The Bankruptcy of Liberalism and Conservatism

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This article argues that the frequently employed distinction between the public and the private realms is becoming increasingly obsolete because the two realms are intertwined, move in tandem, and seem to be codetermined. It follows that many of the statements most commonly made in public discourse about the government and the market, or the state and individual rights, must be reexamined. Such a reexamination is warranted because if it is true that the two realms are driven by the same historical forces—blurring the boundaries and making them prone to moving in unison—it becomes increasingly difficult to assume that one realm is either the main benefactor or the main cause of harm inflicted on the other realm. This observation challenges those who blame the government for interfering in the marketplace and damaging the economy, or for running a surveillance state that undermines privacy and other individual rights, as well as those who see the government as protecting the people from exploitation by private corporations and banks, or as the main protector of the rights of consumers, workers, minorities, and the poor.

My main aim is at public discourse. As my colleagues correctly point out, social science has long established that the public/private distinction is
much less clear and sharp than public discourse about political and social matters takes for granted. However, one should note that there are segments of social science that also rely heavily on this distinction. For instance, major segments of neoclassical economics, the dominant school of economics in the United States, regularly draw a strong line between market forces (those of supply and demand) and government actions (for example, regulations). The same holds true for major segments of jurisprudence. Thus, the Bill of Rights is typically viewed as protecting citizens from the government, but not from private actors, for instance, corporate ones. And not all political scientists and sociologists have fully taken into account the significance of high interpenetration of the two realms.

The divide that these competing public philosophies highlight is between public and private. “Over the course of decades,” notes Andrew Stark, a political scientist, “commentators have offered scores of master narratives to interpret American political conflict. None is more popular than the idea that, in one way or another, political controversy in America consists of an unfolding series of struggles between the values of the public and the private realms.” Law professors Alan Freeman and Elizabeth Mensch observe that “nothing is more central to our experience in American culture than the split between public and private. It is the premise which lies at the foundation of American legal thought, and it shapes the way in which we relate to each other in our daily lives. We consistently take for granted that there is both a public realm and a private realm.”

While social scientists have long observed that the public–private distinction is much less productive than public discourse simply assumes, I attempt to show below that since the advent of cyberspace, the distinction has become even less fruitful.

My preceding claims are so far-reaching that they almost collapse under the weight of their own audacity. If valid, they have considerable implications for the public philosophies, ideologies, and public policy debates that dominate our public discourse, as well as major segments of social science. On one side are the public philosophies of libertarianism, civil libertarianism, laissez-faire conservatism, and right-wing populism, which distrust the government and extol the private realm. On the other side are the philosophies of social liberalism, social democracy, socialism,

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and progressive populism, which fear unrestrained market forces and cast the government in a much more positive light. These conflicting viewpoints are so familiar—they have played a key role in public discourse for at least 200 years—that they need no elaboration here. They are often captured in evocative words and phrases such as *Big Brother* and *Wall Street*. In earlier ages, these phrases included *the Bosses*, *the Trusts*, *Tammany Hall*, *the Establishment*, and *the Invisible Hand*. They are still echoed in sound bites such as “that government which governs best governs least” and “government, even in its best state, is but a necessary evil.”

In the following pages, I present four case studies that seek to go beyond providing more and recent evidence that the assumption that the private and the public realms can be clearly distinguished is an erroneous one. And that the blurring of the realms has increased since the advent of cyberspace. They seek to show that it is a mistake to assume that the forces that drive societal change are mainly in one realm and that these drive the other realm. Forces in both sectors combine, and both are affected by forces that are located elsewhere, arguably within the civil society. I present first one case study to illustrate the key claims of this article. I then turn to matters of definition, before three other case studies are presented.

**CASE STUDY I: THE RISE OF A NATIONAL (PUBLIC–PRIVATE) PERSONAL IDENTIFIER**

Social Security numbers (SSNs) were widely used in both the public and private realms long before the cyber age, and they contributed to efficiency and raised privacy concerns from their inception. We shall see shortly, however, that they acquired a much greater import in both realms after digitization.

The creation of SSNs in 1936 resulted from the Social Security Act of 1935, which authorized the Social Security Administration to establish a record-keeping system to track employees’ earnings and eligibility for social security benefits. Prior to the creation of SSNs, other tracking methods were envisioned, including names and even fingerprints, but numbers were preferred. Soon SSNs were assigned to virtually all Americans and most legal residents.³

From the outset, the public was concerned about privacy and confidentiality issues. “The Social Security Board issued releases at various times assuring the public that the information on the application would be

kept confidential, with access limited to government employees for whom job duties under the Social Security Act required it. In June 1937, the Social Security Board issued a regulation to this effect. In short, the SSN was initially meant to be a tracking device used only in the public realm—and within that realm, only for very limited and closely regulated purposes.

The expansion of SSN use in the public realm became apparent in 1943 when an executive order mandated that all federal agencies exclusively use the SSN to set up new identification systems for individuals (though it was not until the 1960s that Federal agencies outside the Social Security Administration context adopted SSNs as general government identifiers). In 1962, the IRS began to use the SSN as a taxpayer identification number. SSNs came to be employed by other federal programs, including Medicaid, food stamps, welfare programs, and child support programs. The Commercial Motor Vehicle Safety Act of 1986 required states to collect SSNs for use in a nationwide database of drivers’ license information. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 provides employers with a voluntary system to verify the validity of employees’ SSNs. The 2001 USA PATRIOT Act requires financial institutions to collect the SSNs of American citizens and legal residents. In short, in the public sector SSNs became ubiquitous though federal laws continued to restrict the disclosure of SSNs for purposes unrelated to the specific functions of the federal agencies using them.

The private sector found SSNs to be highly useful for verifying identities and matching records for management purposes, keeping records on customer history, and exchanging data with other organizations. This was because other forms of identification, such as names, are often not unique to individuals, and if distinct numbers are assigned to various individual records, data exchanges among corporations become cumbersome and

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4Ibid., p. 60
5Ibid.
costly. Credit bureaus maintain information on 90 percent of the American adult population using individuals’ SSNs, information that is “freely sold and traded, virtually without legal limitations.”  

Banks employ these bureaus to investigate customer history and to assess the likelihood that an individual will repay loans. Health care providers and insurers use SSNs to track patient care across multiple providers.

Digitization made the collection, processing, and analysis of information much more efficient and productive. Although the differences between the paper world and the computerized world are very well known, they are briefly listed here because it is difficult to express the magnitude of the change in any other way. (Comparing efficiency before and after digitization is akin to comparing the speed of a car to the speed of light). Law enforcement, national security, medical care, research, and commerce were all extremely hampered as long they had to rely on paper records. Thus, information about crime used to be kept in local police ledgers, which made it next to impossible to determine whether the same suspect or same modus operandi or the same associates found in one crime may have been also involved in others. Information about health care, still often kept in paper files in the offices of physicians, makes review and analysis across patients and offices extremely challenging. Combining two, let alone more, bodies of data about the same populations was very costly and slow before digitization.

While all this is generally known, it is important to note that none of the enormous increases in efficiency and productivity of digitization could be achieved without the introduction of an effective way to identify people across databases, accounting systems, and records, both private and public. SSNs became the major way in which this identification is carried out in both realms.

This case study illustrates—albeit on matters of limited scope—that the difference between the public and the private realms is much smaller than is often assumed in public discourse and by major segments of social science—and that since the advent of cyberspace, this difference has been further diminished. Both realms came to rely on a nearly universal tracking device to identify people, keep records on them, locate them, and correlate

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information about one facet of their lives with others. And the tracking device is one and the same in both realms. I use the term “intertwined” to refer to such conversions and the resulting links between the two realms.

Although the SSN was initially introduced by the government for its own use, over the decades that followed, the government came to require some parts of the private sector to use SSNs (for instance, to verify the immigration status of prospective employees, to prevent terrorists and drug dealers from using banks, and to prevent financial institutions from laundering money). At the same time, major forces in the private sector promoted the use of the same number for their purposes. From the private sector’s viewpoint, if the number did not exist, it would have had to be invented—because of the considerable ways in which a multi purpose almost universal tracking device enhances profit making. Thus, although the government was the first to introduce the national identifier and to promote its use, private sector forces promoted it strongly for their own reasons. Moreover, each use by one realm fed into the use by the other. And both realms moved in tandem in the same direction: to much expand the use of SSNs.

The same tendency toward moving in tandem is revealed in response to new concerns about identity theft and old concerns about privacy. Such concerns led both realms to introduce some (albeit limited) curbs on the use of SSNs. States deleted SSNs from drivers’ licenses. The 1999 Gramm–Leach–Bliley Act imposed restrictions on the ability of financial institutions to disclose non-public personal information, including SSNs, to nonaffiliated third parties. In the private realm, colleges and investment houses moved to allow applicants to use identifiers other than SSNs. Still, for those concerned about violations of privacy and anonymity emanating from the use of SSNs—concerns that, historically, were mainly focused on the government, as “Big Brother,” the founder of the surveillance state—the intertwining of the realms points to a need for reconsideration. A large number of profit-making corporations currently track Americans by the use of SSNs in various ways, including keeping detailed and intimate dossiers on them. And there seems to be no way to reverse course without simultaneously limiting the usage of SSNs in both realms. I will introduce more case studies before discussing which forces are now driving both realms to curb the use of SSNs and protect privacy from both Big Brother and his corporate brethren.

DEFINITIONS AND BACKGROUND
Now that the subject at hand has been illustrated, I turn to matters of definitions and introduce essential qualifications of the main thesis. By
“public philosophy” I mean those values, ideologies, and worldviews that undergird the wider (well beyond intra academic) social and political discourse. I use this term from here on to include the ideologies and rationales used by public leaders and elected officials to support various public policies and to legitimate court decisions. The term also refers to public understanding of what the Constitution, and more generally the law, means. These are not to be equated with academic bodies of thought that often carry the same name, such as libertarianism and social liberalism; these academic texts tend to be much more nuanced, qualified, and varied.

The terms “private” and “public” have many meanings and definitions. For instance, there are those who treat not-for-profit institutions (of which there are hundreds of thousands in the United States alone) as public entities, and others who treat them as private ones. According to historian William J. Novak, “The most compelling analyses of American power have always refused to split the problem along a single either–or, public–private binary (for example, the people vs. the interests; public good vs. private right; the state vs. the individual; regulation vs. the market). Instead, realistic and pragmatic approaches to American state development emphasize the interpenetration of public and private spheres—the convergence of public and private authority in everyday policymaking.” 12

Elisabeth S. Clemens, who writes about a private/public “tangle,” sees it as “a misrecognition of public services as private...publicly subsidized benefits are understood as privacy owned and privately earned.” 13

For the purposes at hand, I follow a common practice in public discourse that uses “public” more or less synonymously with governmental and “private” to refer to all the rest.

To support the thesis that the public and private realms are increasingly intertwined, I will attempt to show that developments in one realm are often and increasingly paralleled or closely followed by changes in the other. I cannot stress enough that the thesis is not that the two realms are becoming indistinguishable, but merely that the walls that were presumed to separate them—which were never nearly as tall as the dominant public philosophies assume—have already been significantly breached and have been in the process of being further scaled down since the advent of the cyber age. In other words, there is considerable “slack” in the sense that

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developments in one realm can take place to considerable extent without parallel developments in the other. However, such developments are limited compared to those that are co-joined and co-vary and the extent of such “slack” is declining.

Among the many scholars who have written on related subjects, five stand out. Grant McConnell’s position differs from the one laid out here in that he did not view the changes in the private and public sectors as inclined to move in tandem. On the contrary, he held that the weaker and more dispersed public power becomes, the stronger and more centralized private power becomes. E.E. Schattschneider saw a parallel between private and public conflicts. However, he held that these conflicts originate in the private realm and studied the conditions under which they become public. C. Wright Mills did see a convergence of political (public) and economic (private) power, which could lead the two power elites to function as one, a thesis also reflected in the term “military-industrial complex.” For Theodore Lowi and Mancur Olson, interest groups bridged the two realms, and could be viewed as a force that moves them in tandem. Though some of these writings, in particular those by C. Wright Mills, gained currency outside academic circles, public discourse is very often still conducted as if the two realms are distinct and one largely drives the other. One merely has to point to the Tea Party and Paul Ryan to note how popular the assumption about the divide is.

Critics may argue that references to public philosophies are actually references to “elite talk,” that the public’s thinking is actually more nuanced. One way this claim is supported is by pointing out that the majority of Americans have, for decades, opposed the expansion of the government (or have favored scaling it back) while also demanding the delivery of more government services (or at least insisting that they not be scaled back). Hence, Americans are said to be philosophically conservative (meaning laissez-faire conservative) and operationally liberal. This division was well captured in the often-quoted demands by opponents of the 2010 health care law that the government stay out of “their” Medicare. (Adam

Sheingate showed that this inability to see the proper role of the state extends well beyond Medicare.\textsuperscript{20} However, this complexity does not contradict the thesis at hand. Both positions view one realm as the source of good and the other as threatening, rather than treating them as intertwined and asking: what is the locus and nature of the forces that propel history, if they are not found in one realm or the other?

The following discussion uses the term “propel” rather than “cause” because the latter term raises methodological questions that need not be tackled here. The observation that the two realms are increasingly intertwined and tend to move in tandem suffices to support the thesis that the sharp divide between the two realms has lost much of its explanatory power. However, this development could be due to forces in both realms that work on each other and supplement each other, pushing in the same direction (as we have seen so far in the brief study of Social Security numbers), like chemical changes of both sides of the same coin. However, to support the thesis that the main locus of the powers that propel developments in both realms is not located in either realm, as is so often assumed, to show that the realms are co-determined, I need to show that there is another force, located elsewhere, that drives changes in both the public and private realms, that there are extraneous, independent ones (to use the language of social science). I turn to this part of my argument in the last segment of this essay. First, I seek to support the thesis that the two realms are intertwined and move largely in tandem.

No attempt is made to analyze in any depth the case studies that follow. They are merely introduced to support the key thesis at hand. All are drawn from American society; applying the same analysis to other societies would require a separate treatment.

**CASE STUDY II: PRIVACY—BIG BROTHER AND HIS CORPORATE BRETHREN**

In 2010, the administration of Barack Obama began seeking an update to the 1994 Communications Assistance to Law Enforcement Act. One new provision would bring new forms of Internet communications under the scope of the law, allowing the government to require services like Skype and Facebook to maintain the capacity to execute a wiretap order.\textsuperscript{21} Another provision would ensure that upgrades to phone and broadband networks would not diminish the government’s ability to conduct wiretaps.\textsuperscript{22}


Privacy advocates have opposed both proposals, as they have numerous previous measures that have been suggested to enhance national security. Kevin Bankston of the Electronic Frontier Foundation called the first proposal “a drastic anti-privacy, anti-security, anti-innovation solution in search of a problem.”\(^2\) Christopher Calabrese, legislative counsel for the American Civil Liberties Union, argued that “under the guise of a technical fix, the government looks to be taking one more step toward conducting easy dragnet collection of Americans’ most private communications.”\(^3\)

The reactions of privacy advocates to these proposals—along with their reactions to many other such measures—show that they view the government as a major threat to a major element of the private realm, that of privacy. More generally, individual rights are typically considered first and foremost as checks on the power of the government, protecting individual rights from encroachment by the state, not by private actors such as corporations.

Following the development of the Internet, though, major violations of privacy are the work of private actors, mainly corporations. (We shall discuss shortly whether these violations are more or less serious than those carried about by the government.) There are two kinds of corporations that keep track of what Internet users buy, read, or visit; whom they call, e-mail, befriend, or date; what they watch on television, how they vote, and much else.\(^4\) Some corporations merely track users’ activity on their site as part of their regular business, recording purchases and viewed products to better target their advertisements to particular customers. This is true for many thousands of corporations, including nearly every major online retailer from Amazon to Zappos. Other corporations make shadowing Internet users, assembling very detailed dossiers on them, and selling the use of such dossiers their main line of business. In 2005, just one such company—Choicepoint—had records on over 220 million people.\(^5\) As of 2003, another such company, Acxiom, had records on at least 176 million.\(^6\) According to law professor Christopher Slobogin, such corporations offer clients information about “any of us,” including “basic demographic information, income, net worth, real property holdings, social security


number, current and previous addresses, phone numbers and fax numbers, names of neighbors, driver records, license plate and vehicle identification numbers, bankruptcy and debtor filings, employment, business and criminal records, bank account balances and activity, stock purchases, and credit card activity.”

New technologies are expanding this practice. Cell phone companies offer a service by which their customers can be tracked—and cannot refuse the tracking. Computer-savvy users do not even need the assistance of the cell phone company: if they have the target’s cell phone number, they can trace them without the service provider’s help. This capability has been used by stalkers to find out where their victims are located.

Other new violations of privacy arise out of the rapidly changing nature of “cookies”—the tools which have long been used by Websites to track Internet behavior. Vigilant Internet users were once able to clear cookies from their computer. However, this is changing as the Internet’s coding language is upgraded to HTML5. The new language can provide dossier builders with months of individuals’ accumulated data, including a “user’s location, time zone, photographs, text from blogs, shopping cart contents, e-mails and a history of the Web pages visited.” Moreover, these tracking tools (including “Flash cookies” and “supercookies”) are difficult to detect and, if removed, often reinstall themselves.

Using pseudonyms and multiple names and accounts does not protect one from intrusions. Some companies have developed software that matches pseudonyms used on message boards and blogs with real names and personal e-mail addresses. The subjects of this tracking include people who use online pseudonyms to discuss sensitive topics, such as mental illness.

Privacy advocates have sharply objected to the government’s use of deep packet inspection (DPI)—a powerful tool used to analyze the contents of communications transmitted over the Internet—in large part because it is much more intrusive than merely tracking who is communicating with whom. (The difference is akin to reading letters versus examining the

30Ibid.
33Angwin and Stecklow, “Scrapers.”
34Ibid.
outside of an envelope to see who sent the letter and to whom it is addressed.) Now, private companies are offering to perform DPI for anyone who meets their fees.\(^35\)

Moreover, individuals cannot protect themselves from corporations by choosing to deal only with those that promise to respect their privacy. Transparency about their privacy policies does little good, because the privacy statements that corporations post are often written in complex legal terms and there is no realistic way for individuals to ensure that corporations abide by their statements.

In short, corporations do almost everything that the federal government has been banned from doing under various laws, in particular the Privacy Act of 1974. One may argue that the private sector merely uses this information for commercial purposes, whereas the government may use it to jail people, suppress free speech, and otherwise violate individual rights. However, one must note, first of all, that the violation of privacy by private agents often has the same effects as identical violations committed by government agents. Thus, when gay people who seek to keep their sexual orientation private are “outed” by the media, or banks call in loans of those they find out have cancer, or employers refuse to hire people because they find out about their political or religious views, privacy is violated in a manner about as consequential as if the same violations had been carried out by a government agency. And as people learn that if they hold dissenting views or engage in experimental behavior, such actions will not be kept private, they will be “chilled” even if their fear of disclosure is merely due to corporate actors and not to governmental ones.

Most importantly, the information corporations amass is available to the government. The thesis that what is private does not stay private is far from hypothetical. For instance, Choicepoint, which amasses extensive dossiers on most Americans, has at least 35 contracts with government agencies, including the Department of Justice (through which it provides its databases to the FBI), as well as the DEA, the IRS, and the Bureau of Citizenship and Immigration Services.\(^36\) Choicepoint is not alone; commercial data banks regularly work with law enforcement officials to provide background information on individuals—including financial


reports, felony checks, and more. The federal government paid $12 million to a corporate data miner called SeisInt to develop a database that includes individuals’ “criminal histories, photographs, property ownership, SSNs, addresses, bankruptcies, family members, and credit information.”

Even before the attacks of September 11, the U.S. Marshals Service alone performed up to 40,000 searches every month using private data banks. The exact number of contracts the government has made with corporate data miners is unknown, because many of the contracts are classified. However, one government study found that as far back as 2004, at least 52 federal agencies had launched—or were planning to launch—at least 199 data mining projects, using private sector data.

In short, whether the data banks loaded with extensive dossiers of most adult Americans are in the FBI headquarters or in some corporate office matters little. At most, they are just a click away.

Laws may prevent the government from ordering a private company to conduct surveillance or generate dossiers that the government itself is banned from generating (in other words, the government is prohibited from treating companies as government agents), but the government can and does use data already in place. Nor do laws exist that prevent private corporations from collecting and analyzing personal data with an eye toward the government’s needs and shaping their privacy-violating databanks in ways that make them more attractive to government purchases of their services.

Finally, privacy advocates argue that even if one is not concerned about those currently holding public office, once data banks are amassed by the government of, say, the DNA of millions of people, a less-benign government may exploit them in the future. A future Richard Nixon might employ these data banks to harm those on his enemies list, and a future House Un-American Activities Committee could employ them to cause people to lose their jobs and livelihoods. Some observers even worry about what would happen if a totalitarian government took over. These concerns, though, tend to ignore that in all of these circumstances,

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41Ibid.
databanks held in the private realm are subject to the same abuses as those in the public one.

The key question relevant to the current discussion is whether the divide between public and private realms still serves as the major way to organize our deliberations and policies about privacy. It seems that no matter how one approaches the topic, one should pay much less mind to the private/public divide and instead seek approaches that treat both realms as intertwined. Thus, one may argue that explicit consent should be required before a person’s information is released or stored—people should “own” information about themselves, and their permission would be needed before it could be used—both by private and by public actors. Or one could take the position that to protect privacy, one must limit surveillance and the assembling of dossiers on individuals—disregarding whether the data purveyors are private or public—unless special circumstances prevail and special authorization has been granted (say, if the subject of tracking is suspected of a crime, as demonstrated to a judge).

So far, though, neither of these approaches has found wide currency in the United States, nor have any other cross-realm approaches. Nor have the normative, legal, and political concepts needed to analyze and guide action in such an amalgamated way been worked out. Thus, when one suggests that the Fourth Amendment should also apply to private actors as well, the surprised response highlights how far-reaching such a way of thinking is.

**CASE STUDY III: CYBERSECURITY—A CROSS-REALM CHALLENGE**

That national security is the role of the state is a very widely accepted observation. Still, the private sector has long played a major role in providing for national security in the United States. As of 2010, the Pentagon’s spending on private contractors amounted to about $400 billion, or nearly 60 percent,42 of its roughly $700 billion annual budget.43 The private sector manufactures nearly everything the military uses, including “big ticket” items, such as fleets of airplanes, aircraft carriers, and submarines, as well as smaller items like handguns, grenades, and Kevlar vests. Private contractors also provide a wide array of services including

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“logistical support, transportation, engineering, construction, skilled and unskilled laborers, maintenance, technical expertise, and other paramilitary operations.”44 Their work ranges from “highly specialized tasks requiring extensive training and experience” to “unskilled general labor in dining halls, laundry facilities, and construction projects.”45 (One further notes that although the press has usually referred to the size of the U.S. military force in Afghanistan after the surge as equaling roughly 100,000, as of March 2011, there were roughly 90,000 private contractors working for the Pentagon in Afghanistan,46 and they have been dying at a rate sometimes higher than U.S. soldiers47—making it rather a joint public–private force.) Private contractors are employed in capturing suspected terrorists, interrogating detainees, analyzing terrorist networks, training new spies, and protecting CIA directors as they travel.48 The reliance on the private sector for security work was significantly expanded during the administration of George W. Bush and has been scaled back to only a limited extent during the Obama administration.

As a result, various attributes of the private security industry deeply affect public security endeavors. Thus, when private contractors kill civilians or torture prisoners, the U.S. military’s reputation, and cooperation with it by the local populations, are affected. When the private sector finds that producing the so-called “big ticket” items (such as ships) is more profitable than producing small ones (such as body armor) because of more oligopolistic opportunities in big items, the U.S. ends up with more warships and tanks than experts say it needs, but with not enough bulletproof vests and armored vehicles.49 And vast private cost overruns and overdue deliveries limit what the U.S. Defense Department can purchase and what is available to the military.

The intertwining of the realms is significantly higher in all matters concerning cybersecurity, a sector whose importance has been growing rapidly over the last decade. This is because practically all the equipment

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and machinery the military uses is computerized in some way, very often drawing on both hardware and software produced in the private sector—components that are often manufactured overseas, including in China. \(^5^0\) Private computer technology is used by the military, the intelligence community, the U.S. Department of Homeland Security, and other law enforcement and security agencies to process, store, retrieve and analyze information, to communicate commands, and to coordinate policies and actions. In short, computers are an important part of the national security brain and nervous system.

Thus, the extent to which public security assets are themselves secure depends, to a very great extent, on the security of their privately produced components and work carried out in the private sector. Although the military produces some technology in-house, the widespread use of privately made technology means that the private and public facets of security are highly intertwined.

At first blush, one might expect the private sector to strongly support new measures that enhance cybersecurity. Many of the crimes committed in cyberspace (including identity theft and financial crimes) impose considerable costs on the private sector. The same holds for industrial espionage, especially from other countries, which deprives American corporations of the fruits of long-term investments in research and development, and generates major advantages to unfair competitors. If cyber warfare were to break out, many of the assets that would probably be damaged are private-sector assets. Finally, American businesses are largely operated by citizens who, one assumes, are concerned about their nation’s security.

As a matter of fact, though, American businesses have not revealed much support for enhanced cybersecurity. Some security experts argue that this is the case because incentives to secure private computer systems are not aligned in ways that would motivate the private sector to take the needed action. \(^5^2\) Despite the rapid rise of Internet bank theft, for example, the costs of added protections are higher than the losses from the cyber thefts—making added security an unattractive business proposition for financial

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institutions.\textsuperscript{53} The effects of industrial espionage are often not in evidence for several years—beyond the horizons of many CEOs concerned with the short-term profits and stock prices of their corporations.

Government-led measures to enhance cybersecurity in the private sector, which are essential, given the high level of intertwining between public and private cyber equipment and processes, have encountered resistance by private-sector actors, who argue that forcing companies to comply with cybersecurity regulations will harm their profits, flexibility, and ability to innovate.\textsuperscript{54} Furthermore, businesses consider it unfair and inappropriate for the government to impose on private industries security requirements that businesses consider a public-sector responsibility.\textsuperscript{55} Such requirements are viewed as “unfunded mandates.”\textsuperscript{56} Stewart Baker, who served as Assistant Secretary for Policy at the Department of Homeland Security, has described the fate of one cybersecurity proposal advocated by Richard Clarke, the first White House cybersecurity czar. According to Baker, the proposal “sidled up toward new mandates for industry,” would have formed a “security research fund” that would have drawn on contributions from technology companies, and would have increased pressure on Internet companies to provide security technology with their products.\textsuperscript{57} However, these requirements were viewed as too onerous for business by many within the Bush administration, and ultimately “anything that could offend industry, anything that hinted at government mandates, was stripped out.”\textsuperscript{58}

The net result is that cybersecurity is weak for work carried out in and by the private sector—and in the public sector as well. Major security breaches took place in recent years at major defense contractors such as General Dynamics, Boeing, Raytheon, and Northrop Grumman.\textsuperscript{59} In 2007, unknown attackers (probably working for a foreign government) stole several terabytes of information from, among others, the Departments of


\textsuperscript{57}Stewart Baker, Skating on Stilts: Why We Aren’t Stopping Tomorrow’s Terrorism (Stanford, CA: Hoover Institution Press, 2010), 233.

\textsuperscript{58}Ibid.

State and Defense. The amount stolen was nearly equal to the amount of information in the Library of Congress.60

The military’s own computers—produced by the private sector, run with software from the private sector, and often maintained and served by the private sector—are not well protected. The networks of the U.S. Department of Homeland Security are also inadequately protected.61 Cybersecurity expert James Lewis finds that the nation’s digital networks are “easily” accessed by foreigners—both competitors and opponents.62 Lewis flatly states that “the market has failed to secure cyberspace. A 10-year experiment in faith-based cybersecurity has proven this beyond question.”63

Moreover, it is unclear who is responsible for maintaining the security of many critical assets. Currently, the U.S. Department of Homeland Security is working to secure the .gov and .com domains,64 but not critical infrastructure.65 As President Obama stated in 2009 when unveiling his administration’s cybersecurity policy review, “Let me be very clear: My administration will not dictate security standards for private companies.”66

This is a statement of considerable import, given that a very large part of the types of missions carried out in other states by the military (including by state-owned and -managed industries) is carried out in the United States by the private sector. It is not much of an exaggeration to hold that because of the high degree of collaboration, joined projects, and links and exchanges between the private security sector and the public one, vulnerabilities in the private sector lead to vulnerabilities in the public one.

One essential security measure is separating critical infrastructure from the Internet. Such a step has not been taken, because it cannot be done without additional federal regulation, and representatives of the affected industries tend to oppose regulation. For example, lobbyists from the power

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60CBS, “Cyber War: Sabotaging the System,” 60 Minutes, 8 November 2009.
63Ibid.
industry believe that “95 percent of their assets should be left unregulated with regard to cybersecurity.”

Indeed, federal policy is moving in the opposite direction—toward greater connectivity for America’s energy grid. The “smart grid” initiative advanced by the Obama administration is designed to save money and update an aging energy grid by integrating various power suppliers into one system by using a digital network. However, research shows that a smart grid will “introduce new problems, such as increasing the vulnerability to cyber attack as power grid resources become increasingly linked to the Internet.”

The United States could significantly enhance its protection from cyber attacks by working toward greater security for computer component supply chains. Former Assistant Attorney General Jack Goldsmith and cybersecurity expert Melissa Hathaway, who led the Obama administration’s cybersecurity review, warn of the “excessive security vulnerabilities” that result from “the use of commercial off-the-shelf software produced in a global supply chain in which malicious code can be embedded by stealth.” However, the government is continuing to use generic software and hardware, including those produced overseas.

In short, given the realities of computer networks, the Internet, and other elements of cyberspace, there can be no elevated cybersecurity in the public realm unless there is also heightened cybersecurity in the private realm. I am not arguing that the two realms are now one; merely that they are so intertwined that they act, to a significant extent, as if they were one system.

CASE STUDY IV: PREFERENCES—THE BYPRODUCTS OF CULTURE AND SOCIETY

This case study differs greatly from the preceding ones. While they deal with recent developments, mainly ones that took place since the advent of cyberspace, this case study deals with factors that have been at work for as far back as history allows us to explore. It deals with long-standing and in

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this sense “permanent” reasons why the public–private divide should be accorded much less interpretive power than it commands, while the other case studies deal with recent and additional reasons in support of the same overarching thesis. (One can think about the study of preference as the foundation, and the other case studies as floors recently added.) Moreover, this case study is the most telling of them all, not merely due to the scope of its reach, but also because it points to a locus of power beyond the private/public divide.

Major segments of public philosophy, which assumes a clear and deep public–private divide, start with the individual, whose privately formed preferences ought to be respected because they express his will and they ought to guide the public sphere. Thus, modern democratic theory, in its basic form, assumes that each voter will deliberate, make up his or her own mind, and then—privately, in the secrecy of the ballot box—express his or her preference. Out of the aggregation of these private choices, the polity as a public domain gains its direction. Similarly, the “consumer sovereignty” theory starts with millions of individual consumers choosing what to purchase, in line with their personal preferences, and out of the accumulation of these choices, the economy as a whole gains its direction. And constitutional rights exist to prevent the government, as the public agent, from interfering in these and a myriad of other private choices expressing private preferences. The very well known debates that follow this widely held assumption focus on the conditions under which exceptions are justified, in which public considerations may trump private, individual preferences—say, for national security or public health.

To highlight the importance that major segments of public philosophy accord this high respect for private preferences, it may serve to assume for a moment, strictly for thought experimental purposes, that the opposite were true. Assume that these driving preferences reflect not the person, but rather are somehow implanted by a public agency through mass propaganda—like something out of George Orwell’s 1984. Then these implanted preferences would not command anything like the respect they have in the prevailing narratives. Above all, the very private/public divide would become much less important, because the public domain would dominate both sides of the divide. A private/public conflict would be like a fight between a ventriloquist and his dummy.

The position next advanced is not nearly as extreme as the one just used as a thought experiment, but it nevertheless holds that collective

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societal forces significantly influence private preferences, although individuals do have varying degrees of freedom. That is, preferences are co-determined. It follows that preferences should be accorded a much lower normative standing than they have in the major segments of public philosophies.

The societal influence on private preferences is most clearly revealed by examining young children and the ways in which they grow up. When one studies the work of parents and educators, one cannot but realize that children’s preferences are, initially, largely not “theirs,” but, rather, reflect the preferences of their families, neighborhoods, and subcultures—in short their community. Indeed, a major goal of education (as distinct from teaching) is to foster internalization of societal values by children and thus form and affect their preferences. This is accomplished through such non-rational processes as affective attachments and identification with authority figures.

True, children are born with broad, vague predispositions. For instance, they are predisposed to satiety over hunger—but these general predispositions are translated into specific preferences, in line with the particular values they internalize. Thus, while children have an inborn need for food, and perhaps even for variation in food and combinations (such as proteins and carbohydrates), the specific foods they consider desirable—whether Kosher, soul, organic, vegan or traditional—tend to be those their parents or peers or communities cherish, and are thus acquired tastes. Moreover, the acquisition is often not the result of any individual, conscious reasoning. American teenagers do not prefer Cokes and French fries because they have calculated that such consumption will enhance their peer standing; they feel that these are the right foods to consume and typically are unaware how they gained such tastes. All this holds for many other areas of behavior. In all of them, initially, biological predispositions are deeply shaped by societal values, and additional preferences are implanted and become an integral part of the self. Thus, a child born in the United States is much less likely to become a Muslim than one born in Saudi Arabia, a Communist if born in North Korea, a Jew if born in Tel Aviv—not because they each happen to choose their ideational identity and values out of some kind of a normative menu, but because they

initially gain their values, specified in their preferences, from their culture and sub culture.74

Once children become adults, their preferences do not suddenly become immutable (like the “Rocky Mountains,” as George Stigler and Gary Becker put it),75 independent, or hermetically sealed. Non-rational processes—peer pressure, for instance—continue to affect them. These effects occur “under the radar”—that is, without the individual being aware of the penetrating, preference-changing influences—and without being able to screen them and deliberate whether or not to allow them in, so to speak. This point is important because, if the inputs were subject to scrutiny and blocking, individuals would be much more able to protect their private identity from public influence.

Persuasion is the term often used to refer to the non-rational processes through which adult preferences are changed. Persuasion works by non-rational means, such as identification with authority figures and group enthusiasm generated through rituals and appeals. Persuasion is also part of processes such as acculturation (especially of immigrants from other countries or of people moving within the same society from one area to another, where the subculture is different), religious conversions, or joining a cult. Leadership, propaganda, and commercials are all forms of persuasion.

One may wonder why the discussion so far has focused on societal values while omitting other public factors, such as the coercive role of the government and macroeconomic forces. The main reason is that although all of these public factors constrain and even affect private preferences, societal values are much more consequential in terms of blurring the private/public divide. Coercive and economic factors change private choices, but overall, they do not affect the person’s will. People may drive more slowly if the penalties on speeding are increased or if the cost of gas rises, but they still prefer to drive faster; the private/public divide thus remains relevant. However, if people internalize the value of driving at a lower speed, they will come to hold this choice as an expression of their own will.76 When such changes in preferences take place, as they often do, the private/public divide becomes much less important than it otherwise seems, inasmuch as the private preferences of voters and consumers, workers and

investors—which guide the polity and the economy—are themselves in part shaped by a collective realm, albeit not by what is usually understood as the public one, as we shall see shortly.

While the challenges to the public/private divide described here have been with us as far back as we can see, the divide served in an earlier age a strong normative brief, albeit not an evidence-driven one, but what a colleague called “a very useful fiction.” It was at the heart of modern liberalism and its break with traditional societies. Medieval authorities did not distinguish between public and private. Self and society were not distinct entities; on the contrary, the “body politic” was the metaphor for society—with each part playing its role, beginning with the prince (at the head). In this configuration, church and state very much worked together, and the masses were taught that a good person labors to do well in whatever role he was cast, rather than seeking to change the societal or political system. (Sociologists refer to this dictate as “status acceptance,” and it is part of the Aristotelian concept of telos.) Liberty hence required challenging the traditional holistic worldview and drawing on a profound separation between the private and public—in order to legitimate protecting the private from the public. The private person became a free agent—in normative theory. The public/private divide was crucial for limiting the authority of the ruler, ending religious wars (religion was allocated to the private realm, no longer the concern of the government) and building a modern capitalist economy (one in which individuals are free to pursue their preferences). It was once a very productive precept, as it served well those who sought to expand—indeed, to a large extent, create—the realm of liberty. However, now this basic normative precept must be reexamined, because it now obscures the underlying societal dynamics, the powers that drive history, and the ways in which they may be redirected.77

BEYOND THE DIVIDE: THE LOCI OF POWER

The preceding case studies illustrate the thesis that the deep divide between the public and the private realms (which plays a cardinal role in public discourse and is drawn upon in several segments of social science) is not nearly as deep as is often assumed, and that the two realms are intertwined and tend to change in tandem. Moreover, we often face the same forces on both sides of the divide; that is, they have a private face and a public face, but are actually often one and the same actor. Finally, the blurring of the realms

77I am indebted to an anonymous reviewer for this point.
has increased since the advent of cyberspace, although—as the study of preferences shows—it was in place long before the 1980s.

These overarching observations lead one to ask what new precepts ought to guide our analyses and public philosophies as we seek the loci of power that propel history, foster changes in both realms, and, to put it in popular terms, cause much harm and promote great good.

The fact that the two realms are deeply intertwined and move in tandem can be accounted for in three different ways: the forces in one realm can largely shape the other; the two realms can interact to fashion a shared format and course; or there is one power or multiple powers that drive both realms. In any case, we seek to know where the levers are, which forces propel societal change, and in what ways these forces may be redirected, changing the course of history.

I am tempted to respond to these questions by pointing out that the purpose of this essay is to call attention to the growing obsolescence of one of the most important normative precepts, that I rest my case(s)—and leave it to others to find out where the loci of power might be found. Only some rather preliminary thoughts follow.

One way to proceed is to explore the thesis that the main loci of the forces that propel many key changes in both realms lies in a third term. A reader may, for good reason, pause here and demand to know what realm there is beyond the public and the private. The response comes in two parts. The first is of some import and is very familiar. The second is of considerably more significance, but it is much more contested. The first part of the response deals with the nature of the third realm; the second part with driving forces located within it.

While the public discourse often draws on the opposition between the public realm and the private realm, academics and public intellectuals have long and often noted the difficulties in two-realm conceptions and the merit of recognizing the distinctive role of community (or civil society) as a third realm.78 It is a thesis often associated with Alexis de Tocqueville. This communal realm includes relationships among the members of nuclear and extended families; webs of friendships; bonds of affinity in residential, ethnic, racial, religious, professional, and other communities; and many thousands of voluntary associations and not-for-profit corporations, which include, in the United States, many of the most highly regarded and influential universities, medical centers, and cultural institutions, among others.

While public discourse has hardly ignored civil society (and if asked, many citizens are likely to acknowledge its import), when the major issues of the day are considered—from improving the economy to protecting the nation from terrorism to improving the climate to reducing drug abuse—the third realm is often overlooked or considered a marginal player. I shall try shortly to show that it is not.

One reason that the third realm is often overlooked in public discourse is that the discourse is highly polarized; it favors clear opposition and dichotomies, and it abhors complexity, nuances, and “third” positions. Moreover, much of the public discourse is conducted in terms of liberal versus conservative, associated with the public (government) and private (free market, individual rights) realms. Still, as I have already noted, the argument that it is intellectually productive to divide the societal world into three realms is familiar and not controversial. It is merely often overlooked in public discourse when the main issues of the day are debated.

My thesis that the major communal force is that of social movements is likely to be much more contested. Key examples include movements of national liberation, socialism, religious movements (such as radical Islam), and movements that seek to protect the environment. These movements differ greatly from one another, in particular, in terms of the values they promote. They share, though, several sociological attributes, despite their major normative and historical differences: they can withdraw legitimacy and political support from a declining regime and lay the foundations for a new one, in the process affecting both the private and the public realms. Thus, if one compares pre-1917 to post-1917 Russia, or China before and after 1949, one observes that socialism radically changed both the private and the public realms. If one looks at societies that established sharia law after being won over by Islamist movements—for instance, Iran following the overthrow of the Shah, and Afghanistan following the Taliban takeover—one realizes that the Islamist movements effects encompass most facets of public and private life, from the ways judgments are rendered in courts to the ways in which music and alcohol are consumed. The American Civil Rights movement affected both laws and private interpersonal relations. Thus, a key reason that both realms tend to move mainly in tandem, despite significant differences in the pace and scope of change, is that major changes in both realms are, to a significant extent, initiated and propelled by communal factors, in particular, social movements.

Critics may argue that social movements themselves arise because other factors have “prepared the ground” for them. For instance, one reason for the rise of the Civil Rights movement after WWII is that African Americans who served in the army returned home equipped with organizational skills
and self-confidence. However, for every immediate cause, one can always find some preceding one. All that I suggest is that the immediate forces that often propel major changes in both the public and private realms are social movements. This is especially the case when one focuses, as this article does, on normative changes and changes in the public discourse.

The social movement that affected changes in both the public and the private realms in the three cases here studied—in the use of SSNs, privacy, and cybersecurity—might be called the conservative reaction or Reaganism. It is a blend of laissez-faire conservatism and libertarianism amplified by neoconservative ideas. I am referring not only to the ideas of small groups of public intellectuals and leaders who are associated with these public philosophy, but also to an array of anti-government sentiments widely held by people not formally affiliated with any organization or school of thought. These ideas have, of course, played a key role in American society, polity, and economy from their inception. However, these themes lost some of their sway during the New Deal, the Great Frontier, and the Great Society eras as well as the heydays of the Civil Rights, women’s rights, sexual liberation, and counterculture movements. Even during the Nixon era (1969–1974) pro-government normative themes and societal following were still relatively widespread, as evidenced by the rise of the environmental movement that changed both the private (e.g. voluntary recycling) and public (e.g. the formation of the Environmental Protection Agency) realms.

A conservative reaction arose during and in the wake of the Reagan administration (1981–1989) in the United States and the administration of Margaret Thatcher in the UK. It was somewhat mitigated during the administration of Bill Clinton (1993–2001), although it was he who declared the end of big government, ended “welfare as we know it,” and put a five-year freeze on social spending to balance the budget. President George W. Bush (2001–2009) greatly amplified these conservative (broadly understood) themes and forces, leading to the unfettering of capitalism in the public realm and additional increases in inequality in the private one. During the first Obama administration, these conservative forces were so strong that they limited what he could do to move in the opposite direction.79

It would take another essay at least as long as this one to trace the specific ways in which the conservative reaction movement affected the cases at hand. But, basically, the effect was to strengthen the private actors, which

79Amitai Etzioni, “Gridlock?” The Forum 10 (Fall 2012).
led to the spread of the use of SSNs by businesses, gross violations of privacy by private actors, and strong resistance to cybersecurity by the private sector. All of these changes were legitimated by the conservative ideological reaction. Its champions were often unaware that in the process, they also affected the public realm, allowing government agents to use private information amassed by private actors, undermining the cybersecurity of the public sector and granting the government (until recently) a much freer hand in the use of SSNs. Historians will find this type of sociological shorthand annoying for good reason. It is but a very sketchy outline, which has to be fleshed out and documented, but it does indicate the connection between the conservative reaction movement and the cases at hand during the cyber age.

Cyberspace was not created by the conservative reaction, nor did it generate Reaganite ideology, although—despite the fact that it was created by the government—it was considered a government-free zone from its inception.80 It still is much less taxed and regulated than the offline world. The fact that cyberspace rose in the same era as that of Reaganism seems largely coincidental. However, it did play a very major role in providing the technological and economic underpinning that enabled Reaganite policies to be advanced. The wide use of SSNs, violation of privacy, and, of course, the undermining of cybersecurity all were enabled by cyberspace.

While all these changes occurred, preferences continued to be largely shaped by the third realm and much changed by social movements. For instance, the environmental movement led people to prefer “green” products. And public discourse continued to treat individual preferences as being entitled to great respect, ignoring the fact that they often expressed collective forces rather than individual choices. This respect provided a consistent underpinning to the ideas at the center of the conservative reaction.

One may disagree that social movements are the main force that emanates from the third realm and plays a key role in shaping the two others while still agreeing with the main thesis of this essay: that both realms are increasingly intertwined and tend to move in tandem. It would still follow from this agreement that such observations urge reexaminations of several key assumptions of public philosophy.”

81 I am indebted to Marissa Cramer and Nathan Pippenger for extensive research assistance and to Larry DeWitt for comments on the Social Security numbers section.