Chapter 3
Hasta La Vista Privacy, or How Technology Terminated Privacy

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ABSTRACT
Lawyers find great joy in pointing out the destructive effects of digital technology on privacy and naturally expect the law to avert overexposure of people’s personal information. This essay takes a different view by arguing that the trajectory of technological developments renders the expansive collection of personal data inevitable, and hence the law’s primary interest should lie in regulating the use—not the collection—of information. This does not foreshadow the end of privacy, but rather suggests a necessary reconceptualization of privacy in the digital era. Along those lines we first need to acknowledge that people increasingly sacrifice voluntarily some of their privacy to enjoy the benefits of technology. Second, the ready availability of a huge volume of personal information creates attention scarcity, such that the chances a person’s privacy will be intruded are diminished. Most importantly, though, once the law accepts the inevitability of the collection of personal information, it will be best in the position to focus attention on ensuring that the collected information is appropriately used, instead of wasting resources on trying to hinder in vain its collection. This more realistic approach calls for alternative means of regulation, like self-regulation or emphasis on informed consent, and facilitates the flow of information by reducing the transactional cost of its sharing and dissemination.

I. INTRODUCTION
“Congratulations on your colonoscopy” shouted Alan Shore in the courtroom making Judge Nora Lang blush with embarrassment. Too much information? “This is just information I was able to obtain from websites which employ the business standard for Internet security” he went on to explain (Boston Legal, Season 2, Episode 13).

Have we really reached a point where such sensitive information is so easily accessible to a fluffy
non-tech savvy lawyer? And if what confuses you is the imaginary setting I use to ask the question consider the real case of Justice Antonin Scalia of the United States Supreme Court, for whom -as of last spring- we know his home number, the movies he likes, his food preferences, his wife’s personal e-mail address, and what his grandchildren look like. You can thank Professor Joel Reidenberg and his students at Fordham Center on Law and Information Policy for that (Cohen, 2009).

What these two cases, and countless others both in the real and the TV world, have in common is the underlying facilitating effect of technology. And most often in egregiously intrusive cases like the above our almost instinctive reaction is to look for ways to limit the pervasiveness of technology. We fail, however, to see that in a historical perspective the trajectory of technological developments invariably attacks the notion of privacy, and –I argue- will continue to do so. There is indeed no reason to believe that, since technology has progressively enabled us to access more and more information, some of which private, we can somehow prevent this pattern from continuing into the future.

This is a theory of technological determinism in the realm of privacy. My argument is that digital technology, as best exemplified by digital networks, is bound to clash with privacy, and that the more it advances the fainter the privacy will become. Part II will explain the deterministic interaction between technology and privacy. In so doing I will show how privacy has materially shrunk due to the pressures exerted by new technologies and I will try to prove that this tendency will continue into the future. In the third part my aim is twofold: first, establish that privacy is overrated and that people in fact often give it up (deliberately or not) when this is accompanied by benefits, and second, offer general principles of how the law and people should approach the new concept of minimized privacy.

II. THE DETERMINISTIC INTERACTION OF TECHNOLOGY AND PRIVACY

1. Introducing Technological Determinism

Technological determinism is a charming, yet highly contested theory that never really found the acceptance it deserved in the humanities. This is partly attributable to the lack of a generally agreed on definition; as a result supporters of technological determinism are dispersed and uncoordinated (Bimber, 1994, p. 80). For some it states nothing more than the obvious, namely that technology has a role in fixing the form or the configuration of something (Winner, 1978, p. 75). As Heilbroner puts it “that machines make history in some sense … is of course obvious” (1967, p. 335). So obvious indeed that he rushes into the next sentence to explain that it is equally clear “that they do not make all of history” (Heilbroner, 1967, emphasis added). On the other end of the spectrum technology is given the role of society’s base, the fundamental and most important condition that effects a change (White, 1949, p. 366). In that sense social interactions, market forces and regulatory choices are mainly directed by technology. Needless to say that this radical view of the fate of human existence is both hard to accept and probably easily refuted. What does for example the invention of antibiotics (voted as the most important invention of the 20th century, see Lemelson-MIT Survey, 1999) say by itself for the evolution of the human kind? The extension of longevity is a direct corollary of antibiotics, but this is merely a fact. The meaning and ramifications of an extended lifetime for the human kind do not inadvertently flow from the invention of antibiotics itself. Most importantly, though, the problem with the extreme form of technological determinism is the difficulty we face when trying to reconcile the edifice of human logic with the no-choice state extreme