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**The Observer and the Observed:
Re-imagining Privacy Dichotomies in Information
Privacy Law**

Marcy Peek



The Observer and the Observed: Re-imagining Privacy Dichotomies in Information Privacy Law

By Marcy Peek*

¶1

Information privacy law and scholarship has drawn a flawed dichotomy between those who violate privacy (the “observers” or “watchers”) and those who have their privacy violated (the “observed” or the “watched”). For example, theoretical conceptions of privacy such as the “right to be let alone” dovetailed with Jeremy Bentham’s nineteenth-century notion of the Panopticon. His concept of the Panopticon was of a prison, circular in architectural design that had at its center a watch guard tower rising above the circular prison. The key aspect of the Panopticon was the central watch guard tower, which was designed with blackened windows that allowed the guards to see out, but did not allow the prisoners to see in. This created a situation of perfect surveillance and perfect control; the prisoners had no idea at any given time whether the guards were watching or even whether the guards were in the tower at all. In fact, no one had to be in the tower to achieve compliance or maintain control, for the prisoners knew that they might be surveilled, or not, at any moment of the day or night. Michel Foucault elaborated on this notion of the Panopticon, by asserting that the Panopticon is a representation of the ways in which discipline and punishment are carried out in contemporary society. In the mid-twentieth century, George Orwell conceived of the notion of Big Brother in which everyone is watched at virtually all times by the government. These Orwellian, Foucaultian, and Benthamite notions of privacy centered around the dichotomous concept of the observer and the observed, or the watcher and the watched. None of these notions of surveillance take into account the more fluid concept of the observed and the observer mutually engaging in observation or, to put it another way, both parties watching each other (whether consensually or not). Information privacy law generally assumes that a person usually wants privacy and that there is a watcher-watched relationship wherein a watcher invades a person’s privacy (legally or not). However, that assumption is driven by the flawed dichotomy between the observed and the observer and an erroneous assumption that the observed generally desires privacy vis-à-vis the observer. Once we push at the borders of these assumptions, we begin to understand that privacy relations are more nuanced than often portrayed by information privacy law and scholarship. For example, as technology progresses and examples such as webcams (one-way or two-way), reality shows, long-range imaging devices, video-enhanced cell phones, easily accessible personal information via Internet databases or

* Assistant Professor of Law, Whittier Law School. This paper was originally presented at the annual Berkeley-George Washington Privacy Law Scholars Conference in June 2009. I thank the organizers of the conference and the privacy scholars who made significant comments on the paper. I also thank my research assistant, Nora Aponte, for her work on this project.

social networking sites etc., become commonplace, the meanings of privacy are altered. We all take on multiple, shifting roles of the watcher and the watched at various times.

In effect, we are all watching each other. This new paradigm has a myriad of implications for conceptions of privacy. For example, if one value of privacy is self-development, and the concept of self-development in a less complicated environment of relatively stable observed/observer relations is no longer the norm, then privacy becomes less about self-development and more about constructing identity and the presentation of self in everyday life. Indeed, as technology progresses, we all end up in the roles of the watcher and the watched, whether simultaneously or at distinct points in time. The knowledge that observation is taking place changes the behavior of the observed. Because observation is ubiquitous in the modern technological world, our conceptions of normative values such as the ability to shape self-development and self-identity, the privacy torts, and privacy mandates embodied in federal and state law might need to be re-imagined.

I. INTRODUCTION

This article is the first in a series in which I will explore the modern, complicated relationship of privacy, technology, and the “observed vs. observer” relationship. In future articles, I intend to elaborate upon the complicated dance of the observed and the observer vis-à-vis Fourth Amendment reasonable expectations of privacy, possible reconceptualizations of the traditional four privacy torts,¹ and the impact that post-9/11 security measures might have on our ruminations about privacy given the new world of bilateral observation (as explained *infra*).

In this article, I will build a preliminary foundation for these works by elucidating how technology and modern privacy relations have changed the nature of privacy (or lack thereof) and how these modern realities should impact our notions of privacy.

II. THE TRADITIONAL BIG BROTHER CONCEPT OF PRIVACY

Laypersons and scholars alike have traditionally conceived “privacy” largely as a concept of being “watched” by some outside, unwanted observer. In the United States, this concept of privacy, or lack thereof, is consistent with the classic notion of Big Brother embodied in George Orwell’s classic book, 1984.²

¹ There are four main privacy torts that resulted from Warren and Brandeis’ seminal 1890 article on privacy. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). They are:

- Intrusion upon seclusion or solitude, or into private affairs;
- Public disclosure of embarrassing private facts;
- Publicity which places a person in a false light in the public eye; and
- Appropriation of name or likeness.

See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

² GEORGE ORWELL, 1984 (Penguin Classics 2004) (1949); see also, Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA PATRIOT Act*, 80 DENV. U. L. REV. 375 (2002); Neil Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 413 (2008) (“Of course, George Orwell’s 1984 is the most famous literary defense of privacy as a refuge from totalitarianism.”). But see Carl S.

¶6 These concepts (Orwellian, Benthamite, and Foucaultian) have pervaded the national consciousness for many years. The idea, and fear, of the “observer” watching the observed, unbeknownst to the observed, pervades modern thinking and the modern media. Indeed, the notion of Big Brother has become so ubiquitous that it has earned the title of a now-defunct popular television show.³

¶7 However, this concept of being “watched” by an unwanted outside observer, although popularized by Orwell, could be traced back to Jeremy Bentham who introduced it as an effective tool in institutional settings. Later, Orwell brought it to the forefront as a potential government tool of control even among law-abiding citizens and Michel Foucault expounded upon it by arguing that such social interactions represented a new way of gaining power and control by moving beyond the tools of force or fear of physical punishment.⁴

¶8 The concepts of the “observed” and the unwanted “observer” was explored in the nineteenth-century by Jeremy Bentham, albeit in a prison context. Bentham imagined⁵ a concept of a prison design in which prisoners were watched at all times by prison guards.⁶ Bentham’s concept of the Panopticon⁷ was of a prison building, circular in architectural design that had at its center a watch guard tower rising above the circular prison. The key aspect of the Panopticon was the central watch guard tower, which was designed with blackened windows that allowed the guards to see out at all the peripheral cells, but disallowed the prisoners to see in. Thus, the prisoners could not know whether or when the guards were watching them at any given moment. This created a situation of

Kaplan, *Kafkaesque? Big Brother? Finding the Right Literary Metaphor for Net Privacy*, N.Y. TIMES, Feb. 2, 2001, <http://www.nytimes.com/2001/02/02/technology/02CYBERLAW.html> (noting that “for [Daniel] Solove, Big Brother is an apt metaphor to describe the effects of surveillance and the invasion of a person’s secret or private world”).

³ Christopher Bantick, *Big Brother is Still Watching You*, HERALD SUN, July 26, 2008, available at 2008 WLNR 13889864.

⁴ See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 2d ed. 1995).

⁵ Unfortunately, as one scholar notes:

Bentham’s own account of his process of political radicalization centered on the traumatic and massively bitter experience of the abortive Panopticon prison venture. The endless frustrations and ultimate failure of this effort to construct and manage a Panopticon Prison in the metropolis constituted, in Graham Wallas’s phrase, “the great disaster in Bentham’s life.” “He could not speak of the subject without pain,” Bowring reported. “‘I do not like,’ he would say, ‘to look among Panopticon papers. It is like opening a drawer where devils are locked up—it is like breaking into a haunted house.’” The Panopticon campaign dominated Bentham’s activities and reform energies in the period 1793-1803 and, more briefly, in 1811-12.

David Lieberman, *Bentham’s Democracy*, 28 OXFORD J. LEGAL STUD., 605, 610 (2008) (internal citations omitted).

⁶ See generally JEREMY BENTHAM, *THE PANOPTICON WRITINGS* (Miran Bozovic ed., Verso 1995) (1787); Miran Bozovic, *Introduction* to JEREMY BENTHAM, *THE PANOPTICON WRITINGS* 1, 1-27 (Miran Bozovic ed., 1995) (1787); JEREMY BENTHAM, *PANOPTICON: OR, THE INSPECTION-HOUSE* (1787), reprinted in *THE WORKS OF JEREMY BENTHAM*, at 37, 122-23 (John Bowring ed., 1843); JEREMY BENTHAM, *PRINCIPLES OF PENAL LAW* (1788), reprinted in *THE WORKS OF JEREMY BENTHAM* (John Hill Burton ed., 1843); JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1789).

⁷ See generally JEREMY BENTHAM, *THE PANOPTICON WRITINGS* (Miran Bozovic ed., Verso 1995) (1787).

perfect surveillance and perfect control, for the prisoners had no idea at any given time whether the guards were watching or even whether the guards were in the tower at all. In fact, no one had to be in the tower at any given time, for the prisoners knew that they *might* be surveilled at any particular point in time. Therefore the guards and the system achieved compliance and kept control at all times.

¶9 This Benthamite concept⁸ was elaborated on by Michel Foucault.⁹ Foucault drew on the work of Bentham to explain the ways in which power and discipline operate in modern society. Foucault further argued that the notion of the Panopticon represented a change in modus operandi in discipline to gain compliance rather than the old ways of execution or public examples of brutality. In essence, the Panopticon was a new means of power that created more docile people. As one scholar explains:

Decades ago Michel Foucault argued that modern societies had become increasingly focused on watching and measuring people in order to control them, to normalize their behavior and to make them docile and obedient. His famous example was Jeremy Bentham's idea of a Panopticon--a prison designed so that the prisoners could always be watched but would not know exactly when. By making surveillance ubiquitous, governments and private organizations could discourage behavior they deemed unusual or abnormal.¹⁰

These Orwellian, Foucaultian, and Benthamite notions of the lack of privacy, which can also be construed as a metaphor for the state-controlled society, centered on the dichotomous concept of the observer versus the observed, or the watcher versus the watched.

¶10 Commentators have noted that “[t]he panopticon refuses to go away. Despite the appearance of a number of critiques . . . the idea of the panopticon still appears routinely in surveillance discourses It helps in the exploration of knowledge and power . . . and is imbricated with a quest for social order and for progressive social change.”¹¹ As another scholar has observed:

⁸ See Judith E. Koons, *Earth Jurisprudence: The Moral Value of Nature*, 25 PACE ENVTL. L. REV. 263, 264 n.6 (2008) (“In the late 1700s, Jeremy Bentham designed a panopticon ‘inspection-house’ for prisons, ‘mad-houses,’ factories, and hospitals that allowed a centrally located observer to see all occupants without their being able to assess whether they were being observed.”).

⁹ See Paul Ham, *Warrantless Search and Seizure of E-mail and Methods of Panoptical Prophylaxis*, 2008 B.C. INTELL. PROP. & TECH. F. 090801 (2008). Ham writes:

The panoptical society restricts individual autonomy by “unnecessarily constraining individual decision-making” through the constant threat of visibility leveraging the inherently unbalanced power dynamic favoring governmental actors. The post-modern philosophical ombudsman Michel Foucault theorized upon this effect using Jeremy Bentham's “panopticon”--an anonymous, omniscient presence in prison architecture. This panopticon establishes a regime of surveillance that through “discipline and punishment” oppresses individuals, as well as robs them of their rights to self-expression.

Id. at *21-22.

¹⁰ Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 12 (2008).

¹¹ David Lyon, *The Search for Surveillance Theories*, in *THEORIZING SURVEILLANCE: THE PANOPTICON AND BEYOND* 3, 4 (David Lyon ed., Willan Publ'g 2006) (1988).

Even as information privacy theorists have sought to shift the focus of the discussion about privacy interests . . . the terms of both academic and public debate continue to return inexorably to visibility and more particularly to an understanding of surveillance as direct visual observation by centralized authority figures. Within popular privacy discourse, this metaphoric mapping tends to be organized around the anthropomorphic figure of Big Brother. Academic privacy theorists have tended to favor the motif of the Panopticon, a model prison proposed by Jeremy Bentham that consists of cells concentrically arranged around a central guard tower, from which the prison authority might see but not be seen. Historically and also etymologically, the Panopticon suggests that direct visual observation by a centralized authority is both the most effective means and the best exemplar of surveillance for social control.¹²

As I will argue in Part II, these notions of Big Brother and the Panopticon vision of Foucault and Bentham have become severely outdated in the last decade. These flawed concepts of Big Brother and the Panopticon currently serve as the principal models that shape privacy laws; however, these concepts do not take into account the modern realities of advancing technology and modern privacy relations.

¶11 In earlier times, being “observed” was largely a result of either being imprisoned, literally, or being psychologically imprisoned by one’s small community of family, friends, and small social network. Technology was not a force of observance, and thus one could go about daily life with the assurance that unless one was involved in activity that, for example, generally endangered the community or one’s familial or close social ties, generally personal activities were exactly that – personal and private.

¶12 Of course, while the academic literature of figures such as Orwell, Foucault, and Bentham created a nightmarish vision of surveillance and a complete lack of privacy, these remained academic and hypothetical versions of what daily life might be like if government or private entities enforced means of uncontrolled observance via technology or sophisticated architecture. Thus, for most of society, extreme and unwanted privacy invasions were largely a matter of science fiction and criminal imprisonment, and were the antithesis of democracy and the normative values of our society.

¶13 However, the vast majority of Americans no longer live in villages and small towns, surrounded by family, friends, and neighbors who utilize gossip and peeping to erode our privacy. Those means of intruding into one’s privacy are largely outdated. This social phenomenon changed with the advancement of technology, the Internet, the proliferation of large cities, and the disappearance of small social networks represented by close networks of people located in small towns.

¶14 In sum, the traditional, classic notions of privacy, depicted most concretely by notions of Big Brother and the Panopticon, represent the “unilateral vector” of privacy, in which the observer is at the center with power over the observed. Sometimes the observed is oblivious to being watched, and at other times knows she might be watched at any given time – but there is no mutual engaging of observation (the latter representing the “bilateral vector,” as I will expound upon in Part II).

¹² Julie Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181, 184 (2008).

III. THE DICHOTOMIES DRAWN IN INFORMATION PRIVACY

¶15 Information privacy law and scholarship have drawn a flawed dichotomy between those who violate privacy (the “observers” or “watchers”) and those who have their privacy violated (the “observed” or the “watched”). None of these notions, which are fundamentally notions of surveillance, take into account the more fluid, modern reality and concept of the observed and the observer mutually engaging in observation. That is, both parties (whether consensually or not) are watching each other.

¶16 Information privacy law generally assumes that a person usually wants privacy and that there is a watcher-watched relationship in which a watcher invades a person’s privacy (legally or not). In other words, the default assumption is that the observed *does not* want to be watched. However, that assumption is driven by a false dichotomy between the observed and the observer and the sometimes erroneous assumption that the observed generally desires privacy vis-à-vis the observer.¹³

¶17 In today’s world, we should move beyond many of the traditional notions of information privacy because of modern privacy relations, largely caused by the advancement of technology. Consider two examples. First, as some scholars have noted, we need to expand upon the limited notion of “Big Brother”, the Panopticon, and the prisoner-versus-prisoner paradigm.¹⁴ In this paradigm—the “unilateral vector,” in which one party is watching the other—the watched may or may not know they are being watched. In those cases where the observed is unaware that she is being watched—for example, by means of concealed street cameras or department store cameras—this “unilateral vector” is relatively straightforward. In other words, the unilateral watching is carried out unbeknownst to the watched, and there is no “relational” aspect to the situation.

¶18 For example, the watched/observed person moves about her or his day generally ignorant of the pervasiveness of street cameras, retail establishment surveillance systems, and other such devices that record every move the person makes. As some scholars such as Daniel Solove have noted,¹⁵ this creates a situation where the aggregation of

¹³As David Lyon asks: “Is the Panopticon [and its ilk] a diversion, a distraction from much more important issues that we miss at our peril through an obsessive fixation with the prison paradigm?” Lyon, *supra* note 11, at 9.

¹⁴ See Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L.J. 803, 830-831 (2009) (“The important part is not so much the watching, but rather that we all know we are being watched. It’s as if we, who are responsible for all this (and this would seem to be nearly all of us), had read Foucault’s account of the panopticon and decided it was way cool and that we should institute our own version as soon as possible.”).

¹⁵ See Daniel Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 HASTINGS L.J. 1227, 1233 (2003). Solove notes:

A difficulty I have described as the “aggregation problem” complicates the application of tort law in specific cases. In isolation, a particular piece of information may not be very invasive of one’s privacy. But when pieces of information are combined, they may form a detailed account of an individual, what I have referred to as a “digital biography.” The whole may be greater than the sum of the parts. This phenomenon occurs because information that is not revealing alone can be quite revealing in combination with other pieces of information.

Id. at 1233. See generally DANIEL SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR AND PRIVACY ON THE INTERNET* (Yale Univ. Press 2007).

“observing” technology enables the private and public sector to create a near perfect picture of the full spectrum of a person’s day and a person’s life. Significantly, this is much different from the traditional phenomenon of gossip, peeping, and observance in small towns, in which a person’s life was sporadically observed by distinct individuals at random points in time. Instead, in today’s American society, a person, once he or she leaves the sanctity of his or her home, is observed and watched virtually twenty-four hours a day, seven days a week.

¶19 This phenomenon is a straightforward “unilateral vector” observance, in which the observed moves about her daily life with little or no cognizance regarding when or if her daily life is mapped and monitored virtually from the moment she leaves her home until the moment she arrives back into the confines of her home.

¶20 However where people realize or suspect that they are being watched (as in the Panopticon scenario), the unilateral vector becomes infiltrated with a layer of human relations that do not exist in the pure unilateral vector. While not aware of the extent of public observance by unseen monitoring systems, many people in today’s society understand that they are being watched by a public or private entity and act accordingly. In other words, they may or may not be being observed at any given moment, but their behavior is affected by the mere fact that they *are likely to be* under observance.

¶21 This phenomenon I term the “relational unilateral vector.” It is so termed because there is an implicit relational aspect to the watcher/watched relationship, in which the watched responds to possible observance by altering her or his patterns of behavior based upon what they believe the watcher wants to observe, and to fit the pattern of a “normal” and law-abiding citizen.

¶22 To complicate matters, this modern monitoring technology has brought us to a point where people not only realize that they are being watched, but may actually enjoy the notion of being watched by an anonymous or non-anonymous, outside observer.¹⁶ Thus the “relational unilateral vector” becomes multi-layered. It is one thing to suspect that one is being observed and to alter one’s behavior accordingly. It goes a step further to enter the public realm with certainty and revel in the notion that one is being observed, akin to taking one’s fifteen minutes of fame, so to speak.

¶23 *Second*, in the last few years we have seen a shift from simply enjoying being watched to a phenomenon of enjoying “watching each other”; in other words, the watcher and the watched become *mutual observers* and derive intellectual, psychological, and/or sexual satisfaction from knowing what the other is doing at discrete times or at all times. This phenomenon I term the “bilateral relational vector.”

¹⁶ See Josh Blackmun, *Omniveillance, Google, Privacy In Public, and The Right To Your Digital Identity: A Tort for Recording and Disseminating an Individual’s Image over the Internet*, 49 SANTA CLARA L. REV. 313 (2009) (emphasis added). Blackmun writes:

Pervasive and indiscriminate omniveillance tools amass vast quantities of information about anyone who has done nothing to put himself in the limelight, with absolutely no discretion. The cameras are always rolling, and a person never knows when he will be photographed. In essence, you cannot stay away from it. *Everyone gets their fifteen minutes of fame, whether they want it or not.*

Id. at 386 (emphasis added).

¶24 For example, at the simplest level, studies have shown that factory workers change their behavior based on the knowledge that they are being observed (the unilateral relational vector).¹⁷ More profound are those increasingly pervasive instances in which the person prefers to be watched and prefers to simultaneously watch (*e.g.*, webcams). The observer becomes the observed and the observed becomes the observer. In other words, privacy relations can become a dance between the observed and the observer in which there is a fluidity of privacy relations. As technology progresses, we all end up in the roles of the watcher and the watched, whether simultaneously or at sequential points in time. This is, of course, a generational shift. It has, in part, been brought on by the incredibly rapid advancement of technology, but it has also been caused by our younger generation's implicit understanding that privacy in the modern world has been largely eroded and, in many cases, eroded by choice.

¶25 Once we push at the borders of the implicit assumptions of the observed-versus-observer paradigm, we begin to understand that privacy relations are more nuanced than often portrayed by information privacy law and scholarship. As technology progresses, our experience of privacy—or lack thereof—rapidly changes. Moreover, as technologies such as webcams (one-way or two-way), reality shows, long-range imaging devices, video-enhanced cell phones, easily accessible personal information via Internet databases or social networking sites proliferate, our paradigms of privacy rapidly shift. One commentator explains:

Much of today's Web activity involves the creation and consumption of "social media." This term broadly describes the various ways that Internet users interact with one another online, and comprises such activities as creating and commenting on blogs, uploading and sharing user-generated content, such as video and photos, and communicating with friends through social networking sites such as MySpace or Facebook. Typically, when new members join a social networking site, they design an online profile page, which allows them to communicate with other members through email, instant messaging (IM), or electronic bulletin board postings. A member's online profile can be open to all or access can be limited only to "friends" or "buddies."¹⁸

Other commentators have described the social phenomena of webcams and like technologies:

¹⁷ Cf. ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 64 (Doubleday Anchor Books 1959) ("[T]here is hardly a legitimate everyday vocation or relationship whose performers do not engage in concealed practices which are incompatible with fostered impressions."). Goffman continues:

[A]ctivity oriented toward work-tasks tend to be converted into activity oriented toward communication . . . sufficient self-control is exerted . . . an idealized impression is offered by accentuating certain facts and concealing others . . . All of these general characteristics of performances can be seen as interaction constraints which play upon the individual and transform his activities into performances.

Id. at 65.

¹⁸ Kathryn S. Vander Broek et al., *Schools and Social Media: First Amendment Issues Arising From Student Use of the Internet*, 21 INTELL. PROP. & TECH. L.J. 11, 11 (2009).

Use of e-mail and instant messaging has eroded physical distances and social barriers. GPS devices help us navigate streets and forests, while enabling other people to know exactly where we are. Computers collect and analyze our online browsing and buying habits Blogs, chat rooms, and webcams let strangers into our minds and into our homes. With increasing popularity, social networking sites encourage people to volunteer personal information—from their demographic characteristics to their musical tastes—for strangers to peruse.¹⁹

As these technologies and social means of communicating become commonplace, the meanings of privacy are altered, and we all take on multiple, shifting roles of the watcher and the watched at various times. In effect, we are all watching each other.²⁰

IV. PRIVACY AND SELF-IDENTITY IN THE MODERN AGE

¶26 These new social and technological conditions²¹ have a myriad of implications for conceptions of privacy. At this juncture, it is appropriate to move beyond the descriptive question—regarding modern unilateral and bilateral privacy relations—to the normative question of how law should reflect real life experiences and how the practical realities of our lives should influence the law.

¶27 If the observer-observed relationship is a flawed paradigm in regard to modern privacy relations, then this necessitates a re-thinking of our stance toward privacy in modern American law. For example, as discussed earlier, American privacy law has generally assumed that the “observed” often prefers not to be observed, is often unaware of observation, and is, for all practical purposes, at odds with the observer. Furthermore, because of the assumed privacy relations engendered by the default assumption of a unilateral privacy relationship, some scholars argue that various values of privacy, such as the right to be let alone and the value of unimpeded self-development, are undermined. Legal scholars such as Julie Cohen have argued that a crucial value of personal privacy is self-development. Cohen observed:

The point is not that people will not learn under conditions of no-privacy, but that they will learn differently, and that the experience of being watched will constrain, *ex ante*, the acceptable spectrum of belief and behavior. Pervasive monitoring of every first move or false start will, at the margin, incline choices toward the bland and the mainstream. The result will be a subtle yet fundamental shift in the content of our character, a blunting and blurring of rough edges and sharp lines. But rough edges and sharp lines have intrinsic, archetypal value within our culture. . . . The condition of no-privacy threatens not only to chill the expression of eccentric individuality, but also, gradually, to dampen the force of our aspirations to it.

¹⁹ Jason Mazzone & Matthew Moore, *The Secret Life of Patents*, 48 WASHBURN L.J. 33, 33 (2008).

²⁰ *But cf.* PHILIPPA STRUM, *PRIVACY: THE DEBATE IN THE UNITED STATES SINCE 1945*, at 4 (Cengage Learning 1998) (“[H]uman beings appear to share a need for periods of time and space away from each other, although the form privacy takes is very much a function of time and place, of society and class.”).

²¹ *See generally* Wikipedia, List of Social Networking Sites, http://en.wikipedia.org/wiki/List_of_social_networking_websites (last visited June 1, 2009).

The autonomy fostered by informational privacy also generates more concrete collective benefits. Development of the capacity for autonomous choice is an indispensable condition for reasoned participation in the governance of the community and its constituent institutions—political, economic, and social.²²

Cohen's work is generally a discussion of the unilateral relational vector, not the pure unilateral vector. Her work can be said to be an argument that constant or frequent observation (known by the observed) is detrimental to the individual because such observation influences the choices one makes in everyday life about what one will let into one's life, such as what books to read, what information to take in, or even what kind of people with whom to interact. This, she argues, undermines the natural course of individualization.

¶28 While Cohen's argument has merit, the notion of allowing of a self-chosen self-identity is *also* a value of privacy, and one that is becoming more significant as bilateral privacy relations proliferate. In other words, my argument expands on Cohen's work by also incorporating the paradigm of the bilateral relational vector, which does not, of course, render the unilateral relational vector obsolete. Both dynamics of privacy are part of the modern conception of privacy. Moreover, this argument incorporates the notion that bilateral relational observation may be either detrimental for the individual *or* beneficial for the individual because bilateral observation may mute the process of choosing one's identity or it may accelerate and strengthen the natural choosing of one's identity.

¶29 Once we pierce the surface of this myopic focus on the unwanted watcher, Big Brother, and the unstated yet prevalent notion of the Peeping Tom (whether vis-à-vis a private or governmental relationship), much more complex patterns of behavior and sociology begin to emerge. These complex patterns that are engendered by both the unilateral and bilateral relations of privacy reflect the various power dynamics involved and the notion of the allowance of a self-chosen, self-identity as a value of privacy. That is to say, there is a fundamental power dynamic inherent in a unilateral observer relationship, in which the observed has little or no power in regard to the observation.

¶30 But when and where the observed complicates the power dynamic by either simply becoming aware of the observation and acting according to her interests *because* she is aware of the observation (the "unilateral relational vector"), or where she engages in *mutual* observation and therefore engenders a fluid power dynamic of watcher/watched (the "bilateral vector"), this must affect our traditional conceptions of privacy. More specifically, one cannot fundamentally understand modern information privacy law without recognizing that self-identity as a function of what we have traditionally called privacy. Self-identity is a function of privacy because the parameters of one's self-identity—and the extent to which one is allowed to construct the self—has a direct causal relationship with the nature and extent of one's experience of privacy.

¶31 If, for example, a person's privacy is minimal due to her or his choice to engage in bilateral privacy relations, the construction of her or his self and identity will be directly affected. We might imagine that this hampers the construction of the self, because the observers/observed might construct a self-identity in accordance with the expectations of

²² Julie E. Cohen, *Examined Lives: Information Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1426 (2000).

the observer(s). For example, a teenager might construct a notion of self based on what her friends on Facebook think is “hot” at the moment. But one could also imagine a situation in which self-identity engendered by the erosion of privacy due to bilateral privacy relations is actually accelerated and strengthened by a person’s rebellion against the hampering of her construction of identity. The attempted hampering of this construction of self might engender a strengthened self-will and the construction of an identity as one who rejects standard societal and privacy norms. Thus, for example, that same teenager may contemplate how her identity does or does not fit in with the “status quo” for her group based on a myriad of bilateral relations, and may decide to construct an identity that is self-chosen and intentionally subversive of the status quo. In this case, the back and forth of mutual observation is beneficial because it allows one to play the dance of mutual observation as a means of choosing a self-identity based on a sliding scale of conformance or rejection of the status quo of the particular bilateral set or group.

¶32 In other words, muted privacy may lead to individuals who construct identity by conforming to mainstream notions of identity *or* persons whose self-identity is formed by a strengthening of the self-will and a desire to construct one’s self-identity by rejecting traditional patterns that tend to erode privacy. Thus, self-identity and the construction thereof are a function of privacy because privacy relations affect how one reacts to her or his experiences of privacy and constructs one’s identity based on these experiences.

¶33 We can now begin to understand that privacy very much includes the personal choosing of how we decide to embrace or reject outside observation into our space based upon how we want the world to view us and how we want to view ourselves. As we begin to ponder these issues in regard to privacy law, we must begin to ask questions that are fundamental to the underpinnings of privacy law. How, for example, might this affect our notions of how the four privacy torts²³ and privacy laws in general should include the more complex notions of both bilateral and unilateral privacy relations? As just one example, we must acknowledge that the common law of privacy and the four privacy torts were developed in an earlier, simpler era in which the unilateral vector of privacy was the dominant phenomenon.

¶34 But, more importantly, we begin to question to what extent the privacy torts are still relevant in today’s world, because of the advancement of technology and the ensuing effect that this has on the diminution of unilateral privacy relationships and the continuing proliferation of bilateral privacy relationships. As I argue below, privacy (or the lack thereof) sometimes becomes less about self-development and more about constructing identity and, as Erving Goffman elucidated, the presentation of self in everyday life.²⁴

¶35 For example, it is one thing to argue that intrusions into privacy affect one’s ability to be secluded and unencumbered by unwanted outside observance, or to argue that intrusions into privacy render impossible or difficult one’s ability to choose what she wants to read, what movies she wants to watch, or how she chooses to reveal her body in public; in other words, to render impossible the ways in which her choices are influenced or disrupted by society—i.e., self-development. But it is quite to understand that privacy or lack thereof is not only often self-chosen, but is also a mutual dance between observer

²³ See Prosser, *supra* note 1, at 389.

²⁴ See generally GOFFMAN, *supra* note 17.

and observed in which the observed often willingly allows the complicated notion of “privacy” or lack thereof to form her self-constructed notion of identity, that is, who she is, how or what she thinks, and what her place is in the world.

¶36 As Erving Goffman observed in the mid-twentieth century, human beings react differently and engage in a virtual “theatre” when they believe they are being observed.²⁵ When there is no knowledge of observance, the “mask” that we present to the world is dropped. However, when there is a “unilateral relational vector” or a “bilateral relational vector,” the individual typically goes to all measures to construct an identity for the world that he or she believes conforms to society’s expectations. “[W]hen an individual appears before others he [or she] will have many motives for trying to control the impression they receive of the situation.”²⁶ And in a situation of the “relational bilateral vector,” construction of identity becomes two-sided and even more sophisticated and complex.

When two teams present themselves to each other for purposes of interaction, the members of each team tend to maintain the line that they are what they claim to be; they tend to stay in character. . . . At the same time, each team tends to suppress its candid view of itself and of the other team, projecting a conception of self and conception of other that is relatively acceptable to the other.²⁷

¶37 Specifically, the new social phenomenon of the “relational bilateral vector” has brought us to the point where people not only sometimes enjoy the aspect of mutual observance, but they also revel in the opportunity to shift identities, play with identity,²⁸ and render identity fluid. Relevant examples include Facebook, MySpace, Twitter, and cell phones that enable one to identify a friend’s location in real time via GPS.²⁹ Goffman’s point ties into the larger point of this article: the notion that observation is ubiquitous in the modern, technological world, and thus that our conceptions of normative values (such as self-identity, reasonable expectations of privacy, the privacy torts, and privacy mandates embodied in federal and state law) might need to be re-imagined.

¶38 As I have argued elsewhere, “some commentators have criticized the notion of fluidity of identity as a means of escaping stereotypes and harassment online.”³⁰ Yet this new means of fluidity of identity seems to have a new meaning: that of pushing at the

²⁵ See generally *id.*

²⁶ *Id.* at 15.

²⁷ *Id.* at 167.

²⁸ David Lyon has observed that even “the post-panoptics . . . lack attention to crucial dimensions such as socio-economic class, gender, and ethnicity which today must be applied in areas of literal (CCTV) as well as [non-literal] (data mining) ‘watching’; not to mention ‘watch lists.’” Lyon, *supra* note 11.

²⁹ Many applications which are now omnipresent in the use of networking sites also serve to reinforce the notion that less privacy equals greater popularity, at least in the virtual world. For example, Rob Cottingham, president of the social media marketing company Social Signal, says: “There are so many metrics out there that tell you how you are doing, or appear to tell you how you are doing -- you have this many friends on Facebook, you have this many followers on Twitter -- all these serve to tell you what kind of impact you are having.” Gillian Shaw, *More Leading Dual Lives through Networking Sites*, THE WINDSOR STAR, Mar. 23, 2009, available at <http://www2.canada.com/windsorstar/news/life/story.html?id=45f86332-20f5-4b07-ac2b-b359fa13e881>.

³⁰ Marcy Peek, *Passing Beyond Identity on the Internet: Espionage & Counterespionage in the Internet Age*, 28 VT. L. REV. 91, 118 (2003).

boundaries of privacy and embracing the realities of a modern world in which enjoyment and meaningful social interaction can be achieved by eradicating socially enforced norms of privacy.

¶39 Jeffrey Rosen has written about the “growing culture of self-revelation.”³¹ Yet his focus is more on the idea that without privacy, one’s “real” persona might be misunderstood because of the demons of gossip, a tabloid world, and an ever-connected global social sphere enabled by technology.³² But contrary to Rosen’s concerns, MySpace, Facebook, and the ever-proliferating online websites in which individuals can engage in relational bilateral observance actually *enable* individuals to construct and present an identity of their choosing. As one example, the Obama administration has decided to use Facebook, MySpace and Twitter to present the image of the administration that they want to present to the outside world.³³ This is clearly a move towards construction of identity, albeit the identity of a governmental administration. As one commentator has observed, “[t]he social networking sites are just the latest in the administration’s efforts to make information widely available, and they join YouTube, Flickr, iTunes and Vimeo as places to find official content.”³⁴

¶40 “Privacy,” in other words, can be understood as a concept revolving around the notion of imposition into one’s life, or it can be understood as a *complex set of notions that engender fluctuating presentations and self-understandings of identity*³⁵ as more and more people construct their identity by controlling the way in which they are viewed and the manner in which their personalities are exposed to the outside world via bilateral relations of privacy.³⁶ I do not mean to argue that these new modes of social interaction—largely brought about by the rapid advancement of technology—are normatively *good*. Rather, this article aims to advance our understanding of where personal privacy is at the moment and where it is headed given the realities of our contemporary, technology-centric age.³⁷ Moreover, it is unwise to ignore the dangerous side of social networking sites and the new self-imposed erosion of privacy in the attempt to create one’s own identity. As Danielle Kean Citron notes:

Social networking sites and blogs have increasingly become breeding grounds for anonymous online groups that attack women, people of color, and members of other traditionally disadvantaged groups. These destructive groups target individuals with defamation, threats of violence, and technology-based attacks that silence victims and concomitantly destroy their privacy. Victims go offline

³¹ See generally JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* (Random House 2000).

³² *Id.* at 3-25.

³³ See, e.g., Chris Snyder, *Government Agencies Make Friends With New Media*, WIRE, Mar. 25, 2009, <http://blog.wired.com/business/2009/03/government-agen.html>.

³⁴ Michael Hardy, *Obama Administration Joins Facebook*, FEDERAL COMPUTER WEEK, May 4, 2009, <http://fcw.com/articles/2009/05/04/web-white-house-on-facebook.aspx>.

³⁵ See STRUM, *supra* note 20, at 201 (“Privacy has become an endangered species but . . . it is not yet extinct.”).

³⁶ Cf. Gloria C. Cox, *Privacy: The Lost Right*, LAW AND POLITICS BOOK REVIEW, May 4, 2009, <http://www.bsos.umd.edu/gvpt/lpbr/reviews/2009/05/privacy-lost-right.html> (“Occasionally, someone will take a person or business to court for violation of their information privacy, only to hear from the courts that people have no privacy interest whatsoever in their bank records, telephone numbers, Internet Addresses, or other information.”).

³⁷ See STRUM, *supra* note 20, at 198.

or assume pseudonyms to prevent future attacks, impoverishing online dialogue and depriving victims of the social and economic opportunities associated with a vibrant online presence. Attackers manipulate search engines to reproduce their lies and threats for employers and clients to see, creating digital “scarlet letters” that ruin reputations.³⁸

If we intend to engage in thoughtful discussion about privacy and its limits, we cannot ignore the truth of privacy and the means by which generational and technological truths come into play and influence objective social norms of privacy. This has significant implications for legal standards such as the privacy torts, statutory law, case law, and the “reasonable expectations of privacy” test stemming from the Fourth Amendment. This article is meant to bring to the forefront a largely under-addressed reality of privacy (or lack thereof): that it is a function of the construction of identity, by choice, brought about by technology, human desire, personal volition, and the choice to engage in “bilateral relational” privacy experiences.

V. CONCLUSION

¶41 The value of privacy presented here as a means of promoting the construction of self and one’s unique identity—based on the modern reality of bilateral relational experiences of privacy—has a variety of implications for the future of information privacy law and our understandings of where information privacy law and scholarship might be (or normatively should be) headed.³⁹ I briefly consider two such implications.

¶42 First, the values of information privacy law embodied in the four traditional privacy torts⁴⁰ (and essentially conceived in the late nineteenth century in a fundamentally different world) might be reconstrued. For example, the tort of intrusion into seclusion might be conceived of differently if our notion of “intrusion” moves away from the implicit notion of the right to be let alone. Intrusion implies unwanted, unilateral observance. As this paper implies, such an implication cannot be seriously considered in a vacuum in our modern world of shifting relations between the watcher and the watched; a relationship which is sometimes mutual, sometimes desired, and often much too complicated to be simplified as an argument that there has been unwanted observance from a known or unknown other party.

¶43 Naturally, this implies that the standard for “intrusions into seclusion” might be lowered to accommodate the fact of bilateral relational observance. It may also mean viewing privacy as a spectrum/gradation, depending upon exposure/consent given by the individual. But, correspondingly, on a case-specific basis, it might heighten the standard. If, for example, a lone misanthrope leads a Thoreau-like life in which it is clear that he

³⁸ Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 62 (2009).

³⁹ Although this paper does not discuss constitutional issues of privacy, it is necessary in almost any discussion of information privacy to ponder whether the Fourth Amendment concept of “reasonable expectation of privacy” is implicated by the rapid advancements in technology that have tended to befuddle federal courts in deciding information privacy cases. Cf. Frank R. Cooper, *Surveillance and Identity Performance: Some Thoughts Inspired by Martin Luther King*, 32 N.Y.U. REV. L. & SOC. CHANGE 517, 536 (2008) (applying Judith Butler’s theory of identity performance – the idea that “we create our identities by acting in ways that are designed to give others a certain impression” – to the Fourth Amendment.”).

⁴⁰ See Warren & Brandeis, *supra*, note 1.

has little or no patience or desire for bilateral relational observance, then “intrusion” will likely have a very different meaning for him than it might for, say, certain celebrities – Paris Hilton and Lindsay Lohan – who clearly enjoy and encourage these bilateral observances. In other words, the tort of intrusion into seclusion should incorporate an understanding of self-chosen means of eroding privacy as a means of constructing identity.

¶44

Second, the privacy mandates embodied in federal and state informational privacy law might be rethought and perhaps amended. The Children’s Online Privacy Protection Act (“COPPA”) is one example. The Federal Trade Commission (the federal agency charged with enforcing COPPA) describes it in the following way:

[COPPA] gives parents control over what information websites can collect from their kids. Any website for kids under 13, or any general site that collects personal information from kids it knows are under 13, is required to comply with COPPA. . . .

Thanks to COPPA, sites have to get a parent’s permission if they want to collect or share your kids’ personal information, with only a few exceptions. That goes for what information sites ask for up-front, and information your kids choose to post about themselves. Personal information includes your child’s full name, address, email address, or cell phone number.

Under COPPA, sites also have to post privacy policies that give details about what kind of information they collect from kids — and what they might do with it⁴¹

Implicit in COPPA is the desire to not only protect children from marketing or sexual predators, but also the desire to allow parents to determine the ambit of the world in which their children reside and what their children know. This desire clearly speaks to values such as self-development and the right to be alone, but it also smacks of a paternalistic notion that children’s *identities* should be allowed to be formed largely by their parents’ notion of what their children’s identities should ultimately become. For example, if a child is interested in playing the popular socially-interactive video game World of Warcraft, it is often likely that the child is interested in exploring a fantasy world where she or he can embody different personas, join different groups of friends, and determine whether she or he prefers, for example, an explicitly gendered identity such as male or female (or even an aggressive or passive persona), or an identity of ambiguous gender. COPPA restrains such constructions of self-identity by allowing parents to determine whether such constructions should be allowed.

¶45

Of course, one must be careful in assuming—particularly in the context of children—that personal social identity construction is always normatively desirable.⁴² Yet, ultimately, suggesting that individualistic, atomistic persons are harmed by intrusive privacy invasions without simultaneously engaging in an understanding of construction of the self by means of constructing identity via unilateral relational interactions or

⁴¹ FED. TRADE COMM’N, PROTECTING KIDS’ PRIVACY 1-2 (2009), available at <http://www.ftc.gov/bcp/edu/pubs/consumer/tech/tec08.pdf>.

⁴² Cf. Anita Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723 (1999).

bilateral relational interactions is flawed, and ultimately threatens to undermine the relevance of information privacy law.