

Privacy in the Information Age

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Privacy cannot be fully encompassed by a single definition in today's technologically advancing and increasingly complex societal context. Necessary privacy protections within the American legal framework must be informed not by what privacy is, but by what privacy seeks to defend. Throughout this essay I will examine the historic adaptability of privacy protections within the American legal framework while working to define the underlying freedoms privacy is meant to secure. These adaptable definitions coupled with their relatively constant underlying objectives helps to inform today's often-muddled debate over where privacy rights fit into the modern American legal framework. As the contemporary role of privacy is too complex to encompass within a singular definition, multiple definitions of privacy must be accepted. "Privacy" as a concept should include the protection of the freedom to control and develop one's own unique future, private life, and individuality. The validity of this definition of privacy and its ability to take precedent over other constitutional rights such as freedom of speech can be determined circumstantially, evaluating the extent to which the primary purposes of privacy are safeguarded.

1. Importance of privacy rights understood through the historical demand for property protection.

The extent to which individuals governed by the American legal system deserve control over their private lives has been a question at the core of American constitutional debate since the founding. The Framers recognized the dangers of an overbearing government and sought to

protect against the threats centralized power posed to society by empowering the individual. Although privacy is not specifically mentioned in the American Constitution, the boundaries protected by this right help restrain outside pressures from inhibiting the full enjoyment of the constitutional freedoms Americans are meant to enjoy. Privacy rights allow individuals governed by a centralized authority to remain in control over their own lives. Privacy derives its legitimacy as a constitutional right from the values it seeks to promote. Throughout American history, threats to constitutional freedoms through the invasion of privacy rights continually shift with the developments of new technology. Variable definitions are needed in the face of evolving threats if we are to successfully adapt in order to protect the primary purpose of privacy protections and not simply uphold definitions that no longer accomplish their original aim.

In the eyes of many early legal scholars, from John Locke to the Founding Fathers, an individual's ability to retain his or her independence is predicated upon his or her ability to own property.¹ Throughout the Revolutionary period, discussion surrounding the new government's ability to protect individual liberties emphasized the importance of a government ability to protect private property. Arthur Lee, an American diplomat during the Revolutionary War, saw the right to own property as "the guardian of every other right,"² declaring that, to deprive someone of this right "is in fact to deprive them of their liberty."³

Although personal economic motives certainly informed the Framers' focus on private property, the argument that this alone drove support for its legal protections ignores several historical complexities. The seventeenth century was a time of political upheaval in England, producing many influential political theorists who questioned the purpose and nature of

¹ Jim Powell, "The Freeman" *Foundation for Economic Education*, August 1996/May 2015.

² James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights*, (New York: Oxford University Press, 2007), 240.

³ John Reid, *The Authority of Rights Constitutional History of the American Revolution* (Wisconsin: University of Wisconsin Press, 2015), 33.

government. One of the most influential of these thinkers was political theorist and founder of the English Whig Party, John Locke. Locke saw the right to private property as a natural right existing before the establishment of centralized authority, believing its protection to be the primary purpose of a centralized government. Locke associated property and liberty, recognizing the connection between protecting property rights and protecting individual sovereignty.⁴ Furthermore, Locke recognized the adaptability of property protections, stating that to remain effective they must be in “accord with current and local conditions as to assure the individuality of man.” Locke saw property as a means, not an end, and a necessary element of retaining the desired relationship between a government and the citizens it sought to protect.⁵

Heavily influenced by Locke, the Whig Party adopted his respect for the preservation of property rights as a core value of their political philosophy and continued to highlight the parallels between this right and individual liberty. Private property protections were seen as essential to the preservation of the citizen’s autonomy. John Trenchard, an eighteenth century English radical drawing from the Lockean theories of property as a protectorate of other freedoms, believed the fight for independence could be fought through a fight for freedom. Trenchard proclaimed that all men could be “animated by the Passion of acquiring and defending Property, because Property is the best Support of that Independency, so passionately desired by all Men.”⁶

The Framers developed their respect for private property not only from theories put forward by contemporary political theorists, but from their own experiences of oppression. In England, property ownership was the origin of wealth and power. English landowners were

⁴ Jim Powell, “The Freeman,” *Foundation for Economic Education*, August 01 1996/March 15 2015, <https://owl.english.purdue.edu/owl/resource/717/05/>.

⁵ James Olsen, *John Locke: Twentieth Century Liberal* (Oxford:Blackwell Publishing Ltd, 1964), 69.

⁶ Timothy Sandefur, *Cornerstone of Liberty: Property Rights in 21st Century America* (Washington D.C :Cato Institute), 55.

legally obligated to purchase land through a tenurial relationship with the crown. Full and independent ownership of land was impossible for any citizen to attain. In this system the landless were powerless and at the mercy of those with property. Land was allocated in large quantities and distributed amongst a small number of extremely powerful families. Average citizens had little hope of ever purchasing their own land and so these individuals became fully dependent on their oppressors.⁷ The aristocracy capitalized on this dependency by denying citizens many individual liberties. The English monarchy denied its people the ability to assert control over their own lives. Citizens were unable to freely express political opinions, religious views, or attain much independence regarding fundamental life decisions and the shape of their futures.

The colonization of America represented a new beginning. With land seemingly limitless at the beginning of the seventeenth century, virtually every settler arriving in the North American colonies was granted a substantial allotment. The guarantee of landownership, and the freedom and independence this newfound self-sufficiency offered immigrants, attracted settlers to the New World. Social mobility was possible in colonial society, and the concentration of power through land ownership was discouraged in most state constitutions through provisions limiting the land that could be passed down through family inheritance.⁸ The majority of these colonists became landowning middleclass citizens. In 1763 German settlers in awe of property rights in the New World and their social implications reported, “The law of the land is so constituted, that every man is secure in the enjoyment of his property, the meanest person is out of reach of oppression from the most powerful.”⁹

The British government recognized the threat these newly established property rights presented to their authority. In the late seventeenth century the British Crown sought to retain its

⁷ Ely, 13.

⁸ Id., 14.

⁹ Id., 16.

control over the North American colonies by putting New York and the New England colonies under a single regional government run by Sir Edmund Andros. Andros made many structural alterations to the existing political system, removing representative assemblies from government and instituting oppressive land policies. Hoping to shift the societal power structure and make the colonies increasingly politically obedient, he sought to bring back the British system of land ownership. Andros made it increasingly difficult to acquire new land grants and renew existing land titles, and impeded expansion. As explained by James W. Ely, Andros hoped that by “attacking the basis of economic independence...the colonies would become more politically obedient to England” and the political power structure would shift back towards English dominance. Although Boston mobs eventually overthrew Andros as regional governor, this was just the beginning of a long power struggle between the American colonies and the British Empire.¹⁰

The value Americans placed on the right to private property can be demonstrated by the central role disputes over property rights played leading up to and unifying the colonies during the American Revolution. Although the early stages of American colonization was characterized by a lack of regulatory oversight from the British Crown, after 1763 the British Parliament began to crack down and tighten control over American economic life. As Ely explains, the colonists fully recognized the “economic dimensions of liberty” and felt infringements upon this area of life threatened the existence of their liberty entirely.¹¹ In response to the Townshend Acts, acts passed by British Parliament which regulated property ownership North American British colonies, Samuel Adams wrote the Massachusetts Circular Letter in which he stated, “What a man has honestly acquired is absolutely his own, which he may freely give, but cannot be taken

¹⁰ Id., 14-15.

¹¹ Id., 13.

from him without his consent.”¹² A majority of colonists shared this sentiment. Clearly drawing from the Lockean theory of government, the colonists saw a government refusing to protect the right to private property as a government that must be overthrown.

Despite the plethora of varying political opinions held by the framers of the American Constitution, all members recognized the document’s duty to protect property. The nation’s scholarly work at the time of the founding reflects property’s intimate connection with the concepts of liberty, freedom, and individual sovereignty in the eyes of the Framers. “The sanctity of private property was central to the new American social and political order.” The Lockean phrase “life, liberty, and estates,” used to describe the natural rights government existed to protect, was borrowed by Jefferson. Jefferson’s substitution of “estates” with “pursuit of Happiness” in the Declaration of Independence is also indicative of the general sentiments expressed about property at the time. Madison made sure to include property protections in the Bill of Rights.¹³ Documents such as the Magna Carta, written in 1215, which outlawed the arbitrary taking of property without due process of law, influenced the colonists’ feeling of entitlement to property protections. Ely asserts that the Fifth Amendment’s dualistic nature, protecting both criminal and property rights, highlights the link Madison saw between personal liberty and property rights.¹⁴

Economic independence attained through private property protections held more significance than purely personal monetary considerations. The Framers took extreme care to establish adequate property protections as a way of empowering the populace, in a manner that a constitutional right to privacy would later work to achieve. Allowing individuals the ability to

¹² Edward Sisson, “America the Great” (United States of America: Edward Sisson, 2014), 426.

¹³ Olsen, 69.

¹⁴ Ely, 13.

become self-sufficient in turn allowed them to create a private sphere in which they could develop their personality, private lives, and future aspirations. Property rights helped protect a power structure in which individuals living under a centralized government could retain enough control over their private life to develop their individuality and pursue their own definition of happiness.

2. Privacy as a right of its own

Nineteenth century legal scholars and future Supreme Court Justices Louis Brandeis and Samuel Warren worked to define and highlight the importance of privacy as a distinct right in their technologically advancing society. Their work helped to ignite the scholarly debate surrounding the definition of privacy rights, working to conceptualize privacy as divergent from the protections established for tangible property. The men discussed privacy in a collaboratively written law article, which gave birth to American privacy tort law and laid the foundation for the future development of privacy as a constitutional right. Brandeis and Warren saw privacy as inadequately protected, but increasingly important for the individual as American society advanced. Property protections had given the citizenry a certain level of control over their own lives that was needed to pursue their definition of happiness. They were disturbed by technological developments, such as the portable camera, which they believed made the maintenance of a private life increasingly difficult to secure. Brandeis and Warren observed that the individual sovereignty property had once protected could not survive in the current legal framework. They were not attempting to identify a new constitutional right, but to preserve the independence and autonomy to which the American people already had a right.¹⁵

In “The Right to Privacy,” Brandeis and Warren articulated the inadequacies of the contemporary legislative protections for privacy. Their work began to conceptually distinguish

¹⁵ Louis Brandeis and Samuel Warren, "The Right to Privacy." *Harvard Law Review* 4, no.1 (1890), 193-202.

privacy from property, examining the inability a citizen's property rights to protect "to what extent his thoughts, sentiments, and emotions shall be communicated to others." They identify the power of mental anguish and the difficult but important job of legally protecting one's intangible feelings. They believed that privacy intrusions had the ability to cause the individual far greater pain than could be inflicted physically. Brandeis and Warren emphasize that the value of privacy is derived greatly from the peace of mind it affords citizens. For example, the value "is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all." In a simpler society, is it not as difficult to assure the right to be left alone through property protections.¹⁶ Ownership over a physical home had in the past allowed individuals a greater opportunity to retreat from society at large and create a life that was entirely their own. The creation of the tabloid industry and advancing photography technology, however, provided the means and incentive to pry into the lives of others, breaking down the privacy barriers property had once been effective in protecting leaving citizens vulnerable to threats of emotional harm and intimidation. In a changing world, new privacy threats arose while the legal framework remained unchanged. Legislative protections were no longer sufficient to address the heart of the issue Brandeis and Warren present: the right to be left alone. Slander and libel law provided no protections against invasion of what Brandeis called private facts, which was constituted by true but personal information. Property rights were unable to protect privacy when the violations extended beyond the deprivation of physical property. Contract law was too narrow to adapt to technological changes and according to Brandeis had to "be placed upon a broader foundation" to fully tackle the privacy problem.¹⁷

¹⁶ Ibid.

¹⁷ Rebecca Walker, "The Right to Be Forgotten," (San Francisco, CA: The Hastings law journal , 2012), 257-286.

During the twentieth century, four torts laws were enacted to protect against the privacy violations Brandeis identified in his work. These torts include: intrusion on seclusion, misappropriation of name or likeness, publicity placing a person in a false light, and publicity given to private life. These torts demonstrate an attempt to adapt the legal framework and preserve the independence privacy provided the individual in a technologically advancing age.

The law protecting against intrusion on seclusion seeks to protect areas of an individual's life, both physical and emotional, in which he or she should reasonably expect privacy. It further prohibits the collection of information about an individual that unreasonably intrudes into his or her personal life. The misappropriation of likeness law protects the interest of the individual in the exclusive use of his own identity. This tort gives individuals a property right over their own identity and prohibits others from using their image without their consent. When acting with malice, the disclosure of facts about an individual that are highly offensive to a reasonable person, whether true or false, can be protected against under the third tort. The fourth tort protects against invasions into one's private life that are irrelevant to public concern and deeply personal. As personal information became less secure, these torts did not remain effective, as is explored later in the paper. They are, however, a deliberate effort to preserve privacy purposes by acknowledging new violations that detract from the original constitutional goals regarding autonomy. These torts helped address the increasingly intangible privacy invasions developing as a result of technological advancement.¹⁸

Brandeis and Warren recognized the threat technology posed to citizens' privacy. As they saw it, the mental anguish caused by making certain private facts public deterred citizens from pursuing their happiness.¹⁹ Without the ability to adequately protect this information, citizens

¹⁸ Walker, 257-286.

¹⁹ Brandeis and Warren, 193-202.

could lose control over their own lives, unable to freely act, oppressed not by any form of physical restraint but by fear of humiliation. Their work remains extremely influential in the privacy debate. Brandeis and Warren aptly articulated many of the problems and consequences of privacy invasion. What they are striving to protect and the consequences they articulate through this literature remain relevant today. Brandeis and Warren recognized that the end goals of privacy were timeless and the strategies implemented to reach these goals must change with time. We must do the same.

Though the word ‘privacy’ is not mentioned in the Constitution, Brandeis and Warren’s work helped draw scholarly attention to the harm inflicted upon citizens due to a lack of privacy protections within the American legal framework, setting the stage for debate surrounding constitutional violations created by inadequate privacy provisions. The men helped to articulate not simply the importance of privacy, but the potential loss of certain previously protected freedoms at stake if the legal framework was not adapted to complement the advancing societal context in which it was placed.

3. Development of privacy as a constitutional right

Utilizing the groundwork laid by previous privacy theorists and tort law the Supreme Court began to develop relevant precedent as the justices grappled with the definition of privacy within the American constitutional context. Privacy’s definition continued to adjust, in fits and starts, alongside an evolving society and expand throughout the twentieth century as the Supreme Court sought to define and preserve privacy’s purpose. Although the definition of privacy remained flexible, continually changing from case to case, the opinions reflect a consistent goal of the adapting privacy protections informed by a historical fear of an overly powerful central government and the importance of safeguarding certain areas of the private life from state intrusion.

Olmsted v. United States (1928) exemplifies the assumed association between privacy and property. In this case, federal agents suspected petitioner Roy Olmstead of illegal activity relating to the sale, possession, and transportation of alcohol. The agents installed wiretaps in the basement of Olmstead's office building to monitor and record his conversations. Although they did so without judicial approval, there was no official trespass into Olmstead's home nor were the conversations obtained by force. Olmstead argued that this evidence had violated his Fourth and Fifth Amendment rights, but the Court ruled that since there was no physical trespass, and the conversations were made voluntarily, it did not constitute a violation. In the opinion for the Court, Justice Taft argued the necessity of a physical trespass in a Fourth Amendment violation. "The [Fourth] amendment does not forbid what was done here," Taft explained. "There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants."²⁰ Although Taft acknowledged that the invention of the telephone opened up areas of citizens' lives to privacy invasions they had not been vulnerable to at the time of the framing, he did not support an attempt to adapt to these changing times. Instead he insisted the Fourth Amendment be applied in the manner it would have been before the telephone's invention.

Brandeis wrote a scornful dissent to the decision in *Olmstead*, reflecting his belief that to truly protect the vision of the Framers, constitutional interpretation had to adapt to the times. Tying constitutional protections to property rights had drastically different implications as technology advanced. As Brandeis explained in his *Olmstead* dissent:

The makers of our Constitution ... knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things.... They conferred, as against the Government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the

²⁰ *Olmstead v. United States*, 277 U.S. 438 (1928).

Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.²¹

Brandeis' protests were finally validated later in *Katz v. United States* (1967), a case that overruled *Olmstead*. The Court recognized the need to develop a definition of privacy that encompassed the complexities of the modern era. Furthermore, the Court recognized that the primary goal of the Fourth Amendment was better defined as protecting the individual's reasonable expectation of privacy and could no longer be associated with physical location, as modern technology had made one's private life increasingly accessible to outside forces. Constitutional law had to react to this heightened vulnerability.

In *Meyer v. Nebraska* (1923), the Court established that the Fourteenth Amendment right to liberty encompassed a right to privacy. In this case, the state of Nebraska had attempted to prohibit the teaching of modern foreign language to elementary school children. This statute according to the Court "imposed an undue burden on the liberty rights of parents and teachers."²² The state's intrusion into this aspect of the lives and personal decisions of its citizenry intruded upon the individual's pursuit of happiness by restricted one's ability to:

engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.²³

This case established that in order for citizens to freely appreciate these freedoms, privacy had to be maintained and tailored to its time.

The notion of privacy continued to expand as the Supreme Court took on cases focusing on issues of sexuality and childbearing. In *Griswold v. Connecticut* (1965) the Court protected the rights of married couples to use contraceptives. The Court identified a constitutional right to

²¹ Brandeis, *Olmstead v. United States* dissent, 1928.

²² *Meyer v. Nebraska*, 262 U.S. 390 (1923).

²³ *Ibid*.

privacy derived from the “penumbras and emanations” of the Bill of Rights.²⁴ This ruling extended protections to the marital relationship, or with a stricter reading, simply within the physical bedroom. In *Eisenstadt v. Baird*, (1972), this definition grew to include the constitutional right of single women to use contraception as well. Through privacy provisions, the Court attempted to preserve the power structure that serves to protect individuals from unwarranted governmental intrusion and a citizen’s right to assert control over decisions concerning fundamental aspects of his or her private life.

In *Roe v. Wade* (1973), the Court recognized that the privacy right identified in *Griswold* and expanded in *Eisenstadt* encompassed a woman's right to terminate her pregnancy with total autonomy within the first trimester. In the decision, Justice Blackmun stated that the Constitution is meant to protect certain areas or zones of personal privacy. Blackmun defined these zones as having “some extension to activities relating to marriage; procreation; contraception; family relationships; and child rearing and education,” and asserted it to be broad enough to encompass a woman's right to an abortion.²⁵ *Planned Parenthood v. Casey* (1992) reaffirmed *Roe*, but replaced the strict scrutiny standard with an undue burden test to determine constitutionality of state abortion restrictions. Although the decision instituted a standard that allowed all but one of the Pennsylvania abortion restrictions in question, the opinion still promoted the importance of an individual’s ability to develop beliefs regarding fundamental aspects of their lives. Justice Kennedy said, “Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.”²⁶

In 2003, *Lawrence v. Texas* (2003) further expanded this zone of privacy by striking down a Texas statute criminalizing consensual gay sex. Justice Kennedy wrote the opinion stating that

²⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²⁵ *Roe v. Wade*, 410 U.S. 113 (1972).

²⁶ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

the petitioners were “entitled to respect for their private lives...their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”²⁷ A decade prior, *Bowers v. Hardwick* (1986) had upheld a Texas statute banning consensual homosexual sodomy on the basis that the Constitution did not expressly provide a right to engage in this activity. Justice Kennedy stated that although the statute specifically targeted the sexual acts of homosexual partners, the “penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.”²⁸ The Court did not focus on the legitimacy of a specific constitutional right to homosexual sodomy in *Lawrence*, but on the ramifications the statute had on the nation’s power structure and value system.

Privacy cases throughout and beyond the twentieth century identified new areas in which state power must be limited in order to preserve individual autonomy. The Court’s decisions throughout the century portray the integral, yet often convoluted, role of privacy in the protection of decisional freedom. This convolution reflects the increasing difficulty of relying on the definition what privacy is instead of what privacy seeks to accomplish when determining its place within the American constitutional context. In order to allow citizens the ability to conduct their lives and develop their personhood, individuals need a certain level of autonomy impossible to attain without the protection of privacy, which had become harder and harder to define.

4. Complexities of privacy conceptions in the Information Era

The outcomes of these Supreme Court cases are all based upon a specific yet adaptable definition of how the Constitution defines privacy. As privacy rights expanded or contracted with each ruling, theorists and justices found it increasingly difficult to articulate an overarching

²⁷ *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁸ *Ibid.*

definition of privacy. The broad spectrum of rights that privacy protections both defend and infringe upon make it very difficult to sum up in a single constitutional definition. Scholars argue that identifying the core characteristics of privacy in the American constitutional context would improve our ability to judicially protect privacy rights “In Conceptualizing Privacy” Georgetown University Professor and privacy scholar, Daniel J. Solove, categorizes and analyzes the varying conceptualizations of privacy in modern academic discourse. Although each one has its merits, he argues, none of these definitions are capable of fully encompassing all threats to privacy in modern times. Although privacy has always been difficult to pin down, this difficulty has been exacerbated as American society has entered the ‘Information Era.’

One of the definitions of privacy that Solove identifies is the previously discussed “right to be left alone.” This understanding sees privacy as a type of “immunity or seclusion” from interference by other citizens or the State.²⁹ The influence of this concept on Supreme Court jurisprudence dates back to *Olmsted v. United States* (1973) in which Brandeis emphasized the importance of this right. In his dissent, Brandeis highlighted the necessity of protecting individuals’ capacity to develop and express “their beliefs, their thoughts, their emotions, and their sensations” by securing their right to be left alone, free from unnecessary governmental intrusions. Justice Douglas was also a strong proponent of the right to be left alone. Dissenting in *Public Utilities Commission v. Pollak* (1952), Douglas pointed to the right to be left alone as the “beginning of all freedom.”³⁰ In *Griswold v. Connecticut*, he establishes a constitutional right to privacy, which he finds in various guarantees “emanated” from Amendments in the Bill of Rights.³¹ Douglas writes that these guarantees create zones of privacy, in which the individual

²⁹ Daniel Solove, “Conceptualizing Privacy,” *California Law Review* 90, no. 4 (2002), 1102.

³⁰ *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952).

³¹ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

has the right to be free from unnecessary intrusion. *United States v. United States District Court* (1972) established the constitutional necessity of a warrant must be obtained before the government could begin electronic surveillance. This case demonstrated the Court's attempt to protect against governmental intrusions into a zone in which the individual could reasonably expect to be left alone, even when the safety of the general public was in question.

Solove also discusses the "limited access to the self" definition of privacy. This concept emphasizes the importance of ensuring that individuals can preserve the intimacy of their private lives while freely interacting with the broader community. This definition moves beyond a conception of privacy based on areas of total seclusion and is less of an all or nothing understanding of the protections. As Solove explains, "Certainly not all access to the self infringes upon privacy—only access to specific dimensions of the self or to particular matters and information." *Whalen v. Roe* extended the constitutional right to privacy to the "individual interest in avoiding disclosure of personal matters" allowing the State of New York to maintain a centralized computer database of personal information of citizens who had obtained a certain prescription drug, so long as the state took adequate measures to protect against accidental exposure of this information to unauthorized personnel. When individuals obtain a prescription, they are allowing certain individuals to view their information but have a constitutional right to protect against disclosing it to others. This view of privacy protection is more flexible than the first and often involves an element of individual choice.³² To establish to what extent an individual is deserving of protection, privacy scholar Ruth Gavison points to three "independent and irreducible elements: secrecy, anonymity, and solitude." This view allows the individual or societal expectations to determine to what extent one can withdraw from the larger community

³² Solove, "Conceptualizing Privacy," 1102-1105.

and conceal personal information.³³ In *NAACP vs. Alabama*, the court recognized privacy as “indispensable to the preservation of freedom of association.” The State was denied the right to publish membership lists of groups without an “overriding valid state interest.” The Court determined that, without adequate privacy protections the right to freely associate cannot be fully enjoyed.

The third definition Solove presents is privacy as “secrecy.” In this view, privacy is violated when concealed information is made public. This definition is similar to the previously mentioned limited access to self, but emphasizes concealment of personal information. This conception provides the basic argument for information privacy in the Court’s decision that privacy encompassed not only the individual’s right to make certain decisions, but also the individual interest in “avoiding disclosure of personal matters.”³⁴ Personal information deserving of a reasonable expectation to privacy under this definition must be inaccessible to the public or even to a third party. *Smith v. Maryland* (1979) established the third party doctrine, which negates one’s reasonable expectation to privacy protections when information revealed to a third party is concerned.

Privacy can also be understood as “control over information.” This interpretation focuses on the individual’s ability to assert control over their personal information and how it is entered into the public sphere. This theory can be traced back to the Lockean belief that all individuals have “property in their person.” The Constitution gives Congress the power to secure “the exclusive right to their respective writings and discoveries” of authors and inventors. Intellectual property law allows individuals to control to what extent their personal creations are shared. This gives individuals a certain level of control over what is made public and what is kept private.

³³ Ibid.

³⁴ Id., 1105-1109.

Additionally, privacy can be understood as a means of protecting “personhood.” As Jeffery Remain states, “The right to privacy...protects the individual’s interest in becoming, being, and remaining a person” independent of unreasonable societal and governmental pressures.³⁵

Lastly, Solove describes privacy as a form of intimacy and focuses on the role of privacy within human relationships. This value of privacy in personal relationships attempts to use intimacy expectations in order to determine what areas of life individuals expect to restrict access to or keep secret. Philosopher Jeff Reiman uses “the context of caring” to identify personal information that is significant to the individual versus information that may fall within the private sphere but bears less consequence if disclosed. This definition seeks to ensure that privacy protections reflect the significance of the disclosure of the information.³⁶

None of these definitions, however, encompass all privacy concerns relevant today. Conceptions of privacy so far discussed have neglected major areas of life vulnerable to privacy invasions that have recently expanded due to advancing technology. For example, none of the above definitions can explain the potential dangers posed by the societal implications of data aggregation. Modern databases are structured to store, manage, and analyze copious amounts of data. Technological advances coupled with a newfound interest in data collection in the private sector have driven this business to become extremely profitable. The ability of evolving technologies to store, extract, and organize data has had a huge impact on American society.³⁷

Records of personal information have been kept throughout history. The ethics of data collection, however, have only recently earned a place of prominence in contemporary societal discourse. Throughout most of the nineteenth century, records of personal information, date of

³⁵ Id., 1116.

³⁶ Id., 1121.

³⁷ Olivier, Martin S. "Database Privacy Balancing Confidentiality, Integrity and Availability." *ACM SIGKDD Explorations Newsletter* 4, no. 2 (Decemeber 2002): 20-27.

birth, land ownership, marriage, and divorce, were often kept and recorded at a local level. As the size and complexity of American governmental bureaucracies grew so did the need for more efficient methods of data collection. Census data, for example, became increasingly difficult to compile as the data set grew along with the amount of personal information the government attempted to collect. For example, while the 1830 census asked citizens two personal questions, the 1860 census posed 142, drastically increasing data levels that had to be sorted and tabulated.³⁸ As this timeline makes evident, the ability to effectively take and use citizens' personal data is a relatively new phenomenon.³⁹

The existence, but unattainability, of this information drove the development new methods of data collection that would eventually lead to the emergence of the data processing industry. This new technology was particularly attractive to the sales marketing industry. Although mass marketing was already a successful new strategy towards the end of the nineteenth century, the method lacked the personable and tailored aspect of one-on-one sales. Marketers accepted that on average only 2% of any selected audience would respond to their advertisements. Vendors generated floods of ads directed at the entire American public in an inefficient attempt to increase their consumer base.⁴⁰ The development of the Internet and then the electronic databases changed this outcome. Marketers began to keep track of consumers' personal details that would help increase their sales. This was information that companies had always had access to, but was only now able to effectively aggregate and analyze. Information accessible to companies expanded to include demographic data collected from the US census and sold to companies by the federal government. Although census data did not give out subjects'

³⁸ Stephen Fortune, "A Brief History of Databases," *AVANT*, February 27, 2014/ accessed July 14, 2015, <http://avant.org/media/history-of-databases>

³⁹ Daniel Solove, "Privacy and Power: Computer Databases and Metaphors for Information Privacy," *Stanford Law Review* 53 (2001), 1401.

⁴⁰ *Id.*, 1410.

names, once companies had the information they were able to aggregate and analyze it and eventually identify specific individuals. This is an example of how privacy invasions change as technology and strategies used to process this data shift. The collection of census data may not have had a direct impact on the lives of citizens, but using the compilation of this collected information in order to market to or hire the individual, or dictate loans requests, takes power away from the individual, shifting the societal power structure in favour of large entities capable of acquiring and assessing this information.⁴¹

With the dramatic expansion of the Internet throughout the twenty-first century, data aggregation of personal information has become more accessible and commonplace, and harder to detect or prevent. The birth of the Internet created a market for personal information. The Internet makes the buying, selling, and collecting of personal information immensely more efficient and pervasive. The manner in which the Internet can be purposed by its users is seemingly limitless. Citizens use it to shop, bank, learn, teach, express themselves, and connect with friends, family and colleagues. One's race, political party affiliation, gender, even aspects of one's medical or criminal history could not have been tracked down as easily before the creation the technological advances of the late twentieth and early twenty-first centuries.⁴²

An important factor in the current discussion of privacy stems from the increase in accessibility of information taken from individuals who are unaware their information is being taken, unaware of its significance, or powerless to protect their personal information in any meaningful way. Databases amassing these small and seemingly insignificant details allow companies to sort, manage, control, and interpret information that would previously have appeared unimportant or difficult to retain and utilize. The information obtained through

⁴¹Solove, "Privacy and Power," 1398.

⁴² Ibid.

registration and transactional requirements, or search history records can paint an extremely convincing, although often inaccurate, profile on an individual.⁴³

Contemporary scholarship links personal data collection with privacy invasion so frequently that many privacy advocates see it as an “incontrovertible given.” However, a clear articulation of the rationale behind the dangers of data collection is often convoluted under this assumption. In his book *Privacy and Participation: Personal Information and Public*, Paul Schwartz writes matter-of-factly that data collection is inherently linked to the “suppression of a capacity for free choice,” stating that, “the more that is known about an individual the easier it is to force his obedience.”⁴⁴ Michael Fromkin classified privacy as a “good in itself” and a “value worth protecting.”⁴⁵

However not all scholars view this level of data collection as inherently problematic, bad for society, or unconstitutional. These blunt statements proclaiming all acts of data collection to be “oppressive to free choice” as a rule are not difficult to counter. Obtaining another’s personal information does not always constitute a clear societal harm. In many cases, benefits are produced as the result of such data collection and in no way constitutes an oppressive act or a “suppression of the capacity for free choice.” For example, easy access to a patient’s digitalized medical history for a medical professional can mean the difference between life and death. The ability to engage in targeted solicitation can benefit less powerful political and advocacy organizations that would otherwise be hampered by the cost inefficiency of the 20% rule.⁴⁶ Companies often collect information in order to better serve their customers. Amazon attentively tracks every individual’s purchase history in order to give their customers book recommendations

⁴³ Id., 1394.

⁴⁴ Schwartz, Paul M. "Privacy and Participation: “Personal Information and Public Sector Regulation in the United States." *Berkeley Law Scholarship Repository*, 1994: 557-595.

⁴⁵ Michael Fromkin, "Death of Privacy?" *Stanford Law Review* 52 , 2000.

⁴⁶ Solove, “Privacy and Power,”1410.

they are statistically likely to enjoy. Although many citizens are still uncomfortable and feel manipulated by companies like Amazon, a Pew study shows that younger individuals are increasingly open to this practice as new generations adapt their definition of what they consider private. 36% of the 18-29 year olds surveyed find targeted advertising helpful, which is an 18% jump from the 50-64 year old participants.⁴⁷

As Richard Posner, economist and judge for Seventh Circuit court of appeals in Chicago, sees it, privacy is simply “the right to hide discreditable facts about oneself” from the public eye. Most of the data collected on individuals is hardly offensive or incriminating. Posner writes that privacy protections ought to be controlled by market pressures, which will inevitably lead to the most cost effective and societally beneficial solution to our privacy concerns. For companies to compile personal data, this information would have to be purchased or traded for services. Market pressures would determine where societal expectations about privacy lie and how they shift in relation to new information and services for which it could be exchanged.⁴⁸

Studies published in Monika Taddicken’s article “The ‘Privacy Paradox’ in the Social Web” demonstrate minimal changes in online behavior. Despite people’s alleged worries surrounding surveillance and data collection, their actions online do not mirror these concerns. The behavior of most Internet users does not correspond to their alleged fears surrounding privacy violations and the expected censoring effects of these concerns. Surprisingly, this is also evident in the data about online pornography. Online traffic records do not indicate any substantial decrease in people’s willingness to reveal personal information online or engage in possibly embarrassing web activity, such as viewing online pornography. Although potential disclosure and obtainment of search history records would reasonably be thought to discourage

⁴⁷ Sullivan, Danny. "Marketing Land." *Marketing Land*, March 9 2012/ January 20 2015, <http://marketingland.com/pew-survey-targeted-ads-negatively-7548>.

⁴⁸ Ibid.

pornography purchases, mail-order merchants of pornography in which customers must specify their name and address have no reported any difficulties in sales.⁴⁹

The same pattern is recognized in a lack of self-censorship of unpopular political literature. People do not take drastic action to hide their information online and often accept the terms in place in exchange for access to websites and the online services provided. These findings suggest that data collection by companies is not necessarily harmful or oppressive and that people are possibly willing to accept this loss of privacy as reality of twenty-first century life.⁵⁰ Does this lack of censorship and the average individual's increasing willingness to trade personal information for online services justify its collection? Or does this newly developed dimension of invasions into ones private life necessitated new methods for protecting it?

5. Failure of contemporary privacy protections

It is difficult to articulate exactly how online privacy should be protected within the American constitutional context. Going strictly by generally accepted previously developed definition of privacy, data aggregation appears legal and constitutional according to American standards. As previously mentioned, Daniel Solove identified six general privacy definitions prevalent throughout the scholarly privacy discourse. In this list, Solove includes: the right to be forgotten, limited access to self, secrecy, control over personal information, personhood, and intimacy. None of these however, comprehensively addresses the issues that arise with the aggregation of personal information through the use of online databases.⁵¹

“The Right to be Forgotten,” one of the most influential pieces of privacy literature, surprisingly lacks a clear definition of privacy. Brandeis and Warren made it clear that privacy is

⁴⁹ Patrick Carnes, “Enrichment Journal,” *Assemblies of God*, accessed June 15 2015, http://enrichmentjournal.ag.org/200504/200504_022_internet.cfm

⁵⁰ Solove, “Privacy and Power,” 1459.

⁵¹ Solove, “Conceptualizing Privacy,” 1099-1121.

the right to conduct a life free from unreasonable inhibitory outside influences. One area this argument fails to articulate, however, is how to deal with privacy invasions that necessitate state intervention. In their conception of a “right to be left alone,” Brandeis and Warren did not clearly express which activities must be left alone, which deserve express protections, and how to prioritize them. As citizens governed by a central democracy it is virtually impossible to be left completely alone and some guidance detailing what activities deserve protection from interference, occasionally by governmental regulation, needs further articulation.⁵²

The four privacy torts this literature inspired do not compellingly take issue with the collection and aggregation of personal information. The tort of public disclosure protects individuals from the disclosure of a private fact that would “offend a reasonable person” and is not of “public concern.” American jurisprudence asserts that when this tort conflicts with other rights, such as freedom of speech, privacy rights do not take priority. In the case *Cox Broadcasting v. Cohn* (1975), the Supreme Court recognized that “even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record.” In their decision, the Court ruled against the father of a deceased victim of sexual assault attempting to protect his daughter’s privacy and in favor of the broadcasting station who had identified his daughter by name during coverage of the trial. In *Oklahoma Publishing Co. v. District Court ex rel. Oklahoma County* (1977), the Court allowed a newspaper to publish details on a closed-door juvenile trial favoring the judge’s decision to allow media into his courtroom. In Justice White’s dissent, he discussed the detrimental effect he believed this case would have on the tort of public disclosure. The Court asserted that the state was restricted from taking action against newspaper publication solely to when “a state interest of the high order” compelled them to do so. Justice White believed the ruling would effectively

⁵² Id., 1124.

obliterate “one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts.” When information is on public record it is no longer private and the collection of this data cannot be classified as a privacy invasion.⁵³

“Limited Access to the Self” is Solove’s second understanding of privacy and its protection. As mentioned above, here privacy is defined as “a socially constructed need that must factor in the existence of others.” As a member of society, one cannot be completely removed from others; this definition classifies privacy along a spectrum of solitude, secrecy, and anonymity. The question asked here is to what extent does an individual deserve these three aspects of privacy. The collection of private data often fails to fall even remotely into any of these categories. Data can be collected from individuals that would not disrupt their solitude, uncover any secrets, or destroy their anonymity.⁵⁴

“Secrecy” is Solove’s third understanding of privacy. William Stuntz observes that this understanding of privacy “flows out of the interest in keeping secrets not out of the interest in being free from...dignitary harms.” As discussed above, privacy as secrecy protects previously concealed information. This understanding asserts that once a fact is disclosed it can no longer receive an expectation of privacy. This definition makes little room for individuals who wish to share pieces of information with some groups but not others. In *Smith v. Maryland* (1979), the Court ruled against the existence of a reasonable expectation to privacy for individuals in their call histories. Their reasoning for this decision was based on the understanding of privacy as secrecy. They believed that citizens could not legitimately expect privacy in their telephone call histories because a person can reasonably assume the companies have records of their calls.

⁵³ Walker, 257-286.

⁵⁴ Solove, "Conceptualizing Privacy," 1124.

Understanding privacy as control over personal information gives citizens a more active role in how their information is used. This understanding is not based upon keeping personal information out of the public sphere, but allowing the individual to have control over what information is shared and how it is processed. This understanding assumes that privacy is something to be protected at the discretion of the individual. For example, this question arises when considering whether individuals should be allowed to relinquish their privacy rights for benefits such as book recommendations made by Amazon.

The conception of privacy as protecting “personhood” focuses mainly on state interference in citizens’ lives. Although the personhood theory works to protect individuality control, this definition doesn’t effectively identify data aggregation as inhibitory to these goals. Further, the aforementioned studies of online data behavior that have asserted that online activity does not reflect people’s alleged privacy concerns. This makes it difficult to draw a connection between most instances of information solicitation and damage to the development of one’s personality.

Intimacy is the final definition of privacy on Solove’s list. Intimacy, although a component of the privacy definition, is not all-encompassing. The level of intimacy attached to information in question can help define the legitimacy of privacy expectations and the extent to which surveillance interferes with the formation of interpersonal relationships. Privacy here stands to protect interpersonal relationships. Often database information aggregation, however, does not interfere with interpersonal relationships, as it is simply the collection of random pieces of an individual’s personal information they are rarely even aware have been compiled.⁵⁵

⁵⁵ Solove, "Conceptualizing Privacy," 1105-1121.

Power does not come simply from data, but from the knowledge this data provides. For decades, it has been possible to acquire basic information on an individual, their age, date of birth, gender, and address. Information on call history, search history, and purchase history, have for a long time been available to third parties. Now that so many of our actions are tracked and recorded, the amount of information about a person that can be classified as “disclosed” to the public is astronomical. Through technological advances, the ability to amass, analyze, and distribute this information has skyrocketed in the last decade giving entities the ability to effectively turn data into knowledge.

But is this newfound ability to amass data and draw intrusive and often extremely personal conclusions unconstitutional? Is it unconstitutional for Target through use of their purchase algorithms to discover a teenage girl’s accidental pregnancy before her own father? It is unconstitutional for companies collecting users’ information to leave these customers vulnerable to hackers? Is it unconstitutional to post inappropriate pictures of an ex-girlfriend or boyfriend online? Although individuals feel intruded upon when this information is held by governmental and private entities, it is hard to articulate why according to the mainstream theories of privacy listed above.

6. An international comparison

This is not just a problem for the United States, as inter-web related issues cannot be confined to national borders. As technology progresses across the globe, questions addressing the morality and legality of data aggregation arise internationally. The ways in which other nations have tackled these issues help demonstrate the societal costs and benefits of these specific strategies while helping to determine how these reforms would fit into an American constitutional framework. Data protection laws in the United Kingdom, for example, are based

on directives from the European Union. The primary legislation restricting the collection of personal information by companies is the Data Protection Act (DPA) of 1998. The DPA includes eight principles instructing how personal data should be used. One goal of the Act was that “personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.” The Act further states, “Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.” Further, the act demands all collected information be kept current for accuracy and kept for only as long as necessary for the purpose it was collected.⁵⁶

The legal framework that allows for the development of this legislation is unique to the European Union. The EU was established with the aim of ending the violence that plagued the continent during World War II. The devastation the world witnessed during this time had a large impact on the development of the EU’s legal system and continues to influence policy today.

With the establishment of the Treaty of Lisbon in 2009, the Charter of Fundamental Rights of the EU has become legally binding on member states. The Charter combines the rights protected by the EU in one comprehensive document. Importantly among the rights and freedoms set out in the Charter, Dignity is included. Article 1 of the Charter states that “Human dignity is inviolable. It must be respected and protected.” The Charter immediately follows this statement with an enumeration of the rights to which each European citizen is entitled, suggesting that dignity is the basis on which all rights protected by the Charter are founded.⁵⁷

⁵⁶ Office of Public Sector Information, *Data Protection Act 1998*, Part I (Brussels , Belgium), 48, http://www.legislation.gov.uk/ukpga/1998/29/pdfs/ukpga_19980029_en.pdf

⁵⁷Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html> [accessed 16 December 2015]

The European Court's concern for the protection of an individual's privacy holds substantial weight. Europeans see privacy as a component of one's "personal dignity," which they value highly and believe the government must take an active role in protecting. Article 8 of the European Convention of Human Rights expresses "the right to respect for...private and family life." This line finds its legal inspiration in French law, in place to protect the reputations of the citizenry against intrusions by citizens and media outlets. Due to this general conception of privacy rights, the European Courts are less focused on preserving other freedoms than the American justice system has proven to be. For example, European Courts are more likely to actively restrict speech rights in their attempts to respect the dignity of the other citizenry.⁵⁸

The American constitutional conception of privacy focuses more predominantly on freedom from state intrusions and individual independence than the protection of human dignity. Privacy rights revolve around the sanctity of personal decisions, personal relationships, and places, possibly explained by the historical context of America at its founding as a reaction to oppressive monarchical rule in England which generated contempt and fear of an overly powerful central government. On the other hand, in the EU central government can more often be seen as a source of protection.⁵⁹

The current dominant understanding of American privacy rights does not allow for the implementation of the kinds of privacy protections present throughout the European Union. For example if information is held by a third party or constitutionally available to the public it negates one's reasonable expectation to privacy according to American standards. If a piece of information loses little value when disclosed, or that piece of information by itself is not seen as significant to its subject, it is difficult to protect under our current American understanding of

⁵⁸ Rex Glensy. "The Right to Dignity." *Columbia Human Rights Law Review*, 2011: 66-141

⁵⁹ Walker, 257-286.

privacy. Tort law fails to inhibit data collection because the gathering of each detail individually would rarely be deemed offensive to a reasonable person. Most personal information collected does not constitute “private facts,” as it can be ascertained by the outside world or has been given to a third party. It is difficult to prove that data collection restricts the development of individual personhood, as studies do not demonstrate increased in self-censorship. Additionally, it is difficult to articulate the intimacy of a phone record, or to establish clear boundaries over one’s personal information in a world in which we are all so interconnected and dependent on other individuals and entities for goods and services. Through this perspective, it becomes evident why so much pessimism exists about the future of American privacy rights.⁶⁰ If all this is true, in the words of Scott McNealy, chief officer of Sun Mircrosystems, maybe privacy really is dead and we should all just “get over it.”

6. A new understanding of privacy within the American constitutional framework

But if we let privacy die, we let a vital part of our constitutional rights die with it. Throughout history, privacy has been seen as an individual right and violations have been identified on an individual basis. The older paradigms of privacy helped guide a society attempting to defend itself against mostly clear and isolated affronts that could be clearly articulated within the context of a singular event. Disputed privacy offenses are increasingly “unseen unknown and ongoing” to the subjects. Individuals are often entirely unaware that their personal information has been taken, how it will be processed in the future, or what picture the aggregation of random details presents to the collector. This makes it difficult to assess the immediate effects of the privacy invasion and the implications on the individual’s future. It is

⁶⁰ Walker, 257-286.

difficult to address the individual's reasonable expectation to privacy in a world of unknown invasions and potential future consequences that most individuals do not understand.⁶¹

This problem is complex, and not irrelevant. The American Constitution aims to protect individual autonomy, allowing citizens living under the rule of a centralized government to retain a certain level of independence and control over their lives. Property rights first stood to protect individual private life, serving to safeguard the development of an individual's personality and future aspirations. Although the American Supreme Court eventually developed a constitutional right to privacy, the end goal remained the ability to establish a life left minimally vulnerable to intrusion and that gave citizens the ability to make conscious choices surrounding their futures.

Nowadays, however, modern technology is taking away the citizen's privacy, once protected by property and later safeguarded by a continually evolving constitutional definitions. These adapting definitions fail to address the new vulnerability presented by the creation of large databases, which provide a space to store and analyze tremendous amounts of information. Although, most of the information extracted by online data collectors and service companies is not taken with the goal of social control, oppression, or embarrassment, at some point during the amassing of personal information a recognizable, powerful, and convincing picture of the individual begins to develop. Information is compiled by a bureaucracy governed by a limited patchwork of regulatory legislation, and is passed on readily to the highest bidder or freely to whoever gains access. Database information aggregation strips individuals of their ability to control what is done with their personal information by third parties. Information aggregated in online databases can often determine whether an individual gets a loan, a job, or obtains a medical license. Instances of firings based on misinformation in criminal record databases or

⁶¹ Debbie Kasper, "The Evolution (or Devolution) of Privacy," *Sociological Forum* 20, no. 1 (2005), 69-92.

instances of careless release of sensitive medical information to employers are commonplace throughout American society. Although information in the private sector is taken for economic gain, once taken the individual loses virtually all control over how it is interpreted or used and what potential effect it has on his or her future, which surreptitiously shifts the power over that information away from the individual. Although privacy violations caused by each individual extraction of personal information has seemingly minimal consequences, when viewed on a more comprehensive level, it goes directly against the goals of our Framers and of other notions of privacy.⁶²

Changing the way we understand the constitutional right to privacy and identify privacy intrusions will help guide societal demands and expectations for the implementation of regulatory legislation, even if this simply means more pressure on Congress to enact federal legislation. Although we cannot implement the sweeping reforms seen across Europe increased adaptations to the way we measure privacy violations will help society articulate and understand the ways in which their privacy and individual freedoms are being threatened. Demonstrated throughout this essay, it is clear that intrusions must be identified by the extent to which they intrude upon what we define as the ultimate goals of privacy and not by a specific definition explaining certain common denominators all privacy violations inherently share. Data aggregation is simply unconstitutional because it takes away from the individual autonomy that first property rights, and then constitutional right to privacy sought to protect.

A revised understanding of privacy will help us to recognize the societal implications private sector actions have on society. No singular definition of privacy can stand alone, and we must understand that the varying definitions incorporate different important aspects of privacy.

⁶² Solove, "Privacy and Power," 1419-1430.

The common ground on which all privacy violations can be understood is not simply based off notions of either intimacy or personhood, but off the degree to which the violation inhibits the individual from asserting control over his or her personal life, and it must factor in how the violation affects the power structure within the American system.

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