

This minilecture introduces the concept of intellectual privacy as part of the Spring 2021 Workshop, *Why Spy?: Surveillance, Students, and Libraries*.

1. Review

Looking back at the Privacy Workshop

Image courtesy of Pexels

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Let's review ideas from the Privacy Workshop so that we can build on them.

Types of data

1. Consciously given
2. Automatically monitored
3. Modeled

Ip. C. (2018, September 4). Who controls your data? Engadget.
<https://www.engadget.com/2018/09/04/who-controls-your-data/>

Image courtesy of Unsplash

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Information systems, including those we use for library work, teaching, and research, collect three types of data: consciously given, automatically monitored, and modeled data.

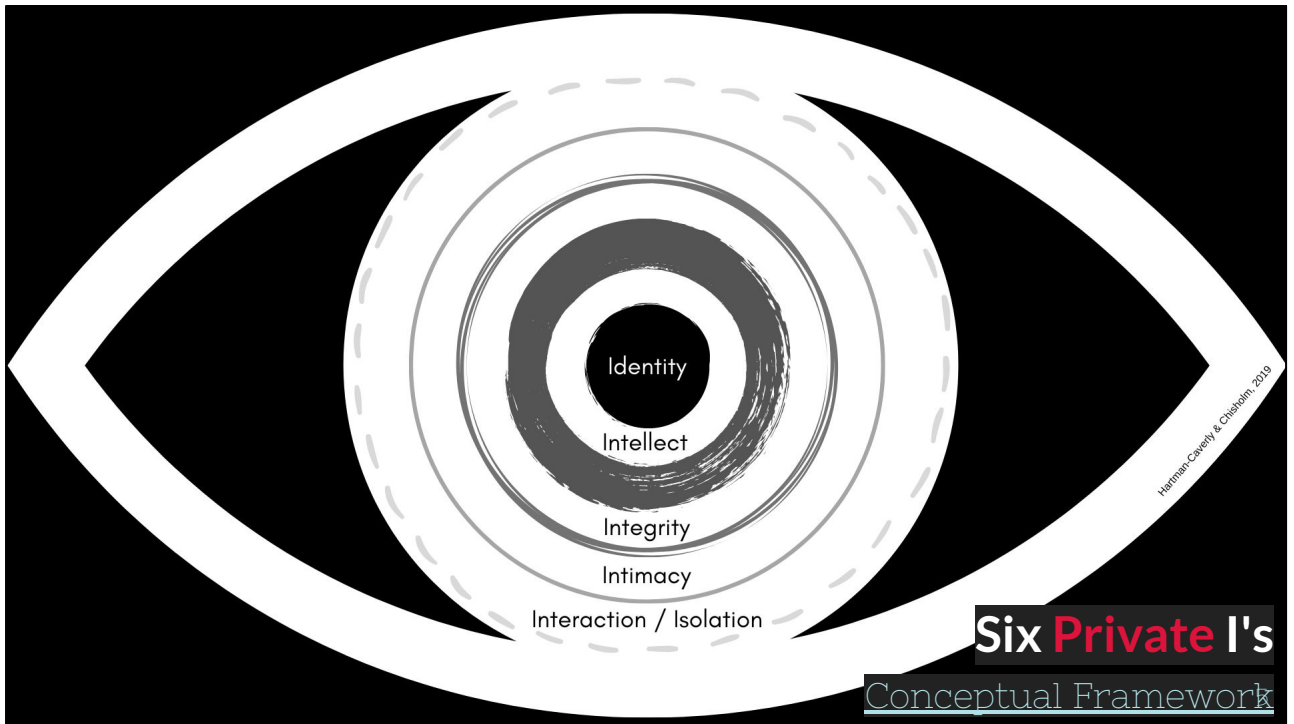
Data double

Used to implement nudges and direct information flows (social media feeds, search results, etc.)



Image courtesy of Pexels 4

Our data double is the story our data tells about ourselves. It is comprised of our aggregated consciously given, automatically monitored, and modeled data. Data doubles become a reference point for serving up nudge interventions, like student notifications from Starfish, or for personalizing Web search results based on past search and click behaviors.



The Six Private I's conceptual framework presents the positive case for privacy in the human experience. Privacy can be understood as “the information constructs of selfhood, social relationships, and expressive activities” ([Hartman-Caverly & Chisholm, 2020](#)). Privacy protects one's individual identity, intellectual activity, bodily and contextual integrity, intimate relationships, freedom of association, and ability to voluntarily withdraw into solitude. Privacy is about respect for persons - not just protection for data.

Session 2: Intellectual privacy

- ◎ Examine evidence of the impact of monitoring on free inquiry and expression in order to understand the chilling effect
- ◎ Explore the theoretical underpinnings of surveillance, privacy, inquiry, and expression
- ◎ Recognize disciplinary and professional perspectives on privacy in education
- ◎ Discuss considerations and principles for data use in higher education, including the requirements and limits of FERPA

Now we'll explore intellectual privacy in greater detail. We'll examine the chilling effect; explore intellectual privacy theory; recognize professional perspectives on privacy in libraries and learning; and consider principles for data use in higher education, including the limits of FERPA.



2. A chilling climate for inquiry

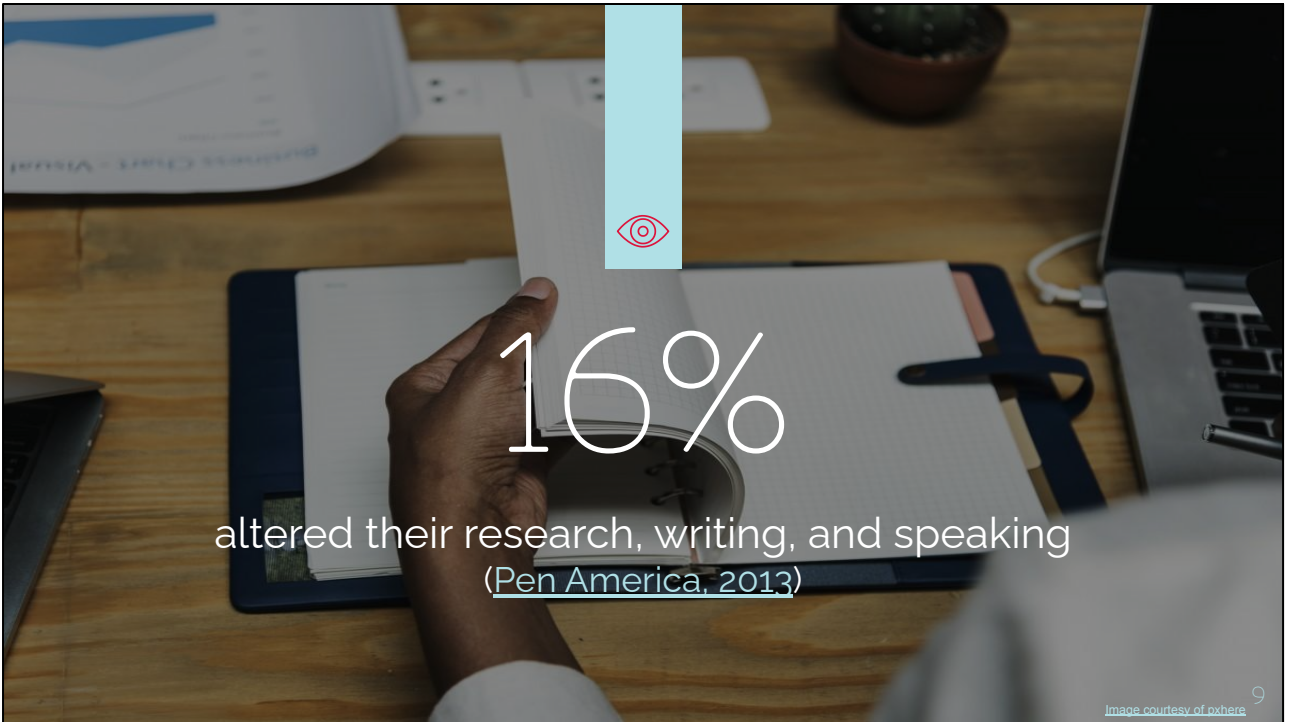
Image courtesy of Pexels

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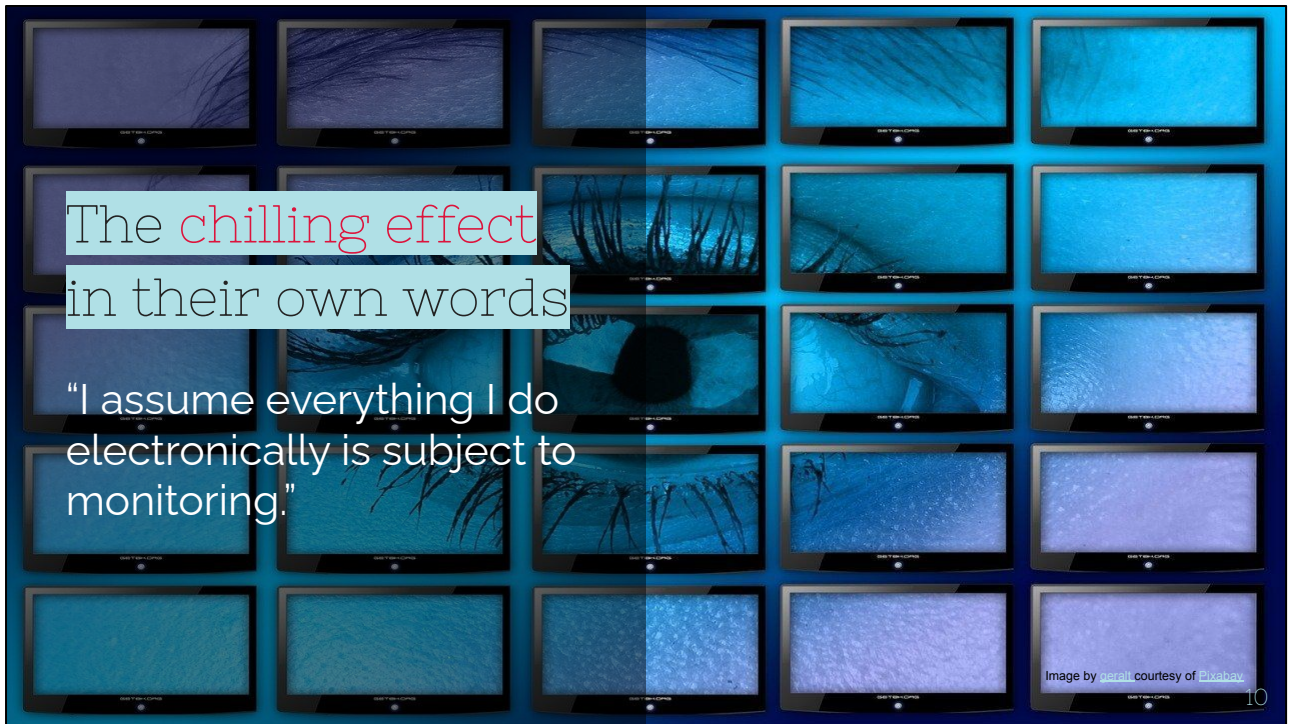
Let's take a closer look at indicators of a chilling climate for inquiry.



In its formal definition, the chilling effect is when individuals self-censor their inquiry and expressive activities due to fear of government surveillance or sanction. Following the Edward Snowden disclosures of the global surveillance grid in 2013, [PEN America and FDR Group](#) partnered to survey more than 500 American writers about whether knowledge of the extent of government surveillance had impacted their research and writing practices.

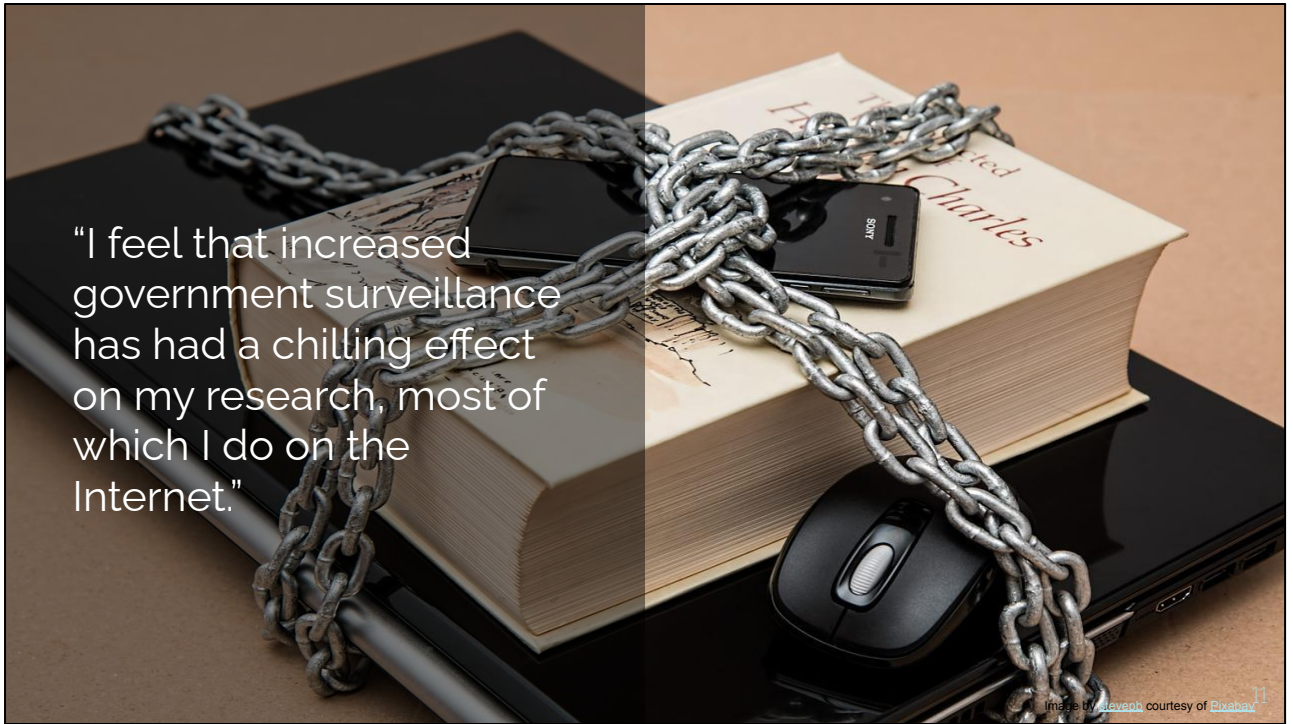


They found that 16% of respondents had “refrained from conducting Internet searches or visiting websites on topics that may be considered controversial or suspicious,” and 16% of respondents had “avoided writing or speaking about a particular topic.”



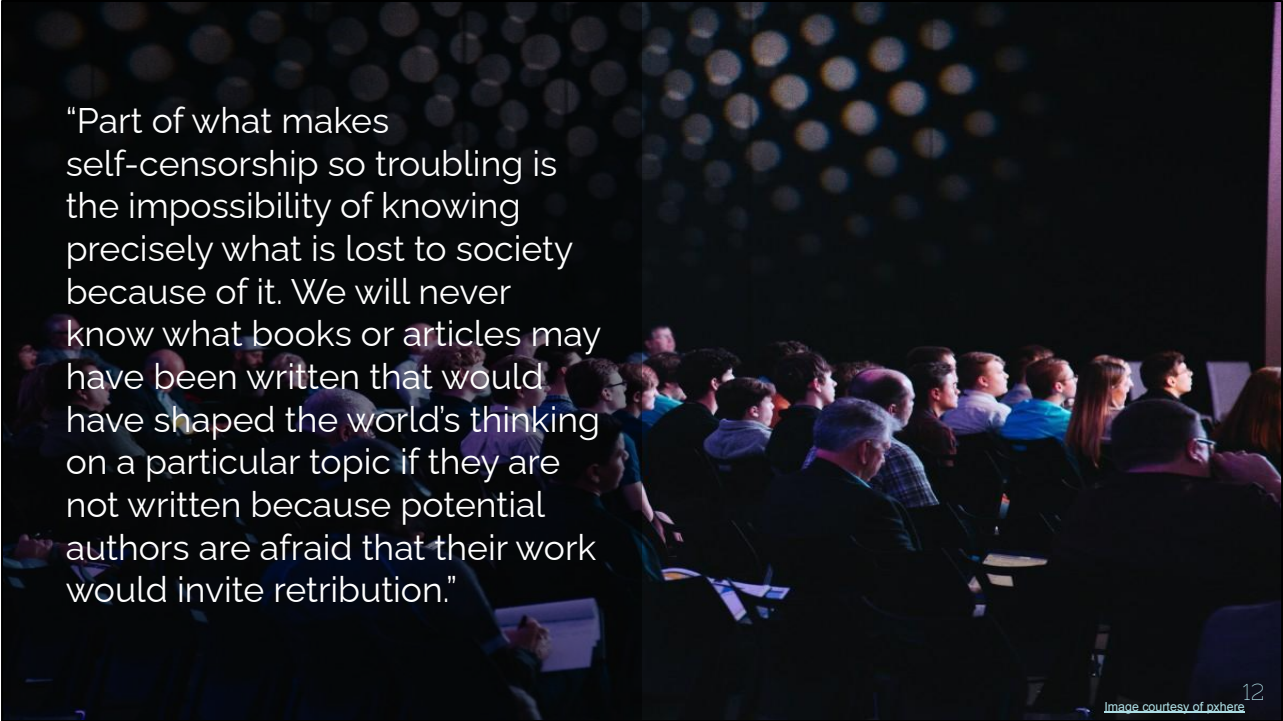
Writers described the impact that surveillance has on their research and writing in their own words:

- “I assume everything I do electronically is subject to monitoring.”



“I feel that increased government surveillance has had a chilling effect on my research, most of which I do on the Internet.”

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Image courtesy of oshera

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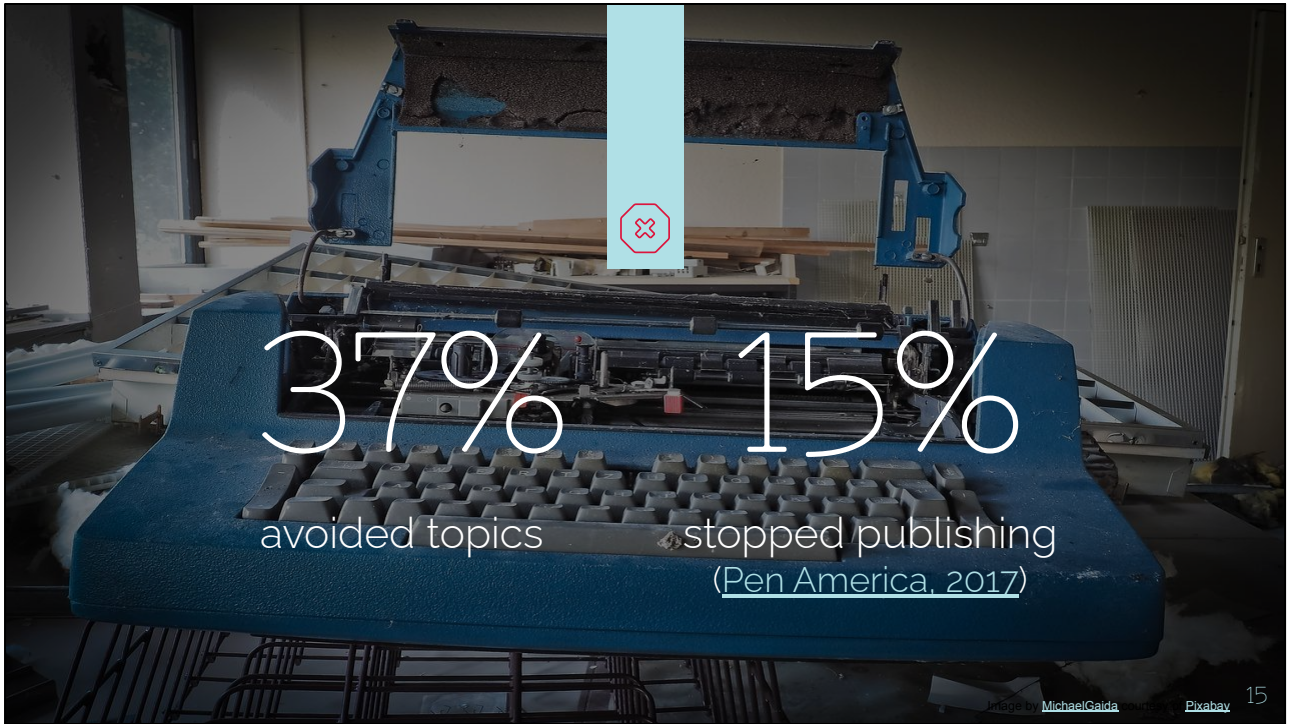
- “The codification of surveillance as a new ‘norm’—with all different forms and layers—is changing the world in ways I think I fail to grasp still.”



The gaze from
below:
sousveillance

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Image courtesy of Shutterstock

In a broader sense, the chilling effect can occur any time a creator fears retribution as a consequence of their research and expressive activities. This includes sousveillance, a term for social surveillance. In fall 2017, [PEN America](#) surveyed more than 200 American writers about the impact of online harassment on their research and writing.



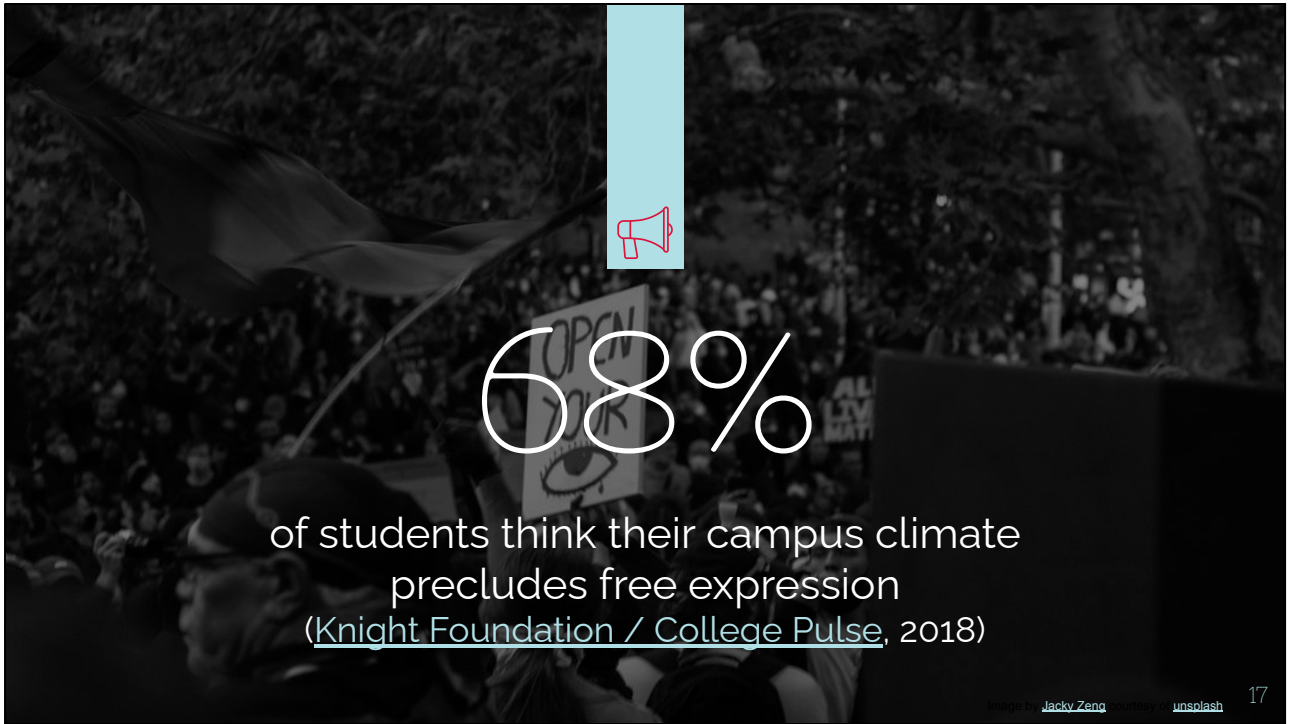
They found that 37% “reported avoiding certain topics in their writing due to online harassment,” and 15% “stopped publishing their writing [altogether] due to online harassment.”

Like surveillance, sousveillance also has a disparate impact - the survey found that respondents “writing about politics, feminism, social justice, LGBTQ+ issues and race/ethnicity were more likely to experience online harassment than [those] writing about sports, technology, the law, national security, or the environment.”



We might think that universities are sanctuaries for open inquiry and free expression, but they largely reflect wider trends. [NPR](#) reported that from 2016-18, 250 faculty were targeted by [right-wing online campaigns](#) for their research, teaching, or social media posts (as cited in Garber-Pearson et al, 2019, "[When research gets trolled](#)").

Campus chilling effects are a nonpartisan concern, as research shows that independent- and conservative-leaning students, faculty, and staff are more likely to self-censor. A [2018 WGBH News National Poll](#) found that 59% of Americans said that colleges are partisan environments that lean towards one particular political viewpoint. 77% of respondents perceived colleges as Liberal-leaning, and 79% considered this a problem.



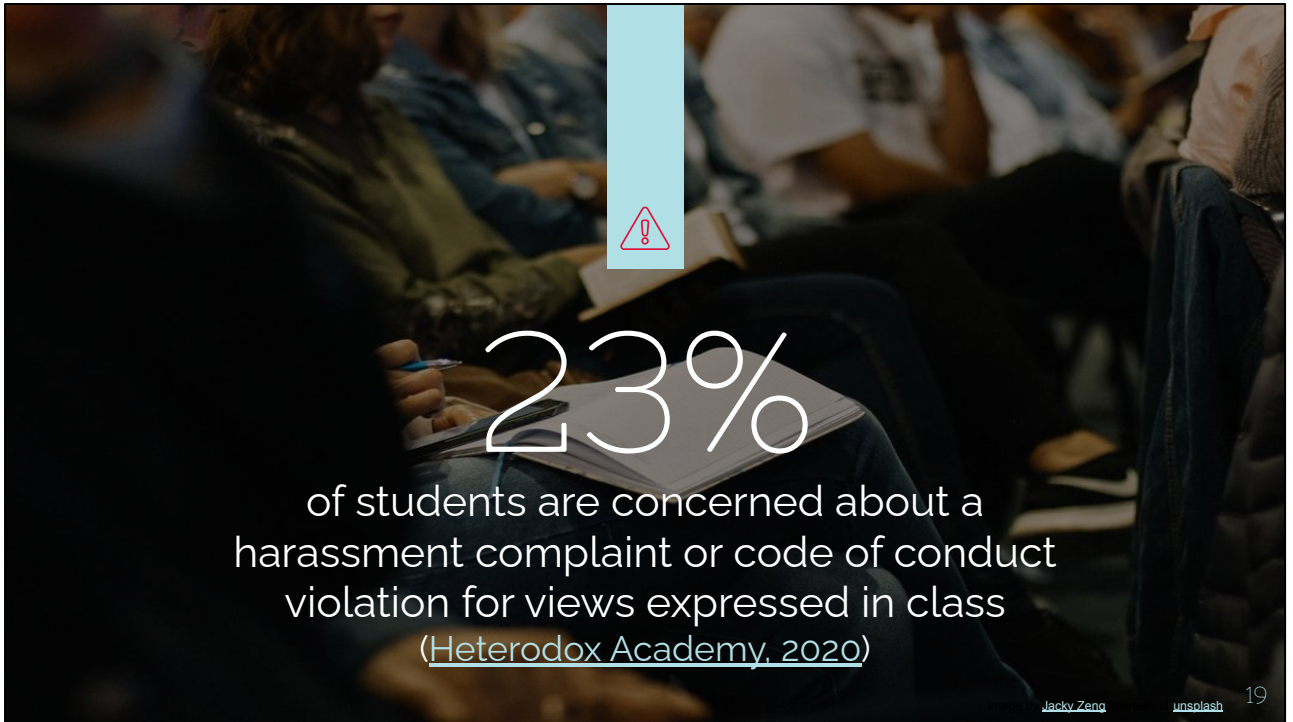
A fall 2018 [Knight Foundation / College Pulse](#) survey of more than 4,000 undergrads found that 68% “say their campus climate precludes students from expressing their true opinions,” noting that 64% “say that political discussions are more likely to occur online.” In 2020, a [Knight Foundation / Gallup](#) survey of more than 3,000 undergrads found that liberal, moderate, and conservative students are in agreement that conservative-leaning students are among the groups least able to openly express their views on campus.



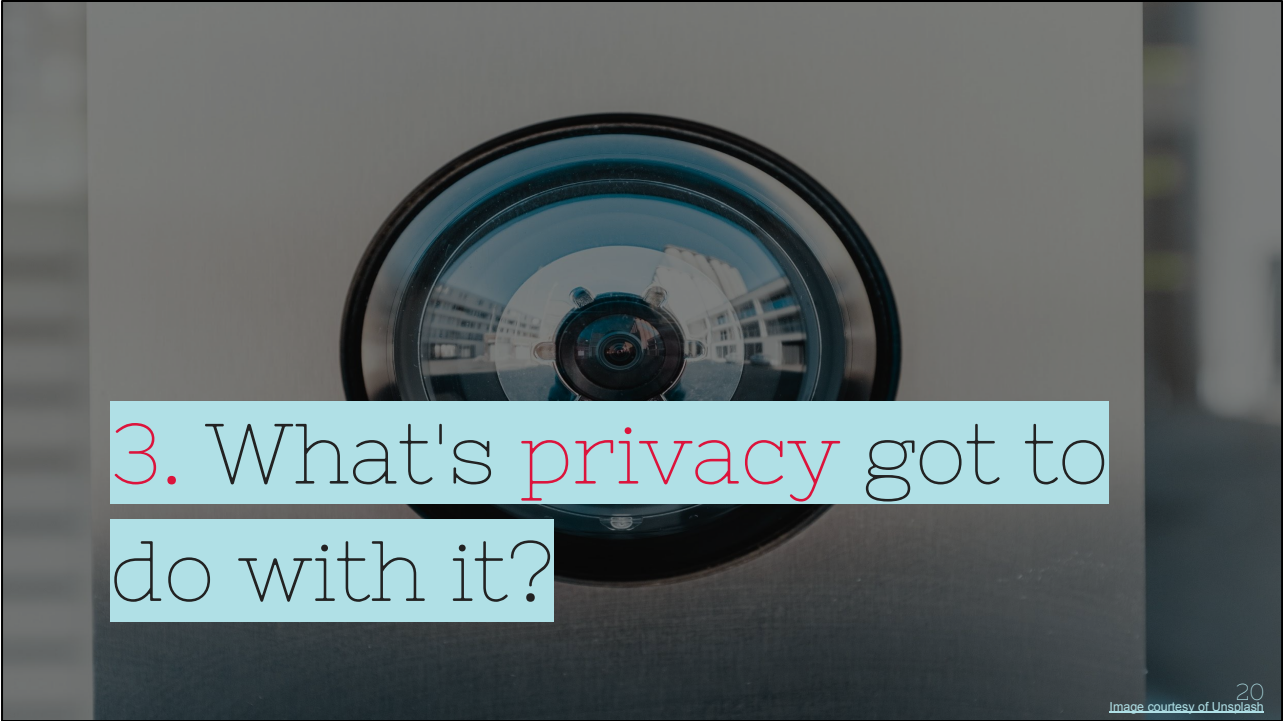
Image by [Jacky Zeng](#) courtesy of [unsplash](#)

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The most recent [Campus Expression Survey](#) administered by Heterodox Academy in Fall 2020 found that reluctance to discuss controversial issues in class increased from 2019 to 2020, and that students were primarily concerned with criticism from other students. Nearly one-third were concerned that “someone would post critical comments about [their] views on social media.”



Despite widespread institutional policies that uphold open inquiry and free expression, the Foundation for Individual Rights in Education (or [FIRE's 2021 Spotlight on Speech Codes](#)) finds that 8% of higher education institutions have speech codes, often soliciting anonymous reports based on vague standards of harm, incitement, obscenity, anti-bullying, tolerance, and bias. Relatedly, the [2020 Campus Expression Survey](#) found that nearly a quarter of student respondents reported self-censoring out of concern that “someone would file a harassment complaint or code of conduct violation.”

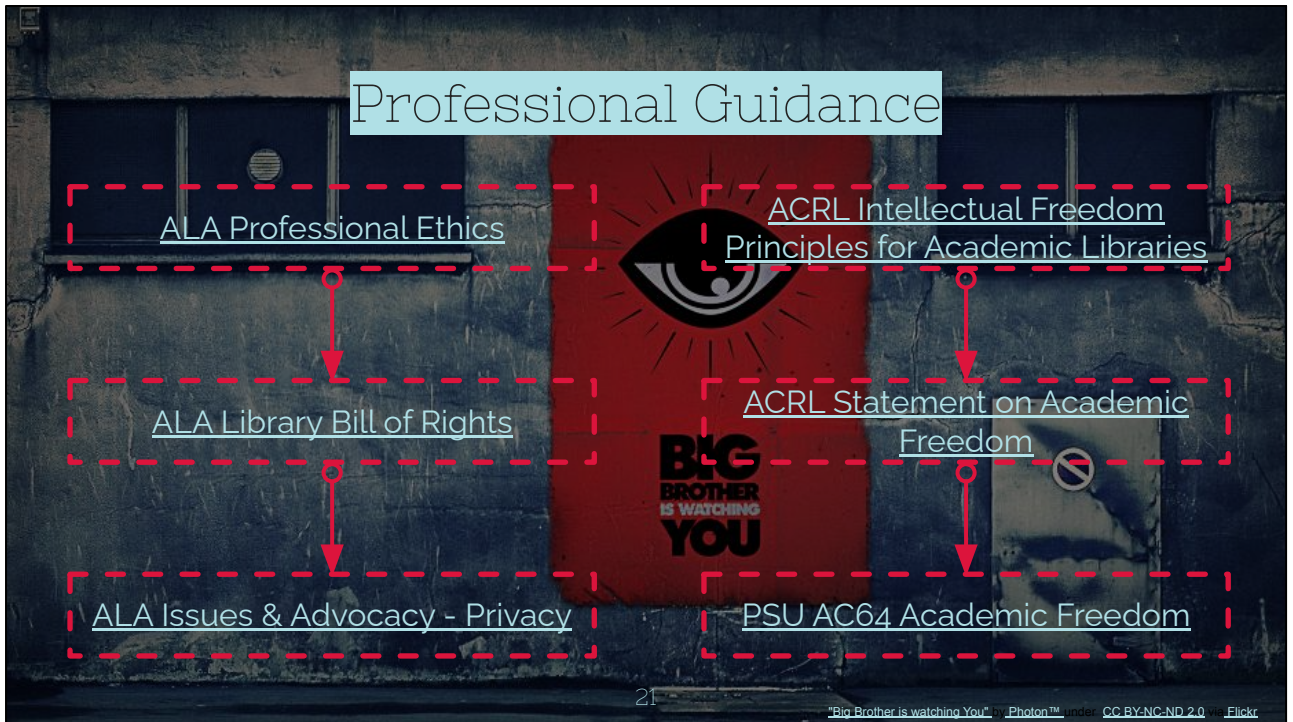
A close-up photograph of a camera lens, showing a reflection of a city street with buildings and a car. The lens is dark and circular, with a blueish tint. The background is a blurred city street.

3. What's **privacy** got to do with it?

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Image courtesy of Unsplash

So, what's privacy got to do with the chilling effect?

Professional Guidance



ALA, ACRL, and Penn State all offer clear guidance that acknowledge the importance of privacy to open inquiry, free expression, and academic freedom. In January 2019, the ALA Library Bill of Rights was amended to add [Article VII](#), which states that “...libraries should advocate for, educate about, and protect people’s privacy...”

ALA on **privacy**

“A lack of privacy in what one reads and views in the library can have a significant chilling effect upon library users’ willingness to exercise their First Amendment right to read, thereby impairing free access to ideas” ([ALA, 2017](#)).

Image by Jasmin Quavnor, courtesy of unsplash

On the subject of privacy, [ALA advises](#):

- “The right to privacy – the right to read, consider, and develop ideas and beliefs free from observation or unwanted surveillance by the government or others – is the bedrock foundation for intellectual freedom. It is essential to the exercise of free speech, free thought, and free association.”
- “Privacy is essential to free inquiry in the library because it enables library users to select, access, and consider information and ideas without fear of embarrassment, judgment, punishment, or ostracism.

[CLICK]

- “A lack of privacy in what one reads and views in the library can have a significant chilling effect upon library users’ willingness to exercise their First Amendment right to read, thereby impairing free access to ideas.”



ACRL on privacy

“The privacy of library users is and must be inviolable” (ACRL, 2000).

Relatedly, ACRL provides guidance on [intellectual freedom](#) as well as [academic freedom](#), stating:

[CLICK]

- “The privacy of library users is and must be inviolable. Policies should be in place that maintain confidentiality of library borrowing records and of other information relating to personal use of library information and services.”
- “[ACRL],... , opposes any actions that limit the free expression of ideas of librarians and faculty on campus, in the classroom, in writing, and in the public sphere, especially in the context of higher education and its traditional support for academic freedom. Further, [ACRL] opposes retaliation for the expression of those ideas. A free and vigorous exchange of ideas is integral to sustaining an environment in which teaching, learning, and research may thrive.”



PSU on privacy

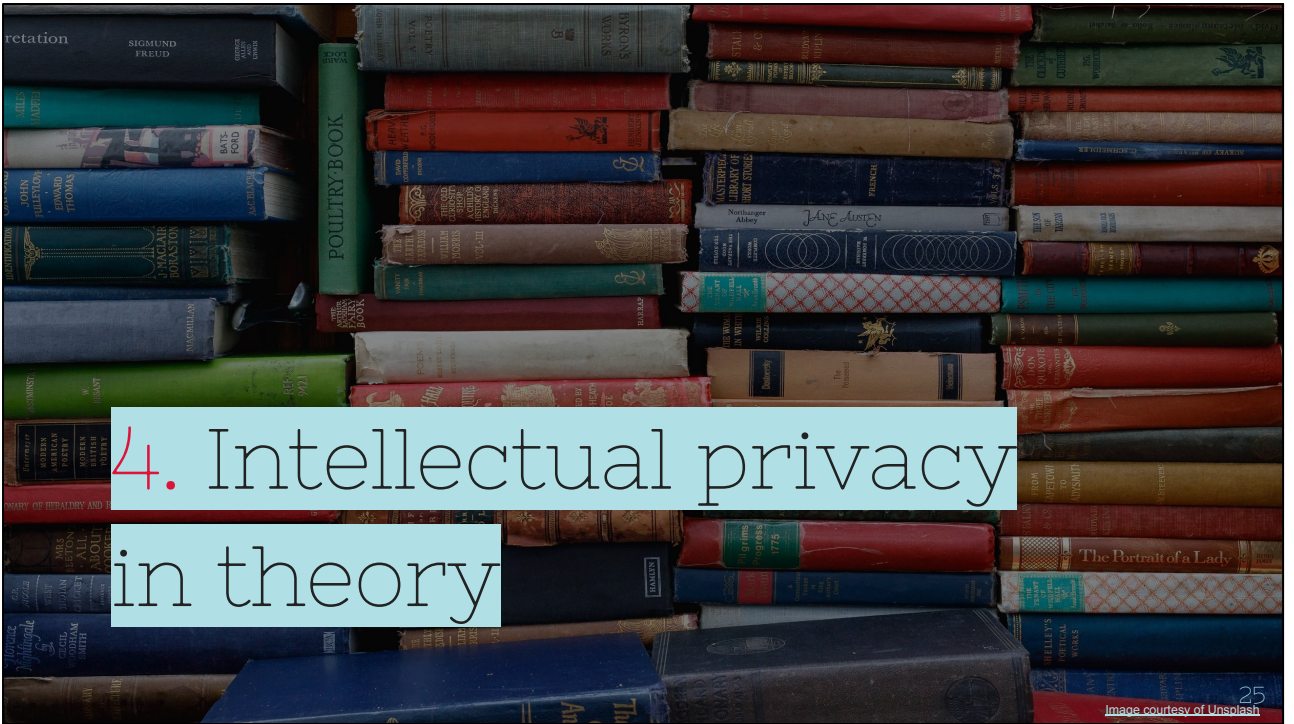
“Faculty members are responsible for respecting confidentiality and the privacy rights of others” ([PSU, 2011](#)).

Finally, [PSU policy AC64](#) draws a direct connection between the rights and responsibilities of academic freedom and respect for privacy:

- “Academic freedom thus embodies the conditions necessary for the University to fulfill its mission of creating new knowledge and of effectively communicating accumulated knowledge and understanding to students and to the community at large....

[CLICK]

- “Faculty members are responsible for respecting confidentiality and the privacy rights of others.... Faculty members are expected to educate students to think for themselves, and to facilitate access to relevant materials that they need to form their own opinions.”



Now that we've established the relationship between privacy and open inquiry, let's take a deeper dive into intellectual privacy theory.

Intellectual privacy

- © “protection from surveillance or interference when we are engaged in the processes of generating ideas” ([Richards, 2015](#), p. 5)
- © “a zone of protection that guards our ability to make up our minds freely” ([Richards, 2015](#), p. 95)



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Image courtesy of Pexels

In his book *Intellectual Privacy: Rethinking Civil Liberties for the Digital Age*, Neil Richards defines intellectual privacy as [CLICK] “protection from surveillance or interference when we are engaged in the processes of generating ideas” ([Richards, 2015](#), p. 5) and [CLICK] “a zone of protection that guards our ability to make up our minds freely” ([Richards, 2015](#), p. 95).

Panoptic sort

- © “The panoptic sort determines the extent to which individuals will be included or excluded from the flow of information about their environment” ([Gandy, 1993](#), p. 89).
- © Related theories: information asymmetries ([Richards, 2013](#)); control paradox ([Brandimarte, Acquisti, & Loewenstein, 2012](#))

More than two decades prior, Oscar Gandy warned of the panoptic sort [CLICK] - the use of modeled data to “determine[] the extent to which individuals will be included or excluded from the flow of information about their environment” ([Gandy, 1993](#), p. 89).

Richards also observed that the intellectual data market poses the risk of “small nudges away from thinking, reading, or talking about novel or dangerous ideas” ([Richards, 2015](#), 162).

[CLICK]

Related theories include information asymmetries ([Richards, 2013](#)) - the inherent power that comes from controlling knowledge about a data subject; and the control paradox ([Brandimarte, Acquisti, & Loewenstein, 2012](#)) - the observation that a perceived ability to configure privacy preferences actually entices people to share more personal information than we otherwise would, resulting in greater vulnerability from settings and tools ostensibly meant to protect us.

Chilling effect

- deterrence predicated on fear of social sanction (p. 697) or punishment that is most felt at the 'margins' of acceptable speech (Schauer, 1978, p. 689, 696-97)

The chilling effect was formally defined by Frederick Schauer as a deterrence to open inquiry and free expression predicated on the fear of social sanction or punishment that is most felt at the 'margins' of acceptable speech ([Schauer, 1978](#), pp. 689, 696-97).

Julie E. Cohen has observed that while "anonymous exploration and inquiry" are protected by traditional First Amendment chilling effect doctrine, they are increasingly threatened by technology ([Cohen, 1996](#), p. 42-43). Writing about Digital Rights Management in the late 1990s, Cohen also asserts that the very act of collecting reader data can engender a chilling effect, regardless of whether the data is actually shared ([Cohen, 1996](#), p. 68).

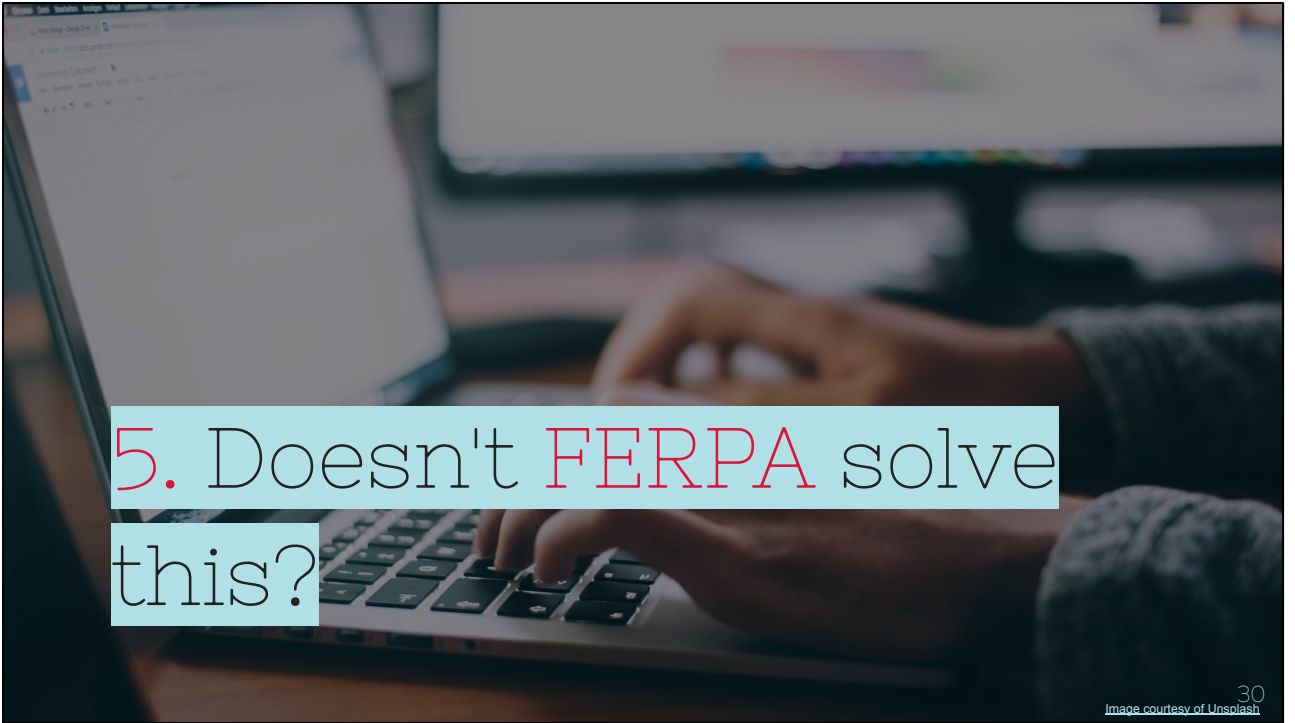
Learning impacts

“The point is not that people will not learn under conditions of no-privacy, but that they will learn differently, and that the experience of being watched will constrain, ex ante, the acceptable spectrum of belief and behavior” (Cohen, 2000, p. 1426).



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Image courtesy of Unsplash

Intellectual privacy is essential to learning as well as inquiry and expression. Cohen observed, “The point is not that people will not learn under conditions of no-privacy, but that they will learn differently, and that the experience of being watched will constrain, ex ante, the acceptable spectrum of belief and behavior.” (Cohen, 2000, p. 1426)



5. Doesn't FERPA solve this?

If our work in University Libraries is FERPA-compliant, doesn't that solve these problems?



FERPA is a regulatory framework for protecting student data to some degree, not necessarily respecting their personhood or intellectual privacy.

First, it's important to understand that FERPA contains a generous provision (or loophole!) for recognizing "school officials" ([34 CFR § 99.31](#)), including any third party to whom the institution has outsourced a function. Such "school officials" then enjoy rights to student data "redisclosure" and downstream use ([34 CFR § 99.33](#)). For our purposes, this includes companies like Google, Microsoft, and Amazon Web Services.

FERPA also lacks meaningful enforcement mechanisms, since case law established that it does not create a tort on behalf of students ([Gonzaga U. v. Doe, 2002](#); [Parks, 2017](#), p. 31).

Compliance with FERPA may also fail to fulfill libraries' ethical commitment to privacy and intellectual freedom. [ALA](#) warns that FERPA permits disclosure when library ethics would otherwise uphold privacy.

Finally, the World Privacy Forum's 2020 report, *Without Consent*, concludes that "many schools, while technically compliant, have not done enough to encourage [eligible] students ... to effectuate their FERPA opt out rights," stating, "This [FERPA] right to restrict disclosure is an essential one, but students,.. may not be aware of the

importance and profound privacy impact of this information” ([WPF, 2020](#)).



While a strong majority of university students see privacy as important, including “to develop intellectual ideas” ([Data Doubles, 2020](#)), they lack awareness of and rarely exercise FERPA privacy rights ([WPF, 2020](#))

In addition to offering minimal support for students to exercise their FERPA rights, institutions further fail to inform students why their privacy matters to both their intellectual and personal development.

The IMLS-funded [Data Doubles research team](#) found that students intuit intellectual privacy as important, but confirmed the World Privacy Forum’s research that students lack awareness of, and therefore rarely exercise, their FERPA rights.

This is important context to keep in mind when considering the [2018 Conversation with the UL Student Advisory Board](#) regarding privacy and library data usage, in which the student board agreed that “libraries have a responsibility to investigate contributions to student success” and that “related data does not warrant further confidentiality efforts beyond those employed for other educational data the university collects.”



PRIVATE

FERPA and the privacy paradox

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Image courtesy of Unsplash

Finally, we should not take student's failure to exercise FERPA rights or other privacy related behaviors as evidence that they do not care about privacy. The privacy paradox is the observation that our privacy behaviors often fail to reflect our stated privacy values. Privacy law expert Daniel Solove has declared the privacy paradox a myth arising from the logical fallacy of conflating our privacy choices in specific contexts with our general privacy values ([2020](#)).

Further, Cohen observed that people are anesthetized to the harms of privacy intrusion in an environment that rewards and reinforces disclosure and digital mediation ([Cohen, 2013](#)). It is unreasonable to expect students to exercise informed consent regarding privacy when they lack meaningful information and alternative options.

Given our commitment to privacy and intellectual freedom, shouldn't libraries be a place where people come to learn about privacy and open inquiry, and to exercise what Ruha Benjamin terms "informed refusal" ([Benjamin, 2016](#))?



6. Looking ahead

Session 3: Privacy and the Dx Workshop

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This minilecture introduced intellectual privacy, the chilling effect, and their impact on open inquiry and expression.

The final workshop session, Privacy and the Dx [digital transformation], will explore current data collection and modeling practices in higher education, and consider their implications for the teaching, learning, and knowledge-creation mission of the academy.