

Statement by  
Lawrence Lessig, Professor of Law  
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Throughout the history of the Soviet Empire, the Russian people were bugged. Originally, they were bugged by other Russians — spies and neighbors who would monitor the comings and goings of the suspicious. But later they were bugged by bugs — technologies that made it possible for the state to listen to conversations through walls, or listen to conversations on the phone. This bugging behavior was common; very few places were safe; the private became that space where the monitoring technologies could not reach.

The Russian people learned to live with this invasion. They learned to put up with the insecurities that technology brought. If they had something private to say, they would go for a walk in the public park; if they didn't want a call traced, they would make it from a phone in the subway. They learned to live with this intrusion, by adjusting their life to it. They found privacy in public places, since private places had been invaded by technology.

And who could blame them. They lived in a totalitarian regime; the state was unchallengeable. Their Congress was a tool of the party, and the party was no servant of freedom. The people put up with this Sovietized life because there was little else they could do. Technologies of monitoring and surveillance took privacy away, because the Soviet people had no way to resist such technology.

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The last twenty years have seen an explosion in technologies for invading peoples' privacy. Parabolic microphones that permit listening from a football field away; telephoto lenses that take pictures at a distance even greater; security cameras that watch as we move around a city; toll booths that remember when we leave or return. Even the internet, born with the promise of liberation from this kind of control, is now being designed to produce monitorable and searchable data about the most intimate communications and interaction between people at a distance. Email, for example, that records your thoughts at one moment becomes a permanently searchable record, for employers or universities to scan at any time in the future.

What is striking about these changes, however, is not really the change. What is striking is our response. For rather than resist, we, like the Russians, have increasingly come to accept them. We

have, like they did, learned to live *differently* in response to these different invasions. We are told that our email can be collected and searched, by our company, or university, and so op-eds advise us not to put private matters into email. Our credit card records become sources for direct mail marketers, and rather than object, we simply buy more with cash. We have responded to this increasing invasion just as the Soviets responded to their increasing invasions. Bovine, we have accepted the reductions in private space; passive, we have adjusted our life to these new intrusions; accepting, we have been told to learn to live in this newly digitized, and monitored, and searchable, age.

I find this all quite bizarre. For while this increasing Sovietization of our personal and private life occurs, we live in no Soviet state. While passivity dominates, there is no reason we couldn't do things differently. We accept these invasions, and these restrictions, on our freedom, though there is no Soviet army to enforce them upon us. We accept them — these reductions in the space of our privacy — even though we are the architects of the technologies that effect to this reduction in privacy, and the shrinkage of our private space.

And worse than accept them, sometimes we are told that we have no choice but to accept them. Technologies of monitoring and searching erode our privacy, and yet, some will argue, the constitution restrict Congress's power to respond. Technology makes it possible from half a mile away to peer into one's home, and watch what goes on there, or allows an eavesdropper to listen to the conversations in a bedroom; but we are told that the free speech clause of the first amendment bars Congress from doing anything in response.

Our constitution is no Politbureau. The free speech clause does not render us hostage to the invasions of new technologies. It does not disable you, as representatives of the people, from responding to these changes, through laws that aim to recreate the privacy that technology has removed. Indeed, other values — themselves as essential to our democracy as free speech — should push you to take steps to protect the privacy, and dignity, that changing technology may take away.

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The question we are addressing today is how best to protect citizens from the intrusions of the "paparazzi." There are any

number of means that have been discussed; I'd like to focus on one that seems to me the most innovative.

For most of our history, most of us had a space into which others were not to pry. For most of our history, this space was protected by the law of property — by trespass laws that made it difficult, or impossible for those who would invade this private space to get in. But emerging technologies of monitoring — telephoto lenses, and parabolic microphones, to name just two — are now eroding this protection of privacy. They are removing the protections that the law of trespass originally gave. They thus render all of us vulnerable to the snooping eyes of others, whether the paparazzi press, or commercial investigators.

The question then is, how best to respond to this erosion of private spaces? One idea—and the one that I intend to discuss here—has been to define a space of privacy by reference to the technologies that the common law presumed. In layman's terms, if you could not have seen it, or recorded it, in 1868 without trespassing on someone else's land, then you can't do it today using modern technologies of surveillance. In one draft, the proposal is outlined like this:

It shall be unlawful to capture a visual image, sound recording, or other physical impression for commercial purposes of a personal or familial activity through the use of visual or auditory enhancement devices even if no physical trespass has occurred, if such image, sound recording, or other physical impression could not have been captured without a trespass if not produced by the use of an enhancement device.

The technique here is important, and it responds in an important and creative way. Rather than passively accepting the erosion in legal protections that new technologies have brought, this idea modifies legal protections, by expanding the protection of trespass law to take account of changing technologies. The notion is to *translate* the protections of a less technologically advanced age, into a world where technology has advanced. It is to recreate a space of privacy that changing technology would otherwise take away. It would preserve traditional values against a changing technologies, by changing the law to protect values that these changing technologies place at risk.

The technique of this approach—this idea of *translation*—is an instance of an important tradition in American constitutional

law. This idea of translation—of finding a way to preserve original values in a fundamentally different context—has been embraced by jurists both on the left and the right. It is a tool of constitutional fidelity—an assurance that the context of our constitutional practice won't change its original meaning. And it is a method that we see echoed in some of the most important opinions of the United States Supreme Court.

But though I believe this practice of translation is appropriate for a court, it is far more appropriate for a legislature. The Supreme Court at times has been forced to update our constitution in light of changes in technology; it has been forced to update to protect values of privacy that it rightly find in our constitutional past. But it has been forced only because the legislature has not acted first.

Our constitutional regime place primary responsibility for keeping our constitution "in tune with the times" in your hands. In the hands of a Congress, that is, that can better account for the political and social costs of individual privacy than a court. To oppose activism in the Supreme Court is not to oppose the values that the Supreme Court protects. It is only to oppose that protection coming from the Supreme Court.

You are the first line of defense against the invasions of private space; you are the constitutionally designated actor in this contest to protect our privacy. And you should do so in a significant and principled way. This proposal does that. It doesn't take the invasions of technology as given; it doesn't simply accept the reduced scope of individual security that technology may yield. It instead responds to this technology, by reaffirming traditional values. It says, we will not cede control of our privacy to engineers designing our technologies. The values of privacy are constitutional. It is your role to protect them.