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Some say that technology has erased privacy and that we no longer have any reasonable expectation of privacy. Surely the law has been unable to keep up with technological advances, and we can all wonder if privacy is "dead" or lost. A comparison of privacy protection approaches between the U.S. and the E.U. can be helpful. While technology to protect privacy is usually available, it is often expensive and complex, and many are not willing to pay the price for it. Nevertheless, I will argue that there are historical, conceptual, and philosophical connections between the three privacy interests developed in law in order to emphasize the numerous ways that our privacy may be invaded. Thus, despite difficulty, there is more force to the alternative claim that it is more important to protect privacy today and to view it as the default for setting technological, ethical, and public policy guidelines.

I. HISTORY:

Much philosophical and legal discussion on the scope and value of privacy is quite recent, and until the turn of the 20th century privacy protection may have been taken for granted.[1] Nevertheless, the concept of privacy is not new.[2] Historical evidence demonstrating that privacy has been discussed and valued for centuries is not difficult to find.[3] Perhaps most famous is Aristotle's distinction in *Politics* between the *polis*, or political realm, and the *oikos*, the domestic realm.[4] While Aristotle deemed the political realm of governing, open to men only, to be a public arena, he viewed the domestic realm of home and family as a private arena.[5] This Aristotelian distinction between public and private spheres of life has

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1. *See* Jeroen van den Hoven et al., *Privacy and Information Technology*, STAN. ENCYCLOPEDIA OF PHIL. (Nov. 20, 2014), http://plato.stanford.edu/entries/it-privacy/.

2. *See id.*

3. *See* ARISTOTLE, POLITICS (350 B.C.), *reprinted in* THE BASIC WORKS OF ARISTOTLE 1127, 1129-30 (Richard McKeon ed., Benjamin Jowett trans., 22nd prtg. 1970); JOHN LOCKE, *Of Property* (1690), *reprinted in* THE SECOND TREATISE OF GOVERNMENT 16, 17 (Thomas P. Peardon ed., Macmillan Publishing Co. 24th prtg. 1986).

4. *See* ARISTOTLE, *supra* note 3, at 1129-30.

5. *See id.*

continued to influence and dominate much of the scholarship on privacy.[6] John Locke provides another well-known example of a historical reference to a public/private distinction.[7] Locke invokes the distinction in the chapter on property in his *Second Treatise of Government*.[8] In the state of nature, he argues, one owns one's own body while other property is held in common, or deemed public.[9] When one mixes one's labor—by harvesting grain or catching fish, for example—with property that was held in common becomes one's private property.[10] Although individuals are cautioned to leave "enough and as good . . . for others," private property acquisition is heralded by Locke as an appropriate goal.[11] Aristotle and Locke serve as two reminders that the concept of privacy has played a prominent role in major philosophical works since ancient times.

As philosopher Alan Westin has pointed out, while "[m]an likes to think that his desire for privacy is distinctively human," studies have shown that virtually all animals share a need for privacy, which they fulfill by seeking individual seclusion, territoriality, or small-group intimacy.[12] Moreover, Westin argues persuasively that anthropological, sociological, and biological literature demonstrate that most cultures around the world mirror these behaviors and use distance-setting mechanisms to protect a private space to promote individual well-being and small-group intimacy.[13] In so doing, these cultures exhibit both the value of privacy and the need to preserve it.[14] Although not all societies protect privacy in the same way, individuals in virtually every society engage in patterns of behavior and adopt avoidance rules in order to seek privacy.[15] Cultures that rely on communal living often have religious or other ceremonies where privacy through isolation is provided.[16] When privacy cannot be attained through physical isolation, individuals find privacy by turning away or averting their eyes, or by finding psychological ways to protect their private thoughts and sentiments. Westin concludes that privacy is a cross-species and cross-

6. *See* van den Hoven et al., *supra* note 1 (discussing two types of privacy rights in modern U.S. law).
7. *See* LOCKE, *supra* note 3, at 17.
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. Alan Westin, *The Origins of Modern Claims to Privacy*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 56, 56 (Ferdinand David Schoeman ed., 1984).
13. *See id.* at 61.
14. *Id.*
15. *See id.*
16. *Id.* at 65-66.

cultural value, and that claims to individual privacy in some form are universal for virtually all societies.[17]

II. EMERGING TECHNOLOGY AND PRIVACY

Modern innovations in technology have undoubtedly threatened privacy.[18] Most of the philosophical literature on this subject focuses on data collection and access to personal data through Internet searches, telephone conversations and texts, and electronic payments and transactions, which are routine processes that are readily available to others.[19] We all know about WikiLeaks and Edward Snowden, and have heard the recent news about the Ashley Madison website ("Have an affair!") getting hacked despite its heavily touted privacy protection efforts.[20] There are many more examples of similar situations: social media tempting and inviting people to share information, direct marketing, surveillance cameras, smart phones with GPS, government rankings of universities using salaries from tax returns, biomarkers, brain imaging, drones, sensor networks such as Fast Lane and E-ZPass, closed circuit TV, government cybersecurity initiatives, and so on.[21] To make matters worse, almost none of us are aware of what information is out there, who has access to it, and what is (or can be) done with it.[22] Information in the Cloud (public and private online data storage services run by Google, Dropbox, Amazon, Microsoft, and others) could be scattered everywhere and anywhere across the globe.[23] Also, we know that the law cannot keep up with medical and technological advances.[24] Legislatures have not been able to work fast enough to deal

17. *See* Westin, *supra* note 12, at 59-61; *see also* Judith Wagner DeCew, *Privacy*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 584 (Andrei Marmor ed., 2012) [hereinafter DeCew, *Privacy*].

18. van den Hoven et al., *supra* note 1.

19. *Id.*

20. *See* Paul Farhi, W*ikiLeaks Spurned New York Times, but Guardian Leaked State Department Cables*, WASH. POST (Nov. 29, 2010, 7:57 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/11/29/AR2010112905421.html (discussing WikiLeaks); Barton Gellman et al., *Edward Snowden Comes Forward as Source of NSA Leaks*, WASH. POST (June 9, 2013), https://www.washingtonpost.com/politics/intelligence-leaders-push-back-on-leakers-media/2013/06/09/fff80160-d122-11e2-a73e-826d299ff459_story.html (discussing Edward Snowden); Dino Grandoni, *Ashley Madison, a Dating Website, Says Hackers May Have Data on Millions*, N.Y. TIMES (July 20, 2015), http://www.nytimes.com/2015/07/21/technology/hacker-attack-reported-on-ashley-madison-a-dating-service.html (discussing Ashley Madison).

21. *See* van den Hoven et al., *supra* note 1.

22. Steve Kroft, *The Data Brokers: Selling Your Personal Information*, CBS NEWS (Mar. 9, 2014), http://www.cbsnews.com/news/the-data-brokers-selling-your-personal-information/.

23. David Goldman, *What is the Cloud?*, CNN (Sept. 4, 2014, 9:05 AM), http://money.cnn.com/2014/09/03/technology/enterprise/what-is-the-cloud/.

24. Vivek Wadhwa, *Laws and Ethics Can't Keep Pace with Technology*, MIT TECH. REV. (Apr. 15, 2014), http://www.technologyreview.com/view/526401/laws-and-ethics-cant-keep-pace-with-technology/ (explaining the gaps between law and technology).

with the protection of confidential information; the law simply cannot keep pace with these rapidly changing technologies.[25]

III. ETHICAL DILEMMAS RELATED TO TECHNOLOGICAL ADVANCES

I was asked to speak a bit about ethical dilemmas related to technological advances, and I am sure you will find these examples familiar. First, there are obvious, enormous threats to privacy that can sometimes cause *irreparable harm* to individuals. Data can be used without the consent or knowledge of the individual, and in the U.S. there is often easy access to massive amounts of information from employers, insurance companies, banks, and governmental agencies.[26] Access to personal information means *power* for others.[27] For example, accurate data about an individual can facilitate identity theft or can be aggregated to paint an inaccurate portrait of the individual by using information that is selectively bundled for political gain, economic advantage, and so on. Our passwords can be hacked, and our whereabouts tracked, without us having any knowledge of this activity. Information can be used for harassment and bullying online, which can lead to devastating results—especially for young people who may be particularly vulnerable.

Second, unfair use and access to data can generate informational *inequality*.[28] Not only are most individuals unaware of who has what information, but few are also in a position to negotiate the use, transmission, or exchange of their data, or even the ability to correct inaccurate data.[29] This all undermines our shared values of trust and reliability and our traditional views on ownership. For example, attempting to correct one's credit report information can lead to a lower credit score for merely making multiple inquiries about one's credit reports.[30] Or, as another example, a

25. *See* Briana Bierschbach, *After Target and Snowden Revelations, Privacy Protection Emerges as a Top Issue at Legislature*, MINNPOST (Mar. 10, 2014), https://www.minnpost.com/politics-policy/2014/03/after-target-and-snowden-revelations-privacy-protection-emerges-top-issue-le (highlighting the efforts Minnesota's legislature has taken to rectify the issues between law and technology).

26. *See* van den Hoven et al., *supra* note 1; *see also* Zack Whittaker, *Yes, the FBI and CIA Can Read Your Email. Here's How*, ZDNET (Nov. 13, 2012, 2:00 PM), http://www.zdnet.com/article/yes-the-fbi-and-cia-can-read-your-email-heres-how/ (explaining the various methods that the United States government can use to gain access to individuals' private e-mail accounts).

27. *See* van den Hoven et al., *supra* note 1.

28. *Id.* (emphasis added).

29. *Id.*

30. Jenna Lee, *The Difference Between Hard and Soft Credit Inquiries*, U.S. NEWS & WORLD REP. (July 24, 2014, 8:40 AM), http://money.usnews.com/money/blogs/my-money/2014/07/24/the-difference-between-hard-and-soft-credit-inquiries.

vacationer may find that his or her bankcard no longer works because a bank system suspects that his or her charges are actually fraudulent.[31]

Third, more specific individual harm can be *discrimination* based on how particularly sensitive data is accessed and used.[32] Consider data on an individual's HIV status, mental health records, and sexual preferences. Despite medical HIPAA regulations, such data can be released—potentially leading to employment discrimination, economic discrimination (as in cases involving home mortgage applications), and so on.

Fourth, moral philosophers stress the *encroachment on moral autonomy* that can occur.[33] A "[l]ack of privacy may expose individuals to outside forces" that can pressure or demand compliance and conformity, and can constrain choices about travel, family, and lifestyle.[34]

Fifth, *designs of technology* in cyberspace may tacitly (or explicitly) *promote or invite unethical behavior*.[35] The allure of gaining information or photos of others for whatever devious use is growing due to the massive amounts of data available, and the ease of gathering it at little or no expense promotes this type of behavior. As well, consider the lure of virtual game worlds, especially for multi-player games, and the growing evidence that playing violent video games can lead to violent behavior.[36]

Despite the well-established protection of tort privacy to control information about oneself in the courts, and the almost universal acceptance of the value of informational privacy, Abraham Newman persuasively argued that the United States and many countries in Asia have developed limited systems of privacy protection that focus on self-regulation within industry and government, making personal information readily available.[37] In contrast, the European Union ("E.U.") and others have "adopted an alternative vision privileging consumer protection and individual privacy against the efficiency and economic interests of firms and public officials."[38] The E.U.'s data privacy protection directive of 1995, now adopted in some form by all twenty-seven E.U. nations, contains

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31. *See* Matt Brownell, *Why Your Bank Thinks Someone Stole Your Credit Card*, DAILYFINANCE (Apr. 26, 2013, 1:46 PM), http://www.dailyfinance.com/2013/04/26/credit-card-fraud-alerts-banks-think-your-card-was-stolen/#!slide=976871.

32. van den Hoven et al., *supra* note 1.

33. *Id.*

34. *Id.*

35. *See* Julie Zhuo, *Where Anonymity Breeds Contempt*, N.Y. TIMES (Nov. 29, 2010), http://www.nytimes.com/2010/11/30/opinion/30zhuo.html.

36. *APA Review Confirms Link Between Playing Violent Video Games and Aggression*, AM. PSYCHOL. ASS'N (Aug. 13, 2015), http://www.apa.org/news/press/releases/2015/08/violent-video-games.aspx.

37. ABRAHAM L. NEWMAN, PROTECTORS OF PRIVACY: REGULATING PERSONAL DATA IN THE GLOBAL ECONOMY 1-2 (2008).

38. *Id.* at 2.

comprehensive rules empowering privacy commissioners or agencies to enhance individual privacy protection, and requires that personal information not be collected or used for purposes other than those initially intended without individual consent—despite the challenges of the September 11, 2001 terrorist attacks.[39] This contrasts sharply with the U.S. approach providing entities (such as insurance companies and employers) with ample access to personal information due to a lack of governmental support for privacy legislation and a mere patchwork of privacy guidelines.[40] Although technologies that provide more privacy protection in Information Technology ("IT") may exist, these technologies are often not adopted due to the expense of implementation as well as the suspicion that lack of privacy protection is inevitable. The U.S. has generally stood behind efficiency and laissez-faire arguments that "business and government [need] to have relatively unfettered access to personal data to guarantee economic growth and national security."[41] In contrast, the E.U. has sent a coherent signal that "privacy [is] critical to the founding of a robust information society," meaning that its "citizens would continue to participate in an online environment only if they felt that their privacy was guaranteed against ubiquitous business and government surveillance."[42] E.U. countries want assurance that U.S. companies will provide the privacy they require in order to do business with U.S. corporations.[43] A huge question, of course, is whether or not there is reliable enforcement.

So, do we have a reasonable expectation of privacy any more? There are probably two major answers to this question. First, some say no—we should just accept the reality of advancing technologies that erase privacy, and give up on salvaging our privacy. Second, other philosophers, including myself, believe privacy is more important now than ever, and it should be a priority. On this view, technological advances and legal protections arising therefrom should treat privacy as the *default*, and push for new and better ways to salvage and protect privacy. One example of a proactive privacy protection group is the Electronic Privacy Information Center ("EPIC").[44] Another is the Privacy Law Scholars Conference ("PLSC"), which is held annually in Berkeley, California or Washington,

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39. *Id.* at 21-22.

40. *See id.* at 31 ("[T]he United States . . . [has] a multitude of unregulated sectors in the economy that offer a source of personal information for regulated sectors.").

41. *Id.* at 3, 12.

42. NEWMAN, *supra* note 37, at 12-13.

43. *See id.* at 13 ("[T]he European Union had to deploy its regulatory capacity to define, monitor, and enforce a clear set of market rules . . . to persuade other countries to adjust.").

44. *See id.* at 34 ("[The Electronic Privacy Information Center] monitor[s] government and business activities, exposing abuses and pressing for greater attention to the issue [of privacy protection].").

D.C.[45] Professor David Vladeck serves on the Advisory Board of EPIC, and has been an extremely effective privacy advocate for consumers as the former Director of the Federal Trade Commission's Bureau of Consumer Protection.[46] MIT's *Technology Review* has called him the FTC's "privacy cop."[47]

IV. PRIVACY IN LAW AND ETHICS: ITS SCOPE AND VALUE

I am not a technology expert or a lawyer, despite spending a fellowship year at Harvard Law School, but I am trained as a philosopher, and much of my research has centered on the value and scope of privacy in law and ethics.[48] Thus, I shall describe early and recent literature on the value of privacy as well as three legal protections of privacy: (1) Tort law and the protection of informational privacy; (2) Fourth Amendment privacy protection against unreasonable searches and seizures and seizures; and (3) What the U. S. Supreme Court has recently termed "constitutional privacy." I shall argue that, despite claims to the contrary, there are important historical, conceptual, and philosophical *connections* between these three interests, making it all the more important that we defend the priority of privacy in multiple contexts.[49]

The first serious discussions of the meaning of privacy in the United States developed in the law, as legal protection for privacy was granted and expanded. The initial legal protection of privacy was introduced in tort law. In 1890, Samuel Warren and Louis Brandeis argued that privacy protection should be established as a legal right to give individuals the right "to be let alone" in order to protect their "inviolate personality."[50] They urged that protections of individual rights over the person and one's property were

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45. *See The 9th Annual Privacy Law Scholars Conference*, BERKELEY CTR. FOR L. & TECH., https://www.law.berkeley.edu/research/bclt/upcoming-events/june-2016-the-9th-annual-privacy-law-scholars-conference/ (last visited Feb. 16, 2016).

46. *Epic Advisory Board: David Vladeck*, EPIC.ORG, https://epic.org/epic/advisory_board.html #vladeck (last visited Feb. 16, 2016).

47. *MIT Technology Review: The FTC's Privacy Cop Cracks Down*, PRIVACY LIVES (June 27, 2012), http://www.privacylives.com/mit-technology-review-the-ftcs-privacy-cop-cracks-down/2012/06/27/.

48. My previous works have also influenced the creation of this article. *See* Judith Wagner DeCew, *Connecting Informational, Fourth Amendment and Constitutional Privacy*, *in* PRIVACY, SECURITY, AND ACCOUNTABILITY: ETHICS, LAW AND POLICY 73 (Adam D. Moore ed., 2016) [hereinafter DeCew, *Connecting Informational, Fourth Amendment and Constitutional Privacy*]; Judith Wagner DeCew, *Privacy*, STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2015), http://plato.stanford.edu/archives/spr2015/entries/privacy/ [hereinafter DeCew, *Privacy*, STAN. ENCYCLOPEDIA OF PHIL]; DeCew, *Privacy*, *supra* note 17; JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS AND THE RISE OF TECHNOLOGY (Cornell Univ. Press, 1997).

49. *See* DeCew, *Connecting Informational, Fourth Amendment and Constitutional Privacy*, *supra* note 48; DeCew, *Privacy*, STAN. ENCYCLOPEDIA OF PHIL., *supra* note 48.

50. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

already established in common law and that political, social, and economic changes demanded recognition of new rights.[51] After all, the courts extended protection against actual bodily injury to protection against an attempt to injure, and protection against physical harm to protection of human emotions through slander and libel.[52] Similarly, new inventions and technology, such as the printing press and camera, called for new methods to curtail invasions of privacy by newspapers and photographers in order to protect a person's general right of immunity and the right to one's personality, and also to guarantee one's right to control information published in the media about oneself and one's family.[53] Thus, Warren and Brandeis argued that privacy protection was already implicitly protected, could fill the gaps left by other remedies (such as nuisance, trespass, and intentional infliction of emotional distress), and should be explicitly recognized as a right to privacy.[54] Arguing that this would *not* be the addition of a new right or judicial legislation, they urged it was reasonable to explicitly acknowledge individual rights in order to rein in publicity about oneself and one's likeness—as long as privacy protection did not prohibit publications of general interest protected by freedom of the press, or data on a "public figure" about whom the public may have a right to know.[55] By 1905, this privacy right to control information about oneself was affirmed and expanded.

Legal theorists have worked to articulate the meaning and scope of this tort of informational privacy protection. In 1960, William Prosser defended tort privacy as four interests, but was troubled about the difficulty of unresolved questions, such as whether one could have a reasonable expectation of privacy in public spaces, whether information available as part of the public record could still deserve privacy protection many years later, and who should count as a "public figure," warranting a lesser expectation of privacy than normal citizens.[56] Later cases and analyses suggest that answers to the first two questions are affirmative[57] and the last

51. *Id.* at 193.

52. *Id.* at 193-94.

53. *Id.* at 195-96.

54. *See id.* at 193-95, 206.

55. *See* Warren & Brandeis, *supra* note 50, at 206, 213 ("The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle . . . when it extends this protection to the personal appearance, sayings, acts, and to personal relations . . . .").

56. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389, 394-96, 398 (1960).

57. *See* HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 217 (2010) ("'[P]ublic' is not synonymous with 'up for grabs'. . . even if something occurs in a public space or is inscribed in a public record there may still be powerful moral reasons for constraining its flow."); Melvin v. Reid, 122 Cal. App 285, 292 (Cal. Dist. Ct. App. 1931) ("[The] right of privacy . . . is a right guaranteed by our Constitution that must not be ruthlessly and needlessly invaded by others.").

question remains a matter of debate.[58] Edward Bloustein argued that all privacy wrongs were similar and conceptually linked as ways of protecting an individual's "inviolate personality," including an individual's independence, human dignity, integrity, and freedom from emotional distress.[59] Privacy protection enabled an individual to be a unique and self-determined being and was a necessary tool for protection against intrusions that were "demeaning to individuality" and "affront[s] to personal human dignity."[60]

Other commentators have concurred that tort privacy protection could be meaningfully viewed as a unitary right protecting one's ability to control personal information, yet they provided alternative accounts of the moral value of this type of privacy.[61]. Some, including Charles Fried, argued that the right protected one's integrity as a person and was essential for the fundamental relations of respect, love, friendship, and trust.[62] On this view, being able to control how much personal information one shares with others is necessary to define oneself, one's values, and one's social boundaries—one can decide with whom one remains a mere acquaintance, with whom one becomes a friend, and with whom one becomes an intimate companion.[63] Philosophers such as Stanley Benn, Robert Gerstein, James Rachels, Jeffrey Reiman and Richard Wasserstrom generally agree with this proposition. For instance, Benn focused on the need for privacy to protect respect for persons, human dignity and personal relations free from scrutiny, and autonomy from social pressures to conform—a sphere of privacy as a necessary condition for one's personality to bloom and thrive.[64] Gerstein emphasized privacy as required for intimacy, without uninvited intrusions that would lead to a chilling effect.[65] He argued that one cannot "lose" oneself in an intimate relationship if one is constantly worried about being overheard or put under surveillance.[66] Rachels and Wasserstrom endorsed the view that privacy is necessary for the development of different

58. *See* Prosser, *supra* note 56, at 411 ("[P]ublic figures are held to have lost, to some extent at least, their right of privacy.").

59. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 971 (1964).

60. *Id.* at 973.

61. *See, e.g.*, Charles Fried, *Privacy*, 77 YALE L.J. 475, 477-78 (1968) (privacy is "necessarily related to . . . respect, love, friendship, and trust".).

62. *Id.*

63. *Id.* at 482-83.

64. *See* Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra* note 12, at 223, 228-29.

65. Robert S. Gerstein, *Intimacy and Privacy*, 89 ETHICS 76, 78 (1978).

66. *Id.* at 81.

relationships.[67] Furthermore, Reiman defended privacy as fundamental for intimacy and personhood because it is "a social ritual by means of which an individual's moral title to his existence is conferred."[68]

A second major way in which privacy protection has evolved in the United States is through the Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[69] Fourth Amendment jurisprudence is undoubtedly related to privacy in tort law since an unreasonable search or seizure is one way of gaining one's personal information. Because initial privacy protection cases under the Fourth Amendment relied on the literal wording from the Bill of Rights, information gained from wiretaps placed outside a home involved no search and no seizure—the language of the Fourth Amendment could not be extended to wiretaps.[70] However, this interpretation was overruled in *Katz v. U.S.*,[71] which held that evidence obtained through an electronic listening and recording device in public was disallowed, even though there was no physical entrance into the area.[72] This judgment favored an expectation of privacy, even in a public place, because it argued that Fourth Amendment privacy is not just about physical intrusion; it "protects people, not places."[73] As Justice Brandeis stated in his famous privacy argument in his *Olmstead* dissent:

> [The makers of the Constitution] recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. . . . To protect that right, every unjustifiable intrusion by the government upon privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[74]

This second type of privacy protection from the Fourth Amendment has endured, but may become controversial. Cases involving new technologies

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67. James Rachels, *Why Privacy is Important*, 4 PHIL. & PUB. AFF. 323, 326 (1975); Richard A. Wasserstrom, *Privacy: Some Arguments and Assumptions*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra* note 12, at 317, 332.

68. Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 39 (1976) [hereinafter Reiman, *Privacy*].

69. U.S. CONST. AMEND. IV.

70. *See* Olmstead v. United States, 277 U.S. 438, 465-66 (1928) (holding that wiretapping without a physical trespass did not amount to a search or seizure within the meaning of the Fourth Amendment).

71. 389 U.S. 347 (1967).

72. *Id.* at 353.

73. *Id.* at 351.

74. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

such as thermal imaging devices, which the U.S. Supreme Court held 5-4 in *Kyllo v. U.S.*[75] does amount to a search and therefore violates privacy, may still allow more privacy intrusions and will continue to test staunch Fourth Amendment privacy safeguards.[76]

A third type of privacy protection has developed in constitutional law. In *Griswold v. Connecticut*,[77] the majority opinion defended a married couple's right to receive information and instruction about birth control and, in the process, first announced that although the term "privacy" is not located within the Constitution, there exists a constitutional right to privacy.[78] Justice Douglas defended the right to privacy as being older than the Bill of Rights, defended marriage as an enduring, sacred, and intimate relation and association, and defended one's home as a special and private area.[79] Justice Douglas and his colleagues cited famous cases they viewed as precedents—concerning personal decisions about one's home, family, and marriage, including the right to association, to educate one's children as one chooses, to decide about a child's study in private school, and protection against mandatory sterilization and more.[80] One can recognize insight in the reasoning. After all, there is no right not to be assaulted articulated in the Constitution, but it is surely protected and deemed to be a basic right. There is good reason to believe that the founding fathers took privacy within the institution of marriage and family to be so fundamental that they saw no reason to mention it explicitly.[81]

Nevertheless, Judge Robert Bork, philosopher William Parent, and others have harshly criticized the constitutional right to privacy.[82] Perhaps most seriously, some have viewed this third type of privacy as not being about privacy at all. On one hand, these critics reject the right for having no justifiable legal grounds—it only serves as a defense of liberty or autonomy.[83] On the other hand, the right has been characterized as being overly vague—it is unclear what exactly it protects and what it does not.[84] In reply to the first complaint, it has been successfully argued that while we have multiple individual liberties such as freedom of expression, many liberties do not seem to be about anything particularly personal or privacy-

75. Kyllo v. U.S., 533 U.S. 27, 34-35 (2001).

76. *See* Paul J. Larkin, *The Fourth Amendment and New Technologies*, LEGAL MEMORANDUM 1, 5-7 (2013) *available at* http://thf_media.s3.amazonaws.com/2013/pdf/lm102(new).pdf.

77. 381 U.S. 479 (1965).

78. *Id.* at 485.

79. *Id.* at 486.

80. *Id.* at 482-85.

81. *See id.* at 494.

82. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 97-98 (1990); W. A. Parent, *A New Definition of Privacy for the Law*, L. & PHIL. 305, 305 (1983).

83. *See* BORK, *supra* note 82, at 99-100.

84. *Id.* at 99.

related. If so, then liberty is a broader concept than privacy and privacy claims are a subset of liberty claims. Many philosophical commentators have supported this view that privacy protects freedom or liberty, and that privacy protection gives us the freedom to define ourselves and our relations to others.[85]

A moving account of understanding privacy as a necessary and an indispensable condition for freedom comes from a literary quotation from Czech writer Milan Kundera:

> But one day in 1970 or 1971, with the intent to discredit Prochazka, the police began to broadcast these conversations [with Professor Vaclav Cerny, with whom he liked to drink and talk] as a radio serial. For the police it was an audacious, unprecedented act. And, surprisingly: it nearly succeeded; instantly Prochazka *was* discredited: because in private, a person says all sorts of things, slurs friends, uses coarse language, acts silly, tells dirty jokes, repeats himself, makes a companion laugh by shocking him with outrageous talk, floats heretical ideas he'd never admit in public, and so forth. Of course, we all act like Prochazka, in private we bad-mouth our friends and use coarse language; that we act different in private than in public is everyone's most conspicuous experience, it is the very ground of the life of the individual; curiously, this obvious fact remains unconscious, unacknowledged, forever obscured by lyrical dreams of the transparent glass house, it is rarely understood to be the value one must defend beyond all others. Thus only gradually did people realize (though their rage was all the greater) that the real scandal was not Prochazka's daring talk but the rape of his life; they realized (as if by electric shock) that private and public are two essentially different worlds and that respect for that difference is the indispensable condition, the sine qua non, for a man to live free; that the curtain separating these two worlds is not to be tampered with, and that curtain-rippers are criminals. And because the curtain-rippers were serving a hated regime, they were unanimously held to be particularly contemptible criminals.[86]

The analogies between Kundera's scenario and today's electronic surveillance and street cameras are clear. There is further evidence that privacy and liberty are distinct concepts, that liberty is a broader notion, and

85. Fried, *supra* note 61, at 477-78, 485; Reiman, *Privacy*, *supra* note 68, at 39-40.

86. MILAN KUNDERA, TESTAMENTS BETRAYED: AN ESSAY IN NINE PARTS 260-61 (Linda Asher trans., HarperCollins 1995) (1993).

that privacy is essential for protecting liberty. For personal reasons, we have many forms of liberty unrelated to what we might value as private and inappropriate for government intervention. The right to travel from state to state without a passport, for example, is a freedom seemingly distinct from the freedom to make choices about personal and intimate concerns about one's body (for example, the use of contraception). The U.S. Supreme Court has recognized this, calling the constitutional privacy cases as legal issues involving an individual's "interest in making certain kinds of important decisions."[87]

However this philosophical reply about the relationship between privacy and liberty does not address the second critique about the vagueness of the right. The constitutional right to privacy has protected information and access to birth control,[88] the right of couples to choose the marriage partner of their choice regardless of race,[89] the right of an individual to view pornographic materials in the privacy of his or her home (as long as there is no production or distribution of the material),[90] the right to an abortion,[91] the right of adults—gay or straight—to engage in consensual, sexual intimacy in their own homes (striking down anti-sodomy statutes),[92] and ultimately the right of same-sex couples to marry.[93] While these decisions are admittedly somewhat varied, the question is what "kinds of important decisions" are worthy of being protected?[94] At one point, the Court said that the constitutional right to privacy protects certain decisions about home, procreation, family, and marriage, and has added that it covers certain personal decisions about one's lifestyle.[95]

Articulating the scope of privacy concerns and how such concerns may relate to freedom, intimacy, and self-development is problematic.[96] Unfortunately, this is a serious and intransigent difficulty. One approach has been to dismiss privacy as a philosophically important concept.[97] In this sense, Judith Jarvis Thomson's famous critique of privacy takes on a reductionist view that there is no need for a right to privacy because all talk of privacy can be reduced to talk of other rights, including rights to property

87. Whalen v. Roe, 429 U.S. 589, 598-600 (1977).
88. *Griswold*, 381 U.S. at 485.
89. Loving v. Virginia, 388 U.S. 1, 12 (1967).
90. Stanley v. Georgia, 394 U.S. 557, 568 (1969).
91. Roe v. Wade, 410 U.S. 113, 164 (1973).
92. Lawrence v. Texas, 539 U.S. 558, 578 (2003).
93. Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015).
94. *See Whalen*, 429 U.S. at 599-600.
95. Scott D. Gerber, *Privacy and Constitutional Theory*, 17 SOC. PHIL. & POL. FOUND. 165, 178-79 (2000).
96. Judith Javis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295, 295 (1975).
97. *See id.*

and bodily security.[98] However, Thomas Scanlon, Rachels, Reiman, Julie Inness, and others echoing Kundera, have criticized Thomson's account, arguing that the reverse is just as true—rights to property and bodily security can be derived from *a more fundamental* right to privacy.[99]

Yet it has not been easy for philosophers to provide clear guidelines on the positive side of understanding what privacy protects and why it is important. There has been consensus that the significance of privacy is almost always justified for the individual interests it protects—most notably, protections of freedom and autonomy in a liberal, democratic society.[100] Philosophers have argued that it is reasonable to categorize a subset of liberty cases as privacy cases; namely, those involving choices or decisions about one's body, marriage, intimate relationships, and lifestyle.[101] Ferdinand Schoeman eloquently defended the importance of privacy for protection of self-expression, bodily integrity, and social freedom.[102] More recent literature has extended this view, focusing on the value of privacy, not merely for the individual interests it protects but also for its irreducible social value.[103] Concerns over the accessibility and retention of electronic communications and the expansion of camera surveillance have led commentators to focus attention on loss of individual privacy as well as privacy protection with respect to the state and society.[104]

Political scientist and philosopher Priscilla Regan writes:

> I argue that privacy is not only of value to the individual as an individual but also to society in general, and I suggest three bases for a social importance of privacy. . . . Privacy is a *common value* in that all individuals value some degree of privacy and have some common perceptions about privacy. Privacy is also a *public value* in that it has value not just to the individual as an individual or to all individuals in common but also to the democratic political system. . . . Privacy is rapidly becoming a *collective value* in that technology and market forces are making it hard for any one person to have

98. *Id.* at 312-13.

99. *See* Thomas Scanlon, *Thomson on Privacy*, 4 PHIL. & PUB. AFF. 315, 315 (1975); Rachels, *supra* note 67, at 331-33; Reiman, *Privacy*, *supra* note 68, at 26-27; JULIE C. INNESS, PRIVACY, INTIMACY, AND ISOLATION 28-30 (1992).

100. Jeffrey H. Reiman, *Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future*, 11 SANTA CLARA HIGH TECH. LAW J. 27, 42 (1995) [hereinafter Reiman, *Driving to the Panopticon*]; FERDINAND DAVID SCHOEMAN, PRIVACY AND SOCIAL FREEDOM 13 (1992).

101. SCHOEMAN, *supra* note 100, 14-19.

102. *Id*.

103. Rieman, *Driving to the Panopticon*, *supra* note 100, at 30-31.

104. *Id.* at 32; DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 4-5 (2008); NISSENBAUM, *supra* note 57, at 36-37.

> privacy without all persons having a similar minimum level of privacy.[105]

As Daniel Solove writes: "By understanding privacy as shaped by the norms of society, we can better see why privacy should not be understood solely as an individual right. . . . Instead, privacy protects the individual because of the benefits it confers on society."[106] Moreover, "the value of privacy should be understood in terms of its contribution to society".[107] Solove believes privacy "fosters and encourages the moral autonomy of the citizen, a central requirement of governance in a democracy."[108] One way of understanding these comments—that privacy not only has intrinsic and extrinsic value to individuals but also has instrumental value to society—is to recognize that such views developed from the earlier philosophical writings on the value of privacy, which increased respect for individual autonomy in decision-making, for self-development of individual integrity and human dignity, and also the value of privacy in various social roles and relationships that contribute to a functioning society.[109] According to this contemporary scholarship, privacy norms help regulate social relationships—intimate, familial, and even professional relationships (as between a physician and a patient, a teacher and a student, a lawyer and a client, and so on).[110] Thus, privacy enhances social interaction on a variety of levels and, in this way, enhances intimacy, self-development, and the ability to present ourselves in public as we wish.[111] According to Solove, a society without respect for privacy for oneself and others becomes a "suffocating" society.[112]

It may be messy and difficult to find adequate words to express just what privacy governs, and it is understandable that some still believe the term "privacy" is too vague.[113] Consider, however, Ronald Dworkin's observation about another general concept: "Equality is a popular but mysterious political ideal. People can become equal (or at least more equal) in one way with the consequence that they become unequal (or more unequal) in others. . . . It does not follow, of course, that equality is

105. PRISCILLA M. REGAN, LEGISLATING PRIVACY 213 (1995) (emphasis in original).
106. SOLOVE, *supra* note 104, at 98.
107. *Id.* at 173.
108. *Id.* at 80.
109. *See* Fried, *supra* note 61, at 477; SCHOEMAN, *supra* note 100, at 408; Rachels, *supra* note 67, at 326-29; Wasserstrom, *supra* note 67, at 332.
110. *See* NISSENBAUM, *supra* note 57, at 84-85, 103-26 (chapters 4 and 6); *see also* Fried, *supra* note 61, at 477; SCHOEMAN, *supra* note 100, at 408; Rachels, *supra* note 67, at 326.
111. *See id.*
112. SOLOVE, *supra* note 104, at 93-94.
113. Thomson, *supra* note 96, at 295.

worthless as an ideal."[114] Similarly, with the ambiguity and vagueness of liberty (positive vs. negative liberty, freedom of expression and other freedoms), it may protect a range of different but related interests. It does not follow that it is worthless as an ideal. These concepts, like privacy, are crucial for understanding our role as social beings and for protecting values fundamental to living lives free from various unacceptable governmental and individual intrusions and surveillance.[115]

Nevertheless, concerns about the scope of privacy protection and its individual and societal value blur the boundaries between private and public spheres, particularly when feminist critics raise the darker side of privacy. Here, the lingering effects of Aristotle's distinction between the public-political and private-domestic spheres continue to be damaging.[116] If privacy protects individual intimacy and family relationships, it is important to ask if it is possible to defend privacy staunchly in the face of feminist critiques, namely that privacy has and still shields male dominance in family relations.

The reality of domination and abuse in private needs to be aired more fully and addressed, but collapsing the public/private distinction and leaving everything public is an unacceptable and dangerous alternative. I have worked to defend the view that absent domestic violence and coercion, the preservation of privacy presents great value for women and men—a sanctuary where they can live free from scrutiny and the pressure to conform; where they are free to express their identities through relationships and choices about their bodies and lifestyles. I have begun to explain how to understand the public/private dichotomy in a way that intertwines the two, most recently in my paper *The Feminist Critique of Privacy: Past Arguments and New Social Understandings* in an anthology published by Cambridge University Press.[117]

Privacy claims are not absolute and the privacy considerations need to be taken seriously, but they can certainly be outweighed by other considerations such as harm to others in domestic abuse cases, threats of harm, paternalism (for example, must a physician honor a woman's rational and deeply entrenched cultural belief that the physician must perform female genital mutilation on her?), and more. But if considerations such as harm to others can override privacy, what other considerations can do so? It

114. Ronald Dworkin, *What Is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185, 185 (1981).

115. NISSENBAUM, *supra* note 57, at 36-37.

116. *See* ARISTOTLE, *supra* note 3, at 1129-30.

117. *See generally* Judith Wagner DeCew, *The Feminist Critique of Privacy: Past Arguments and New Social Understandings*, *in* SOCIAL DIMENSIONS OF PRIVACY: INTERDISCIPLINARY PERSPECTIVES 85 (Beate Rossler & Dorota Mokronsinka eds., 2015) [hereinafter DeCew, *The Feminist Critique of Privacy*].

is classic for governmental agencies to cite national security concerns as adequate reasons for overriding individual expectations of privacy. But clarifying which national security concerns are serious enough to justify a privacy breach can lead to an interminable tangle of arguments, as is clear from debates that surrounded the Patriot Act.

Two relatively recent court cases on privacy help demonstrate the way in which thought about constitutional privacy, the public/private distinction, and the role of government as a public enforcer against individual claims to privacy are evolving. In *Bowers v. Hardwick*,[118] the U.S. Supreme Court refused to strike down Georgia's anti-sodomy statute and the privacy argument lost by a narrow margin.[119] Some have argued that the Court failed to consider the privacy issue at all, but that is misleading. The majority *did* consider the privacy claim, even if summarily, and rejected it. They argued that no demonstration had ever been given that there was a connection between family, marriage, or procreation on one hand, and homosexual sodomy on the other.[120] An enraged dissent, written by Justice Blackmun, condemned the majority's refusal to take into account the intimacy of the issue at stake, retorting that only the most willful blindness could prevent one from recognizing the right of individuals to conduct intimate, consenting, adult relationships within the privacy of their own homes as being at the heart of the Constitution's protection of privacy.[121]

The 5-4 decision in *Lawrence v. Texas*[122] overturned *Bowers*.[123] In *Lawrence*, the Court was aided by the fact that the statute targeted homosexuals and was thus discriminatory, whereas the Georgia anti-sodomy statute in *Bowers* was explicitly worded for both heterosexuals and homosexuals.[124] While the majority, led by Justice Kennedy, could have treated the issue merely as a liberty or autonomy case, it placed a major focus on privacy.[125] Regarding the anti-sodomy statutes, the majority argued such restrictions:

> [T]ouch[] upon the most *private* human conduct, sexual behavior, and in the most *private* of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

118. 478 U.S. 186 (1986).
119. *Id.* at 195-96.
120. *Id.* at 190-91.
121. *Id.* at 204-05 (Blackmun, J., dissenting).
122. 539 U.S. at 558.
123. *Id.* at 578.
124. *Id.* at 566.
125. *Id.* at 578.

> This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own *private* lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.[126]

Noting that punishing consenting adults for private acts had not been discussed much in the legal literature, the majority referred to precedents that confirm "our laws and tradition afford constitutional protections to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[127] The Court quoted at length from *Planned Parenthood of Southeastern Pa. v. Casey*[128] about the most intimate and personal choices a person may make in a lifetime—choices central to personal dignity and autonomy and the right to define one's own concept of existence, meaning, and so on.[129] The majority concluded that the "petitioners are entitled to respect for their *private* lives. The State cannot demean their existence or control their destiny by making their *private* sexual conduct a crime."[130] The majority opinion makes clear that nothing can justify the statute's "intrusion into the personal and private life of the individual."[131] This provides a strong general recognition and confirmation that with meaningful consent and the absence of harm to others or other overriding considerations, privacy must be protected.[132]

Given that privacy protection has developed in three distinct areas of law—with separate introductions and historical developments in different decades for each—it is not surprising that both legal texts and many legal theorists (and a few philosophers) treat the privacy interests at stake very differently. The separate classifications of these three interests may be viewed by some as a historical coincidence or may provide some with a sense of order in the law. Let me close by emphasizing, to the contrary, that there are important historical, conceptual, and philosophical reasons for understanding all three interests in privacy developed in the law—informational protection in tort, Fourth Amendment prohibition against

126. *Id.* at 567 (emphasis added).
127. *Lawrence*, 539 U.S. at 573-74.
128. 505 U.S. 833 (1992).
129. *Lawrence*, 539 U.S. at 573-74.
130. *Id.* at 578 (emphasis added).
131. *Id.*
132. *See id.*

unreasonable search and seizure, and the constitutional right to privacy—as being closely related. **First**, note that the Court's majority opinion in *Lawrence* adopted, in this recent crucial case, an understanding of constitutional privacy that is remarkably close to early descriptions of the value of affording protection for informational privacy as well as privacy protection under the Fourth Amendment.[133] The wording echoes early writings by legal theorists and philosophers, as well as Milan Kundera, on the value and meaning of privacy as being central to human dignity, one's personhood, and at the heart of one's right to define one's own existence.

Second, historical uses of the term "privacy" are not solely focused on informational privacy. For Aristotle, the public and private spheres are realms of life, and the domestic or private sphere is located within the home and family, clearly distinct from the public realm of government.[134] For Locke, one owns one's body and makes property one's own by mixing one's labor with it.[135] Thus, historical references to privacy include references to a sphere surrounding one's body and family and personal property—echoing the current, ordinary use of "privacy" and the Supreme Court's invocation of the term "privacy" in the constitutional cases.

Third, the sweeping language from Warren and Brandeis' argument for protection of a right to privacy in tort law by protecting information about oneself and one's reputation, is echoed in Brandeis' famous quote in his dissent in *Olmstead*:[136]

> 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 that 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.[137]

133. *See id.*; Bloustein, *supra* note 59, at 973; *Katz*, 389 U.S. at 351.
134. ARISTOTLE, *supra* note 3, at 1129-30.
135. LOCKE, *supra* note 3, at 17.
136. *Olmstead*, 277 U.S. at 438.
137. *Id.* at 478 (emphasis added); *see* Warren and Brandeis, *supra* note 50, at 205.

This language became part of the majority view in *Katz*, the subsequent Fourth Amendment case, and is reflected again in the groundbreaking 1965 *Griswold* decision, which announced the constitutional right to privacy.[138] This dissent is also quoted at length in a 1969 constitutional privacy case where it is called a well-established and fundamental right to be free from unwanted governmental intrusions into one's privacy.[139] The wording of all these varied cases makes clear that privacy protects both peace of mind and bodily integrity. Moreover, it is difficult to believe that Brandeis' language was used by mere accident as a basis for all three types of privacy protection in the law.

Fourth, these three types of privacy achieved legal protection based on shared/similar rationales and arguments.[140] There is a philosophical argument for connecting the three strands of privacy protection in the law based on the range of similar reasons given in defense of their importance.

People have many different reasons for wanting to control personal information, and their motives range from freedom from libel and defamation to commercial gain. Often, however, freedom from scrutiny, embarrassment, judgment, and even ridicule are at stake, as well as protection from pressure to conform, prejudice, emotional distress, and the losses in self-esteem, opportunities, or finances arising from those harms. In such cases, we are more inclined to view the claim to control information as a privacy claim. A tort privacy action to control information about oneself, and Fourth Amendment claims about unreasonable searches and seizures, are two mechanisms that society and the law have created to accomplish such protection.[141] By themselves they are not wholly adequate, however, because the interests that justify the screen on information include the interests in being free to decide and make choices about family, marriage, and lifestyle absent the threat of the same problematic consequences that accompany an information leak. In other words, it is plausible to maintain that worries about what information others have about one are often *due* to worries about social control by government or others. What one can do to me, or what I can do free of the threat of scrutiny, judgment, and pressure to conform, may often depend on what information (personal or not) an individual, the state, or others have about me. Clearly, my behavior is also affected by the extent to which I can make my own choices. Therefore, both the threat of an information leak and the threat of decreased control over decision-making can have a chilling effect on my behavior. If this is correct, then the desire to protect a sanctuary for

138. *See Katz*, 389 U.S. at 350-51; *Griswold*, 381 U.S. at 484-86.
139. *Stanley*, 394 U.S. at 564.
140. *See Lawrence*, 539 U.S. at 578; Bloustein, *supra* note 59, at 973; *Katz*, 389 U.S. at 351.
141. *See* Warren & Brandeis, *supra* note 50, at 194-95; *Katz*, 389 U.S. at 351.

ourselves, a refuge within which we can shape and carry on our lives and relationships with others—intimacies as well as other activities—without the threat of scrutiny, embarrassment, and the deleterious consequences they might bring, is a major underlying reason for providing information control, protection from unreasonable search and seizure, and control over decision-making. Thus, there are clear conceptual and philosophical connections between privacy interests and the values they protect in tort, Fourth Amendment, and constitutional law.[142]

The point can be highlighted in cases where all three privacy concerns are importantly relevant and intertwined, such as cases about drug testing in public high schools.[143] In *Board of Education v. Earls*,[144] informational privacy was certainly at stake when the results of student drug tests were strewn about teachers' desks, where anyone passing by could see them, and though targeted at drug use, the tests could also detect prescription medications, information about pregnancy, diabetes, and other medical conditions.[145] The Court treated *Earls* and related drug testing in school cases as Fourth Amendment privacy cases—asking if the drug tests were a violation of prohibitions against unreasonable search and seizure.[146] Furthermore, issues that go to the heart of constitutional privacy were also involved: Concerns about whether students were being watched while urinating, had their skin punctured for blood samples, etc., especially if the drug tests were mandatory or random and unannounced.[147] In such cases, the courts have been concerned about the role of public schools as guardians of students.[148] But the privacy issues are still significant, and the drug testing cases raise privacy questions about control over information about oneself, about whether drug tests are reasonable as a search and seizure, as well as concerns about the inviolability of the body.

V. CONCLUSION

Privacy has been discussed since ancient times; it appears to be a cross-species and cross-cultural value, and can be highly valuable despite important feminist concerns about its use to shield domination and abuse.[149] Privacy is not an absolute value, but due to the moral harms that privacy intrusions often cause, privacy can and should be viewed as the default,

142. *See Lawrence*, 539 U.S. at 578; Bloustein, *supra* note 59, at 973; *Katz*, 389 U.S. at 351.

143. *See generally* Bd. of Educ. v. Earls, 536 U.S. 822 (2002); Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995).

144. *Earls*, 536 U.S. at 822.

145. *Id.* at 833.

146. *Id.* at 828; *Vernonia*, 515 U.S. at 652.

147. *Earls*, 536 U.S. at 832-33; *Vernonia*, 515 U.S. at 657-58.

148. *Earls*, 536 U.S. at 830; *Vernonia*, 515 U.S. at 654.

149. Westin, *supra* note 12, at 59-61; DeCew, *The Feminist Critique of Privacy*, *supra* note 117.

requiring government and others to justify their need to intrude. I believe the digital age and the scope of privacy after 9/11 has increased interest in, and urgent pleas for, more careful, thoughtful privacy guidelines and controls—be it for more extensive wiretapping and e-mail tracking under the Patriot Act, electronic medical records, airport scanners, or biometric identification and neuroscience on brain scans. As technology advances, new privacy challenges will proliferate.[150] The legislatures, courts, and philosophical dialogue must try even harder to push technology developers and all of us to keep up with these changes and protect our privacy.[151]

So what is the takeaway message? I have argued that privacy interests protected in tort, Fourth Amendment, and constitutional law can be seen as historically, conceptually, and philosophically related, demonstrating that privacy may be considered a distinct and fairly coherent set of values and concerns.[152] Thus, there is a broad scope of ways that privacy can be invaded. My argument that the three interests in privacy, which developed in different parts of law, are clearly connected gives more strength, power, and force to the importance of protecting privacy because the interest in privacy is so inclusive. Lawyers, legislatures, and—dare I say—judges, as well as technology experts, need to focus more on the importance and value of privacy protection. We cannot give up and say privacy is lost due to advancing technology. We must adopt the alternative point of view and fight to protect privacy on the informational side—if we lose that, we may lose all the other ways in which privacy protects us. We need *more* dialogue on privacy protection, not less.

150. *See* van den Hoven et al., *supra* note 1; *see, e.g.*, Ellen Nakashima, *Apple vows to resist FBI demand to crack iPhone linked to San Bernardino attacks*, WASHINGTON POST (Feb. 17, 2016), https://www.washingtonpost.com/world/national-security/us-wants-apple-to-help-unlock-iphone-used-by-san-bernardino-shooter/2016/02/16/69b903ee-d4d9-11e5-9823-02b905009f99_story.html.

151. *See* Bierschbach, *supra* note 25.

152. *See supra* Part IV.