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**Fractured Freedoms:  
The United States' Postmodern Approach to Protecting Privacy.**

Adam G. Todd\*

In literary scholarship, there are references to “the postmodern novel” and also references to a particular poem or writing being labeled “postmodern.”<sup>1</sup> Such a designation in literature is rather commonplace but in law there appears to be no such use of the term “postmodern”. Despite the growth in the “law and literature” movement, which examines the law as literature,<sup>2</sup> laws are never described as being “postmodern.”<sup>3</sup> There are, however, laws that do fit the characteristics of postmodernism and can aptly be labeled “postmodern”. Privacy law in the United States, much like a piece of postmodern literature, fits this label.

There are some individual pieces of legislation relating to privacy that, like a piece of literature, can be labeled “postmodern; for example, the Financial Services Modernization Act<sup>4</sup> or the United States-EU Safe Harbor Agreement<sup>5</sup> fit this label due to their postmodern traits. For this paper, however, rather than examining one specific law, the sweeping area of the law referred to in the United States as “privacy law” is examined. These laws cover a broad range of

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<sup>1</sup> “Special Issue: Terrorism and the Postmodern Novel,” *Studies in the Novel* 36:3 (Fall 2004). <http://www.engl.unt.edu/sitn/currentissue3.htm> (accessed October 31, 2004).

<sup>2</sup> Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York: New York University Press, 1995): 149-166.

<sup>3</sup> There are some Supreme Court decisions that have been described as “postmodern” and also postmodern interpretative tools applied by scholars. See Stephen M. Feldman, “Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (With an Emphasis on the Teague Rule against New Rules in Habeas Corpus Cases),” 88 *Northwestern University Law Review* (1996): 166.

<sup>4</sup> Gramm-Leach-Bliley Financial Services Modernization Act, 15 U.S.C. §§ 6801-6809 (2000).

<sup>5</sup> Issuance of Safe Harbor Principles and Transmission to European Commission, 65 Fed. Reg. 45, 666 (July 24,

issues ranging from video surveillance and wiretapping to abortion, gay marriage and Internet security. This broad range of laws, like the more specific laws, demonstrate as a whole, the characteristics of “postmodernism” and provide greater insight into the strengths and problems of the United States’ approach to privacy protection.

Privacy law in the United States can be characterized as postmodern because it is fractured or broken as a legal regime. But, paradoxically, there are strong arguments that its fractured structure and other postmodern characteristics make it the appropriate form of law or legal regime to regulate privacy in the post-industrial age. Its postmodern characteristics make it suited to the rapidly changing technologies that affect privacy protection.

This paper tackles two subjects, two terms, that are very difficult to, and some would say practically defy, definition: “privacy” and “postmodernism”. The term “privacy”, in American law, is extremely unclear to the point of being amorphous. The term “postmodernism” is even worse; it, arguably, cannot be defined. The term “postmodernism” is used here as a label, specifically to identify products that maintain the attributes of postmodern philosophy; in other words, products that reflect the rejection of modernism. United States privacy law can be characterized as rejecting a modernist label (or not modern) because it is not strictly rational, orderly, or capable of a single definition or explanation. It maintains postmodern traits such as being fragmented, paradoxical, intertwined with high technology and mass consumerism.

Using postmodernism in legal scholarship often raises criticism. Many argue that postmodernism’s state of flux and uncertainty is antithetical to the normative needs of the law.<sup>6</sup> The very idea behind a modern, written law is to create certainty and clarity in our relations with

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2000).

<sup>6</sup> Minda, 208.

others and the State.<sup>7</sup> Labeling a law as “postmodern”, however, is useful for linking the discourse between postmodern theory, our post-industrial, high-tech age, and the modern, normative needs of the law and lawyers and judges.

The label of “postmodernism” can be a liberating construction—one that allows for a bridge between the rigidity and normalization of modernism and the fluidity and flux of postmodernism. Postmodernism grants a license for flexibility and multiplicity in a discipline that is often rigid and inflexible. It removes the necessity of privileging one position over another and can allow multiple positions and interpretations to exist simultaneously. Identifying and labeling this process in the law returns a certain form of normalization and “certainty” (at least certainty about uncertainty) into the law. Postmodernism allows jurists to label and examine this broad and chaotic area of the law and expose its strengths and weaknesses.

I focus on six broad characteristics that can be used to label a particular law or at least privacy law as “postmodern.” These broad characterizations incorporate most if not all of the characteristics and themes of postmodernism identified by scholars but simply under broader categorizations<sup>8</sup> A law can be considered postmodern if it: (1) lacks a clear definition, challenges or lacks certainties, edifices and boundaries and, rejects master or meta-narratives; (2) contains paradox and irony; (3) emphasizes the social construction of the self as opposed to the autonomous self; (4) is politically ambivalent (has radical implications, but it is also conservative); (5) is intertwined with high technology such as the internet and consumer culture; and (6) is grounded in consumerism and daily life.

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<sup>7</sup> Anthony Walsh and Craig Hemmens, *From Law to Order: The Theory and Practice of Law and Justice* (New York: American Correctional Association, 2000).

<sup>8</sup> Stephen M. Feldman, *American Legal Thought from Premodernism to Postmodernism* (New York: Oxford Univ. Press, 2000): 162-184.

The first characteristic of American privacy law that makes it “postmodern” is that it lacks a clear definition, certainty and boundaries, and is without clear foundation. The scholar Hans Bertens identifies “ontological uncertainty” as a “central concept of postmodernism.”<sup>9</sup> Privacy law in the United States, which regulates key protections of an American citizen’s selfhood, is anything but certain; it lacks boundaries, has holes, and some even question whether privacy still exists in the United States in such a way that it is worth having laws relating to them.

The definition of privacy in the United States, at least in terms of the law, is considered particularly elusive. There is no right to privacy clearly written in the United States Constitution. Under the common law, privacy rights did not get much attention until 1890 when Louis Brandeis wrote an influential article calling for privacy to be protected under American law.<sup>10</sup> The formal “right to privacy” was not truly recognized by the United States Supreme Court until the case *Griswald v. Connecticut* in 1965.<sup>11</sup> In that case, the court found this right not directly in the Constitution but in the (rather mysterious) penumbra or shadow of the rights found in the United States Bill of Rights. Since the *Griswald* case, privacy has expanded and applies to a wide range of cases in American law. As mentioned earlier, it applies to items such as whether the police can search your car or ask your name, your right to die, use of marijuana for medical purposes, abortion, workplace surveillance, internet commerce, credit checks, school grading procedures, gun control, and meetings with the President or Vice President about energy policy and national security.

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<sup>9</sup> Hans Bertens, “The Postmodern Weltaanschauung and its Relation with Modernism: An Introductory Survey.” *Approaching Postmodernism*. Eds. Douwe Fokkema and Hans Bertens (Philadelphia: John Benjamins Co., 1986). 9-48. Reprinted in *A Postmodern Reader*. Eds. Joseph Natoli and Linda Hutcheon (Albany: State University of New York Press, 1993): 25-70.

<sup>10</sup> Louis D. Brandeis & Samuel D. Warren, “The Right to Privacy,” *Harvard Law Review* 4 (1890): 193-220.

<sup>11</sup> *Griswald v. Connecticut*, 381 U.S. 479 (1965).

In academic circles, there is also no consensus on the role or function of privacy law. Some see privacy law as protecting individual autonomy; others see it as protecting the right of self-definition; solitude and intimacy; confidentiality; anonymity; security; freedom from physical or technological intrusion; freedom from annoyance; freedom from crime; freedom from embarrassing disclosures; freedom from discrimination; protection of profit; trust; property rights and commercial rights.<sup>12</sup> There is no clear consensus on this issue.

It is interesting that European jurists use more specific language when referring to privacy issues. Americans use the broad term “privacy” when talking about the need to protect personal information while Europeans use the terms “data protection”.<sup>13</sup> Similarly American law discusses a women’s “privacy” when talking about the legality of abortions while European jurists frame the issue as about reproductive rights or human dignity and not “privacy”.<sup>14</sup>

Thus, American privacy law fits this first characteristic of postmodernism in its lack of definition and boundaries; it is uncertain. This characteristic exposes the law’s strength; it covers a variety of concerns that raise general angst in people and legitimate concerns about safety and security. But it is also, paradoxically, so broad that it is dangerous in its amorphous. The diversity of definitions heightens the extent to which the laws mislead or confuse citizens and lawmakers alike. Laws may purport to operate under one definition but, in fact, serve an entirely different purpose. For example, the Financial Services Modernization Act,<sup>15</sup> purports to protect privacy but, in fact, provides individuals little control over information collected about

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<sup>12</sup> Fred H. Cate and Litan Robert, "Constitutional Issues in Information Privacy," *Michigan Telecommunications and Technology Law Review* 9 (2002): 35.

<sup>13</sup> Julia M. Fromholz, "The European Union Data Privacy Directive," *Berkeley Technology Law Journal* 15 (2000): 461.

<sup>14</sup> Edward J. Eberle, "Human Dignity, Privacy, and Personality in German and American Constitutional Law," *Utah Law Review* (1997): 963.

<sup>15</sup> Gramm-Leach-Bliley Financial Services Modernization Act, 15 U.S.C. §§ 6801-6809 (2000).

them and exceptions in the law allow for broad violations of privacy. This postmodern trait exposes the lack of stability and lack of normative power in U.S. Privacy law.

A second characteristic of U.S. privacy law that makes it “postmodern” is its fragmentary nature. In contrast to the European Union’s modernist and comprehensive privacy law as exemplified by the EU Privacy Directive,<sup>16</sup> the United States does not have a unified, “overarching” regime of privacy protection, but rather privacy legislation applicable to different sectors of government and industries. This patchwork is highly regulatory in some instances, extremely lax in other areas, and non-existent in others. The law has specific regulations restricting activities by the government and has separate regulations covering the private sector.

The government, in a variety of statutes and under the United States Constitution, is restricted from doing things like collecting and maintaining data on U.S. citizens, from excessively wiretapping phones, and monitoring mail through acts such as the Privacy Act of 1974, the Freedom of Information Act, and tax and census regulations.<sup>17</sup> But, these acts have been seriously eroded after 9/11 and the security measures implemented by the U.S. Patriot Act<sup>18</sup> and the Computer Assisted Passenger Pre-Screening System.<sup>19</sup> These regulations are also diminished by the rise of private sector surveillance and the government’s ready access to this information. The regulation in the United States of data processed by the private sector is especially confusing and inconsistent, and limited to certain industries. For example, there is specific and fairly robust legislation for health care data, but inconsistent regulation of financial records and credit reports, telephone use, cable television, video rentals, children’s Internet use, and motor vehicle

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<sup>16</sup> Council Directive 95/46 of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281): 31.

<sup>17</sup> Electronic Privacy Information Center and Privacy International. *Privacy and Human Rights 2003*. <http://www.privacyinternational.org/survey/phr2003/>. (accessed October 31, 2004).

<sup>18</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56 § 203, 115 Stat. 272, 278-81 (2001).

data.<sup>20</sup> Outside of these targeted and specifically regulated areas, there is no residual federal regulation. For example, data collection by Internet companies and many businesses are completely unregulated or subject to “self-regulation.” In fact, self-regulation or “technological protections” to safeguard privacy are the Bush administrations’ primary response to privacy regulation.<sup>21</sup>

Some states have stepped in to fill some of the gaps but federal preemption has eroded those efforts.<sup>22</sup> The common law provides some protections under tort law. But under the common law any claim of invasion of privacy has also to be balanced with First Amendment free speech rights. The collection, exchange, and sale of personal data are protected as a form of commercial speech under recent cases.<sup>23</sup>

The fragmented and inconsistent U.S. privacy law has such large gaps, that arguably the law does not protect privacy at all. Thus, unlike in Europe, there is no requirement for a person’s consent to the processing, marketing, and sale of personal information. Additionally, you have no right of access to processed information about you and cannot challenge its accuracy or use before any court or administrative body. These gaps in U.S. privacy law show that it is more than merely fragmented; it is arguably broken. One CEO of a large software company summed the state of privacy protections in the United States by saying “You already have zero privacy - get over it.”<sup>24</sup>

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<sup>19</sup> Computer Assisted Passenger Pre-Screening System, 49 C.F.R. § 1544.201 (2004).

<sup>20</sup> Electronic Privacy Information Center.

<sup>21</sup> Jeffery P. Cunard and Jennifer B. Coplan, "Internet and E-Commerce: A Summary of Legal Development," *Practising Law Institute, Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series*. PLI Order No. G0-00UG. New York City, November 14-15, 2002.

<sup>22</sup> California Financial Information Privacy Act, Cal. Fin. Code § 4060 (2004).

<sup>23</sup> *United Reporting Publ'g Corp. v. California Highway Patrol*, 146 F.3d 1133, 1137 (9th Cir. 1999), *rev'd on other grounds sub nom. Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 120 S. Ct. 483 (1999).

<sup>24</sup> A. Michael Froomkin, "The Death of Privacy?" *Stanford Law Review* 52 (2000): 1462.

The third aspect of U.S. privacy law that makes it postmodern is that it is riddled with paradox and irony. While many paradoxes could be discussed, this paper identifies nine that illustrate United States' privacy law's postmodern character.

First, many who fear the government's power to violate people's privacy rights turn to the power of the government to protect privacy. These individuals or entities, like the ACLU, paradoxically simultaneously distrust the government and rely on the government to protect privacy.

Second, the government is restricted by privacy laws from collecting information about people's privacy, but, paradoxically, the government is free to use information garnered by the private sector for investigative purposes and, since much of the private sector is self or unregulated, the government has access to this information. In the United States, the police have few surveillance cameras. The private sector, however, is awash in cameras; every convenience store, gas station, bank, private individuals, have cameras that scan the public landscape. Ironically, or rather disconcertingly, police have access to this surveillance.

Third, the dominant fear or paradigm of fear about privacy violations is the specter of George Orwell's vision of an all-seeing Big Brother.<sup>25</sup> For all of the fears of Big Brother raised by those advocating for stricter privacy laws, the greatest threat to privacy is not from government but from private companies and individuals that are capturing some much data about our purchasing and consuming habits. It is not just Big Brother watching you but also Big Sister, Big Mama, Big Aunt, uncle, cousin.... It is the public (particularly shopkeepers) who are the surveyors. There is not necessarily the danger of a single, all seeing power as in Orwell's *1984*; instead, there is the danger of everyone watching everyone else. But the paradox of this lack of

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<sup>25</sup> George Orwell. *1984*. (New York: Signet, reissued 1990). Also available online at: <http://www.online->

surveillance regulation is that the gaze on the public also captures the state in acts of malfeasance. The beating by police of people being arrested such as Rodney King and the abuses in Iraqi prisons by U.S. soldiers, have come about due to the private surveillance by the public with their ubiquitous cameras and computers. The fact that cell phones are now coming with cameras attached, is emblematic of this loss of traditional sense of privacy, but also the power that individuals have to capture everyday events and spread them across the world in minutes.

Fourth, a number of conservative judges in the United States have taken paradoxical stances on some key privacy issues; While conservative judges generally advocate States' rights and devolution of federal power; these same judges use the power of the federal courts to preempt state legislation on privacy issues such as abortion, gay marriage, medical use of marijuana, and right to die. (But they do not use it to preempt the privacy rights of gun owners.)

Fifth, a number of scholars have observed that privacy law has granted some major advances for American women in such areas as reproductive rights, but, paradoxically, many women's advocates are distrustful of privacy laws because of the fear that the protected privacy will act as a shield to cover up domination, degradation and abuse of women and others.<sup>26</sup>

Sixth, privacy laws are engaged in a battle with emerging technologies and it is hard to envision the battle ever ending. The more regulations that are passed to restrict private data being collected and transferred, the greater the value of this information and thus, paradoxically, new, more intrusive means for accessing then develop.

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literature.com/orwell/1984/

<sup>26</sup> Anita L. Allen, "Taking Liberties: Privacy, Private Choice, and Social Contract Theory," *University of Cincinnati Law Review* 56 (1987): 470.

Seventh, self-regulation, which is supposed to limit the intrusion of privacy law, can have the paradoxical effect of increasing litigation by creating norms and expectations of privacy under the common law. For example, privacy notices that pop up on Internet web pages arguably create contractual rights.

Eighth, some privacy law while providing certain privacy protection for citizens, can paradoxically also provide protections for those who collect data and violate privacy. Loopholes in legislation provide cover for entities to continue to collect information. Federal law can preempt and prevent states from enacting more restrictive policies or prevent states from experimenting with new privacy laws or regimes.

Ninth, the problem with violations of privacy is not what people end up knowing about you, it is, paradoxically, what they do not know about you. The type of data that is collected by private surveyors is problematic because it is fragmentary and incomplete and therefore, misleading. If there is a record of someone buying beer and cigarettes every week, a person or insurance company that receives this information does not have an accurate picture of that person; they might erroneously think he or she is a health risk or have bad habits unless they also know that this person belongs to a health club or that his or her father smokes and drinks and this person buys him cigarettes and beers every week.

These paradoxes, identified above, give U.S. privacy law a particular postmodern bent and expose its lack of clarity.

The fourth characteristic that makes U.S. privacy law “postmodern” is that it emphasizes a social construction of the self as opposed to the autonomous self. This characteristic is interesting because many scholars equate the concept of privacy to the concept of self-

definition.<sup>27</sup> They argue that matters relating to one's innermost self are inherently private.

Privacy is valued because it allows one control over information about oneself, which allows one to maintain differing degrees of intimacy. It is argued that love, friendship and trust are only possible if persons enjoy privacy and grant it to one another. Privacy is essential for such relationships and explains why a threat to privacy is a threat to our very integrity as persons.

Privacy law protects our concept of “self” or our very selves.<sup>28</sup>

Privacy is also, arguably, culturally relative, contingent on such factors as economics, access to technology, environmental, and religious practice. For example, concepts of privacy are likely to be very different on a Kibbutz in Israel or a North American Eskimo community, particularly compared to people in a town or on a ranch on the plains of Texas.

The question then arises that if privacy is relative or socially constructed and connected to our construction of our selves; what are the powers that are constructing these norms? If a large corporation or entity has enough information about our habits and preferences, our likes and dislikes, (in other words, ourselves), can this information be used to influence these same or other decisions in the future? What is distressing under American privacy law, is there is a general wait and see attitude about these pressing questions. On one hand, this “wait and see” approach allows for great potential advances in efficiencies in the marketplace and in technological development. Marketing and consumerism can be directly targeted and exceedingly efficient. But, on the other hand, it also allows for great dangers that threaten our very selves. It allows for the potential for manipulation at the deepest levels of the lives of Americans.

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<sup>27</sup> James Rachels, ‘Why Privacy is Important,’ *Philosophy and Public Affairs* 4 (1975): 323-33

<sup>28</sup> Julie Inness, *Privacy, Intimacy and Isolation* (Oxford: Oxford University Press, 1992).

Another characteristic of postmodernism that aptly fits American privacy law is that it is politically ambivalent. Privacy laws and regulation are not affiliated with one particular party or political movement in the United States. Those concerned with privacy in United States, at least vocally, are not everyday people, but an odd coalition of right and left such as the ACLU and NRA, gay activists and white supremacists; right to die advocates and librarians. But I find it distressing that outrage at privacy violations is only being found on the edges of the political mainstream. Most of the middle-of-the-road Americans do not seem particularly concerned with violations of their privacy. (The exception being outrage at telemarketers; there was strong public clamoring for restrictions on telemarketers calling people in their homes resulting in the high-tech do-not call-list.)

The final two characteristics of postmodernism are self-evident. Much of the current privacy concerns relate to data stored and information collected by high tech devices and much of the information is collected in the course of daily consumer transactions. As mentioned earlier, the shopkeepers are responsible for much of the surveying through high tech tools like computers and digital cameras. Besides just regulating (or refraining from regulating) technology and daily consumer activities; the very laws themselves have a high tech bent. Under U.S. privacy law, consumers may be directed to websites for information, they may file complaints through the internet, and companies register their privacy policies using web sites set up by these privacy laws and the Federal Communications Commission.<sup>29</sup> But this raises another irony. These very sites created by privacy law can track and maintain data about your visit to them, creates a spooky postmodern specter of having more and more data being collected about you and more of

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<sup>29</sup> Act of Sept. 29, 2003, Pub. L. No. 108-82, 2003 U.S.C.A.N. (117 Stat.) 1006 (to be codified at 15 U.S.C. § 6102 note) (ratifying the authority of the Federal Trade Commission to establish a do-not-call registry).

your privacy violated as you try to learn about our privacy rights or try to lodge a complaint about privacy violations.

Privacy law's postmodern character is ultimately problematic and antithetical to laws regulating functions. In response to the problems raised by the U.S. postmodern privacy law, I don't believe, however, one can simply state that the United States should borrow the comprehensive, modernist, European approach. The lack of a comprehensive regime and this fragmented and diverse approach is not necessarily something to be reflexively lamenting. It can be argued that this fragmented or fractured approach is, in fact, appropriate in this evolving and rapidly changing technological age. The variety and diversity of approaches are, arguably, appropriate for this high-technological era. A strong argument can be made that—in light of the dizzying speed of technological change—the marketplace, custom, and common law (rather than statutory or other governmental restrictions) should determine how privacy should be protected. The marketplace fosters innovation and the enormous potential of the technologies might work best unfettered by privacy regulations. The unregulated, free-market approach to privacy protections is arguably another form of “freedom” that is being protected in the United States. Although at times confusing, the fragmented postmodern tangle of statutory, judicial-made common law, government regulation, and voluntary custom that makes up privacy law is possibly what works best to protect “freedom” in a postmodern America. People are being given as much power to watch their government and regulate the data as the government can. Any restrictions by privacy law, it is argued, will most likely be done as much to protect government secrecy as it would be to maintain the American people's privacy. Indeed, American legal culture and tradition demonstrates a distrust of laws granting power to the government and prefers market forces over government regulation.

On the other hand, the problem with this free-market approach is that it has left dangerous gaping holes in privacy protections under U.S. law. Technological change and fears of terrorism have aggravated this problem even further. There is the potential of abuse that can ultimately emerge from the lack of privacy protections engendered by this postmodern, fragmented approach. The countervailing threat to the freedom of average citizens' privacy is too great for the United States not to take a more coherent and comprehensive approach to privacy protections

There are no clear answers to the issues raised in this paper. Privacy law is changing so rapidly that one clear cut solution is not readily apparent at this time. On balance, the more modernist and comprehensive European Union approach appears to provide the more "rational" and modern solution, and therefore is the more desirable option as a workable legal norm. The dangers of privacy abuse are too great to leave this power unregulated and in a postmodern state of flux. Postmodernism is often labeled as "dangerous".<sup>30</sup> The American postmodern approach to regulating privacy can also be aptly labeled "dangerous" because of the potential evisceration of our current notions of privacy and what is needed to protect them. A more comprehensive, modern approach, while possibly more stifling or even ineffective, can, as some scholars have argued, "buy us time" to sort out the most effective manner to determine and regulate our privacy needs.<sup>31</sup> A more modern approach would, at least temporarily, give us a sense of security, privacy, and ourselves.

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<sup>30</sup> Simon Blackburn, "Relatively Speaking," *Think, The Journal of the Royal Institute of Philosophy* (October 1, 2002) [http://www.butterfliesandwheels.com/printer\\_friendly.php?num=12](http://www.butterfliesandwheels.com/printer_friendly.php?num=12) (accessed October 31, 2004).

See also Stanley Kurtz, "Postmodernism Kills," *National Review Online* (August 12, 2002) <http://www.nationalreview.com/kurtz/kurtz081202.asp> (accessed October 31, 2004).

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<sup>31</sup> See Amitai Etzioni, *The Limits of Privacy* (New York: Basic Books, 1999). Jeffery Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (New York: Vantage Books, 2001).

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## ENDNOTES