

THE PRISM

An extraordinary fuss about eavesdropping started in the spring of 1844, when Giuseppe Mazzini, an Italian exile in London, became convinced that the British government was opening his mail. Mazzini, a revolutionary who'd been thrown in jail in Genoa, imprisoned in Savona, sentenced to death in absentia, and arrested in Paris, was plotting the unification of the kingdoms of Italy and the founding of an Italian republic. He suspected that, in London, he'd been the victim of what he called "post-office espionage": he believed that the Home Secretary, Sir James Graham, had ordered his mail to be opened, at the request of the Austrian Ambassador, who, like many people, feared what Mazzini hoped—that an insurrection in Italy would spark a series of revolutions across Europe. Mazzini knew how to find out: he put poppy seeds, strands of hair, and grains of sand into envelopes, sealed the envelopes with wax, and sent them, by post, to himself. When the letters arrived—still sealed—they contained no poppy seeds, no hair, and no grains of sand. Mazzini then had his friend Thomas Duncombe, a Member of Parliament, submit a petition to the House of Commons. Duncombe wanted to know if Graham really had ordered the opening of Mazzini's mail. Was the British government in the business of prying into people's private correspondence? Graham said the answer to that question was a secret.

Questions raised this month about surveillance conducted by the National Security Agency have been met, so far, with much the same response that Duncombe got from Graham in 1844: the program is classified. (This, a secret secret, is known as a double secret.) Luckily, old secrets aren't secret; old secrets are history. The Mazzini affair, as the historian David Vincent argued in "The Culture of Secrecy," led to "the first modern attack on official secrecy." It stirred a public uproar, and eventually the House of Commons appointed a Committee of Secrecy "to inquire into the State of the Law in respect of the Detaining and Opening of Letters at the General Post-office, and into the Mode under which the Authority given for such Detaining and Opening has been exercised." In

August of 1844, the committee issued a hundred-and-sixteen-page report on the goings on at the post office. Fascinating to historians, it must have bored Parliament silly. It includes a history of the delivery of the mail, back to the sixteenth century. (The committee members had “showed so much antiquarian research,” Lord John Russell remarked, that he was surprised they hadn’t gone all the way back to “the case of *Hamlet*, Prince of Denmark, who opened the letters which had been committed to his charge, and got *Rosencrantz* and *Guildenstern* put to death instead of himself.”)

The report revealed that Mazzini’s mail had indeed been opened and that there existed something called the Secret Department of the Post Office. Warrants had been issued for reading the mail of the king’s subjects for centuries. Before Mazzini and the poppy seeds, the practice was scarcely questioned. It was not, however, widespread. “The general average of Warrants issued during the present century, does not much exceed 8 a-year,” the investigation revealed. “This number would comprehend, on an average, the Letters of about 16 persons annually.” The Committee of Secrecy was relieved to report that rumors that the Secret Department of the Post Office had, at times, sent “entire mail-bags” to the Home Office were false: “None but separate Letters or Packets are ever sent.”

The entire episode was closely watched in the United States, where the *New-York Tribune* condemned the opening of Mazzini’s mail as “a barbarian breach of honor and decency.” After the Committee of Secrecy issued its report, Mazzini published an essay called “Letter-Opening at the Post-Office.” Two months after the Mazzini affair began, the Secret Department of the Post Office was abolished. What replaced it, in the long run, was even sneakier: better-kept secrets.

The opening of Mazzini’s mail, like the revelations that the N.S.A. has been monitoring telephone, e-mail, and Internet use, illustrates the intricacy of the relationship between secrecy and privacy. Secrecy is what is known, but not to everyone. Privacy is what allows us to keep what we know to ourselves. Mazz-

ini considered his correspondence private; the British government kept its reading of his mail secret. The A.C.L.U., which last week filed a suit against the Obama Administration, has called the N.S.A.'s surveillance program a "gross infringement" of the "right to privacy." The Obama Administration has defended both the program and the fact that its existence has been kept secret.

As a matter of historical analysis, the relationship between secrecy and privacy can be stated in an axiom: the defense of privacy follows, and never precedes, the emergence of new technologies for the exposure of secrets. In other words, the case for privacy always comes too late. The horse is out of the barn. The post office has opened your mail. Your photograph is on Facebook. Google already knows that, notwithstanding your demographic, you hate kale.

The particular technology matters little; the axiom holds. It's only a feature, though, of a centuries-long historical transformation: the secularization of mystery. A mystery, in Christian theology, is what God knows and man cannot, and must instead believe. Immortality, in this sense, is a mystery. So is the beginning of life, which is a good illustration of how much that was once mysterious became secret and then became private. Anciently invoked as one of God's mysteries, the beginning of life was studied, by anatomists, as the "secret of generation." Finally, citizens, using the language of a constitutional "right to privacy," defended it against intrusion. Theologically, the beginning of life, the ensoulment of new flesh, remains a mystery. Empirically, uncovering the secret of generation required tools—microscopes, lenses, cameras—that made the creation of life both visible and knowable. Only after it was no longer a mystery, and no longer a secret, only after it was no longer invisible, did it become private. By then, it was too late: contraception was already in the hands of the state.

Secret government programs that pry into people's private affairs are bound up with ideas about secrecy and privacy that arose during the process by which the mysterious became secular. The mysteries of the Church are beyond the knowledge of any man and, therefore, outside the scope of the state. During

the Reformation, Protestants rejected many mysteries as superstitions, and what was mysterious then began to move from priests to princes. By the seventeenth century, the phrase “mysteries of state” meant both state secrets and monarchical power and right—not what God knows, and we do not know and must accept, but what the king knows, and we do not. In 1616, in a speech to the Star Chamber, James I talked about his “Prerogative or mystery of State,” proclaiming, “That which concernes the mysterie of the Kings power, is not lawfull to be disputed.” But monarchical notions about the royal prerogative were challenged by the very existence of books like “The Cabinet-Council, Containing the Cheif Arts of Empire and Mysteries of State, Discabineted,” published in 1658. It was an age of political reformation, rich with arguments that knowledge that was once the privilege of the king ought to be revealed, taken out of the king’s cabinet. In the early modern world, a mystery came to mean any kind of secret that could be revealed to an ordinary man.

It was at just this moment in the history of the world, on the knife edge between mystery and secrecy, that the United States was founded—as a republic whose politics would be open to scrutiny, its mysteries of state discabineted. The Constitution was meant to mark the end of an age of political mystery. (The claim was loftier, as is inevitably the case, than the reality.) In a republic, there ought to be no mysteries of state: all was to be revealed to the people. It would be revealed, chiefly, in print, and, especially, in newspapers, where, as Thomas Jefferson explained, the “contest of opinion” was waged. The danger, in a republic, wasn’t an inquisitorial priesthood. It was a corrupt journalist. And so when Jefferson attacked newspaper printers the best way he could think to insult them was to accuse them of cultivating mystery: “They, like the clergy, live by the zeal they can kindle.” The objection to mystery in government lies behind Jefferson’s commitment to the separation of church and state.

“Secresy is an instrument of conspiracy,” Jeremy Bentham argued, in an essay called “Of Publicity,” first published in 1843, a year before the Mazzini affair. “It ought not, therefore, to be the system of a regular government.” By “publicity,” Bentham meant what is now usually called transparency, or openness.

“Without publicity, no good is permanent: under the auspices of publicity, no evil can continue.” He urged, for instance, that members of the public be allowed into the legislature, and that the debates held there be published. The principal defense for keeping the proceedings of government private—the position advocated by those Bentham called “the partisans of mystery”—was that the people are too ignorant to judge their rulers. “This, then, is the reasoning of the partisans of mystery,” Bentham wrote. “ ‘You are incapable of judging, because you are ignorant; and you shall remain ignorant, that you may be incapable of judging.’ ” But Bentham insisted not only that publicity could educate the public (who would learn about politics by reading the proceedings) but also that it would improve the nature of political conversation (because elected officials would behave better if they were being watched).

In 1844, during the parliamentary debate that followed the report issued by the Committee of Secrecy, some members, believing, with Bentham, that publicity is the enemy of secrecy, suggested that it was fine for the government to open people’s mail, as long as the recipients of the mail were notified that it had been read. (Disraeli said that he would be only too happy to hand over his mail to the Home Office: “They may open all my letters, provided they answer them.”) In “Letter-Opening at the Post-Office,” Mazzini revealed just how much the debate had been informed by Bentham’s arguments about publicity. Diplomats might have their secrets, he granted, but postmen? “Why, who are these men who treat as enemies their fellow subjects of the realm?” he asked. “For public servants, we want responsibility and responsibility cannot be obtained without publicity. Secrecy is but another word for fear. MYSTERY was the name of the beast in the revelations. The great monster by which was typified all the civil and ecclesiastical corruptions of the earth, had on its forehead a name written and that name was MYSTERY.”

Bentham’s argument influenced not only how Parliament and the public responded to the Mazzini affair—with calls for transparency and an end to secrecy—but also how Americans came to understand the nature of a democracy. The mystery of state, in which a king is crowned by the hand of an invisible

God, had yielded to a democracy, in which rulers are elected and the secrets of state are made public. In a democracy, publicity is a virtue.

Still more influential than Bentham's ideas about publicity, though, was the growing fetish for privacy in an age of domesticity. (The history of privacy is bounded; privacy, as an aspiration, didn't really exist before the rise of individualism, and it got good and going only with the emergence of a middle class.) Nineteenth-century Americans were obsessed with the idea of privacy and the physical boundaries that marked it, like the walls of a house, and, equally, with the holes in those walls, like mail slots cut into doors. When mystery became the stuff of the past, of medievalism and of Gothic romance, a "mystery" came to mean a kind of fiction, stories—in the United States, those of Edgar Allan Poe, above all—in which something that first appears inexplicable and even supernatural is submitted to explanation, through the art of detection. (To detect is, etymologically, to remove the roof of a house.) "It was a mystery all insoluble," Poe's narrator remarks, in "The Fall of the House of Usher." But in Poe every mystery is soluble. Nothing ever remains hidden. Crimes must be solved. Walls must be breached. Tombs must be unearthed. Envelopes must be opened.

The fetish for privacy attached, with special passion, to letters. In the spring of 1844, the year of the Mazzini affair, Poe sat down to write a story called "The Purloined Letter." A few months later, a hardworking young man named James Holbrook was hired as a special agent by the United States Post-Office Department. He chronicled his experiences in a memoir called "Ten Years Among the Mail Bags; or, Notes from the Diary of a Special Agent of the Post-Office Department." "A mail bag is an epitome of human life," Holbrook explained. The point of this Post-Office Department was not to violate people's privacy but to protect it. Holbrook's job was to stop people from opening other people's mail. He was a post-office detective. "Ten Years Among the Mail Bags," like a great deal of nineteenth-century fiction, is full of purloined letters.

E-mail isn't that different from mail. The real divide, historically, isn't digital;

it's literary. The nineteenth century, in many parts of the West, including the United States, marked the beginning of near-universal literacy. All writing used to be, in a very real sense, secret, except to the few who knew how to read. What, though, if everyone could read? Then every mystery could be revealed. A letter is a proxy for your self. To write a letter is to reveal your character, to spill out your soul onto a piece of paper. Universal literacy meant universal decipherment, and universal exposure. If everyone could write, everyone could be read. It was terrifying.

In 1890, two Boston lawyers, Samuel Warren and Louis Brandeis, published an article in the *Harvard Law Review* called "The Right to Privacy." Warren was a Boston Brahmin, but Brandeis's parents were Eastern Europeans who had supported a failed uprising in Austria in 1848—the very revolution that, four years before, had been anticipated by the Austrian Ambassador who persuaded the British Home Secretary to read Giuseppe Mazzini's mail. The suppression of the uprising had been followed by a wave of anti-Semitism, leading to the Brandeis family's decision to emigrate to the United States. Louis Brandeis was born in Kentucky in 1856. In the eighteen-seventies, he and Warren were classmates at Harvard Law School (Brandeis helped found the *Harvard Law Review*); after graduation, they opened a law firm together. Warren married Mabel Bayard, a senator's daughter, in 1883. As the legal scholar Amy Gajda has shown, nearly sixty articles of gossip about the Warren-Bayard family appeared in newspapers between 1882 and 1890—including front-page stories, two weeks apart, about the funerals of Mrs. Warren's mother and sister. Warren was infuriated. His household had been violated; his family's privacy, like a letter, had been purloined. (A great many ideas about privacy have to do with hiding women and families.)

In "The Right to Privacy," Warren and Brandeis argued that there exists a legal right to be let alone—a right that had never been defined before. Their essay lies at the heart of every legal decision that has been made about privacy ever since. The right to privacy, as they understood it, is a function of history, a consequence of modernity. Privacy, they argued, hadn't always been necessary; it

had become necessary—because of the shifting meaning and nature of publicity. By the end of the nineteenth century, publicity, which for Bentham had meant transparency (the opposite of secrecy), had come to mean the attention of the press (the opposite of privacy). Making public the deliberations of Congress was a public good; making public the names of mourners at Mrs. Warren’s mother’s funeral was not. (The same distinction informed the debate that resulted, in the eighteen-eighties and nineties, in the adoption of the secret ballot. Citizens vote in private; legislative votes are public.)

“The Right to Privacy” is a manifesto against the publicity of modernity: the rise of both the public eye (the eye of the citizen, and of the reporter) and the private eye (the eye of the detective). “The intensity and complexity of life, attendant upon advancing civilization,” Warren and Brandeis wrote, “have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.” Modern life, according to Warren and Brandeis, consists of an endless chain of machines that threaten to expose the private to public view: “Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’ ”

For Warren and Brandeis, the right to privacy was necessary to protect what they called the “inviolable personality.” As a pair of literary scholars has suggested, Warren and Brandeis got part of this idea from philosophers and part from poets. (William James wrote about a “hidden self”; William Wordsworth wrote about “the individual Mind that keeps her own / Inviolable retirement.”) Warren and Brandeis believed that the violation of the right to privacy constitutes a kind of wound—a puncturing of the soul—that might, finally, deaden our minds. The stakes had become, suddenly, very high.

Something creepy happened when mystery became secular, secrecy became a technology, and privacy became a right. The inviolability of the self replaced the inscrutability of God. No wonder people got buggy about it.

Long before the Patriot Act, of 2001, and the expanded authorization of surveillance to fight terrorism—long, even, before the rise of the national-security state—Louis Brandeis predicted the encroachment of technologies of secrecy on the right to privacy. Brandeis was appointed to the Supreme Court in 1916. He was sitting on the bench when, in 1928, in *Olmstead v. United States*, the Court considered the constitutionality of wiretapping. Roy Olmstead was a bootlegger from Seattle who had been a police officer before he was arrested for violating laws prohibiting the import and sale of alcohol. He was arrested in 1924; his conviction rested on evidence obtained by tapping his telephone. The question before the Supreme Court, in 1928, was whether evidence acquired through wiretapping was admissible in criminal proceedings, or whether the gathering of that evidence violated the Fourth and Fifth Amendments. In a five-to-four decision, the Court affirmed Olmstead's conviction. (Olmstead served three years' hard labor but was pardoned by Franklin Roosevelt, in 1935.) Brandeis dissented: he argued that tapping Olmstead's telephone constituted a violation of his right to be let alone.

Brandeis's dissent in *Olmstead* is, in effect, a continuation of the argument that he had begun in 1890. He thought that wiretapping was just a new form of coerced confession—the replacement of “force and violence” by wires and electrical current. At one time, Brandeis said, the government “could compel the individual to testify—a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life—a seizure effected, if need be, by breaking and entry.” But, in the twentieth century, he went on, “subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.”

And the invasion wouldn't end there. "The progress of science in furnishing the Government with means of espionage is not likely to stop with wire tapping," Brandeis predicted. "Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home."

The N.S.A. has been gathering data online for years. Through the Prism project, which began in 2007, and is aimed at preventing terrorist attacks, it has been "tapping directly into the central servers of nine leading U.S. Internet companies," according to the *Washington Post*. The companies have denied that this is true. "We have not joined any program that would give the U.S. government—or any other government—direct access to our servers," Larry Page and David Drummond, Google's C.E.O. and chief legal officer, said. "Facebook is not and has never been part of any program to give the U.S. or any other government direct access to our servers," Mark Zuckerberg, Facebook's C.E.O., insisted. Congress is sure to launch an investigation. (Exactly how Internet companies have complied with requests from intelligence agencies has not yet fully come out.)

For all that has changed in the past few centuries, much that happens in government remains cloaked in mystery, if only because cloaking a secret in mystery is a very good way to hide the exercise of power. In the coming days and weeks, much of the investigation of N.S.A. surveillance will involve detective work: in the stories that will be written, Edward Snowden will make a good character and the plot will be dark, but Poe would have devised a better ending.

One aspect of this story that Congress is unlikely to concern itself with is the relationship, in the twenty-first century, between privacy and publicity. In the twentieth century, the golden age of public relations, publicity, meaning the attention of the press, came to be something that many private citizens sought out and even paid for. This has led, in our own time, to the paradox of an

American culture obsessed, at once, with being seen and with being hidden, a world in which the only thing more cherished than privacy is publicity. In this world, we chronicle our lives on Facebook while demanding the latest and best form of privacy protection—ciphers of numbers and letters—so that no one can violate the selves we have so entirely contrived to expose.

A measure of the distance between the Mazzini affair and the N.S.A. scandal is their wholly different understandings of the nature of the public eye. In 1844, when news broke that the British government had been opening people's mail, the editors of the London *Times* insisted that "the proceeding cannot be English, any more than masks, poisons, sword-sticks, secret signs and associations, and other such dark ventures." It was mysterious; it was un-English; it was anachronistic. "Public opinion is mighty and jealous, and does not brook to hear of public ends pursued by other than public means," the *Times* went on. "It considers that treason against its public self." In the wake of revelations about N.S.A. surveillance, the open-source software group Mozilla organized an online petition to Congress called Stop Watching Us, stating, "This type of blanket data collection by the government strikes at bedrock American values of freedom and privacy." There is no longer a public self, even a rhetorical one. There are only lots of people protecting their privacy, while watching themselves, and one another, refracted, endlessly, through a prism of absurd design.

