

PURE PRIVACY

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ABSTRACT—In 1890, Samuel Warren and Louis Brandeis began a storied legal tradition of trying to conceptualize privacy. Since that time, privacy’s appeal has grown beyond those authors’ wildest expectations, but its essence remains elusive. One of the rare points of agreement in boisterous academic privacy debates is that there is no consensus on what privacy means.

The modern trend is to embrace the ambiguity. Unable to settle on boundaries, scholars welcome a broad array of interests into an expanding theoretical framework. As a result, privacy is invoked in debates about COVID-19 contact tracing, police body cameras, marriage equality, facial recognition, access to contraception, loud neighbors, telemarketing calls, and on and on. This “pluralistic turn” has made privacy popular, but this popularity comes at a cost. Lacking precision, ubiquitous invocations of privacy tend to cloud rather than clarify, raising the temperature of academic and policy debates while generating little light.

This Article proposes a baseline definition of “privacy” to anchor legal discourse. The definition responds to privacy skeptics by identifying a core of pure privacy that can and should be protected. But it also pushes back on privacy pluralists by insisting on the need for precision. In a post-pandemic world, policymakers face powerful temptations to override longstanding privacy protections and countervailing pressures to abandon lifesaving policies in the face of vigorous privacy objections. Precisely identifying what is at stake in these debates can help to clarify the difficult choices that will shape the future.

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INTRODUCTION

Legal privacy discourse suffers from two related problems. The first is theoretical. While legal doctrine, scholarship, and advocacy regularly invoke the concept of “privacy,” there is no consensus about what privacy means.¹ Without a clear definition, privacy lacks the necessary foundation for theoretical development. For the legal discipline, which prides itself on precision, this is a puzzling state of affairs. Decades ago, pioneering privacy scholar Alan Westin insisted that “privacy must be defined rather than

¹ See, e.g., PRISCILLA M. REGAN, *LEGISLATING PRIVACY*, at xiii (1995) (“In virtually all philosophical and legal writing about privacy, authors begin by noting the difficulty in conceptualizing their subject.”); JULIE C. INNESS, *PRIVACY, INTIMACY, AND ISOLATION* 3 (1992) (“[T]he literature lacks an accepted account of privacy’s definition and value.”); David E. Pozen, *Privacy-Privacy Tradeoffs*, 83 U. CHI. L. REV. 221, 225 (2016) (noting “the ‘bewildering variety of meanings’ the concept has accumulated”); Neil M. Richards, *The Information Privacy Law Project*, 94 GEO. L.J. 1087, 1134 (2006) (“[V]irtually all scholars agree that ‘privacy’ is a concept that has eluded definition despite innumerable efforts”); Julie E. Cohen, *Privacy, Ideology, and Technology: A Response to Jeffrey Rosen*, 89 GEO. L.J. 2029, 2040 (2001) (recognizing the “lack of clarity at the theoretical and normative roots of privacy doctrine”); Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 35 (1967) (critiquing “the conceptual vacuum surrounding the legal notion of privacy”); sources cited *infra* note 3.

simply invoked.”² Today’s leading scholars proclaim that “[p]rivacy is too complicated a concept to be boiled down.”³

Modern scholarship reflects this theoretical bloat. Instead of coalescing around a definition, privacy scholars embrace a “pluralistic turn,”⁴ ushering a wide array of interests into a “big tent” conception of privacy.⁵ Most prominently, leading privacy scholar Daniel Solove contends that “there are no clear boundaries for what we should or should not refer to as ‘privacy.’”⁶ Instead, “[w]e can determine whether to classify something as falling in the domain of privacy if it bears resemblance to other things we similarly classify.”⁷ Solove proposes a “taxonomy of privacy” that consists of “four general categories of privacy problems with sixteen different

² ALAN F. WESTIN, *PRIVACY AND FREEDOM* 3 (1967); cf. Rebecca Green, *Candidate Privacy*, 95 WASH. L. REV. 205, 216 (2020) (describing Westin as a “‘founding father’ in the field of privacy law and author of the seminal 1967 book *Privacy and Freedom*”); Kirsten Martin & Helen Nissenbaum, *Measuring Privacy: An Empirical Test Using Context to Expose Confounding Variables*, 18 COLUM. SCI. & TECH. L. REV. 176, 186 (2016) (“Alan Westin’s vast contribution to privacy in research and public policy cannot be overstated . . .”).

³ Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 485 (2006); see also JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY 61 (1997) (“[I]t is not possible to give a unique, unitary definition of privacy that covers all the diverse privacy interests.”); Anita L. Allen, Univ. of Pa. L. Sch., *The Philosophy of Privacy and Digital Life: Presidential Address at the Eastern Division Meeting of the American Philosophical Association* (Jan. 9, 2019), in 93 PROC. & ADDRESSES AM. PHIL. ASS’N 21, 30 (2019) (explaining how the author “eventually came to deemphasize the importance of definitions”); Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1911 (2013) (“Privacy is not a fixed condition that can be distilled to an essential core, but rather ‘an interest in breathing room to engage in socially situated processes of boundary management.’”); Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2087 (2001) (“Privacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all.”).

⁴ Pozen, *supra* note 1, at 225 (coining this phrase and describing Solove’s work as “exemplary in this regard”).

⁵ See Solove, *supra* note 3, at 485–86; cf. Bert-Jaap Koops, Bryce Clayton Newell, Tjerk Timan, Ivan Skovránek, Tomislav Chokrevski & Masa Galic, *A Typology of Privacy*, 38 U. PA. J. INT’L L. 483, 488 (2017) (describing “Solove’s taxonomy” as “arguably the most-cited and best-known classification in recent privacy literature”); David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1082 (2014) (noting “the popularity of Solove’s suggestion that privacy is a diversity of things without any common essence”); M. Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L.J. 1131, 1139 (2011) (“In a series of influential articles and books, Daniel Solove rejects the notion that privacy can or should be reduced to any one, or even multiple, concept(s).”); Danielle Keats Citron & Leslie Meltzer Henry, *Visionary Pragmatism and the Value of Privacy in the Twenty-First Century*, 108 MICH. L. REV. 1107, 1116 (2010) (embracing Solove’s taxonomy and noting that “Solove’s analysis and proposed solutions to those problems have received considerable attention from scholars, media, and the courts”); Omer Tene, *What Google Knows: Privacy and Internet Search Engines*, 2008 UTAH L. REV. 1433, 1457–58 (relying on “Solove’s[] ‘Taxonomy of Privacy,’ which is a comprehensive, topical, and robust classification of privacy-invasive activities”).

⁶ Daniel J. Solove, *“I’ve Got Nothing to Hide” and Other Misunderstandings of Privacy*, 44 SAN DIEGO L. REV. 745, 759 (2007).

⁷ *Id.*

subcategories.”⁸ The authors of a competing “typology of privacy” differ with Solove on the appropriate name for the exercise (“typology” versus “taxonomy”),⁹ but embrace his general approach. They scour the literature to identify “eight primary ideal types of privacy”: “bodily, spatial, communicational and proprietary (or property-based) privacy, . . . intellectual privacy, decisional privacy, associational privacy and behavioral privacy.”¹⁰ Like Solove, these authors believe a comprehensive categorization “improve[s] our understanding of what privacy means in all its variety.”¹¹

There is nothing objectionable about efforts to categorize the wide variety of ways people use the term “privacy.” The surprise in modern privacy scholarship is the lack of dissent. Remaining complaints concern values that have (somehow!) been left out of the privacy tent, not all the divergent values that are allowed in.¹² As one prominent scholar told me, “one cannot be ‘against’ privacy” anymore.¹³ All that is left is to join the party. That’s the second problem plaguing privacy discourse: privacy has become too popular.

Legal scholars take full advantage of the unchallenged freedom to fit more and more conceptions of privacy into this boundaryless theoretical space. In the academic literature, people lose privacy when they are forced to disclose intimate details about their lives¹⁴ or obliged to keep them secret;¹⁵ permitted to obtain information¹⁶ or blocked from doing so;¹⁷ forced to wear clothes¹⁸ or take them off.¹⁹ Privacy means: “being free to choose who [we]

⁸ *Id.* at 757–58.

⁹ Koops et al., *supra* note 5, at 494 (“[T]here is a meaningful difference as to what typologies and taxonomies classify.”).

¹⁰ *Id.* at 566–67.

¹¹ *Id.* at 490.

¹² *See, e.g.*, Michael Fromkin & Zak Colangelo, *Privacy as Safety*, 95 WASH. L. REV. 141, 162–63 (2020) (critiquing Solove because “in the context of a lengthy and careful analysis of privacy harms, there is very little express discussion of how the absence of privacy can put safety at risk”); Pozen, *supra* note 1, at 226 (“Solove might have added still more items to the list.”).

¹³ Author’s recollection of a private communication with the source.

¹⁴ *See infra* Section II.B.

¹⁵ *See* Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1895 (2019) (“Being forced to hide one’s sexual orientation or gender identity denies LGBTQ individuals sexual privacy.”).

¹⁶ REGAN, *supra* note 1, at 240 (proposing a “public value of genetic privacy” that “might necessitate total restrictions on certain genetic tests”).

¹⁷ *Id.* at 232 (proposing a privacy right “of the public to access records about themselves”).

¹⁸ Citron, *supra* note 15, at 1895 (“Sumptuary laws violated sexual privacy by denying women the choice of how much of their bodies to reveal to the public.”).

¹⁹ *Cf.* Scott Skinner-Thompson, *Performative Privacy*, 50 U.C. DAVIS L. REV. 1673, 1676 (2017) (“When a Muslim woman wears a head, face, or body covering, she can be practicing her religion, but

want to interact with,” “freedom of bodily movement,” the ability to avoid “being touched,” the unfettered “development of opinions and beliefs,” “image management,” and “[b]eing oneself” in public.”²⁰ Privacy “encompasses liberty, equality, freedom of bodily integrity, autonomy, and self-determination.”²¹ Privacy is safety.²² Privacy is trust.²³ “Privacy is shorthand for breathing room to engage in the processes of boundary management that enable and constitute self-development.”²⁴ “Privacy actually exists within our minds and souls. Privacy is the way we perceive privacy. In other words, privacy is an internal illusion and it is intangible.”²⁵

It was not always like this. Robust critiques of privacy, and particularly its opacity, used to be common in academic discourse. In fact, privacy’s pluralistic turn feeds right into these once-prominent “reductionist” critiques.²⁶ Leading reductionist Judith Thomson agreed with the privacy taxonomists—typologists that those who invoke privacy refer to “a cluster of rights,” but she claimed that this diffusion demonstrates that privacy is not a distinct value at all.²⁷ In 1975, Thomson contended, “[I]t is possible to explain in the case of each right in the cluster how come we have it without ever once mentioning the right to privacy.”²⁸ Almost fifty years later,

may also be engaged in an act of performative privacy or modesty, registering her refusal to be the object of social gaze.”).

²⁰ See Koops et al., *supra* note 5, at 531, 567–68 (collecting these and other privacy interests).

²¹ Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 975 (1991); cf. Sonia M. Suter, *Disentangling Privacy from Property: Toward a Deeper Understanding of Genetic Privacy*, 72 GEO. WASH. L. REV. 737, 772 n.172 (2004) (explaining that “the concept of personhood helps define the kinds of autonomy and liberty interests that are central to privacy”).

²² Froomkin & Colangelo, *supra* note 12, at 141 (explaining “that in many cases privacy is safety”).

²³ ARI EZRA WALDMAN, PRIVACY AS TRUST: INFORMATION PRIVACY FOR AN INFORMATION AGE 36 (2018) (arguing for a conception of “privacy-as-trust”); Suter, *supra* note 21, at 746–49 (similarly emphasizing the centrality of trust to privacy).

²⁴ Cohen, *supra* note 3, at 1906.

²⁵ Shlomit Yanisky-Ravid, *To Read or Not to Read: Privacy Within Social Networks, the Entitlement of Employees to a Virtual “Private Zone,” and the Balloon Theory*, 64 AM. U. L. REV. 53, 82 (2014).

²⁶ See Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 422 (1980) (discussing variations in reductionists who “are united in denying the utility of thinking and talking about privacy as a legal right”).

²⁷ Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFFS. 295, 312–13 (1975); cf. Judith DeCew, *Privacy*, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 18, 2018), <https://plato.stanford.edu/archives/spr2018/entries/privacy/> [<https://perma.cc/4VHK-XNJJ>] (describing Thomson’s as “[p]robably the most famous reductionist view of privacy”); Jeffrey M. Skopek, *Untangling Privacy: Losses Versus Violations*, 105 IOWA L. REV. 2169, 2186 (2020) (“While Solove’s approach to privacy is illuminating, it is important to recognize that it maintains the distinctiveness of the concept of privacy by denying that it has any core meaning.”).

²⁸ Thomson, *supra* note 27, at 313; cf. Anita L. Allen, *Synthesis and Satisfaction: How Philosophy Scholarship Matters*, 20 THEORETICAL INQUIRIES L. 343, 359 (2019) (“The intractable vagueness of privacy thesis suits well the needs of privacy law opponents . . .”).

Thomson's provocative challenge still resonates.²⁹ Yet it is the academic privacy skeptics who abandoned the field. What happened? Privacy pluralism changed the game, turning ambiguity into a virtue, not a vice. Privacy emerged undefined and undefeated.

Even for those who champion privacy, this popularity comes at a price. Without a clear essence, privacy is often reduced to a slogan, generating superficial sound bites for news coverage, legal briefs, and social-media takes. Devoid of precision, privacy has become something we worry about on the way to making decisions that are often based, whether we recognize it or not, on other, more concrete considerations.³⁰

Confusion about the meaning of privacy isn't just an academic dilemma. Each day's headlines reveal the enormous stakes.³¹ In a post-pandemic world in which individual choices reverberate through the community, policymakers confront two opposing dangers. They face both powerful temptations to override longstanding privacy protections and countervailing pressures to abandon potentially lifesaving policies in the face of vigorous privacy objections.³² These are the hard choices that will shape our future. Yet there is little hope of getting the balance right if we cannot define our terms.

²⁹ See Ignacio N. Cofone & Adriana Z. Robertson, *Privacy Harms*, 69 HASTINGS L.J. 1039, 1044 (2018) (emphasizing an absent progress towards responding to Thomson's critiques).

³⁰ See *infra* Part IV.

³¹ See, e.g., Jennifer Daskal, *Digital Surveillance Can Help Bring the Coronavirus Pandemic Under Control—but Also Threatens Privacy*, CONVERSATION (Apr. 9, 2020, 8:07 AM) <https://theconversation.com/digital-surveillance-can-help-bring-the-coronavirus-pandemic-under-control-but-also-threatens-privacy-135151> [<https://perma.cc/X8VT-M7AG>] (“The [COVID-19] pandemic is confronting Americans with important questions about how much and what kinds of surveillance and tracking to accept in support of better health, as well as a revitalized economy.”).

³² See *id.*; Natasha Singer, *The Hot New Covid Tech Is Wearable and Constantly Tracks You*, N.Y. TIMES (Nov. 15, 2020), <https://www.nytimes.com/2020/11/15/technology/virus-wearable-tracker-privacy.html> [<https://perma.cc/3LGX-ME5D>]; *Before We Use Digital Contact Tracing, We Must Weigh the Costs*, WASH. POST (May 1, 2020, 12:33 PM), https://www.washingtonpost.com/opinions/tech-firms-must-prove-that-digital-contact-tracing-is-worth-the-privacy-intrusion/2020/05/01/cbf19b8e-7dc7-11ea-9040-68981f488eed_story.html [<https://perma.cc/SE5E-WG34>]; Natalie Kitroeff & Jessica Silver-Greenberg, *Airlines Refused to Collect Passenger Data that Could Aid Coronavirus Fight*, N.Y. TIMES (Apr. 29, 2020), <https://www.nytimes.com/2020/03/31/business/coronavirus-airlines-contact-tracing-cdc.html> [<https://perma.cc/DGV9-2URJ>] (reporting that health officials efforts to introduce contract-tracing requirements for the airline industry were “rebuffed,” in part because “Senate aides were concerned about the privacy implications”); Thomas Fuller, *How Much Should the Public Know About Who Has the Coronavirus?*, N.Y. TIMES (Mar. 30, 2020), <https://www.nytimes.com/2020/03/28/us/coronavirus-data-privacy.html> [<https://perma.cc/7JLJ-SDY5>] (“In the perennial tug-of-war between privacy and transparency in the United States, privacy appears to be winning in the coronavirus pandemic.”).

The good news is that there is much to build upon. A vast body of scholarship contributes to the modern understanding of privacy. Much of what is needed is just decluttering.³³

The cluttered state of modern privacy discourse can be traced directly to its origins in the “most influential law review article of all.”³⁴ In 1890, Samuel Warren and Louis Brandeis published *The Right to Privacy*, widely recognized as “the foundation of privacy law in the United States.”³⁵ Scholars and judges celebrate this work as the historic setting where “Warren and Brandeis defined privacy as the ‘right to be let alone.’”³⁶ Decades later when the Supreme Court sought a new home for rights that are not explicitly referenced in the Constitution, it seized upon the “right to be let alone,” equating the concept with “a general right of privacy.” The cases unspooled from there. The constitutional right to privacy became a cherished, if controversial, protector of a variety of important liberties, ranging from access to contraception to the choice of a marriage partner. Importantly, scholars endorsed not just the rulings (understandable), but the Court’s “privacy” label (unfortunate), expanding the generally understood contours of the term. This seemingly innocuous step had important implications. It made it difficult to deny a “privacy” home to other interests that occasionally overlap with or bear “resemblance” to privacy.³⁷ As definition became impossible, scholars unfurled the big tent.

The strangest and least discussed aspect of this history is that little of it follows from privacy’s fabled origins. In *The Right to Privacy*, Warren and Brandeis identified a broad umbrella right, “the more general right of the individual to be let alone,”³⁸ from which they derived a narrow privacy right. They did not equate the two.³⁹ Almost universally missed by judges and scholars,⁴⁰ that distinction was critical. The right to be let alone, which, as Warren and Brandeis noted, includes such things as protection from assault,⁴¹ cannot be a definition of privacy. It is far too broad. And it parallels a

³³ Cf. Richards, *supra* note 1, at 1140 (“The real challenge for scholarship falling in this category going forward will be to bring some coherence to the field.”).

³⁴ Harry Kalven Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327 (1966); *see also* sources cited *infra* note 63.

³⁵ Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1099–1100 (2002); *see* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 213 (1890).

³⁶ Solove, *supra* note 35, at 1100 (quoting Warren & Brandeis, *supra* note 35, at 193); *see infra* Part I.

³⁷ Solove, *supra* note 6, at 759.

³⁸ Warren & Brandeis, *supra* note 35, at 205; *see infra* Part I.

³⁹ *See* Warren & Brandeis, *supra* note 35, at 205–06.

⁴⁰ For a collection of these errors, *see infra* Part I and the sources cited *infra* note 65.

⁴¹ Warren & Brandeis, *supra* note 35, at 205.

different, more fitting concept that, unlike privacy, appears in the Constitution's text. Indeed, the Supreme Court itself once characterized some of the same rights now described as privacy as part of "the right of the individual to his personal liberty."⁴² In its more recent opinions, the Court appears to be steering back to this rhetorical path, increasingly framing substantive due process rights in terms of liberty, not privacy.⁴³

As the Supreme Court relinquishes the term, modern scholars looking to add rigor to privacy discourse can revisit its legal roots. Warren and Brandeis sought to prevent public disclosure of private facts.⁴⁴ That is the rough core of privacy. Before the Court intervened, scholars were on their way to a privacy definition that hewed close to that core. In 1967, Westin proposed the following definition: "Privacy 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."⁴⁵ Although increasingly overshadowed by big-tent privacy, Westin's "conception of privacy as control over personal information" is the "dominant" alternative.⁴⁶

For those seeking a concrete "privacy" definition, control-of-information is the logical step after Warren and Brandeis. But two flaws in Westin's proposal prevent it from serving as a viable baseline privacy definition. First, Westin and others who adopt an information-control definition define the wrong thing. Control of information is not privacy. It is a means of ensuring privacy.⁴⁷ Westin defined a kind of *right* to privacy, not privacy itself. Second, even recast as a right, control over personal information doesn't quite work.⁴⁸ The right and the thing protected should exhibit a direct relationship. When we invoke a right to privacy, privacy should result. But invocations of a right to control information can lead to the opposite of privacy, especially when the same information concerns more than one person. For example, I can exercise control over my personal information to publish intimate details of my life, even over the objections of my family. That is no one's understanding of privacy. As this Article explains, a right to privacy is not broadly concerned with the *control* of information; it is a right to prevent disclosure.

⁴² See *Lochner v. New York*, 198 U.S. 45, 56 (1905); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *infra* Part I.

⁴³ See *infra* Section II.A.

⁴⁴ See Warren & Brandeis, *supra* note 35, at 206.

⁴⁵ WESTIN, *supra* note 2, at 7.

⁴⁶ Sklansky, *supra* note 5, at 1084; see *infra* Section II.B.

⁴⁷ See *infra* Section II.C.

⁴⁸ See *infra* Section II.D.

It is easier to criticize than to construct. The challenge in this context is to move from critique to an alternative: a clear definition of privacy that is not similarly flawed. That definition, along with a robust defense of both its terms and necessity, is this Article's principal contribution. Picking up on the unfinished efforts of an earlier generation of scholars like Westin and Ruth Gavison, and adjusting where (I think) they went astray, this Article proposes the following baseline definitions to anchor legal privacy discourse. We can think of a *right to privacy* as the *ability to prevent disclosure of information about ourselves*,⁴⁹ and *privacy* as the *absence of information about us in the minds of others*.⁵⁰ These straightforward, nontechnical definitions reflect a series of important and nuanced choices. The definitions:

- exclude sometimes-overlapping but distinct values such as personal liberty;
- distinguish between the right and the thing protected;
- capture disclosures of all information that is identifiable to a person, not just "sensitive" or "private" information;
- maintain neutrality as to the desirability of any gain or loss of privacy, leaving contested normative debates outside of the definitions themselves;
- capitalize on a broad understanding of the concept of "disclosure"; and
- avoid terms that add rather than dispel ambiguity, a common misstep in modern privacy discourse.

Each of these choices is explained and defended in the pages that follow. Importantly, this set of choices enables precise definition of a famously elusive term. And that lays a foundation for the development of a robust privacy theory that can inform difficult legal policy choices.

A concrete privacy definition can solidify the concept's role in legal discourse even as it diminishes the term's rhetorical appeal. This is a necessary tradeoff, at least for scholars. For when privacy means everything it also means nothing. A concrete definition of a core privacy value that is distinct from other values (i.e., "pure privacy") is the only real rebuttal to the

⁴⁹ See *infra* Section II.D.

⁵⁰ See *infra* Section II.B. Consistent with my contention that debates about the strength of the privacy interests should not be resolved in these definitions, I do not intend to signal anything about the strength of any privacy entitlement by using the term "right" or "interest," see INNESS, *supra* note 1, at 12, 13 n.9 (including similar caveat), although I do emphasize a distinction between a right and state of privacy, *contra* HELEN NISSENBAUM, *PRIVACY IN CONTEXT* 2–3 (2010) (noting disagreement about "whether privacy is a claim, a right, an interest, a value, a preference, or merely a state of existence" and declining to take a position).

reductionists' critique. But to get there, privacy scholars must usher some of their prized residents out of the big tent: liberty, equality, anti-totalitarianism, and, yes, "the right to be let alone." These are important concerns. They sometimes overlap with privacy. They are not privacy.⁵¹

It is important to stress that moving values out of the privacy tent does not diminish those values. To the contrary, it brings them into focus. Privacy proxy wars—policy fights that invoke the term privacy but are not really about privacy at all—only obscure the interests at stake. By identifying the distinct concerns driving any controversy, we can better weigh the tradeoffs involved. The rhetoric may be less appealing, but the policies will improve. At a minimum, precision ensures that when we argue, we are arguing about the same things.

Having laid out an ambitious agenda, this Article proceeds in four Parts. Part I provides a historical account of our failure to define privacy and offers some hints at how to clear the haze surrounding the term. Part II builds on the work of other scholars to construct a baseline definition of privacy for use in legal discourse. By excluding distinct values and expanding on and repairing flaws in the popular information-control conceptualization, this definition offers precision to privacy debates. Part III responds to the reductionists by demonstrating that the conception of privacy identified in the proposed definition is a distinct value, not derivative of other rights. It also builds out a theory of privacy by distinguishing the related concept of "access," and exploring a key aspect of the proposed definitions: the multilayered meaning of "disclosure." Finally, Part IV illustrates the value of a definition by critiquing prominent debates that are, in fact, privacy proxy wars: fights that center the term "privacy" but really concern other interests, such as abuse of power and government oppression. The discussion shows how precisely identifying the interests at stake can help clarify and refocus difficult modern privacy debates.

I. THE FAILURE TO DEFINE PRIVACY

This Part lays out the legal history of our inability to define privacy and the unfortunate acquiescence to that failure. The discussion surfaces two themes: (1) the early and ongoing mischaracterization of Warren and Brandeis's seminal article and (2) the Supreme Court's repurposing of Warren and Brandeis's work to describe an important liberty interest that the Justices did not want to call "liberty." Philosopher Julie Inness understandably criticizes those who contend that we confuse other interests

⁵¹ See *infra* Section II.A.

with privacy on the ground that these critics “lack[] any explanation of the birth of our ‘confusion.’”⁵² This Part offers that missing origin story.

The tale begins with an omission. The Declaration of Independence proclaims that all people are endowed with “unalienable Rights,” including “Life, Liberty and the pursuit of Happiness.”⁵³ The Fifth and Fourteenth Amendments to the U.S. Constitution similarly protect “life,” “liberty,” and “property.”⁵⁴ But like the Declaration of Independence, “[t]he Constitution does not explicitly mention any right of privacy.”⁵⁵

While other rights trace their lineage to these founding documents, privacy is forced to look elsewhere. The drop-off is immense. “[T]he foundation of privacy law in the United States” is Warren and Brandeis’s 1890 *Harvard Law Review* article, *The Right to Privacy*.⁵⁶ The article followed its authors’ lesser known collaborations, “‘The Watuppa Pond Cases’ and ‘The Law of the Ponds,’ which drew upon their own experiences in practice but left no enduring mark upon legal scholarship.”⁵⁷

The Right to Privacy is an advocacy piece.⁵⁸ Warren and Brandeis urged courts to recognize a common law tort claim against the public disclosure of private information. Most of the short article involves a single move. Warren and Brandeis abstract a broad principle (the right “to be let alone”) from a series of common law torts and argue that their proposed right enforced that

⁵² INNESS, *supra* note 1, at 66; *see also* Allen, *supra* note 28, at 359 (“[P]hilosophical theories should not define privacy in a way that construed [the broad conception of privacy] as a mere confusion.”).

⁵³ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁵⁴ U.S. CONST. amends. V, XIV.

⁵⁵ *Roe v. Wade*, 410 U.S. 113, 152 (1973).

⁵⁶ Solove, *supra* note 35, at 1099–1100; *see also* *Time, Inc. v. Hill*, 385 U.S. 374, 380 (1967) (“celebrated article”); *Griswold v. Connecticut*, 381 U.S. 479, 510 n.1 (1965) (Black, J., dissenting) (“The phrase ‘right to privacy’ appears first to have gained currency from an article written by Messrs. Warren and (later Mr. Justice) Brandeis in 1890”); Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1732 (2010) (describing “celebrated nineteenth-century law review article by Samuel Warren and Louis Brandeis” as “the wellspring of information privacy law”); Kenneth Einar Himma, *Privacy Versus Security: Why Privacy Is Not an Absolute Value or Right*, 44 SAN DIEGO L. REV. 857, 858 (2007) (“Prior to the seminal argument published by Samuel D. Warren and Louis D. Brandeis . . . there was no widely held belief that people have a right to privacy—moral or otherwise.”); Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CALIF. L. REV. 889, 923 (1992) (“a quasi-legendary article”); Frederick Davis, *What Do We Mean by “Right to Privacy”?*, 4 S.D. L. REV. 1, 3 (1959) (“It is doubtful if any other law review article, before or since, has achieved greater fame or recognition.”).

⁵⁷ Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1343.

⁵⁸ *See* Rubin, *supra* note 56, at 924 (critiquing the article as “strategic, not communicative” and thus “represent[ing] a defect in legal scholarship”); Kalven, *supra* note 34, at 327–29 (“[T]he article reads so much like a brief”); Clark C. Havighurst, *Privacy: Foreword*, 31 LAW & CONTEMP. PROBS. 251, 251 (1966) (describing the article as “a lawyer’s catharsis rather than objective scholarship”); *cf.* Davis, *supra* note 56, at 23 (contending that the article “is an illustration of how well-meaning but impatient academicians can upset the normal development of the law by pushing it too hard”).

same principle.⁵⁹ A right to privacy, they wrote, “is merely an instance of the enforcement of the more general right of the individual to be let alone.”⁶⁰ Using this logic, the authors assured courts that their proposal would not amount to “judicial legislation,” because “the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relations, domestic or otherwise.”⁶¹

Warren and Brandeis’s article became “one of the most famous and influential law review articles ever written,”⁶² leading to a new cause of action that barred “public disclosure of . . . private facts.”⁶³ Unfortunately, “the most famous law review article of all time”⁶⁴ is also the most misunderstood. *The Right to Privacy* is almost universally characterized as the historic text where “Warren and Brandeis defined privacy as the ‘right to be let alone.’”⁶⁵ But Warren and Brandeis never claimed that the right to

⁵⁹ Warren & Brandeis, *supra* note 35, at 205–13.

⁶⁰ *Id.* at 205. They also describe the principle as “that of an inviolate personality,” using that phrase to distance the source of their proposed right from “rights of property.” *Id.*

⁶¹ *Id.* at 213.

⁶² Charles E. Colman, *About Ned*, 129 HARV. L. REV. F. 128, 128 (2016).

⁶³ William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 384–89 (1960) (describing influence of Warren and Brandeis’s article); ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN’S LIFE* 70 (1946) (quoting Dean Roscoe Pound, who called it “nothing less than . . . a chapter to our law”); Colman, *supra* note 62, at 128 (“*The Right to Privacy* enjoys a reputation as one of the most famous and influential law review articles ever written.”); Erwin Chemerinsky, *Rediscovering Brandeis’s Right to Privacy*, 45 BRANDEIS L.J. 643, 643 (2007) (describing it as “one of the most famous law review articles in American history”); sources cited *supra* note 56.

⁶⁴ See sources cited *supra* note 63.

⁶⁵ Solove, *supra* note 35, at 1100. For a sampling of the long history of these misstatements, see SARAH E. IGO, *THE KNOWN CITIZEN* 180 (2018) (“In 1890, Samuel Warren and Louis Brandeis had described privacy as ‘the right to be let alone.’”); Jeffrey M. Skopek, *Untangling Privacy: Losses Versus Violations*, 105 IOWA L. REV. 2169, 2178 (2020) (describing “the foundational claim of Warren and Brandeis that the right of privacy is the right ‘to be let alone’”); Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921, 951 (2009) (“*The Right to Privacy* . . . defined privacy as ‘the right to be let alone’”); Adam Moore, *Defining Privacy*, 39 J. SOC. PHIL. 411, 412 (2008) (“Warren and Brandeis . . . called it ‘the right to be let alone.’”); Paul M. Schwartz & William M. Treanor, *The New Privacy*, 101 MICH. L. REV. 2163, 2176 (2003) (“Samuel Warren and Louis Brandeis . . . conceived of privacy as the right ‘to be let alone.’”); Gormley, *supra* note 57, at 1336 (“Warren and Brandeis themselves defined it as a ‘right to be let alone.’”); Jonathan B. Mintz, *The Remains of Privacy’s Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 427 (1996) (“Samuel Warren and Louis Brandeis colloquially defined privacy in 1890 as ‘the right to be let alone.’”); George P. Long III, *Who Are You?: Identity and Anonymity in Cyberspace*, 55 U. PITT. L. REV. 1177, 1189–90 (1994) (“Samuel Warren and Louis Brandeis broadly defined privacy as ‘the right to be let alone.’”); ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 7 (1988) (describing Warren and Brandeis’s “definition of ‘privacy’ as ‘being let alone’”); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 292 (1983) (“Warren and Brandeis dubbed the protection they proposed a ‘right to privacy,’ and described it as the

privacy *was* the right to be let alone. They situated their proposed privacy right alongside other narrow rights, “like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed.”⁶⁶ A right to privacy, they argued, was entitled to the same kinds of protections as these other specific rights, *all of which* traced their ancestry to the “more general right of the individual to be let alone.”⁶⁷ In a largely unrecognized but momentous quirk of legal history, much of the influence of Warren and Brandeis’s article stems from later commentators’ failure to recognize this key nuance.⁶⁸

Brandeis, of course, was just getting started. After narrowly escaping a fate as the nation’s leading ponds scholar, “the people’s attorney”⁶⁹ went on to a seat on the Supreme Court.⁷⁰ There, Justice Brandeis reprised his views on privacy in a 1928 dissent in *Olmstead v. United States*.⁷¹ In language that would prove broadly influential, he channeled the Framers’ purpose in enacting the Bill of Rights: “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.”⁷²

Brandeis’s soaring rhetoric foreshadowed a jurisprudential revolution. But his underlying theme remained consistent. Brandeis contended in *Olmstead*, as he had in *The Right to Privacy*, that the right to be let alone was an umbrella right (“the most comprehensive of rights”) from which other rights, such as a privacy right against wiretapping, could be derived.⁷³ Once

right ‘to be let alone.’”); Louis Lusky, *Invasion of Privacy: A Clarification of Concepts*, 72 COLUM. L. REV. 693, 693 (1972) (“Warren and Brandeis identified privacy—which they defined . . . as the right ‘to be let alone’”); William M. Beaney, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROBS. 253, 254 (1966) (describing “Warren[] and Brandeis’s characterization of it as ‘the right to be let alone’”); *see also infra* text accompanying notes 74–75, 82–86 (quoting Supreme Court Justices).

⁶⁶ Warren & Brandeis, *supra* note 35, at 205.

⁶⁷ *Id.*

⁶⁸ *Cf.* Vernon Valentine Palmer, *Three Milestones in the History of Privacy in the United States*, 26 TUL. EUR. & CIV. L.F. 67, 78 (2011) (“[T]he inspiring effects that the suggestive phrase ‘the right to be let alone’ had on the imaginations and intuitions of future interpreters cannot be discounted.”). In the innumerable discussions of Warren and Brandeis’s seminal article, I found only one that makes this critically important point but buries it in a footnote. *See* Gavison, *supra* note 26, at 437 n.48 (“Warren & Brandeis . . . never equated the right to privacy with the right to be let alone; the article implied that the right to privacy is a special case of the latter.”).

⁶⁹ *The Papers of Louis D. Brandeis*, NAT’L HIST. PUBL’NS. & RECS. COMM’N., <https://www.archives.gov/nhprc/projects/catalog/louis-brandeis> [https://perma.cc/28QU-Y94C].

⁷⁰ Melvin I. Urofsky, *Louis D. Brandeis: Teacher*, 45 BRANDEIS L.J. 733, 738–42 (2007).

⁷¹ 277 U.S. 438, 475–78 (1928) (Brandeis, J., dissenting).

⁷² *Id.* at 478 (emphasis added). Brandeis’s *Olmstead* dissent marked the first appearance of the “right to be let alone” in a Supreme Court opinion.

⁷³ *Id.*

again, Brandeis abstracted an overarching principle (the right to be let alone) from a series of more specific rights (those listed in the Bill of Rights) to identify another specific right (privacy). And, again, the nuance was lost. In 1967, Justice Abe Fortas wrote a stirring dissent trumpeting this misunderstanding: “As Mr. Justice Brandeis said in his famous dissent in *Olmstead v. United States*, the right of privacy is ‘the most comprehensive of rights and the right most valued by civilized men.’”⁷⁴ The internal quotation marks hint at the critical alteration. Brandeis argued that “the right to be let alone” was the most comprehensive of rights. Fortas changed it to “the right of privacy.” Other Justices would follow suit.⁷⁵

For Justice Fortas and his colleagues, the jurisprudential challenge of the era was how to address violations of civil liberties that were not covered by specific textual guarantees in the Constitution. The Supreme Court’s answer to this question began to crystalize in *Griswold v. Connecticut* in 1965.⁷⁶ There, the majority ruled that “specific guarantees in the Bill of Rights have penumbras” and the “[v]arious guarantees create zones of privacy.”⁷⁷ These zones doomed the Connecticut law at issue in that case, which prohibited married couples’ access to contraception.⁷⁸ The association of marriage, the Supreme Court explained, involved “a right of privacy older than the Bill of Rights.”⁷⁹

The majority opinion in *Griswold*, authored by Justice William Douglas, does not cite Brandeis’s *Olmstead* dissent or *The Right to Privacy*, but its roots grow directly from those sources.⁸⁰ In fact, Douglas’s law clerk

⁷⁴ *Time, Inc. v. Hill*, 385 U.S. 374, 413 (1967) (Fortas, J., dissenting) (citation omitted).

⁷⁵ See *infra* notes 80–84 for examples from Justices Brennan, Douglas, and Stewart.

⁷⁶ 381 U.S. 479, 481–84 (1965); see Westin, *supra* note 2, at 353 (describing *Griswold* as “a major first step toward enunciating a new constitutional doctrine of privacy”); Chemerinsky, *supra* note 63, at 647 (“The word ‘privacy’ was introduced into this area in *Griswold v. Connecticut* . . .”); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1421 (1974) (stating, in reference to *Griswold*, that “[a] constitutional ‘Right of Privacy,’ *eo nomine* and fundamental, was born in 1965”).

⁷⁷ *Griswold*, 381 U.S. at 484.

⁷⁸ *Id.* at 485–86.

⁷⁹ *Id.* at 486; cf. *Poe v. Ullman*, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting) (“Of this whole ‘private realm of family life’ it is difficult to imagine what is more private or more intimate than a husband and wife’s marital relations.”). Douglas’s original draft anchored this line in a “right of association” rather than a right of privacy. BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 235 (1985) (“We deal with a right of association older than the Bill of Rights . . .”).

⁸⁰ The connection is easily traced through Douglas’s lectures, particularly one from 1958, titled “The Right to Be Let Alone.” See WILLIAM O. DOUGLAS, THE RIGHT OF THE PEOPLE 87–88 (1958) (published lectures) (“There is, indeed, a congeries of . . . rights that may conveniently be called the right to be let alone. They concern the right of privacy—sometimes explicit and sometimes implicit in the Constitution. This right of privacy protects freedom of religion and freedom of conscience. It protects the privacy of the home and the dignity of the individual It was described in comprehensive terms by Mr. Justice Brandeis in his dissent in *Olmstead v. United States*.” (citation omitted)).

suggested adding a reference to Brandeis's 1928 dissent, but Douglas, known for being inattentive to such details, "let the suggestion pass unheeded."⁸¹ Douglas did, however, make the connection explicit in a later concurrence in *Doe v. Bolton*, writing: "This right of privacy was called by Mr. Justice Brandeis the right 'to be let alone.'"⁸² Justice William Brennan, who had pushed Douglas to adopt the "privacy" framing in *Griswold*,⁸³ picked up the baton in a subsequent contraception case, *Eisenstadt v. Baird*.⁸⁴ There, Brennan, like Fortas and Douglas, treated "the right of privacy" as a jurisprudential twin of the right to be let alone. Citing Brandeis's *Olmstead* dissent, Brennan wrote: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁸⁵ The Supreme Court went on to apply this reasoning in a variety of contexts, developing a line of "'right of privacy' cases" that restricted state interference in "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education."⁸⁶

A puzzling aspect of this legal framing is why the Court used "privacy" when another label, "liberty," seems better suited. As historian Sarah Igo explains, "The Court's historic ruling [in *Griswold*] raising privacy to the status of a constitutional right resolved an issue that almost no one at the time associated closely with privacy."⁸⁷ The obvious word choice here was "liberty." As philosopher W.A. Parent explains: "The commonly accepted and philosophically justified conception of liberty is precisely the absence of

⁸¹ DAVID J. GARROW, *LIBERTY AND SEXUALITY* 252 (1994). Many of Douglas's opinions were "drafted in twenty minutes" with some "written on the bench during oral argument." *Id.* at 245.

⁸² 410 U.S. 179, 213 (1973) (Douglas, J., concurring).

⁸³ See Laurence H. Tribe, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 1, 45 (1997) (describing "Brennan's pivotal role in *Griswold*" but noting that, since Douglas only partially followed Brennan's guidance, the "opinion was unsatisfyingly sketchy" and it "was left to Justice Brennan to bring the analysis to full gestation in his opinion for the Court in *Eisenstadt*"); SCHWARTZ, *supra* note 79, at 237–39 (summarizing Brennan's influence).

⁸⁴ 405 U.S. 438, 453 (1972).

⁸⁵ *Id.* This sentence had obvious implications for the then-pending *Roe v. Wade* case, something Brennan and his clerks recognized in writing the *Eisenstadt* opinion. GARROW, *supra* note 81, at 542.

⁸⁶ *Paul v. Davis*, 424 U.S. 693, 713 (1976); Chemerinsky, *supra* note 63, at 651 (collecting cases where "[p]rivacy as autonomy has been safeguarded in decisions upholding rights such as the right to marry, the right to procreate, the right to custody of one's children, the right to keep the family together, the right to control the upbringing of children, the right to purchase and use contraceptives, the right to engage in private consensual homosexual activity, and the right to refuse medical treatment" (citations omitted)).

⁸⁷ IGO, *supra* note 65, at 158; cf. SCHWARTZ, *supra* note 79, at 227 ("Before *Griswold* the right of privacy was essentially a right only between private individuals, with a tort action available to those aggrieved by violations of that right.").

external constraints. Laws that effectively prevent citizens from pursuing various activities infringe (sometimes justifiably, sometimes not) on personal liberty. The laws in *Griswold* [and subsequent cases] all infringed liberty”⁸⁸ The “right to be let alone,” as Warren and Brandeis used the phrase, and as used in later Supreme Court opinions, expresses a conception of liberty, not privacy. And liberty, unlike privacy, is explicitly protected by the Constitution.⁸⁹

So why didn’t the Justices use “personal liberty” to describe a right against unwarranted government interference in peoples’ lives? Because an earlier set of Justices poisoned the phrase. As one critic writing in 1975 framed the problem: “Terrified by history to talk openly in terms of substantive liberty rights under the Fourteenth Amendment, the Justices talked instead in fragile and convoluted reasoning of privacy rights swirling around in ectoplasmic emanations.”⁹⁰

The history that terrified the Justices dated to the 1905 case of *Lochner v. New York*.⁹¹ In that case, the Supreme Court invalidated a state law that limited bakery-employee hours because the law violated “the right of the individual to his personal liberty.”⁹² The Court followed *Lochner* with a series of rulings striking down progressive business regulations and raising the ire of Franklin Roosevelt’s New Deal coalition.⁹³ The Court publicly retreated from *Lochner* in 1937—the same year that President Roosevelt proposed court-packing legislation.⁹⁴ *Lochner* became synonymous with bad politics and bad judging, an object lesson in “how courts should not decide constitutional cases.”⁹⁵ By the time *Griswold* was decided, judges and scholars across the ideological spectrum repudiated the case.⁹⁶

⁸⁸ W.A. Parent, *A New Definition of Privacy for the Law*, 2 LAW & PHIL. 305, 316 (1983); see also Thomson, *supra* note 27, at 312 (arguing that “making a kind of conduct illegal is infringing on a liberty” as opposed to privacy interest).

⁸⁹ See U.S. CONST. amends. V, XIV.

⁹⁰ GRAHAM HUGHES, THE CONSCIENCE OF THE COURTS 72 (1975).

⁹¹ 198 U.S. 45 (1905).

⁹² *Id.* at 56.

⁹³ See Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 227–36 (1994) (chronicling the disputed relationship between the Court’s doctrinal evolution and the prospect of court-packing).

⁹⁴ *Id.*

⁹⁵ Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 678, 689 (2005) (chronicling history).

⁹⁶ See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (“The doctrine that prevailed in *Lochner* . . . and like cases . . . has long since been discarded.”); Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (noting that the “received wisdom is that *Lochner* was wrong” and “an illegitimate intrusion by the courts”).

The “ghost of *Lochner*”⁹⁷ haunted the constitutional right to privacy cases.⁹⁸ Estelle Griswold’s brief states, “We are not, in short, asking here for reinstatement of the line of due process decisions exemplified by *Lochner vs. New York*.”⁹⁹ The majority opinions in both *Griswold*¹⁰⁰ and *Roe v. Wade*¹⁰¹ explicitly disclaim reliance on *Lochner*, over protests of the dissents on that point.¹⁰² Justice Douglas, the author of *Griswold*’s majority opinion, was acutely conscious of the “ghost of *Lochner*.” He had coined that now-famous phrase in a 1958 opinion to reject a constitutional challenge to restrictive federal housing regulations.¹⁰³ And Douglas insisted in his lectures that “[t]he natural rights of which I speak are different” from the “[n]atural rights . . . invoked by the laissez-faire theorists” responsible for *Lochner*.¹⁰⁴ In private correspondence, Justice Brennan invoked this concern to convince Douglas to revise his first draft of the *Griswold* opinion, cautioning that the loosely styled constitutional right to association Douglas initially relied on “may come back to haunt us just as *Lochner* did.”¹⁰⁵

One way to sidestep the ghost of *Lochner* (and a resurgence of *Lochner*-like cases) was to identify “privacy,” not “liberty,” as the touchstone of the new jurisprudence.¹⁰⁶ The only problem—that privacy did not have the same

⁹⁷ Fed. Hous. Admin. v. Darlington, Inc., 358 U.S. 84, 92 (1958).

⁹⁸ See Stephen M. Feldman, *Unenumerated Rights in Different Democratic Regimes*, 9 U. PA. J. CONST. L. 47, 99 (2006) (“As was true of Douglas, the other Justices wrote their opinions in the shadow of *Lochner*.”).

⁹⁹ Brief for Appellants at 23, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 496).

¹⁰⁰ 381 U.S. at 481–82 (“Overtones of some arguments suggest that *Lochner v. New York* . . . should be our guide. But we decline that invitation . . .”).

¹⁰¹ 410 U.S. 113, 117 (1973) (endorsing “Justice Holmes’ . . . now-vindicated dissent in *Lochner v. New York*”).

¹⁰² See *id.* at 174 (Rehnquist, J., dissenting) (“While the Court’s opinion quotes from the dissent of Mr. Justice Holmes in *Lochner* . . . the result it reaches is more closely attuned to the majority opinion.”); *Griswold*, 381 U.S. at 524 (Black, J., dissenting) (arguing that the majority “would reinstate the *Lochner* . . . line of cases”); see also William H. Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, 23 U. KAN. L. REV. 1, 6 (1974) (arguing that “the two lines of cases are ‘sisters under the skin’”); Balkin, *supra* note 95, at 683 (explaining that the “task of the constitutional scholar” of the era was to explain “why you could love *Roe* and still hate *Lochner*”).

¹⁰³ Fed. Hous. Admin. v. Darlington, Inc., 358 U.S. 84, 91–92 (1958) (“Invocation of the Due Process Clause to protect the rights asserted here would make the ghost of *Lochner v. New York*, 198 U.S. 34, walk again.”); see also *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955) (Douglas, J.) (“The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”).

¹⁰⁴ DOUGLAS, *supra* note 80, at 89.

¹⁰⁵ GARROW, *supra* note 81, at 246–47 (quoting Brennan’s letter to Douglas).

¹⁰⁶ See Gavison, *supra* note 26, at 466 (“Privacy . . . has been used to avoid such historically loaded legal terms as ‘substantive due process’ and ‘liberty.’”); Westin, *supra* note 2, at 350–51 (emphasizing

meaning as liberty—could be elided in a variety of ways. Douglas followed the path sketched in his and others’ writings: equating a right of privacy with a close cousin of liberty, Brandeis’s right to be let alone.¹⁰⁷ Douglas had been pushing to conflate liberty with privacy for years. This desire was most transparently expressed in an obscure dissent in a 1952 case. In *Public Utilities Commission v. Pollak*, the Supreme Court rejected a constitutional challenge to the District of Columbia’s practice of playing radio programs to “captive audiences” on public streetcars.¹⁰⁸ Douglas disagreed with the ruling, arguing, among other things, that “the meaning of ‘liberty’ as used in the Fifth Amendment . . . must mean more than freedom from unlawful governmental restraint; it must include privacy as well.”¹⁰⁹ Douglas had long sought to marry liberty and privacy. In *Griswold*, the Court finally accepted this proposal.

This history illuminates the question that started this Part: How did we end up with such a cluttered understanding of “privacy”? The answer, as summarized above, is that the term was collateral damage in the Court’s struggle to exorcise the ghost of *Lochner*. Warren and Brandeis invited confusion by insisting that the common law *already* protected a right to privacy through an amorphous “right to be let alone.” Later, scholars and Supreme Court Justices mischaracterized Warren and Brandeis’s claim to suggest an illogical equivalence between the right to be let alone and a right to privacy. For historical reasons, this “right to privacy, in its constitutional incarnation,”¹¹⁰ became an expedient legal anchor for the most famous line of cases in American jurisprudence. Privacy scholars, open to expanding their budding field and perhaps leery of slighting the popular new constitutional rights, welcomed the lot into an expanding privacy tent.

II. A NEW DEFINITION OF AN OLD CONCEPT

The history summarized in Part I identifies the crux of the definitional dilemma. Without some decluttering, those seeking to conceptualize privacy must include all of the following under a privacy banner:

the constraints placed on the Supreme Court in this era by “the philosophical and institutional realities of the American judicial process”); Henkin, *supra* note 76, at 1421 (“The majority, per Justice Douglas, expressed its determination not to find it in undifferentiated ‘liberty’ subject to substantive due process.”).

¹⁰⁷ See *supra* note 80 and accompanying text; *Doe v. Bolton*, 410 U.S. 179, 213 (1973) (Douglas, J., concurring); cf. William N. Eskridge Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2237–38 (2002) (quoting a 1919 brief, which states: “Personal ‘liberty’ includes not only freedom from physical restraint, but also the right ‘to be let alone,’ to determine one’s mode of life”).

¹⁰⁸ 343 U.S. 451, 468 (1952).

¹⁰⁹ *Id.* at 467 (Douglas, J., dissenting).

¹¹⁰ Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 802 (1989).

- protecting personal information (Warren and Brandeis);
- the “right to be let alone” (Warren and Brandeis misunderstood); and
- an expansive catalogue of constitutional “privacy” cases.

No definition can span these categories. Consequently, all the movement is in the wrong direction. In the absence of definitional boundaries, other interests flow freely into the privacy tent, including dignity,¹¹¹ liberty, equality, autonomy, self-determination,¹¹² entitlements to be free of nuisance,¹¹³ and, ultimately, the ability to access all the ingredients necessary to “human flourishing.”¹¹⁴ A definition is the only way out. And the only way to get to a definition is to first untangle liberty and privacy.

A. Distinguishing Privacy from Liberty

To the extent judges and scholars recognize the awkward fusion of privacy with nonprivacy interests, they try to bracket the problem by dividing privacy into two major subfields: “decisional privacy” and “information privacy.”¹¹⁵ Although not precisely delineated, the former contains the constitutional privacy cases and the latter captures Westin’s notion of

¹¹¹ See discussion in *infra* note 202.

¹¹² Schneider, *supra* note 21, at 975 (arguing that privacy “encompasses liberty, equality, freedom of bodily integrity, autonomy, and self-determination”).

¹¹³ See Rowan v. U.S. Post Off. Dep’t, 397 U.S. 728, 737 (1970) (upholding a law that allowed people to opt out of certain mail “to protect privacy”); Christina E. Wells, *Privacy and Funeral Protests*, 87 N.C. L. REV. 151, 177 (2008) (describing how “[s]tatutes regulating peaceful funeral protests purport to embrace a privacy interest that protects against unwanted intrusions”); Mark S. Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy*, 4 YALE J. ON REGUL. 99, 101 (1986) (“The constitutional right of privacy supports regulation protecting individuals against undesired unsolicited phone calls.”).

¹¹⁴ Ryan Calo, *Privacy and Markets: A Love Story*, 91 NOTRE DAME L. REV. 649, 651 (2015) (citing Cohen, *supra* note 3, at 1911); see also *supra* Introduction (describing a wide array of “privacy” interests).

¹¹⁵ See, e.g., Whalen v. Roe, 429 U.S. 589, 598–600 (1977) (noting “at least two different kinds of interests” in the Court’s privacy cases: “One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions”); Babbette Boliek, *Prioritizing Privacy in the Courts and Beyond*, 103 CORNELL L. REV. 1101, 1112 (2018) (explaining that “[i]nformational privacy is not the same as decisional privacy”); Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159, 171 (2015) (explaining, “scholars have attempted to draw a proximate relationship between informational privacy and . . . decisional privacy”); Richards, *supra* note 1, at 1089 (“[I]nformation privacy scholars have tended to base their work either expressly or implicitly upon a binary distinction between ‘decisional privacy’ and ‘information privacy.’”); Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2058 (2004) (“Information privacy can, therefore, be distinguished from ‘decisional privacy.’”); cf. Nat’l Aeronautics & Space Admin. v. Nelson, 562 U.S. 134, 146 (2011) (discussing prospect of “a constitutional right to information privacy”).

controlling information.¹¹⁶ But this move, even when explicitly acknowledged, generates rather than eliminates incoherence.

The decisional privacy category—drawn from loose phrasings in Supreme Court opinions¹¹⁷—is itself a conceptual minefield. The biggest flaw is its descriptive bankruptcy, with both words in the phrase serving as opaque placeholders for the more fitting terms: “personal” and “liberty.”¹¹⁸

“Decision” is the wrong word in this context because it shifts the focus away from the government prohibition at issue. The laws struck down in the constitutional decisional privacy cases prohibited acts, not decisions. In *Griswold*, Connecticut prohibited the distribution of contraception.¹¹⁹ In *Roe*, Texas prohibited abortion.¹²⁰ It is true that any legal prohibition can be recharacterized as an infringement upon a decision to do the forbidden thing. But we don’t normally characterize things this way. I wouldn’t say, “The store is closed; therefore I cannot *decide* to enter the store.” This exercise becomes farcical when applied in analogous legal contexts. When the District of Columbia prohibited handguns, it did not deprive its residents of their “decisional right to keep and bear arms.”¹²¹ Similarly, banning a book does not violate the author’s “decisional free speech rights.” Decisions are an odd place to look when assessing government prohibitions. Without some compelling justification (and none is apparent), there is little reason for scholars to focus on decisions in this context, as opposed to the direct infringement on liberty that arises when the government prohibits a specific act.¹²²

The term “privacy” in decisional privacy introduces further imprecision. Confusion arises immediately since privacy is being used differently than in the phrase’s partner, informational privacy. In informational privacy, “privacy” typically concerns the disclosure and

¹¹⁶ See sources cited *supra* note 115.

¹¹⁷ See, e.g., *Roe v. Wade*, 410 U.S. 113, 154 (1973) (holding that “the right of personal privacy includes the abortion decision”); *Carey v. Population Servs., Int’l*, 431 U.S. 678, 693 (1977) (discussing “the right to privacy in connection with decisions affecting procreation”).

¹¹⁸ Cf. *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 419 (1983) (“[T]he right of privacy . . . [is] grounded in the concept of personal liberty guaranteed by the Constitution.”).

¹¹⁹ See *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965) (Connecticut statute: “Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined . . . or imprisoned . . .”).

¹²⁰ See 410 U.S. at 117 n.1 (Texas statute: “If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine . . . and thereby procure an abortion, he shall be confined in the penitentiary . . .”).

¹²¹ See *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008).

¹²² Outside a scholarly context, legal advocates might seek to focus on the decision rather than the act to increase popular support in circumstances where the act is unpopular.

dissemination of information.¹²³ But in the decisional privacy cases, the state is not forcing people to disclose any decisions. If anything, the prohibitions that implicate decisional privacy push forbidden decisions out of view.

The problem is that, despite its appearance in noun form, the term “privacy” in the phrase decisional privacy is not being used in a nounal sense at all. “Privacy” serves in this context to evoke “private,” the adjective, and thus a public–private dichotomy.¹²⁴ The term emphasizes an individual’s increased liberty to make *personal* choices, i.e., choices that uniquely impact the individual as opposed to the public.¹²⁵ As the Supreme Court’s own opinions make clear, the Court recognizes decisional privacy rights only “in the context of certain personal decisions.”¹²⁶

Thus, both terms, “decisional” and “privacy,” fail in their descriptive efforts while “personal” and “liberty” fit perfectly. So why use decisional privacy instead of “personal liberty” in this context? One explanation is that it maintains the fiction that decisional privacy and information privacy are related when, in fact, they have little direct connection at all.¹²⁷

But descriptive bankruptcy isn’t the only problem with the decisional privacy label. Since decisional privacy is an expansive, ambiguous category with only coincidental overlap with informational privacy, its inclusion in the privacy tent opens broad spaces for other privacy-adjacent interests. If privacy includes personal liberty interests like “the right . . . to be free from unwarranted governmental intrusion,”¹²⁸ it is easily stretched to include freedom from analogous intrusions, such as the colleague who sits too close, the neighbor who plays loud music, and marketers who flood us with

¹²³ Solove, *supra* note 5, at 489.

¹²⁴ See *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (“Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government.”); *Whisenhunt v. Spradlin*, 464 U.S. 965, 971 (1983) (Brennan, J., dissenting from the denial of certiorari) (“Without identifying the precise contours of this right, we have recognized that it includes a broad range of private choices involving family life and personal autonomy.”). There are occasional elements of privacy (as defined here) mixed into the prohibitions, but these fall neatly into the other half of the dichotomy, informational privacy.

¹²⁵ See sources cited *supra* note 124; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”); *Rust v. Sullivan*, 500 U.S. 173, 216 (1991) (Blackmun, J., dissenting) (“‘[L]iberty,’ if it means anything, must entail freedom from governmental domination in making the most intimate and personal of decisions.”).

¹²⁶ *Harris v. McRae*, 448 U.S. 297, 317–18 (1980).

¹²⁷ Cf. Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. 2007, 2009–10 (2010) (“[T]he stark differences in the respective analytical frameworks, stakes, historical pedigrees, and distributive contexts dwarf the extant similarities between informational and decisional privacy.”).

¹²⁸ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

unwanted calls, texts, and advertisements. It is a small and popular step from decisional privacy to a boundaryless conception. Privacy becomes an interest in being free from any disfavored influence, spanning everything from a slap in the face to that annoying sound people make when they chew.¹²⁹

It is no affront to any of the constitutionally protected “privacy” rights to recognize that the road forward requires scholars to make an important choice. Privacy is either a rigorous concept susceptible to definition or it is a rhetorical label that we attach to things we like. I would choose the former. But after decades of cloudy legal discourse, it seems clear that explicit recognition of either alternative would be preferable to the straddling of both options represented by the status quo.

It may be important at this point to emphasize that any superficial resemblance of the arguments above to conservative critiques of the legitimacy of substantive due process case law is illusory. Distilling liberty out of “privacy” should not be viewed as a repudiation of the decisional privacy cases. It is just getting ahead of the curve. As the ghost of *Lochner* fades into history and constitutional text becomes an increasingly important interpretive currency,¹³⁰ the Supreme Court’s reliance on the term “privacy” will continue to ebb. The Justices were always ambivalent about their embrace of the term.¹³¹ True, Robert Bork imploded his Supreme Court prospects by scolding the Senators at his confirmation hearings that a general right to privacy was nowhere to be found in the Constitution.¹³² But his replacement, Anthony Kennedy, found the sweet spot by noting that, even if Bork was right, Americans’ cherished decisional privacy rights were protected by the term “liberty, which is . . . in the Constitution.”¹³³ As Kennedy understood, Bork didn’t stand outside the mainstream because he thought “privacy” was the wrong word. He stood outside the mainstream because he didn’t think “liberty” worked either.¹³⁴ Kennedy’s insight led to his unanimous confirmation (in Bork’s place) to the Supreme Court, where Justice Kennedy became a reliable vote for unenumerated substantive due

¹²⁹ See James Cartreine, *Misophonia: When Sounds Really Do Make You “Crazy,”* HARV. HEALTH BLOG (June 24, 2019), <https://www.health.harvard.edu/blog/misophonia-sounds-really-make-crazy-2017042111534> [<https://perma.cc/V7ZR-59Q5>].

¹³⁰ See Jeffrey Bellin, *Fourth Amendment Textualism*, 118 MICH. L. REV. 233, 238 n.24 (2019) (describing textualism as “the dominant mode of modern constitutional interpretation”).

¹³¹ See *supra* note 80 and accompanying text.

¹³² GARROW, *supra* note 81, at 671–72 (recounting history); Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715, 740 (2010) (noting “Bork’s rejection of the right to privacy is widely viewed as having doomed his nomination”).

¹³³ GARROW, *supra* note 81, at 672 (quoting Kennedy’s response to Senator Biden at his hearings: “It is not clear to me that substituting the word ‘privacy’ is much of an advance over interpreting the word ‘liberty,’ which is already in the Constitution”).

¹³⁴ *Id.* at 671–72 (chronicling confirmation hearings).

process rights. As this history demonstrates, recognizing that privacy isn't a synonym for liberty doesn't make you Bork. It makes you Kennedy, Marshall,¹³⁵ Stevens,¹³⁶ Nussbaum,¹³⁷ and Greene.¹³⁸ Calling liberty "liberty" rather than "privacy" doesn't devalue so-called decisional privacy rights. It tightens the connection between those rights and the Fourteenth Amendment text, enhancing rather than undermining the legitimacy of the Court's substantive due process cases.¹³⁹

Largely thanks to a series of Kennedy opinions, the semantic groundwork for a substitution of "personal liberty" for constitutional decisional privacy already exists, most obviously in the marriage cases.¹⁴⁰ A century ago, the Supreme Court placed the "right to marry" under the heading "liberty," only to swap labels fifty years later, proclaiming that "the right to marry is part of the fundamental 'right of privacy.'"¹⁴¹ In 2015 in *Obergefell v. Hodges*, Kennedy's opinion for the Court returned to liberty, emphasizing the "abiding connection between marriage and liberty."¹⁴² The *Obergefell* majority uses the word "liberty" twenty-five times, twice in the

¹³⁵ After the first argument in *Roe v. Wade*, Justice Marshall summed up this sentiment at the Justices' conference, stating that he thought the Court should ground its decision in liberty, since "'liberty' covers about any right to have things done to your body." *Id.* at 530.

¹³⁶ See *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) ("[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship . . . are a form of 'liberty.'").

¹³⁷ See Martha C. Nussbaum, *What's Privacy Got to Do with It?*, in *WOMEN AND THE UNITED STATES CONSTITUTION* 153, 163 (Sibyl A. Schwarzenbach & Patricia Smith eds., 2003) ("What is at stake in contraception and abortion is decisional autonomy or liberty."). Justice Stewart, too. See *Roe v. Wade*, 410 U.S. 113, 168 (1973) (Stewart, J., concurring) ("The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the 'liberty' protected by the Due Process Clause . . . covers more than those freedoms explicitly named in the Bill of Rights.").

¹³⁸ See Greene, *supra* note 132, at 746–47 (arguing that the constitutional right to privacy has "bad optics" and that "liberty" would be a preferable replacement).

¹³⁹ See *id.* at 743 ("'Liberty' is hardly self-defining, but it can boast three appearances in the Constitution, including in the Fifth and Fourteenth Amendments — that is of course three more appearances than 'privacy.'").

¹⁴⁰ See Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, 2002–2003 *CATO SUP. CT. REV.* 21, 33 (2003) (stressing that "[l]iberty, not privacy, pervades" Kennedy's majority opinion in *Lawrence*). Jamal Greene credits Justice Stevens for the Court's evolution from "privacy" to "liberty," arguing that "Justice Kennedy appeared to adopt Justice Stevens's view" in *Lawrence*. Greene, *supra* note 132, at 718, 736.

¹⁴¹ See *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("While this Court has not attempted to define with exactness the liberty thus guaranteed, the term . . . denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry . . .").

¹⁴² 135 S. Ct. 2584, 2589 (2015); see also *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places."); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 853 (1992) (emphasizing "the reasoning in *Roe* relating to the woman's liberty"); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) ("Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government.").

first sentence: “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”¹⁴³ Following the old playbook, the dissent drags out the ghost of *Lochner*.¹⁴⁴ The *Obergefell* majority hardly blinks. The majority never responds to the *Lochner* charge and mentions “privacy” only once (in a quote). The Court is already well on its way to ushering the constitutional privacy-qua-liberty cases back into a pure liberty home.¹⁴⁵ Scholarly acknowledgement of the distinction between privacy and liberty can parallel and encourage this salutary development.

Stripping away liberty and various other permutations of the right “to be let alone” makes defining privacy possible. Solove’s fourfold privacy taxonomy illustrates this point. The taxonomy consists of the following:

- “information collection”;
- “information processing”;
- “information dissemination”; and
- “invasion.”¹⁴⁶

To borrow a line from *Sesame Street*, one of these things is not like the others.¹⁴⁷ The last category—which Solove defines as “direct interferences with the individual, such as intruding into her life or regulating the kinds of decisions she can make about her life”¹⁴⁸—is the right to be let alone. It is liberty, not privacy. Removing the fourth category leaves three categories that center around the disclosure and dissemination of information. This is a necessary first step on the path to a definition.

B. *The Information that Matters*

The Supreme Court’s repurposing of the term privacy came at an inopportune time. Just as the Court was commandeering “privacy” to protect a type of personal liberty, scholars were beginning to work out a concrete definition of the term. In an influential book published in 1967, Alan Westin

¹⁴³ 135 S. Ct. at 2593.

¹⁴⁴ *Id.* at 2617 (Roberts, C.J., dissenting) (“In the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty . . .”).

¹⁴⁵ *Cf.* William N. Eskridge Jr., *Latter-Day Constitutionalism: Sexuality, Gender, and Mormons*, 2016 U. ILL. L. REV. 1227, 1281 (describing “due process ‘liberty’” as “the new and broader home for privacy doctrine”); David Garrow, *Privacy and the American Constitution*, 68 SOC. RSCH. 55, 55–56 (2001) (describing the shift from privacy to liberty).

¹⁴⁶ Solove, *supra* note 3, at 489.

¹⁴⁷ *Sesame Street*, *One of These Things*, YOUTUBE (June 7, 2011), <https://www.youtube.com/watch?v=rsRjQDrDnY8> [<https://perma.cc/K5FL-HPG6>].

¹⁴⁸ Solove, *supra* note 6, at 759; Solove, *supra* note 3, at 491 (“invasions into people’s private affairs”).

offered the following definition: “Privacy 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.”¹⁴⁹ A year later, Charles Fried wrote: “Privacy is not simply an absence of information about us in the minds of others; rather it is the *control* we have over information about ourselves.”¹⁵⁰ He added: “Privacy, thus, is control over knowledge about oneself.”¹⁵¹

Westin’s notion of privacy as control over information appears in a variety of sources, including a brief cameo in a Supreme Court opinion;¹⁵² it is “perhaps the most widely cited definition of privacy among scholars.”¹⁵³ In an alternative universe where the Court stuck with “liberty” rather than “privacy” to limit government restrictions on people’s activities, debates centered on Westin’s definition would likely have led to a broadly accepted legal conception of privacy.

Privacy as control over personal information is the next logical step after Warren and Brandeis. But Westin’s definition has significant flaws, some widely recognized, and others hardly noticed. Even when these flaws are addressed, the information-control conception requires refinement and explication. The balance of this Part takes up that task.

We begin with some of the most common criticisms. Dan Solove takes special aim at the conception of privacy as the control of personal information in arguing for his taxonomy. Echoing criticism by Parent and

¹⁴⁹ WESTIN, *supra* note 2, at 7. On Westin’s influence, see Lisa M. Austin, *Re-Reading Westin*, 20 THEORETICAL INQUIRIES L. 53, 54 (2019) (describing Westin’s work as “foundational to the field of privacy”); Kirsten Martin & Helen Nissenbaum, *Measuring Privacy: An Empirical Test Using Context to Expose Confounding Variables*, 18 COLUM. SCI. & TECH. L. REV. 176, 186 (2016) (“Alan Westin’s vast contribution to privacy in research and public policy cannot be overstated.”); Parent, *supra* note 88, at 326 (stating that “Alan Westin is perhaps its best known advocate” in reference to information control theory of privacy); Chemerinsky, *supra* note 63, at 649 (describing Westin’s as a “seminal book on the right to privacy”).

¹⁵⁰ Charles Fried, *Privacy*, 77 YALE L.J. 475, 482 (1968).

¹⁵¹ *Id.* at 483; see also Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117, 2120 (2001) (“By privacy, then, I mean the ability to exercise control over personal information.”).

¹⁵² U.S. Dep’t of Just. v. Repts. Comm. for Freedom of Press, 489 U.S. 749, 763 (1989) (“[P]rivacy encompass[es] the individual’s control of information concerning his or her person.”).

¹⁵³ Sklansky, *supra* note 5, at 1083; Jeffrey M. Skopek, *Reasonable Expectations of Anonymity*, 101 VA. L. REV. 691, 701 (2015) (recognizing “the widely advanced idea that privacy is a form of informational control”); Paul M. Schwartz, *Internet Privacy and the State*, 32 CONN. L. REV. 815, 820–21 (2000) (describing the “weight of the consensus about the centrality of privacy-control” as “staggering” and including “the scholarship of Charles Fried, Richard Posner, Frederick Schauer, Alan Westin, and others”).

others,¹⁵⁴ Solove argues that “conceptualizing privacy as control over personal information can be too vague, too broad, or too narrow.”¹⁵⁵

Solove contends that an information-control theory of privacy is “too narrow,” because “it excludes those aspects of privacy that are not informational, such as the right to make certain fundamental decisions about one’s body, reproduction, or rearing of one’s children.”¹⁵⁶ We have already addressed this objection. These are important concepts, but they concern liberty, not privacy. These liberty concepts (aka decisional privacy) destabilize modern efforts to conceptualize privacy only through a historical accident: the mischaracterization of Warren and Brandeis’s 1890 article and the Supreme Court’s subsequent leveraging of that misunderstanding to exorcise the ghost of *Lochner*.

Solove’s remaining critiques concern one parameter of an information-control definition—and the subject of this Section. Solove argues that attempts to use information control to define privacy are either “too vague” because proponents of the theory often “fail to define the types of information over which individuals should have control” or “too broad because there is a significant amount of information identifiable to us that we do not deem as private.”¹⁵⁷

Solove is correct that any definition of privacy that centers on the disclosure of information must identify the information that counts. The most common approach is to carve out a category of intimate or sensitive information. Judicial discussions of statutory privacy rights take this approach, restricting legal protections to disclosures of “personal matters,”¹⁵⁸ such as “sexual relationships” or “medical records.”¹⁵⁹ Scholarly treatments take on the more difficult task of attempting to precisely describe these boundaries. In one of the more prominent efforts, W.A. Parent argues:

[P]ersonal 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

¹⁵⁴ Parent, *supra* note 88, at 326–27; Sklansky, *supra* note 5, at 1114 (critiquing information control as “a conception with some serious shortcomings”).

¹⁵⁵ Solove, *supra* note 35, at 1115.

¹⁵⁶ *Id.* at 1110; ALLEN, *supra* note 65, at 8 (critiquing Westin’s definition as incomplete on similar grounds).

¹⁵⁷ Solove, *supra* note 35, at 1111–12, 1115.

¹⁵⁸ *Whalen v. Roe*, 429 U.S. 589, 599 (1977); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 458–59 (1977) (emphasizing that claim in *Whalen* applied to “private medical information” while Nixon’s materials did not include “purely private papers and recordings”).

¹⁵⁹ *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633, 654 (Cal. 1994) (limiting the right to “sensitive and confidential information”); *John B. v. Super. Ct.*, 137 P.3d 153, 166–67 (Cal. 2006) (noting application to “sexual relations” and “medical records”).

does not choose to reveal about himself—even though most persons don’t care if these same facts about themselves are widely known.¹⁶⁰

Julie Inness draws a line at “intimate” matters, which she defines as “matters that draw their meaning and value from the agent’s love, liking, and care.”¹⁶¹

These examples illustrate one of the common perils for a privacy definition. A definition should clarify the defined term, not introduce additional uncertainty. Definitions like those offered by Parent and Inness generate more questions than answers. How do we determine which facts “most persons in a given society choose not to reveal” or “draw their meaning from . . . care”? What counts as “acutely sensitive” as opposed to just “sensitive”? Why not include other facts identifiable to an individual, such as a person’s purchases or location, that are usually not sensitive but, especially in the aggregate, implicate privacy?¹⁶²

The most important point to make about these line-drawing efforts, however, is that they are unnecessary. We need not decide what facts people desire or should desire to keep to themselves. A definition of privacy can apply to all facts about a person. For this, we can borrow just two words from Parent’s lengthy definition (“about themselves”). Although speaking more colloquially on this point, Fried identifies the information of concern as “information about us,” “information about ourselves,” or “knowledge about oneself.”¹⁶³ Westin uses “information about them,” referring to “individuals, groups, or institutions.”¹⁶⁴

Broad conceptions of the information that matters for a privacy definition recognize that any disclosure of information identifiable to an individual implicates privacy. For example, my height and eye color are not generally concealed or sensitive or intimate facts. But that does not mean we should exclude these types of facts from a definition of privacy. Some people do conceal these facts.¹⁶⁵ Their efforts sound squarely in privacy. But even if

¹⁶⁰ Parent, *supra* note 88, at 307; *see also* Rosen, *supra* note 151, at 2120 (“[B]y personal information, I mean information over which I reasonably expect to exercise control.”).

¹⁶¹ INNESS, *supra* note 1, at 140; *cf.* Skinner-Thompson, *supra* note 115, at 205 (seeking heightened constitutional protection for “intimate information”); Cohen, *supra* note 3, at 1911 (“Lack of privacy means reduced scope of self-making.”).

¹⁶² *See* Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1185 (2002) (emphasizing the “aggregation problem”).

¹⁶³ Fried, *supra* note 150, at 482–83.

¹⁶⁴ WESTIN, *supra* note 2, at 7.

¹⁶⁵ *See, e.g.*, Tim Molloy, *James Gunn Would Like Actors to Please Stop Lying About Their Height*, MOVIE MAKER (June 17, 2021), <https://www.moviemaker.com/james-gunn-would-like-actors-to-please-stop-lying-about-their-height/> [<https://perma.cc/WXD6-D2MR>] (reporting director James Gunn’s estimate that “easily 50% of the time male actors exaggerate how tall they are, sometimes by a lot, on

no one can avoid disclosure of certain information, that means only that, in this society at this moment, we lack certain aspects of privacy. This is especially true in an era when seemingly mundane bits of data, such as our location at any given moment, can be strung together to draw conclusions about our habits and preferences. Definitions of privacy that only capture “intimate” or “sensitive” information miss this critical point—an omission made especially salient with the arrival of “Big Data.”¹⁶⁶

Limits on the types of information captured by a privacy definition appear to stem from a desire to characterize privacy as a positive normative good.¹⁶⁷ Many scholars assume that privacy is good and therefore losses of privacy must be bad. This leads to efforts to build these normative conclusions into the definition of privacy. Nonintimate or widely known facts, such as the color of your car,¹⁶⁸ your status as a politician,¹⁶⁹ or a newsworthy arrest,¹⁷⁰ must be excluded from the definition because these facts can be justifiably disclosed and transmitted. The revelation of that kind of information is not bad, the argument goes, so that kind of information should not be captured in a definition of privacy. The instinct is understandable but misguided and, as described above, ultimately dooms the effort. The alternative is to craft a neutral definition of privacy.¹⁷¹

Neutrally defined, privacy is not an ideal we must maximize, like justice or health. It is not necessarily a positive thing at all. It is like temperature. The desirable setting depends on the individual and the context. For example, four hundred degrees is too hot, except if you are making pizza. Importantly,

their resumes”); Amanda Barrell, *Eye Color Percentages Around the World*, MED. NEWS TODAY (Nov. 25, 2020), <https://www.medicalnewstoday.com/articles/eye-color-percentage> [https://perma.cc/4ZGN-W67T] (“For cosmetic reasons, some people choose to wear colored contact lenses to change the color of their eyes.”).

¹⁶⁶ See Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1205–06 (1998).

¹⁶⁷ See Skopek, *supra* note 153, at 699 (“Normative conceptions of privacy, which dominate the privacy scholarship, define privacy in terms that incorporate into its meaning the idea that privacy is a good thing that deserves moral and legal protection.”); Solove, *supra* note 35, at 1145 (“According to many theorists, privacy has . . . an inherently positive value.”); INNESS, *supra* note 1, at 45–47, 59 (criticizing conceptions of privacy characterized by “value neutrality” and arguing that privacy is a “positively valued condition”); REGAN, *supra* note 1, at 221 (“Most privacy scholars emphasize that the individual is better off if privacy exists; I argue that society is better off as well when privacy exists.”).

¹⁶⁸ INNESS, *supra* note 1, at 58 & 71 n.13 (“where I park my car,” “my car’s color, the nature of my job, or the timber of my voice”).

¹⁶⁹ Solove, *supra* note 35, at 1111–12 (contending that the fact that “a person is a well-known politician is identifiable to her but is not private”); *cf.* Green, *supra* note 2, at 256 (arguing for a more nuanced take on candidate privacy).

¹⁷⁰ Parent, *supra* note 88, at 308 (offering this example as “belonging to the public record”).

¹⁷¹ I use the term “neutral” here to mean that the definition does not prejudice the normative goodness or badness of any privacy loss. The term is not meant to connote the absence of a choice in adopting this definition or to deny that, like any meaningful choice, this choice has downstream effects.

adopting a neutral definition of privacy does not commit scholars to remaining neutral as to the benefits of protecting privacy rights—so long as those rights are precisely defined. This precision (Section II.D), along with a key distinction between the right and the thing protected (Section II.C), is discussed in later Sections.

For now, the critical point is that we need not build any predetermined “good” amount or type of privacy into a privacy definition. All we need to agree on at the outset is that when facts about a person are disclosed, that person’s privacy decreases. This may be good or bad, but we can more candidly argue about these normative questions if they are not smuggled into the privacy definition.¹⁷² Normative assumptions can be transparently surfaced in decisions about the protections afforded to a right to privacy and the degree to which the right can be overridden by other interests.

Even with a neutral approach to defining privacy, a line must be drawn. Not all disclosures implicate privacy. Only information about yourself counts. As already emphasized, the category is intended to be inclusive. It includes information about one’s body, activities, spaces, knowledge, feelings, and thoughts. As Jerry Kang explains, a broad understanding is especially important with respect to digital information. Kang emphasizes that “personal” in this context should “not mean especially sensitive, private, or embarrassing. Rather, it describes a relationship between the information and a person, namely that the information—whether sensitive or trivial—is somehow identifiable to an individual.”¹⁷³

Many facts in public discourse are not identifiable to an individual. This is true even if the information concerns individuals. For example, if a news site publishes an estimate of the prevalence of chickenpox in the population, that revelation does not implicate privacy. Privacy is still not implicated even if the publication includes common symptoms, treatments, and outcomes. It is true that when I later learn that someone has chickenpox, the publication gives me a sense of what that means. Privacy is ultimately implicated in this indirect way, but the focus of “privacy” is a connection to an identifiable individual. Thus, if the site publishes a list of the names of individuals with chickenpox, there is a clear reduction of privacy.

¹⁷² Ruth Gavison similarly argues for a “neutral” definition of privacy “that does not make desirability . . . part of the notion of privacy,” while accepting that “[w]hen we claim legal protection for privacy, we mean that only those aspects should be protected, and we no longer refer to the ‘neutral’ concept of privacy.” Gavison, *supra* note 26, at 425; *see also* ALLEN, *supra* note 65, at 3 (identifying privacy as a “neutral concept denoting conditions that are neither always desirable . . . nor always undesirable”).

¹⁷³ Kang, *supra* note 166, at 1206–07; *see also* Commission Regulation 2016/679, art. 4, 2016 O.J. (L 119) 33 (EU) (“‘[P]ersonal data’ means any information relating to an identified or identifiable natural person . . .”).

While some information is not identifiable to any specific person, other information is identifiable to multiple persons. Child abuse dramatically illustrates the point. The fact of abuse is a fact about the child *and* the abuser. The privacy definition proposed in this Article accommodates this typically overlooked wrinkle. Any disclosure of the abuse reduces the privacy of both parties. As discussed below (Section II.D), this simple example wreaks havoc with information-control definitions of privacy.

In sum, privacy is concerned with information about oneself. It ties into control over that information but, as explained in the next Sections, there are problems with the information-control definition beyond the need to define the information that matters. Those critiques require substantial adjustments, not just refinement, to the popular information-control conceptualization of privacy.

C. Differentiating a Right to Privacy from Privacy

There are two serious problems with control of information as a definition of privacy: (1) it conflates the right with the thing protected, and (2) it captures both privacy and the opposite of privacy. Both problems must be resolved in any viable privacy definition. The first problem is addressed in this Section. The second is discussed in the next Section.

Controlling information is important to privacy, but it does not define privacy itself. This objection is crystallized in the observation that the ability to control information is “neither necessary nor sufficient” for privacy.¹⁷⁴ Someone can have total control over information about themselves and no privacy. For example, contestants on the reality television show *Big Brother* voluntarily choose to live in public view.¹⁷⁵ These individuals start with the same control as everyone else but end up with little privacy. A less exaggerated variation on this theme is the myriad individuals who post personal pictures and stories on social media. These individuals lose privacy but their control over the information they shared was the problem (not the solution).

Similarly, many people have lots of privacy despite little control over information. The two classic examples are Fried’s “lonely man on a desert island” and Beate Rössler’s person-who-falls-into-a-crevasse.¹⁷⁶ Both unfortunate individuals have substantial privacy, but not because they

¹⁷⁴ Skopek, *supra* note 153, at 702 n.40; Austin, *supra* note 149, at 58 (noting a similar concern); Parent, *supra* note 88, at 327 (expressing a similar critique).

¹⁷⁵ *About Big Brother*, CBS.COM, https://www.cbs.com/shows/big_brother/about/ [https://perma.cc/BRQ9-DS7Q] (“*Big Brother* follows a group of people living together in a house outfitted with dozens of high-definition cameras and microphones recording their every move, 24 hours a day.”).

¹⁷⁶ Fried, *supra* note 150, at 482; BEATE RÖSSLER, *THE VALUE OF PRIVACY* 7 (2005).

control information about themselves. Again, these extreme examples resonate with another more prevalent category: individuals, perhaps most of us, who are largely anonymous due to broad disinterest in the details of our lives.

This dilemma reveals a common conceptual error in the effort to define privacy: the failure to distinguish a condition or state of privacy from a claim or right to that state. Westin, Fried, and others who offer control over personal information as a definition of privacy define the wrong thing. The ability to control information about yourself is not a formula for defining privacy. It is an effort to define a *right* to privacy. As the *Big Brother* contestants and the crevasse-dweller illustrate, the fact that a person can (or cannot) control information about themselves, tells us little about the degree of privacy they actually enjoy.

There is always a distinction between the right to something and the thing itself. For example, we often speak of a “right to remain silent.”¹⁷⁷ That right is operationalized by one’s control over speaking to authorities.¹⁷⁸ But the right and the thing protected (silence) are not the same. The right offers a choice: to speak or not to speak. Whether silence results depends on the choice made. Similarly, the First Amendment guarantees a right to free speech. Having the right to speak freely does not mean we say anything. Lisa Austin finds a similar distinction in a generous “re-reading” of Westin’s views on privacy. She explains: “When we make a *claim* of privacy, what we claim is that it is up to us to choose the balance between privacy and disclosure. But what we choose when we choose privacy is a *state* of privacy.”¹⁷⁹ Ruth Gavison offers a similar take that is less friendly to Westin. Gavison concludes that we should “reject attempts to describe privacy as a claim,” and “[f]or the same reasons, another description that should be rejected is that of privacy as a form of control.”¹⁸⁰

The often-overlooked distinction between the right and the thing protected provides helpful insight into a variety of privacy dilemmas. For one thing, this distinction offers an opening for those seeking to bring normative heft to privacy discourse. As discussed in the preceding Section, privacy should be defined neutrally. But remaining neutral on privacy does not necessitate neutrality on the right to privacy or its application in common contexts. Again, this parallels the typical treatment of other rights. We often seek to protect rights without prejudging the desirability of their exercise. The constitutional right to privacy cases illustrate the point. One can argue

¹⁷⁷ *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966).

¹⁷⁸ *See id.*

¹⁷⁹ Austin, *supra* note 149, at 59.

¹⁸⁰ Gavison, *supra* note 26, at 425–26.

for a right to access contraception, for example, without taking a position on how frequently, if at all, individuals should exercise that right.

In addition, the distinction highlighted above directs scholars evaluating new policies or technologies to focus not on reductions of privacy but on changes in privacy rights as manifested by individuals' inability to prevent privacy losses. This explains why voluntary services like Facebook or Instagram are less problematic from a privacy perspective than cell phone location tracking. A person's decision to share a "selfie" on Facebook does not violate that person's *right* to privacy, just like a person's decision to call 911 after an accidental shooting does not violate the caller's right to remain silent.

This distinction between a right to privacy and privacy itself also provides an answer to one of the compelling conundrums in contemporary privacy debates. Privacy scholars are puzzled by the complacency of younger generations about sharing personal information.¹⁸¹ To scholars, millennials do not value privacy rights.¹⁸² Yet, with all the modern emphasis on privacy, there is no obvious explanation for why this would be. The answer may be that the diagnosis is flawed. Millennials and their successors (Generation Z)¹⁸³ may be just as interested as their predecessors in privacy *rights*. What has changed is the benefits obtained from waiving those rights. Privacy is lost, for example, when young people routinely share their location data with friends and family.¹⁸⁴ But this information sharing reduces loneliness and worry. Privacy scholars, who are experts only on the privacy costs, may overlook these new benefits. Those who eagerly interact with privacy-reducing services may not be overlooking the value of privacy rights. They may simply be recognizing unprecedented benefits from waiving them.¹⁸⁵

¹⁸¹ See Daniel J. Solove, *Introduction: Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1885 (2013) (asking: "Why are so few people engaging in privacy self-management?"); Teri Dobbins Baxter, *Low Expectations: How Changing Expectations of Privacy Can Erode Fourth Amendment Protection and a Proposed Solution*, 84 TEMP. L. REV. 599, 612 (2012) (reviewing studies).

¹⁸² See, e.g., Arthur R. Miller, *Privacy: Is There Any Left?*, 3 FED. CTS. L. REV. 87, 102 (2009) ("[W]e appear to be raising a nation of young people willing to give up their right to privacy before they even comprehend the value of it.").

¹⁸³ Michael Dimock, *Defining Generations: Where Millennials End and Generation Z Begins*, PEW RSCH. CTR. (Jan. 17, 2019), <https://www.pewresearch.org/fact-tank/2019/01/17/where-millennials-end-and-generation-z-begins/> [<https://perma.cc/6P5B-Q7K4>].

¹⁸⁴ See, e.g., Julie Beck, *It's 10 P.M. Do You Know Where Your Friends Are?*, ATLANTIC (Aug. 20, 2019), <https://www.theatlantic.com/family/archive/2019/08/why-people-use-find-my-friends/596386/> [<https://perma.cc/9GCD-LA9L>].

¹⁸⁵ An analogy can be drawn to a situation in which a new police officer replaces an ineffective and brutal predecessor on a local beat. People may become more cooperative in their dealings with the new officer without this change reflecting any subjective devaluation of their Fifth Amendment rights.

D. Preventing, Not Controlling, Disclosure

The second problem with the information-control definition of privacy is that it encompasses a right to *disclose* information. The problem is not that people may decline to exercise their right to control information and thus lose privacy. It is that people can, and often will, invoke a right to control personal information to reduce rather than enhance privacy.¹⁸⁶

There are countless examples in which control decreases rather than increases privacy, but interconnected information is the most compelling. Imagine, for example, that a parent abuses a child. Seen through the prism of controlling personal information, the child has a right to report the parent's action. Few would disagree. But it is absurd to refer to this right to disclose personal information, as Westin, Fried, Austin, and others apparently would, as the child's "right to privacy." Certainly, the parent's right to privacy is implicated in this scenario, but the child's right to *disclose* this personal information is something different.

A coherent definition of a right to privacy must distinguish the right to prevent disclosure of personal information from its opposite, the right to disclose. A right to privacy, then, is not "the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others" (Westin),¹⁸⁷ or "the *control* we have over information about ourselves" (Fried),¹⁸⁸ or the ability "to choose the balance between privacy and disclosure" (Austin).¹⁸⁹ It is a right to *prevent disclosure* of information about ourselves.¹⁹⁰

At this point we seem to have fallen into the same trap (crevasse?) that snared Westin, Fried, and others, defining the right but not the thing itself. But awareness of the trap makes all the difference. Defining the right to privacy takes us directly to a definition of privacy. While the right and the thing protected are not the same, they should exhibit a direct connection. Privacy should be what results when we exercise our right to privacy. Thus, the right to privacy crafted above ("a right to prevent disclosure of

¹⁸⁶ Cf. ALLEN, *supra* note 65, at 26 ("Since a person can exercise control over access in the direction of making herself more accessible rather than less accessible, privacy itself cannot be identified with control over access.")

¹⁸⁷ WESTIN, *supra* note 2, at 7.

¹⁸⁸ Fried, *supra* note 150, at 482.

¹⁸⁹ Austin, *supra* note 149, at 59.

¹⁹⁰ Cf. *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (characterizing an aspect of privacy as an "interest in *avoiding disclosure* of personal matters" (emphasis added)).

information about ourselves”)¹⁹¹ points the way to a definition of privacy. Fried almost got it when he wrote: “Privacy is not simply an absence of information about us in the minds of others”¹⁹² The only error was the “not.”

This brings us to the main course: the baseline definitions that are the subject of this Article.

- *A right to privacy* is the ability to prevent disclosure of information about ourselves to others.
- *Privacy* is the absence of information about us in the minds of others.

The next Sections illustrate the power of these definitions to build out a theory of privacy and clarify the terms’ role and importance in modern policy debates.

III. A THEORY OF PRIVACY

The definitions developed in Part II lay the foundation for a theory of privacy. This Part begins to develop that theory. It starts by leveraging the definitions to respond to reductionist claims that privacy is not a distinct interest. Next, it distinguishes “access,” a related but ultimately distinct privacy-adjacent concept. Finally, it elaborates on the meaning of “disclosure,” a key multilayered facet of the proposed definition.

A. Pure Privacy

A viable definition of privacy should possess two characteristics. It should capture everything that truly constitutes privacy, and it should leave out everything else. This is exactly what the reductionists say the current conception lacks.¹⁹³ Invocations of “privacy,” they charge, introduce no new interests, instead borrowing bits and pieces from other rights to unnecessarily complicate an already cluttered rights landscape.¹⁹⁴ “Probably the most

¹⁹¹ This framing parallels some state law privacy protections. *See, e.g.*, *ACS Sys., Inc. v. St. Paul Fire & Marine Ins.*, 147 Cal. App. 4th 137, 149 (2007); *Motorists Mut. Ins. v. Dandy-Jim, Inc.*, 912 N.E.2d 659, 663 (Ohio Ct. App. 2009) (similar right under Ohio state constitution). However, these treatments tend to be conclusory, rather than definitional, and typically limit their coverage to sensitive information. *See, e.g.*, *John B. v. Super. Ct.*, 38 Cal. 4th 1177, 1198 (2006) (noting application to “sexual relations” and “medical records”).

¹⁹² Fried, *supra* note 150, at 482. For a definitional approach that appears to resonate with the one proposed here, see Skopek, *supra* note 27, at 2189 (arguing that “a privacy loss occurs when true information about a person is accessed by another via a means that has epistemic merit”).

¹⁹³ *See* Gavison, *supra* note 26, at 422 (discussing variations in reductionists who “are united in denying the utility of thinking and talking about privacy as a legal right”).

¹⁹⁴ *Id.*

famous reductionist view” comes from Judith Jarvis Thomson,¹⁹⁵ who wrote that “the right to privacy is everywhere overlapped by other rights.”¹⁹⁶ Consequently, Thomson argued, “it is possible to explain in the case of each right in the cluster how come we have it without ever once mentioning the right to privacy.”¹⁹⁷ The best response to the reductionists is a definition of privacy that identifies a unique interest that does not depend on other interests.¹⁹⁸ A definition, in other words, must survive Thomson’s critique.

The path forward begins with the recognition that some of Thomson’s critique is sound. Thomson accurately identified uses of “privacy” in public and academic discourse that are completely derivative of other values or rights. For example, Thomson argued: “[M]aking a kind of conduct illegal is infringing on a liberty, and we all of us have a right that our liberties not be infringed in the absence of compelling need to do so.”¹⁹⁹ Although Thomson only addressed a few of the problematic overlaps in privacy discourse, her general critique resonates with the decluttering theme.²⁰⁰

The baseline privacy definition proposed in this Article accepts the spirit of Thomson’s reductionist critique. The definition does not reach out to capture intrusions on other interests, such as liberty, dignity, autonomy, or the desire to be free of nuisance.²⁰¹ These interests must be left out because in each instance a different right or interest fully explains the perceived intrusion and does so more convincingly than “privacy.”²⁰²

¹⁹⁵ DeCew, *supra* note 27; Sklansky, *supra* note 5, at 1078 (describing Thomson’s “particularly influential essay”).

¹⁹⁶ Thomson, *supra* note 27, at 310, 313–14.

¹⁹⁷ *Id.* at 313.

¹⁹⁸ See INNESS, *supra* note 1, at 38 (emphasizing that only a definition of privacy can mollify the privacy skeptic).

¹⁹⁹ Thomson, *supra* note 27, at 312; see *supra* Section II.A (“Distinguishing Liberty From Privacy”).

²⁰⁰ Thomson also critiques the treatment of nuisance as privacy. Thomson, *supra* note 27, at 310 (rejecting the suggestion that privacy is violated when the “neighbors make a terrible racket” or “cook foul-smelling stews”); cf. Warren & Brandeis, *supra* note 35, at 194 (noting that the “law of nuisance” offered protection “against offensive noises and odors, against dust and smoke, and excessive vibration”).

²⁰¹ Cf. Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 38 (1967) (distinguishing “weak senses of ‘privacy’” where the term “is used . . . as a synonym for another [more fitting] term” from “‘privacy’ in the strong sense,” for which “there is no exact synonym” (emphasis omitted)).

²⁰² David Sklansky argues for a broad definition to account for enhanced harms in street frisks and strip and home searches. Sklansky, *supra* note 5, at 1102–06, 1115–18. He correctly notes that it is difficult to capture the nature of these invasions through an information privacy lens. *Id.* at 1102–06. The answer, though, is not to expand the term privacy, as in Sklansky’s conception of privacy as “a zone of personal sovereignty” or private “refuge.” *Id.* at 1113. It is to recognize that other overlapping values can aggravate privacy harms. A home search entails a paradigmatic property invasion. The strip search and street frisk involve severe intrusions on liberty as well as privacy. Sklansky is right to object to dignity as the answer in these cases, as “dignity is an even vaguer term than privacy.” *Id.* at 1106. But dignity offers a clue as to what is driving the enhanced harms. Dignity, in this context, is a recognition that certain

Ultimately, of course, the proposed baseline definition parts ways with Thomson and the reductionists by identifying a core of pure privacy alongside a corresponding claim that this core cannot be explained by other interests. Although not addressing this definition specifically, Thomson characterized even interests that would be captured in the proposed definition as something other than privacy.

My disagreement with Thomson can be framed through one of Thomson's primary examples, "a man who owns a pornographic picture":

He wants that nobody but him shall ever see that picture—perhaps because he wants that nobody shall know that he owns it, perhaps because he feels that someone else's seeing it would drain it of power to please. So he keeps it locked in his wall-safe, and takes it out to look at only at night or after pulling down the shades and closing the curtains.²⁰³

With a nod toward the *Lord of the Rings* trilogy, let's call Thomson's unnamed man "Gollum."²⁰⁴ Looking at our proposed definition, Gollum's claim sounds in privacy. His possession of the picture is a fact about himself, and his desire to conceal that fact from others is squarely captured by our definition and its accompanying right to prevent the disclosure of facts about ourselves.

Thomson contended that Gollum's rights in this context are actually property rights that flow from his ownership and possession of the picture.²⁰⁵ She extended this conception to information about a person's body and (presumably) activities, such as "your right that your left knee not be touched or looked at," which she places under the broad heading of "the right over the person."²⁰⁶ "For if we have fairly stringent rights over our property, we have very much more stringent rights over our own persons."²⁰⁷ For Thomson, even information privacy claims mask these property and personhood rights. This leads to Thomson's reductionist conclusion: "The question arises, then, whether or not there are any rights in the right to privacy cluster which aren't also in some other right cluster. I suspect there

liberty interests resonate beyond the physical intrusion. These invasions sometimes overlap with privacy as in the strip-search example, but it is not because privacy and dignity are inherently linked. Similar indignities occur without privacy implications, such as forcing persons to wear embarrassing clothes or painful symbols, barring religious accessories such as yarmulkes or veils, or desecrating gravesites.

²⁰³ Thomson, *supra* note 27, at 298.

²⁰⁴ *Gollum*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Gollum> [https://perma.cc/8AYA-XXHH] (noting Gollum's similar attachment to his ring).

²⁰⁵ Thomson, *supra* note 27, at 298–303.

²⁰⁶ *Id.* at 303–05.

²⁰⁷ *Id.* at 303.

aren't any, and that the right to privacy is everywhere overlapped by other rights."²⁰⁸

Thomson's provocative claim has haunted privacy scholarship for fifty years.²⁰⁹ But her arguments do not undermine the proposed baseline definition. Thomson's alternative explanations for the rights protected by this definition—property and “the right over the person”²¹⁰—fall away under scrutiny while privacy remains.

Particularly problematic for Thomson's property-rights account is that there is little correlation between the strength of the property rights and the corresponding privacy interests. For example, if Gollum only rented or stole the picture, his property right decreases but his privacy interest remains unchanged. In some circumstances, the diminution of his property right actually increases the privacy intrusion that occurs when the picture is revealed to be in his possession.

In fact, Gollum's privacy claim remains intact no matter how far we reduce the property right, including a reduction to zero.²¹¹ For example, replace the pornographic picture with assorted crumbs of food scattered across the floor or a spill of water in Gollum's apartment. Gollum's desire to keep others unaware of this embarrassing mess again sounds in privacy. Yet it gets harder to frame the interest as deriving from a property right to the crumbs or spilled water.

We can push the point further. Say Gollum, who is a bit of a slob, is employed by a robotics company selling automated cleaning robots. As part of his sales shtick, he routinely sings the praises of his own tireless “Roomba.”²¹² In fact, Gollum does not own a Roomba. His understandable desire to keep the world ignorant of the absence of a Roomba among his possessions sounds neatly in privacy. Yet it is impossible to characterize this claim as a component of a property right in the Roomba that he does not own.

One might respond that the property right shifts in these circumstances to the apartment itself. But, again, we can test this by weakening Gollum's property interest in the apartment to see if his privacy right retains similar force. Maybe Gollum is a squatter or guest in someone else's apartment. Or

²⁰⁸ *Id.* at 310, 313–14 (emphasis omitted).

²⁰⁹ See Ignacio N. Cofone & Adriana Z. Robertson, *Privacy Harms*, 69 HASTINGS L.J. 1039, 1044 (2018) (discussing influence).

²¹⁰ Thomson, *supra* note 27, at 305.

²¹¹ Cf. INNESS, *supra* note 1, at 33 (countering Thomson with an example of love letters in which the author no longer possesses a property interest but maintains a privacy interest).

²¹² *Roomba Robot Vacuums*, IROBOT, <https://www.irobot.com/roomba> [<https://perma.cc/Z8TU-32YG>].

the apartment is a cave on someone else's land. Even when Gollum's property rights fall to zero, a substantial portion of his privacy interest remains.²¹³

The harder we look, the more it appears that Gollum's claim to prevent disclosure of various facts does not depend on a property interest. Say Gollum walks out of the messy borrowed apartment that has no Roomba and accidentally crushes a butterfly on the sidewalk with his shoe, while farting. His claim that no one should know of the mess, his nonpossession of a Roomba, the butterfly's fate, and who farted all fit neatly into a value we call privacy. It takes exhaustive mental gymnastics to characterize any of these interests as property based. The same is true for Warren and Brandeis's primary (and dated) example of a privacy interest in *The Right to Privacy* of a man "not din[ing] with his wife on a certain day."²¹⁴ Thomson might try at this point to switch to the more elusive "right over the person" source (which she concedes is "not mentioned when we give lists of rights").²¹⁵ But that right only applies to these examples in one specific form—a right to prevent disclosure of facts about ourselves. And it is that right, I think, that we can comfortably call privacy and nothing else.

This is not to deny that privacy rights often arise in concert with other rights. For example, one of Julie Inness's key examples is a person who hides under the bed to avoid the gaze of a "peeping Tom." Inness correctly contends that no one should have to go to such lengths to preserve privacy.²¹⁶ But the same scenario becomes humorous, not horrific, when it occurs in a mattress store. Why? Because the privacy invasion in Inness's example strongly overlaps with an invasion of the occupant's property rights. Thus, Thomson is correct that property and privacy rights can overlap. But contrary to Thomson, they do not always overlap. And even when multiple rights are implicated simultaneously, there is often a distinct element that is only privacy.

Police–citizen encounters offer an important example of overlapping but distinct rights. A series of rights come into play when a police officer stops someone on the street and commands them to reveal what is in their cupped hands. The officer infringed on the suspect's liberty by virtue of the stop and any subsequent physical contact or commands. Perhaps the officer targeted the suspect based on race or class, implicating equality rights. The

²¹³ Gollum's privacy interest may be overridden in some scenarios by the owner's property rights. But that only reveals that privacy rights can be overridden, not their absence. And even in those scenarios, Gollum's privacy interests remain intact against the rest of the world.

²¹⁴ Warren & Brandeis, *supra* note 35, at 201.

²¹⁵ Thomson, *supra* note 27, at 305.

²¹⁶ See INNESS, *supra* note 1, at 62.

suspect's dignity suffers as well. But on top of all this, there is an additional privacy harm. By coercing the disclosure of a fact about the suspect—revealing what is in the suspect's hands (even if it is nothing at all)—the officer caused an additional harm that is not overlapped by any of the others. That harm is pure privacy.

B. A Reductionist Critique of “Access”

Identifying a discrete and definable privacy interest provides insight into a prominent alternative conceptualization of privacy. Some of the most thoughtful writing on this topic, including the works of Anita Allen, Ruth Gavison, and David Sklansky, conceptualize privacy in terms of “access.”²¹⁷ Gavison, for example, contends that people lose privacy not just when information about them is disclosed but also “when others gain physical access to them.”²¹⁸ She offers intuitive examples like shared office space or a park bench, where “the essence of the complaint is not that more information about us has been acquired, nor that more attention has been drawn to us, but that our spatial aloneness has been diminished.”²¹⁹

To my mind, an interest in “spatial aloneness” borders the proposed baseline definition but does not introduce any new privacy interests. Access, as used by privacy scholars, appears to be a blend of the privacy interest identified in Part II with a lurking liberty interest. We can distill this mixture through a reductionist critique of Gavison's most powerful example: “a stranger who chooses to sit on ‘our’ bench, even though the park is full of empty benches.”²²⁰

If I am enjoying an afternoon in an empty park, the stranger's arrival and bold seating choice reduces both my liberty and privacy. Privacy is implicated through the stranger's absorption of information about me, such as what I am doing, how I smell(!) and look. After all, privacy, as defined in Part II, involves the disclosure of information *to others*, and the stranger's arrival dramatically increases the frequency of such disclosures when compared to the previously empty park. As explained below, any additional invasion caused by my loss of “spatial aloneness” is a deprivation of liberty. Consequently, there is no need to clutter the privacy definition with an additional “access” component.

²¹⁷ See, e.g., Gavison, *supra* note 26, at 433; ALLEN, *supra* note 65, at 15 (“[P]ersonal privacy is a condition of inaccessibility of the person, his or her mental states, or information about the person to the senses or surveillance devices of others.”); Sklansky, *supra* note 5, at 1113 (defining privacy as “respect for a personal sphere shielded . . . from public inspection and regulation”).

²¹⁸ Gavison, *supra* note 26, at 433.

²¹⁹ *Id.*

²²⁰ *Id.*

The first clue that privacy (as defined in Part II) and liberty are all that is involved in Gavison's example is that if I truly ignore the stranger's arrival, and the stranger somehow absorbs no information about me, there has been no invasion of any interest at all.²²¹ For example, if a second person sits nearby, little changes. (Any physical danger generated by the stranger's arrival can be handled through an interest in my right to bodily integrity or, more specifically, my right not to be assaulted.)

Few people could completely ignore the stranger. I couldn't. I might even leave the bench. These influences, however, reflect familiar restrictions on liberty. The liberty infringement operates both externally and internally. Most obviously, there is an external constraint: I can no longer put my legs up on the bench or gesticulate wildly. This harm would be identical if generated by some inanimate obstruction or a rule prohibition. Internally, I likely curtail my activities out of politeness (I stop picking my nose), shame (I turn off my Taylor Swift mix), or fear (I put away my cocaine).²²² Although less obvious, this too is an intrusion on my liberty. Imagine the stranger sat down and said, "Put away your cocaine or I will call the police." This slight variation, applicable to each change in my behavior, makes the internal constraint into an external one. But the constraint has the same nature. Once articulated, the liberty infringement is clear. That the stranger accomplished the same restrictions implicitly rather than explicitly (and without real fault) does not alter the interest at stake: my ability to *act* according to my preferences.

Liberty is not alone in the park-bench scenario. Part of the reason I am not acting according to my preferences has to do with privacy. But we can completely describe the privacy interest implicated in this scenario through the proposed baseline definition. The stranger's arrival both reduces my current privacy by revealing information about me right now and threatens future privacy invasion through ongoing revelations. If I respond to the threat of future privacy invasions by restricting my activities, I lose liberty as well as privacy. In this respect, my park-bench misfortune differs only in degree from the many actions I take every day to prevent disclosure. Since privacy concerns disclosures *to others*, access is always part of the calculus. I lower the volume of my conversations to avoid being overheard. I use a password for my computer. By taking steps to avoid disclosure, I burden my liberty to protect privacy. These two discrete notions—liberty (freedom of action) and privacy as defined in Part II (preventing information about me from being

²²¹ Imagine a towering matrix of small, insulated boxes that individuals enter to play virtual-reality games; everyone is in extreme physical proximity, but the individuals have no awareness of each other's presence. Physical proximity becomes irrelevant because the liberty and privacy interests drop out.

²²² Note to readers: I do not use cocaine and you shouldn't either.

disclosed *to another*)—are all that is needed to explain the interests implicated.²²³ This is not to deny the appeal of spatial aloneness. Instead, the point is that this appeal does not reflect the arrival of a new interest. Spatial aloneness is attractive because it is a state where privacy–liberty tradeoffs are not required.

C. Disclosure

The distinct privacy interest identified in the preceding Sections is implicated whenever a person seeks to prevent disclosure of information about themselves. The reason that this short definition captures such a complex topic is that “disclosure” has great depth. This Section underscores the many layers of disclosure captured in the proposed privacy definition.

Disclosure is often framed as an on–off toggle switch.²²⁴ A person possesses some personal information (for example, sexual orientation) and decides whether to disclose it to the world.²²⁵ Rarely, however, is the privacy calculus so straightforward. Countless variations exist along the spectrum between total secrecy and universal disclosure. This explains the unpopularity of Fourth Amendment third-party doctrine, which ignores the enhanced privacy invasions that arise when information disclosed to one person is transmitted to others, such as the government.²²⁶ This is also why “secrecy,” an often-invoked term in this context, is such a poor synonym for privacy.²²⁷

Disclosure, as used in the proposed baseline definition, involves not just the initial revelation (intentional or not) of previously unknown information to another person. It includes every subsequent revelation of that information to others. As discussed below, this also includes the enhanced understanding of already revealed information that occurs when multiple bits of information are strung together to reach a conclusion about an individual.

²²³ Similarly, a person could sacrifice privacy to protect another interest. For example, imagine a law that required gun owners to connect tracking devices to their firearms. Those who complied would lose privacy to protect their right to possess a gun. Those who gave up their guns would protect their privacy. We might even describe the GPS requirement as an intolerable burden on gun rights, but the GPS tracking remains a privacy invasion.

²²⁴ See, e.g., Boliek, *supra* note 115, at 1111 (“[O]nce personal information is disclosed, that privacy is gone forever.”).

²²⁵ See, e.g., IGO, *supra* note 65, at 301 (describing controversy in the 1990s over “outing” of “prominent politicians and celebrities unwilling to publicly acknowledge their homosexuality”).

²²⁶ See *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (“This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”); Bellin, *supra* note 130, at 268 (describing the third-party doctrine).

²²⁷ Cf. *Smith*, 442 U.S. at 749 (Marshall, J., dissenting) (“Privacy is not a discrete commodity, possessed absolutely or not at all.”).

We rarely completely hide information.²²⁸ Since we generally disclose, or cannot keep concealed, even the most sensitive information about ourselves, the term “disclosure” must cover more than whether information has ever been revealed to another person. The disclosure concept includes the limits we implicitly or explicitly place on the revelation of information to the broader world. Thus, someone might stand shirtless on the balcony for a moment but put on a shirt after a neighbor starts taking pictures. Putting on a shirt is an effort to limit the disclosure of visual information. It is an effort to increase privacy. Drawing on earlier theorists, Westin analogizes the various levels of disclosure to a series of “concentric circles” within which we try to contain different information. “The series continues until it reaches the outer circles of casual conversation and physical expression that are open to all observers.”²²⁹

The concept of disclosure is further complicated by uncertainty. When we disclose information, we can only estimate the spread *ex ante* based on the fact to be disclosed and what we know about our audience. Many disclosures wither away immediately because the initial recipient finds the disclosure uninteresting and not worth remembering or repeating. Others radiate far and wide. Some disclosures are intercepted and spread in ways we could not anticipate. Greater uncertainty decreases the likelihood that we will be able to prevent unintended disclosures of information about ourselves to others. This is why notice about how information will be used is an important tool for enhancing privacy rights. Notice makes it easier to prevent the disclosure of information about ourselves by forecasting the disclosures that will follow from an initial revelation.

Privacy’s key ally in the context of disclosure is noise. Most information is noisy. It reveals something, but exactly what is unclear. Consequently, it often takes multiple pieces of information to reach a useful conclusion about an important matter. A red-light camera does not discern the driver’s identity. The Google-search results by themselves don’t reveal who searched for “incendiary devices” or why. The water utility doesn’t know if the residents in a home are taking wasteful showers or growing an organic garden. Further, since generally no one is auditing our mundane actions, we can increase noisiness by, for example, using a friend’s account to stream a movie or using pseudonyms or fabricated information in digital profiles. Plus, Netflix, Google, and other information magnets store so much information that any one person or entry is at least momentarily hidden in a sea of data. Noisiness is not perfect protection, however. The Achilles heel

²²⁸ Cf. *U.S. Dep’t of Just. v. Reps. Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989) (“In an organized society, there are few facts that are not at one time or another divulged to another.”).

²²⁹ WESTIN, *supra* note 2, at 33.

of noise is the possibility that someone will painstakingly configure the bits and pieces into a meaningful picture.²³⁰

Under the conceptual framework set out above, every accurate disclosure of information about a person decreases that person's privacy. This includes every additional person to whom information is disclosed and every enhancement (or decrease in noise) of initially revealed information. When we protect peoples' privacy rights, we offer them the ability to prevent disclosures of information about themselves. This includes the ability to prevent: (1) an initial disclosure or revelation, which often requires accurate notice of the scope of disclosure involved in any revelation, and (2) any subsequent disclosures, including clearer understandings of already-revealed information.

Although there may be some value in teasing out each of the disclosure scenarios, the underlying interest is always the same. The central concern of privacy is the disclosure of individually identifiable information.²³¹ How we perceive a resulting privacy reduction depends as much on the nature of the information disclosed and its justification as it does on the particular mechanics of "disclosure" involved.²³² Disclosure can occur through the prying of outsiders, the repetition of already-disclosed information, or careful efforts that connect various bits of information to reveal an otherwise unknown fact. In each case, when someone learns a fact about another person, that person's privacy decreases. Consequently, the baseline definition proposed above can rely on the rich term "disclosure" to capture the broad array of potential privacy losses.

IV. CLARIFYING POLICY DEBATES

A precise privacy definition offers numerous benefits. A few have already been illustrated. The definition highlights the importance of focusing legal scrutiny on the loss of privacy rights rather than reductions in privacy itself.²³³ It also provides a much-needed response to reductionist critiques.²³⁴ Revealing a core of pure privacy that is not "everywhere overlapped by other rights"²³⁵ explains why privacy should have a seat at the table for policy debates.

²³⁰ See Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1721 (2010) (emphasizing "ease" of de-anonymization).

²³¹ See *supra* Section III.A.

²³² Cf. Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119, 155 (2004) (similarly noting "several variables" that play a role in this calculus).

²³³ See *supra* Section II.C.

²³⁴ See *supra* Section III.A.

²³⁵ Thomson, *supra* note 27, at 310.

Having established that privacy should be part of the policy conversation, a clear definition also fosters a more rigorous framework for thinking about privacy in those debates. When a policy or technology is challenged on privacy grounds, a concrete definition permits a clear assessment of both the nature of the challenge and its normative strength. A definition tells us what it is we are protecting, which in turn sheds light on how best to offer that protection. Often, this additional precision highlights ways to directly address (or even solve) privacy problems, rather than the more traditional framing of balancing privacy versus other values. Other times, precision uncovers a privacy proxy war, where different interests, such as liberty or equality, animate a purported “privacy” challenge. This insight increases the likelihood of striking the appropriate policy balance between a new technology or practice and the status quo. To illustrate the clarifying value of a definition of privacy, this Part analyzes common scenarios in which “privacy” framings mask other interests, leading to unproductive debate and poor policy.

The most common privacy proxy wars involve abuse-of-power concerns, including fears of government oppression and losses of individual liberty. These proxy wars arise in both abstract academic arguments and concrete policy debates.

The unproductive conflation of interests in academic discourse is most apparent in “ubiquitous” privacy claims that invoke George Orwell’s dystopian novel, *Nineteen Eighty-Four*.²³⁶ Totalitarian governments, like Oceania, the state villain in *Nineteen Eighty-Four*, have numerous vices. These vices are magnified by illegitimate state goals. People understandably recoil when they are told that a policy will set us on the road to *Nineteen Eighty-Four*. Oceania routinely lies to its people and kills and tortures them (with rats!). The ruling party does all this, Orwell explains, “for its own sake.”²³⁷ And Oceania is led by “Big Brother,” who, the saying goes, is always watching. The hellscape of *Nineteen Eighty-Four* implicates actual privacy (surveillance), big-tent privacy (liberty, propaganda, lack of human flourishing), and a bunch of interests that no one even claims are privacy (diabolical torture, murder, rats). Allusions to *Nineteen Eighty-Four* blend all these interests together, complicating any assessment of the strength of the objection and potential solutions. Decades ago, Westin advised privacy

²³⁶ See, e.g., Sklansky, *supra* note 5, at 1076 & n.27 (describing how, starting in the 1960s, “[s]cholars and popular writers alike linked totalitarianism with an absence of privacy; it became common, even ubiquitous, to cite George Orwell’s *Nineteen Eighty-Four* for what life would look like if attacks on privacy were not resisted”); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *YALE L.J.* 1151, 1153 (2004) (“It is the rare privacy advocate who resists citing Orwell when describing these dangers.”).

²³⁷ GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* 252 (1949).

advocates to “forsak[e] Orwellian imagery for hard facts.”²³⁸ The advice continues to go unheeded.²³⁹

A definitional lens reveals the same obfuscating phenomenon in policy debates. Modern “privacy” objections often mask worries about abuse of power, not the inability to prevent disclosure of information about ourselves. For example, the ACLU’s objections to Ring video doorbells note that while “individuals . . . have a right to photograph their property in front of their front door[,] . . . more pervasive private cameras do erode our privacy.”²⁴⁰ The ACLU’s official guidance, however, cautions consumers not about any problematic privacy losses, but instead against “contribut[ing] to the creation of a broad surveillance infrastructure in your community that may be used in abusive ways.”²⁴¹ This framing regularly appears in analogous policy debates. A recent article about police drones characterizes the privacy objection as follows: “For privacy advocates . . . the concern is that increasingly powerful technology will be used to target parts of the community — or strictly enforce laws that are out of step with social norms.”²⁴² Again, in the debate about one of the most controversial “privacy-invading surveillance technolog[ies],”²⁴³ automated facial recognition, “civil liberty groups have expressed unease about the technology’s potential abuse by government amid fears that it may shove the United States in the direction of an overly oppressive surveillance state.”²⁴⁴

Although the term “privacy” is invariably invoked when the government considers new technologies, the common thread in most modern critiques is abuse of power. The problem is not that a police drone records someone dropping a gun in a trash can²⁴⁵ or that a technology tentatively matches surveillance footage to a driver’s-license photo (and does so especially poorly for African Americans).²⁴⁶ The concern is that the more

²³⁸ WESTIN, *supra* note 2, at 4.

²³⁹ See sources cited *supra* note 236.

²⁴⁰ Jay Stanley, *Should You Buy a Ring Doorbell Camera?*, ACLU, <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/should-you-buy-ring-doorbell-camera> [<https://perma.cc/6X5U-BKEL>].

²⁴¹ *Id.*

²⁴² Cade Metz, *Police Drones Are Starting to Think for Themselves*, N.Y. TIMES (Dec. 5, 2020), <https://www.nytimes.com/2020/12/05/technology/police-drones.html> [<https://perma.cc/X3FB-RVAF>].

²⁴³ Kashmir Hill, *Another Arrest, and Jail Time, Due to a Bad Facial Recognition Match*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2020/12/29/technology/facial-recognition-misidentify-jail.html> [<https://perma.cc/99CZ-AV9W>].

²⁴⁴ Kate Conger, Richard Fausset & Serge F. Kovaleski, *San Francisco Bans Facial Recognition Technology*, N.Y. TIMES (May 14, 2019), <https://www.nytimes.com/2019/05/14/us/facial-recognition-ban-san-francisco.html> [<https://perma.cc/R9CL-TKJC>].

²⁴⁵ See Metz, *supra* note 242.

²⁴⁶ See Hill, *supra* note 243.

crimes the government detects (or thinks it detects), the more people’s liberty is jeopardized.²⁴⁷ The disclosure of information is part of this equation, but the primary concern is overpolicing (and a resulting loss of liberty), not privacy. The “privacy” objections quoted above flow more naturally into low-tech reforms that have little privacy resonance, such as reducing the number of police officers, narrowing the scope of criminal law, and dismantling mass incarceration. The giveaway in the quoted statements is that the “surveillance state” is a problem because it is “abusive” and “overly oppressive,” not because it detects information. It’s Oceania’s government, not its surveillance cameras, that we are worried about. That’s why China,²⁴⁸ not Orwell’s native England,²⁴⁹ is the usual real-world villain in modern privacy debates, even though “Britain is one of the most heavily surveilled nations on earth, with an estimated one surveillance camera per 11 citizens.”²⁵⁰ “Privacy” in these contexts has become a proxy for an argument that the U.S. government, like Oceania, is too powerful and likely to use its power for nefarious ends. It’s an important argument. But it’s not usefully considered under the rubric of “privacy.”

Precision matters. Using the wrong term clouds important policy debates and increases the chances of miscalculating complex tradeoffs. The problem is apparent in a variety of areas, such as longstanding resistance to automating traffic enforcement. When cities started installing red-light cameras decades ago, critics, such as the one-time Majority Leader of the House of Representatives, blasted the cameras as “an ‘Orwellian’ threat to privacy.”²⁵¹ The objection is familiar. And again, the fight is about overpolicing and abuse of power, not privacy.

²⁴⁷ See *id.*

²⁴⁸ See Anna Mitchell & Larry Diamond, *China’s Surveillance State Should Scare Everyone*, ATLANTIC (Feb. 2, 2018), <https://www.theatlantic.com/international/archive/2018/02/china-surveillance/552203/> [<https://perma.cc/D97G-ZWY9>]; Conger et al., *supra* note 244 (pointing to tracking of Uighurs, an ethnic group in China primarily composed of Muslims, as basis for banning facial-recognition technology); Paul Mozur, *Inside China’s Dystopian Dreams: A.I., Shame and Lots of Cameras*, N.Y. TIMES (July 8, 2018), <https://www.nytimes.com/2018/07/08/business/china-surveillance-technology.html> [<https://perma.cc/ZJ6B-QDTD>].

²⁴⁹ See, e.g., A. Michael Froomkin, *The Metaphor Is the Key: Cryptography, the Clipper Chip, and the Constitution*, 143 U. PA. L. REV. 709, 848 n.601 (1995) (“The Orwellian archetype also gathers some of its power from the existence of surveillance states such as North Korea, the People’s Republic of China (at least in some times and regions), and the former Soviet Union.”).

²⁵⁰ Ellen Barry, *From Mountain of CCTV Footage, Pay Dirt: 2 Russians Are Named in Spy Poisoning*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/world/europe/salisbury-novichok-poisoning.html> [<https://perma.cc/W782-TSVB>].

²⁵¹ Valerie Alvord, *Critics of Red-Light Cameras Laud Ruling*, USA TODAY, Sept. 6, 2001, at A3, ProQuest, Doc. No. 408878840 (“[T]he programs are under siege from critics, including House Majority Leader Dick Armey, who say they are unconstitutional and are an ‘Orwellian’ threat to privacy.”); Joe

Looking at automated traffic enforcement through an overpolicing as opposed to a “privacy” lens turns the policy debate on its head. Automated traffic enforcement may decrease privacy, but it would likely reduce rather than enhance oppression.²⁵² The alternative to automated enforcement is not a free pass to violate traffic laws. It is a different, sometimes lethal, enforcement mechanism that history suggests is more threatening to liberty and equality than cameras: discretionary roadside stops by armed police.²⁵³ In fact, there may be few policy interventions more beneficial to individual liberty than removing armed police from traffic enforcement. Nobody likes to get a ticket in the mail. But people get killed during traffic stops.²⁵⁴ Police know this better than anyone. One of the most radical statements in the debates referenced above comes from a police officer who explains that the benefit of using drones is that they “limit [police officers’] exposure to other people.”²⁵⁵ What the officer knows but advocates tend to overlook is that someone is going to answer the 911 call about the man with a gun. A drone that can immediately signal “false alarm” may be preferable to three squad cars racing to the scene filled with nervous police holding loaded weapons. Disagree? It’s a debate worth having. Most importantly, that debate doesn’t benefit from a “privacy” overlay, particularly if privacy remains undefined. The overlay may even be counterproductive. As things stand, privacy victories keep us safe from becoming Oceania, but they may also prevent us from becoming more like England, where ubiquitous public cameras can displace traditional policing.²⁵⁶

Conlon, Note, *A Missouri Citizen’s Guide to Red Light Cameras*, 80 MO. L. REV. 197, 217 (2015) (discussing objections “to the use of red light cameras on the grounds of privacy” by those who “do not want ‘Big Brother’ snooping around their lives”).

²⁵² See I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1271 (2017) (arguing that “more public surveillance cameras” could “deracialize and de-bias policing”).

²⁵³ See Wesley Lowery, *A Disproportionate Number of Black Victims in Fatal Traffic Stops*, N.Y. TIMES (Dec. 24, 2015), https://www.washingtonpost.com/national/a-disproportionate-number-of-black-victims-in-fatal-traffic-stops/2015/12/24/c29717e2-a344-11e5-9c4e-be37f66848bb_story.html [https://perma.cc/5UGC-ARS4]; cf. Jane Bambauer, *Other People’s Papers*, 94 TEX. L. REV. 205, 211 (2015) (criticizing “the technopanic that currently shapes privacy debates”).

²⁵⁴ Lowery, *supra* note 253.

²⁵⁵ Metz, *supra* note 242.

²⁵⁶ Although there are numerous factors in play, one data point of interest is that England’s police force killed three people in 2018–2019, about 0.3% of the total in the United States. *Number of Fatal Shootings by Police in England and Wales from 2004/05 to 2018/19*, STATISTA, <https://www.statista.com/statistics/319246/police-fatal-shootings-england-wales/> [https://perma.cc/SD8L-YRD6]. For police killings in the United States, see *Police Shootings Database 2015–2021*, WASH. POST (May 21, 2021), <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> [https://perma.cc/5Z3N-E4TB], and compare Pozen, *supra* note 4, at 227 (“A police force that devotes significant resources to surveillance will have fewer resources left over—and perhaps less of a practical need—for interrogation.”).

David Pozen similarly bemoans the “privacy-privacy tradeoffs” that dominate policy debates, where distinct and competing interests are all obscured under the same “privacy” label.²⁵⁷ As Pozen observes: “It cannot simply be assumed that because a certain measure causes privacy harm, even serious harm, privacy would be enhanced overall by jettisoning the measure.”²⁵⁸ But since Pozen embraces the big-tent approach to privacy, he overlooks the most elegant solution. The best way to untangle this mess is to stop calling everything “privacy”²⁵⁹ and precisely identify the distinct interests at stake.

This pattern of imprecise “privacy” objections clouding the concrete interests involved repeats in countless contexts, such as in the fight against COVID-19. In the early days of the COVID-19 crisis, American health officials’ efforts to trace international arrivals were rebuffed in part due to the privacy implications of releasing travelers’ names.²⁶⁰ In a second potentially missed opportunity, the country declined to repurpose existing cell phone location tracking to isolate the infected and identify those exposed. This commonsense substitute for outdated manual contact tracing was “stymied by privacy concerns.”²⁶¹ Countries such as South Korea took

²⁵⁷ See Pozen, *supra* note 4, at 222.

²⁵⁸ *Id.* at 242; cf. Rosa Ehrenreich, *Privacy and Power*, 89 GEO. L.J. 2047, 2049 (2001) (“[T]here are dangers in relying too much on the language of privacy, for the privacy rubric has the potential to obscure certain kinds of consequential harms that are felt differentially by people in different social and economic groups.”).

²⁵⁹ See Pozen, *supra* note 4, at 225 (explaining the pluralistic nature of the conception of “privacy”).

²⁶⁰ See Natalie Kitroeff & Jessica Silver-Greenberg, *Airlines Refused to Collect Passenger Data That Could Aid Coronavirus Fight*, N.Y. TIMES (Apr. 29, 2020), <https://www.nytimes.com/2020/03/31/business/coronavirus-airlines-contact-tracing-cdc.html> [<https://perma.cc/R49P-EP8L>] (reporting that health officials’ efforts to introduce contact-tracing requirements for the airline industry were “rebuffed” in part because “Senate aides were concerned about the privacy implications”); Thomas Fuller, *How Much Should the Public Know About Who Has the Coronavirus?*, N.Y. TIMES (Mar. 30, 2020), <https://www.nytimes.com/2020/03/28/us/coronavirus-data-privacy.html> [<https://perma.cc/LB5T-NZT8>] (“In the perennial tug-of-war between privacy and transparency in the United States, privacy appears to be winning in the coronavirus pandemic.”).

²⁶¹ Jennifer Valentino-DeVries, *Coronavirus Apps Show Promise but Prove a Tough Sell*, N.Y. TIMES (Dec. 7, 2020), <https://www.nytimes.com/2020/12/07/technology/coronavirus-exposure-alert-apps.html> [<https://perma.cc/Z4QR-ZNYV>]; see also Sara Morrison, *The United Kingdom’s Contact Tracing App Could Be a Preview of America’s Digital Tracing Future*, VOX (May 6, 2020, 1:20 PM), <https://www.vox.com/recode/2020/5/6/21247955/united-kingdom-nhs-contact-tracing-app> [<https://perma.cc/L37G-UHU9>] (emphasizing privacy concerns as an obstacle to adoption of effective tracing apps); Kate Murphy, *Contact Tracing Is Harder Than It Sounds*, N.Y. TIMES (May 23, 2020), <https://www.nytimes.com/2020/05/23/sunday-review/coronavirus-contact-tracing.html> [<https://perma.cc/4UEU-DG4F>] (describing “contact tracing, which health experts say is essential to containing the coronavirus”); *Virus-Tracing Apps Must Not Be Used for Mass Surveillance: EU Says*, REUTERS (May 14, 2020, 5:17 AM), <https://www.reuters.com/article/us-health-coronavirus-eu-apps/virus-tracing-apps-must-not-be-used-for-mass-surveillance-eu-says-idUSKBN22Q1KA> [<https://perma.cc/LMR8-JT3U>]

the opposite approach, allowing health officials to get the results of automated contact tracing “minutes” after learning of a diagnosis.²⁶²

In the United States, policymakers waited on developers to create a more privacy-conscious, voluntary contact-tracing technology.²⁶³ By the time the technology rolled out, the virus was everywhere, and few people saw the point of downloading a new application that no one was using.²⁶⁴ Looking back, researchers described a privacy Catch-22: “[P]eople want assurances not only of privacy but also of the technology’s effectiveness before agreeing to use the apps in large numbers. But privacy protections make it harder to collect the very data that can show how well the apps work.”²⁶⁵

One hint that our resistance to cell phone location contact tracing wasn’t based in privacy (as that term is defined here) is that we never stopped tracking ourselves. As COVID-19 spread across the country, our cell phones pinged out our locations to the Weather Channel App, Google Maps, and Angry Birds.²⁶⁶ Location information remained available to the government

(noting European officials’ assurance that surveillance would be turned off after crisis “to allay concerns over state surveillance”); Kelly Servick, *Cellphone Tracking Could Help Stem the Spread of Coronavirus. Is Privacy the Price?*, SCIENCE (Mar. 22, 2020, 1:30 PM), <https://www.sciencemag.org/news/2020/03/cellphone-tracking-could-help-stem-spread-coronavirus-privacy-price> [<https://perma.cc/S2PV-5DF7>] (noting the tension between developing contact tracing and preserving privacy); Craig Timberg & Drew Harwell, *Government Efforts to Track Virus Through Phone Location Data Complicated by Privacy Concerns*, WASH. POST (Mar. 19, 2020, 4:25 PM), <https://www.washingtonpost.com/technology/2020/03/19/privacy-coronavirus-phone-data/> [<https://perma.cc/G9AF-JJS4>] (reporting that collecting contact-tracing data is complicated “by the legal and ethical issues surrounding government access to information that can reveal intimate details about citizens’ lives”).

²⁶² Hyonhee Shin, Hyunjoo Jin & Josh Smith, *How South Korea Turned an Urban Planning System into a Virus Tracking Database*, REUTERS (May 21, 2020, 11:39 PM), <https://www.reuters.com/article/us-health-coronavirus-southkorea-tracing/how-south-korea-turned-an-urban-planning-system-into-a-virus-tracking-database-idUSKBN22Y03I> [<https://perma.cc/N3VN-A9G7>] (“People do not have any choice whether their data is collected and accessed, but officials told Reuters that authorities notify anyone whose information is gathered and that all the data will be deleted when the virus is contained.”).

²⁶³ See Valentino-DeVries, *supra* note 261 (reporting that “Apple and Google launched an ambitious effort to harness technology in the fight against Covid-19”).

²⁶⁴ *See id.*

²⁶⁵ *Id.*

²⁶⁶ See Alfred Ng, *Weather Channel’s Location Data Settlement Doesn’t Mean Much for Your Privacy*, CNET (Aug. 20, 2020, 1:53 PM), <https://www.cnet.com/news/weather-channels-location-data-settlement-doesnt-mean-much-for-your-privacy/> [<https://perma.cc/3DNC-NJW5>]; Jennifer Valentino-DeVries, *How Your Phone Is Used to Track You, and What You Can Do About It*, N.Y. TIMES (Aug. 19, 2020), <https://www.nytimes.com/2020/08/19/technology/smartphone-location-tracking-opt-out.html> [<https://perma.cc/LPE7-V96H>]; *Spies Use Angry Birds and Other Apps to Track People, Documents Show*, CBS NEWS (Jan. 27, 2014, 5:00 PM), <https://www.cbsnews.com/news/spies-use-angry-birds-and-other-apps-to-track-people-documents-show/> [<https://perma.cc/JET8-EE4W>].

too, so long as it used traditional channels.²⁶⁷ As tends to be the case with modern privacy objections, the status quo survived unscathed. We drew the line at trying to use existing infrastructure for something new.²⁶⁸ This irony seemed especially pointed as researchers and reporters regularly tapped cell phone location data to inform us *about* the worsening pandemic. For example, in an article titled *Location Data Says It All, Staying at Home During Coronavirus Is a Luxury*,²⁶⁹ *New York Times* reporters found that there was wide variance in social distancing by socioeconomic status.²⁷⁰ NBC analyzed data from 15 million cell phones to determine that Americans were still traveling over Thanksgiving.²⁷¹ Fascinating stuff. But the public health officials actually trying to fight the virus's spread had to make do with manual contact tracing (i.e., asking sick people questions about where they had been), a stone-age tool that was quickly overwhelmed.²⁷²

The failure to use surveillance technology to combat COVID-19 led to a classic privacy–privacy tradeoff.²⁷³ We avoided a perceived privacy invasion (automated cell phone contact tracing) but may have ended up losing more than we gained. Our inability to track people infected with

²⁶⁷ See Wendy Davis, *Law Enforcement Is Using Location Tracking on Mobile Devices to Identify Suspects, but Is It Unconstitutional?*, ABA J. (Dec. 1, 2020, 1:50 AM), <https://www.abajournal.com/magazine/article/law-enforcement-is-using-location-tracking-on-mobile-devices-to-identify-suspects-geofence> [<https://perma.cc/RD2T-TLYT>] (explaining the phenomenon of “geofence warrants,” which allow the government to obtain consumers’ location information from private companies).

²⁶⁸ Cf. Eric Topol, Opinion, *How Digital Data Collection Can Help Track Covid-19 Cases in Real Time*, WASH. POST (Apr. 10, 2020, 4:46 PM), <https://www.washingtonpost.com/opinions/2020/04/10/how-digital-data-collection-can-help-track-covid-19-cases-real-time/> [<https://perma.cc/ME8H-LVBR>] (“Americans who willingly share their location so their phone apps can help them avoid a traffic jam might well think the risk, and the trade-offs, are worth it to halt a pandemic.”).

²⁶⁹ Jennifer Valentino-DeVries, Denise Lu & Gabriel J.X. Dance, *Location Data Says It All: Staying at Home During Coronavirus Is a Luxury*, N.Y. TIMES (Apr. 3, 2020), <https://www.nytimes.com/interactive/2020/04/03/us/coronavirus-stay-home-rich-poor.html> [<https://perma.cc/993Y-UV29>].

²⁷⁰ See *id.* (relying on “smartphone location data analyzed by The New York Times”).

²⁷¹ Nigel Chiwaya, *Americans Traveled in High Numbers for Thanksgiving. Cellphone Location Data Shows They Struggled to Maintain Social Distance.*, NBC NEWS (Dec. 3, 2020, 1:03 PM), <https://www.nbcnews.com/news/us-news/americans-traveled-high-numbers-thanksgiving-cellphone-location-data-shows-they-n1249860> [<https://perma.cc/SGD8-8MKJ>] (“NBC News analysis of cellphone location data [showed] . . . Americans in more than 1,900 counties saw increased rates of closeness during Thanksgiving travel[] compared to the previous week.”).

²⁷² See Murphy, *supra* note 261 (reporting on problems with manual contact tracing); Matt Richtel, *Contact Tracing with Your Phone: It’s Easier but There Are Tradeoffs*, N.Y. TIMES (Jan. 28, 2021), <https://www.nytimes.com/2020/06/03/health/coronavirus-contact-tracing-apps.html> [<https://perma.cc/BJ8L-R898>] (“The traditional method of contact tracing is time consuming and labor-intensive.”); Ellen Barry & Ron DePasquale, *U.S. Deaths Climb Toward Daily Record, but More People Are Surviving Infection*, N.Y. TIMES (Nov. 30, 2020, 12:56 AM), <https://www.nytimes.com/live/2020/11/25/world/covid-19-coronavirus> [<https://perma.cc/E4LA-DSSJ>] (reporting that “overwhelmed state and local health officials [were] scaling back . . . contact tracing efforts”).

²⁷³ See Pozen, *supra* note 1, at 222 (discussing privacy–privacy tradeoffs).

COVID-19 necessitated widespread reductions in liberty and quality of life. If the concern about cell phone contact tracing and the disclosure of medical information (a COVID-19 diagnosis) was actually oppression or loss of liberty (and not “privacy”), we may have made these difficult questions harder by focusing on the wrong variables.

The point is not to offer answers to the policy choices described above. Instead, it is to show that our inability to define “privacy” makes hard questions harder. Precisely defined, pure privacy is an important consideration in policy debates. As a general matter, more privacy is better than less. But without a precise definition, shouting “privacy” at problems forces us to look in many different directions at once, distorting debates that are better centered on abuse of power, efficacy, and replacement effects. Sometimes big-tent privacy rhetoric does good work. But other times it places sensible policies off-limits, diverts attention from more central concerns, and privileges an ineffective and oppressive status quo. A precise definition of the term that regularly dominates these debates isn’t the entire answer, but it is a necessary first step toward clearer thinking and better solutions.

CONCLUSION

There are over 4,500 law journal articles that use “privacy” *in their titles*. A Westlaw search for the string “right to privacy” returns 10,000 judicial opinions, the ceiling on the database. This literature is full of soaring quotes such as: “Privacy is one of the truly profound values for a civilized society”²⁷⁴ and “one of the great ideas with which the law has grappled.”²⁷⁵ These accolades for privacy are also interspersed with a common critique. Thomson wryly observed in 1975 that “[p]erhaps the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is.”²⁷⁶ Sadly, “[i]n the forty years since she made this observation, the literature has made little progress on this front.”²⁷⁷ The problem is not just academic. The absence of a clear definition of privacy combined with widespread indifference to its necessity leads to unproductive debate and bad policy.

²⁷⁴ Kalven, *supra* note 34, at 326.

²⁷⁵ Clark C. Havighurst, *Foreword*, 31 LAW & CONTEMP. PROBS. 251, 251 (1966).

²⁷⁶ Thomson, *supra* note 27, at 295; cf. Richards, *supra* note 1, at 1139 (“Privacy’s importance is perhaps rivaled only by its lack of coherence . . .”).

²⁷⁷ Cofone & Robertson, *supra* note 209, at 1044.

Groundhog Day arrives with each new technology and policy initiative.²⁷⁸ Scholars and advocates shout “privacy” at legislators, officials, courts, consumers, and companies. We are constantly cautioned to be on alert against the ceaseless erosion of privacy. *Nineteen Eighty-Four* always looms around the corner. Precisely what must be done and feared is less clear. The privacy battle echoes across the airwaves with some voices mourning the “death of privacy”²⁷⁹ and others claiming that exaggerated privacy concerns cost lives.²⁸⁰ Sometimes privacy wins, sometimes it loses. No patterns emerge and no victory lasts.

This Article seeks to break the cycle. Legal discourse on privacy cannot move forward without a definition of the term. Commentators will surely find flaws with the proposed definition and this Article’s defense of that definition. But these discussions can bring us closer to a shared understanding of what we mean by privacy. With the stakes constantly rising, consensus on the desirability of that goal should be easy to reach. If we truly care about privacy, it’s time to figure out what it is.

²⁷⁸ See *Groundhog Day*, IMDB, <https://www.imdb.com/title/tt0107048/> [<https://perma.cc/AM9W-V8M5>].

²⁷⁹ See A. Michael Froomekin, *The Death of Privacy?*, 52 STAN. L. REV. 1461 (2000).

²⁸⁰ See Richard A. Posner, *Privacy, Surveillance, and Law*, 75 U. CHI. L. REV. 245, 251 (2008) (arguing that “[p]rivacy is the terrorist’s best friend”).