***A Theory of Privacy: What’s love got to do with it?***

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Abstract:

Although there is little agreement about the contours of the right to privacy, many would like to believe that there is a realm of personal space that is and should be protected from unwelcome intrusion. This has been codified in state, federal, as well as regional and international privacy laws. In addition, it has been found within a penumbra of rights in the United States Constitution. Yet, privacy remains an elusive concept in both theory and practice. This article attempts to argue for a theory of privacy based in a notion of personhood. Privacy is more than a positivist response to an expanding state. It represents a conception of self which is independent of the perceived utility of life behind the curtain. In the process of developing a theory of privacy, a foundation for a proper approach to privacy policy making will emerge. This is essential with the increasing dominance of computers, mobile phones, surveillance cameras, data mining technologies, and body scanners. Individual’s personal information is often voluntarily and involuntarily disseminated over the internet. As a result, privacy policies and laws are constantly reacting to changing circumstances brought on by new technologies; technologies that increasingly define our sense of self, by redefining the way we live our lives. A theory of privacy will help us understand the operation of power and politics in modern society.

At a very basic level, privacy is a realm of personal space that is, and should be protected from unwelcome intrusion. Clearly, this can mean physical space, as with the sanctity of one’s home. An individual has the strongest claim to privacy within his/her home, particularly for behaviors that do not harm others. But once an individual steps into public space their expectation of privacy is significantly reduced, and questions about privacy get more difficult to resolve. This is particularly true as the increasing dominance of computers, mobile phones, surveillance cameras, and data mining technologies raise new and interesting questions about privacy and the laws that have developed to protect it. Some see the promise of technological rationality, as our computers become better able to anticipate the goods and services that we want, even before we do. Others fear the possibility of “Big Brother” and a surveillance state in which all privacy is lost in exchange for peace and order.

It should be no surprise that there is disagreement about the contours of the right to privacy. As Judith Jarvis Thomson put it, "the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is."[[1]](#footnote-1) This is compounded by the fact that there are enormous individual, cultural and subcultural variations in attitudes towards privacy. As a result, norms and laws vary considerably from one jurisdiction to the next. At one extreme are vague and informal understandings, which are rarely formulated as explicit rules. Other norms of privacy take the form of explicit social rules, and some of these rules come to be expressed as laws.

In fact, laws have been enacted to address these issues in almost all jurisdictions, including regional agreements, and international laws. In the United States, the Constitution protects an individual from violations of an individual’s privacy by government. Although it doesn’t make reference to a right to privacy, the U.S. Supreme Court has interpreted such a right to be found within a penumbra of rights in the document. States, as well as the federal government have passed additional laws intending to protect the privacy of individuals from other government and non-governmental entities. This includes other individuals, but also corporations that have an increasing incentive to gather and utilize personal data in order to pursue profit and market share, often at the expense of privacy.[[2]](#footnote-2)

As a result of these changes, many suggest that our privacy is under threat, and that the laws, particularly in the U.S., are inadequate to protect individuals from the systematic erosion of privacy that comes with modern technologies. Therefore, we need a theory of privacy that can account for the divergent views about privacy, while recognizing the important role that privacy plays in the creation and maintenance of the individual and personality. As we will see, privacy is necessary for intimacy, relationships, love, and trust. Privacy is more than a positivist response to an expanding state. It represents a conception of self that is independent of the perceived utility of life behind the curtain. In this regard, privacy is an essential part of the complex social practice in which an individual is granted moral title to his existence. This is a precondition of personhood. To be a person, in individual must recognize not just his actual capacity to shape his destiny by his choices. He must also recognize that he has an exclusive moral right to shape his destiny.

A theory of privacy will help us understand the operation of power and politics in the modern world. In developing such a theory, it will be necessary to review both theory and practice in the development of privacy. In this regard, I will start with a historical discussion of privacy including Louis D. Brandeis and Samuel D. Warren’s seminal article on the subject written in the *Harvard Law Review* in 1890. Brandeis and Warren set the tone for the development of privacy law in the U.S. over the last hundred years. We will see some common themes that will become relevant to more modern treatments of these issues. I will also look at more philosophical discussions of the value of privacy in order to more fully grasp the role privacy plays in personal development and human flourishing. With this background, we will be in a better position to develop a theory of privacy, linking theory to practice.

**Historical Development of Privacy and the Law**

Privacy has not always been understood in the same way. Historically, individuals within many societies lived in close proximity to one another with multiple family members living in the same house. Under such circumstances, there is little one individual did not know about another. Further, there were few written records to keep track of details about individuals outside of one’s extended family, with the exception of church records of birth, marriage, and death. In the late 18th century, the Industrial Revolution brought about changes in the way people lived their lives, as well as their expectations about privacy. The industrial world and the growth of the middle class broke down barriers between social classes and offered new opportunities for mobility. People from different places, with different backgrounds and with different customs were thrown together and forced to find ways to live comfortably with one another. This created the need to establish boundaries of personal space.

The emergence of the modern nation-state brought centralized governments that concerned themselves with many matters that were formerly considered private. Statistics began to be used to evaluate economic conditions and plan national policies. The drafting of large citizen armies required registration, training, and the tracking of millions of citizens as potential soldiers. There became a variety of reasons to compile individual data. Many states started using machines and punch cards to keep track of the number of people and dozens of categories such as occupation, income, and ethnicity.

Almost immediately people began to recognize the value of privacy. For example, the right to speak and read anonymously played a central role in the history of free expression in America. The Federalist Papers were famously anonymous—“Publius” was a pseudonym for Madison, Hamilton, and Jay; and the other federalists pamphleteers use names such as “an American citizen,” “a landholder,” and “Marcus.” The anti-federalist responded with “Centinel,” “Brutus,” and “the impartial examiner.” The current U.S. Supreme Court Justice Clarence Thomas has noted the importance of anonymity in protecting the unpopular speakers, and the right to read it anonymously as deeply rooted in the First Amendment and the constitutional guarantee of freedom from unreasonable searches and seizures.

In American jurisprudence, debates about the existence of a right to privacy start with a law review article published in the *Harvard Law Review* in 1890. In the article titled “The Right to Privacy,” Louis D. Brandeis, the future Supreme Court Justice, and Samuel D. Warren, his former law partner, announced confidently that “the common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.”[[3]](#footnote-3) Nevertheless, they recognized, as many do today, that from time to time we must “define anew the exact nature and extent of such protection.”[[4]](#footnote-4) In this regard, Brandies and Warren acknowledged that “[p]olitical, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society.”[[5]](#footnote-5) Over time the scope of these rights broaden: “[T]he right to life has come to mean the right to enjoy life, --the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term “property” has grown to comprise every form of possession—intangible, as well as tangible.”[[6]](#footnote-6)

Brandies and Warren use numerous examples to support the expansion of rights under the law. They point out that the protection against actual bodily injury was extended to prohibit mere attempts to do injury. Historically, an individual could be held liable for battery, which included harmful or offensive touching of another. However, liability came to include assault, which includes an act that produces apprehension in another of imminent harmful contact. They also mention the development of a qualified protection of the individual against offensive noises and odors, against dust and smoke, and excessive vibration. Further, human emotions extended the scope of personal immunity beyond the body of the individual. His reputation, the standing among his fellow man, was considered, and the law of slander and libel arose. Man’s family relations became a part of the legal conception of his life, and the alienation of a wife’s affections was held as remediable.

Similar to the expansion of the right to life was the growth of the legal conception of property. Over time, the courts have come to recognize the products and processes of the mind, such as works of literature and art, goodwill, trade secrets, and trademarks. Brandeis and Warren argue that this development of the law was inevitable.

The intense intellectual and emotional life, and the heightened sensations which come with advanced civilization make it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demands legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the inter position that of the legislature.[[7]](#footnote-7)

Brandeis and Warren were careful not to root the right to privacy in private property alone. Instead, they suggest that the principle which protects all personal writings and other productions against publication in any form is that of an “inviolate personality.”[[8]](#footnote-8) This principle requires that individuals retain the power to control the limits of the publicity which shall be given them. Further, it does not matter what method of expression is adopted. Therefore, it is immaterial whether it is by word, in painting, by sculpture, or in music. Nor does it depend upon the nature or value of the thought or emotions.[[9]](#footnote-9) Ultimately, in their view, no one has the right to publish the productions of another in any form, without his consent.[[10]](#footnote-10)

Although it is generally agreed that Brandeis and Warren were the first to advocate for a right to privacy, the codification of principles of privacy law didn’t happen till much later.[[11]](#footnote-11) In 1960, Richard Prosser wrote a *California Law Review* article titled “Privacy,” which was subsequently entered into the Second Restatement of Torts at §§ 652A-652I (1977).[[12]](#footnote-12) Prosser starts with the Brandeis and Warren article and mentions that it was the first in a series of law review articles on the right to privacy, most of which agreed with Brandeis and Warren and supported the existence of a right to privacy. Prosser goes on to discuss the early cases addressing such a right.

By 1960 there were already more than 300 privacy cases in the books, leading Prosser to suggest that the “holes in the jigsaw puzzle have been largely filled in, and some rather in definite conclusions are possible.”[[13]](#footnote-13) He concludes that there is not just one common law tort related to a right to privacy, but a complex of four. “The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, up which are tied together by the common name, but otherwise have almost nothing in common.”[[14]](#footnote-14) He went on to discuss the following four torts:

1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff and a false light in the public eye.
4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.[[15]](#footnote-15)

These categories of privacy have been embraced by the courts in different jurisdictions to varying degrees, and Prosser provides a detailed discussion of the relevant cases of the day.[[16]](#footnote-16) Some of these laws have been codified in state and federal statutes, while others rely on case law to protect individuals from invasions of privacy by others. However, there remains one main category of privacy rights that had become particularly threatening, and raised difficult questions for the courts. Given the rich history of privacy in common law cited by many legal scholars and jurists, many questioned the existence of a constitutional right to privacy that would protect individuals from invasion by government.[[17]](#footnote-17)

For many, the fear that government could intrude into something as private as contraception indicated that “Big Brother” was just around the corner. *Griswold v Connecticut* involved a Connecticut law that made it a crime to use any “drug, medicinal article or instrument for the purpose of preventing conception.”[[18]](#footnote-18) Griswold appealed her conviction under the law to the U.S. Supreme Court, arguing that the Connecticut statute was unconstitutional as a violation of the 14th Amendment, which states, "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law ... nor deny any person the equal protection of the laws" (U.S. Constitution, Fourteenth Amendment, Section 1). Justice William Douglas, writing for the majority, discussed the existence of a number of rights that are not mentioned in the Constitution or the Bill of Rights. These rights are consistent with the spirit of the Constitution and necessary in order to secure existing rights. For example, Justice Douglas states:

[t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read[[19]](#footnote-19) and freedom of inquiry, freedom of thought, and freedom to teach[[20]](#footnote-20) -- indeed, the freedom of the entire university community.[[21]](#footnote-21)

These rights are part of what the Court refers to as a penumbra of rights, “formed by emanations from those guarantees that help give them life and substance.”[[22]](#footnote-22) Justice Douglas uses these various guarantees to create zones of privacy.[[23]](#footnote-23) He cites the right of association contained in the penumbra of the First Amendment, as well as the Third Amendment, in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner. Perhaps most directly on point is the Fourth Amendment’s "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Justice Douglas also cites the Fifth Amendment, in its Self-Incrimination Clause, to create a zone of privacy that the government may not force an individual to surrender to his detriment.

According to Justice Douglas, *Griswold* concerned a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. Therefore, the Connecticut law forbidding the use of contraceptives was found to violate the right of “marital privacy which is within the penumbra of specific guarantees of the Bill of Rights.”[[24]](#footnote-24) Many cases since *Griswold* have addressed the constitutional right to privacy from government intrusion and the courts have tried to define the contours of such a right. In so doing, the courts have reiterated the ways in which this right depends on a number of factors, including ones expectation of privacy.

In *Katz v. United States* (1967), the U.S. Supreme Court was asked to define the limits to government eavesdropping activities based on the Fourth Amendment.[[25]](#footnote-25) Although the Court acknowledged a person’s general right to privacy, the majority opinion notes that privacy laws are largely left to the individual states. In his concurrence, Justice Harlan focused on the nature of the Fourth Amendment right discussed in the majority opinion. He notes that the Fourth Amendment protects people, not places, and goes on to discuss the two fold requirement that emerges from prior decisions: (1) that a person has exhibited in actual (subjective) expectation of privacy, and (2) that the expectation the one that society is prepared to recognize as reasonable.[[26]](#footnote-26) The critical fact for Justice Harlan is that a person that uses the telephone booth shuts the door behind him and assumes that his conversation is not being intercepted. Therefore, the telephone booth is a temporarily private place whose occupants’ expectations of freedom are reasonable. Since this case, most courts have decided questions regarding a constitutional right to privacy with reference to the reasonableness of ones expectation of privacy.

It is clear that privacy means something different for different people in different situations. As we have seen, scholars and judges have attempted to articulate what privacy is. But, what has resulted is a patchwork of norms, rules, and regulations that protect certain aspects of privacy while leaving others unprotected. In the next section, we will turn to a more philosophical discussion of the value of privacy before discussing the possibility of a theory of privacy.

**The Value of Privacy**

Although privacy is a term that is used in many contexts, and with a variety of meanings, a number of scholars have tried to reconcile these divergent views in an effort to identify what the right to privacy is, and the role it plays in human flourishing. Although many, like Brandeis and Warren defend the right to privacy, others suggest that there is nothing truly unique about the right to privacy. Thomson, for one, suggests that the right to privacy is derivative from existing rights. Her argument is that all the protections to which we feel the right to privacy entitles us are already included under other rights, such as "the cluster of rights which the right over the person consists in and also . . . the cluster of rights which owning property consists in.”[[27]](#footnote-27)

Someone looks at your pornographic picture in your wall-safe? He violates your right that your belongings not be looked at, and you have that right because you have ownership rights-and it is because you have them that what he does is wrong. Someone uses an X-ray device to look at you through the walls of your house? He violates your right not to be looked at, and you have that right because you have rights over your person analogous to the rights you have over your property-and it is because you have these rights that what he does is wrong.[[28]](#footnote-28)

From this Thomson concludes that the right to privacy is "derivative," and therefore there is no need to settle disputes about its boundaries.[[29]](#footnote-29) In other words, it is not surprising that many do not have a very clear idea about what the right to privacy is, and how it should be protected. She would have us focus on the adequacy of other protected rights, such as the right to property, security, or the rights of the person.

In respond to Thomson, James Rachels directly confronts the question, "Why, exactly, is privacy important to us?"[[30]](#footnote-30) He suggests that privacy accords us the ability to control who knows what about us and who has access to us, and thereby allows us to vary our behavior with different people so that we may maintain and control our various social relationships. Different human relationships are marked by different degrees of sharing personal information. One shares more of himself with a friend than with an employer, more with a life-long friend than with a casual friend, more with a lover than an acquaintance. He writes that "however one conceives one's relations with other people, there is inseparable from that conception an idea of how it is appropriate to behave with and around them, and what information about oneself it is appropriate for them to have.”[[31]](#footnote-31) It is "an important part of what it means to have a friend that we welcome his company, that we confide in him, that we tell him things about ourselves, and that we show him sides of our personalities which we would not tell or show to just anyone.”[[32]](#footnote-32) And therefore, Rachels concludes, "because our ability to control who has access to us, and who knows what about us, allows us to maintain the variety of relationships with other people that we want to have, it is, I think, one of the most important reasons why we value privacy."[[33]](#footnote-33)

This view is similar to that put forth by Charles Fried in *An Anatomy of Values*. Fried argues that privacy has intrinsic value, and is necessarily related to and fundamental for one's development as an individual with a moral and social personality able to form intimate relationships involving respect, love, friendship and trust. Privacy is valuable because it allows one control over information about oneself, which allows one to maintain varying degrees of intimacy. Indeed, love, friendship and trust are only possible if persons enjoy privacy and accord it to each other. By characterizing privacy as a necessary context for love, friendship and trust, Fried is basing his account on a moral conception of persons and their personalities, on a Kantian notion of the person with basic rights and the need to define and pursue one's own values free from the impingement of others. Privacy allows one the freedom to define one's relations with others and to define oneself. In this way, privacy is also closely connected with respect and self-respect. Fried writes that,

privacy is the necessary context for relationships which we would hardly be human if we had to do without-the relationships of love, friendship, and trust.

Love and friendship . . . involve the voluntary and spontaneous relinquishment of something between friend and friend, lover and lover. The title to information about oneself conferred by privacy provides the necessary something. To be friends or lovers persons must be intimate to some degree with each other. Intimacy is the sharing of information about one's actions, beliefs or emotions, which one does not share with all, and which one has the right not to share with anyone. By conferring this right, privacy creates the moral capital, which we spend in friendship and love.[[34]](#footnote-34)

Jeffery Reiman doesn’t think rights are derivative, but he thinks Rachels and Fried fail to appreciate the extent to which the context of caring makes the sharing of personal information significant. Necessary to an intimate relationship is a reciprocal desire to share present and future intense and important experiences together, not merely to swap information.[[35]](#footnote-35) In the context of a reciprocal desire to share present and future intense and important experiences, the revealing of personal information takes on significance. The more one knows about the other, the more one is able to understand how the other experiences things, what they mean to him, how they feel to him. In other words the more each knows about the other, the more they are able to really share an intense experience instead of merely having an intense experience alongside one another. The revealing of personal information then is not what constitutes or powers the intimacy. Rather it deepens and fills out, invites and nurtures, the caring that powers the intimacy.[[36]](#footnote-36)

On the Rachels and Fried view, it follows that the significance of sexual intimacy lies in the fact that we signal the uniqueness of our love relationships by allowing our bodies to be seen and touched by the loved one in ways that are forbidden to others. This explains the appropriateness of sexual intimacy to love: in sexual intimacy one is literally and symbolically stripped of the ordinary masks that obstruct true sharing of experience. This happens not merely in the nakedness of lovers but even more so in the giving of themselves over to the physical forces in their bodies.. If this takes place in the context of caring, in other words if people are making love and not just having sex, their physical intimacy is an expression and a consummation of that caring.[[37]](#footnote-37)

Also, according to the Rachels and Fried view, the right to privacy is not a fundamental right. It is derived from the fact that without this right, we could not meaningfully reveal our bodies to loved ones in that exclusive way that is necessary for intimacy. Stanley I. Benn's theory of the foundation of privacy comes closer to establishing a basis for a fundamental right to privacy. He attempts to base the right to privacy on the principle of respect for persons. Benn's view is that the right to privacy rests on the principle of respect for persons as choosers. Covert observation or unwanted overt observation deny this respect because they transform the actual conditions in which the person chooses and acts, and thus make it impossible for him to act in the way he set out to act, or to choose in the way he thinks he is choosing. Benn goes on to say that what is rightly covered by this immunity are one's body and those things, like possessions, which the conventions of a culture may cause one to think of as part of one's identity.

Reiman suggests that privacy is a social ritual by means of which an individual's moral title to his existence is conferred. Privacy is an essential part of the complex social practice by means of which the social group recognizes and communicates to the individual that his existence is his own. And this is a precondition of personhood. To be a person, an individual must recognize not just his actual capacity to shape his destiny by his choices. He must also recognize that he has an exclusive moral right to shape his destiny. And this in turn presupposes that he believes that the concrete reality which he is, and through which his destiny is realized, belongs to him in a moral sense.

It follows then that the right to privacy is the right to the existence of a social practice that makes it possible for me to think of this existence as mine. This means that it is the right to conditions necessary for me to think of myself as the kind of entity for whom it would be meaningful and important to claim personal and property rights. The right to privacy protects something that is presupposed by both personal and property rights. It protects the individual's interest in becoming, being, and remaining a person. In this regard, it is a right that all humans possess. It is a right which protects my capacity to enter into intimate relations, not because it protects my reserve of generally withheld information, but because it enables me to make the commitment that underlies caring as my commitment uniquely conveyed by my thoughts and witnessed by my actions.

Privacy is necessary for one to develop a concept of self as a purposeful, self-determining agent. Privacy enables control over personal information as well as control over our bodies and personal choices for our concept of self.[[38]](#footnote-38) Some emphasize the importance of intimacy for all privacy issues, noting the need for privacy to protect intimate information about oneself, access to oneself, as well as intimate relationships and decisions about one's actions.[[39]](#footnote-39) Others focus on the importance of privacy norms that allow one to restrict others' access to them as well as privacy norms that enable and enhance personal expression and the development of relationships. Privacy provides protection against overreaching social control by others through their access to information or their control over decision-making.[[40]](#footnote-40) Similarly, Adam Moore (2003) offers a “control over access” account of privacy. According to Moore, privacy is a culturally and species relative right to a level of control over access to bodies or places and information. While defending the view that privacy is relative to species and culture, Moore argues that privacy is objectively valuable — human beings that do not obtain a certain level of control over access will suffer in various ways. Moore claims that privacy, like education, health, and maintaining social relationships, is an essential part of human flourishing or well being.

Although there are many different ways of understanding privacy and it’s value, some common themes have emerged. In the next section we will discuss these themes and attempt to fit them into a theory of privacy based on a notion of personhood.

**A Theory of Privacy**

At this point, we have reviewed the development of privacy laws in United States, as well as the philosophical literature on the value of privacy. Starting with Brandeis and Warren, scholars have struggled with the extent to which privacy can adequately be understood as a property right, or derivative from other existing rights. It is interesting to note that despite the divergent views on privacy, many scholars have returned to the notion of personality. As a result, any viable theory of privacy must account for this component. In this section we will explore the possibility of developing a theory of privacy that adequately addresses these concerns.

In 1964, Edward J. Bloustein sought to develop "a general theory of individual privacy" (p. 963). The main title of his article describes its thesis, and its subtitle identifies the perspective that it sought to refute: “Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser.”[[41]](#footnote-41) Discussing each of Prosser's four types of privacy rights, Bloustein defends the view that each of these privacy rights is important because it protects against intrusions demeaning to personality and human dignity. For Bloustein, the starting point in answering Prosser was with Warren and Brandeis and their view that privacy protects an "inviolate personality.”[[42]](#footnote-42) Bloustein defines these terms in a way that seeks to capture the core of the views of Brandeis and Warren, but also builds on the German definition of the right of personality. "I take the principle of "inviolate personality' to posit the individual's independence, dignity, and integrity; it defines man's essence as a unique and self-determining being.”[[43]](#footnote-43) Bloustein asserts that Prosser fails to adequately address the true harm in privacy cases, which was the violation of human dignity. Rather than emotional trauma, as Prosser seems to focus, the real problem was the "blow to human dignity, an assault on human personality.”[[44]](#footnote-44) Privacy was needed, Bloustein wrote, to protect against "degradation of personality.”[[45]](#footnote-45)

Building on the work of Bloustein, I would like to argue that it is possible reconcile all the divergent views on privacy by returning to Brandeis and Warren’s reference to “inviolate personality.” Bloustein suggests that this concept defines our essence as human beings and includes individual dignity and integrity, personal autonomy and independence. As discussed above, this seems to be consistent with much of the legal and philosophical literature. Brandeis and Warren drew on the concept of a personality interest to develop their right of privacy as more than a new property right. Of their "right to be let alone," Brandeis and Warren first noted its similarity with interests in being free from assault, false imprisonment, malicious prosecution, and defamation. They then wrote:

In each of these rights, as indeed in all other rights recognized by the law, there inheres the quality of being owned or possessed - and (as that is the distinguishing attribute of property) there may be some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term. The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an *inviolate personality*.[[46]](#footnote-46)

This language makes clear that Brandeis and Warren intended more than a property right. They confessed that their right of privacy resembles interests that are owned, like property, and conceded that one might even speak of them as a property interest. Nonetheless, Brandeis and Warren believed that the true principle in privacy law is the concept of the "inviolate personality." Later in the article, they defined their proposal as placing "the right to privacy" in the context of "a part of the more general right to the immunity of the person, the right to one's personality.”[[47]](#footnote-47) Their intention seems to have been to draw on German philosophy to suggest that each person deserves protection against certain kinds of mental harms simply as a consequence of her status as a human.[[48]](#footnote-48)

Subsequent to Warren and Brandeis's article, there are numerous mentions in U.S. privacy literature of privacy as a personality right.[[49]](#footnote-49) For example, in “Interests of Personality,” published in 1915, Roscoe Pound adopted the approach of Warren and Brandeis in discussing privacy and drew more explicitly on German sources.[[50]](#footnote-50) In surveying the rights of personality, Pound included "the disputed legal right of privacy" as "another phase of the same interest."[[51]](#footnote-51) This right protected a "demand which the individual may make that his private personal affairs shall not be laid bare to the world and be discussed by strangers.”[[52]](#footnote-52) A hundred years later, the desire to maintain the privacy of personal affairs has taken on a new urgency as modern technologies have increased the possibility that an individual’s personal information will be voluntarily or involuntarily disseminated over the Internet.

Early privacy scholars could not possibly have anticipated the ways in which modern technologies have developed. Nevertheless, they were particularly concerned about technologies implications. Even in 1890, Brandeis and Warren addressed changes in technology and their impact on privacy:

Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life, and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the housetops’.[[53]](#footnote-53)

In their view, these changes make us more sensitive to publicity, and solitude and privacy more essential to the individual, as he is subjected to “mental pain and distress far greater they could be inflicted upon his body alone.”[[54]](#footnote-54) One is also reminded of Bloustein's prediction that if the privacy tort focused on human dignity instead of being bound to Prosser's four categories, it would be freer to grow in response to "threats posed by some of the aspects of modern technology.”[[55]](#footnote-55)

**Conclusion**

New technologies have increased the danger that intimate personal information originally disclosed to our friends and colleagues maybe exposed to and misinterpreted by others. In this regard, that part of our life that can be monitored and searched has vastly expanded. As an example, email, even after being deleted, becomes a permanent record that can be resurrected by employers and prosecutors at any point in the future. Privacy is necessary to protect us from being judged out of context in a world in which information can easily be confused with knowledge. True knowledge of another person is the culmination of a slow process of mutual self-disclosure. It requires the gradual setting aside social masks, the incremental building of trust, which leads to the exchange of personal information, and in some cases, love. In a world in which citizens are bombarded with information, people form impressions quickly, and these impressions are likely to oversimplify and misrepresent their complicated and often contradictory characters.[[56]](#footnote-56)

Privacy is necessary to protect us from this kind of misinterpretation, and is essential in the formation of intimate relationships, allowing us to reveal parts of ourselves to friends, family members, and lovers that we withhold from the rest of the world. It is, therefore, a precondition for intimacy, friendship, individuality, and even love. Yet it is not clear our norms and laws adequately appreciate this important value. In the U.S., privacy laws tend to protect a property interest, as reflected in the significance of Prosser’s four torts. However, several scholars and judges have recognized that privacy is much more than that. The Supreme Court has made clear that a right to privacy is to be determined based on a reasonable expectation of privacy. But it’s not clear that a reasonable person fully appreciates the way in which technology has increased the magnitude of these issues. Equally troubling is the fact that the U.S. government has sided with corporations, such as Google in regards to enforcement of European privacy laws.

European laws are much better at protecting the “inviolate personality” that Brandeis and Warren, as well as many others have endorsed. Although concerns for human dignity and personality exist in American privacy jurisprudence, a theory of privacy based on a notion of personhood would improve our ability to protect privacy from new threats posed by corporations and technologies. As Jeffery Rosen reminds us, “There is nothing inevitable about the erosion of privacy, just as there is nothing inevitable about its reconstruction.”[[57]](#footnote-57) At the very least we must recognize that privacy is the minimal precondition for love, friendship, and trust. Clearly, there is a lot at stake.

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*Poe v. Ullman*, 367 U. S. 497, 367 U. S. 516-522.

*Prince Albert v. Strange*, (1849)

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*Wiemann v. Updegraff,* 344 U. S. 183, 344 U. S. 195.

1. Thomson 1975, p. 295 [↑](#footnote-ref-1)
2. In the U.S., corporations have been, and continue to be given more power, and benefits at a time when technology has opened up their ability to violate our rights to privacy. Although a theory of privacy based in a notion of personhood raises interesting question regarding corporate rights, this paper will not address these issues. [↑](#footnote-ref-2)
3. Brandeis & Warren, 1890. The *Harvard Law Review* article was written after the *Saturday Evening Gazette* published embarrassing details of Samuel D. Warren’s daughter’s wedding. Mr. Warren, who had recently given up the practice of law to devote himself to an inherited business, became annoyed and turned to his recent law partner, Louis D. Brandeis. The two collaborated on the article, although it has been suggested that Brandeis most likely did most of the work (Prosser, 1960). [↑](#footnote-ref-3)
4. Id. [↑](#footnote-ref-4)
5. Id. [↑](#footnote-ref-5)
6. Id. [↑](#footnote-ref-6)
7. Id. [↑](#footnote-ref-7)
8. Id. [↑](#footnote-ref-8)
9. It is interesting to note that Brandeis and Warren mention that if a man writes 10 letters, the substance of the letters shall be his to publish alone, but also no person would be permitted to publish a list of the letters written. This seems to parallel the pen registry issue with phone calls and emails, particularly in light of the U.S. PATRIOT Act. Brandeis and Warren cite *Prince Albert v. Strange*, 1849 in support of their position. [↑](#footnote-ref-9)
10. Brandeis and Warren end with this quote, “the common law has always recognized a man’s house as his castle, impregnable, often, even to his own officers engaged in the execution of its command. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?” (Brandeis & Warren, 1890). [↑](#footnote-ref-10)
11. Brandeis eventually became a U.S. Supreme Court Justice and was given the opportunity to further articulate, what he referred to as “the right to be let alone.” In his dissent in *Olmstead v. United States* (1928), he echoed the importance of privacy he had argued for in his law review article many years earlier, calling it, “the most comprehensive of rights and the right most valued by civilized men” (*Olmstead v. United States*, 1928). Justice Brandeis went on to suggest that, “[to protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment” (*Olmstead v. United States*, 1928 (Brandeis,J., dissenting)). [↑](#footnote-ref-11)
12. Prosser, 1960. [↑](#footnote-ref-12)
13. Id. [↑](#footnote-ref-13)
14. Id. [↑](#footnote-ref-14)
15. Id. [↑](#footnote-ref-15)
16. Id. [↑](#footnote-ref-16)
17. George Orwell’s famous novel *1984* highlighted for many the fear that governments posed to individual privacy. The novel portrayed a world in which government’s interest in order outweighed the need for personal freedom. New technologies, including the television, would be used to realize Bentham’s notion of the panopticon. Citizens would have to live every moment of their lives under the gaze of Big Brother. In fact, even the idea of having a notion of self, separate from Big Brother becomes “thoughtcrime.” But this totalitarian government aimed not merely to punish, but to narrow the range of thought so that such “thoughtcrimes” would be impossible. [↑](#footnote-ref-17)
18. *Griswold v Connecticut*, 1965. Estelle Griswold was the Executive Director of the Planned Parenthood League of Connecticut, and Dr. C. Lee Buxton was a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven. The center was open for about 10 days in November of 1961 when Appellants Griswold and Buxton were arrested for giving “information, instruction, and medical advice to married persons as to the means of preventing conception” (*Griswold v Connecticut*, 1965). This was a deliberate act intended to provoke litigation that could be used to challenge the constitutionality of the statute. The appellants were tried, convicted, and required to pay a $100 fine, which was upheld by the Appellate Division of the Circuit Court, and by the Connecticut Supreme Court. [↑](#footnote-ref-18)
19. *Martin v. Struthers*, 319 U. S. 141, 319 U. S. 143. [↑](#footnote-ref-19)
20. See *Wiemann v. Updegraff*, 344 U. S. 183, 344 U. S. 195. [↑](#footnote-ref-20)
21. *Griswold v Connecticut*, 1965, citing *Sweezy v. New Hampshire*, 354 U. S. 234, 354 U. S. 249-250, 354 U. S. 261-263; *Barenblatt v. United States*, 360 U. S. 109, 360 U. S. 112; *Baggett v. Bullitt*, 377 U. S. 360, 377 U. S. 369. [↑](#footnote-ref-21)
22. See *Poe v. Ullman*, 367 U. S. 497, 367 U. S. 516-522 (dissenting opinion). [↑](#footnote-ref-22)
23. Central to this opinion is the Ninth Amendment which provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" (U.S. Constitution, Ninth Amendment). [↑](#footnote-ref-23)
24. *Griswold v Connecticut*, 1965. [↑](#footnote-ref-24)
25. In that case the defendant was convicted of transmitting gambling information by telephone from Los Angeles to Miami and Boston, in violation of Federal statute. At trial that government was allowed to introduce evidence obtained by attaching a listening device to a public telephone. The Supreme Court reversed the conviction because government agents failed to get a warrant. [↑](#footnote-ref-25)
26. *Katz v. United States*, 1967. [↑](#footnote-ref-26)
27. Thomson 1975, p. 306 [↑](#footnote-ref-27)
28. Id at p. 313 [↑](#footnote-ref-28)
29. Id. [↑](#footnote-ref-29)
30. p. 323. [↑](#footnote-ref-30)
31. pp. 328-329. [↑](#footnote-ref-31)
32. pp. 327-328 [↑](#footnote-ref-32)
33. p. 329 [↑](#footnote-ref-33)
34. Fried 1970, p. 142. This makes jealousy understandable. If the value-indeed, the very reality-of my intimate relation with you lies in your sharing with me what you don't share with others, then if you do share it with another, what I have is literally decreased in value and adulterated in substance. Reiman finds this market conception of personal intimacy distasteful. The value and substance of intimacy is constituted not simply by the quality and intensity of what we share, but by its unavailability to others-in other words, by its scarcity (1976, p. 32). Under this view, our personal relationships are valuable to us because of their exclusiveness rather than because of their own depth or beauty. He points out that it may be a function of the historical limits of our capacity for empathy and feeling for others. “It may be a function of centuries of acculturation to the nuclear family with its narrow intensities” (pp. 32-33). [↑](#footnote-ref-34)
35. p. 33 [↑](#footnote-ref-35)
36. p. 34. [↑](#footnote-ref-36)
37. It is worth noting that the inclusion of context eliminates the market notion of intimacy. There is no necessary limit to the number of persons one can be intimate with, no logical necessity that friendship or love be exclusive. The limits rather lie in the limits of our capacity to care deeply for others, and of course in the limits of time and energy. In other words it may be a fact-for us at this point in history, or even for all people at all points in history-that we can only enter into a few true friendships and loves in a lifetime. But this is not an inescapable logical necessity. It is only an empirical fact of our capacity, one that might change and might be worth trying to change. It might be a fact that we are unable to disentangle love from jealousy. But this, too, is not an a priori truth. It is rather an empirical fact, one that might change if fortune brought us into a less possessive, less exclusive, less invidious society. [↑](#footnote-ref-37)
38. Kupfer, 1987. [↑](#footnote-ref-38)
39. Inness, 1992. [↑](#footnote-ref-39)
40. Schoeman, 1992. [↑](#footnote-ref-40)
41. Bloustein explicitly sought to counter Prosser, because Prosser's "influence on the development of the law of privacy begins to rival in our day that of Warren and Brandeis" (p. 964). [↑](#footnote-ref-41)
42. p. 971. [↑](#footnote-ref-42)
43. p. 971. [↑](#footnote-ref-43)
44. p. 974. [↑](#footnote-ref-44)
45. p. 984. [↑](#footnote-ref-45)
46. Brandeis & Warren, p.205, Emphasis Added. [↑](#footnote-ref-46)
47. p. 207. [↑](#footnote-ref-47)
48. This idea has been influential in German law as well as European human rights jurisprudence. Huw Beverley-et al., Privacy, Property and Personality 218 (2005). For a discussion of Article 8 of the European Convention on Human Rights and its protection of private life, see Daniel J. Solove & Paul M. Schwartz, *Information Privacy Law* 78-231 (3d ed. 2008), at 1004-43. [↑](#footnote-ref-48)
49. In addition to those mentioned, there have been several other scholars that have discussed the important of privacy for the development of personality. In 1929, a note in the *Harvard Law Review*, while conceding that the right to privacy "was an amorphous concept," referred to it as one of the "interests of personality." Note, The Right to Privacy Today, 43 Harv. L. Rev. 297, 300 (1929). In 1941, Louis Nizer, an American trial lawyer, stated his view in an article in the *Michigan Law Review* that tort privacy served to protect "inviolate personality." Louis Nizer, The Right to Privacy: A Half Century's Developments, 39 Mich. L. Rev. 526, 528 (1941). [↑](#footnote-ref-49)
50. Roscoe Pound, “Interests of Personality,” 28 Harv. L. Rev. 343, 350-58, 362-64 (1915). [↑](#footnote-ref-50)
51. Id. at 362. Pound divided individual interests into three categories: (1) interests of personality, which he viewed as protecting "the individual physical and spiritual existence"; (2) "domestic interests"; and (3) individual economic life. Id. at 349. [↑](#footnote-ref-51)
52. p. 362 [↑](#footnote-ref-52)
53. Brandeis & Warren, 1890 [↑](#footnote-ref-53)
54. Id. [↑](#footnote-ref-54)
55. Bloustein, pp. 1005-6. [↑](#footnote-ref-55)
56. Rosen 2000, p.10. [↑](#footnote-ref-56)
57. p.25. [↑](#footnote-ref-57)