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Inventing Privacy: Biopolitics of Race, Gender, and Class in the 19th Century America

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The article using Michel Foucault's concept of apparatus will examine the genealogical history of privacy. Privacy as a concept has been accorded universal status in the discourse of liberal subjectivity. The article will examine how in the late nineteenth-century America, the apparatus of privacy engendered the discourse of privacy as a truth claim. Beneath the universality of privacy, there was a contested relationship between race, class, gender, and technology. Using different case studies, it will be argued that the apparatus of privacy was instrumental in constructing a white upper-class privileged discourse of privacy.

Keywords: Privacy, Apparatus, Biopolitics, Governmentality, Genealogy, Discourse, Surveillance, Power- knowledge, Race, Technology

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The arrest of a well-known scholar of African American history Professor Henry Louis Gates on 16 July 2009 on charges of misconduct raised controversy about racial policing in America. He was arrested by Sgt. James Crowley of the Cambridge Police Department for forcing open the door of his own house. Sgt. James Crowley mistakenly considered him a burglar (Goodnough, 2009). The incident was portrayed in the media as another story of police excesses, but for the African American community, it added to a long history of racial discrimination, surveillance, and violence. In the ensuing debates, the media highlighted the constitutional right of privacy enshrined in the fourth amendment that protects citizens from unreasonable searches and intrusions (Legal Information Institute, 1984). However, the racial aspect of Professor Gates belonging to the African American community outweighed the value of privacy. Judith Butler has called this culture of racial policing 'a racially saturated field of visibility' (Butler, 1993). because blackness is coded with criminality in the surveillance machinery of America. The surveillance gaze illuminated the black bodies with greater intensity compared to the white bodies. In 2013 an unarmed teenager Trayvon Martin was killed by a policeman and the policeman was acquitted by the court. The then-President Barack Obama commented that African American viewed tragic incidents through the lens of lived experiences. He recalled his personal experience when people locked their car doors out of fear while walking across the street or being followed by a salesman when he walked into the departmental store. As an African American he remained a suspect or a potential criminal deprived of privacy rights (Lewis, 2013).

Historically, there has been deep tension between surveillance and privacy when it intersects the grids of race or gender. This article will explore the relationship between the discourse of biopolitical surveillance and privacy by examining some

cases that occurred in the 19th-century America. Before delving deeper, it is important to understand how privacy has been conceptualised in various theoretical discourses.

Liberalism and Privacy

Discourses on privacy have traditionally originated from the tenets of liberal theory. In liberalism, freedom has ontological status. The subjectivity in liberal theory is endowed with natural freedom that is pre-political and pre-social. The state is artificially created through a social contract among the multitude, and the former exists to protect and preserve the liberties of liberal subjects. Liberalism also believes in foundational equality that is premised on the principle that all individuals have equal worth, regardless of their social location. Freedom and power in the liberal discourse are seen as opposites. Social spaces saturated with power result in the limitation of freedom. Hence demarcation of spaces is essential to preserve freedom. Public spaces are represented by acts of deliberation, public reasoning, citizenship, economic activity in the marketplace, etc. The realm of private spaces includes family, faith, emotions, sentiments, care, and child-rearing (Roessler, 2006, p. 696). It is within the context of family and household that the traditional notion of privacy developed.

Within liberal discourse, the concept of privacy is commonly associated with the autonomous individual subject. As defined by Alan Westin, privacy is the claim of an individual to determine what information about oneself should be known to others to protect an individual domain of life from being transgressed by the state and society (Westin, 1984). Westin identified four functions of privacy. First, privacy enhances individual autonomy. It is an important democratic principle as it insulates individuals from being manipulated by others. Second, privacy gives an avenue for emotional release which is built up by societal pressure. Third, it allows us to engage in self-evaluation – the ability to formulate and test creative and moral activities and ideas. And, fourth, privacy enables an environment in which we can share intimate information and engage in limited and protected communication (Westin, 1984, pp. 69–70). Ferdinand Schoeman argues that individuality is the foundation of values. He notes, 'Although there are many things that we regard as private, some of these things seem essentially private because they are central to us— because they define what we are emotionally, physically, cognitively, and relationally' (Schoeman, 1984). Solove views privacy as a dimension of social practice. Privacy can be understood as a form of value system that intervenes in certain social practices. Privacy serves as an intervening process that limits, blocks or impedes surveillance, which can be viewed as a political process conducted by the state. The very act of intervention draws boundaries between the private and public spheres of individual life. Privacy as a value system illuminates the boundaries to protect the individual self (Solove, 2002).

Communitarian Perspective on Privacy

The liberal discourse of privacy has come under attack from several quarters. Communitarian thinkers like Amitai Etzioni have criticised liberal notions of privacy for promoting 'possessive individualism' which turns an individual into a selfish being. He focused on the sphere of community that is based on shared public goods. He suggests that public goods are not solely created by state agencies but rather defined

by members of the community through substantive dialogical processes (Etzioni, 2000). According to Etzioni, communitarian values serve as a moral code that outlines the limits of individual behaviour. Since these values are shared by members of the community, they reduce the likelihood of deviant behaviour, thus limiting the surveillance powers of the state. Conversely, individual-centric privacy breeds social suspicion that breaks social bonds within the community. This in turn increases the surveillance power of the state because the latter becomes an intervening agency between individuals and the community. He argued that a communitarian approach maintains a balance between privacy, social good, and state surveillance (Etzioni, 2000).

Marxist view on privacy

Christian Fuchs developed a Marxist perspective on privacy by taking cues from Marx's critique of private property and its relation to privacy. Marx argued that one of the main tenets of capitalism is that individuals pursue their private interests. Private interest is a functional requirement of capitalism. Hence the capitalist class promotes private interest and its pursuit as a natural and universal attribute of mankind (Fuchs, 2011). According to Fuchs, privacy and surveillance are offshoots of modern capitalism. Privacy has utilitarian value for the capitalist and consumer class whereas surveillance is necessary for social control of the working class (Fuchs, 2011).

Feminist View on Privacy

Feminists have been ambivalent about the concept of privacy as it has evolved. Feminist political theories have critiqued the public-private divide on which privacy is premised. The main contention is that the private sphere is structured by decisions made in the public sphere, and it is often to the detriment of women (Pateman, 1998). As Martha Nussbaum notes 'history tells us that even when appeals to privacy appear to protect the interests of women (or children), we should be sceptical, and be sure to ask whose interests are advanced'(Nussbaum, 2000).

Race and Privacy

Race studies, similar to gender and class studies, have critically examined the relationship between race and privacy. Charles W. Mills highlighted the deep-rooted racial fault line, which remains hidden within the dominant paradigm of social contract theory in modern Western political thought. He has called it a contract of white people 'to restrict moral and political equality to themselves and maintain the subordination' of people of colour engendering a racial political system (Lim, 2020). As argued by Michael Omi and Howard Winant race is a 'master category' (Omi & Winant, 2015, p. 106) that shaped social formation in the United States. Historically, other axes of difference and discrimination like class and gender function on the pivot of race hence subjecting the black community to surveillance, profiling, and invasive scrutiny. Consequently, the intersection of privacy and race results in disparate impacts and outcomes for African Americans.

The apparatus of privacy

Privacy is seen as an essential and universal attribute of human subjectivity. Using Foucault's genealogical method, it will be argued that privacy as an apparatus

(Foucault, 1980a, p. 194) of power-knowledge engendered liberal subjectivity in the nineteenth century which must be protected from the surveillance gaze of the state and society.

Foucault rejects the idea of an essentialist, unencumbered and universal idea of the subject. Subjectivity is an effect of power. Power saturates social relations and is exercised, 'through networks, and individuals do not simply circulate in those networks; they are in a position to both submit to and exercise this power' (Foucault, 2003, p. 9). Apparatus, according to Foucault, is like a device that directs or controls, or regulates vectors of power. It has a strategic function at a given historical juncture regarding aligning the forces of power and the flow of knowledge. Every apparatus develops dominant forms of discourse. Foucault cites examples of prison, asylum, security, and sexuality as forms of apparatus that emerged historically to respond to particular emergencies (Foucault, 1980b, p. 195). Genealogy brings to light the strategies of power that gave rise to a particular apparatus and the struggles of resistance developed against the apparatus. It excavates the *subjugated knowledge* (Foucault, 2003, p. 7) that lies hidden beneath the hegemonic and dominant discourses (Foucault, 2002, p. 29). The genealogical investigation unearths the history of struggles, conflicts, and combats of the marginalised discourses that were colonised by dominant discourses. In the Foucauldian sense, privacy can be perceived as an apparatus of power-knowledge. The genealogical analysis of privacy will reveal how the dominant discourse of race, class, gender, and technology as a 'subterranean network and field of force' created privacy-embodied subjectivity (Rae, 2020, p. 96).

Privacy as a concept is about the gaze, illumination, and corporeal bodies. In other words, it is about making corporeal bodies visible or invisible to the gaze of the state or society. The discourse of privacy is a product of complex entanglement with other processes like state formation, the emergence of the modern economy, the development of the modern family, puritan culture, technological innovation, printing technology, town planning, medical science, and bureaucratic rationality (Foucault, 2003, pp. 230–231).

The article will examine how in the late 19th century America, the apparatus of privacy engendered the idea of privacy as a truth claim. Beneath the universality of privacy, there was a contested relationship between power, knowledge, and subjectivity. It will be argued that race, class, and gender aspects were deeply embedded in the discourse of privacy in 19th-century America.

Inventing the doctrine of privacy

The modern-day idea of privacy is generally traced back to Samuel D. Warren and Louis Brandeis's article, 'Right to Privacy' published in *Harvard Law Review* in 1890. They argued that the common law has given protection to tangible aspects of life, like personal property, the right against bodily injury, torts, and libel laws. Further, they said that with the advancement of civilisation, the domain of law has to expand to meet the new challenges to personal liberty that can harm the intangible aspects of human personality. In their view, exigencies of time demand that human thoughts, emotions, and sensations should be given legal recognition as these aspects were threatened by technological innovations like cameras, printing, telephones, etc., and the resultant mass marketing techniques that were developing in the 19th century (Warren & Brandeis, 1890, p. 195). Warren and Brandeis feared the rising 'yellow'

journalism culture that was threatening the social life of the elite class in America. They pointed to the glaring absence of legal remedies available in matters of violation of privacy. The existing libel and slander laws can be availed only when the individual is participating in the social domain in his capacity and his reputation is harmed due to the publication of false information. According to them, libel laws can protect only material harm and not psychological harm, which is manifested in the form of feelings and sentiments. The psychological aspects, according to them, fall under the domain of privacy rights. Warren and Brandeis used the term 'inviolate personality' to refer to all psychological aspects of human personality that cannot be traded, purchased, and rented like traditional property (Warren & Brandeis, 1890, p. 196). The domain of privacy included all personal aspects like diaries, letters, memoirs, portraits, and photographs that cannot be published without the owner's explicit consent. Implicit in their argument about privacy, is the subtle difference between privacy and solitude. Solitude is about retreating from social life and making oneself invisible to society. On the other hand, privacy is about owning all aspects of personality necessary to live a decent and dignified life and having control over all elements of human personality. This right is reciprocal in the sense that society has to recognise the controlling claim of the individual (Glancy, 1979, pp. 26–27).

The liberal understanding of privacy as a universal doctrine has been critiqued from the Foucaldian perspective. The doctrine of privacy was an apparatus performing a strategic function of responding to the socio, cultural and technological changes affecting America. The immediate trigger for the article was titillating news coverage on the pages of *The Saturday Evening Gazette*. The intimate details of Warren's family in the media had angered him. Warren belonged to an affluent family in Boston. Further, his marriage to the daughter of Senator Thomas Francis Bayard made him the target of the sensationalist press (Glancy, 1979, p. 1).

Apart from personal reasons, other developments at that time shaped the discourse of privacy. By 1890, America's east coast became heavily populated due to rising urbanisation and post-civil war reconstruction effects. Approximately eight million people immigrated to America and this congested the urban spaces even more. New technologies like telephone, telegraphy, cameras, and sound recorders were bringing social life under surveillance (Glancy, 1979, pp. 7–8). They were concerned about the penetrating gaze of society into the intimate sphere of the family and hence the need to protect its honour. However, the gendered and racial conception of family is underwritten in the works of Warren and Brandeis, and it will be explored in greater detail below. As it has been argued above that the private sphere of family or sentimental family is the result of a historical process that developed in the 17th and 18th centuries. Warren and Brandeis were primarily articulating the concerns of middle-class white male-centric families in America whose privacy was perceived to be threatened by new technologies (Richardson, 2015, p. 42).

Privacy and family violence

The 19th-century privacy discourse not only privileged white males but also reinforced patriarchal family values. John Adams, an important member of the Constituent Assembly who later became the President of America, considered the private family as the springboard of national morality (Bloch, 2007, p. 225). The American Constitution made private property a natural right by making it immune from state action. The natural rights recognised by the constitution did not apply to

the slaves and women. Slaves were specifically counted as three-fifths of all other people (Goldwin, 1987). There was no separate term to describe women, so they were counted in phrases like the 'whole number of free persons' and 'all other persons'(Goldwin, 1987).

Slaves and women were explicitly denied voting rights by the Constitution. The Constitution codified the prevalent social norms of subordinating women and slaves. The unequal distributions of rights in American society were maintained through the institution of family that gave a privileged role to white males. Women after marriage become part of the family property along with children, servants and slaves. The privacy right discourse in the 19th century America was centred on white male who was considered the custodian of the family (Bloch, 2007, p. 226). The American laws recognised a man's authority over his wife, and she was obliged to obey him. Further, domestic violence was inscribed in the family laws. For instance, the eminent jurist William Blackstone granted the husband power to give his wife moderate correction for her misbehaviour (Siegel, 1996, p. 2128).

During the antebellum era vast literature flourished that questioned the morality and efficacy of corporal punishment inflicted on prisoners, sailors, slaves, women, etc. The temperance movement and feminist movement that emerged now questioned domestic violence. The former blamed alcohol for domestic violence, whereas feminists blamed power relations for the same (Siegel, 1996, p. 2128). The American courts began to recognise the rights of women to claim tort damages in matters of marital violence. However, the judicial interpretation often diluted the claims of the victim under the mask of privacy, as is evident in the Rhodes case (1868). In this case, the husband accused of marital violence was exonerated on the grounds of beating his wife with a stick thinner than his thumb size (the rule of thumb allowed the wife to beat with a stick thinner than his husband's thumb size). The court stated that laws of the state did not allow wife beating, but at the same time, the court refrained from interfering in such cases of domestic violence. Judicial rationality considered domestic violence a trivial matter, which should be best left to the family government. The court considered families as autonomous units having their laws. By bringing family trifles to the court, the former exposes itself to public disgrace and criticism. The court referred to middle-class families as abodes of morality and purity whose seclusion must be protected (*STATE v. A. B. RHODES*, 1868). The court judges belonging to the white middle class believed that protecting the privacy of middle-class homes is more important than wife beating. The aggrieved wife by filing cases against her husband harmed the reputation of the family by bringing it to the public gaze. The court applied privacy to the household and not to the individual. Gender and class bias is implicit in the construction of privacy (Richardson, 2016, p. 35). The matter gets even more complicated when, as will be examined below, race is added to the privacy discourse.

Privacy, slavery and family violence

The Fulgam v. State (1871) case of gender violence resonated with privacy debates on a different tangent. In this case, a man was accused of domestic violence and charged with assault and battery. The court argued 'the wife is not to be considered as the husband's slave…the wife is entitled to the same protection of the law that the husband can invoke for himself'(Siegel, 1996, p. 2124). The judgment appears to be more progressive and liberal than the Rhodes verdict, explained earlier. But a careful

examination reveals another dimension of liberal rationality in the court's judgement. In Fulgam's case, both husband and wife were former slaves and the racial discourse was inscribed in the judgement. The question was whether the court's indictment of the abusive husband was aimed at freeing the ex-slave woman from the domestic slavery of her husband, or about highlighting the culture of violence prevalent among African families. Situating the case in the racial discourse of the post-civil War era points to the complex intersection of race, gender and privacy. During the reconstruction era, the discourse of marital violence shifted from domestic issues to law and order problems. Like women activists, the Klu Klux Klan took an interest in the issue. The latter was, however, motivated by their desire to debase black culture. The American Bar Association suggested whipping at the lamppost as a punishment for wife beaters. This brutal method was used to punish the slaves. The Medico-Legal Society in 1899 compared wife beaters to the vicious classes which must be brought under surveillance. The medical and criminal sciences and experts created a racialised discourse of black men as inherently violent human beings. Statistical figures were used to prove that blacks are dangerous classes. Louisiana and South Carolina called for the disenfranchisement of blacks (Siegel, 1996, p. 2126).

The above two cases, Rhodes and Fulgam, had domestic violence as a common theme, but the Rhode case moved in the direction of privacy while the latter towards surveillance. Class, gender and race were implicated in the discourse of privacy and surveillance. Both privacy and surveillance are power-knowledge discursive practices encapsulating human bodies through governmental rationalities. In Rhodes's case privacy of family was used to protect the privileges of the white man by ignoring the plight of the white woman whereas in Fulgam's case by denying privacy to the black man the court deprived him of subjectivity to the head of the 'family government', a term the court extolled in Rhodes case.

Rhodes and Fulgam's cases raise the issue of social construction. Social identities are not fixed or biologically determined but are rather complex social constructs that shape experiences, opportunities, and societal hierarchies. Race, as a social construct based on physical attributes and ancestral backgrounds, privileges certain human groups while marginalising others. Similarly, gender roles and norms are deeply ingrained in society and shape our understanding of masculinity and femininity. These gender constructs contribute to the creation of gender inequalities and exploitation. In the same vein, class determines one's access to resources, opportunities, and social mobility. Social class is not solely about economic status; it also encompasses cultural capital, and social networks. Recognising the interplay and intersections of race, class, and gender is vital to understand the deployment of surveillance mechanisms and privacy discourses in American society.

Race, technology, capitalism and privacy

Technology and capitalism played an influential role in shaping the contours of privacy in the 19th century. This can be seen clearly in Roberson v. Rochester Folding Box Company case in 1902. A white middle-class woman, Abigail Roberson's photographic portrait was sold by a photographer to a company which used her image to market a pre-packaged commercial flour mix. Roberson's claim of violation of privacy was overturned by the New York State Court of Appeals on technical grounds. It argued that there was no existing statute or case law on privacy. In the light of Warren and Brandeis' article and growing public outcry over the Abigail

Roberson issue, the New York state recognised the right to privacy by enacting *The New York Privacy Statute 1903* (Osucha, 2016, p. 69). In contrast to the outcry over the Abigail Roberson case, there was no criticism over the Aunt Jemima issue. A decade earlier in 1890 a pancake mix product became a commercial hit in America. The product was sold with a trademark image of Aunt Jemima, a fictional figure who resembled a plantation 'mammy' signifying the ethos of domesticity and servility. The fictional image was sold so successfully that many believed Jemima was a real woman (Osucha, 2016, p. 87). The company used another ingenious trick to commercialise its product. They used a former slave Nancy Green as a spokesperson for the fictional Aunt Jemima (*The Sunday Morning Star*, 1923). However, the use of Nancy Green to represent the fictional character of Aunt Jemima never figured in the debates about privacy prevailing at the end of 19th century America. The racialised narrative of privacy was assuming that white bodies have subjectivity, whereas black bodies are commodified products (Richardson, 2016, p. 44). In the age of digital technology, black bodies are often subjected to symbolic violence. Black women have become targets of mimetic surveillance. Internet memes, though humorous, are loaded with subtle racism. In the context of black women mimetic surveillance uses images, pictures, or cartoons of historically marginalised communities without consent to incite humour. However, the discourse intensifies prejudices towards the black community and reinforces white domination (Armand, 2022).

Race, class, privacy and Crime

While Warren and Brandeis disparaged camera technology and commercial culture (yellow journalism) for transgressing privacy, it is important to understand how photographic technology, commercial capitalism, race and class began to reconfigure the public/private spheres. Since the 17th century portraiture (painted form) became a signifier of class representation among the bourgeoisie class and these portraits were only for personal consumption. The invention of photography in the 19th century alongside the growth of yellow journalism had effects on the social hierarchies, at least at the level of visual culture. The bourgeoisie had the privilege of secluding their family and personal life from the rest of society. On the other hand, photographic images from mug shot cameras were extensively used in medical and criminal discourses. The bodies of the poor, criminals and slaves became representational images of surveillance practices by state agencies and disciplinary sciences. Thus, portrait culture for the bourgeoisie had 'honorific' values while mass photography due to its origin in biopolitical surveillance had a 'repressive' function (Sekula, 1986, p. 6). With the emergence of Kodak camera technology and commercial culture towards the end of the 19th century, photographic images became a commodity of mass consumption. However, for the bourgeoisie the intrusion of commercial photography into the inner precincts of their family was denigrating to their social status and hence they clamoured for privacy. The privacy discourse, mostly propagated by upper-class males, became a protective tool to safeguard its class status (Osucha, 2016, p. 78). In the 21st century mug shots are replaced by digital technology in the field of law enforcement. These technologies are embedded in the discriminatory legal practices that have historically targeted the black community. Face recognition technologies are using algorithms that systematically criminalise the black community (SITNFlash, 2020).

Conclusion

The cases discussed above show how surveillance and privacy have differential impacts on corporeal bodies. In the 19th century America theoretical debate on privacy was framed through the ideology of liberalism, however in practice, it was implemented within the meshes of family laws, racial inequality and gender relations. The 'inviolate personality' referred to by Warren and Brandeis deserving privacy protection was a privilege of the white upper-class male subjectivity. The white female was denied privacy protection as argued in the Rhodes case because she was treated as a piece of property owned by her husband. The judicial discourse delimited the surveillance gaze of the state from breaching the walls of the white upper-class family but legitimised the subjection of women to the patriarchal gaze of their husbands. The Fulgam case showed how the black body's subjection to societal and state surveillance was naturalised. The Abigail Roberson and Aunt Jemima cases further highlighted how commercial and technological intervention with white and black bodies produces differential outcomes on the continuum of privacy and surveillance. The privacy discourse developed in the 19th-century America was deeply embedded in racial and gendered relationships. These embodied subjectivities were already shaped by the surveillance practices that distributed the corporeal bodies along the racial and gender hierarchies. Even in the 21st century, the racially saturated surveillance discourse continues to frame black bodies as inferior or potential criminals. The construction of Professor Gates's corporeal body was not merely an issue of police excess, but the outcome of pathologisation of vision.

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