the letters of two disgruntled emigrants on their way back to England. Governor Bradford recorded that the letters were "full of slanders, and false accusations, tending not only to their prejudice, but to their ruine and utter subversion."⁴⁰ An explanation of this invasion of privacy must have been necessary, for the governor admitted in court that his actions could be considered "trecherus" and "disgracefull" in others, but were consistent with his duty "to prevent the mischeefe and ruine that this conspiracie and plots of theirs would bring on this poor colony."⁴¹

Colonial postmasters, who started the first newspapers in America and delivered them free, were suspected of using the flow of information through their hands as a source of newsmatter.⁴² Benjamin Franklin, royal appointee to supervise the North American posts and one of these early newspapermen, recognized the need for confidentiality and required his employees to swear "not to open or suffer to be opened any Mail or Bag of Letters."⁴³ Official interception of private letters at higher levels of the British government was probably both more common and more serious than the inquisitiveness of postmasters or governors.

Kenneth Ellis has revealed the extensive covert opening and copying of foreign and inland correspondence in the "Secret Office" during the eighteenth century. Warrants from a secretary of state then were not necessary, for "secrecy made legality unimportant."⁴⁴ Nineteenth-century British writers admitted the "disgraceful art of opening and resealing letters," both diplomatic and domestic, was practiced by past governments, but indignantly denounced it as a "flagrant breach of trust, which scarcely any necessity could justify."⁴⁵ At the end of the colonial period, as revolutionary tensions increased, Franklin found that even his own letters were being opened either in Boston by "some prying persons that use the Coffeehouse" or more likely by London postal officials.⁴⁶

As early as 1774 patriots in Boston responded to this abuse by urging the establishment of a "New American Post Office" to protect the privacy of letters and of newspapers, "those necessary and important Alarms in Time of public Danger."⁴⁷ Military considerations outweighed secrecy in the provisional postal network set up during the Revolutionary War, as evidenced by the Continental Congress's resolution providing for an "Inspector of Dead Letters" to report "inimical schemes or intelligence" discovered in unmailable letters.⁴⁸ The later peacetime National Post Office, as created by the Continental Congress in 1782, could not "open, detain, delay, secrete, embezzle, or destroy" any letter without the consent of the addressee or the warrant of a president, governor, or commanding general.⁴⁹ Under the Constitution, the first organic law of the United States Post Office (1792) used similar language in penalizing letter opening by postal employees.⁵⁰ The postal powers of Congress were yet untested and uncertain, thus one historian of the Post Office has doubted the effectiveness of fines imposed under the 1792 law.⁵¹

Certainly complaints of letter opening by local postmasters were numerous. In the politically charged years from the Constitutional Convention to the

first decade of the nineteenth century, the legitimacy of partisan politics was hotly disputed. Prominent political figures of the early national period resorted to ciphers in their important correspondence, directed their letters through intermediaries, and used pseudonyms for themselves and others.⁵² Even so, according to a biographer of John Marshall, "Such letters as went through the post-offices were opened by the postmasters as a matter of course, if these officials imagined that the missives contained information, or especially if they revealed the secret or familiar correspondence of well-known public men."⁵³ George Washington had to admit that even his private sentiments about the new constitution were no secret, for "by passing through the post-office," he wrote to Lafayette, "they should become known to all the world."⁵⁴ Thomas Jefferson also complained of "the curiosity of the post-offices" which continued to open his letters during his own presidency.⁵⁵ Understandably, early nineteenth-century correspondents still relied on private messengers, friends, and even judges in their circuits to transport letters safely.⁵⁶

As the century wore on, post office regulations and procedures enhanced the confidentiality and security of the mails, by, for example, using special locks on bags of "through mail" which nosy postmasters in the small towns between lacked keys to open.⁵⁷ Moreover, advancing literacy and the introduction of cheap postage added to the number of Americans with a stake in the privacy of letters. This increase in mail volume also provided the protection of sheer numbers; it was more difficult to give any letter individual attention.⁵⁸ Prepayment by the sender, another innovation, insured that privacy no longer depended upon "the whims of a clerk who willingly delivered letters to anyone who would pay for them, without taking the trouble to find out whether or not they belonged to him."⁵⁹

At the same time, legal limits were being set on a related invasion of

privacy. A letter once delivered, said the courts, could not be published without the sender's consent. Judge Francois Xavier Martin, in an 1811 decision in the Territory of Orleans, drew upon British and Continental precedent in ruling that the property of the sender endures in the letter once sent. His judgment in Denis v. Leclerc also made reference to the evolving concept of the sanctity of the mails: "Is it possible to believe that the law should respect the sacredness of a man's correspondence so far as to disallow its violation for a just purpose, the discovery of truth in the attainment of justice, and yet allow the same violation for the purpose of wanton injury?"⁶⁰ Even when the sender of letters wished to produce them in court, the proceeding, according to a later account, was absolutely confidential:

They are handed quietly to the judge. He reads them not only privately, but he reads them as to the rights of the parties upon his honor. He does not disclose them to the other side of the cause, he does not disclose them to the jury, he does not disclose them to the public, unless they be of that nature falling within the restrictions of the law which commits them to the record as evidence in the case. Everything except that is protected.⁶¹

By more general rules of evidence in force at that time, any matter "injurious to the feelings or interests of third persons," contained in a letter or not, were excluded "on grounds of public policy."⁶²

The organic postal act of 1825, which has remained in effect, first put real teeth into the legal protection of postal privacy, levying a fine

if any person shall take any letter, or packet, not containing any article of value, or evidence thereof, out of a post-office, or shall open any letter, or packet which shall have been in a post-office, or in custody of a mail-carrier, before it shall have been delivered to the person to whom it is directed, with a design to obstruct the correspondence, to pry into another's business or secrets...."⁶³

The prohibition had extended from postal employees to all persons, and no specific exemption for official letter opening was made here. An even stronger

prohibition against delaying the mails for any reason made it doubtful that a specific court warrant for a letter could be carried out.⁶⁴

This idea that no legal process, no executive order, could detain and open a letter in the post office captured the popular imagination. Ralph Waldo Emerson marvelled at the sanctity of the mails: "To think that a bit of paper, containing our most secret thoughts, and protected only by a seal, should travel safely from one end of the world to the other, without anyone whose hands it had passed through having meddled with it."⁶⁵ If not for this absolute inviolability, Justice Joseph Story believed that concerns for privacy would "compel every one in self defense to write, even to his dearest friends, with the cold and formal severity, with which he would write to his wariest opponents, or his most implacable enemies."⁶⁶ Two grounds of public policy protected the privacy of letters; first, the trust which the federal government owed the users of its monopoly postal system, and second, the more fundamental right of citizens that Story invoked and that political theorist Francis Lieber called "freedom of communion."⁶⁷

One of the most fervent enunciations of the principle of sanctity was penned by a special agent of the Post Office in 1855:

The laws of the land are intended not only to preserve the person and material property of every citizen sacred from intrusion, but to secure the privacy of his thoughts, so far as he sees fit to withhold them from others....Now the post-office undertakes to maintain this principle with regard to written communications as they are conveyed from one person to another through the mails. However unimportant the contents of a letter may be, the violation of its secrecy while it is in charge of the Post Office Department, or even after having left its custody, becomes an offence of serious magnitude in the eye of the law....⁶⁸

But as an inspector, he had reason to know the reality behind this rhetoric of sanctity. The occasional interception of letters went on in smaller post offices around the country.

It was difficult to detect, in part because the public believed the sanctity rhetoric and was not suspicious. Special Agent Holbrook wrote,

There are many who would recoil from the thought of robbing a letter of its pecuniary contents, but feel no compunction at violating its secrecy for the sake of indulging an idle or malicious inquisitiveness, if the commission of the deed can be concealed. This may not be called a common evil, and yet it exists; and it is one against which Acts of Congress have been leveled almost in vain, for there is perhaps hardly any portion of the laws of that body relative to the protection of correspondence, through the mails, about which there is felt so great a degree of security.⁶⁹

As Holbrook was quick to recognize, more important than the privacy of personal information in letters was the protection of property, that is, of money and other negotiable drafts sent through the mails.⁷⁰

Stricter penalties for postal larceny (the original death penalty had been reduced to flogging in 1799) outweighed the relatively mild \$500 fine and year's imprisonment for opening letters "not containing any article of value."⁷¹ Authorities tried to stop inquisitive mail tampering not because "letters...fall into hands for which they were not designed," nor because the public "have lost their confidence in the integrity of the postmaster," but because "he who pries into letters for one purpose, may be led to pry into them for another [that is, robbery]."⁷² When the New York Times complained in 1859 that "the sacredness of the mail-bag has departed," it referred not to the invasions of prying eyes but to those of greedy fingers.⁷³

The Civil War, like all wartime situations, was a test of the government's commitment to the sanctity principle. While there was no systematic postal espionage directed from Washington, letters were occasionally detained and opened on suspicion of treasonable contents.⁷⁴ More than a decade later, one Republican congressman recalled that "when repeated applications were made by local postmasters of the importance of ascertaining hostile proceedings through letters deposited in war districts of the country, an order issued

from the Department prohibiting the slightest detention, delay, or tampering in any manner with such letters."⁷⁵ Yet letters between prisoners-of-war or civilians of the Confederacy and the Union were censored as a matter of course.⁷⁶ Still, mail privacy was more secure than that for the telegraph medium, over which a strict military censorship was conducted. After the war, federal laws on letter tampering went unchanged, but some states, such as California in 1872, legislated their own penalties for the offense.⁷⁷

In the election battle of 1876, perhaps the first political campaign to employ targeted mass mailings, the Democratic presidential campaign manager made a public accusation that his correspondence had been steamed open by the New York City Post Office.⁷⁸ This led to a full-scale Congressional investigation, but served only to reassure the public that the enormous volume of letters and constant scrutiny by inspectors and fellow-employees made systematic spying impossible in post offices as large as New York's; that was possible only "in the small post-offices where the 'rules are not so rigid, and where there was less regard to popular rights.'"⁷⁹ A relatively constant and very small number of "tampering" complaints and accusations were reported annually by the Post Office Department up to the late nineteenth century. The disposition of these cases is unknown, but they were dwarfed by the millions of letters opened routinely at the Dead Letter Office.⁸⁰

Americans did not fear government surveillance of their letters through most of the nineteenth century. Sanctity of the mails prevailed between the state and the citizen, while the real invasion of privacy went on at the local community level. This problem, "against which Acts of Congress have been leveled almost in vain," was better handled immediately and directly, by the victims themselves, without appeal to Washington. Adhesive envelopes, introduced around the middle of the century, were some help: "The ordinary letter,

sealed with its red wafer, and into which the prying eyes of the village postmistress so often peeped, was soon superseded by the envelope, which secured the inviolability of the contents from all eyes but those for which they were intended."⁸¹ The post card, however, was "open to the inspection of all curious eyes," and especially embarrassing to "all not fortunate enough to enjoy the safe privacy of private residences." Boarding houses and summer resorts could thrive on the gossip generated by post cards "on which the writer has taken occasion to allude to private affairs in a manner which has just obscurity enough to stimulate curiosity, and not enough to preserve secrecy."⁸² Even a sealed envelope, so inviolable to the village postmistress, had writing on the outside, identifying the sender:

It is sometimes, indeed, annoying to a man to have the name of a correspondent known. In a small village, for instance, a young gentleman may not altogether desire that all the loungers around the store which contains the Post-office shall be joking about the fair object of his affections. Or a business man may apprehend that undue advantage will be taken if a rival is told the names of firms or individuals written on the envelopes of letters, in the handwriting of himself or his clerk.⁸³

Laws could have little effect on small-scale, inquisitive invasions of privacy in the general store, the boarding house, or the back room of the village post office. The situation was the same in the mid-nineteenth-century telegraph office, where laws against disclosure of telegrams "have very little practical force and have come to be widely regarded as obsolete."⁸⁴ Public protest, however, was never directed against these minor intrusions, frequent as they may have been. Individuals defending their privacy in the late nineteenth century did not have local postmasters or telegraph clerks in mind.

The new United States of America established the first periodic national census in its federal Constitution of 1787. There had been censuses before, since Roman times, all - as a popular citizenship manual of the nineteenth-century reminded - "for some political purpose."⁸⁵ The early American census

was no different; it had avowedly political ends and means. James Madison explained in the Federalist Papers that a state's incentive to return more than its true population for greater representation was counterbalanced by its incentive to underestimate its numbers for lower direct taxes. In the manner of other constitutional checks and balances, "the states will have opposite interests, which will control and balance each other, and produce the requisite impartiality."⁸⁶

The nineteenth-century French statistician Moreau de Jonnés credited the framers of the Constitution with more scientific motives:

The United States did something unexampled in history. They established the statistics of their country when they founded its government, and in one and the same instrument made provision for the census, for their own civil and political rights, and the destiny of the nation....It is evident that they took statistics seriously.⁸⁷

But far outweighing any interest in national statistics were the needs of practical politics. "A careful search through the 'Madison papers,'" made by future president James A. Garfield when he chaired a House Committee on the Census, "failed to show that any member of the Convention considered the census in its scientific bearings."⁸⁸ Not until the tenth enumeration of the American people would politicians hand over this task to professional statisticians and social scientists.

From the perspective of 1875, one newspaper remarked that "the universal suspicion of the census is as old as it is unaccountable."⁸⁹ One source of resistance to such government enumerations could be found in the Bible; King David ordered a numbering of the people of Israel and was punished by God for exceeding his authority.⁹⁰ The folk belief that a pestilence or famine would follow a census persisted in eighteenth-century England as it had in ancient China.⁹¹ In 1753 a member of the House of Commons opposed a census proposal, warning that "the people looked on the proposal as ominous, and feared lest

some public misfortune or an epidemical distemper should follow the numbering:"⁹² Another member of Parliament objected on different grounds: "I hold this project to be totally subversive of the last remains of English liberty.... The new Bill will direct the imposition of new taxes, and indeed the addition of a very few words will make it the most effectual engine of rapacity and oppression that was ever used against an injured people."⁹³ These suspicions, not unexpectedly, crossed over to the American colonies. A colonial governor of New York informed the Lords of Trade in 1715, "The superstition of the people is so insurmountable that I believe I shall never be able to obtain a complete list of the number of inhabitants of this province."⁹⁴ The same body eleven years later heard from the New Jersey governor that an enumeration "might make the people uneasy, they being generally of a New-England extraction and thereby [religious] enthusiasts; and that they would take it for a repetition of the same sin that David committed in numbering the people, and might bring on the like judgments."⁹⁵

The first census of the independent states met with similar misgivings. Representative Samuel Livermore of New Hampshire opposed any government demands for additional information, fearing that

it would excite the jealousy of the people; they would suspect that Government was too particular, in order to learn their ability to bear the burden of direct or other taxes; and, under this idea, they may refuse to give the officer such a particular account as the law requires, by which means you expose him to great inconvenience and delay in the performance of his duty.⁹⁶

Another congressman urged moderation in the inquiries of their avowedly political census. "This particular method of describing the people," he believed,

would occasion an alarm among them; they would suppose the Government intended something, by putting the Union to this additional expense, besides gratifying an idle curiosity; their purposes cannot be supposed the same as the historian's or philosopher's—they are statesmen, and all their measures are suspected of policy.⁹⁷

The 1790 census, though very limited in scope, ran up against state loyalties disputing its federal authority, suspicions that the returns would be used for some new tax, and objections on religious grounds.⁹⁸ No specific incidents from that year have come to light, but when nine years later the federal government tried to register the number and size of windows for a house tax, women "treated the invaders of their firesides with every species of indignity," according to a contemporary account. The protest in northeastern Pennsylvania counties escalated into a disturbance ultimately requiring military occupation ordered by President Adams.⁹⁹

The description of the 1799 incident also notes that such resentment was nearly always confined to rural areas, whereas in the cities such "inquisitorial duty" was understood and treated with mere indifference. It is questionable whether this opposition is best ascribed to unvoiced instincts of privacy and individualism, or to suspicion of the government and lack of information. A statistician advised Congress in 1849 that when new facts were sought in the census, "the people sometimes look with a jealous eye upon the whole subject, without understanding the purpose of it, and refuse to give correct information, or give wrong information."¹⁰⁰ But enumerators in the next census found it necessary "in only three cases to call the attention of a United States district attorney to require the enforcement of the act of Congress for refusal to reply to interrogations of the assistants."¹⁰¹ In all three cases the requisite information was finally obtained.

From the first, census administrators placed a higher priority on accuracy than on confidentiality of the returns. Beginning in 1790, two copies of the enumerators' lists were posted in public places in every district to be checked for errors by those concerned.¹⁰² This requirement persisted in some form until 1870.¹⁰³ Complained a magazine writer later in the century,

"It is from this crude law that the mischievous custom is borrowed of having a copy of the census returns deposited with the county court clerk. As originally conducted, the system was harmless, since only the names of heads of families were given and only the number of persons constituting the family reported."¹⁰⁴ But the returns posted decade by decade included more personal information--physical defects in 1830, insanity in 1840, value of real property in 1850--which from 1850 was no longer aggregated under the single name of the head of the household, but was individually returned for each inhabitant.¹⁰⁵

Another persistent provision in census law was the penalty for refusal to answer, first enacted in 1790. Every person over sixteen was required to "render a true account, to the best of his knowledge, of every person belonging to the family in which he usually resided."¹⁰⁶ The fine was \$20 at first, \$30 by 1850, rising to \$100 by 1880.¹⁰⁷ Enumerators, who were supposed to be residents of the districts they counted, were obligated to make an "actual," or "personal" inquiry at every house, but could also gather information from neighbors.¹⁰⁸ Naturally, suspicions were aroused that "an occasional enumerator, clothed in a little brief authority, should seek to gratify his curiosity concerning his neighbors under the pretense of carrying out instructions," but this remained a problem at the local level on which official census policy could have little impact.¹⁰⁹

By contrast, the central collating offices in Washington had no potential for invading individual privacy until 1830, when copies of the actual schedules were first included with the usual aggregate summary. Manuscript returns of the first four censuses, preserved in the records of the district courts, were also sent in to the capital in that year.¹¹⁰ As Robert C. Davis has discovered, specific inquiries reached the census office, and although replies were usually limited to aggregate data, at least one instance is recorded of individual

names and personal information having been given out, to help a man locate his missing brother in Texas.¹¹¹ An official statement on the use of individually-identifiable items appeared in a census circular of 1840:

Objections, it has been suggested, may possibly arise on the part of some persons to give the statistical information required by the act, upon the ground of disinclination to expose their private affairs. Such, however, is not the intent, nor can be the effect, of answering ingenuously the interrogatories. On the statistical tables no name is inserted--the figures stand opposite no man's name; and therefore the objection can not apply. It is, moreover, inculcated upon the assistant that he consider all communications made to him in the performance of his duty, relative to the business of the people, as strictly confidential.¹¹²

Before any requirement was enacted by Congress, census officials found such a promise necessary to secure public compliance with their undertaking.

Joseph C.G. Kennedy, census superintendent for the 1850 count, recognized a privacy problem at the local level:

Information has been received at this office that in some cases unnecessary exposure has been made by the assistant marshals with reference to the business and pursuits, and other facts applied to the private use or pecuniary advantage of the assistant, to the injury of others. Such a use of the returns was neither contemplated by the act itself nor justified by the intentions and designs of those who enacted the law. No individual employed under sanction of the Government to obtain these facts has a right to promulgate or expose them without authority.¹¹³

Kennedy instructed his marshals and their assistants that no census-taker should use any information "to the gratification of curiosity, the exposure of any man's business or pursuits, or [his] private emolument." This directive from Washington could have little effect, however, while original copies of the schedules were still kept by the clerks of court where census-takers could "enjoy the same access to them which can be had by every citizen."¹¹⁴ Twenty years later, a leading politician still pointed to these local, small-scale invasions of privacy, the prying of neighbors in closed communities of an older America, against which no confidentiality policy could prevail.¹¹⁵

Economic statistics in the census had always presented a different problem. In the very first census, James Madison wished to have information with which to "make proper provision for the agricultural, commercial, and manufacturing interests," but his proposal was defeated. The suggestion reappeared in 1800, with the same results. A later writer commented on this refusal to collect economic statistics: "So jealous was Congress of the power of the central government that it would tolerate no Federal officer within the sacred precincts of a State armed with a schedule, and inquiring how many bushels of potatoes, corn, and wheat had been raised the previous year."¹¹⁶ In 1810, Secretary of the Treasury Albert Gallatin made still another plea for census data on the state of manufactures in America, and Congress this time authorized the gathering of some economic information.¹¹⁷

This initial effort, however, was conducted without specific instructions or complete cooperation of the enumerators. According to the report submitted in 1813, only the kind, quantity, and value of products were ascertained, and even these aggregates had "numerous and very considerable imperfections and omissions."¹¹⁸ The issues of privacy and confidentiality then raised were addressed in the more detailed instructions of Secretary of State John Quincy Adams for the census of 1820:

as the act lays no positive injunction upon any individual to furnish information upon the situation of his property, or his private concerns, the answers to all inquiries of that character must be altogether voluntary, and every one, to whom they are put or addressed, will be at liberty to decline answering them at all....It is to be expected that some individuals will feel reluctant to give all the information desired in relation to manufactures; but, as the views of Congress in directing the collection of this information, were undoubtedly views of kindness toward the manufacturing interest in general, it is hoped, that the general sentiment among the persons included in that highly important class of our population will incline them to give all the information relating to their condition...¹¹⁹

In the laws providing for subsequent censuses, the voluntary nature of economic inquiries came into doubt, not to be resolved by the courts until the end of the nineteenth century.¹²⁰

The economic part of the census came to include more and more questions through the century. Statistics relating to occupation, agricultural holdings, and slaves were collected along with the population figures, while a census of manufactures, made at the same time, was conducted on separate schedules.¹²¹ Details including raw materials, kind of machinery, capital invested, market value of products, contingent expenses, wages, and composition of the labor force appeared in 1820.¹²² Objections to the extent of this investigation, and probably the inadequacy of the results obtained, contributed to its temporary abandonment in 1830.¹²³ Congress substantially enlarged the next census, however, to include "all such information in relation to mines, agriculture, commerce, manufactures, and schools, as will exhibit a full view of the pursuits, industry, education and resources of the country."¹²⁴ The censuses of 1850, 1860, and 1870 all issued separate volumes on agriculture and on manufacturing, along with those on population and social statistics.

Early and persistent confusion of the federal census with tax-collecting or -assessing activities of government may have been responsible for complaints against the intrusive economic census throughout the first half of the nineteenth century. The very incompleteness of the 1810 and 1820 returns would seem to imply a determined resistance to the economic questions. Direct evidence of this noncompliance with the manufacturing schedules appears for the census of 1840, in which rural counties of several Southern states refused altogether to reply.¹²⁵ Andrew Jackson was certain that "the foolish questions" cost the Democrats votes in the presidential election of that year.¹²⁶ Of the 1840 census Carroll Wright later wrote:

Indeed, the attempt to gather the industrial and commercial statistics was looked upon with very great disfavor in some sections of the country, and a leading journal of the South went so far as to inquire whether "this Federal prying into the domestic economy of the people" was not "a precursor to direct taxes," and whether it was "worthy of the dignity and high function of the Federal Government to pursue such petty investigations."¹²⁷

Sectional hostility or rural indifference to federal interventions could explain this reaction, but so could a fear that some individual interest in the privacy of financial information was being threatened.

By 1850, it was thought necessary to append a promise of confidentiality to the manufacturers' census schedule:

Should anyone object on the ground of not wishing to expose the nature of his business [emphasis in original], the assistant marshal should state that it is not desired to elicit any information which will be used or published concerning the operations of any individual or concern. The individual facts are confidentially imparted and received, and will only be published, if at all, in connection with and as part of a great body of similar facts, from which it will be impossible to abstract or distinguish those of individual firms or corporations.¹²⁸

Even this promise was a limited one, not to publish individually-identifiable economic data, making no mention of other uses, judicial or regulatory, to which such information could be put by those in government who gained access to it. Perhaps the greater concern was rather that business rivals would elicit the information from local census-takers on their rounds.

Robert C. Davis, writing about census confidentiality from a more recent perspective, has admitted the possibility that the Civil War led to breaches of privacy for census data. Certainly economic statistics came into new uses, determining the costs of buying the black population out of slavery, assessing the burdens of draftee quotas on the states, and locating food and forage for General Sherman's march through Georgia.¹²⁹ After the war, business grew to new heights of power and complexity, the interrelation of all the country's sections in an economic whole could no longer be questioned, and sentiment for increased federal regulation of the economic dealings of private individuals

and corporations grew too loud and insistent to be ignored. In the late nineteenth century the new scale of economic stakes and new conceptions of the role of government made the collection of economic information, like that of other personal information, a privacy problem to be resolved at the highest levels of government.

Despite these small advances in census and postal policy, privacy itself had as yet no place in American law. Before the closing decades of the nineteenth century, as Arthur R. Miller has written, "it was relatively simple to evaluate the legal position of a man whose privacy had been invaded--the doors of the courthouse were closed to him."¹³⁰ To be sure, a variety of procedural rules, property protections, and personal rights existed to safeguard values associated with privacy.¹³¹ But courts still afforded no recourse for the individual on the basis of invasion of privacy.¹³² Infringements on personal privacy, even in such national institutions as the post office and the census, remained on a local level--part of "that mild police" of small communities, "in which everybody's life is very carefully inspected and registered by a small circle of neighbors."¹³³

In the national convulsion that began with the Civil War and continued through the end of the nineteenth century, however, circumstances changed dramatically. Industrialization and urbanization altered traditional ways of life and methods of handling information. Fundamental changes in the economy and society spawned changes in popular expectations of privacy. These transformations in turn led to public protests against newly organized and impersonal entities in government and big business in the name of a right to privacy for Americans.

CHAPTER II

"THE NEW INQUISITION":

Government Invasions of Privacy

The New Inquisition¹

I am a census inquisitor.
I travel about from door to door,
From house to house, from store to store,
With pencil and paper and power galore.

I do as I like and ask what I please.
Down before me you must get on your knees;
So open your books, hand over your keys,
And tell me about your chronic disease.

Are you sure you don't like it? Well, I'm not to blame;
I do as I'm ordered. Wouldn't you do the same?
I'm a creature of law, and work in its name
To further the new statistical game.

I nose around from garret to garret,
With my last improved statistical smeller.
If the housewife objects I loftily tell her,
"I'm a socialistic government feller."

- New York Sun, 1890

The state was the expected source of invasions of private rights in the nineteenth century. Colonial experience had led many Americans to suspect that the central government, however artfully checked or balanced, would always threaten to usurp their individual liberties.² Therefore, the Constitution was supplemented by a Bill of Rights, including the fourth and fifth amendments prohibiting unwarranted searches and self-incrimination, to shield citizens from familiar government excesses. These were legal safeguards of an as yet unarticulated right to privacy against particular tactics of invasion practiced by the European state.³

Eighteenth-century colonial legislatures, as legal historian David H. Flaherty has demonstrated, "did not provoke consistent intrusions into private lives under ordinary circumstances." On rare occasions of close governmental supervision, however, "the colonists were prepared to assert their rights to a private life against the government."⁴ Overseas political example in the next century, especially that of France, appeared to demonstrate the state's perpetual warfare on individual privacy.⁵ Yet by the late nineteenth century, most Americans viewed new intrusions by the federal establishment as a break with the American tradition of limited government. The ambiguity of that evolving tradition has been well summarized by Perry Miller:

American jurists of the early nineteenth century were caught in a dilemma which was not of their devising and from which they constantly struggled to be liberated: on the one hand they were required to administer a legal method premised upon the assumption that all government was a constant threat to the liberties of the citizen, and on the other to adapt this method to the official proposition that in this nation no such threat existed.⁶

For the latter half of the century as well, the most influential legal writers were concerned to further delimit the scope of governmental power. Chief among these conservative innovators was Thomas McIntyre Cooley, the

author of A Treatise on the Constitutional Limitations. In this treatise of 1868 Judge Cooley sought to reconcile constitutional principles with doctrines of laissez-faire economics.⁷ Turning from property rights to personal liberties, he enunciated the general principle that "it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his trunks broken open, his private books, papers, and letters exposed to prying curiosity...."⁸ Subsequent editions of the treatise expanded this passage as new examples of government intrusions in the name of law and order came to light. Already, legal theorists were beginning to react to actual increases in the power and scope of state activities.

By twentieth-century standards, to be sure, the federal establishment was small, with relatively little involvement in education, commerce, or agriculture. Tariffs and excises, rather than an income tax, supplied its modest peacetime revenue needs.⁹ Government at the federal level impinged on the average citizen most frequently through the post office, most broadly through the decennial census, and most directly through military pensions and public land sales. Throughout this period the modern general welfare state would have seemed an impossible socialist vision.

Washington emerged from the Civil War, however, a larger force than Americans had previously known. As Henry Adams later recalled, "little by little, one began to feel that, somewhere behind the chaos in Washington power was taking shape; that it was massed and guided as it had not been before."¹⁰ The number of civilians employed by the federal government doubled in the 1870s to over 100,000 and more than doubled again by the end of the century.¹¹ One advocate of a stronger central government, Carroll D. Wright, justified the expansion of Washington's power in far-reaching terms:

The law making power of the state, especially in America, is constantly called upon to exercise greater and greater supervision

over the affairs of the people. To do this it has to assume autocratic power. Boards of health can order private dwellings to be vacated, and the convenience of the individual in such cases is sacrificed to the welfare of the community. This spirit prevails in all directions. The law making branch of our governments cannot resist the demands; call it socialism, if you choose, the tendency is as strong as it is perceptible, and as inevitable as it is strong.¹²

Such opinions were extreme in 1887, but not utopian. U.S. Commissioner of Labor Wright addressed his words not to any obscure radical faction, but to the distinguished American Social Science Association, of which he was then President. As governmental power grew, this activist interest in social statistics and social legislation, along with concern for effective law enforcement, motivated new invasions of privacy.¹³

Immediately after the Civil War, it was Congress that took the initiative in expanding the powers of the federal government. Having impeached the President and assumed direction of Reconstruction in the defeated South, Congress undertook numerous and wide-ranging investigations of official misconduct, commercial swindles, and fraud at the polls.¹⁴ In search of evidence, its committees demanded access to the files of telegraph messages kept by Western Union offices in every city.¹⁵ One reaction to this new practice was to assert the inviolability of telegraphic dispatches to legislative and judicial process. This became the first important appeal for legal recognition of a right to privacy in late nineteenth-century America.

With the onset of fighting, Lincoln's War Department had seized all telegrams of the previous twelve months in major cities.¹⁶ Telegraph company officials cooperated with the administration in this effort to uncover rebel treason and in subsequent censorship of the telegraph network to guard military secrets.¹⁷ Few agreed with the argument of a New York telegraph office manager in 1864 that messages in his custody were confidential and privileged

communications.¹⁸ Then, with peace restored, Congress continued to order the surrender of telegrams to the government. In the House of Representatives, Benjamin F. Butler authorized "wholesale seizure of telegrams" in his search for evidence to support the impeachment of Andrew Johnson. To this action a single congressman lodged an official protest, calling Butler's dragnet "an outrage upon private life and liberty."¹⁹ Sitting in trial of Johnson, the Senate admitted telegrams from a Western Union office into evidence without similar objection or opposition from the telegraph company.²⁰ Members of the House learned in 1874 that even their own telegraphic secrets were not safe from each other, and again Rep. Butler was the object of suspicion.²¹

The issue of congressional authority to subpoena telegrams came to public attention in 1876 amid the highly charged partisan recriminations of the contested Hayes-Tilden election. That summer had seen the use of telegraphic evidence in an impeachment trial of Secretary of War William Belknap.²² Concurrently, a House committee investigating financier Jay Cooke's failure had sifted through three-quarters of a ton of messages discarded by the Atlantic and Pacific Telegraph Company to ferret out evidence.²³ According to the New York Times, the latter proceeding was "unconstitutional and indecent" - "an outrage upon the liberties of the citizen which no plea of public necessity can justify."²⁴ Western Union tried to turn the tables, attacking instead the rival company for "gross dereliction of duty toward confiding patrons."²⁵ But serious public concern did not crystallize until both Houses of Congress laid open the telegraph files in their search for political ammunition to capture the disputed electoral votes of Louisiana and Oregon.²⁶

On December 18, 1876, in New Orleans, the House Louisiana Affairs Special Committee questioned the manager of that city's Western Union Telegraph office about messages to and from state Republican officeholders and candidates for

four months previous. The manager, under orders from company president William Orton, refused to reveal the contents of any dispatch. The committee then found the recusant witness in contempt and reported to the whole House.²⁷ A similar situation arose in early January, 1877, as the Senate Committee on Privileges and Elections probed into Oregon's electoral vote. Another telegraph officer refused to meet the committee's request for evidence of political dispatches. "It would be a violation of the law of the State," he argued, "to divulge anything that passes over the telegraphic wires and also a violation of the rules of the company."²⁸

Western Union Rule 128 permitted no exceptions:

All messages whatsoever - including Press Reports, are strictly private and confidential, and must be thus treated by employees of this Company. Information must in no case be given to persons not clearly entitled to receive it, concerning any message passed or designed to pass over the wires or through the offices of this Company.²⁹

President Orton's Executive Order 147, drawn up in 1873, further required subpoenaed employees to tell courts that messages in the company's possession were privileged or to insist that the courts rule otherwise.³⁰ Orton himself wrote to the House committee chairman in December of 1876 hoping to settle the legal status of telegrams. He protested that "agents of this company have been commanded to lay aside the business in which they are engaged to become spies and detectives upon and informers against the customers who have reposed in us the gravest confidence concerning both their official and their private affairs."³¹ To the Democratic chairman of the House Judiciary Committee Orton argued further:

the senders of twenty-five millions of messages a year, representing as they do the capital, the enterprise and the intelligence of the country in every department of human affairs have peculiar claims upon Congress for protection from the seizure and search of their private communications, and especially from any use of them which would be liable to intensify political excitement.³²

The Telegrapher, a union journal in harmony with company policies, reiterated Orton's request that Congress settle the matter in favor of the "confidentiality of telegraphic despatches."³³

Arguments over "the sacred privacy of individual correspondence" in the House of Representatives turned on the narrower question of whether "drag-net" subpoenas broader than those permitted in courts of law could be employed by Congress "in an inquisitorial investigation in regard to the conduct of public officers."³⁴ Rep. James A. Garfield, the future president, observed dramatically that his colleagues were but one step away from destroying "the last possible protection that the American people enjoy against the invasion of their privacy by their servants, the House of Representatives."³⁵ "Every day," he continued,

hundreds of thousands of our fellow-citizens intrust their most sacredly private affairs to the telegraph companies under the seal of its confidence. It is now proposed that all the transactions conducted through this great instrumentality shall be put down to the level of open, oral communications. All that public or private malice needs is to seize the telegraph operator at any office, require him to bring in his bundle of dispatches, and this inquisitorial body can fish out from among them whatever evidence may happen to suit its passion or its caprice. There never was an Anglo-Saxon law in any country of the Anglo-Saxon world that would permit so great an invasion of private rights.³⁶

Garfield and other critics of the investigating committee rested their case on the "rights of private citizens" and their "constitutional privileges," as well as "the maxims of the old common law."³⁷

In response, Democratic supporters of the committee's subpoena power insisted "that this House and the Senate and the country have a right to know all the facts" on so crucial a matter, "a question that may determine who shall be the next President of the United States."³⁸ Rep. Knott of Kentucky, Garfield's chief opponent in the debate, ridiculed his "new-fangled sentimentality about the sanctity of telegraphic messages," and Rep. Wood of New York agreed

that the medium had "lost all privacy and secrecy" in the public mind.³⁹ The witness was brought before the House and questioned. All Western Union's legal arguments, according to Knott's Judiciary Committee, could not defeat "the superior claim which society has upon the testimony of all its members when essential to the proper administration of public justice."⁴⁰ Accordingly, by a strictly partisan vote, the unfortunate office manager was found in contempt and remanded to custody until he produced the evidence.⁴¹

Meanwhile, the Senate debated the identical question in far less political terms. A Democratic senator from Oregon supported the Republican committee chairman in his demand for evidence. "There is no reason why telegraphic communications should not be made public when justice demands that it should be done," he announced to open the debate. "I see nothing of privacy about them which should prevent their disclosure."⁴² Senator Sherman, a Republican, countered that if no foundation had been laid for the inquiry, it was "in violation of that principle which men born under English institutions have always regarded among the most sacred, that a man's private property, private papers, a man's household, a man's private affairs should be sacred from inspection.... If a precedent was made, warned Republican Senator Conkling, "Congress shall assert the right to handle, and fumble, and expose all the messages touching a person's domestic, private, financial and other affairs."⁴⁴

On the other side of the question there were Republicans with forceful arguments for disclosure. Pennsylvania Senator Cameron remarked that this doctrine of inviolability had only recently been got up.⁴⁵ "There is nothing in the method of transmission," added a Kansas senator, "that makes them [telegrams] particularly sacred or surrounds them with any special protection or privilege." Any interpretation to the contrary, he said, would make the telegraph "one of the most dangerous and malign minister:

of evil, instead of one of the most beneficent agencies of modern society."⁴⁶ George Edmunds, Senator from Vermont, reminded his colleagues of the principle that "no man has a right to set up his private confidence or his private honor or his private anything when it stands in the way of countervailing considerations of security to the whole body of community or justice...."⁴⁷ Dispelling, as he thought, the "delusion and nonsense and humbug" of telegraphic privacy, Edmunds turned out to have the last word in the Senate debate. As in the House, a resolution was passed requiring the telegraph manager to answer the committee.⁴⁸ Roll-call votes in neither House exhibit the full partisan polarization one would have expected during the battle over the 1876 election; one senator is on record as saying during the voting that it was "not a political question."⁴⁹ In an earlier House vote on protection of telegrams, twenty Democrats had joined the Republicans, while the senators on both sides of the question were split roughly equally.⁵⁰

This debate, like other episodes of the 1876 election controversy, made front page news across the country. Opposing "Congressional surveillance of telegraphic dispatches," the New York Times - which had endorsed the Republican Hayes - stated in an editorial that "every person using the telegraph to communicate about his private affairs, assumes that a telegram is as free from exposure as a letter."⁵¹ The New York Tribune, founded by former Democratic candidate Horace Greeley, also applauded Western Union's resistance to the congressional investigation. "If we had not grown used to invasions of personal right," the Tribune argued, "such a procedure would seem monstrous. It violates the commonest legal maxims as to the right to call for papers, and outrages every man's sense of his right to the secrets of his own correspondence."⁵² In the view of the New York Sun, a vociferous Democratic stronghold, the importance of telegraphic privacy outweighed even the interests of law

enforcement. The Sun went on to say, "the idea that every curious and prying legislative committee may cause to be spread before the public everything that has been sent over the wires will be hateful and repulsive to the people in general."⁵³ According to the Telegrapher, President Orton's stand received "the commendation of the better portion of the press, irrespective of politics."⁵⁴

In the midst of the controversy, Western Union's board of directors resolved to arrange for "such speedy destruction of all written messages as the necessary keeping of accounts between the respective offices of the company will allow."⁵⁵ This strategy had been under consideration for some time. Orton had already reduced the preservation time for copy telegrams from two years to six months in the previous summer and had withdrawn all political messages from telegraph offices immediately after the election.⁵⁶ The journal of the telegraphic fraternity applauded the move, warning:

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.⁵⁷

The business community at large, on the other hand, was displeased. To destroy every dispatch would not only preserve privacy but would also make it impossible to prove that Western Union had been responsible for mistakes in transmission.⁵⁸

The telegrams were not burned. On the 20th of January, 1877, with the New Orleans office manager in custody in the Capitol and an ailing President Orton under arrest by a deputy Sergeant-at-Arms, Western Union submitted to the subpoenas.⁵⁹ Pressed to the point of imprisonment, company officials grudgingly acquiesced to the congressional committees, still maintaining that their

company was "in honor and in law bound to resist by all lawful means the exposure of the business and other communications of its customers."⁶⁰ Nearly 30,000 political telegrams in an iron-bound trunk were delivered to Republican Senator Morton's Committee on Privileges and Elections, in response to the first subpoena to reach President Orton.⁶¹ They were kept for nearly two months, then returned to Western Union and finally destroyed. An Electoral Commission having by then been established, the senators never made official use of the messages, and the Democrats on the House committee never saw them, but someone did extract from the lot and publish coded dispatches that imputed serious bribery charges to Democratic candidate Samuel Tilden, the long-remembered "cipher telegrams."⁶²

The issue was by no means resolved. One principle of central importance to the continuing debate was an analogy between telegraphic dispatches and letters in the post office. "If the privacy of one is invaded," so thought the New York Tribune, "the sanctity of the other may be violated."⁶³ Proponents of privacy wished to protect the new medium by extending to it the "sanctity of the mails." This was not a new argument. It had appeared in telegraph company regulations as early as 1847 and supposedly had been recognized by a congressional committee in 1853.⁶⁴ The widely-held belief that no writ or order could open a letter⁶⁵ was clarified by the Supreme Court in 1878:

Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.⁶⁶

In this decision the court founded the principle of "sanctity" not on specific postal legislation penalizing theft of letters, nor on a policy of insuring public confidence in government services, but on the Fourth Amendment to the

Constitution.

Could this principle also apply to privately-operated telegraph companies? Judge Thomas M. Cooley believed that it should, and in the fourth edition of Constitutional Limitations he added to his discussion of unreasonable searches the observation that "the reasons of a public nature for maintaining the secrecy of telegraphic communication are the same with those which protect correspondence by mail."⁶⁷ He amplified this point in an article in the American Law Register of February 1879. Cooley claimed that "considerations of a broad and liberal public policy" as well as "the general principles which are the animating spirit of constitutional law" required the courts to protect telegraphic communication. "The interests that would suffer from the violation of secrecy," he reasoned, "are vastly greater than any that can be subserved." Legislative power in the United States had grown "little regardful of private rights," and so judicial safeguards were needed for the ordinary correspondence of the American people, "the privacy of which is absolutely essential to the peace and comfort of society."⁶⁸

Judge Cooley's principal opponent, as the debate was joined in legal periodicals, turned out to be Henry Hitchcock, later founder of the St. Louis Law School and governor of Missouri. In his presidential address to the American Bar Association in 1879, Hitchcock argued against judicial application of the principle of inviolability to the telegraph. Neither public policy nor any "right of free communion" implied "exemption from those disclosures, however inconvenient to individuals, which the due administration of justice and the execution of process issued under lawful conditions must from time to time require."⁶⁹ Though Hitchcock recognized in the telegraph dispute "an exceptional danger of abusing even the lawful power of the courts," he saw no remedy available for the judges to apply. Only Congress could exercise its interstate

commerce regulation power to

protect those who use it, not only against unauthorized disclosures by telegraph employees, but also from interference by state legislation, or by any court, with the lawful right of free communion, and from "unreasonable searches or seizures" of such communications under color of civil or criminal process.⁷⁰

Hitchcock's position, however, was ambiguous. Three years earlier, he had stood at the side of William Orton in federal district court pleading that telegrams be considered privileged and confidential.⁷¹

Meanwhile, legislative invasion of telegraphic privacy had reappeared on a smaller scale. An investigating committee of the Kansas legislature drew up a familiar "drag-net" subpoena in 1879 to demand from the Topeka Western Union manager all dispatches relating to the disputed election of Senator Ingalls from that state. The Chicago Tribune applauded Western Union's renewed resistance and cited Judge Cooley's treatise to effect. "It is probable," speculated the Tribune, "that the telegraph company would have made the issue with Congress in the case of the cipher dispatches, had it not been that both political parties united in demanding the messages...because neither was willing to rest under the suspicion of desiring to suppress the correspondence."⁷² The company wished to make this a test case, but as the New York Tribune wryly commented, "this commendable proceeding the Legislature of Kansas has prevented by running away from its prisoner in sheer fright." Western Union's employee had been in custody for a week when "the announcement in a newspaper that Judge Cooley had just published an opinion maintaining the view that telegraph messages are strictly inviolable, had the effect of throwing the honorable members into a panic, and the operator was released at once."⁷³ The telegraph company was disappointed at this outcome, but hoped that their efforts would "attract such general attention to the subject as to create a demand that shall be heeded, for a final legal definition" of the status of private telegrams.⁷⁴

At the end of the year, the election investigation was carried into the U.S. Senate, where again the office manager refused to turn over any dispatches. Western Union's counsel argued that the public understood telegrams to be entitled to the same "privacy and secrecy" as the mails. The senators were inclined to press on, but postponed their inquiry for the holiday recess.⁷⁵

Within that time, at the beginning of 1880, Western Union prepared legislation to Mr. Hitchcock's specifications for the 46th Congress. The bill (H.R. 5101) provided that "all telegraphic messages...shall be deemed to be private papers of the senders and receivers of such messages, and shall be protected from unreasonable search and seizure and from production as evidence in individual and legislative proceedings to the same extent as letters sent by the United States mail."⁷⁶ Most New York papers took up Western Union's cause. Any member of Congress who shamelessly "filched" private correspondence was branded a "political rag-picker" probably accumulating "secrets enough to set him up in the black-mailing trade for life." If "absolute inviolability" was not immediately enacted for telegrams, "the only remedy the senders will have will be to insist upon their immediate destruction."⁷⁷ Other major newspapers echoed the New York press in denouncing congressional committees' "scandalous proceedings," "the sport of politicians," an "outrageous invasion of privacy" and an "unauthorized interference with the constitutional rights of all citizens." The Detroit Free Press proclaimed, "The right of the people to secrecy and privacy in inter-communication is one of the most cherished rights," and the Baltimore Sun warned, "the world simply cannot afford to have the privacy of the telegraph violated."⁷⁸

Hitchcock's response this time was to oppose the bill on the grounds that "neither Congress nor the public generally can afford to ignore or diminish the indispensable power of the Courts to compel the production of

relevant and competent testimony...in the form of telegrams...."⁷⁹ The New York Times also opposed the measure because it believed the postal analogy to be inexact, preventing only government wire-tapping of messages in transit.⁸⁰ Though favorably reported out of the House Committee on the Revision of the Laws, the privacy bill was never heard of again.⁸¹ Instead, the Senate committee investigating the election of Senator Ingalls adopted a resolution that compromised the right to privacy and the interests of disclosure. Congress affirmed its own authority to demand dispatches in the possession of telegraph companies, with the proviso, however, that such authority "ought to be so regulated by a sound discretion as to protect the privacy of communications."⁸² Subpoenas were limited to particular and germane messages; in the case at issue, Western Union complied with a modified subpoena requiring, as the company phrased it, "the production of legitimate evidence in the cause of public justice."⁸³

The Missouri Supreme Court reached the same compromise that very year. This test case, involving the refusal of a telegraph office manager to provide a St. Louis grand jury with telegrams allegedly tying the governor and police commissioner to a gambling ring, had received national attention the year before.⁸⁴ Like his Kansas counterpart, the witness was jailed for contempt. Denying a writ of habeas corpus, the state court of appeals rejected an analogy between telegrams and posted letters.⁸⁵ On further appeal, however, Western Union had the subpoena quashed. As the court noted:

Such an inquisition, if tolerated, would destroy the usefulness of this most important and valuable mode of communication by subjecting to exposure the private affairs of persons intrusting telegraph companies with messages for transmission, to the prying curiosity of idle gossips, or the malice of malignant mischief-makers.⁸⁶

Telegraphic messages were not deemed privileged communications nor placed on the same legal footing with the mails, but henceforward Missouri required that subpoenas specify the telegrams by date and subject. A string of state and federal cases through the second half of the nineteenth century all reached essentially the same solution.⁸⁷

Congress's investigatory power was twice checked by the federal courts in the 1880s. The case of Kilbourn v. Thompson originated in a House committee investigation of Jay Cooke & Co. that took place in the summer of 1876.⁸⁸ Invoking the constitutional principle of separation of powers, Justice Miller decided in 1880 that neither House of Congress "possesses the general power of making inquiry into the private affairs of the citizens."⁸⁹ Justice Stephen Field in another case held that a congressional committee set up to investigate Leland Stanford and his Central Pacific Railroad Company was not a judicial body. Therefore, "in its inquiries it is controlled by the same guards against the invasion of private rights which limit the investigation of private parties into similar matters."⁹⁰ Both decisions, though benefitting business corporations, were based on the individual citizen's "right to personal security" in his "personal" or "private affairs."⁹¹

For over half a century Congress maintained the compromise it reached with William Orton and Western Union in 1880. In the courts as well, a right to privacy was interposed against a power to investigate. This compromise would endure changes in the character of the telegraph company and in its relation to Congress. But after fifty years a new medium of communication, invented in the very year the telegraph episode began, raised the basic issue anew and once again required its resolution.⁹²

The second major episode of privacy protest and compromise in the late

nineteenth century focused upon the federal census of population, that governmental operation reaching every individual living in the United States every ten years. Though some states - notably Massachusetts - had established their own comprehensive censuses in the fifth year of each decade, the main thrust of organizational change in the collection of statistics came at the national level.⁹³ The federal census of 1890, the eleventh census taken under the constitutional mandate for a periodic enumeration of inhabitants, was the target of nation-wide complaint arising out of concern for personal privacy.

In that protest, constitutional arguments on the proper scope of the census recalled that the idea for a national census had originated in the Continental Congress's efforts to distribute the financial burdens of the War for Independence equitably among the states.⁹⁴ The framers of the Constitution intended it as the basis for representation in the House of Representatives and for direct taxation.⁹⁵ But the very first administration of the census had gone beyond the constitutional provision for a simple numbering of inhabitants, slave and free, state by state. In Congress, James Madison urged his colleagues to authorize the collection of information that would "enable them to adapt the public measures to the particular circumstances of the community," though he knew that "this kind of information had never been obtained in any country."⁹⁶ The 1790 census added only categories of age to the enumeration, but that became the precedent for a long list of questions confronting sixty million Americans one hundred years later.

With each passing decade the enterprise gradually expanded. Age divisions became more elaborate, and inquiries came to include occupation, health, education, military service, and property. From four details required in 1790, the number grew to twenty in 1820, eighty-two in 1840, and 142 in 1860.⁹⁷ As the scope of the census widened, methods also improved. By 1850 census

returns named every individual, no longer totalling family counts under the head of the household's name.⁹⁸ Among the reasons for this steady elaboration were constitutional scruples in Congress that it had no other authority to collect statistical information; anything the government wished to know had to be included in the decennial head count.⁹⁹

In 1880, when politicians turned over its administration to social scientists, the census was still the only instrument of the federal government to gather statistical information.¹⁰⁰ As it came to be applied to "the scientific investigation of the social and economic conditions of the nation," it grew more costly, took longer to compile, and asked many more questions.¹⁰¹ Said Labor Commissioner Carroll D. Wright of this growth:

the great, and what is fair to be termed the extraordinary, increase in the scope of the census did not come until 1880 and 1890, when, instead of comprising only about 150 details, there were at each of the last two enumerations more than 200 general and special schedules, relating to very many subjects and comprehending several thousand inquiries or details.¹⁰²

Wright, an advocate of closer governmental supervision of the affairs of the people, insisted that these inquiries be pursued in spite of possible antagonism, "in order to meet the advanced demand of the very people who create the antagonism."¹⁰³

The 1890 census retained all of the inquiries made in 1880 and added two more subjects, disease and debts.¹⁰⁴ Question 22 on the population schedule asked "whether suffering from acute or chronic disease and length of time afflicted," and Question 23 asked "whether defective in mind, sight, hearing, or speech, or whether crippled, maimed, or deformed, with name of defect." Questions numbered 26 to 30 inquired, "Is the home (or farm) you live in hired, or is it owned?...Is the home (or farm) free from mortgage incumbrance?" Respondents then had to supply the name and address of the mortgage holder.¹⁰⁵

These census inquiries "provoked the most severe criticism from all classes of people," with the possible exception of that for age, a perennial impertinence to women of high and low station.¹⁰⁶ E.L. Godkin explained the prevalent feeling against the questions in the pages of the Nation:

No man, and especially no woman, likes to tell a stranger about a secret disease or disability - that is, about one which is not visible - and about debts and liabilities. Almost everybody resents inquiries on such subjects, even from friends, as an impertinence. It is therefore easy enough to foresee the state of mind in which they would receive them from a more or less forbidding stranger popping in from the street with a note-book.¹⁰⁷

"To put such questions to every man and woman in the United States," agreed the Los Angeles Times, would indeed be "a piece of offensive impertinence"; but even more, "to attach a penalty to refusal to answer them is a monstrous oppression."¹⁰⁸ There was a prevalent feeling that "for the federal government to demand answers to such questions was unconstitutional, and an invasion of the liberty of the individual."¹⁰⁹

Once again, as in the controversy over Congress's demand for telegrams, a governmental investigation was said to be "inquisitorial." According to Hallet Kilbourn, who had fought a House committee's subpoena through the courts in 1876, "Some of the census interrogations are more insulting and disgraceful than any ever propounded by a Congressional investigating committee."¹¹⁰ In the lead among newspapers attacking the census was the New York Sun - which the Boston Globe quoted with approval, adding that the questions constituted "an outrageous invasion of the personal and private business of the citizen."¹¹¹ In New York, the Times and the Tribune also criticized the census, though without the scare headlines or mocking cartoons found in other papers.¹¹² Even the stodgy Boston Evening Transcript printed a letter expressing doubt "that the framers of the constitution ever contemplated so deep an inroad upon the privacy of the individual."¹¹³

The protest was not confined to newspapers in the largest cities. As Census Superintendent Robert P. Porter complained: "All over the country could be heard murmurings of discontent and declarations that the people of the United States would never submit to such an inquisitorial inquiry into their private affairs."¹¹⁴ Criticism of the new census questions appeared not only in the New York, Boston, Chicago, and Philadelphia press, but also in the small-town Dubuque Daily Herald.¹¹⁵ Among national magazines, the humor weekly Life lodged its protest, too. "Be kind to the census man," it advised:

If you must kick him, kick him softly, or better still, wait till he comes again to sell you a book. It is wrong to kick even a book-agent, but it is less expensively criminal than to kick a census-taker. Stand up and be counted like little mice,...remembering that it is you, the people, that have hired him, however much your intentions may have been boggled as to details.¹¹⁶

John Boyle O'Reilly, the charismatic editor of the Boston Pilot, proposed more seriously a public "strike" against the census.¹¹⁷ Other newspapers also urged citizens not to respond to offensive questions.¹¹⁸

Many doubted the legal authority of the census to require answers to the new questions. "There is at least a prevalent disinclination," reported the New York Tribune, "to believe that any Government official has authority to ask a citizen what, if any, acute or chronic disease he has, and what, if any, debts he owes."¹¹⁹ Though several papers claimed that "the most eminent lawyers to be found in this country" united in opposition, legal opinion split on the issue.¹²⁰ Eight-four-year-old David Dudley Field believed that "the claim of power is too absurd to be seriously argued," since the Constitution gave no express sanction to such an inquiry by government.¹²¹ But Chauncey Depew reminded an interviewer that "the courts usually side with the Government."

"Take the statute and the Constitution," he concluded, "and I rather think our

friend with Bright's disease, curvature of the spine, or a mortgage on his farm will have to answer."¹²² Recognizing that "the limitation of constitutions and the requirement of laws sometimes count for little with men in authority," a Southern newspaper expected "to see questions of personal liberty and the right of citizens to be secure against unreasonable search and inquisition, brought before the Federal courts, and perhaps the Supreme Court growing out of the census."¹²³ A Republican gubernatorial aspirant in Pittsburgh, recognizing a good campaign issue when it came along, said: "I will most assuredly make a test case if any clients come to me in regard to refusing to answer some of the questions. I'll carry the matter into the courts and there prove the utter absurdity and illegal character of the last six questions."¹²⁴

The medical profession had a quarrel of its own with the census office. Ten years earlier, "the public-spirited cooperation of nearly thirty thousand physicians throughout the country" and the endorsement of the American Medical Association had made it possible to collect better mortality statistics than in any previous census.¹²⁵ No such response was forthcoming in 1890 when the Surgeon-General requested reports on patients' diseases as well, to check against the population schedules.¹²⁶ A doctor who thus violated the confidence of his patients, it was complained, would, by "acting the spy," soon lose his entire practice.¹²⁷ This was the collective opinion in several cities, where "the doctors have sworn not to answer the questions."¹²⁸ For example, at a meeting of the Connecticut Medical Society, one member summed up the near unanimous feeling: "This request on the part of the Government is an insult to the profession, and I want this body to say so. (Applause) It is an invasion of the confidential relation of the physician to his patients. It is an outrage...." A Yale Medical School professor in the room exclaimed, "It is

the most tyrannical thing that this Government has undertaken."¹²⁹ Newspapers estimated that only "a few physicians," perhaps "not one in a hundred," would comply, not only because of their Hippocratic oath and their patients' complaints, but also because of the work and trouble required to search through their records.¹³⁰

Superintendent Porter's initial reaction in the face of widespread public complaint seems to have been uncompromising. E.L. Godkin mentioned "talk of giving power to enumerators to arrest people who refused to answer them, or to start some sort of legal proceedings against them on the spot."¹³¹ But police cooperation was not forthcoming, and at least one paper expected the courts to stop the intrusive census-takers, much as they had stopped "the efforts of legislative investigating committees to pry into private affairs."¹³² On May 22, Rep. William McAdoo of New Jersey introduced a resolution calling for a House inquiry into the proposed census questions, in response to complaints of their "alleged inquisitorial character" - "incompatible with the rights of freemen and an unwarranted and unconstitutional exercise of power by the Federal Government."¹³³ In an emergency meeting, the Committee on the Census decided there was not enough time to change the printed schedules.¹³⁴ On May 26, less than a week before census-taking was to begin, Porter instructed all enumerators only to enter the words "Refused to Answer" when objection was made to the disability and mortgage questions. This well-publicized order ended on an ominous note: "All legal proceedings will be instituted by the Washington office through the Department of Justice."¹³⁵ At least the mortgage questions, if not those on chronic diseases, would be pursued without stint.¹³⁶ But the New York World reminded Attorney General Miller, "You cannot indict a whole nation."¹³⁷ "There are not courts enough," wrote the St. Louis Post-Dispatch, "to try all those who refuse to answer some of the questions..."¹³⁸ Doubting

that "the Federal courts would entertain such a case," the New Orleans Daily Picayune reassured its readers that the government "has not yet established a Spanish inquisition."¹³⁹ Other papers interpreted the census order as a surrender and announced that no prosecutions would ever be undertaken.¹⁴⁰ Georgia families who used the facsimile census forms reproduced in the Atlanta Constitution found the words "You need not answer this" already printed in for them after the offensive questions.¹⁴¹

Carroll Wright was reported to have told Congress he believed "that from 10 to 15 per cent of the persons interrogated would consent to give the desired information" on debts and mortgages; quoting this estimate, the New York Tribune expected no larger a percentage to list their diseases and defects.¹⁴² "The Attorney General may find himself confronted with anywhere from 2,000,000 to 20,000,000 cases of refusals to answer," predicted the New York Times.¹⁴³ Enumerators beginning their work in the nation's largest city found "there are some questions that don't go," not among Eastern European immigrants in Greenwich Street, nor with saloon-keepers on the East Side, nor with the mistresses and servant girls in fashionable brownstones.¹⁴⁴ Discouraged, some census-takers stopped asking about diseases and debts altogether.

Similar reports came in from other parts of the country.¹⁴⁵ At the end of the first day, the Detroit Evening News dramatically reported, "The female population is up in arms and the male citizens sullenly back them. There's blood on the moon and an incipient rebellion seems inevitable."¹⁴⁶ Not only in major cities, but in rural communities the size of Washington, Louisiana, enumerators encountered the same trouble in securing answers.¹⁴⁷ Those few persons who refused to give even their names came to the immediate attention of the Washington authorities. There were twenty-five cases across the nation in the first day-and-a-half of the two-week enumeration and ultimately sixty

arrests in New York City alone.¹⁴⁸ Fewer than half a dozen such total refusals had been recorded in previous censuses.¹⁴⁹ The number who refused only to answer the specific objectionable questions can never be known. That information, contained in the manuscript schedules of 1890, was almost completely destroyed by fire in 1921.¹⁵⁰

Statisticians and social scientists missed the point of this public protest in 1890. Two years earlier, Francis A. Walker, superintendent of the 1870 and 1880 censuses, had predicted complacently: "What an American doesn't know about his own farm, or, for that matter, his neighbor's too, is not worth knowing; and all he knows he is perfectly willing to tell."¹⁵¹ Along with others in his field, Walker subsequently concluded that too many questions had been asked in 1890, provoking the outcry. He suggested:

But whether we have regard to the interest and the attention of the enumerator, which should be concentrated on comparatively few subjects, or to the patience of the public, we must say that a highly conservative spirit should control the number and nature of the census interrogatories....A comparatively few interrogatories, searchingly put, carefully answered, and accurately recorded, will be worth more than a wider canvass conducted with any failure of interest and attention on the part of the enumerator, or with increasing impatience and irritation on the part of the public.¹⁵²

As it happened, the offending questions were last on the regular population schedule. Therefore, some statistical experts chose to interpret public criticism as a response to the length of the inquiry rather than to the subject matter of specific questions.¹⁵³

Legislators seemed more sensitive to public concerns and more resourceful at devising remedies. They had the benefit of long collective experience defending another "inquisitorial" federal activity, the income tax.¹⁵⁴ Enacted as an emergency measure in the Civil War, the first federal income tax continued until 1872 amid mounting criticism in and out of Congress that it was

"inconsistent with the personal liberty of the citizen," a tax which "authorizes the assessor to intrude into the household, the private business affairs, the domestic relations of every individual."¹⁵⁵ From the first, it was collected with this objection in mind. The Commissioner of Internal Revenue in 1863 "instructed the officials that returns of incomes should not be open to inspection by others than the proper officers of the revenue."¹⁵⁶ But so much revenue was lost through fraud and evasion that later legislation vainly threw open the assessors' returns to the newspapers, engendering the hostility that finally killed the tax.¹⁵⁷ Attempts to revive the federal income tax in 1878-1879 and again after 1889 when increased Western representation made its passage through the Senate possible, raised these arguments of "inquisition" anew for the legislators.¹⁵⁸

This previous experience with the American public's sensitivity to "official penetration into private affairs" was a lesson not lost on the politicians dealing with the census.¹⁵⁹ As far back as 1870, Rep. Garfield, who had been outspoken in his opposition to the income tax, observed:

The operations of the Census Office under the present law are not sufficiently confidential. The citizen is not adequately protected from the danger, or rather the apprehension, that his private affairs, the secrets of his family and his business, will be disclosed to his neighbors.

The facts given by the members of one family will be seen by all those whose record succeeds them on the same blank; and the undigested returns at the central office are not properly guarded against being made the quarry of book-makers and pamphleteers.¹⁶⁰

Though the Garfield Committee's recommendation that family returns be kept separate and inaccessible for tax or other judicial purposes died on the floor of the Senate in a partisan battle distorted by personal animosities, the situation was improving by 1890.¹⁶¹ Separate family schedules had been instituted, and a \$500 fine was prescribed for enumerators who violated their oath

not to disclose "any information contained in the schedules, lists, or statements."¹⁶² Suspicious respondents were assured that all the information they supplied would be "strictly confidential" - that "no names" would be published.¹⁶³

Your answers will be tabulated with about 60,000,000 others, and your blank then destroyed. No names will be recorded.

The information you give will be more impersonal than the grave and quite as secret. Your record will then represent only one atom in about 65,000,000 other atoms.¹⁶⁴

Nevertheless, complaints filled the popular press as the day of enumeration drew near.

When the returns of that enumeration were finally published, they included no tables on diseases or physical defects, as might be expected. A report on real estate and mortgages, however, was included. The compilers of that report, in their introduction, did not minimize "the difficulties of ascertaining the amounts and objects of existing mortgage indebtedness." Their statistics were based not on the questions asked in the regular population schedule, but on special preliminary investigations of 102 selected counties across the 48 states and territories. Curiously, the disastrous inclusion of mortgage questions in the population census is not mentioned here, but instead the introduction states, "it was feared that an effort to secure the facts in regard to every mortgage would stir up many persons who would be easily irritated and who would enlist the aid of newspapers, and thus arouse a feeling against the census...."¹⁶⁵ The compilers would not admit that their fears had been realized. Even so, their success with a more limited inquiry did point toward one way privacy complaints could be minimized. Statistical sampling had proved a more efficient and, in this case, more accurate method of information gathering than the usual census practice of asking every question of every individual in the country.

Another methodological innovation in the 1890 census foreshadowed developments in information gathering that would have profound impact on the issue of privacy protection in the twentieth century. To aid in compiling the returns, Herman Hollerith introduced an electrical machine that could "read" and count punched holes in paper cards. Processing a card for every inhabitant of the United States, Hollerith's tabulator correlated various details in ways that had never been possible before.¹⁶⁶ At the time, this precursor of the computer data bank was thought to offer additional protection of individual privacy. "The clerks working on them," it was noticed, "cannot tell the names or addresses of the individuals for whom the cards stand, and...thus in the preparation of census tables the personal element is entirely lost."¹⁶⁷ After this initial success, Hollerith went on to found a parent company of International Business Machines Corporation.¹⁶⁸

Following the protests of 1890, legal requirements were elaborated to guard against abuse of census information. Inquiries for 1900 were scaled down; personal indebtedness and chronic diseases joined religion and politics on the list of inadmissible topics.¹⁶⁹ Though 1890 returns had been used illegally to compile mailing lists for an agricultural periodical, the permanent census office created by Congress ten years later was better able to maintain its independence, refusing to share information even with the Federal Bureau of Corporations.¹⁷⁰ The penalty for unauthorized disclosure, which had been doubled to \$1000 in 1909, was strengthened by a term of imprisonment and declared a felony in 1919.¹⁷¹

Such piecemeal enactment of a policy requiring confidentiality for United States Census data represented a compromise between the informational demands of social scientists and a right to privacy asserted by individual citizens. Those who opposed the census in the name of privacy challenged the constitu-

tionality of gathering data beyond a simple enumeration of inhabitants for reapportionment. They challenged, in other words, the power of the government to learn anything at all about citizens' private lives. But the courts upheld the constitutionality of a broader census inquiry in 1901 and applied the legal penalty to anyone who refused to give required information about his person and property.¹⁷² On the other hand, federal policy makers tried to balance the information needs of government with a recognition of individual privacy interests. Legislators and census administrators removed overly sensitive topics from the schedule, while guarding other personal data with tougher penalties for disclosure.

In the protest against the census of 1890, as in the resistance to congressional subpoenas of telegrams in 1876, governmental invasions of privacy encountered determined opposition. Admittedly, arguments for privacy were advanced by partisan politicians and editors, toward partisan ends, in each debate.¹⁷³ Economic interest played its part, too, in the claims of Western Union and the business community in general to protection from "inquisitorial" government.¹⁷⁴ But through both episodes, ideas about privacy for the individual gained currency in late nineteenth-century public discourse - in the Congressional Record, in legal journals, and most widely in the newspaper press. Formulators of public policy began to take the right to privacy into account in limiting the growing power of government. Government, however, was not the only source of invasions. In this period the telegraph company and the newspapers, seen so far as champions of privacy, were also its invaders.

CHAPTER III

"A SYSTEM OF ESPIONAGE":¹

Business Invasions of Privacy

They used to say a man's life was a closed book. So it is but it's an open newspaper. Th' eye iv th' press is on ye before ye begin to take notice....

An' so it goes. We march through life an' behind us marches th' phottygrafter an' th' rayporther. There are no such things as private citizens. No matther how private a man may be, no matther how secretly he steals, some day his pitcher will be in th' pa-aper....He can't get away fr'm it. An' I'll say this f'r him, he don't want to. He wants to see what bad th' neighbors are doin' an' he wants thim to see what good he's doin'. He gets fifty per cint iv his wish; niver more. A man keeps his front window shade up so th' pa-apers can come along an' make a pitcher iv him settin' in his illi-gant furnished parlor readin' th' life iv Dwight L. Moody to his fam'ly. An' th' lad with th' phottygraft happens along at th' moment whin he is batin' his wife.²

- Mr. Dooley

Constitutional protections against search and seizure or self-incrimination were designed to protect the privacy of individuals from invasion by government, not business. But the private sector, by the latter part of the nineteenth century, had spawned organizations that rivalled the largest government agencies in size and power. Among these new giant corporations were railroad lines, extractive industries, financial houses, and foodstuff processors.³ Included, too, were businesses that conveyed, broadcast, bought, and sold information - a commodity of growing importance in a more and more organized society. Their new ways of handling information conflicted with public expectations of confidentiality in business practices, revealing big business to be as much an invader of personal privacy as the government.

American businessmen, whatever their product or service, were traditionally more accustomed to standing on the other side of the privacy debate, defending their own "personal affairs" or trade secrets against inquisitorial government. "None of your business" was a more colloquial way of phrasing the freedom-of-contract doctrine in late nineteenth-century American law. Courts interpreting the Fourteenth Amendment failed to distinguish between the rights of an individual person and those of a corporation.⁴ As units of big business grew to dwarf the individual, however, critics of the prevailing economic order had no difficulty in arguing that the distinction was real and frightening.

Along with expanded production and concentrated capital, a higher level of organization and rationalization characterized the new business world following the Civil War. Railroads were leaders in this trend, and the telegraph network was not far behind.⁵ In the 1880s and 1890s hundreds and perhaps thousands of new business organizations comparable in dimension to the first

railroad companies appeared in the private sector.⁶ Sketching the human impact of the new organizations, Samuel P. Hays has listed - along with impersonality, standardization, and materialism - "a feeling of insecurity as men faced vast and rapidly changing economic forces that they could not control."⁷ Some of this vague insecurity in the late nineteenth century heightened more specific fears of business invasions of individual privacy.

Since intrusions on personal rights from the private sector had been uncommon throughout most of the nineteenth century, there was little in the way of developed legal protection against the "threat of private power."⁸ Then, toward the end of the century,

there came into existence a number of hitherto unfamiliar agents acting on behalf of the private, commercial, and industrial order. These were the industrial police, the coal and iron police, the railway police, and a host of private operatives. A man could retreat to the privacy of his home, but during working hours he was to discover that he had to surrender more and more of his own individuality.⁹

Not even the home was safe from the reach of new business enterprises, especially the purveyors and conveyors of information. Only the government had touched so many lives so closely before, and popular fears of "the trusts" magnified the reality of business intrusions into private affairs.

An anti-monopoly mentality, rooted in traditional individualistic values, exaggerated the solidarity of monopolistic "robber barons" and the degree of influence they wielded in state and national politics.¹⁰ Even decentralized sectors of the business world, such as the newspaper industry, were seen in conspiratorial combinations.¹¹ As the nineteenth century drew to a close, protests accumulated against threats from big business to individual rights to privacy. In response to these protests, new responsibilities imposed by law on business corporations began to compromise their accustomed liberties. The longest sustained and most successful protests on behalf of a right to

privacy focused upon the intrusive activities of the telegraph company and the newspaper press.

William Orton's health was failing when Congress ordered his arrest in early 1877. Before he died the next year, President Orton was further beset by attempts of railroad tycoon and Wall Street financier Jay Gould to buy the Vanderbilts' controlling interest in Western Union.¹² Gould renewed his attack in 1879, organizing the American Union Telegraph Company out of the few surviving independent lines in an effort to drive down Western Union stock.¹³ Vowing publicly to slay the "great monopoly," he ended by uniting both companies under his personal control in 1881.¹⁴ "In probably no other country in the world," remarked a contemporary biographer, "could one man control its telegraph system. But Gould became the absolute dictator of the Western Union and successfully overcame every competitor that arose."¹⁵

This financial coup generated national outrage at Gould personally and at monopolistic tendencies in general.¹⁶ One chronicler of American wealth, writing almost twenty years after Gould's death, still called him "the most hated man in the United States":¹⁷

He became invested with a sinister distinction as the most cold-blooded corruptionist, spoliator, and financial pirate of his time; and so thoroughly did he earn this reputation that to the end of his days it confronted him at every step, and survived to become the standing reproach and terror of his descendants. For nearly a half century the very name of Jay Gould has been a persisting jeer and by-word, an object of popular contumely and hatred, the signification of every foul and base crime by which greed triumphs.¹⁸

Having removed his private offices to the top floor of the Western Union building in New York, Gould installed private telegraph lines connecting him with every part of his railroad network and other holdings.¹⁹ At his desk was a "ticker" - "constantly picking and clicking, telling of important happenings about as fast as they occur."²⁰

It was a compelling image of vast power and unlimited information - with a look of conspiracy as well.²¹ Gould's new board of directors numbered "the most influential men in the financial and political world,"²² including at one time or another, John Jacob Astor, J. Pierpont Morgan, Cyrus Field, Chauncey Depew, Alonzo B. Cornell, Collis P. Huntington, Russell Sage, John Hay, and John F. Dillon.²³ Dr. Norvin Green, Western Union's president after Orton's death, counted for little in the presence of such titans of finance. After railroads and metal industries, not surprisingly, the communications sector of the economy became a focus of national anti-monopoly attacks in periodicals of the 1880s.²⁴

With hatred and fear of Jay Gould arose the suspicion that he intercepted, read, and censored telegrams to further his stock-trading schemes. "He scanned the telegraph," wrote Matthew Josephson decades later, "as an open book to the secrets of all the marts....He had spies and agents everywhere."²⁵ His influence looked particularly sinister in the election of 1884, when rumors that Western Union "doctored" or withheld New York State returns favoring Grover Cleveland provoked a mob to surround the company headquarters and chant "We'll Hang Jay Gould to a Sour-Apple Tree."²⁶ Western Union's public image suffered immediately upon takeover by Gould. In 1881, still writing on the inviolability of telegrams to congressional and court subpoena, Francis Wharton expressed a widespread new fear that

parties using the telegraphic wires would be at the mercy of the companies. In important transactions, the wires are tapped, or imperfect and one-sided reports would be obtained from the subalterns of the company. If the company were at liberty to withhold telegrams at its discretion, it could put the business of the country at its feet, and instead of working good to the country, work incalculable evil.²⁷

Another episode of privacy protest, in the face of invasions by business rather than by government, had begun.

The context for this national protest was a public campaign for government

ownership and operation of the telegraph network. The "postal telegraphy" movement, as it was usually called, long predated Gould's involvement with Western Union. Samuel F.B. Morse built the first working telegraph line with federal appropriations and offered his patent to Congress in 1846.²⁸ Twenty years later, after Western Union had emerged dominant from the early chaos of small private telegraphers, Congress affirmed the public nature of the medium by permitting the Postmaster-General to set rates for official government messages and allowing eventual government purchase of all telegraph property at a value to be appraised.²⁹ European nations had already adopted this course by that time.

Nearly every session of Congress in the next thirty years saw bills introduced to authorize the actual purchase and operation of the telegraph.³⁰ Proponents included Benjamin F. Butler, the notorious investigator of telegraphic secrets, and Gardiner G. Hubbard, a Boston lawyer and telephone pioneer with a plan of his own to spark competition under government sponsorship.³¹ After 1881, when critics of the monopoly could focus on a single unscrupulous individual, the campaign picked up momentum. The late nineteenth-century champion of postal telegraphy who came closest to success was the Philadelphia merchant John Wanamaker, Benjamin Harrison's Postmaster-General. Wanamaker's proposal of 1890 for "limited postal telegraphy," like Hubbard's and Butler's bills, included strong measures to preserve the secrecy of wire communications. Any government employee who divulged the contents of a telegram would risk being "imprisoned at hard labor for not less than one year nor more than three years."³² Concurrent civil service reform, it was hoped, and a great increase in the volume of telegraphic business with low government rates, would soon remove the possibility of such tampering.³³ Government telegrams, the Postmaster-General assured the nation, "would have all the sanctity that the mails have today."³⁴

Supporters of postal telegraphy contrasted the sanctity of the government-run mails with stories of wiretapping by private enterprise.³⁵ Before Jay Gould's advent in Western Union, Henry George had accused the "great telegraph company" of "tampering with correspondence," and earlier still Western Union officials had been suspected of selling information and turning the secrets of businessmen to their own advantage.³⁶ But Gould made an especially appealing target. "The telegraphic lines of this country," the Indianapolis Times reported, "are practically in the hands of one man, and that man a gigantic speculator."³⁷ According to the Philadelphia Manufacturer, "this individual possesses the power to inform himself of the nature of any intelligence transmitted over the wires, whether it refers to business, to family matters, or to politics."³⁸ Gould's management had made "the telegraph offices leak-holes through which run into the community the contents of private messages," undermining private commerce and public justice alike.³⁹ As editor Lyman Abbott summed up the general complaint:

The thought-intercommunication of a nation ought never to be left subject to the control of private parties. It is generally believed that in many instances the intelligence flashed over the wires of the Western Union Telegraph Company has been effectually used for purposes of private speculation before it reached the parties for whom it was intended.⁴⁰

With the "private correspondence of the people open to its inspection," Western Union was said to hold "the commerce of the country at its will and the people at its mercy."⁴¹ "Mr. Jay Gould and his associates," predicted the Washington Critic in 1887, "will become more powerful, as the arbiters of finance, politics, and commerce, than the Government itself."⁴² In Gould's monopoly the St. Louis Republican saw the power "to control the Government," while the Brooklyn Eagle believed that "on several occasions diplomatic and financial secrets have leaked out."⁴³

A further charge was that Gould's Western Union censored the nation's news supply through its exclusive contract with Associated Press.⁴⁴ In Senate testimony, Gardiner Hubbard claimed such power to be "greater than any ever wielded by the French Directory." When subject "to the caprices of an individual," it meant that "the reputation of the ablest and purest public men may be fatally tainted in every town and village on the continent by a midnight dispatch."⁴⁵ "If Mr. Gould could suppress for a few hours or days news of an outbreak on the Pacific Coast, or of the departure of a hostile ironclad from Europe," speculated a New York paper, "he could make millions by it."⁴⁶ According to Knights of Labor president Terence V. Powderly: "Every item of news that will militate against the interest of the masses and operate to the welfare of monopoly is wired through from one end of the country to the other." Contrary information, he believed, was suppressed.⁴⁷ To the Nation, Gould's link through Associated Press with newspapers was "a species of tyranny."⁴⁸ More than twenty years later, Gustavus Myers was still repeating the accusation that Jay Gould had manufactured news dispatches to influence stock market prices and disrupt trade union activities.⁴⁹

Despite this abundance of accusations, actual surveillance of the telegraph network by Gould or anyone else was and is difficult to prove. Railroad leaders, even those on Gould's board of directors, had their suspicions, and generally avoided the telegraph in communications with subordinates,⁵⁰ but Western Union under Gould seems to have protected the "integrity of the company's service" from wiretappers and dishonest operators as energetically as ever.⁵¹ Reported cases of divulged information appeared to stem not from New York headquarters but from individual operators and messengers.⁵² It was Lyman Abbott's conclusion, however, that "it is not necessary to determine whether these suspicions were well grounded or not; it is sufficient to note that they

exist, and that the public has no means of protecting itself against the perpetration of such wrongs so long as the telegraph is in the hands of private parties."⁵³

President Norvin Green led Western Union's counter-attack, with the aid of sympathetic journalists and lawyers. Arguing that private correspondence by telegraph would be much less secure under the control of the government, Green reminded Americans that

the objects of the European Governments in assuming control of their telegraph systems are to maintain espionage and censorship over the utterances of their subjects, and of strangers, but...it would be a surrender of the rights of the people to put in the hands of the political party dominant for the time being such powers of espionage and censorship.⁵⁴

The New Orleans Picayune agreed, remarking that the political party which had "direct and complete knowledge of every telegram passing over the wires" would constitute a "monstrous agent of despotism" and a "constant and formidable menace to our free institutions."⁵⁵ According to the Newark News, this would be an "outrage on the rights and privileges of the people."⁵⁶ Like-minded newspapers in New York opposed legislation granting the federal government "the terrible power of espionage into the private affairs of its citizens," and urged readers to resist such a tendency toward "the tyranny of national socialism."⁵⁷

Those who would keep the telegraph network in private hands also made frequent comparisons to the postal system. "The mails are none too safe as a repository of political secrets," observed the Erie Herald; it would trust a government telegraph even less.⁵⁸ "When has been the time," asked a correspondent in the Journal of the Telegraph, "that the post office would not hurry forward the dispatches, documents and letters of the reigning party, in advance of those sent by the opposition?"⁵⁹ If government telegraph rate

were lower in Europe, it was countered that "the directors of the Paris Bourse have the first reading of every financial message."⁶⁰ "In respect to the privacy of the service" at Western Union itself, Dr. Green dismissed as absurd the imputation "that any one man has or may have access to private messages."⁶¹

To be sure, privacy was only one issue in a debate that took account of such economic factors as capitalization, valuation, discrimination, and rate-setting in the United States and Europe. "The most sacred impartiality and inviolability of the privacy of messages," as Western Union's president termed it, was, nevertheless, an argument much in evidence on both sides of the controversy.⁶² In fact, during the 1876 debate over congressional subpoenas, one senator traced the whole notion of inviolability to this scheme for government purchase.⁶³ Enumerations of reasons for postal telegraphy in petitions and platforms from 1877 to 1897 place "privacy" or "sanctity" of correspondence among the two, five, or twelve major arguments.⁶⁴ The ultimate failure of the campaign implied neither a rejection nor an affirmation of a right to telegraphic privacy.

The defeat of the nationalization movement has since been ascribed to lack of broad support in the Congress, in the business community, and in the public at large.⁶⁵ More sinister explanations abounded at the time. As the Pittsburgh Times sarcastically commented, "It does not seem probable that Congress will act on the postal telegraph question. The reason given is that 'there is no public demand for it.' That is what Jay Gould has always said and will ever say."⁶⁶ It is known that Gould liberally distributed franks among legislators for free use of the wires.⁶⁷ In 1890 he was thought to have prevailed upon President Harrison to rein in Postmaster-General Wanamaker, after attempting himself to bribe Wanamaker and sabotage his Philadelphia business.⁶⁸ Further accounting for the eventual rejection of postal telegraphy was sponsorship of

the cause by radical groups - Socialists, Populists, Knights of Labor, Nationalists, and followers of Henry George.⁶⁹ As a final twist, many believed that Gould was secretly scheming all the time to maneuver the government into buying his heavily overcapitalized company.⁷⁰

For whatever reason, postal telegraphy failed, and with it disappeared the possibility of federal legislation protecting the privacy of the telegraphic medium.⁷¹ The deaths of Jay Gould and Norvin Green in the 1890s, the growth of healthy competitors to both Western Union and Associated Press, and the eclipse of the telegraph by the telephone transformed the situation after 1900.⁷² The Mann-Elkins Act of 1910 finally placed telegraphy under the regulation of the Interstate Commerce Commission, but without prescribing penalties for improper use of telegraph secrets.⁷³ Not until 1918, when a wartime measure temporarily placed all private telegraph companies under military control, did Congress forbid wiretapping and disclosure of information transmitted by telegraph.⁷⁴ This prohibition, motivated by fears of foreign espionage rather than business intrusions, lasted only as long as America participated in the First World War.⁷⁵ By that time, the telephone was by far the more important and more vulnerable medium of communication.

Meanwhile, however, legislation at the state level had accumulated to prohibit the disclosure of messages by employees of private telegraph companies.⁷⁶ By the time of William Orton's death, twenty states of the thirty-eight had passed laws penalizing divulgence of telegraph secrets.⁷⁷ Typical was that of Maine, enacted February 5, 1868:

Sec. 4. Any clerk, operator, messenger, or other agent of any telegraph company, doing business in this state, who shall wilfully divulge the contents or the nature of the contents of any private communication entrusted to him for transmission or delivery, shall be punished by imprisonment in the county jail not more than three months, or by a fine of not more than one hundred dollars.⁷⁸

Wiretapping was covered by laws penalizing malicious damage to telegraph company property.⁷⁹ By 1909, the number of states with anti-divulgence statutes had risen to thirty.⁸⁰ These laws either explicitly exempted judicial subpoenas of telegrams or were so interpreted by the courts.⁸¹ Even in the absence of state legislation, suits against Western Union for improper disclosure or use of dispatches were upheld when pecuniary loss could be shown.⁸²

In the final analysis, this compromise position between complete government control and unregulated private operation of the telegraph network reflected the ambiguous relationship of both government and business to personal privacy. Proponents of a right to privacy played off each gigantic potential invader against the other in the interests of the individual. If consistency was lacking in the controversy, all involved were quick to invoke the sanctity and security of personal communications in support of their ideas and interests. The result was to increase significantly the frequency with which the principle of privacy was asserted and acknowledged in the national public forum.

The second and probably more important invader of privacy to emerge from the business sector in the late nineteenth century was the newspaper press. As F.B. Sanborn of the Springfield Republican put it, "The telegraph and the innumerable newspapers have made the world one enormous ear of Dionysius - a perpetual whispering gallery."⁸³ Unlike the telegraph, these "innumerable newspapers" were not concentrated in the hands of one man, yet they reached out to more Americans and had less to fear from government interference or regulation. In no other industry, according to E.L. Godkin, was "the separation between capital and morals...so great."⁸⁴ An English visitor agreed that the American press threatened an "even more dangerous despotism" than the railroads and trusts.⁸⁵ "There are no limits, in the ambition of enterprising

editors, to the future power of the American newspaper," said Sanborn prophetically in the 1870s. "It reports everything, has an espionage as universal and active as any despot ever established."⁸⁶

The years from 1870 to 1899 saw dramatic growth in the industry; the number of newspapers doubled each decade, then peaked after the turn of the century - never to recover.⁸⁷ Technological innovations in the late nineteenth century - the rotary press, the linotype, and the automatic folder - all brought newspaper issues of greater length more quickly to a larger number of people.⁸⁸ "Facility of production has established a cheap and daily circulation of millions of newspapers," marvelled a foreign observer.⁸⁹ So had lower costs of paper manufactured from wood pulp.⁹⁰ Telegraph cables and wire services linked newspaper offices with the wider world, while such inventions as the telephone, the typewriter, the streetcar, the bicycle, and even the fountain pen expedited the gathering and processing of local news.⁹¹

But changes in organization and technology alone did not account for the late nineteenth-century transformation of mass circulation newspapers. Urbanization, immigration, and universal public education conjoined to create in the major cities of the United States a large and diverse market for daily newspapers.⁹² Charles Dudley Warner blamed the new readers for contemporary journalistic excesses. "Perhaps it is this very ability to read conferred upon multitudes whose taste is low," he conjectured, "that accounts for the greater circulation of journals suited to the low taste."⁹³ When critics charged that "journalism has developed an inordinate hunger and thirst for gossip,"⁹⁴ newspapermen responded in self-defense that the demand was not of their making; they had merely yielded to competitive pressures and supplied a market that others would quickly have served in their place.⁹⁵ Defenders of the private life despaired that "what the average newspaper reader wants is

peppery gossip...a juicy morsel that smacks of the innermost privacy of some prominent man or woman."⁹⁶

Whichever came first, market or product, newspaper pages that had been transformed by Civil War headlines of battle and death continued to attract readers with stories of crime and adventure, of sport and society.⁹⁷ American journalists invented the interview in these years, and added women to their reportorial staffs as well as to their growing readership.⁹⁸ "Keyhole journalism," according to a leading historian of the American press, became "a part of the formula upon which the great circulations were based."⁹⁹ In the words of Arthur M. Schlesinger, Sr., "prying sensationalism robbed American life of much of its privacy, to the gain chiefly of morbid curiosity."¹⁰⁰

Some of the earliest complaints of invasions of private life by newspapers came from public officials and on their behalf from critics of the sensational press.¹⁰¹ Of course, public men in America had been subject to attack by a partisan press ever since Benjamin Franklin railed against that "supremest court of Judicature" in 1789.¹⁰² Just before the Civil War, another virulent critic charged "the newspaper press of America with invading the sanctuary of private life, ... calumniating the worthiest and most honorable men...."¹⁰³ But even politicians enured to partisan criticism at the national level were not prepared for curiosity's inroads on their most private moments. Ex-President Grant on his deathbed in 1885 was the victim of news reports revealing "all his private, personal habits, as to neatness or the lack of it, capping the whole business with a minute description of the state of his teeth."¹⁰⁴

Another presidential victim, Grover Cleveland, vehemently resented the intrusions of the press on his honeymoon. In June 1886 he took his new bride Frances Folsom off to a cabin in Maryland, but they could not elude "newspaper

espionage":

All day long the "flower of Washington journalism" stood in the bushes and watched the house. They recorded the hour when the President first appeared at the window; examined the dishes when meals were sent from the hotel to the cottage, in order to report to the country what the bridal pair had to eat; they distended their ears to catch every scrap of conversation which floated from the piazza when the beleaguered pair ventured out of doors; took notes of the garments worn by both, and recorded every nod and look and smile of both throughout the day; they stood in the bushes until the lights in the cottage were put out, when they carefully noted the hour; then they wrote out the results of their day's watching in jubilant accounts, many columns in length, and sent them to the leading newspapers of the land, and those newspapers published them in their most conspicuous columns.¹⁰⁵

The New York Evening Post, one of the first old-guard papers to disassociate itself from such "keyhole journalism," published an editorial condemning newspapers that "hired and directed reporters to dog the President's steps and poke their noses into the sanctity of his private life."¹⁰⁶ As it happened, Cleveland himself had written those words. The following November, in an address at Harvard University, he again denounced the press for "the silly, mean and cowardly lies that every day are found in the columns of certain newspaper which violate every instinct of American manliness, and in ghoulish glee desecrate every sacred relation of private life."¹⁰⁷

A more general protest soon followed. Any individual, prominent or not, could be a potential target. In its "search for the sensational" the press never hesitated "to invade the sacred privacy of the family and squat in repulsive familiarity on the hearthstone."¹⁰⁸ Newspaper "espionage" meant literal "messages stolen from the wires" and "spies put upon houses to unearth domes scandals."¹⁰⁹ This ready outlet for secrets and scandals heightened fears of congressional investigating committees, income tax assessors, and census enumerators disclosing the private information they gathered.¹¹⁰ Though a wider-r critique of reportorial ethics encompassed falsification, manufacture, and

political slanting of news, the critical issue was simply whether "the private individual has no rights that the reporter is bound to respect."¹¹¹ Critics of sensational journalism eloquently invoked such a right:

A man's private life is inviolably his own, be he the lowliest or the highest in the land, be he the most prominent official or the obscurest citizen. Over his own threshold it is lawful for no intruder to put his foot. Therein is the sanctum of privacy, the violation of whose rights is sacrilege.¹¹²

Without this right, better organized and more powerful newspapers could transform any moment of domestic tragedy or quiet celebration into a circus event.

Novelists contributed to the growing protest on behalf of privacy, turning the intrusive American reporter into a stereotypical character.¹¹³ Harriet Beecher Stowe, for example, portrays an English visitor to New York complaining, "if you will pardon the suggestion, that there is too little of this sense of privacy in America." Yes, agreed his host, "here are four or five big dailies running the general gossip-mill for these great United States..."¹¹⁴ Ministers concurred with the novelists, perhaps in part because their preaching had to compete directly with mammoth Sunday editions spiced with crime, scandal, and vice.¹¹⁵ Protests from the pulpit aimed especially at "indecent exposure of transactions and behavior from which healthy souls shrink in disgust and abhorrence,"¹¹⁶ or material "that addressed itself to the faculties that lay below the ears."¹¹⁷

Foreign travellers, too, were quick to chastize the daily press in their accounts of American life. Often they complained of incessant interviewing, including numerous questions about their personal opinions and private life - "disorders, diet, dress, habits etc." - in their capacity as distinguished and newsworthy guests. "To have to submit to cross-examination, under penalty of having ill-natured things said if one refuses," was an ordeal that Herbert Spencer predictably called "an invasion of personal liberty which I dislike."¹¹⁸

French humorist Paul Blouet, better known on the lecture circuit as Max O'Rell, professed to enjoy being interviewed, but took a dim view of the larger problem. "Thanks to that indefatigable meddler, the American reporter, who thrusts his nose everywhere," Blouet said, "the slightest incidents of private life are made public, and commented on right and left immediately."¹¹⁹ Often visitors to the United States would compile lists of sensational headlines and impertinent paragraphs to convince their countrymen of America's "noisy, scandal-hungry, wild and clench-fisted, gun-smoking journalism."¹²⁰

Amid such complaint and protest, the invention of instantaneous photography suddenly increased the likelihood and impertinence of press intrusions on personal privacy. The Kodak "detective camera" was introduced in 1889, along with new methods of reproducing photographs in the press, thus making it possible to exploit any person's likeness for advertising, publicity, or even blackmail.¹²¹ According to one journalist, John Gilmer Speed:

The illustrated journalism now prevalent finds its finest achievements in the publication of photographs surreptitiously taken. The value does not seem to lie in the fact that the photographs are of notabilities, but that they have been taken by stealth when the subjects were unconscious of the purpose of the person manipulating the camera. Indeed, it is a well-known fact that at least one of the newspapers in New York keeps a photographer busy in the streets of the metropolis taking "snap shots" at every person who appears to be of consequence.¹²²

If these practices were, as Speed and many others thought, "unquestionably" invasions of the right of privacy,¹²³ victims had no recourse in the courts. Instantaneous photography, shockingly new, intensified the search for some legal remedy to restrain or penalize the sensational press.

The law's lack of a remedy for invasions of privacy had been noted some time earlier by the lawyer David Dudley Field. In 1876, criticizing newspapers for their "indulgence of personalities," he wrote that "the right of reputa-

tion, that great right, without which all other rights lose half their value, is habitually violated" without adequate redress for the wrong.¹²⁴ John Bascom, president of the University of Wisconsin, writing when his major concern was still partisan attacks on public men, aptly stated the problem:

New conditions both of law and custom were called for as safeguards against the collisions of railroads; new customs, if not new laws, are now required as a fresh reconciliation of private persons and possessions and the omnipresent press, breaking in on many of the amenities of social life, and scattering as news things of private interest only and of dear personal concern. It is time that new defenses should be set up in behalf of the individual...¹²⁵

In 1890 a magazine editor echoed this conclusion that the individual citizen, rather more than society as a whole," needed legal protection, but--like many of his contemporaries--he believed that only voluntary reform by newspapers themselves could safeguard personal privacy.¹²⁶ Short of such self-reformation, journalists, educators, and politicians suggested press censorship, the endowment of newspapers, and mandatory signatures for all news items as solutions.¹²⁷ But such remedial proposals ran afoul of the constitutional liberty of the press. To guard effectually against invasion of individual privacy, an individual remedy was required.¹²⁸

Libel laws afforded no relief. "In the relation of the newspaper to the individual," a beleaguered city editor was most impressed by "the utter inadequacy of the present libel law to protect either party."¹²⁹ "There are few prosecutions for libel," wrote Bascom in 1884, "and still fewer successful ones."¹³⁰ From the individual's point of view, a libel suit only invited further publicity to compound the damage:

What redress have you? A suit for libel? That only makes matters worse by the publication of everything sacred to your privacy, conjoined with a detestable notoriety and the expense of a wearisome litigation with a soulless, conscienceless corporation.¹³¹

"Money and power, with all the agencies they control," according to Illinois Governor John P. Altgeld, made of the libel action "a remedy which kills the

party using it and inflicts comparatively little injury on the defendant."¹³² The case is recorded of one unfortunate victim of publicity, a clergyman, who brought a suit for libel, only to find that the journal then "went to work with those detective agencies with which American daily newspapers are so well equipped, to investigate his 'record'" and publish it minutely.¹³³

Just at this time, moreover, newspapers were successfully campaigning for a relaxation of libel laws in the largest states.¹³⁴ In 1889 Massachusetts and New York legislators considered amendments to the press laws sanctioning "the publication of any matter of legitimate interest to the public" without liability,¹³⁵ and lobbyists for the press obtained legislation in nearly a dozen states affirming that truth was a complete defense, overruling the old maxim that "the greater the truth, the greater the libel."¹³⁶ This hurt the cause of privacy, for in such cases the truth of the personal description or photograph published was precisely the injury. Even where the letter of the law still punished truthful but damaging publications, David Dudley Field asked, "Who can remember when a libeler has been punished, after proving the truth of the defamatory matter?"¹³⁷ Then too, as the editor E.L. Godkin pointed out, it was unclear how to furnish the necessary proof that an invasion of personal privacy had caused monetary losses that were measurable for the purpose of assessing libel damages.¹³⁸

Himself the defendant in more than one libel suit, Godkin wrote a widely noticed article in July 1890 on the right of a citizen to his reputation. The interest that individuals had in "deciding for themselves how much or how little publicity should surround their daily lives," in Godkin's judgment, was a natural right:

The right to decide how much knowledge of this personal thought and feeling, and how much knowledge, therefore, of his tastes, and habits, of his private doings and affairs, and those of his family living under his roof, the public at large shall have, is as much one of his natural rights as his right to decide how he shall eat and drink, what he shall wear, and in what manner he shall pass his leisure hours.¹³⁹

"Privacy," he admitted, "is a distinctly modern product, one of the luxuries of civilization." It could be rescued from "love of gossip" and "passion for notoriety" only by reformed and enlightened public opinion:

In truth, there is only one remedy for the violations of the right to privacy within the reach of the American public, and that is but an imperfect one. It is to be found in attaching social discredit to invasions of it on the part of conductors of the press.¹⁴⁰

Lacking confidence in the efficacy of libel prosecution, Godkin offered only this vague and broad solution.

In December of that year, two young Boston lawyers followed up on Godkin's discussion with an article in the Harvard Law Review. Like many previous writers, they observed that "instantaneous photographs and newspaper enterprise" had "invaded the sacred precincts of private and domestic life." Further, they agreed with the New York editor that "man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual."¹⁴¹ Samuel Warren and Louis D. Brandeis then traced in their article the gradual extension of common law protections from physical and material considerations to intangible and spiritual rights. This development of the law, they ventured to assert, was not at an end. Recent cases in the English courts extending legal protection to intellectual and artistic property were but "instances and applications of a general right to privacy."¹⁴² Just as an author held a common-law copyright on unpublished letters, every person held a right in his or her photographic likeness - and could therefore prevent its unauthorized publication.¹⁴³ Warren and Brandeis hoped that American courts would recognize this principle explicitly in awarding damages and issuing injunctions in all cases of invasion of privacy by newspapers. Criminal sanctions, suggested by another Boston attorney, would also be helpful, but "the protection of society must come mainly through a recognition of the rights of the individual."¹⁴⁴

The solution offered by Warren and Brandeis represented a compromise between unrestrained license of the press to intrude into every private life

and severe self-censorship of newspapers. Such a solution, to be administered on a case-by-case basis, was most realistic because personal demands for privacy had to be balanced against personal demands for publicity. "Among the differences that mark men from one another," wrote a Philadelphia editor in 1890, "this interest for privacy in some and for publicity in others is very noticeable."¹⁴⁵ According to one description of the many letters a newspaper in that city might receive: "Some write to forbid the use of their names in print; while scores of others write to the editor for no other reason under heaven than to get their names into print."¹⁴⁶ A Washington newspaperman noted that "the very large proportion of the personal notices" of which socialites habitually complained "with the air of those whose privacy has been invaded," were "prepared in the handwriting of those to whom they relate."¹⁴⁷ In New York, Charles Dudley Warner confirmed these observations. The very people who most vocally condemned newspaper intrusions were disappointed if any details of their weddings, balls, and parties went unpublished.¹⁴⁸

The legal creativity of Warren and Brandeis received much wider notice than was usual for articles in the Harvard Law Review.¹⁴⁹ Several victims of unwanted publicity tested the experimental privacy doctrine in the 1890s,¹⁵⁰ but state courts avoided explicit recognition of the new right during that decade - "hiding judicial legislation" as some commentators thought, under fictions of contract and property right.¹⁵¹ In the most important of these cases, relatives of Mary Hamilton Schuyler, a prominent philanthropist, sought to prevent her commemoration after death in an exhibit at the Chicago World's Fair - the most highly publicized event of its day. A lower court agreed that there existed a right to privacy in this situation, but the holding of the Court of Appeals was ambiguous: "Whatever right of privacy Mrs. Schuyler had died with her....When Mrs. Schuyler died her own individual right of privacy whatever it may have been, expired at the same time."¹⁵² Nevertheless, opinion prevailed in law periodicals that the doctrine proposed by Warren and

Their reading of legal history in support of a right to privacy did not go unchallenged, however. Herbert Spencer Hadley, a Kansas City lawyer of the same generation as Warren and Brandeis, rejected their developmental approach toward rights in law and equity. Equity jurisprudence, he wrote, was a "crystallized system, not a system of justice administered according to the consciences of the individual judges," nor could any right in equity be sustained if not "connected with the ownership and enjoyment of property."¹⁵⁴ There had never before been a right to privacy, so there never could be one. Another young lawyer, Augustus Hand, reviewed the debate, finding Hadley's objections "to say the least, technical and conservative."¹⁵⁵ Indeed, in a later law review article, Hadley himself seemed to have been converted, proposing that injunctions be issued against sensational newspaper reporting because "advancing civilization, with the increased complexity and intensity of life that it brings, gives rise, in many instances, to a demand for new rights and new remedies."¹⁵⁶

As the twentieth century opened, two important cases - one in New York and the other in Georgia - determined the fate of the embryonic right to privacy. Both involved unauthorized publication of photographs in handbills or newspaper advertisements. In New York the Court of Appeals declined to affirm the existence of such a right, fearing the "vast amount of litigation... bordering on the absurd" that it would engender.¹⁵⁷ Public indignation at the adverse decision, expressed most vocally in the New York Times, was so intense that one judge was moved to defend the decision in the pages of the Columbia Law Review.¹⁵⁸ An editor of the American Law Review spoke for the legal profession: "The decision under review shocks and wounds the ordinary sense of justice of mankind. We have heard it alluded to only in terms of regret."¹⁵⁹ The state legislature in Albany immediately responded to the outcry by passing a law that covered the abuse.¹⁶⁰ In Georgia, on the other hand, the court decided that the

right of privacy has its foundations in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in normal condition recognizes at once that as to each individual member of society there are matters private and there are matters public so far as the individual is concerned.¹⁶¹

The Virginia Law Register faced with such contradictory decisions would ordinarily have followed the lead of New York, but in these circumstances was persuaded by the Georgia justices.¹⁶² Nearly every state eventually followed the same course, either by judicial recognition or by legislation.¹⁶³ The compromise outlined in "The Right to Privacy" by Warren and Brandeis was a classic example of the initiation of public policy through legal scholarship. As Roscoe Pound told the Senate a quarter of a century later, when Louis Brandeis joined the United States Supreme Court, the article "did nothing less than add a chapter to our law."¹⁶⁴

Over the last decades of the nineteenth century, Americans began to express mounting concern for individual rights to privacy against intrusive business practices of both the newspaper press and the telegraph monopoly. In the controversy over Jay Gould's management of Western Union, considerations of economic interest and partisan politics certainly sustained some of the assertions of privacy for telegraphic messages.¹⁶⁵ Similarly, economic competition and professional rivalries between magazines and newspapers must have underlay in part the journalistic critique in which privacy figures so prominently.¹⁶⁶ But whatever the specific motives that prompted various individuals to speak out, in each case ideas of privacy were being articulated to a national audience and crystallized into law and public policy. Privacy - as a concept - was in the air. This phenomenon deserves to be investigated as a whole, rather than as a series of separate episodes, and analyzed in the context of changing American society in the late nineteenth century.

CHAPTER IV

"SO DARNED PRIVATE":

Embattled Individuals and the Privacy Phenomenon

There is a story of the traveller in the hotel in the Western mining town, who pinned a shirt across his open window to screen himself from the loafers on the piazza while performing his toilet; after a few minutes he saw it drawn aside roughly by a hand from without, and on asking what it meant, a voice answered, "We want to know what there is so darned private going on in there?"¹

- E.L. Godkin, 1890

In the words spoken and written on behalf of privacy in different episodes of protest may be found the unity of the privacy phenomenon. A common rhetoric forged these distinct controversies with their disparate arguments into a single historical event. The facts do not support allegations of any great conspiracy of census-takers and telegraph operators in the late nineteenth century against the secrets of the citizenry. The reality of complaint is more easily demonstrable than the reality of invasion, and the unity of the phenomenon lies not in any single motivation for either. The rhetoric of concern for privacy undoubtedly blanketed a variety of motives, salutary and unsavory alike. Only a unity of language, employed for variously motivated assertions of privacy against real or imagined invasions, emerges from the surviving evidence. When Herbert Spencer Hadley translated the values of privacy as "the sanctity of the home and the protection of private reputation," he encapsulated three common themes present in all episodes of debate about privacy - that of sanctity, that of the home or domesticity, and that of reputation or personality.²

The first rhetorical theme of late nineteenth-century privacy language, then, was the recurrent idea of sanctity. Writers attributed "an inviolable sanctity to telegrams" against the probings of an inquisitorial Congress and not long afterwards appealed to that same body to purchase the telegraph and "make and enforce laws for its complete sanctity."³ Even matters of debt and disease were not merely sensitive but sanctified, according to newspapers that repeated for the census office the biblical lesson of God's punishment when King David undertook to number his people.⁴ It was also the "sanctity of private life" against which newspapers practiced their espionage.⁵

Perhaps the common source of these persistent themes was the ascription

of sanctity to letters in the post office, by virtue of what Francis Lieber in 1853 had called "the sacredness of epistolary communion" and what the New York Times argued was "the most sacred right of every private citizen among us."⁶ The image of sanctity penetrated into official as well as editorial discourse on postal privacy throughout the latter half of the nineteenth century.⁷

The statutes defining crimes against the Post Office establishment admonish every person in the postal service of the absolute sanctity of a seal. Under no circumstances will any person in the postal service, except those employed for that purpose in the Dead Letter Office, break or permit to be broken the seal of any letter or packet, while it is in custody of the postal service....(T)hat it may contain improper or criminal matter, or furnish evidence for the conviction of offenders, is no excuse.⁸

The step from this manifestation of privacy to the sanctity of telegrams was self-evident, and the law went further in sanctifying zones of private life in the late nineteenth century. Courts began to recognize that such an occasion as childbirth was "a most sacred one" in which a woman had "a legal right to the privacy of her apartment."⁹ Also among "those affairs of the individual which were in a sense sacred" came to be included financial matters that the proposed income tax would have disclosed.¹⁰ Critics in the 1880s began to fault biographers for violating "the sacred recesses of saintly lives" and trampling upon the "human rights" of the dead to the "sacredness of personality."¹¹ Readers of nineteenth-century fiction found the overlapping themes of sanctity and domesticity respected even in prison. Nathaniel Hawthorne's son Julian, a novelist in his own right, depicted one convict telling another, "I've always held home life sacred"; preferring to plunder banks, he explained that he was firmly "opposed to invading the sanctity of the home."¹² A female prisoner, too, in a novel by Mrs. Ann S. Stephens, was heard to say, "My home's my castle, if it is in a prison."¹³

House, home, and family evoked a second common thread in privacy protests - the rhetoric of domesticity. Again and again is found the British legal proverb, "A man's house is his castle."¹⁴ Sir Edward Coke had incorporated the maxim into the common law, and James Otis, in his 1761 speech against writs of assistance, had domesticated it for the Americans.¹⁵ On census-taking the New York Times reiterated this "old British maxim," as did the Tribune in comparing searches of houses to searches of private telegrams.¹⁶ Rev. Minot J. Savage likewise appealed to the "sturdy old British saying," while university president John Bascom, lawyers Warren and Brandeis, and Supreme Court Justice Henry B. Brown cited it in their indictments of the newspaper press.¹⁷

But the image of privacy embodied in the rhetoric of domesticity went further than the frequent repetition of a hallowed legal proverb. Within the rhetorical realm of domesticity were two key concepts - private property and familial privacy. In 1906 the sociologist Albion W. Small translated Georg Simmel's concept of privacy as "spiritual private property."¹⁸ Indeed, legal recognition of the individual's right to quiet and exclusive enjoyment of property had been formulated at a relatively early date in the development of American thinking about privacy. A "right of quiet occupancy and privacy" had been recognized in Vermont in 1880, and in the same year a vigorous congressional debate focused on invasion of "the privacy of the premises of an individual" by District of Columbia water meter readers.¹⁹

If property considerations lay at the basis of many assertions of a right to privacy,²⁰ they applied not just to any piece of real estate, but specifically to the home and to home life. "The sense in which the house has a peculiar immunity," wrote another Vermont judge, "is that it is sacred for the protection of (a man's) person and of his family."²¹ The home as the

domain of the family had become "an increasingly private place," one social historian has recently written, as a result of urban, industrial compartmentalization of experience - just as "the sacredness of the idea of the family" grew out of "the divisive effects of civil war, territorial expansion, and the birth of modern industrialism."²² Familial integrity was at the very heart of that cluster of values which added emotional legitimacy to the meaning of private property as a source of rights to privacy.

If anything was more sacred than domestic privacy, it was the inviolable personality of the individual - the third major theme of late nineteenth century privacy rhetoric. Judge Thomas M. Cooley wrote that the "right to one's person may be said to be a right of complete immunity; to be let alone," and from this pronouncement Samuel Warren and Louis Brandeis drew their "right to privacy."²³ There was also the "right to reputation," so vigorously asserted by David Dudley Field, E.L. Godkin, and others in protests directed at the newspaper press.²⁴ Included, too, were "sensitive matters" and "personal habits of individuals" that it was claimed were threatened by the census of 1890.²⁵ Gardiner Hubbard warned that the reputation of every citizen lay at the mercy of Jay Gould's telegraph monopoly, and similar fears of possible blackmail focused on congressional committees.²⁶

The American habit of respect for the personality and the reputation of private citizens provoked commentary from various perspectives then and since. William James, in his widely-read text on psychology of 1890, applauded "the well-known democratic respect for the sacredness of individuality" as a precondition for the advancement of society.²⁷ Four years later, an economist could only add that from his perspective, "the American people are a sensitive, 'touchy' people," unwilling to expose their "private affairs."²⁸ At the end of the decade, Thorstein Veblen more skeptically interpreted "the habit

of privacy and reserve" as a universal desire to shield the shabbiness of everyday life from one's neighbors.²⁹ In the more recent Freudian tradition, reticence about personal matters found among all classes in late nineteenth-century urban society reflected a sexual reticence.³⁰

More important than the particular social or psychological underpinnings of late nineteenth-century rhetoric concerning reputation and personality was its relationship to legal traditions of personal rights - analogous to the relationship of rhetoric concerning domesticity to traditions of property rights. For instance, the Supreme Court in 1891 vindicated a minimal right to "inviolability of the person" by ruling that railroad companies could not force a physical examination upon injured persons.³¹ In general, personal rights and property rights came into conflict throughout the nineteenth century in America, with the interests of property usually uppermost in fact if not in theory.³² The incipient right to privacy was nourished by both traditions.³³ Some contemporary legal scholars derived privacy from "the right of personal liberty,"³⁴ while others called "the peace and quiet of the home" and "the reputation of the individual, property rights of the highest value."³⁵

By the close of the nineteenth century, many Americans were beginning to realize that privacy was threatened by a multiplicity of related invasions to person and property. More than an isolated value to be asserted against a specific abuse by government or business, it was a way of life endangered from many sides. Each episode of privacy protest reminded writers of other invasions from different sources. For Frank Parsons, to entrust a secret to Western Union was tantamount to telling it to "the new reporter on a city paper, whose position and wages depend on the amount of sensational matter he can collect."³⁶ Judge Cooley had similarly speculated that telegrams in the possession of legislative committees would "furnish the reporters of daily

papers with sensational literature,"³⁷ as Justice Brown later berated the newspapers for printing "messages stolen from the wires."³⁸ The San Francisco Examiner expected 45,000 census enumerators, by the end of their task, to sympathize with the "impudent reporters."³⁹

Moreover, to shield Americans from these related intrusions, a single right was called upon. The words "right of privacy" appeared in the 1880s in reference to both journalistic and telegraphic invasions, and "private rights," "the 'natural and inalienable right' of everybody to keep his affairs to himself," were asserted in opposition to income tax assessment and census interrogation prior to the publication of Warren and Brandeis's article in 1890.⁴⁰ "The rights of a citizen that are directly covered by civil law," wrote John Bonham in 1884, "are but a small portion of his entire rights."⁴¹ As Oscar and Mary Handlin have concluded, the right to privacy "was respected in advance of any direct protection from statutes or binding judicial decisions."⁴² The exact formulation of words "right to privacy" appears to have been popularized by E.L. Godkin's Scribner's article in 1890. Warren and Brandeis then took his phrase, in preference to a "right of reputation" or "right to be let alone," as the title of their influential article.

If privacy, broadly defined, was understood as a unified body of ideas and a single right in the late nineteenth century, it remains to ask who was responsible for its articulation and acceptance in the American public forum in advance of legal recognition. How far did the privacy complaint extend through various segments of society? Most lawyers and sociologists examining the origins of modern rights to privacy have associated developments in the late nineteenth century exclusively with the privileged upper stratum of American society. Thus Alan F. Westin has interpreted privacy complaints of

that era as "a protest by spokesmen for patrician values against the rise of the political and cultural values of 'mass society.'" ⁴³ Other legal writers have identified "the affluent, society-minded upper classes," and "the upper social echelons" as sources of "elite resistance" to intrusions on personal privacy. ⁴⁴ The sociologist Edward Shils has attributed privacy concerns in the latter half of the nineteenth century somewhat more broadly to "the upper sections of the working classes" and "middle classes" as well as elites of the period, ⁴⁵ but others in his discipline have generally regarded privacy as a "luxury" linked to high status or social rank. ⁴⁶

This class interpretation of privacy concerns is derived from examination of the complaint against the newspaper press, and in particular of the seminal legal article by Warren and Brandeis. Brandeis's biographers have turned up evidence that "lurid details" with which Boston's Saturday Evening Gazette depicted Mrs. Warren's society dinners had driven Brandeis's law partner to seek a legal remedy and engage him in the search. ⁴⁷ Dean William L. Prosser, a leading authority on privacy law, is typical of scholars who have generalized Mr. and Mrs. Warren's feelings to represent those of the entire urban social elite - "in which a lady and a gentleman kept their names and their personal affairs out of the papers." ⁴⁸

Thus later students of the newspaper episode have explained the privacy phenomenon as a search for a "law that would protect people like the Warrens from the indignities imposed upon them by the journalistic Paul Prys of Boston." ⁴⁹ "Out of such 19th-century condescension," the standard interpretation says, "the law of privacy was born," reflecting "the irritation of the upper classes at their social inferiors." ⁵⁰ The unspoken purpose underlying the efforts of exponents of privacy was, by this account, to reduce the visibility of the ostentatious rich to the impoverished urban masses - lest "hungry eyes peer into

private houses" and "read the tempting menus."⁵¹ "An unwise display of great wealth," it was feared, "had introduced to America that greatest of European curses, class hatred."⁵² Amidst apprehensions that "the other half" might rise up in resentment at the extravagance of "high society," privacy could be an excuse for patrician censorship of an upstart press that pandered to envious curiosity.⁵³

Merely to interpret late nineteenth-century privacy interests as a rear-guard action of an entrenched elite, however, is to ignore simultaneous complaints on other fronts. "Society gossip" was a mainstay of sensational journalism, but far from its only intrusive feature. Criminal suspects resented being incessantly interviewed as much as foreign notables did.⁵⁴ In the same year that Warren and Brandeis vented their outrage at the society papers, men and women of other classes as well were moved to harass countless unfortunate census-takers across the country in the name of privacy. A newspaper recorded the protests of one uneducated woman as racial humor, it is true, but recorded them nonetheless:

"Sah," cried the widow, thoroughly exasperated, "I gib my senses an' pay my taxes, but foh de Lawd, no man am going to hab familiarities wid me; no, sah. I'se 'spectable, I is; en no dude man wid cockeye glasses am goin' to spyin' my privut his'ry. You's a despisable man; you git no more senses from me. Git out."⁵⁵

According to other press reports, recent immigrants in New York and stockyard hands in Chicago resented the intrusion of government inquisitors as much as the most sensitive souls among the "four hundred."⁵⁶

If the wealthy and prominent used privacy as a shield against newspaper publicity, "members of the criminal classes" were accused at the same time of manipulating the census controversy to their own advantage in order to conceal their identities.⁵⁷ But protests also came from simple folk with no

sophistication in dealing with information demands, as in the encounter reported by another federal investigator:

Once, as I was leaving a large New England cotton-mill, whither I had gone to secure the names of some of the operatives with the purpose of interviewing them at their homes, an old woman who had given me her name and residence came running up.

"If you please, sir, I think I would like to have my name back."

I was a Government agent, and some one had cautioned her not to trust a Government agent. I gravely read from my notebook the name and address she had given me; whereupon she returned to her loom apparently satisfied. Afterwards, when I called upon this same woman, she evinced surprise that I had remembered her, and knew where to find her house after I had given back her name!⁵⁸

Working women in great numbers opposed these inquiries of agents of the Commissioner of Labor in the 1880s, guarding their private affairs with the eloquent protest - "It ain't the Government's business."⁵⁹

Convicts and charity recipients, whom Edward Shils excluded from any consciousness of privacy, also joined in the general privacy complaint.⁶⁰ The anonymous prisoner "19,759" whose Confessions were published by Julian Hawthorne in 1893, noted that in spite of day and night surveillance the "sneaks" of the penitentiary dared not break into a convict's private cupboard.⁶¹ Nor, observed a postal expert, could a warden always open the letters of prisoners.⁶² Even prison officials opposed "marking men" by copious records, or else, as one indignant warden put it, "our penal institutions would become nothing more than Pinkerton detectives."⁶³ Dependents upon public charity, who had to submit to the "snooping" of charity organization societies, took some comfort in systems such as Boston's "Confidential Exchange" where information they yielded was made known only to member agencies.⁶⁴ In tenement improvement as well, the poor desired the addition "not simply of more space, but of more separate rooms" for at least a possibility of physical privacy.⁶⁵ Privacy for those far below the Warrens' social level was at least sometimes

a live concern.

In the case of sensational newspapers, moreover, the class which Warren and Brandeis purportedly represented was far from united in wishing to protect its privacy. Society reporting in sumptuous detail quite often arrived at the newspaper office in the host's or hostess's own handwriting.⁶⁶ Warren and Brandeis recognized this division of sentiment among their neighbors, and E.L. Godkin expressed it thus:

Of course, the importance attached to this privacy varies in individuals. Intrusion on it afflicts or annoys different persons in different degrees. It annoys women more than men, and some men very much more than others. To some persons it causes exquisite pain to have their private life laid bare to the world, others rather like it....⁶⁷

Perhaps the most lurid example of invasive newspaper gossip was New York's Town Topics, which was said to have featured "tales of high society, adultery, incest, illegitimacy, abortion, transvestitism, and nymphomania, giving broad clues as to the participants and sometimes coming right out and naming names."⁶⁸ Such sensationalism was not unanimously scorned by upper class victims, nor was it solely the reading fare of the lower orders of society. Rather, it seems, Town Topics was found in nearly every Tuxedo Park cottage and Newport villa.⁶⁹ Society journals, even of this character, were more likely organs of communication within one class than exposures of that class to the less fortunate. Indeed, exclusive communities like Tuxedo Park revelled in backstairs and drawing room gossip unperturbed by any serious desire for what social historian E. Digby Baltzell has called "real privacy."⁷⁰ When Warren and Brandeis's article appeared, the Boston Saturday Evening Gazette marvelled that "there are really people in Boston who object to see their names in the society columns of the newspapers." Adding that such people were "few and far between," seemingly drawn from "an older fashioned civiliza-

tion than that of today," the Gazette immediately followed this observations with a familiar comment about "an ever-growing craze for newspaper notoriety" among the educated, literate urban elite.⁷¹

Samuel Warren and his wife, though admittedly of the older fashioned group, were not, in fact, the object of sustained journalistic attention for their dinner parties. Presumably, if Warren, angered by that journal's treatment of his wife, wrote his article with Brandeis in December of 1890, the invasion ought to have been fresh in his mind. Yet a check of the Saturday Evening Gazette for the year 1890 turned up a mere half dozen mentions of the S.D. Warrens, and only one dinner they gave:

-Mrs. S.D. Warren, Jr., gave a dinner for twelve on Wednesday, at 151 Commonwealth Avenue.⁷²

The single "lurid detail" one could gather from these pages was that the Warrens' home - for which the address, incidentally, was incorrect - had been turned into a "veritable floral bower" for a cousin's wedding breakfast.⁷³ Most of Boston's society gossip was compressed into such one-line notices, without even mentioning a woman's first name. It is more likely that such items were generally printed to please the persons involved than to stimulate the envy and curiosity of the discontented masses.

In no single social class of late nineteenth-century America is it possible to locate unanimous concern for the values of privacy. Various individual temperaments and motives converged in a public outcry - a phenomenon larger than the sum of its parts. What was observable among the favorites of fortune characterized the unfortunate as well. Some prison convicts steadfastly refused to reveal their true names, as others defiantly asserted their identities.⁷⁴ Some distorted their features for the "rogue's gallery" camera, as others primped and posed for the photographer.⁷⁵ Apparently, concern for

privacy extended throughout the population of urban industrial America, to rich and poor, to native and immigrant. If the most abundant evidence from the period represents a small group privileged to have access to the print medium in the years before polls of public opinion, it seems that they spoke as individuals, not as a special interest or class. The articulate few whose thoughts on privacy were published and survive shared no single political orientation, social status, or economic position. Republicans and Democrats, conservatives and radicals, aristocrats and egalitarians, capitalists and socialists, monopolists and anti-monopolists joined on this single issue.

Who, then, was excluded from a right to privacy in the late nineteenth-century? What were the limits that proponents of the legal right to privacy meant to place upon its application? Answers to these questions provide insight into the nature of the privacy phenomenon as a whole and its sources in prevalent American values of the nineteenth century. In particular, an understanding of the boundaries of privacy as a broadly-based social ideal underscores the point that - contrary to the opinions of some commentators then and since⁷⁶ - politicians in office and corporate business interests were neither the chief instigators nor the chief beneficiaries of the new legal doctrine. Explanations of privacy protest as a reflection of the desires of government officials to stifle unfavorable publicity ignore, of course, how much of the protest was directed against government itself as an invader of privacy. Similarly, at least as many privacy complaints were lodged against as by business interests.⁷⁷

More significantly, perhaps, both government and business were finally unsuccessful in using the concept of privacy to protect their operations from public scrutiny and control. Indeed, the word "secrecy" carried with it largely

unfavorable connotations in the late nineteenth century, in contrast to the positive associations of "privacy."⁷⁸ It was more common to proclaim "the sanctity of telegrams" than "telegraphic secrecy." Secret societies, secret diplomacy, and secret sessions of the Senate came under fire just as privacy protests began to mount.⁷⁹ The words might occasionally be used synonymously, as in the "secret ballot" or in Woodrow Wilson's criticisms of the "privacy" of committee-rooms, executive sessions, and caucuses in Congressional Government,⁸⁰ but - not surprisingly - the formulators of a legal right to privacy limited its application with regard to governmental secrecy. Warren and Brandeis, among others, set out to "protect the privacy of private life," specifically exempting candidates for public office, who were fair game for journalistic espionage.⁸¹

In like manner, large corporations were often rebuffed when they tried to take advantage of public concern about privacy to assert a "right to manage their own private business in their own way."⁸² To be sure, Leland Stanford successfully persuaded the courts in 1887 that a federal commission had illegally exposed Central Pacific Railroad affairs - matters "of an exclusively private character" - "to the public and the prying curiosity of rival business competitors."⁸³ This "railway practice of secrecy" eventually adopted by Standard Oil and the great banking and insurance corporations, was also imitated by the Pullman Palace Car Company and its president in the climactic strike of 1894.⁸⁴ "He maintained," a lawyer later wrote, "that he was competent to and had the right to manage his own affairs," but the near civil war that resulted belied his statement that "the public has no concern with his private business...."⁸⁵ In opposition to corporate secrecy, anti-monopolists proposed using "the white light of publicity" as a weapon to fight the railroads and the trusts as it had been used to fight political corruption.⁸⁶

Representing this position was the economic writer John M. Bonham, who in 1890 warned against "the industrial evils produced by secrecy and indirection" in the management of railroads and trusts. Yet his condemnation of secrecy was balanced by an affirmation of privacy. "As far as concerns the citizen in his social and political relations," he wrote, "it would be almost impossible to over-value the right of privacy and the essential part which the maintenance of this right plays in his social and economic well being."⁸⁷ Bonham reconciled individual privacy and corporate publicity with this argument:

We all know how readily the defenders of quasi-public corporations fall back upon what is called the constitutional right of privacy, but any true analysis of the Constitution with reference to the quasi-public corporation must show that the constitutional right of privacy was meant for the individual citizen - meant to guard his personal and private and political status - and that it cannot be construed to confer immunity from investigation upon any factious institution, which, from the inherent necessity of its being, tends to impair or destroy this individual right.⁸⁸

"A corporation," he concluded, "is not a human being." Andrew Alexander Bruce, a lawyer writing in 1906, agreed with Bonham. Asking whether the growing number of inspection laws constituted "arbitrary searches and seizures," whether privacy in all instances was an inalienable right, Bruce concluded, "at the risk of being branded as a socialist,"

that the businesses are businesses public in their nature and affected with a public interest; that the factory and the workshop and the store and the mine are not castles....The existence or nonexistence of the right of privacy should not be left, as it is now so often, to the whim of the police and to the waves of popular excitement or be dependent on the financial or political power of the parties sought to be interfered with.⁸⁹

Bruce denied the protection of privacy to corporations, while affirming it for all citizens, including "the outcasts of society," "the tramp or the

prostitute," on the basis of an "individualistic code."⁹⁰

In the very year that Bruce made this point, a theoretical basis for the reconciliation of individual privacy and collective publicity appeared, ironically, from the authoritarian atmosphere of Berlin. Professor Georg Simmel, noticing the trend in England the United States, derived a "universal scheme of cultural differentiation" in advancing urban civilization - so "that which pertains to the public becomes more public, that which belongs to the individual becomes more private." Accordingly, political and economic affairs "have lost their secrecy and inaccessibility in precisely the degree in which the individual has gained the possibility of more complete privacy."⁹¹ The family was the last social unit greater than the individual to maintain privacy with respect to the outside world and deny it to members within. But even familial privacy was being rapidly eroded by stronger claims to individual privacy. Breadwinners tried to keep financial details from "the members of our families, whose expenditures we should control," and housewives equally wished to keep their own letters and lives inviolable.⁹² The rhetoric of domesticity had begun to retreat before that of personality.⁹³

This limitation on assertions of the right to privacy in the late nineteenth century did not entirely proceed from public discourse into public policy, as had limits on the secrecy of public officials. In particular, courts still refused to distinguish between corporations and individual persons in their constitutional rights. "The Central Pacific Railroad," decided a federal court in 1887, "is, simply, an artificial person" entitled to the same "right of personal security" that exempted the citizen and "his private affairs, books, and papers from the inspection and scrutiny of others."⁹⁴ An anonymous reviewer commented caustically in 1890 on such judicial actions:

One prized fruit of the Anglo-Saxon struggle for liberty has been the right of privacy for the individual as a guarantee of his higher rights. But in this regard extreme individualism has become corporationism, and quasi-public institutions threaten to defeat true individualism not only in the right of privacy but in the right of property.⁹⁵

Only gradually did the view of Bonham and Bruce prevail in the federal courts. By 1910, corporate claims to fourth amendment protection were being bounded, but four decades would pass before the corporation's attempt to shield its affairs in a cloak of privacy were laid to rest.⁹⁶ Plainly, "individual" privacy was a constant refrain throughout the phenomenon of protest. Most proponents of the right to privacy spoke and wrote as individuals, for individuals - not for larger social or economic groups.

As a final question, it must be asked what happened to the individual American in the last decades of the nineteenth century prompting him to protest invasions of privacy from government and business and to assert a right to privacy that had yet to be recognized by law. Had privacy never been gravely jeopardized before? Or had most individuals previously been altogether indifferent to privacy as both a value and an experience? It seems that increased expectations as well as reactions to real events accounted for the timing of the phenomenon at the end of the nineteenth century.

One survivor of the wrenching changes that characterized the late nineteenth century wrote that his generation had seen "the incoming of a new social order consequent upon the rise of industrialism." In the social revolution of the 1880s and 1890s, he explained, "individualism, as a working theory of society, was overwhelmed and put to confusion by the vast output of the material forces."⁹⁷ The importance of the individual shrank to insignificance beside the growing responsibilities of government and the increasing power of

business corporations.⁹⁸ According to a student of late nineteenth century public opinion, Americans experienced a "widening gap between the ideology of individualism and the changing conditions of society."⁹⁹ Among the metaphorical giants facing the embattled individual were a national monopoly of telegraphic communications, large newspapers filled with faceless anonymous reporting, and a massive census leaving no detail unrecorded "to the detriment of the individual."¹⁰⁰ Individuals understandably tried to assert their rights to privacy against the impact of these organized, impersonal powers.

Prior to these decades, however, individual privacy had hardly been secure in America. Small communities, such as Robert Wiebe has described in The Search for Order, had limited the privacy of individuals long before national government and national business emerged as new threats.¹⁰¹ One characteristic of early nineteenth century America that had impressed Henry Adams, as a historian writing near the century's end, was the frequent complaint by European travellers that "privacy was out of the question."¹⁰² As Adams reported, "almost every writer spoke with annoyance of the inquisitorial habits of New England and the impertinence of American curiosity."¹⁰³ Americans themselves seemed not to notice this supposedly national trait, tolerating everyday invasions of privacy in their tightly-knit communities.¹⁰⁴

Foreign accounts of American curiosity filled early- and mid-nineteenth century travel literature. Yankees and Southerners were equally guilty of prying inquisitiveness toward each other and toward strangers.¹⁰⁵ It was encountered on the Kentucky frontier and points West as often as in urban Boston and settled Pennsylvania.¹⁰⁶ "If the Americans have any national trait," concluded an exasperated Englishman in 1807, "it is this intrusive curiosity."¹⁰⁷ According to the popular writer Caroline Kirkland, English immigrants who

brought ideals of untrammelled individualism to the American frontier soon learned that social equality was the more potent force - for "whoever exhibits any desire for privacy is set down as 'praoud', or something worse...."¹⁰⁸ As one of Harriet Beecher Stowe's characters said, "our vulgar, jolly, democratic level of equality over here produces just these insufferable results."¹⁰⁹ Charles Nordhoff, recalling the many communistic societies that had embodied the collective spirit in an earlier American landscape, lamented from his perspective of 1875 that there had been "hardly the possibility of privacy" in these "island communities," fast disappearing by the last quarter of the century.¹¹⁰

In the decades following the Civil War, impersonal organizations in business and government threatened to replace the petty tyrannies of human-scale communities with more sweeping invasions of privacy. Habits of reticence or exclusiveness, which earlier had been stigmatized as aristocratic snobbery, became legitimate expressions of individualism. E.L. Godkin, having just read Warren and Brandeis's article on privacy, wrote skeptically that "there is nothing democratic societies dislike so much to-day as anything which looks like what is called 'exclusiveness', and all regard for or precautions about privacy are apt to be considered signs of exclusiveness."¹¹¹ But soon afterward an editor of Scribner's corrected Godkin:

In the great future battle of the world between the two systems of Socialism and Individualism, one of the vital points of difference is to be privacy; and it is important to note that it is between individualism and socialism that the point of difference lies, and that privacy is not by any means an attribute of aristocracy as opposed to democracy. That Western citizen who raised the curtain of the new-comer's shanty and desired to know "what was going on so darned private in here," was the typical socialist, not the typical democrat.¹¹²

Individualism, as an alternative to "a relatively sudden and powerful concentration of power in certain segments of society," became a more precious value

to many Americans as the nineteenth century drew to a close.¹¹³ It democratized the previously aristocratic concept of privacy, making of it a right that any citizen could and did claim.

Prevalent American values of individualism, which came to play so large a role in late nineteenth-century protests over privacy, were deeply rooted in Anglo-American tradition. English liberals cherished the rights and privileges of the individual against both the state and the community. "There is a limit," observed John Stuart Mill, "to the legitimate interference of collective opinion with individual independence; and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism."¹¹⁴ Immediately upon publication, Mill's "simple principle" gained wide acceptance in England, and, in the opinion of a contemporary observer, retained an undisputed hold until the beginning of the twentieth century.¹¹⁵ Even Mill's harshest critic, James Fitzjames Stephen, agreed on one point: "legislation and public opinion ought in all cases to respect privacy."¹¹⁶ So did a later English writer, Francis Montague, even as he announced the end of an age of individualism and laissez-faire.¹¹⁷ The currency of the term "individualism" in post-Civil War America was perhaps more attributable to another English thinker, Herbert Spencer, whose evolutionary theories of competition fortified the laissez-faire temper of the times.¹¹⁸

Individualism had indigenous sources as well in nineteenth-century America. The word itself was unknown until introduced in 1835 by Henry Reeve's translation of Tocqueville's Democracy in America:¹¹⁹

Individualism is a novel expression, to which a novel idea has given birth.... Individualism is a mature and calm feeling, which disposes each member of the community to sever himself from the mass of his fellows and to draw apart with his family

and friends, so that after he has thus formed a little circle of his own, he willingly leaves society at large to itself.¹²⁰

This view of the individual in society, though harshly criticized by Tocqueville, resonated from Ralph Waldo Emerson's popular essay on "self-reliance" and surfaced in the radical solitude achieved by Henry David Thoreau at Walden Pond.¹²¹ Sounding much like later spokesmen for the right to privacy, another New England Transcendentalist wrote: "Individuals are sacred. The world, the state, the church, the school, all are felons whensoever they violate the sanctity of the private heart."¹²² More in the vein of John Stuart Mill, political theorist Francis Lieber sought to convince his American students of "man's inextinguishable individuality," and the necessity of protecting it against "police government."¹²³

By 1890 individualism may be said to have permeated the American value system.¹²⁴ So pervasive was the idea that a skeptical Boston columnist could observe in the midst of the census controversy, "When the government asks a few questions, then the quondam nationalist is at once an eloquent exponent of individualism."¹²⁵ In England it could still be said during the 1890s that the poor had no privacy - "that is the privilege of the rich and the well-to-do."¹²⁶ But in the United States, many poor workers, immigrants, and even convicts insisted upon their individualistic interest in freedom from intrusions by government and business.

The rapid material and social changes that America underwent in the closing decades of the nineteenth century, then, account for the formulation of a legal right to privacy. Revolutions in organization and communication were believed to threaten the security of personal information that previously had been inviolable. But new intrusions on personal affairs, real or imagined, were not enough to provoke so broad a protest in the name of privacy. At the

same time, as a result of late nineteenth-century social and economic revolutions, the fear arose that organized, impersonal forces endangered the individualistic basis of American society. This, in turn, drove individuals to secure for themselves a right to privacy capable of balancing the newly powerful interests of collective society. Embattled individuals, speaking for themselves as individuals, registered their protest in an era when the values of individualism were largely taken for granted but had ceased to represent social, economic, or political realities. It was a measure of the emotional and ideological force behind their protest that they succeeded in writing their concerns into American law and public policy for the twentieth century.

CHAPTER V

"DIFFERENT INSTITUTIONS":

Privacy in the Twentieth Century

An Epilogue

Nearly all American homes and buildings are now tied together by a net-work of telephone wires. That has made them in many ways different institutions from the isolated places they were when Anglo-Saxon doctrine was forming on a man's right to privacy and safety in his own residence. The answering of a telephone is in itself a relinquishment of this privacy.¹

- Grand Rapids Press, 1928

A challenge to the privacy of ordinary conversations arose with the invention of the microphone in 1876, and of the dictograph recorder, first publicly demonstrated in 1889.² Thereafter, eavesdroppers no longer needed to come within earshot of a conversation to intercept it. Further inventions of instruments to transmit the human voice invisibly and miniaturization of all these electric and electronic instruments made the physical dimension of privacy shrink to unimportance in this century.³ Microphone eavesdropping of private conversations, later to be called "bugging," was only infrequently reported in the late nineteenth century, ordinarily as a tool of private detectives and city police forces. In 1895, for example, a postal inspector overheard the confession of dishonest lawyer through a telephone transmitter hidden in the top hat of his accuser.⁴ One widely publicized case after the turn of the century involved the use of a dictograph by the Burns Detective Agency to foil a dynamiting scheme in 1912.⁵ Such behavior, even in the interest of law enforcement, was still not condoned by society. "Much detective work, at best, is disagreeable," said a New York City police officer in 1916. "It involves methods that no one likes to use. It involves eavesdropping, shadowing, looking through windows, listening to conversations."⁶

More cases began to appear around the time of World War Two, perhaps in response to the electronics advances fostered by that war, perhaps also reflecting a wartime lowering of internal ethical restraints on eavesdropping.⁷ "Under the pressure of advances in nontelephonic electronic eavesdropping," wrote Arthur R. Miller, coherent policy disintegrated, and "courts indulged in bizarre distinctions between 'spike' microphones that were driven into a wall [constituting an intrusive "search and seizure"] and bugging devices that

were merely attached to a wall or a heating duct."⁸ Bizarre distinctions were necessary when the legal protections of privacy in this situation hinged almost entirely on physical notions of search and seizure. Courts had not progressed to a full recognition of personal privacy interests in everyday face-to-face conversations. The Fourth Amendment still protected property, not privacy. Legal safeguards from an earlier century had not yet adapted to the changing nature of privacy with changing technology.

At the turn of the twentieth century another new invention promised further variations on the theme of technology outstripping the protection of privacy. Wireless telegraphy and its successor radio were invisible media, mysteriously projecting information into the impalpable ether without even a strand of wire one could tap. "There is no apparent prospect of 'wireless' being rendered secret," wrote a British telegraphy expert during the First World War. "...Whereas a 'wireless' 'eavesdropper' cannot readily be detected, it is comparatively difficult nowadays for anyone to attempt to tap even an aerial land line unobserved."⁹ From 1920 to 1923 experimenters on the radio telephone on Catalina Island found "that anyone with a suitable receiver could listen to the conversations (and nearly everyone did)."¹⁰ AT&T engineers made some progress in "scrambling" radio speech in the search for a "privacy system," but the Catalina experiment was terminated only six weeks after the system was added.¹¹ Radio's distinctive contribution came not in person-to-person communications but in a service that fully exploited the public's impulse to eavesdrop—entertainment broadcasting. Legislation did not reflect this new use, however, as it evolved.

Congress in the Radio Act of 1912 first provided for the privacy of messages:

No person or persons engaged in or having knowledge of the operation of any station or stations shall divulge or publish the contents of any messages transmitted or received by such station, except to the person or persons to whom the same may be directed, or their authorized agent, or to another station employed to forward such message to its destination, unless legally required to do so by the court of competent jurisdiction or other competent authority. Any person guilty of divulging or publishing any message, except as herein provided, shall, on conviction thereof, be punishable by a fine of not more than two hundred and fifty dollars or imprisonment for a period of not exceeding three months, or both fine and imprisonment, in the discretion of the court.¹²

The Radio Act of 1927, in even stronger language, directed that "no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person."¹³ Just how any person with the right equipment could be prevented from using radio messages as he pleased, the law-makers did not say. Though perhaps unenforceable for radio, these provisions would have profound influence on telephone wiretapping, the more important technological invasion of privacy in the first half of the twentieth century.

Patented as a "Harmonic Telegraph" in 1876, the telephone remained a curious and rather exotic adjunct of the telegraph for many years.¹⁴ Courts in the 1880s and 1890s applied the statutes for interference with and divulgence of telegraphic communications to the new telephone wires and their operators.¹⁵ When states amended their laws at all, it was only to add the words "or telephone" after the word "telegraph."¹⁶ The story of twentieth-century telephone wiretapping necessarily begins with the nineteenth-century telegraph.

To intercept information transmitted along telegraph wires, in the words of an operator in 1880, "all that is required...is a small portable receiving instrument and a few yards of copper wire to connect it with the line. A

single individual thus equipped can 'tap' a telegraph line and read whatever messages may be passing over it."¹⁷ The first American experts in wiretapping received their special training in military service during the Civil War.¹⁸ Wiretappers were employed by both armies to intercept field orders, and their activities were portrayed in the national press.¹⁹ Interception could also take place at either end. After telegraphers found it easier to transcribe an audible signal than a paper record of dots and dashes, those with this special literacy could decode the loud clatter of a confidential message when merely standing in the same room with the receiving instrument.²⁰

Late nineteenth-century cases of telegraph interception included the stealing of news dispatches by rival correspondents, wiretapping to receive racetrack "tips," and political tampering with campaign and patronage information sent along the wires.²¹ Most cases, however, involved business information, especially speculative stock and commodity ventures.²² This is readily explained by the market the telegraph companies served, estimates placing the proportion of business communications as high as 95 per cent, and the speculative class accounting for nearly half of the total.²³ Throughout this period the telegraph was a relatively expensive medium for the immediate communication of urgent messages, sometimes called "the rich man's mail." Thus even non-financial telegrams were liable to contain information of birth, death and extremes of good and bad fortune, more interesting to the idle gossip than most letters in the mail.²⁴

Government wiretapping of telegraph messages, unlike its subpoenas, was practically unknown during most of the late nineteenth century, even though at the beginning and the end of that period wartime censorship was instituted in at least some sections of the country.²⁵ According to a New York Times editorial in 1880:

There is little temptation or opportunity to intercept telegrams, and no practice of doing it. If, indeed, Government were addicted to tapping the wires, stationing spies in offices to read the clicking of the instrument, or stopping boys on their way to deliver messages, in hope of detecting "treasons, stratagems, or spoils," a law saying that dispatches should be respected like letters in the mail would have some practical meaning. But there is no such abuse.²⁶

In 1894 the same newspaper again rejected the possibility of police wiretapping in the city. Another paper had reported that Western Union allowed the police superintendent to tap underground wires, but the telegraph company manager responded, "Why, such an arrangement would make us liable to arrest. We have no authority to subject the messages of our patrons to the eyes or ears of anyone else."²⁷ Not long after, however, the New York Telephone Company was to take a very different approach with its subscribers.

The earliest subscribers to telephones were connected on a single line; there was little privacy when anyone could hear everyone else.²⁸ Newspapers humorously speculated on the possibilities of telephone surveillance in its first year of use:

With this telephone, by which apparatus oral conversation can be heard for miles, what is there to prevent fathers, mothers, and big brothers from turning the crank, and listening to all the pretty words, soft sayings, and sweet cooings between Frank and Lizzie in the parlor every Sunday evening?...How are the sewing societies, Masons, Odd Fellows, Fenians, politicians of the Gobble order, to have any secrets from the public with this abominable telephone business echoing their sayings and dispensing them through fog horns to the reporters and the rest of mankind. The country is in great danger from the operations of this new infernal machine.²⁹

Later, companies were structured with party lines of usually four subscribers connected to a central switchboard.³⁰ Again confidential communication was compromised by the undetectable access of party-line sharers, but research took place on the "privacy problem." Selective ringing was introduced by the

Chicago Telephone Company in 1896, so one party would not be disturbed by calls to another.³¹ Soon afterward a "lockout system" made it possible to send a busy signal to would-be eavesdroppers.³²

The late nineteenth-century telephone, even more emphatically than the telegraph, was a "rich man's mail." A Pittsburgh newspaper observed in 1890, "the telephone has not yet become a necessity for all the people. It is a recognized luxury for all, a convenience for a great many and a necessity for a comparatively few."³³ Although Postmaster-General Wanamaker in that year proposed a government telephone along with the postal telegraph, "when he declared that it was bound to become a factor of greater importance than the telegraph as an indispensable means of communication in business and personal affairs," wrote his biographer, "the new Postmaster-General was called an erratic visionary."³⁴ But law enforcement bodies were quick to exploit this new source of information. "The rapidity and simplicity of the means by which a wire could be milked, without being cut or put out of circuit" impressed early experimenters on the telephone, who would sanction "the dangerous practice of tapping the wire" only for military purposes.³⁵ Alan Westin has discovered evidence of telephone wiretaps by government and private parties no more than ten years after the telephone's invention.³⁶

The New York City police, known to have tapped the city's network with telephone company cooperation since 1895, were publicized in a notorious case in 1916 for listening in on the private conversations of a Catholic priest administering charity funds and those of a law firm in competition with J.P. Morgan & Co. for World War I munitions deals.³⁷ Federal agencies are known to have joined in wiretapping after that war, with the anti-radical prosecutions of Attorney-General A. Mitchell Palmer.³⁸ One of the novel uses of the telephone was in organized crime, including the coordination of bookmaking, prostitution,

and especially bootlegging operations. Governmental wiretapping was most notorious in Prohibition cases.³⁹

The operator, of course, was always a potential interceptor; in 1916 a New York City police commissioner rationalized his department's surveillance of the wires on these grounds: "telephone conversations from their very nature cannot be private in the way that letters can be, since the employees of the telephone company cannot help hearing parts of conversations and may, if they are inclined, easily hear all."⁴⁰ But the increasing number of calls and the introduction of dialing made the human operator more "invisible" and increased the public's expectations of privacy, as did the availability of one-party lines and later "unlisted numbers." Moreover, a social disapproval of eavesdropping, even of eavesdropping by the police to catch a criminal or by a homeowner tapping his own telephone, continued into the twentieth century.⁴¹ In the 1920s, both the Department of Justice and Department of the Treasury officially repudiated wiretapping as an "unethical tactic," akin to entrapment or bribery.⁴² Attorney-General Harlan Fiske Stone made public in 1924 his department's order forbidding the "use of any illegal or unethical tactics in procuring information," specifically including wiretapping.⁴³ Replying to an early Congressional privacy advocate in 1931, young J. Edgar Hoover testified,

No sir. We have a very definite rule in the bureau that any employee engaging in wiretapping will be dismissed from the service of the bureau....While it may not be illegal, I think it is unethical, and it is not permitted under the regulations by the Attorney General.⁴⁴

These were only rules however, not laws, and were frequently honored in the breach. The failure of prohibition agents in Seattle to obey either a 1909 Washington state law or Treasury Department rules led to the landmark privacy case of Olmstead v. United States.

In this case the conviction of Roy Olmstead's multi-million dollar bootlegging ring on wiretap evidence was appealed to the Supreme Court as a violation of the Fourth Amendment prohibition of unreasonable searches and seizures. According to one study of the case, the most astute legal argument presented to the justices was an amicus curiae brief by major telephone companies.⁴⁵ As abstracted in the case report, the reasoning of the companies, desirous of protecting their users' privacy, was this:

The function of a telephone system in our modern economy is, so far as reasonably practicable, to enable any two persons at a distance to converse privately with each other as they might do if both were personally present in the privacy of the home or office of either one....A third person who taps the lines violates the property rights of both persons then using the telephone, and of the telephone company as well.⁴⁶

A five-to-four majority was unpersuaded. Chief Justice Taft, writing the opinion for the court, denied that there had been any searching or any seizure. Physical entry into a house or office was not made, nor were any material effects taken.⁴⁷

But the dissents will be remembered after the Taft opinion is forgotten. Justice Holmes yielded for the most part to Justice Brandeis, but did a service to interests of privacy by castigating government wiretapping as "dirty business" and recommending the "lesser evil that some criminals should escape than that the Government should play an ignoble part."⁴⁸ Justice Brandeis dissented more forcefully, arguing for the recognition of a constitutional "right to be let alone—the most comprehensive of rights and the right most valued by civilized men."⁴⁹ He had foreshadowed this argument nearly forty years earlier in his influential article on the right to privacy. "Numerous mechanical devices," he then warned, "threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'" Again, in 1928, Brandeis wrote for the future:

The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may some day 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. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions.⁵¹

Crediting the framers of the Bill of Rights with an appreciation of man's spiritual nature as well as material interests, Justice Brandeis added that "every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."⁵² The dissent was received well in the nation's editorial columns, but Congress passed up the chance to legislate an immediate remedy.⁵³

In 1933, just before Prohibition was repealed, Congress did act to ban wiretapping in Volstead Act investigations.⁵⁴ A wider protection appeared in the 1934 Federal Communications Act.⁵⁵ By that act, provisions in the law of radio were extended to telegraph and telephone communications as regulation of all three media became consolidated under the Federal Communications Commission. By forbidding the interception and divulgence of "any interstate or foreign communication by wire or radio," § 605 of the act reversed the line of telephone wiretapping cases after 1934, although its original application to federal radio regulation was made nearly unenforceable by the state of the technology. One legal writer on wiretapping has asserted, "In direct response to the Olmstead case, Congress in 1934 passed the Federal Communications Act, § 605 of which prohibited the interception and divulgence or use of such [telephone] communications."⁵⁶ Congress did no such thing. No discussion of wiretapping was heard in the committee hearings or floor debates on the Federal Communications Act.⁵⁷ Rather, the manager of the bill assured congressmen that "the bill as a whole does not change existing law" through

its transfer of jurisdiction to the new commission.⁵⁸ The effective provision was "no more than a revision and recodification of existing federal regulations governing radio broadcasting."⁵⁹ Thus by indirection, or perhaps by accident, a statutory right to privacy for wire communications emerged at the national level in the 1930s.

The Supreme Court in 1937 and again in 1939 barred the use of evidence from wiretaps in court, not yet overturning the Olmstead decision but basing the new policy on the 1934 law's penalty for unauthorized interception and divulgence of wire communications.⁶⁰ Wartime fears for national security, however, prompted President Roosevelt and his Attorney General to allow F.B.I. interception in cases of espionage, treason, and serious crimes, provided that permission of the Director and the Attorney General was secured.⁶¹ The legal justification for this was that both interception and disclosure had to take place for wiretapping to violate the 1934 law. F.B.I. agents did not publicly disclose the information they intercepted, or use it directly as court evidence. Judges interpreted these statutes to allow subscribers to have their own phones tapped. In only two cases before World War II were damages assessed against private persons for tapping or bugging.⁶²

There the matter of wiretapping stood as the twentieth century reached its midpoint.⁶³ Since then, further technological breakthroughs have elevated the practice into a global problem. Long-distance telephone transmissions between microwave towers are allegedly "tapped" by foreign agents and culled for strategic information by a still newer invention, the high-speed computer. And the computer, even in its more mundane uses, is popularly thought, rightly or wrongly, to pose an even greater threat to privacy than sophisticated telephone "eavesdropping" or electronically broadcast "gossip." The point to be remembered here, however, is that legislative and judicial responses to these new

invasions of privacy are rooted in the protests and compromises of 1890. Justice Brandeis in the Olmstead decision, calling on the Supreme Court to recognize a constitutional "right to be let alone," was echoing his historic Harvard Law Review article of that year. The words Congress employed to protect wire communications in 1934 likewise recalled statutory language proposed in the drive for postal telegraphy that climaxed in 1890. The events of that year must be reviewed for an understanding of privacy in this century.

To be sure, Americans in 1890 did much more than complain about invasions of individual privacy. Business and politics went on as usual, or rather more than usual. Economic activity peaked between the hard times of the mid-1880s and mid-1890s, and Congress passed the Sherman Silver Purchase Act and the McKinley Tariff. Mafia killings in New Orleans and an Indian uprising on the Plains occupied national attention.⁶⁴ Three other events, however, stand out in historical retrospect with significance not appreciated at the time. The United States Census Office declared the frontier closed, inspiring Frederick Jackson Turner to assess its formative national influence. Congress enacted the Sherman Anti-Trust Act, a statute that would await the Progressive years for vigorous prosecution. And at Topeka, Kansas, the Populist Party wrote its first platform for agricultural and economic reform, which failed politically in the short run but which in the twentieth century has been substantially enacted.⁶⁵ These events shared something with the privacy protest that climaxed in that year. They, too, were expressions of the passing of individualism in the face of threatening new forces that represented the future.

Anti-monopoly movements and sentiment against big government embodied individualism in the economic and political spheres. The privacy protest carried it to the realm of information - of telegraphic communications, census

data, and newspaper stories. In an age of materialism, information was an intangible commodity that was only beginning to be appreciated as a national and individual resource.⁶⁶ Still, each of the episodes of privacy protest ended in a compromise between individual and societal interests in information. No one was guaranteed complete privacy, but the general policy prevailed that information about a person belonged under his control until society could show an overriding need for its disclosure. The right to privacy was emphatically a right of the individual as it entered the body of American law at the close of the nineteenth century.

Embattled individuals fought a losing battle on most fronts against material forces of growth and organization in late nineteenth-century America. Since then both the public and the private sectors have continued to spawn vast concentrations of power that dwarf the individual. He has continued to feel less and less in control of the national economy, polity, and society. Individualism failed to break up the great corporations, as it failed to reduce the federal government to human scale. But the right to privacy, as affirmed in the Privacy Act of 1974 and kindred legislation, is one important remnant of that late-nineteenth-century value system. Beginning just over a decade ago, legal scholars and governmental agencies have rekindled interest in the definition of privacy first proposed by Godkin, Warren, and Brandeis - the "power," "claim," or "right" of the individual to control the dissemination of personal information about himself.⁶⁷ New public policy measures were required, and still have not been completely formulated, to protect this principle in an age of computer data banks, satellite communications, and electronic journalism. The principle is a legacy of late nineteenth-century individualism. As it was in the 1890s, so for the 1980s it is the cornerstone of United States information policy.

NOTES

Chapter I

¹Thomas Jefferson to John Taylor, November 26, 1798, in Jefferson, Works, Federal edition (New York, 1905), v. 8, p. 488.

²Alan F. Westin, Privacy and Freedom (New York, 1967), p. 330; Jacob W. Landynski, Search and Seizure and the Supreme Court (Baltimore, 1966), p. 198.

³A New English Dictionary on Historical Principles, ed., J.A.H. Murray (Oxford, 1897), v. 3, "E," p. 25. Also Ronald Ridout and Clifford Witting, English Proverbs Explained (New York, 1967), p. 51, no. 161.

⁴Commonwealth v. Mengelt (Pa., 1818), manuscript decision read in Commonwealth v. Lovett, 4 Clark 5 (Pa., 1831).

⁵Joel Bishop, Commentaries on the Criminal Law (6th ed., Boston, 1877), v. 2, p. 630, 1122.

⁶David H. Flaherty, Privacy in Colonial New England (Charlottesville, Va., 1972), p. 89.

⁷George C.D. Odell, Annals of the New York Stage (New York, 1928), v. 3, p. 188 and passim; Mitchell Dawson, "Paul Pry and Privacy," Atlantic Monthly, 150 (October 1932): 385.

⁸John Poole, Paul Pry (New York, n.d.), act 1, scene 3, p. 24.

⁹The School of Good Manners (Boston, 1837), p. 16.

¹⁰James Payn, The Eavesdropper: An Unparalleled Experience (New York, 1888), p. 97.

¹¹Lawrence M. Friedman, A History of American Law (New York, 1973), p. 254.

¹²Justice (British Section of the International Commission of Jurists), Privacy and the Law (London, 1970), p. 15.

¹³Sir William Blackstone, Commentaries on the Laws of England, ed. William Draper Lewis (Philadelphia, 1922), bk. 4, p. 168.

¹⁴ Commonwealth v. Lovett, 4 Clark 5 (Pa., 1831).

¹⁵ State v. Williams, 2 Overton 108 (Tenn., 1808). William H. Bailey, in The Onus Probandi (New York, 1886), p. 463, agreed with defendant that "in the evolution of society, customs and manners have so much changed that it is deemed hardly worth while to discuss the matter."

¹⁶ State v. Pennington, 3 Head 299 (Tenn. 1859); Bishop, Criminal Law, v. 2, p. 630, § 1124.

¹⁷ Charles William Janson, The Stranger in America, 1793-1806, 1807 (Rpt. New York, 1935), p. 20.

¹⁸ Horace Smith, The Tin Trumpet (London, 1836), pp. 113, 209, s.v. "Curiosity" and "Inquisitiveness."

¹⁹ See ch. 4 below, p. 96.

²⁰ Washington Irving, The Sketch Book of Geoffrey Crayon, Gent. (New York, 1859), v. 2, p. 358 (orig. pub. 1820).

²¹ H.D. Lasswell, "The Threat to Privacy," in Robert M. MacIver, ed. Conflict of Loyalties (New York, 1952), pp. 129-130.

²² E.L. Godkin, "The Rights of the Citizen. - IV. - To His Own Reputation," Scribner's, 8 (July 1890): 66.

²³ Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," Harvard Law Review, 4 (December 15, 1890): 196; John Bascom, "Public Press and Personal Rights," Education, 4 (July 1884): 610.

²⁴ Edward J. Bloustein, "Privacy as an Aspect of Human Dignity," New York University Law Review, 39 (December 1964): 984.

²⁵ John Poole, The Village Gossip, or, Scan Mag (Philadelphia, n.d.), p. 13.

²⁶ Blackstone, Commentaries, v. 4, p. 168.

²⁷ Apparently she subsequently returned to her ways, for she was editor of a newspaper denominated Paul Pry in the same city from 1831 to 1836.

²⁸ United States v. Royall, 27 Fed. Cas. 906 (1829).

²⁹ Blackstone, Commentaries, v. 4, p. 168.

- ³⁰ United States v. Royall, 27 Fed. Cas. 907 (1829).
- ³¹ Flaherty, Colonial New England, p. 116.
- ³² Karl Baarslag, Robbery by Mail (New York, 1938), p. 294.
- ³³ Flaherty, Colonial New England, pp. 116-117. This dependence for news on private letters continued in remote areas into the nineteenth century; Albert Beveridge, The Life of John Marshall (New York, 1919), v. 1, p. 267.
- ³⁴ Massachusetts Historical Society, Collections, 3d ser., v. 7, p. 83; Wesley Everett Rich, The History of the United States Post Office to the Year 1829 (Cambridge, Mass., 1924), p. 19.
- ³⁵ 9 Anne, cap. X, § 40.
- ³⁶ Gerald Cullinan, The Post Office Department (New York, 1968), pp. 10, 13; "taxation without representation" was an issue in 1711.
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- ³⁸ Flaherty, Colonial New England, p. 118; see also John Wilkins, Mercury, or the Secret and Swift Messenger (London, 1641).
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- ⁴⁰ William Bradford, Of Plimmoth Plantation (Boston, 1912), v. 1, p. 383 (p. 119 in original).
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- ⁴³ Benjamin Franklin, Papers, ed. Leonard W. Labaree et al. (New Haven, Conn., 1959), v. 5, p. 164.
- ⁴⁴ Kenneth Ellis, The Post Office in the Eighteenth Century (London, 1958), p. 63.
- ⁴⁵ Eustace Murray, Embassies and Foreign Courts: A History of Diplomacy (London, 1855), pp. 130, 136; Thomas Erskine May, The Constitutional History of England Since the Accession of George the Third, 1863, ed. Francis Holland (London, 1911), pp. 153-154.

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⁴⁹ Ibid., v. 21, p. 671, October 18, 1782.

⁵⁰ 1 Statutes at Large 232, 236 (1972), § 16.

⁵¹ Wayne E. Fuller, The American Mail: Enlarger of the Common Life (Chicago, 1972), p. 38.

⁵² George Washington to Alexander Hamilton, Philadelphia, September 1, 1796, in Washington, Writings, ed. John C. Fitzpatrick (Washington, 1940), v. 35, pp. 198-199; Alexander Hamilton to Gouverneur Morris, Philadelphia, June 22, 1792, in Hamilton, Works, Federal edition (New York, 1904), v. 9, p. 537.

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⁵⁴ George Washington to the Marquis de Lafayette, Mount Vernon, February 7, 1788, in Washington, Writings, ed. Worthington C. Ford (New York, 1891), v. 11, p. 218.

⁵⁵ Thomas Jefferson to James Thomas Callender, Monticello, October 6, 1799, in Jefferson, Works, Federal ed., v. 9, p. 85; Elbridge Gerry to Jefferson, Cambridge, April 29, 1801, in Gerry, Letters, ed. Worthington C. Ford (Brooklyn, 1896), p. 22. On "the infidelities of the post office," Jefferson wrote to John Taylor, November 26, 1798: "I know not which mortifies me most, that I should fear to write what I think, or my country bear such a state of things," in Works, Federal ed., v. 8, p. 488.

⁵⁶ John Steele, Papers, ed. Henry M. Wagstaff (Raleigh, N.C., 1924), v. 1, p. 448n.

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⁵⁸ Westin, Privacy and Freedom, pp. 335-336.

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⁶¹ Sen. Roscoe Conkling, in Congressional Record, 44th Cong., 2d sess., January 5, 1877, p. 444.

⁶² Simon Greenleaf, A Treatise on the Law of Evidence (Boston, 1846), v. 1, § 253, p. 367.

⁶³ 4 Stat. 102, 109 (1825), § 22, believed to have been drafted chiefly by Daniel Webster - Sen. Conkling, Congressional Record, p. 444.

⁶⁴ Chief Postal Inspector Montague, February 23, 1965, quoted in Garrison, Spy Government, p. 117.

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⁶⁷ Francis Lieber, On Civil Liberty and Self-Government (Philadelphia, 1853), v. 1, pp. 108-114, referring to the "sacredness of epistolary communion."

⁶⁸ James Holbrook, Ten Years Among the Mail Bags (Philadelphia, 1855), p. xviii.

⁶⁹ Ibid., p. 394.

⁷⁰ Fuller, American Mail, p. 246; Baarslag, Robbery by Mail, p. 306.

⁷¹ Baarslag, Robbery by Mail, p. 304; 4 Stat. 102, 109 (1825).

⁷² Holbrook, Ten Years, pp. 353, 395, 372.

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⁷⁴ James G. Randall, Constitutional Problems Under Lincoln (New York, 1926), p. 500.

⁷⁵ Mr. Kasson of Iowa, in Congressional Record, December 21, 1876, p. 350.

- ⁷⁶ Scheele, Mail Service, p. 88.
- ⁷⁷ Westin, Privacy and Freedom, p. 336; California Penal Code, § 618.
- ⁷⁸ Mr. Hewitt, of New York, in Congressional Record, December 20, 1876, p. 329; David B. Parker, A Chautauqua Boy: In '61 and Afterward (Boston, 1912), pp. 236-239; "Charges Against the Post Office," New York Tribune, December 21, 1876, p. 1, col. 3.
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- ⁸⁶ The Federalist, No. 54, from the New York Packet, February 12, 1788, in The Federalist, ed. Henry Cabot Lodge (New York, 1888), p. 344. This counterbalance broke down in the late nineteenth century, when no direct federal taxes were assessed. States and cities then vied for the largest counts for both political power and economic prestige. Walter F. Willcox, "American Census Methods," Forum. 30 (September 1900): 110.

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⁸⁸James A. Garfield, "The American Census," Journal of Social Science, 2 (1870): 38; R.P. Falkner, "The Development of the Census," Annals of the American Academy of Political and Social Science, 12 (1896): 36.

⁸⁹"Trials of the Census-Taker," New York Times, July 19, 1875, p. 4., col. 4.

⁹⁰Ibid.; Garfield, "American Census," p. 36.

⁹¹New York Times, July 19, 1875, p. 4, col. 4; "Census of England and Wales and of the United Kingdom, 1881," Journal of the Statistical Society, 44 (June 1881): 399.

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⁹³Ibid.

⁹⁴New York Colonial MSS, v. 5, p. 459, in Garfield, "American Census," p. 36.

⁹⁵William Burnet to Lords of Trade, June 26, 1726, in ibid.

⁹⁶"Census of the Union," Annals of Congress, February 2, 1790, p. 1107.

⁹⁷Rep. Page, in ibid., p. 1108; Madison responded that "it was more likely that the people would suppose the information was required for its true object, namely, to know in what proportion to distribute the benefits resulting from an efficient General Government."

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¹⁰⁰Jesse Chickering to Sen. John Davis, Boston, January 20, 1849, in Sen. Misc. Doc. No. 64, 30th Cong., 2d sess., March 3, 1849, pp. 21-22.

¹⁰¹Carroll D. Wright and William C. Hunt, The History and Growth of the United States Census (Washington, 1900), p. 48.

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- ¹⁰³Wright and Hunt, U.S. Census, pp. 30, 35.
- ¹⁰⁴Henry Stone, "The Census of 1880," Lippincott's, 22 (July 1878): 109.
- ¹⁰⁵Wright and Hunt, U.S. Census, p. 85; It was a step nearer the scientific census, for "the returns related to the individual, therefore, and were, for the first time in the census, susceptible of detailed treatment and classification," Wright and Hunt, U.S. Census, p. 47.
- ¹⁰⁶Ibid., p. 14.
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- ¹⁰⁹New York Times, July 19, 1875, p. 4, col. 4.
- ¹¹⁰Robert C. Davis, "Confidentiality and the Census, 1790-1929," U.S. Department of Health, Education and Welfare, Records, Computers, and the Rights of Citizens (Washington, 1973), p. 186.
- ¹¹¹Ibid., p. 191.
- ¹¹²"Instructions to Marshals, Etc.--Census of 1840," in Wright and Hunt, U.S. Census, p. 145.
- ¹¹³"Circular to Marshals, Etc.--Census of 1850," in ibid., p. 150.
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¹²¹Francis A. Walker, "The Eleventh Census of the United States," Quarterly Journal of Economics, 2 (January 1888): 158-159.

¹²²Davis, "Confidentiality," p. 185.

¹²³Falkner, "Development of the Census," p. 57.

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¹²⁹Davis, "Confidentiality," p. 192.

¹³⁰Arthur R. Miller, The Assault on Privacy (Ann Arbor, Mich.; 1971), p. 184.

¹³¹Westin, Privacy and Freedom, p. 337.

¹³²Sir William Holdsworth, A History of English Law (London, 1903-1966), v. 7, pp. 332-333, no action would lie at common law.

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NOTES

Chapter II

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- ¹⁹ Mr. James Brooks of New York, May 25, 1868, in Congressional Globe, 40th Cong., 2d sess., part 3, p. 2579.
- ²⁰ U.S. Senate, Trial of Andrew Johnson, supp. to the Congressional Globe, 40th Cong., 2d sess., April 2, 1868, pp. 89-92; Journal of the Telegraph, 1 (June 1, 1868): no. 14, p. 4.
- ²¹ Mr. Pierce of Massachusetts, March 23, 1874, in Congressional Record, 43rd Cong., 1st sess., p. 2378; "Eavesdropping Extraordinary," New York Times, May 18, 1874, p. 4; Telegrapher, 10 (June 13, 1874): 141.
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- ²⁴ "Washington - Secrets of the Telegraph," New York Times, June 24, 1876, p. 4, col. 7, col. 2; see also "Glover's Raid for Telegrams," New York Tribune, December 20, 1876, p. 1, col. 2.
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- ²⁶ Ernest J. Eberling, Congressional Investigations (New York, 1928), p. 232.
- ²⁷ Congressional Record, House, 44th Cong., 2d sess., December 21, 1876, pp. 352-353.
- ²⁸ William M. Turner, in Congressional Record, Senate, 44th Cong., 2d sess., January 5, 1877, p. 439.
- ²⁹ Western Union Telegraph Company, Rules, Regulations, and Instructions (Cleveland, 1866), p. 55.

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- 31 William Orton to William R. Morrison, December 15, 1876, in ibid.
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- 33 "Congress and the Telegraph," Telegrapher, 12 (December 23, 1876): 310.
- 34 Mr. Wood of New York, Mr. Hurd of Ohio and Mr. Lynde of Wisconsin, Congressional Record, House, pp. 328, 326, 327.
- 35 Congressional Record, House, p. 328.
- 36 Ibid., p. 329.
- 37 Mr. McCrary of Iowa, Mr. Hoar of Massachusetts, and Mr. Garfield of Ohio, Congressional Record, House, pp. 327, 330, 335.
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- 40 Report of the Judiciary Committee at ibid., p. 602
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⁴⁴Congressional Record, Senate, January 5, 1877, p. 445.

⁴⁵Ibid., p. 448.

⁴⁶Senator Ingalls of Kansas, ibid., p. 446.

⁴⁷Ibid., January 8, 1877, p. 477.

⁴⁸Congressional Record, Senate, p. 477.

⁴⁹Sen. Gordon of Georgia, ibid., p. 448.

⁵⁰House of Representatives: December 20, 1876, yeas 20 Democrats and 71 Republicans, nays 121 Democrats and 1 Republican; but January 12, 1877, 128 Democrats and 2 Republicans opposed 67 Republicans and 3 Democrats. Senate: January 5, 1877, yeas 14 Democrats and 18 Republicans, nays 2 Democrats and 1 Republican (no quorum); January 8, 1877, yeas 15 Democrats and 20 Republicans, nays 2 Democrats and 1 Republican. Party affiliations from the Congressional Directory, 1876.

⁵¹"The Investigating Committees," New York Times, December 13, 1876, p. 4, col. 2; New York Times, December 16, 1876, p. 4, col. 1.

⁵²New York Tribune, December 18, 1876, p. 4, col. 2.

⁵³Quoted in Journal of the Telegraph, 10 (January 1, 1877): 6.

⁵⁴"Congress and the Western Union Telegraph Company," Telegrapher, 13 (January 6, 1877): 1; conspicuous in the opposition was J.N. Pomeroy, "The House of Representatives and the Telegraph Companies," Nation, 24 (January 11, 1877): 25-26.

⁵⁵Resolution of December 22, 1876, quoted in "The Privacy of Telegrams," New York Tribune, December 26, 1876, p. 1, cols. 4-5.

⁵⁶"Inviolability of Private Despatches," Journal of the Telegraph, 9 (July 1, 1876): 201; Telegrapher, 12 (July 8, 1876): 162; "The Confidential Character of Telegraphic Despatches," Telegrapher, 12 (December 30, 1876): 318; "Preserving the Original Copies," Journal of the Telegraph, 10 (January 1, 1877): 4.

⁵⁷"Congress and the Western Union Telegraph Company," Telegrapher, 13 (January 6, 1877): 1.

⁵⁸"Postal Telegraph," New York Tribune, January 13, 1877, p. 4, col. 4.

⁵⁹"Western Union Surrenders," New York Tribune, January 20, 1877, p. 1, col. 4; Telegrapher, 13 (January 20, 1877): 17.

⁶⁰"Congress and the Western Union Officials. - The Messages to Be Surrendered," Telegrapher, 13 (January 27, 1877): 23; Journal of the Telegraph, 10 (February 1, 1877): 37-38.

⁶¹Political motives on Orton's part to let only the Senate Republicans get at the dispatches were hotly denied. Orton's vice-president and successor, Norvin Green, and about half the Executive Committee were Democrats, and Western Union prided itself on impartial reporting of the election returns. Journal of the Telegraph, 9 (November 15, 1876): 340; 10 (January 1, 1877): 5; 12 (February 1, 1879): 33; 12 (February 16, 1879): 51, 53.

⁶²New York Herald interview with Dr. Norvin Green, quoted in Journal of the Telegraph, 12 (February 1, 1879): 33; "The Cipher Messages Investigation," Journal of the Telegraph, 12 (February 1, 1879): 37; John Bigelow, The Life of Samuel J. Tilden (New York, 1895), v. 2, pp. 170ff.

⁶³Quoted in Journal of the Telegraph, 10 (January 1, 1877): 6; see also Abram S. Hewitt of New York in Congressional Record, House, p. 329.

⁶⁴Magnetic Telegraph Company, Articles of Association, and...Office Regulations (New York, 1847), p. 20; letter to the Telegrapher, 12 (December 30, 1876): 315 on a House Judiciary Committee investigation of Samuel Colt, 33rd Cong., 1st sess., December 1853.

⁶⁵Francis Lieber, On Civil Liberty and Self-Government (Philadelphia, 1853), v. 1, p. 111; testimony of Anthony Yeoman, U.S. House of Representatives, Tampering with Mails in New York Post-Office, Report 138, 44th Cong., 2d sess., January 23, 1877; Mr. Kasson of Iowa and Mr. Hale of Maine, Congressional Record, House, p. 350.

⁶⁶Ex parte Jackson, 96 U.S. 727 (1878).

⁶⁷Thomas M. Cooley, A Treatise on the Constitutional Limitations, 4th ed. (Boston, 1878), p. 476n.

⁶⁸Thomas M. Cooley, "Inviolability of Telegraphic Correspondence," American Law Register, n.s. 18 (February 1879): 70, 72, 67.

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⁷⁰Ibid., p. 140.

⁷¹U.S. v. Babcock, 5 Dill. 566, 569 (1876).

⁷²Quoted in Journal of the Telegraph, 12 (March 1, 1879): 72.

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⁷⁸The Nation, St. Louis Post-Dispatch, Boston Herald, Chicago Inter-Ocean, Cincinnati Daily Gazette, Detroit Free Press, Cleveland Leader, Chicago Tribune, Denver Times, Charleston News and Courier, New York Graphic, Providence Journal, Indianapolis Daily Journal and Daily News, Springfield Republican, Baltimore Sun, and Philadelphia Enquirer, quoted in Journal of the Telegraph, 13 (February 1, 1880): 33-34; 13 (February 16, 1880): 50-51.

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⁸⁰"Privilege of the Telegraph," New York Times, February 8, 1880, p. 4, col. 4; see also A.G. Sedgwick, "The Inviolability of Telegrams," Nation, 30 (February 5, 1880): 91-93.

⁸¹U.S. House of Representatives, Telegraphic Communications, Report 1262, 46th Cong., 2d sess., April 27, 1880, citing the Fourth Amendment, Ex parte Jackson, and Judge Cooley in support of the bill.

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⁸⁵"Protection of Telegraphic Messages," Journal of the Telegraph, 12 (May 16, 1879): 149.

⁸⁶ Ex parte Brown, 72 Mo. 83, 95 (1880).

⁸⁷ Henisler v. Freedman, 2 Pars. Sel. Cases in Eq. & Law 274 (Pa. 1851); State v. Litchfield, 58 Me. 267 (1870); National Bank v. National Bank, 7 W. Va. 544 (1874); United States v. Babcock, 3 Dill. 567 (1880); United States v. Hunter, 15 Fed. 712 (1882); Ex parte Jaynes, 70 Cal. 638 (1886); Re Storrer, 63 Fed. 564 (1894); Western Union Tel. Co. v. Bierhaus, 8 Ind. App. 563 (1894).

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