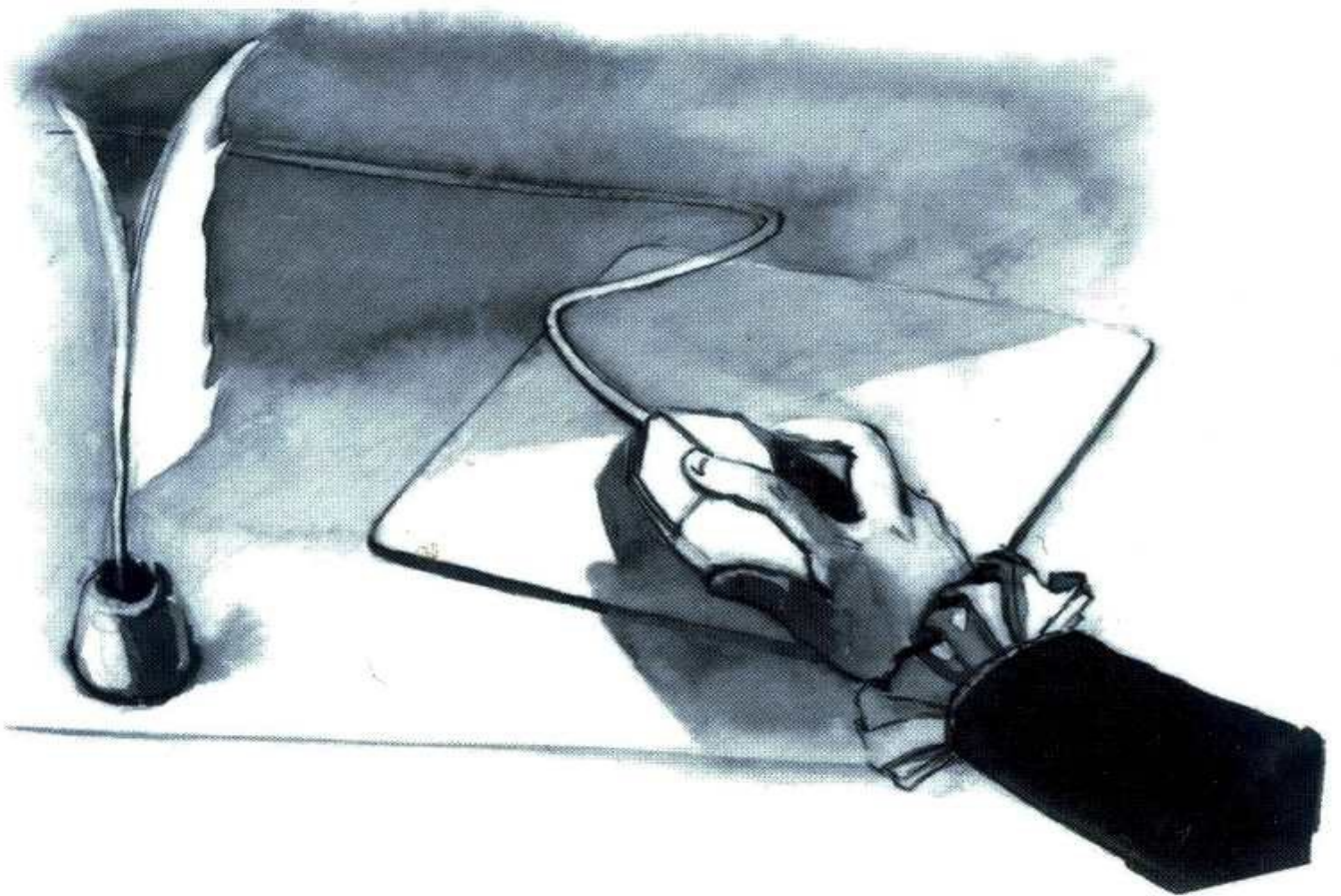


Ben Franklin's Web Site

Privacy and Curiosity
from Plymouth Rock
to the Internet



Robert Ellis Smith
Publisher, Privacy Journal

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Notes

To the Reader

I had to remind myself continually when writing this book that there were wars and great explorations going on at the time of the events and ideas I describe. This book of history is not about wars and explorations. It's about the lives and living conditions and values of average individuals, who in their own ways contributed to the tapestry of American history.

This is a book about “the silences in traditional history.” I am talking about those episodes that were not a part of traditional recorded history because they concerned not momentous public events but discrete occurrences in the lives of everyday persons – individuals who create the raw materials of history. While much of this book is about the actions and beliefs of public men and women, what really propelled the story of personal privacy in American life, of course, were the actions of average persons. Such as Abigail Roberson, Paolo Pavesich, Michael Hardwick, Edward Lawson, Stephen Roy, Estelle Griswold, Elizabeth Hill, and others who appear in this story.¹

With regard to the public personalities in the book, it has been interesting to me that the same ones appear and then reappear in the narrative – for good or for ill. They include Benjamin Franklin, James Madison, Jay Gould, Walt Whitman, William Randolph Hearst, Anthony Comstock, Joseph Pulitzer, Louis Brandeis, J. Edgar Hoover, Richard M. Nixon, and William H. Rehnquist.

In the course of writing and publishing a monthly newsletter since 1974 about the right to privacy, I have practiced the advice attributed to the twenty-ninth First Lady of America, Eleanor Roosevelt: “Go out and see for yourself. Make others see what you've seen.” This book is the product of that endeavor.

Since I have been publishing *Privacy Journal*, writing books on the subject, and advocating increased recognition of the right to privacy, I have been accumulating lots of files. In one of those folders marked “History of Privacy,” I kept items like the one about J. Edgar Hoover complaining about clandestine sex in the motor courts of the 1930s. Then, through the writings of David J. Seipp, I found an intriguing observation from the French humorist Paul Blouet late in the Nineteenth Century about the typical American, “Meeting you in a railway carriage, he will ask you point blank where you are going, what you are doing, and where you are from. By degrees, he grows bolder.” At that point I formed the idea for a book on the history of privacy.

But this story is about more than privacy. (Secretly, I have long felt that Americans are a little bit nervous about the subject – and probably reluctant to read a whole book about privacy.) Nearly all other books about privacy assume that this is a positive value shared by all Americans. I'm not sure that it is. Our feelings about personal privacy – our privacy and everyone else's – are ambivalent. To understand why, you have to look to all aspects of our culture. That is what this book does. It looks into the hidden niches of our history. I'll be pleased if when you read each page of this book you say to yourself, “I didn't realize that.”

And so, this book offers a different way of looking at parts of our nation's history, to see how they have shaped our ideas about privacy, how they have brought us to our current situation at the beginning of the millennium – a time when we all think that our personal sense of privacy has

disappeared.

My intent is to describe the events and ideas that brought us to where we are today. From that we can see that some of the debates of today have been waged before and that some of the earlier warning signs were ignored. Especially, I hope, we can see that the drift of technology is not inevitable. Instead, it is determined by corporate decisions, government actions, individuals' tastes and prejudices – some of them unwise and others of them hastily considered. The direction of technology is determined also by seemingly unrelated events occurring at the same time.

As I continued to travel the country in the course of writing this book, I kept asking myself (usually as I looked down on American cities and towns from an airplane window), “How is what I am writing about relevant to readers across this huge country?” This nation stretches across a full continent and beyond, with different ethnic and language groups that have heritages quite different from the Anglo-Saxon roots of our founders. Much of my story takes place in New England and the rest of the East Coast. It is about our Puritan roots. Is that relevant to Americans everywhere? The more I wrote, the more I understood that it is indeed relevant, because those Puritan roots affect every aspect of our nation, from Alaska to Florida and from Maine to Hawaii – our legal system, our communications with each other, our values, our governmental structure, and our relationships to large private and public organizations.

The historian David Hackett Fischer points out that every one of our elected Presidents but one has had direct blood lines from the four regional groups in England that first settled this country. (The only exception so far has been John F. Kennedy. Ironically he was the President in the Twentieth Century most identified with New England.) The government and the laws they administered and the values they tried to appeal to – all stemmed from our Puritan beginnings in the Seventeenth Century.

And so even though this saga, like so many other accounts of American history, seems to concern only a small corner of the nation, the elements of the story affect any one of us who calls himself or herself an American. “Whoever gets there first sets the tone for the culture,” according to one of my colleagues, Douglass Lea.

As I wrote, I kept nearby – buried under papers on my desk, to be sure, but nearby – a warning from a critic in the journal *Foreign Affairs*:

“Books that propound theories of history – that is, that claim to find common patterns in events widely separated in time and space – have had a deservedly dicey history among the professionals. When such books are good they can be very good: a classic like William McNeill’s *Plagues and Peoples* can permanently change the way you look at human affairs.”

My goal has been to avoid the pitfalls pointed out by the critic, who was reviewing a 1996 book by David Hackett Fischer, *The Great Wave: Price Revolutions and the Rhythm of History*. For me, Fischer’s *Albion’s Seed* is another example of a book that succeeds at this. Luckily it touches on issues of privacy in every chapter, and so I consulted it regularly. And its structure served as a model for me.

In looking at American history through the prism of personal privacy, I allow myself and the reader to take short digressions that shed light on the topic at hand. To me, each of the detours reflects on the larger story – America’s tug between privacy and curiosity. Occasionally they are simply interesting on their own. The fact that George Washington as President would pack his bags and travel to country inns and stay out of touch from his own staff for days and days may not tell us anything about the

theme of the book (although my wandering mind grasps the connection). The anecdote itself is interesting, however, and so I included it. I believe that it contributes to the final mosaic, in ways we don't even realize at first.

As they told me in the first-year of law school "Wait till you get to the end to see how it all fits together."

When you do get to the end, I hope that you will send me your ideas and reactions. I can be reached at *Privacy Journal*, P.O. Box 28577, Providence RI 02908 or at our World Wide Web site, www.privacyjournal.net.

For clarity, I have updated spellings and punctuation in early writings and quotations, but only occasionally. Where it was not necessary for clarity, I have not done so. I have not included in my account the legal development of searches and seizures under the Fourth Amendment to our Constitution, only because that has been written about elsewhere with great expertise. Besides, a purist might say that the history of searches and seizures belongs in a history of criminal justice more than in a history of personal privacy. All I can say is that the omission here is intentional.

This is the place in an author's preface when he or she acknowledges the legion of interns, research assistants, and grant-funded minions who hustled to make the book happen. I wish that I had such a list. To my continual regret, getting foundations to fund research, writing, and advocacy in this field has been impossible. Grants makers simply reflect the nervousness about the subject of "privacy" that I believe all Americans sense. I hope that this book persuades some of them that the field of privacy is coherent, defined, and desperate for attention. It is also filled with a cadre of extraordinarily committed and perceptive scholars and activists, most of whom are cited in the text or the footnotes. They are also a very congenial group. One of the reasons that this issue has sustained my interest over more than 25 years is that the experts in the field easily cross traditional disciplinary lines; there are scholars, lawyers, business executives, public-policy activists, politicians, computer enthusiasts, and technologists active in this field. I have relied on their work continually.

Shelley Roth, of the Roth Agency in Rehoboth, Massachusetts – within a short ride of where the events in the early part of this story took place – was passionate and persistent in her belief in this book. In that respect, as a literary agent, she has been a true partner in this endeavor. In my writing and research, I had special help from Dawud G. Alexis, Elisha S. Anderson, David A. Banisar, Bill Brown, Pam Brown, David B. Burnham, Ann Cavoukian, James X. Dempsey, David H. Flaherty, Stephen J. Fortunato, A. Michael Froomkin, Simson Garfinkel, Dana Hawkins, Ralph Keyes, Douglass Lea, Ronald B. Lewis, Douglas Parker, Stan Pottinger, Daniel Asa Rose, Marc Rotenberg, William Safire, James J. Sulanowski, Shauna Van Dongen, for fact checking and editing; Richard Ziehler – and most especially Kathryn Ritter-Smith. Each of them was ready to assist me in a second.

I have to offer acknowledgment to two tools of the 1990s: Microsoft's word processing and its Encarta multimedia encyclopedia, both of which make the writer's task a lot easier.

Join me now in an exploration from our beginnings as a nation to the new millennium, to discover why we as a people are so curious that we seem to have lost our privacy irrevocably. For me the odyssey has reaffirmed the words of the poet T.S. Eliot, which illuminated my involvement in this issue in the first place. They are a variation on Eleanor Roosevelt's advice:

"We shall not cease from exploration
And the end of all our exploring

Will be to arrive where we started
And know the place for the first time.”

Additional editing by Chisheng Li.

Introduction

Since this continent was settled from Europe, Americans have quested for personal privacy, first in our physical space and later in the use of our personal information.

At the same time, Americans have always been extremely curious. Virtually all visitors from abroad say that about us. We are too willing to intrude into the affairs of others and, by the same token, too willing to furnish strangers with personal information about ourselves. No other culture has more outlets for gathering information and disseminating it – “talk radio” and television news 24 hours a day, a gaggle of weekly magazines, ubiquitous tabloid newspapers and published memoirs with personal revelations by celebrities and non-celebrities, news and information within reach of virtually all Americans, in the car, at home, by computer modem, and even by earphones while alone in the woods. We seem to be enamored with the idea of privacy, but probably more enamored with the idea of learning more and more about our friends and neighbors – and about the celebrities among us.

By understanding this duality in the American character we can come to understand the current conflicts over protecting privacy. We Americans have institutionalized this duality in our Constitution, which protects the sanctity of each private residence at the same time that it requires each of us to report our whereabouts to the government at least once every ten years. The same Constitution that protects the right to remain silent gives unprecedented protection to authors and news reporters to find out about other people and write about them.

Just what is privacy? It is the desire by each of us for physical space where we can be free of interruption, intrusion, embarrassment, or accountability and the attempt to control the time and manner of disclosures of personal information about ourselves. In the first half of our history, Americans seemed to pursue the first, physical privacy; in the second half – after the Civil War – Americans seemed in pursuit of the second, “informational privacy.”

Each time when there was renewed interest in protecting privacy it was in reaction to new technology. First, in the years before 1890, came cameras, telephones, and high-speed publishing; second, around 1970, came the development of computers; and third, in the late 1990s, the coming of personal computers and the World Wide Web brought renewed interest in this subject. In each case, the rhetoric had similar sounds to it. What worried people was not so much the technology; what worried them was that it was in the hands of large and powerful organizations.

The coming of personal computers and the Internet has changed the equation in significant ways. In this new era, individuals and small organizations have gained cyberpower that seems comparable to what large organizations can effectively manage. A solitary individual can now publish a news periodical and reach as many readers as his or her content warrants. A solitary individual now possesses the technical wherewithal to intrude into another’s business, to keep information on other persons, and even to alter the content of information in the computer systems of large organizations. Individuals, like large organizations, can now snoop into the private activities of others and record them on audio or video tape. And many individuals have attempted to do just that. At the height of the

Watergate scandal, a columnist for *The Washington Post*, Nicholas von Hoffman, observed, “We still know more about our government than it knows about us.” But the balance is shifting.

In the end, the question of privacy throughout our history comes down to the relationship of the individual to large organizations and the method by which those large organizations foster and use new technology. The theme of the story ahead is privacy vs. curiosity, but the leitmotif is surely the impact of new technology on our individual rights and our autonomy.

Watchfulness

Living conditions, community values, and surveillance in the Colonies and the search for confidentiality in mailed correspondence

“We must all watch one another.”

That was the instruction from the Rev. Robert Browne for church members in the Colonial period of our nation’s history. Browne was an Anglican minister back in England whose views had great influence on the Puritans who settled in New England. In 1582, he set down on paper his guiding principles for the Congregational church. He laid out more than 125 Frequently Asked Questions, including, “How are we made Kings?” His answer was “We must all watch one another, and try out all wickedness. We must privately and openly rebuke the private and open offenders. We must also separate the willful and more grievous offenders, and withdraw ourselves from them.” Browne’s tenets became the basis for modern Congregationalism in America.²

Keeping an eye on one another was important to Puritans because good behavior in people’s private lives was regarded as a prerequisite for a functioning society. For practicing Puritans in early New England, subjecting their private lives – including one’s most intimate activities *and thoughts* – to public scrutiny was routinely expected. It was a tenet of their church, and the church was then the dominant force in regulating behavior.³

Browne’s own Church of England created courts to supervise the morality of the entire population. Puritans in New England didn’t go that far, because they regarded the ecclesiastical courts in England as ineffectual and corrupt. They knew in fact that the courts had aimed much of their zeal at infractions by Puritans themselves. There were no church-run courts in New England. Puritans imposed their discipline only upon volunteers who freely joined the church, not on the whole community, as the Church of England had done.

One Calvinist meeting house painted the all-seeing eye of God on the front of the pulpit from which the minister preached, lest any members of the congregation think for a moment that they were not accountable. In front of the pulpit, beneath the big eye, sat the lay leaders of the church on the “elder bench,” monitoring the parishioners during the church service.

The Puritan leader Thomas Hooker took it upon himself “to prevent all taint of sin in any Member of the Society, that either be never committed; or if committed, it may speedily be removed.” Hooker tried to impress upon church members that there was a duty to inform on others. This attitude was a part of the church notion of “the Relation,” in which a person seeking admission to the church would subject himself or herself to scrutiny by church members, to specific questioning about his or her personal life, and to the testimony of friends and neighbors. Nothing less than dealing “nakedly and sincerely” with one’s shortcomings would do, according to Hooker. He knew, however, that he could not impose this discipline on non-church members.

The clergy of the late 1600s tried their best to keep track of what was going on within members’

households. They banned most frivolity, including celebrations of Christmas. They required attendance at church on the Sabbath (although this usually was not onerous because going to church was a crucial social opportunity during the week, an opportunity to pick up a little gossip).

Further, “no one could settle in a New England town without permission of the inhabitants or their representatives,” reported David H. Flaherty, in his original study on *Privacy in Colonial New England*. Heads of households in New England had to register with the town the names of any overnight guests. Captains of ships docking in the ports were sometimes expected to provide passenger lists to town authorities.

There were laws in nearly all communities prohibiting living alone. For the good of families and the community as a whole, the church regarded living together in a family unit as the best possible arrangement. The rule applied to widows and young persons alike. There are records in Middlesex County, Massachusetts, of the court systematically searching residences in 1668 for single persons and placing them with families. This was a requirement that the settlers had become accustomed to in their villages back in England.

William Petty, an English political economist who took a special interest in the Pennsylvania Colony, decreed that “no youth of between 18 and 58 yeares old, nor woman of between 16 and 41 yeares old, bee unmarried.”⁴

It is also true that there were good practical reasons at that time *not* to live alone. It was a waste of resources in many ways, an unnecessary risk, and in an agriculture economy – virtually impossible. A person living alone would not be able to maintain even a small farm.

These teachings stuck with the early Americans – long after Puritanism lost its influence over the majority of the population. A French writer in the 1790s observed that an American woman was eager to be married – even though a woman had “unlimited freedom” when unmarried and as a wife she became “little more than a nursemaid.”⁵

The authorities were empowered to enter homes without warning to enforce laws against drunkenness even in private homes. Where order in the family had broken down, the constables were expected to restore it, even removing children or servants from the home.⁶ Increase Mather, the crusty pastor of the North Church in Boston and father of the equally crusty Cotton Mather, begged constables, “Especially see that you keep a vigilant eye over these private, dark alehouses.”⁷

Laws based on religious beliefs prohibited certain kinds of dress, but these restrictions had disappeared in England by then and were difficult to enforce in New England.

“Among the peculiarly English ideas which the Colonists brought to Massachusetts, which all the wear and tear of democracy have not been able to obliterate, was that of family. Family feeling, family pride, family hope and fear and desire, were, in my early day, strongly marked traits. ‘Of a very respectable family’ was a sentence so often repeated at the old fireside that its influence went in part to make up my character.”

Nineteenth-Century novelist Harriet Beecher Stowe.⁸

And then there was the custom of the “nightwatch.” Puritan authorities appointed ordinary citizens to

stroll neighborhoods “in case they meet with any persons walking in the streets unseasonably... to examine them, and in case they cannot give a good account of their occasions” to arrest them, according to the law in Connecticut. Neighboring Massachusetts had a similar law. Boston instructed its nightwatch to lurk and listen “in order to make discovery.”⁹ Still, Boston was more restrictive than other port cities; its authorities monitored personal behavior more than elsewhere in the colonies. By the early 1700s this onerous custom had been curtailed even in Boston, except for surveillance of persons of color and persons suspected of misbehavior.

Not only was the church the arbiter of proper behavior, it was also the keeper of vital records about the population. Colonists had been accustomed to codes in England that required the reporting of births, deaths, and marriages in the community, and they continued to report this data back to England. (In the previous century, Governor John White of Roanoke Colony created what is probably the first birth certificate in the New World. He sent a note back to England: “The 18 [of August, 1587] Elenor, daughter to the Governor, and wife to Ananias Dare one of the Assistants, was delivered of a daughter in Roanoak, and the same was Christened there the Sunday following, and because this child was the first Christian borne in Virginia, she was named Virginia.”¹⁰)

This task of data collection fell to the clergy. They, after all, conducted the baptisms, weddings, and burials and were in the best position to record vital statistics. The church also collected information about salvations, heresies, and near heresies. Before long, clergymen like the Rev. John Eliot of First Church in Roxbury, Massachusetts, were also recording the causes of death, accidents, family size, number of houses, and other information of a civic, not ecclesiastical nature. They even collected demographic information about Indians, as best they could. The New England church was as much a vital-records office as a place of salvation. Many of the early debates about separation of church and state – which were to become crucial in the 1700s – focused in the 1600s on the propriety of the church keeping these civic records.

Of all the settlements, the Massachusetts Bay Colony developed the most sophisticated information-collection system. It was apparently the first jurisdiction to require citizens themselves to report information. In 1639, the legislature of the colony, the General Court of Massachusetts, required, “That there bee records kept of all wills, administrations & inventories, as also of the dayes of every marriage, birth & death of every person within this jurisdiction.”¹¹ Later, the other colonies followed the practices in Massachusetts. To this day, the Commonwealth of Massachusetts is the only state to require an annual census by each town clerk, to list name, date of birth, occupation, nationality, and residence of each and every resident. By law, the police have access to the lists, and the names of all school-age children must be submitted to the school authorities.

The massive information collection by governmental agencies in the second half of the Twentieth Century had its roots in the importance the early New Englanders placed in having accurate data about illnesses, mortality, types of employment, and mobility within the colonies. Obviously they wanted the data in order to prevent or control epidemics. They wanted also to notify next-of-kin in England of settlers’ whereabouts. And they wanted to attract new settlers with data about opportunities in the New World. Massachusetts Bay authorities were protective of their data – just like Twenty-First-Century bureaucrats. They refused to disclose information on mortality rates, not so much to protect the identities of individuals, but out of fear that release of the information may have made the colony less attractive to prospective settlers back in England. And so began a 350-year tradition of government agencies trying to avoid sharing with the public the information they had

gathered.

Nor was data collection any easier then than it is now. Many residents were not Puritans and did not cooperate with the church-managed nose counts; others wanted to conceal births out of wedlock; still others lived in the wilderness and did not bother or refused to be registered. Some colonies were obligated to report back to England the number of Dissenters (those Protestants who did not conform to the Church of England), but as the numbers multiplied this became impossible. Dissenters, of course, would not consent to be married or buried by the established church in the colonies, and so the church was not able to keep counts as the years went on. In the next century, after the Revolutionary War, the difficulties of the clergy in keeping tabs on everybody in the community increased to such an extent that secular leaders were pleading with church leaders to compile accurate demographic statistics.¹²

As tensions increased between the Colonies and the Crown, collecting personal data became even more difficult. Colonial governors, who reported to the British government, complained that they had no authority and no funds to act as census takers. They said that there was widespread lack of cooperation. An officious emissary from England named Edward Randolph who sought to collect personal data in New England – and collect fees in the process – wrote home in 1686, “I am called Register, but no man comes and records their Deeds at my Office.”¹³

The new settlers had brought with them across the Atlantic another medieval custom for keeping order in their villages. “Tythingmen,” a term based on the Old English word for ten or tenth, were responsible for supervising the moral conduct of ten families. These men seemed to be outside the recognized law enforcement cadre but could haul an offender before a magistrate after a warning. They were on the lookout for “all single persons that live from under Family Government, stubborn and disorderly children and Servants, nightwalkers, [tipplers], Sabbath breakers, [and associated other reprobates, debauchers, atheists, or other rude or non-church going characters].” As an example, Hampshire County, Massachusetts, instructed its tythingmen “to have a vigilant eye upon all persons that shall without just and necessary Cause be unseasonably abroad in the Evenings from their parents or masters houses or families.”¹⁴

Written records of the time indicate that tythingmen could inspect private homes. The records also show that the tythingmen seemed not to exercise the vague and broad authority they had been given, instead confining themselves to a few arrests for drunkenness and absences from church services. Their diligence – such as it was – seemed to wane over the years, and many of those selected chose not to serve. “What shall we do?” Cotton Mather, the great protector of Puritan ethics, asked in 1704. Even he recognized that the enforcers must exercise discretion in singling out miscreants.

Indeed, there was one important privacy protection that happened to be built into the system. Tythingmen served on a rotating basis, rarely for more than one year. By the time one of the enforcers learned juicy details of the families he “supervised,” he was off the job in favor of someone without benefit of the background information.

Complementing the tythingmen’s work was a loose network of informers, who were often paid for tips about the misdeeds of their neighbors. Their job was to satisfy the church’s expectation that all members had an obligation to report sins of others to the authorities. Beyond that, so-called Select members of the church were ever vigilant for sins by others.

This aggregation of informers, tythingmen, nightwatches, and clergy members who regularly visited

homes and did not hesitate to keep tabs on drinking and socializing seems to add up to an environment of oppressive and constant surveillance for the early settlers from England. But that is only half the story.

As the years went on, the church and Puritan teachings had far less influence on peoples' lives than they did at the time North America was first settled from abroad. The Relation ritual in the church was voluntary on the part of citizens who wished to join the church. Far fewer than a majority of residents – perhaps only one-fifth – considered themselves among the “Elect” of church members bound by these principles. And by 1700 the practice had pretty much been phased out.¹⁵ By 1704 Cotton Mather was complaining that New England Christians were neglecting to watch over one another adequately.

A visiting English journalist noted this inclination of New Englanders to snoop on each other but he himself, with old country values and with no fear of retaliation, disparaged one member of the Select as “Mr. Busie-Body” and seemed to believe that the man deserved a whack for his nosiness. Here is the full account by the visiting journalist, Edward Ward:

“A good Cudgel apply’d in the Dark is an excellent Medicine for a Malignant Spirit. I know it once Experienced at Boston, with very good success, upon an Old rigged Precisian, one of their Select, who used to be more then ordinary vigilant in discovering every little Irregularity in the Neighborhood; I happened one Night to be pritty Merry with a Friend, opposite to the Zealot’s dwelling, who got out of his Bed in his Wast-coat and Drawers, to listen at our Window. My Friend having oft been serv’d so, had left unbolted his Cellar Trap-door, as a Pit-fall for Mr. Busie-Body, who stepping upon it, sunk down with an Outcry like a distressed Mariner in a sinking Pinnacle. My Friend having planted a Cudgel ready, run down Stairs, crying ‘Thieves,’ and belabour’d Old Troublesome very severally before he would know him. He crying out, ‘I am your Neighbor.’”¹⁶

With settlers having real concerns about protecting themselves from Native Americans, resisting oppressive measures from England, and facing the harsh reality of establishing communities in the New World, the sanctimonious enforcers of the church, in spite of their best efforts, simply couldn’t keep up with the task. What law enforcement officers there were in those times were pressured to stay out of the private affairs of residents. “Let every one meddle with his own Business” was a proverb of the time.¹⁷

In fact, church ministers had limits imposed on them by the need to stay in the good graces of their congregations. The great fire-and-brimstone preacher Jonathan Edwards, for instance, lost his pulpit by demanding more allegiance to church canons than his parishioners were willing to accept. Another clergyman was criticized for asking a dying woman intrusive questions in the presence of family and close friends.

Even in these times, the authorities recognized the principle from England that a person ought not be compelled to confess his own crimes, or as one legal treatise used by Colonial magistrates put it, no man should have his faults wrung out of him. From this principle, the framers of the Bill of Rights in the next century forged the Fifth Amendment protection against self-incrimination.¹⁸

“He that prieth into every cloud may be struck with a thunderbolt.”

Puritanism was not the totality of the New England experience. The harshness of the natural environment, the constant threats to personal safety from hostile Indians, the weather, wildlife, the estrangement from family and culture back in England, the day-to-day needs to survive and to make a living, and the fear of retaliation from abroad – all of these contributed to the culture of early New England as well. And many of these factors created a cultural recognition of privacy, even if officialdom seemed to do the opposite. The clergy who led the original migration to America came in search not of liberty for everyone but the freedom to preach their chosen doctrines as they wished. But the rank and file who accompanied them were people who took the ultimate risk of leaving home precisely because of a sense of oppression – a deprivation of freedom – in their homeland. By the time the first settlers from Europe had landed off the Mayflower, surely these people had a notion of leading their own lives free of church or governmental oppression. The rhetoric in their pronouncements shows that.

The First Charter of Massachusetts, for instance, spoke of the right to “enjoy all liberties and immunities of free and natural subjects.” The charters for the Colonial communities eventually recognized freedoms – some of them granted in England – of religion, of conscience, of assembly, and against unreasonable searches. Taken together, these are the precursors to an explicit right to autonomy.¹⁹

While it appears that the rigidities of Colonial life dictated a life of little personal privacy at all, there were other factors at work that simultaneously created some elements of privacy. One of the founders of Connecticut, the Puritan cleric the Rev. John Davenport, Sr., even used the term “privacy” in a letter in the 1630s.²⁰ He wrote of “my naturall desire of privacy and retiredness.” Here, in a theme to be repeated continually by the leaders in America for the next 100 years, was a community leader stressing the need for solitude, reserve, and privacy as a respite from his day of engagement in public affairs.

William Penn, the Quaker who founded the Pennsylvania Colony, made a similar observation, in a collection of aphorisms called *Fruits of Solitude* that was a best seller in the Colonies. This was not a tome on the subject of solitude but instead *the product* of solitude. In it Penn wrote, “The country life is to be preferred, for there we see the works of God; but in cities, little else but the works of men; and the one makes a better subject for our contemplation than the other... a sweet and natural retreat from noise and talk, and allows opportunity for reflection.”²¹

A Virginia farmer and prolific writer, William Byrd, wrote to a friend in England in 1726, bragging about life in America – a new world of “innocence and retirement.”

“We sit securely under our vines, and our fig trees without any danger to our property.... We have no such trades carried on amongst us, as that of housebreakers, highwaymen, or beggars. We can rest securely in our beds with all our doors and windows open, and yet find everything exactly in place the next morning.”²²

If there is one thing that colonists had in abundance, it was space outdoors – elbow room. (In fact, a document from 1679-80 used the term “elbow room.”)²³ Finding physical privacy outdoors – in the form of solitude or serenity – was not difficult. But, in a strange new land, there were countervailing

considerations. Most communities were laid out with the homes located close to each other. “The reason was that they might keep together, both for more safety and defence, and the better improvement of the general employments,” wrote Nathaniel Morton, one of the prominent colonists in Plymouth, in 1669.²⁴

For five years during the 1630s, the Massachusetts Colony actually forbade construction of homes beyond half a mile from the meeting house, the center of town. This was exactly the layout of the villages in England that the settlers had left.²⁵ The fact that the Massachusetts ordinance was repealed in 1640 showed that there was a growing desire to sprawl. Land, after all, was a cheap commodity.

David Flaherty pointed out, “After the first generations of settlement in New England, the gradual weakening of Puritan influence over the community, familiarity with life in the New World, and the disappearance of the Indian threat to most towns encouraged flexibility in town planning and the location of homes.” Here is the genesis of the American belief that we need to surround ourselves with grass and greenery for a sense of privacy. Some might say that the main tangible legacy of the early New Englanders was fences – stone walls or, as New Englanders called them, “stone fences.” They used the stone walls for a sense of possessiveness – of their livestock and of their land. The walls also provided nothing more than a place to put all of the stones cleared from the New England soil when preparing it for cultivation.

To be alone for contemplation or to engage in sexual relations, residents needed only to walk outside and into the woods. In fact, harvest time, in the eyes of many young people, became known as an opportunity for finding a safe haven for sex in the fields. Cotton Mather called the autumn a time of rudeness and lewdness. In early America, the woods became a refuge for privacy and for sex. In Twentieth-Century America, the automobile and then the motel would become that refuge. This is the search for what a contemporary novelist calls “public privacies.”²⁶

Still, in Colonial America, the opportunity for serenity in the woods was in many ways no more than an illusion (as it may be in Twentieth-Century America). The wilderness –with good reason – was perceived as a place of unexpected dangers and hostility. William Bradford, governor of the Massachusetts Colony, took a look at his environment and pronounced it “a hideous and desolate wilderness, full of wild beasts and wild men.”

“The seeds of the attitude that many British nature lovers still sense in ordinary American life can be seen planted in [Bradford’s] story of the Pilgrims Fathers’ grim early years in Massachusetts. I can best describe it as a resentful hostility towards the overwhelming power of the wild land; for Bradford, natural America seems a far worse enemy than the Indians or the machinations and failings of his neighboring colonists. Of course it would be ridiculous to speak of hostility to natural America in the modern United States, but there lingers a kind of generalized suspicion about it, or else a cold indifference, as if it may have been officially forgiven the sweat and tears it exacted from the settlers and pioneers, but can’t expect to be trusted, let alone loved, for a long time yet.”

**British novelist John Fowles.
In Wormholes, 1998.**

If there was limited opportunity for solitude outdoors, there was certainly no opportunity at all within the four walls of the typical colonial residence. The New Englanders regressed, in part, to the ways of a culture two or three generations earlier in England – a time when, in the words of French scholar Georges Duby, “in feudal residences there was no room for individual solitude, except perhaps in the moment of death.”²⁷ It was improper for a man of quality to be alone, except for prayer. “Until the end of the Seventeenth Century, nobody was ever alone,” wrote Philippe Aries in *Centuries of Childhood: A Social History of Family Life*. “The density of social life made isolation virtually impossible.”

Homes in early America were cramped indeed. Up and down the East Coast a whole family might live in an underground cellar covered with green sod for three or four years or more until the family could afford a frame house above the foundation. Even many wealthy people lived this way.²⁸

With all the wealth in Boston, there were not 20 homes with more than ten rooms, according to a census at the time.²⁹ This, in a community that was the largest in North America at the time, with 6000 inhabitants. There were no ceilings over the rooms, so that sounds could easily be heard from room to room and anybody willing to climb to the roof beams could peer into another room. Many homes, of course, had no room partitions at all. Sometimes a curtain or other flimsy barrier separated man and wife in bed from the children, or from adult family members, or even visitors.

This was the home environment into which Benjamin Franklin was born in 1706. The youngest of 17 children, he lived in a narrow row house. (Families the size of young Ben’s were not totally unknown; the average number of children in colonial families in Seventeenth– and early Eighteenth-Century Massachusetts was an astounding seven or eight.)³⁰

“People did not like to sleep alone in early America,” reported Flaherty. Even strangers who were offered lodging for the night would share a bed with the host, whether of the same sex or not. This was done out of necessity. Early homes did not have enough rooms or even beds to offer the kind of hospitality Twenty-first-Century Americans would expect. It was also done for warmth.

Consider a clergyman in that period casually referring to another clergyman whom he had visited overnight as “my Bedfellow.” Or the Rev. John Cotton of Plymouth writing to his cousin, Cotton Mather, “to thanke you for your late courteous entertainment in your bed.” Or the English gentleman who noted in his diary, while in Virginia, “I called up my man, who lay in my room with me.” Masters and servants often shared the same room.³¹

In the court files of Suffolk County, Massachusetts, was this account: “I Ann James of Boston Testify and declare that living with my brother Phinehas James... I frequently used to lodge in the Same Roome where the said Mrs McCarthy lay and two nights William Stone of Boston lay with Mrs McCarthy in one Bead and I lay with her two Sisters Abigail and Elizabeth Floyd in another bed in the Same Roome.”³²

It is easy to appreciate how common bed-sharing was in those times from the complaint of a visitor to North America, who found the custom hard to accept. Francisco de Miranda complained in the 1780s about his landlord “because notwithstanding a formal stipulation he had put another guest in my room; thank God he was not put in my bed, according to the custom of the country.” Another traveler from England, Sarah Kimball Knight, traveling on horseback in 1704, stopped for the night at an inn between New York and Boston. She was shocked to awake and find two men unknown to her sharing

the bed next to her.³³ These were visiting foreigners, of course; the new Americans themselves would have hardly noticed.

The visitors should not have been totally shocked. These arrangements were known also in parts of Europe, especially in peasant homes.³⁴ David Hackett Fischer, author of *Albion's Seed*, the analysis of British folkways in America, argues persuasively that to understand the customs of the early Americans you have to look precisely to the regions of Britain and of other countries in Europe where they formerly lived; there was no one European custom nor even one British custom. In *the regions* from which the New Englanders originated, Fischer shows in his 1989 book, these swarming living conditions within residences were common at the time, although they were not common throughout all of Britain.

Flaherty uncovered the testimony of a young woman saying that an unmarried couple apparently did not have sexual intercourse, as accused, on a certain occasion. She knew, because she shared the bed, which was “very Narrow on which the three were and thinks it almost if not wholly impossible that they should be guilty of that Crime without her knowledge and She observed no such thing.”

Only with the coming of taverns and coffeehouses and inns did this custom of bed-sharing fade, but not entirely. There is plenty of evidence that families shared rooms and beds for sleeping – as did strangers – well into the last decades of the Nineteenth Century.

Although it was not uncommon for visitors to enter another's home without knocking, the average colonist regarded the home as a special preserve, deserving special protection, even if only conceptually. (The idea of the sanctity of the home can actually be traced to Biblical times.) The maxim that “a man's house is his castle” was brought over from England; the English took it from Roman law. The great Roman orator Cicero said, “What is more inviolable, what better defended by religion than the house of a citizen.... This place of refuge is so sacred to all men, that to be dragged from thence is unlawful.”³⁵ Boston lawyer James Otis called this a “right of House,” in his famous argument to a British court in Boston in 1761 against the Crown's writs of assistance, which permitted unfettered searches of premises. Otis' eloquent but unsuccessful defense of the sanctity of each modest dwelling place was so vital to John Adams that he later wrote, “Then and there the child Independence was born.”

It's important to remember that this solemn protection did not extend to the dwellings of persons of color.

Eavesdropping – listening to others under the eaves of a house – was occasionally punished, and Peeping Toms faced ostracism. The great commentator on American and English law, Sir William Blackstone, in his commentaries of 1783, defined such offenders as: “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....” He called them “a common nuisance,” and for many years they were deterred by the legal principle of nuisance, not by grand constitutional principles.

Early on, the Colonial community of New Haven enacted a statute permitting the authorities “to search or cause to be searched any man's house, study, closet, or any other place for bookes, letters, wrightings, or any thing else” but only “upon probable grounds” that a crime had been committed, and only in the case of major crimes.³⁶ The reason for this balancing of privacy and crime control was “that wee may live a quiet and peaceable life, in all [godliness] and honesty.”

Prior to entering someone's house for purposes of regulating consumption of alcohol, the tythingmen, constables, and others customarily secured a warrant from a court even though they were not required to under the laws then in effect.

By the 1730s, Benjamin Franklin was concerned about the free hand given to constables. Much later in his life, he wrote in his *Autobiography*,

“The city watch was one of the first things that I conceiv'd to want regulation. It was managed by the constables of the respective wards in turn; the constable warned a number of housekeepers to attend him for the night. Those who chose never to attend paid him six shillings a year to be excus'd, which was suppos'd to be for hiring substitutes, but was, in reality, much more than was necessary for that purpose, and made the constableness a place of profit; and the constable, for a little drink, often got such ragamuffins about him as a watch, that respectable housekeepers did not choose to mix with. Walking the rounds, too, was often neglected, and most of the nights spent in tippling....

“On the whole, I proposed as a more effectual watch, the hiring of proper men to serve constantly in that business; and as a more equitable way of supporting the charge, the levying a tax that should be proportional to the property.”

The six shillings paid by the neighbors to escape constable duty, incidentally, is equivalent to \$800 in the 1990s. Within a few years, people had adjusted to the more formalized establishment of law enforcement and instituted Franklin's ideas.

The importance of protecting the home against law enforcement intrusions is clear from an editorial comment in Philadelphia 50 years later. The writer was arguing, in the debates over the new Constitution, the need for juries of public members to hear criminal cases, not a government-run court that might go easy on a wayward constable. In his argument, the editor was trying to suggest his idea of one of the most outrageous offenses imaginable. “Suppose,” he asked “that a constable, having a warrant to search for stolen goods, pulled down the clothes of a bed in which there was a woman, and searched under her shift – suppose, I say, that they commit similar, or greater indignities, in such cases a trial by jury would be our safest resource.”³⁷

Abuses occurred enough to inspire citizen complaints. As the framers of the constitution sat down to meet in Philadelphia in the 1780s, a pamphlet circulating in Boston proclaimed:

“Thus our Houses, and even our Bed-Chambers, are exposed to be ransacked, our Boxes, Trunks and chests broke open, ravaged and plundered, by Wretches, whom no prudent Man would venture to employ even as menial Servants; whenever they are pleased to say they *suspect* there are in the House, Wares, etc., for which the Duties have not been paid. Flagrant instances of the wanton exercise of this Power have frequently happened in this and other seaport Towns. By this we are cut off from that domestic security which renders the Lives of the most unhappy in some measure agreeable. These Officers may under color of Law and the cloak of a general warrant, break through the sacred rights of the domicil, ransack Men's houses, destroy their Securities, carry off their Property, and with little Danger to themselves commit the most horrid Murders.”³⁸

While there were recorded cases of snooping into residences, there were only a few prosecutions for intercepting or reading private correspondence. This is remarkable, in view of the haphazard non-system for transporting letters among the colonies. Scattered attempts to develop organized mail systems in New England seemed to flounder each time one got underway. And so the settlers entrusted

acquaintances, ship captains, or strangers to deliver messages and packages. Usually this was reliable, at least in getting the letters delivered. It did not guarantee confidentiality. Often mail would be left at a tavern or meeting house for the next person traveling in a particular direction to gather up and take to the destination. At least the service was free. But it was not unusual for the person delivering the correspondence to read the letter – even a sealed letter – and even to add his own postscript.³⁹

Receiving mail was crucial for the settlers, living in remote rural communities and anxious to know about possible new restrictions coming from England. Life in America was pretty uniform, noted William Byrd of Virginia in his diary in 1736, until the ships come in. “Then we tear open the letters they bring us from our friends, as eagerly as a greedy heir tears open a rich father’s will.” Early records show evidence that, in at least one court, all proceedings ceased while the participants had a chance to read the newly arrived letters.

In the early years hand-delivered letters were generally not vehicles of personal correspondence. It was mostly the merchants of early America who exchanged letters, and so their correspondence concerned business affairs, not so much personal tidbits. This is true of their diaries as well. Their writings were in many ways more like modern newsletters than personal letters, in that incoming letters were usually circulated around town by the recipients so that more traders could have access to the information.

The non-system for delivering letters is similar to the early years of electronic correspondence 300 years later, in the 1990s. In the Internet age, there is only a slight assurance that your message will be delivered, in confidence, only to its intended recipient and remain forever secret. Yet historians in the future will probably write that complaints were few and Americans – and persons in all cultures – seemed to adapt to the hit-or-miss aspects of the Internet. (Historians may also write that correspondents in the late Twentieth Century used the Internet for sending and receiving business-related matters and frivolous notes, but not intimate revelations.)

For letter writers in the Colonial period, the consequences were serious if their writings were disclosed, especially if the messages appeared to defy the Crown or to be otherwise suspicious. Consequently, persons in official positions, even though they were not reluctant to intrude into homes and into innocent evening activities, were uneasy about ordering mail opened.

To be safe, letter writers developed means for preserving the confidentiality of their correspondence. They used sealing wax and wrapping paper. They used pseudonyms or “pen names.” They developed codes for disguising their words. For instance, someone in Ireland described his precautions to John Winthrop, Jr., in Massachusetts in 1635. His comment implies that the two had previously worked out an elementary code for preserving confidentiality:

“Herewith I send you a casement through which I thinke you may much more securely impart your minde... I had written in the way wee agreed on, butt I fownd itt, in my judgment, more tedious, and less secrett.”

A man seeking medical advice from Winthrop asked him to be mindful of the sensitivity of his wife’s condition when Winthrop wrote back.⁴⁰ The man added, “Modo hoc obsecro, ut si aliquid secreti scribus latine scriberes.” Translation: “I beseech you to write in Latin anything of a private nature.”

For the colonists, using codes to encrypt their messages was a crucial element of exercising free speech. In fact, language itself was a form of encryption. Simply using the written word, whether in

English or any other language, prevented most of the rest of the populace from understanding the content. A large number of male residents and probably nearly all women could not read or write English at the time, and so they could not understand the contents of letters even if they intercepted them. (Illiteracy meant, of course, that most early Americans had to sacrifice their own privacy by having a scribe write their letters and a reader read incoming correspondence aloud).

The importance of encryption as a means of communicating sensitive thoughts was invoked in the late Twentieth-Century debate over whether the government could regulate the use of encryption and regulate its availability to users of electronic mail. Modern-day government prosecutors argued that encryption software is merely a product to be regulated, and they set out to do so. Privacy and free-speech activists countered that since colonial days the ability to encode one's personal correspondence is *a form of language*, a form of expression, to be fully protected by the First Amendment.⁴¹

In his book, Flaherty wrote, "In 1622 an English correspondent of Governor William Bradford of Plymouth Colony sent his missive sewn into the sole of a new pair of shoes 'for fear of intercepting.' The fear was well founded, for one of Bradford's enemies discovered the letter while on board ship."

Just two years later, Bradford apparently turned the tables. Suspecting that two settlers were plotting to overthrow him, Governor Bradford is said to have intercepted two incriminating letters that they had intended for friends back in England. At a public assembly the two denied plotting an overthrow. As evidence, Bradford produced their personal letters and caused them to confess publicly. The defendants then expressed outrage that their letters had been intercepted. "You think this is evil?" responded the governor. The men "would not say a word," according to Bradford's own account.⁴²

Authorities were motivated to develop a formal postal system in the next century. It is clear from the wording of a statute in 1699 that one reason for this was concern about the lack of security.

Obviously, it was crucial for Colonial settlers to keep in touch with family and associates back in England and, later, with those up and down the East Coast. It was a matter of life and death to know what was going on, here and abroad. Here's one account of how information traveled in the early years, jotted down by a day laborer named Abner Sanger who lived in New Hampshire:

"A man might come home from Northfield, Massachusetts, with news of the depredations of the Hessian troops, another might come from Connecticut with reports of French aid to Congress, while a third local traveler might return from Boston with a still wider range of reports.

"One day [a citizen] might go up the main street in Keene, New Hampshire, and hear only of local doings, or he might, as on November 26, 1779, learn of the Comte d'Estaing's defeat at Savannah. At work the talk would be about a neighbor's livestock or, as in November 1777, when [the man] was working for the tanner, news would be passed of Washington's and Howe's armies at Philadelphia.

News came at random. Thus, near the end of August 1782, he happened to meet a man on the bridge over Keene River 'that tells me there is talk of peace.' Later that day, while he was 'dragging old flood-wood out of the saw mill creek,' he inquired of a passerby, a 'Londonderry man,' who told him 'there [is] much talk of peace with Britain.'

"Similarly in October, while he was digging potatoes, '[a neighbor] come along and tells me that their talk was that Governor Hancock of Boston was dead.'

“In the first two cases the information was accurate, and in the third it was mistaken.”⁴³

Haphazard as it was, the primitive mail “system” was probably much more reliable for conducting business and for staying abreast of revolutionary fervor than was word of mouth. Still, word of mouth was the primary means of information dissemination for decades to come.

The fact that correspondence could remain fairly private in informal delivery arrangements may have been a testament to the fact that it was not very fascinating. Most of the letters concerned dry commercial and trade data, not personal secrets.

The respect for confidentiality also indicates the deference that the early settlers showed towards the private realm of their neighbors, irrespective of the religious teachings their leaders brought from the Old World.

Already one of the ambiguities of American life was beginning to be established: an intuitive yet informal recognition of others’ rights to privacy amidst a governmental and religious structure – and later a commercial sector – that sought to intrude into that private realm.

LINKS

To see how these Colonial values shaped our Constitutional principles, continue to the next chapter, on [Serenity](#).

To see how the new nation developed a confidential mail system, go to the chapter on [Mistrust](#).

To see how Colonial values of sexuality shaped Twenty-First-Century values, go to the chapter on [Sex](#).