

Intellectual Privacy Minilecture

Introduction

This mini lecture introduces the concept of intellectual privacy as part of the spring 2021 workshop, *Why spy?: Surveillance, students and libraries*. Let's review ideas from the privacy workshop so that we can build on them. Information systems, including those we use for library work, teaching, and research, collect three types of data, consciously given, automatically monitored, and model data. 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 Eyes 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.

Outcomes for this Minilecture

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.

A Chilling Climate for Inquiry

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

The Gaze from Above: Surveillance

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, And 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 percent of respondents had refrained from conducting Internet searches or visiting websites on topics that may be considered controversial or suspicious; and 16 percent of respondents had avoided writing or speaking about a particular topic ([PEN America, 2013](#)).

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.”

“Part of what makes self-censorship so troubling is the impossibility of knowing precisely what is lost to society because of it. We will never know what books or articles may have been written that would have shaped the world's thinking on a particular topic if they are not written because potential authors are afraid that their work would invite retribution.”

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

The Gaze from Below: Sousveillance

In a broader sense, the chilling effect can occur anytime 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 percent reported avoiding certain topics in their writing due to online harassment, and 15 percent stopped publishing their writing altogether due to online harassment ([PEN America, 2017](#)).

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

The View from Campus: Reflecting Wider Trends

We might think that universities are sanctuaries for open inquiry and free expression, but they largely reflect wider trends. NPR reported that from 2016 to 2018, 250 faculty who are targeted by right-wing online campaigns for their research, teaching, or social media posts ([NPR, 2018](#); as cited in [Garber-Pearson et al., 2019](#)).

Campus chilling effects are a non-partisan 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% consider this a problem ([WGBH News, 2018](#)).

A fall 2018 Knight Foundation and College Pulse survey of more than 4000 undergrads found that 68% say their campus climate precludes students from expressing their true opinions, noting that 64 percent say that political discussions are more likely to occur online ([Knight Foundation, 2018](#)). In 2020, a Knight Foundation and Gallup survey of more than 3000 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 ([Knight Foundation, 2020](#)).

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 ([Heterodox Academy, 2020](#)).

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 the 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 ([FIRE, 2021](#)). 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.

What's Privacy Got to Do With It?

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

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 7, which states that "libraries should advocate for, educate about, and protect people's privacy" ([ALA, 2019](#)). 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. 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](#))

Relatedly, ACRL provides guidance on intellectual freedom as well as academic freedom, stating:

"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." ([ACRL, 2000](#); [2015](#))

Finally, PSU policy AC 64 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. 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." ([PSU, 2011](#))

Intellectual Privacy in Theory

Now that we've established the relationship between privacy and open inquiry, let's take a deeper dive into intellectual privacy theory. In his book, *Intellectual Privacy: Rethinking Civil Liberties for the Digital*

Age, Neil Richards defines intellectual privacy as: "protection from surveillance or interference when we are engaged in the processes of generating ideas," and "a zone of protection that guards our ability to make up our minds freely" ([Richards, 2015](#), pp. 5, 95).

More than two decades prior, Oscar Gandy warned of the panoptic sort, 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](#), p. 162).

Related theories include information asymmetries, the inherent power that comes from controlling knowledge about a data subject ([Richards, 2013](#)); and the control paradox, 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 ([Brandimarte, Acquisti, & Loewenstein, 2012](#)).

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" 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).

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).

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, including any third party to whom the institution has outsourced a function ([34 CFR § 99.31](#)). 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 ([ALA, 2019](#)).

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 rates," 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](#)).

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 ([Data Doubles, 2020](#)).

This is important context to keep in mind when considering the 2018 conversation with the University Library 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" ([PSUL, 2018](#)).

Finally, we should not take students' 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 ([Solove, 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](#))?

Looking Ahead to Session 3: Privacy and the Digital Transformation

This mini lecture 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.

About This Minilecture

Developed for Penn State University Libraries Instruction Community of Practice Spring 2021 Workshop, [Why Spy?: Surveillance, Students, and Libraries](#).

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