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A NEW DEFINITION OF PRIVACY FOR THE LAW

ABSTRACT. The paper begins with a defence of a new definition of privacy as the absence of undocumented personal knowledge. In the middle section, I criticise alternative accounts of privacy. Finally, I show how my definition can be worked into contemporary American Law.

I. THE NEW DEFINITION

1. *Introduction*

American privacy jurisprudence is in conceptual shambles. Our courts have yet to defend a credible conception of privacy. Instead they continue to work with spurious and sometimes even irreconcilable definitions.[1] Law journal articles on privacy have only managed to contribute to the general confusion by advancing analyses that are equally impoverished. The absence of a clear, precise, and persuasive definition of privacy is particularly shocking and inexcusable when we consider the large, significant workload that the judiciary has assigned to this concept over the past twenty years: landmark cases ranging from the right to use contraceptives to abortion and euthanasia have become integral privacy doctrine.

My principal aim here is to trace the development of the present privacy quagmire and to suggest what might be done to straighten

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[1] This fact hasn't escaped all legal scholars. See, for example, Raymond Wacks's 'The Poverty of Privacy,' *The Law Quarterly Review* 96 (1980): 73–90; Harry Wellington's 'Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication,' *Yale Law Journal* 83 (1973): 221–311 and Louis Henkin's 'Privacy and Autonomy,' *Columbia Law Review* 74 (1974): pp. 1410–33.

Law and Philosophy 2 (1983) 305–338. 0167–5249/83/0023–0305 $03.40.

out this "haystack in a hurricane."[2] Specifically, I will offer a new definition of privacy that captures its essential, core meaning and consequently enables us to differentiate it from other related but distinct ideals. I then discuss the judicial mishandling of the concept and suggest some of its causes. Finally, I indicate how privacy properly conceived can be integrated into contemporary American law.

2. *The Definition*

I propose that privacy be defined as the condition of not having undocumented personal information about oneself known by others. To clarify this definition the notion of undocumented personal information must be explained. Very few legal scholars have attempted such an explication, but it is of crucial importance if we are to present a conception of privacy that will lend itself to ready application by the courts.

Several accounts of personal information can be dismissed straightaway. To claim, for example, that whether a piece of information about *A* is personal depends entirely upon *A*'s own attitude and sensitivity towards it cannot be reconciled with the incontrovertible fact that when a person willingly discloses intimate truths about himself, not caring how much of himself is known to others, he is indeed disclosing personal information about himself. Nor should we identify personal information with facts about a person that are no one else's business. After all, we do often and with warrant argue that investigative agencies charged with the responsibility of law enforcement are entitled to obtain personal information about citizens. Just because the information is someone else's business doesn't alter its sensitive and sometimes intimate nature.

My suggestion is that personal information be understood to consist of facts about a person which most individuals in a given

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[2] This memorable expression was coined by a Judge Biggs in the case of Ettore v. Philco Television Broadcasting Corp., 229 F. 2d 481 (3rd Cir., 1956), at 485.

time do not want widely known about themselves. They may not mind if a few close friends, relatives, or professional associates know these facts, but they would mind very much if the information passed beyond this limited circle of acquaintances.[3] In contemporary America, facts about a person's sexual habits, drinking habits, income, the state of his marriage, and his health belong to the class of personal information. Ten years from now some of these facts may be a part of everyday conversation; if so their disclosure would not diminish individual privacy.

This account of personal information, which makes it a function of existing cultural norms and social practices, needs to be broadened a bit to accommodate a particular and unusual class of cases of the following sort. Most of us don't care if our height, say, is widely known. But there are a few persons who are extremely sensitive about their height (or weight or voice pitch, etc.). They might take extreme measures to ensure that other people not find it out. For such individuals height is a very personal matter. Were someone to find it out by ingenious snooping we should not hesitate to talk about an invasion of privacy.

Let us, then, say that personal information consists of facts that most persons in a given society choose not to reveal about themselves (except to close friends, family,...) or of facts about which a particular individual is acutely sensitive and therefore does not choose to reveal about himself – even though most persons don't care if these same facts about themselves are widely known.

At this point someone might raise a question about the status of information belonging to the public record, that is, in newspapers, court proceedings, title offices, government archives, etc. Such information is available to the public; any one of us can look it up. It is, then, a kind of public property. Should it be excluded from

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[3] Thus I venture the belief that most people consider information concerning the condition of their homes, particularly their bedrooms and bathrooms, as being personal. A hostess might well show some guests her "private quarters," but she almost certainly will not invite just anyone in for a grand tour.

the category of personal information? I believe it should not. There is, after all, nothing odd or misleading about the proposition that public documents contain some very personal information about persons. We might discover, for example, that Jones and Smith were arrested many years ago for engaging in homosexual activities. I will henceforth refer to personal facts belonging to the public record as documented.

My definition of privacy excludes knowledge of documented personal information. I do this for a simple reason. Suppose that *A* is browsing through some old newspapers and happens to see *B*'s name in a story about child prodigies who unaccountably fail to succeed as adults. *B* had become an obsessive gambler who committed suicide. Should we accuse *A* of invading *B*'s privacy? An affirmative answer needlessly blurs the distinction between the public and the private. What belongs to the public domain cannot without glaring paradox be called private and consequently should not be incorporated within a viable conception of privacy.

Thus I agree with the opinion, expressed in the well-known and much respected Second Restatement of Torts, that 'there is no liability (under invasion of privacy) for giving publicity to facts about the plaintiff's life which are matters of public record...'[4] And this is simply because the concept of privacy cannot reasonably be understood as embracing such facts. The U.S. Supreme Court has also recognized this point. In *Cox Broadcasting Corp.* v. *Cohn* Mr. Justice White, writing for the majority, affirmed that "the interests in privacy fade when the information involved already appears on the public record."[5]

No one will plausibly object that my definition is too broad. But is it too narrow? For instance, must not an adequate conception of privacy take into consideration the impressions we form of each other as well as the information we acquire about each other?

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[4] Restatement of Torts (Second), Tentative Draft No. 13, section 652D, Comment C, at 114. The parenthetical addition is mine. See also Prosser's *Handbook of the Law of Torts*, 4th ed. (1971), section 116, pp. 810–11.

[5] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), at 19.

Well, impressions are beliefs that are acquired from brief or casual encounters with a person or thing. Impressions can turn out to be either true or false. If they are true and concern personal facts about a person then they comprise personal information whose acquisition and disclosure does implicate bonafide privacy interests. If false, their acquisition and disclosure falls under the concept of libel or slander.

I believe, and have argued at length elsewhere[6] that privacy is an ideal distinct from values like secrecy, solitude, and autonomy. One very important virtue of my proposed definition is that it permits these distinctions and requires that they be respected in our moral-legal reasoning instead of being ignored or buried behind inflationary analyses. The search for adequate definitions is, as Plato averred, the search for essential ideas[7] or distinguishing characteristics. Those who charge me with narrowness should ask themselves whether the ideas, over and above that of undocumented personal information, which they would like to see incorporated under privacy cannot be more clearly and perspicuously articulated through other concepts.

3. *The Right to Privacy*

The concept of a right to privacy is quite different from and should not be confused with the concept of privacy simpliciter. The former is designed for the purpose of enabling us to discuss, classify, and condemn wrongful or unjustified invasions of privacy. To say that we possess a right to privacy means essentially that we are entitled not to be victimized by gratuitous or indiscriminate snooping, prying, spying, etc. It is one thing for me voluntarily to disclose undocumented personal facts about myself, or to have such facts responsibly gathered as a necessary part of important law-enforcement activities, for example. It is quite another matter

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6 'Recent Work on the Concept of Privacy,' *The American Philosophical Quarterly*, forthcoming.

7 See *Theaetetus*, 206c–207a, and 208c, where Plato makes it clear he is seeking some mark by which knowledge differs from all other things.

if newspapers, the government, or private persons obtain and/or disseminate undocumented personal information about me without any compelling reasons or if in the pursuit of legitimate objectives they deploy irresponsible prying techniques. To argue against the latter we need the concept of a right to privacy.

Let me elaborate a bit on wrongful invasions of privacy. I think we can usefully classify them into three categories. There are first of all *gratuitous* or *wanton* intrusions, which can be broken down into the following kinds:

(1) those that serve no legitimate purpose, being simply products of idle curiosity or malicious prankstering;
(2) those that are unnecessary in that less intrusive means of obtaining the needed information are available – e.g., sending questionnaires instead of wiretapping;
(3) those that are arbitrary and capricious – e.g., a government official orders surveillance on a group of citizens chosen at random on the grounds one of them might be involved in criminal activity.

The second category consists of *indiscriminate* invasions, and these can be broken down into two broad classes:

(1) those that acquire information that is not relevant to the justifying purpose involved, as when the police secretly observe a restroom trying to apprehend homosexuals and in the process watch hundreds of innocent persons partake of the facility;
(2) those that are carried out in such a way that persons with no business knowing the personal facts acquired are permitted cognitive access to them, as when a welfare officer discloses highly sensitive information about a recipient to his family and neighbors.

The third category of wrongful invasions of privacy includes failures to institute or enforce suitable safeguards for the procured information, thus allowing it to fall into the wrong hands. In view of the huge amounts of undocumented personal information

generated today – perhaps this is the single most important consequence of living with computer technology – it is imperative that the storage facilities for the collected data be made secure against unwanted break-ins.

To guard against violations of the right to privacy I propose five requirements that must be met by anyone advocating the acquisition disclosure of undocumented personal knowledge.

A. *The need requirement.* There must be a valid or legitimate need for invading privacy.

B. *The probable cause requirement.* There must be probable cause to believe that the information sought is relevant to the justifying need. And there must be probable cause to believe that this information (and not some other, irrelevant information) can be obtained by the techniques recommended.

C. *The alternative means requirement.* There mustn't be any alternative, less intrusive means available for obtaining the desired information.

D. *The warrant requirement.* An impartial judicial officer must issue a warrant particularly describing the place to be searched and the information sought. The Fourth Amendment to the U.S. Constitution usually imposes this requirement on law enforcement officers.

E. *The security requirement.* There must be restrictions on cognitive access to the information during the times of its acquisition, disclosure, and storage, so that only persons entitled to know the facts have them.

The above is, of course, very sketchy, more an adumbration than a complete theory of the right to privacy. Still it does isolate most of the crucial questions that must be addressed when asking whether a particular program or activity does violate the right. To be sure reasonable persons will occasionally disagree over whether uses of physical, psychological, and data surveillance are gratuitous or indiscriminate.

Hence arguments concerning alleged violations of the right to privacy will continue to occupy us, and their resolutions will shape the contour of the right. But at least we will be arguing about

privacy and not some other value. Our reasoning will be correctly focused. Unhappily this cannot be said of our courts' recent efforts.

II. THE JUDICIAL MISHANDLING OF PRIVACY

4. *The Griswold Opinion*

The trouble all began in 1965 with the Supreme Court decision *Griswold* v. *Connecticut*. The appellant Griswold was Director of Connecticut's Planned Parenthood League. In that capacity he was giving out information, instruction, and medical advice to married persons regarding the use of contraceptives. Connecticut law forbade such activity. It also prohibited married couples from using contraceptive devices. Griswold was arrested and convicted for violating this law. He appealed and his case went all the way to the Supreme Court.

Mr. Justice Douglas wrote the majority opinion for the Court. Refusing to judge the issue on liberty grounds, Douglas argued for the existence of a constitutionally protected right to privacy. This was not an easy task since the Constitution nowhere mentions a right to privacy. Douglas's ingenious strategy involved the claim that the specific guarantees of the Bill of Rights have penumbras formed by emanations from these guarantees. These penumbras, which breathe life and substance into our constitutional entitlements, create zones of privacy. These in turn form a general right to privacy. *Griswold*, according to Douglas, concerns the kind of intimate relationship between husband and wife that lies safely within the privacy penumbra. The Connecticut contraceptive law had a maximum destructive impact on this relationship. Accordingly it must be struck down.[8]

Douglas's argument raises a number of vexing questions. We can ask, as Mr. Justice Black did in dissent, whether any penumbral analysis purporting to establish the existence of rights not express-

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[8] Griswold v. Connecticut, 381 U.S. 479 (1965), at 482–487.

ly enumerated in the constitutional text is legitimate. After all, if the founding fathers had intended to include privacy among the rights to be granted constitutional protection why didn't they explicitly say so? Black mordantly summed up the point this way: "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."[9]

To my mind an even more urgent question to ask in light of Douglas's opinion is, how exactly are we to understand the meaning of the privacy that we are now told constitutes a fundamental right of the people? Douglas does not offer a definition of it, but without some attempt at conceptual elucidation one is hard pressed to assess his claim that privacy is indeed presupposed by several constitutional articles. It also becomes difficult to know what kinds of conduct the Court will subsequently declare to be in violation of the right to privacy.

The omission of a privacy definition is especially frustrating and disappointing in view of the fact, forcefully underscored in the Harlan and White dissents, that the Connecticut law under challenge in *Griswold* seemed most offensive to liberty interests, not privacy interests. For it prohibited an activity, hence constrained choice, hence limited the freedom, in a paradigmatic sense of the word, to pursue what many citizens probably regarded as a prudent, responsible objective. The way in which the law directly imperiled privacy was much less evident and only tangentially relevant to the Court's principal argument.

5. *The Eisenstadt Definition and Its Applications*

It took seven years before the U.S. Supreme Court told us how it conceived of the newly created privacy right. In *Eisenstadt* v. *Baird*, a case involving the validity of a Massachusetts statute that prohibited the use of contraceptives by unmarried couples, Mr. Justice Brennan writing for the majority declared:

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[9] Ibid., p. 510.

> It is true that in *Griswold* the right to privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[10]

The Massachusetts law was found by Brennan and three other Justices to be a violation of this right.

The following year we were told that the right to privacy, understood as a species of the right to make fundamentally important decisions, is broad enough to encompass a woman's decision whether or not to have an abortion, provided this decision concerns a nonviable fetus (the Court identified viability with the capacity to lead a meaningful life outside the womb and placed it at between 24–28 weeks of gestation) and is made in consultation with a licensed physician.[11] During the next five years the Supreme Court issued several more abortion decisions in which they dealt with questions ranging from the rights of the husbands and parents of women seeking abortions[12] to the responsibility for funding the abortions of poor women.[13] For our purposes what is most significant about these cases is that they (or at least the majority opinions) treat the *Eisenstadt* definition as an established part of Constitutional Law.

This fact of judicial usage received further confirmation in the 1977 case of *Whalen* v. *Roe*. The issue here was whether the state of New York could record, in a centralized computer file, the names and addresses of everyone who pursuant to a doctor's prescription obtains a Schedule II drug – e.g., cocaine, amphetamine,

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[10] Eisenstadt v. Baird, 405 U.S. 438 (1972), at 453.

[11] Roe v. Wade, 410 U.S. 113 (1973), at 153.

[12] See, for example, Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); and Bellotti v. Baird, 428 U.S. 132 (1977).

[13] See, for example, Maher v. Roe, 432 U.S. 464 (1977); and Beal v. Doe, 432 U.S. 438 (1977).

or other substance for which there is both a lawful and an unlawful market. In the course of upholding the validity of this practice the Court, in an opinion by Mr. Justice Stevens, singled out the interest in independence in making certain kinds of important decisions as a defining element in many of the privacy cases they had decided.[14]

In developing the contours of the right of privacy the Supreme Court has been faced with the difficult task of ranking different kinds of personal choices in terms of their importance to human well-being. The abortion and contraception choices have been classified as fundamentally important and hence as subsumable under the right of privacy. Other kinds of personal decisions have been refused this status. For example, in *Village of Belle Terre* v. *Boraas*, the Court ruled, over the vigorous dissent of Mr. Justice Marshall, that local communities may set limits on the number of single, unrelated adults living together in one household.[15] And the Court has refused to afford constitutional protection to the decision by homosexuals to have sexual intercourse with consenting adults in private.[16]

Several state courts have followed the U.S. Supreme Court in identifying the right of privacy with the right of individuals to make fundamentally important decisions. The New Jersey Supreme Court, for instance, in the famous *Quinlan* case, declared that the constitutional right to privacy "...is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions."[17] The California Appeal Court asserted, in *People* v. *Privitera*, that the right to privacy explicitly set forth in the California Constitution "encompasses a fundamental and

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[14] Whalen v. Roe 429 U.S. 589 (1977), at 599.

[15] Village of Belle Terre v. Boraas 416 U.S. 1 (1974).

[16] Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), affirming the decision in 403 F. Supp. 1199 (E.D. Va.).

[17] *In the Matter of Quinlan*, 355 A. 2d 647 (1976), at 663.

compelling interest of the cancer patient to choose or reject his or her own medical treatment on the advice of a licensed medical doctor."[18] And the Alaska Supreme Court ruled that the state and federal right to privacy is broad enough to protect the decision of adults to use marijuana in their homes.[19]

6. *A Respectful Dissent*

The above summary clearly shows that the right to privacy has come a long way in American law and has done so in a relatively short time. But has the journey been misguided from the outset? I believe that it has, and for the following reason. The *Eisenstadt* definition confuses the values of privacy and liberty. A person who makes and executes his own decisions without government interference can quite properly be described as acting in the absence of officially imposed (external) constraints. The commonly accepted and philosophically justified conception of liberty is precisely the absence of external constraints. Laws that effectively prevent citizens from pursuing various activities infringe (sometimes justifiably, sometimes not) on personal liberty. The laws in *Griswold, Eisenstadt, Roe, Privitera,* and *Ravin* all infringed liberty and were challenged for this reason.[20]

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[18] People v. Privitera, 74 C.A. 3d 936 (1977), at 959. The Court of Appeal accordingly ruled that cancer patients do have the right to try leatrile as a treatment. The California Supreme Court disagreed, however. It accepted the privacy conceptualization of the issue, but argued that the right to privacy does not encompass the cancer patient's decision whether or not to use laetrile. See, People v. Privitera, 23 Cal. 3d. 697 (1979).

[19] Ravin v. State, 537 P. 2d. 494 (1975).

[20] Of course the enforcement of a law forbidding the use of contraceptives would raise serious and legitimate privacy questions, for doubtless all kinds of sensitive, undocumented personal information could be discovered in police raids. Douglas recognized this fact when he asked, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notion of privacy surrounding the marital relationship." See *Griswold*, p. 516. But this difficulty is not the gravamen of petitioners' complaint. Nor is it addressed by the *Eisenstadt* definition.

At least two of the Supreme Court Justices recognized this. Writing separate concurring opinions in *Griswold*, Harlan and White argued that, in Harlan's words, "the proper constitutional inquiry in this case is whether the Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty.' "[21] Both men thought that it did.[22]

A few law professors have taken note of this confusion between privacy and liberty. Henkin points it out as does Wellington, who goes on to urge the Supreme Court to develop a coherent and systematic theory of the right to liberty embodied in the Fifth and Fourteenth Amendments to the Constitution.[23] I enthusiastically endorse Wellington's suggestion. And I suggest that the Court might well want to incorporate the *Eisenstadt* definition in such a theory. For part of what the right to liberty means is that citizens ought not to be subject to unwarranted government coercion in matters which fundamentally affect their lives. Mr. Justice Harlan deserves credit for recognizing just this point and giving clear expression to it well before *Griswold:*

> The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere presented in the Constitution. This 'liberty' is not a series of isolated points picked out in terms of the taking of property; the freedom of speech, press, and religion, the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly

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[21] Ibid., p. 500.

[22] Justice Rehnquist makes a similar point about the Texas statute under challenge in Roe v. Wade. See his dissenting opinion, p. 172.

[23] See the Henkin and Wellington essays cited in note 1. For readers who may not be familiar with the constitutional amendments, the Fifth provides in part that no person "shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property without due process of law." This amendment constrains the federal government. The Fourteenth Amendment constrains state governments. It provides in part that no state shall "deprive any person of life, liberty, or property, without due process of law. . . ."

> speaking, includes freedom from all substantial arbitrary impositions and purposeless restraints ... and which also recognizes what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.[24]

Doubtless many of the Court's judgments about the arbitrariness or reasonableness of particular statutory or administrative restraints will be contested. A preponderance of legal opinion now believes, for instance, that the decision reached in the infamous *Lochner* decision, striking down a law that forbade employees in biscuit, bread, or confectionary establishments from contracting to work more than 60 hours per week or 10 hours per day, was mistaken.[25] Few constitutional scholars now accept the thesis, defended at length in *Lochner*, that laws designed to guard employees from unsafe or hazardous working conditions constitute arbitrary restrictions on liberty. But the remedy for *Lochner* does not consist either in judicial retreat from substantive due process, where judges assess the justification for laws which abridge basic liberties, or in feats of conceptual legerdemain. Instead it demands rigorous disciplined reasoning aimed at constructing credible criteria for distinguishing justifiable from unjustifiable forms of government coercion.

7. *The Brandeis Definition and Its Influence*

There is a second conception of privacy that several former members of the U.S. Supreme Court, including William Douglas,[26] Potter Stewart,[27] and Abe Fortas have embraced. According to it, privacy consists simply of being let alone. Fortas provides a more embellished formulation. The right to privacy, he says, "is, simply stated, the right to be let alone; to live one's life as one chooses, free from assault, intrusion, or invasion except as they can be justi-

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[24] Poe v. Ullman, 367 U.S. 497 (1962), at 543.

[25] Lochner v. U.S., 198 U.S. 45 (1905).

[26] See Douglas's *The Rights of the People* (Westport: Greenwood, 1958).

[27] See, for example, Stewart's opinions in Katz v. U.S., 389 U.S. 347 (1967), at 350; and in Whalen v. Roe, 429 U.S. 589 (1977), at 608.

fied by the clear needs of the community living under a government of law."[28]

A number of distinguished law professors think of privacy in essentially this way. Paul Freund, for example, argues that the right to privacy conceived of as the right to be left alone can serve a useful role as a principle of law.[29] Bloustein distinguishes individual privacy from group privacy and equates the former with the right to be let alone.[30] Posner, Monagham, and Konvitz share this view of privacy.[31] Shattuck, writing as a spokesman for the ACLU, gives his support to it.[32]

The definition owes its origin and much of its popularity to the writings of Louis Brandeis. In the classic essay 'The Right to Privacy,' written almost 100 years ago, Brandeis and Samuel Warren argued that American common law must respond to the growing threat to individual privacy posed by technological innovations like instantaneous photography as well as by irresponsible "newspaper enterprise" – i.e., gossip. The two young lawyers were especially worried about a press that in their opinion was

> overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but

[28] Time v. Hill, 385 U.S. 374 (1967), at 412. See also Fortas' opinion in Gertz v. Robert Welch, Inc., 418 U.S. 323 U.S. 323 (1974), at 412–13.

[29] Paul Freund, 'Privacy: One Concept or Many?' in *Nomos XIII: Privacy*, ed. J. Pennock and J. Chapman (New York: Atherton Press, 1971), pp. 182–98.

[30] Edward Bloustein, 'Group Privacy: The Right to Huddle,' in his *Individual and Group Privacy* (New Brunswick: Transaction Books, 1978), pp. 123–86.

[31] Henry Paul Monagham, 'Of "Liberty" and "Property,"' *Cornell Law Review* **62** (1977): 405–44; Milton Konvitz; 'Privacy and the Law: A Philosophical Prelude,' *Law and Contemporary Problems* **31** (1966): 272–80; Richard Posner, *The Economics of Justice* (Cambridge: Harvard U. Press, 1981), p. 272. Posner differentiates two bona fide senses of "privacy," those of secrecy and seclusion, and maintains that the latter protects our interest in being let alone.

[32] John Shattuck ed., *Rights of Privacy* (Skokie: National Textbook Co., 1977), in his introductory comments.

has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient task the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be secured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasion upon his privacy, subjected him to mental pain and distress far greater than could be inflicted by mere bodily injury.[33]

Warren and Brandeis thought that the law should respond to this most troublesome situation by granting formal recognition to the general right to be let alone, a right more basic than because presupposed by the venerable common-law right to intellectual and artistic property.[34] And they clearly identified the right to be let alone with the right to privacy.[35] Their argument, in short, was that the right to privacy is an integral and indispensible part of American common law whose enforcement had become necessary in order to forestall a way of life where "what is whispered in the closet shall be proclaimed from the housetops."[36]

Almost 40 years after the publication of 'The Right to Privacy' Brandeis reiterated his advocacy of the right to be let alone in a new famous dissent to the Supreme Court's decision, in *Olmstead* v. *N.Y.*, that wiretapping private telephone conversations did not violate the Fourth Amendment's prohibition against unreasonable searches and seizures.[37] The majority of the Court emphasized

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[33] Samuel Warren and Louis Brandeis, 'The Right to Privacy,' *Harvard Law Review* 4 (1980): 196.

[34] In Warren's and Brandeis's words "no basis is discerned upon which the right to restrain publication and reproduction of such so-called literary and artistic works can be rested, except the right to privacy... ." Ibid., p. 207.

[35] Ibid., pp. 205–7.

[36] Ibid., p. 195.

[37] The Fourth Amendmend reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable

that wiretapping does not involve an actual physical trespass, but Brandeis did not see this as a reason for worrying less about invasion of privacy. On the contrary, he saw it as a reason for more concern and for more judicial diligence. In his words: "Whenever a telephone line is tapped, the privacy of the persons at both ends of of the line is invaded, and all conversations between them upon any subject, and although proper, confidential, and privileged, may be overheard."[38] Brandeis went on to proffer his well-known analysis of the Fourth Amendment:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. 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 this right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[39]

The right to privacy has never been so eloquently and passionately praised!

8. *A Second Respectful Dissent*

Unfortunately neither has the right been so badly misunderstood! Think about some of the ways in which *A* can fail to leave *B* alone: by hitting him, interrupting his conversation, shouting at him, repeatedly calling him, joining him for lunch. There is no compelling reason of logic or law to describe any of these actions as an invasion of privacy. To do so engenders a needlessly inflationary conception that manages to accomplish the nearly impossible feat of hopelessly obscuring the central, paradigmatic

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cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

[38] Olmstead v. U.S., 277 U.S. 439 (1928), at 475–76.

[39] Ibid., p. 478.

meaning of privacy, viz., the condition of not having undocumented personal facts about oneself known by others. Of course privacy can be invaded through certain forms of human interaction. For example, if *A* interrupts *B*'s conversation with *C* and in the process finds out something very personal about *B* it would probably be entirely appropriate to talk about an invasion of privacy. But it is a serious mistake to insist that all instances of not letting a person alone are so similar to this one that we can call them all infringements of privacy.

III. PROSSER, AND RECENT RESCUE ATTEMPTS

9. *The Failure of Prosser's Analysis*

One of the most influential essays on privacy, arguably the most important essay after Warren's and Brandeis's, is William Prosser's.[40] Prosser was an expert in the law of torts. His purpose in proffering an analysis of privacy cannot be understood as an attempt to rectify the judicial mishandling of the concept – the essay 'Privacy' was published in 1960 before this terrible quagmire began. Rather, Prosser wanted to bring some order and coherence to the tort law of privacy by classifying the huge number (over 300) of cases that the courts had until then decided on privacy grounds into distinct categories. His conclusion was that "the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff – which interests have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be let alone.' "[41]

Let us briefly examine Prosser's four privacy torts, to see whether he did fulfill his estimable purpose. The first form of privacy invasion is intrusion upon the plaintiff's seclusion or solitude, or into his private affairs. Typical of the cases falling under this category is *DeMay* v. *Roberts*, in which a young man in-

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[40] William Prosser, 'Privacy,' *California Law Review* 48 (1960): 383–423.
[41] Ibid., p. 389.

truded upon a woman giving birth.[42] The woman didn't know the intruder, was very disturbed that he should be present at at time like this, and sued him for invasion of privacy.

Should the law endorse this conceptualization? The difficulty is that there are many ways to intrude upon a person's seclusion or solitude and it isn't at all obvious why we need to describe each in terms of privacy. In the *DeMay* case a cause of action for invasion of privacy would have been legally feasible and conceptually appropriate. But individuals complaining of environmental intrusions upon their solitude – e.g., loud noises, offensive odors – should seek a legal remedy under the law of nuisance. (They might also claim a violation of their right to property.) The intrusions of burglars definitely involves physical trespass; whether they also implicate privacy interests depends on what the burglars find out about their victims. Only intrusions that result in the acquisition of undocumented personal knowledge should be decided under privacy law.

Prosser's second privacy tort is public disclosure of embarrassing private facts. Typical of cases falling under this category is *Sidis* v. *F-R Publishing Corp.*[43] Sidis was a child prodigy who in his adult years became a recluse seeking anonymity, solitude, and privacy. The New Yorker magazine published a story on him which focused on his abandonment of intellectual pursuits for a life of simple, eccentric pleasures. He sued for invasion of privacy. *Melvin* v. *Reid*[44] is another common kind of disclosure case. The plaintiff was a former prostitute and defendant in a sensational murder trial. She was acquitted, left her life of shame, married, and began to lead a respectable life. Seven years later the defendant made and exhibited a motion picture which reenacted her true story using her past name. She sued for invasion of privacy.

I believe that *Sidis* is a genuine privacy case. (I also believe that he should have won the case.) But cases like *Melvin* are not

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[42] DeMay v. Roberts, 9 N.W. 146 (1881).

[43] Sidis v. F-R Publishing Corp., 113 F. 2d 806 (1940).

[44] Melvin v. Reid, 112 Cal. App. 283 (1931).

because the facts revealed in them are undocumented. Anyone could easily – i.e., without resort to snooping or prying – have found out about the plaintiff's past life.

Prosser's third privacy tort is publicity that places the plaintiff in a false light in the public eye. Belonging to this category are cases like *Gill* v. *Curtis Publishing Co.*,[45] where the face of an innocent person was used to ornament an article on profane love, and *Peay* v. *Curtis Publishing Co.*,[46] where the face of an innocent cab driver was published in an article on the cheating propensities of cabbies.

False light grievances should be conceptualized and brought under the law of libel or slander. Invasion of privacy always involves the finding out of true information about persons. We must remember that persons can be injured badly by the disclosure of personal information about themselves. And when this information is no one else's business they can quite properly appeal to the right of privacy for legal protection.

The last privacy tort Prosser distinguishes is appropriation for the defendant's advantage of the plaintiff's name or likeness. Here we confront cases like *Roberson* v. *Rochester Folding Box Co.*,[47] where a beautiful young woman's picture was used without her consent to advertise flour, and *Pollard* v. *Photographic Co.*,[48] in which a photographer took plaintiff's picture and put it on sale.

It is a mistake to conceptualize these kinds of cases in terms of privacy. For they don't involve the finding out of personal facts about anyone. Most of them have essentially to do with the issue of financial renumeration and consequently should be handled as property cases. If the gravamen of petitioner's complaint is not financial but concerns the preemption of choice – she wasn't asked whether her name or likeness could be used – the right to liberty becomes the focus of attention. In neither situation does

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[45] Gill v. Curtis Publishing Co., 38 Cal. 2d 273 (1952).
[46] Peay v. Curtis Publishing Co., 192 F. Supp. 395 (D.D.C., 1948).
[47] Roberson v. Rochester Folding Box Co., 64 N.E. 442 (1902).
[48] Pollard v. Photographic Co., 40 Ch. D. 345 (1888).

the concept of privacy have a useful role to play. Indeed it only deflects attention away from the real issues at stake.

So Prosser's analysis is largely a failure. This should come as no surprise, though, since he starts off on the wrong foot by accepting past judicial usage of the term "privacy" without blinking a critical eye. Anyone who works from the naive assumption that the courts have all along been working with an adequate conception of privacy is asking for trouble.

10. *The Failure of Recent Rescue Efforts*

A good number of legal scholars and philosophers have within the past decade offered their own definitions of privacy. These can be understood as attempts to clean up the disheveled haystack. Unfortunately they only contribute to the conceptual chaos.

Consider first Gerety's proposal that privacy be equated with autonomy over the intimacies of personal identity.[49] What does he have in mind by such intimacies? It turns out they consist of fundamental personal decisions that most of us would not want to be regulated by law.[50] Decisions relating to sex receive most of Gerety's attention. For him the paradigmatic form of privacy invasion is intrusion upon sexual autonomy.[51] Greenawalt[52] and Richards[53] advance similar views of privacy. We can dispose of the Gerety conception very quickly, for it is substantially equivalent to the *Eisenstadt* definition and thus stands vulnerable to the charge of conflating privacy with (one dimension of) liberty. If anyone needs further convincing, there are two compelling counter-

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[49] Tom Gerety, 'Redefining Privacy,' *Harvard Civil Rights – Civil Liberties Law Review* 12 (1977): 236.

[50] Ibid., p. 273.

[51] Ibid., p. 296.

[52] Kent Greenawalt, 'Privacy and Its Legal Protections,' *Hastings Center Studies* 2 (1974): 45–68.

[53] David A. J. Richards, 'Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution,' *Hastings Law Journal* 30 (1979): 957–1018.

examples to the definition. Consider the case of a comatose patient who lacks any kind of autonomy. Efforts to safeguard his privacy still make perfectly good sense, and can be entirely successful. So the claim that autonomy over the intimacies of personal identity is a necessary condition of a person's privacy should be rejected. That such autonomy is not a sufficient condition either is shown by the fact that we can keep a suspected criminal under constant surveillance, thereby diminishing his privacy, without necessarily jeopardizing his sexual life.

One of the most popular recent conceptions of privacy identifies it with control over information about oneself. Elizabeth Beardsley, for example, equates the right to privacy with the right to selective disclosure and explicates the latter as the right to decide when and how much information about ourselves we will make known to others.[54] Fried[55] at times speaks of privacy in this way, as does Wasserstrom.[56] Alan Westin is perhaps its best-known advocate: privacy, he avers, is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.[57]

This definition is far too broad. It implies, contrary to common sense and common usage, that whenever I go out in public my privacy is compromised since by doing so I lose considerable control over information that others can acquire about me. What jeopardizes privacy is the acquisition of personal facts about me and these are not imperiled by public activities.

An amended Westin conception, identifying privacy with

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[54] Elizabeth Beardsley, 'Privacy: Autonomy and Selective Disclosure,' in *Nomos XIII*, p. 65.

[55] Charles Fried, 'Privacy,' *Yale Law Journal* 77 (1968): 483.

[56] Richard Wasserstrom, 'The Legal and Philosophical Foundations of the Right to Privacy,' in *Biomedical Ethics* ed. Thomas Mappes and Jane Zembaty (New York, McGrawhill, 1981), p. 110.

[57] Alan Westin, *Privacy and Freedom* (New York: Atheneum, 1967), pp. 7 and 42.

control over personal information, has a few adherents, including Gross[58] and Wasserstrom[59] (the latter as well as Fried vacillate between these two definitions). But it too is unsatisfactory. For one thing it is subject to the comatose counterexample. It is also vulnerable to what might be called the voluntary self-disclosure counterexample. Suppose that *A* freely divulges all of the most intimate, personal facts about himself to *B*. Has *A* exercised control over this information? Well in one basic sense of "control" he certainly has, since it was within his power either to disclose or not to disclose and he chose to do the former. Yet in telling all to *B*, *A* has lost privacy. Here is a paradigm case where liberty is exercised at the expense of privacy.

Nor is control over personal information a necessary condition of privacy, if by "control" we mean the power to prevent disclosure of such information to individuals other than those to whom we have chosen to reveal it. Suppose that *B* has the technological prowess and the political authority to obtain all sorts of personal information about citizen *A*. And further suppose that *A* can do nothing to stop *B* from doing so and from disclosing the acquired facts to anyone he pleases. Under these circumstances *A* lacks control over these facts: he is without the power to prevent their disclosure by *B*. But is *A* without privacy? No, not unless *B* actually proceeds to initiate a prying and dissemination campaign against him. That *A*'s privacy is threatened doesn't mean it is actually diminished.

Still another control conception of privacy that has gained increasing support during the last decade, especially among social scientists, identifies it with control over access to the self. Irwin Altman is its most persuasive advocate. In two influential essays he attempts to defend the idea that privacy consists of a boundary control process whereby people can make themselves accessible

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[58] Hyman Gross, 'Privacy and Autonomy,' in *Nomos XIII*, p. 170.

[59] Richard Wasserstrom, 'Privacy: Some Assumptions and Arguments,' in *Philosophical Law*, ed. Richard Bronaugh (Westport: Greenwood, 1978), pp. 157 and 162.

to others or close themselves off.[60] Van Den Haag[61] and Parker[62] offer similar conceptions.

This definition is no more plausible than any of the previous control species. It falls prey to the threatened loss and comatose counterexamples. In addition, it indulges the utterly fantastic assumption that we can and should exercise complete sovereignty over personal relationships. Plausible moral principles dictate that such relationships be founded on mutual accord and respect.

Something is radically wrong with the effort to conceive of privacy as a form of control. The right to control, whether it be over sexual matters, personal information, or access to oneself should be seen not as constitutive of the right to privacy but as an integral element of the right to liberty. Whenever one person or group of persons tries to deprive another of control over some aspect of his life, we should recognize this as attempted coercion and should evaluate it as such, under the general concept of freedom-limiting action.

One final definition of privacy should be mentioned. It equates privacy with the limitation of access to the self. Gavison[63] and Garrett[64] defend it. This definition is in one way broader than Altman's, since exercising autonomy is only one way to ensure distance from oneself. Unfortunately, it is no more convincing than the control conception. If "access" is taken to designate something like physical proximity to a person then this definition succumbs to the threatened loss counterexample. If "access" is

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[60] Irwin Altman, 'Privacy – A Conceptual Analysis,' *Environment and Behavior* 8 (1976): 7–29; and Altman, 'Privacy Regulation: Culturally Universal or Culturally Specific?' *The Journal of Social Issues* 33 (1977): 66–84.

[61] Ernest Van Den Haag, 'On Privacy,' in *Nomos XIII*, p. 149.

[62] Richard Parker, 'A Definition of Privacy,' *Rutger's Law Review* 27 (1974): 286.

[63] Ruth Gavison, 'Privacy and the Limits of Law,' *Yale Law Journal* 89 (1980): 428.

[64] Roland Garrett, 'The Nature of Privacy,' *Philosophy Today* 18 (1974): 274.

taken to designate knowledge of the self[65] then another problem emerges. Suppose that *A* taps *B*'s phone and overhears many of *B*'s intimate conversations. But there have been limits set on *A*'s snooping. He can only listen when there is in the opinion of a designated court probable cause to believe that *B* is planning a crime. Here we have a case of limited cognitive access *with* invasion of privacy.

The above survey does, I hope, strengthen the case for my own definition. Privacy ought to be conceived as the condition of not having undocumented personal information about oneself known. This account captures the essential meaning or, if you will, the form of privacy. Our courts should embrace it but they haven't thus far. So what can be done? One would be naive to suggest that the judiciary simply dismiss the *Griswold-Eisenstadt* line of cases and begin anew. The place of precedent in legal reasoning is firmly established and quite indispensable. In Part IV, I offer some more realistic suggestions.

IV. FASHIONING A CREDIBLE PRIVACY JURISPRUDENCE

11. *Privacy and the Fourth Amendment*

I have argued that it is a mistake to interpret the Fifth and Fourteenth Amendments to the U.S. Constitution as safeguarding individual privacy. Rather their express purpose is to protect life, *liberty*, and property against unwarranted governmental intrusions. Are there any constitutional provisions that do safeguard privacy as I have defined it?

The Fourth Amendment, which condemns unreasonable searches and seizures and requires for any search the issuance of a warrant "particularly describing the place to be searched, and the persons or things to be seized," clearly is designed, among other things, to ensure that the government not acquire sensitive personal knowledge about citizens via arbitrary investigative methods (it

[65] Hyman Gross proposed this amended definition in his 'The Concept of Privacy,' *The New York University Law Review*, 42 (1967): 34–35.

is also designed to ensure that the government not arbitrarily interfere with citizens' enjoyment of their property). The warrant requirement in particular reflects our founding fathers' concern for what I earlier called indiscriminate invasions of privacy. And the reasonableness requirement serves to condemn what I have called gratuitous invasions of privacy. So the Amendment as a whole can plausibly be interpreted to presuppose a right to privacy.

It is convincing to say, then, that while privacy is not among the explicitly enumerated Constitutional rights it is nonetheless a right protected by the Constitution. It follows that whenever the Supreme Court is presented with questions concerning the admissibility of evidence secured by wiretapping or by other forms of official prying, or with questions concerning the need to obtain a search warrant before conducting a search, it inevitably engages in the difficult task of defining the contours of the right to privacy presupposed by the Fourth Amendment.

Over the past fifteen years the Court has been busily engaged in just this task. Here is a brief sampling of its opinions. In *Katz* v. *U.S.* it ruled that the police may not attach electronic listening devices to the outside of a telephone booth in order to record the conversations of a person suspected of conveying information on bets and wages without first obtaining a search warrant.[66] In *Berger* v. *N.Y.* the Court invalidated a permissive eavesdropping statute authorizing the indiscriminate use of electronic surveillance devices.[67] In *Stanley* v. *Georgia* it ruled that allegedly pornographic movies seized without a search warrant from the defendant's home could not be introduced as evidence in his trial.[68] In *Lo-Ji Sales, Inc.* v. *N.Y.* the Court declared that a search of an adult bookstore resulting in the seizure of several films and magazines violated petitioner's Fourth Amendment rights because the warrant issued failed to particularly describe the things to be

[66] Katz v. U.S., 389 U.S. 347 (1967).
[67] Berger v. N.Y., 388 U.S. 41 (1967).
[68] Stanley v. Georgia, 394 U.S. 557 (1969).

seized.[69] Finally, in *Steagold* v. *U.S.* the Court ruled that the police may not search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant.[70]

A more controversial area of Fourth Amendment jurisprudence involves automobile searches by the police. In several recent cases the Court has held that law enforcement officers who have probable cause to believe that contraband is concealed somewhere within a moving vehicle may conduct a warrantless search of the vehicle and of any individual compartments and containers they happen to find there.[71] Justices Marshall and Brennan have vigorously dissented from this broad ruling. Marshall argued that it will have profound implications for the privacy of citizens riding in automobiles. In his words:

> A closed paper bag, a tool box, a knapsack, a suitcase, an attache case can alike be searched without the protection of the judgement of a neutral magistrate, based only on the rarely disturbed decision of a police officer that he has probable cause to search for contraband in the vehicle. The Court derives satisfaction from the fact that its rule does not exalt the rights of the wealthy over the rights of the poor. A rule so broad that all citizens lose vital Fourth Amendment protection is no cause for celebration.[72]

Two points merit emphasis here. First, reasonable persons are going to disagree when applying the right of privacy to particular searches. The judgments of purpose and responsibility that have to be made are not self-evident.[73] Second, and more significantly, the

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[69] Lo-Ji Sales v. N.Y., 442 U.S. 319 (1979).

[70] Steagold v. U.S., 101 S. Ct. 1642 (1981).

[71] See, for example, Texas v. White, 423 U.S. 67 (1975), and U.S. v. Ross, 72 L. Ed. 2ed 572 (1982).

[72] U.S. v. Ross, at 605.

[73] However in a case just handed down the Court did unanimously agree that the Fourth Amendment does not forbid the police from placing a beeper (radio transmitter which emits periodic signals that can be picked up by a radio receiver) in a drum of chloroform for the purpose of monitoring the progress of a car that carried the drum. Law enforcement officers reasonably believed that the parties under surveillance were conspiring to manufacture controlled substances, including methamphetamine, in violation of federal law. See Knotts v. U.S., 51 LW 4232 (1983).

law should require that these judgements be made, whenever possible and feasible, by a judge after he has been provided with all of the relevant data pertaining to the need for a search and its required scope. Procedural restraints governing the origination and implementation of privacy-invading techniques are of indispensable importance in safeguarding our dignity.

12. *Privacy and the First Amendment*

The First Amendment to the Constitution provides in part that "Congress shall make no law...abridging and freedom of speech, or of the press...' At first glance it might seem that the right to privacy is seriously jeopardized by this provision. After all, speech and the press are two prominent vehicles through which undocumented personal knowledge is disclosed, so if there aren't any legal restrictions whatsoever on their operation then what's to stop gratuitous and indiscriminate invasions of privacy on a massive scale?

Of course one should be surprised if this were indeed a consequence of First Amendment jurisprudence since, as we have seen, the Fourth Amendment serves in part to protect against just such a possibility. Are we to assume that the two Amendments work against each other?[74] No, for the simple reason that the Supreme Court has never treated the First Amendment as an absolute. Justifiable exceptions for the "no law" rule have been recognized and in my view the safeguarding of individual privacy against wrongful assault can and should be included among them. Let me elaborate.

The Supreme Court has never taken the position that the publication of obscenity is guaranteed under the First Amendment.[75] Every state has laws forbidding the sale of child porno-

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[74] Mr. Justice Powell is surely right when observing that "the framers of the Constitution certainly did not think these fundamental rights (those belonging to the Bill of Rights) of a free society are incompatible with each other." See his majority opinion in Lloyd Corp. v. Tanner, 407 U.S. 551, at 570.

[75] Roth v. U.S., 354 U.S. 476 (1957), and Miller v. Ca., 413 U.S. 15 (1973).

graphy, for example. Similarly, the Court has never defended the view that public speech, no matter how inflammatory, enjoys an absolute immunity from legal restrictions. It all depends on the nature of the words used and the circumstances under which they are uttered.[76] Nor has the Court taken a completely hands-off attitude towards the publication of false statements about individuals. Libelous utterances do not fall within the area of constitutionally protected speech.[77]

Privacy deserves to count as a First Amendment limiting principle as well. Whenever the press discloses undocumented personal information about an individual in an entirely gratuitous, arbitrary, or indiscriminate manner it should be subject to legal sanctions. After all, the hurt and damage caused by such disclosures can be as severe and traumatic as that brought about by defamatory publications, instigative language, or obscenity. In other words, we can be seriously wronged by invasions of privacy and there is no compelling reason why the right to freedom of speech and of the press should be interpreted to allow this wrong while forbidding other comparable offenses.

Unfortunately First Amendment privacy jurisprudence is not faring well. For one thing, the Courts have too often confused false-light defamation grievances with bona fide privacy issues, this due unquestionably to Prosser's influence (see Part III, section 9). In addition, the Courts have on occasion treated cases involving the disclosure of documented personal information as raising legitimate privacy interests.[78] This is unfortunate because, as I

[76] Schenck v. U.S., 249 U.S. 47 (1919) is the classic case here. The Court introduced the "clear and present danger" test for deciding whether inflammatory speech can be stopped.

[77] See Brauhainais v. Illinois, 343 U.S. 250 (1952).

[78] See, for example, Melvin v. Reid, and Briscoe v. Reader's Digest Association, Inc., 4 C. 3d 529 (1971), in which a former truck hijacker's identity, already a part of the public record, was divulged in Reader's Digest some eleven years after he had committed the crime. The California Supreme Court ruled that the publication of plaintiff's name was not newsworthy, interfered with his rehabilitative process, and therefore furnished him with a valid cause of action under privacy law.

have argued earlier, documented facts belong to the public sphere and therefore cannot without undue strain be brought under the concept of privacy. Finally, when the Courts have been presented with obviously gratuitous infringements of bona fide privacy interests they have not always given protection to these interests. A classic instance of this failure is *Sidis* v. *F-R Publishing Corp.*[79] Sidis was a child prodigy – he was lecturing to Harvard professors on the Fourth Dimension at 11. In his latter years he sought privacy and solitude, living a quiet and rather eccentric life. The New Yorker magazine interrupted his quest for anonymity by publishing two articles with pictures depicting his "decline" from scholarly preeminence. Sidis sued the magazine but, much to the chagrin of privacy lovers, lost resoundingly. We can only hope that the future will bring more promising results.

13. *Privacy and Whalen*

In my opinion *Whalen* v. *Roe* is the most significant privacy decision rendered by the supreme Court in the last decade. I say this for two reasons: for the first time the Justices explicitly endorse a conception of privacy that is nearly adequate; and they display some moral sensitivity to some of the conditions that must be satisfied if our right to privacy (in the sense defended in this paper) is to be taken seriously.

The facts of *Whalen* are as follows. The state of New York required that the names and addresses of all persons obtaining schedule II drugs – e.g., opium, cocaine, amphetamines and other drugs for which there is both a lawful and an unlawful use – be kept on record in a centralized computer file. This information was put on magnetic tapes that were then stored in a vault. After five years the tapes would be destroyed. A locked fence and alarm system provided security for the information-processing system. Public disclosure of the patient's identity was prohibited.

The Court unanimously agreed that this legislation did not

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[79] Sidis v. F-R Publishing Corp., 113 F. 2d 806 (2d Circ., 1940).

infringe the patient's right to privacy. But in reaching this (reasonable, I believe) conclusion, the judges exhibited a genuine concern for the privacy interests at stake. Thus Justice Stevens wrote:

> We are not unaware of the threat to privacy implied in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collecting of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our armed forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in nature and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures.[80]

The Court has appropriately scrutinized the New York scheme to ensure that it does not allow gratuitous or indiscriminate invasions of privacy and that the personal facts accumulated and filed in the State Department of Health are secure against unjustified cognitive access. In so doing it has used the criteria I set forth (Part I, section 3) for identifying wrongful invasions of privacy. And it has appropriated, at last, a conception of privacy quite different from the *Griswold-Eisenstadt* definition, a conception that focuses essentially on the interest in avoiding disclosure of personal matters. Justice Stevens uses exactly these words[81] to describe it. If the Court were to combine this account with their observation in *Cohn* that facts belonging to the public record are not a part of the privacy interest then they would have the right definition. We might then see a new era of conceptually accurate, morally responsible privacy jurisprudence.

The recent case of *H.L.* v. *Matheson* reminds us, however, that even with the correct conception of privacy members of the Court will continue to disagree over the question of its wrongful invasion. Utah law requires that physicians notify, if possible, the

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[80] Whalen v. Roe, 429 U.S. 589 (1976), at 605.

[81] Ibid., p. 599.

parents or guardians of a minor upon whom an abortion is to be performed. It also requires physicians to notify the husband of a woman seeking an abortion. A majority on the Court did not believe that this law violated women's right to privacy. Justice Marshall, joined by Brennan and Blackman, strongly disagreed. Marshall, utilizing the *Whalen* definition of privacy, expressed his dissent thus:

> Many minors, like appellant, oppose parental notice and seek instead to preserve the fundamental, personal right to privacy. It is for these minors that the parental notification requirement creates a problem. In this context, involving the minor's parents against her wishes effectively cancels her right to avoid disclosure of her personal choice. Moreover, the notice requirement publicizes her private consultation with her doctor and interjects additional parties in the very conference held confidential in *Roe* v. *Wade*.[82]

Surely the crucial issue here is whether the disclosures of an intention to abort serves a valid purpose. The claim that it will bring about greater familial cohesion is problematic, given the emotional nature of the subject and the communications gap that characterizes so many parent-daughter relationships. The argument that notification will minimize the likelihood of rash, unwise decisions to abort is also problematic. It will more likely either preempt any decision at all on the part of the women – they will see themselves as having no choice but to have the baby – or drive them to defy the law, at possible risk to their own health, seeking any doctor willing to perform a secret abortion. If no persuasive arguments are forthcoming in defense of the notification requirement, we should declare it a gratuitous invasion of privacy and accordingly invalidate it as a violation of the right to privacy protected by though not explicitly mentioned in the Constitution.

14. *Privacy and the Ninth Amendment*

The Ninth Amendment reads: "The enumeration in the Constitution of certains rights, shall not be construed to deny or disparage

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[82] H. L. v. Matheson, 101 S. Ct. 1164 (1981), at 1186.
[83] Griswold v. Connecticut, at 493.

others retained by the people." Justice Goldberg attempted to find the right of privacy in this Amendment thereby making it part of the Constitution. However, his argument, set out at great length in *Griswold*, rests on a fallacy. For he supposes that it is the responsibility of judges to decide which rights not named in the Constitution are retained by the people. Judges are to make such decisions looking to the traditions and collective conscience (whatever that is) of the people.[83] But there is nothing in the Ninth Amendment authorizing the judiciary to undertake this task. The only reasonable interpretation of the Amendment is that *the people* can and should decide which rights they want for themselves.

There are various means available for the people to exercise this right with respect to privacy. We can push for privacy legislation in Congress. We can urge our state representatives and governors to pass laws and regulations safeguarding privacy against wrongful invasion. Finally, we can demand that our State Constitutions give formal recognition to a basic right to privacy. California citizens did this in 1972. They passed a Legislative Constitutional Amendment adding privacy to the inalienable rights of the people set forth in Article 1, Section 1.[84] Some of the arguments deployed on behalf of this Amendment were badly confused – for example, the right to privacy is equated with the right to be let alone.[85] Nonetheless important points were made, particularly concerning the serious dangers posed by the proliferation of government snooping and data collection. Many were made painfully aware of the fact that, in the language of the Election Brochure, "computerization of records makes it possible to create cradle-to-grave profiles on every American."[86]

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[84] Article 1, Section 1 of the California Constitution now begins: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy*." (Italics mine.)

[85] California Election Brochure, Proposition 11 (Nov., 1972), p. 27.

[86] Ibid., p. 26.

The right to privacy is uniquely qualified for use in arguments urging the responsible exercise of high technology information processing and management capabilities. These capabilities will become increasingly powerful during the last third of this century, so the need to demand our privacy properly conceived in terms of undocumented personal knowledge will become more urgent and more vital. It might also become more difficult given the predictable resistance of technology capitalists. The future role of privacy in the law hangs in the balance.

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