

PLOTTING PRIVACY AS INTIMACY

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“[T]he right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution’s protection of privacy.”¹

INTRODUCTION

The search for a legal definition of privacy is approaching an end as unsatisfying as that famously reached by Justice Stewart regarding pornography—“[P]erhaps I could never succeed in intelligibly [defining it] . . . [b]ut I know it when I see it”² This perceived inability of privacy scholars to agree on a definition of privacy has led some to suggest that we abandon the quest.³ Before taking that drastic step, I suggest that we reexamine some of the canonical privacy law cases across multiple disciplines in search of a core value that all of them agree is worthy of privacy protection. Continuing this search is essential because what makes an expectation of privacy reasonable should not be

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1. *Bowers v. Hardwick*, 478 U.S. 186, 208 (1986) (Blackmun, J., dissenting), *overruled by* 539 U.S. 558 (2003). In *Bowers*, the Court rejected due process and privacy-based arguments challenging the constitutionality of a Georgia statute criminalizing sodomy. *Id.* at 194-96. The Supreme Court later reversed course in *Lawrence v. Texas*, which is discussed in detail in Part II.A.2, *infra*. 539 U.S. 558, 578 (2003) (“*Bowers v. Hardwick* should be and now is overruled.”).

2. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”); *see also* Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195, 200 (1995) (“Considerable disagreement exists among privacy theorists over exactly what the core of the right of privacy is, whether such a core holds together its tort law and constitutional law manifestations, and what falls inside and outside of it.” (footnote omitted)).

3. *See, e.g.*, DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 8 (2008) (concluding “that the attempt to locate the ‘essential’ or ‘core’ characteristics of privacy has led to failure”); Rosa Ehrenreich, *Privacy and Power*, 89 GEO. L.J. 2047, 2047-48 (2001) (“I am inclined to think that attempts to find an abstract and neutral definition of privacy are doomed, at least if they purport to offer an explanation of how threats to abortion rights, neighborhood peeping toms, and electronic cookies are really all ‘the same thing.’”); Sheena Foye, *Understanding Privacy*, 8 J. HIGH TECH. L. 1, 1 (2008) (reviewing SOLOVE, *supra*) (“[C]rafting an exact definition of exactly what privacy is has proven to be extremely challenging and has stumped even the brightest of scholars.”).

how closely it reflects public opinion.⁴ Rather, the privacy expectation's alignment with a core interest should determine the expectation's reasonableness.⁵ Isolating a core area of privacy protection also is critical given the Supreme Court's recent proclamation in *United States v. Jones*⁶ that a privacy violation initially depends on whether the government is "physically intruding on a constitutionally protected area."⁷

In this Article, I nominate and evaluate intimacy as one of the core, unifying interests that privacy law has aimed to, and should aim to, protect.⁸ The most obvious source for this nomination is Justice Blackmun's dissent in *Bowers v. Hardwick*.⁹ Justice Blackmun declared that, to him, "the heart of the Constitution's protection of privacy" is "the right of an individual to conduct *intimate* relationships in the *intimacy* of his or her own home."¹⁰ This Article

4. See John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 657 (positing that, at least in the Fourth Amendment context, "reasonableness" is "often little more than a shorthand reference for 'What would I do in this situation?'""); Erwin Chemerinsky, *Chemerinsky: Keeping Up with the Joneses—How Far Does the 'Reasonable Expectation of Privacy' Go?*, A.B.A. J. (Nov. 1, 2011, 7:55 AM), available at http://www.abajournal.com/news/article/keeping_up_with_the_joneses_how_far_does_the_reasonable_expectation_of_priv/ ("[F]ocusing on the reasonable expectation of privacy confuses a description of what people think it should be with a conclusion about what the Fourth Amendment should be deemed to protect.").

5. Chemerinsky, *supra* note 4 ("Courts make an intuitive sense about whether people expect privacy in particular instances. But the question should not be about what people actually expect, but what they *should* be entitled to expect under the Fourth Amendment."). Otherwise, an individual's right to privacy would be subject to the desires and whims of the so-called reasonable majority or, worse yet, the individual whim of a court or legislature. *Id.* ("One key problem with the 'reasonable expectation of privacy' test is that the government seemingly can extinguish it just by telling people not to expect any privacy in a particular area.").

6. 132 S. Ct. 945 (2012).

7. *Id.* at 950 n.3 ("Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred."). In *Jones*, the Court considered whether the warrantless use of a GPS tracking device attached to a suspect's vehicle violated the Fourth Amendment's protections from unreasonable searches and seizures. *Id.* at 948. The Court ultimately ruled that the use of the device was a "search," primarily because it involved a "physical intrusion" into an area that was historically "sacred." *Id.* at 949.

8. As further described in Part I, *infra*, my use of intimacy is more objective—and less reliant on relationships—than other privacy scholars' use of the term. See, e.g., JULIE C. INNESS, *PRIVACY, INTIMACY, AND ISOLATION* 65-67 (1992). As discussed in Part I, *infra*, what makes some relationships feel intimate likely is the space in which the relationship is shared and the connection of the relationship to one's intimate body. See *infra* notes 27-57 and accompanying text (defining "spatial intimacy" and "bodily intimacy").

9. 478 U.S. 186, 199-214 (Blackmun, J., dissenting), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

10. *Id.* at 208 (emphasis added). Other privacy scholars have not yet evaluated intimacy with the objective, two-dimensional, and detailed analysis this Article uses.

evaluates whether Justice Blackmun's intuitive appreciation of intimacy is reflected in other canonical cases and, if so, how it could be used to guide and predict future privacy law decisions.¹¹

To begin evaluating intimacy as an objective core of privacy, I introduce a basic, two-dimensional Venn diagram called the Intimacy Plot.¹² In Part I of this Article, I define and justify the two overlapping circles of the Intimacy Plot—spatial intimacy and bodily intimacy.¹³ In Part II, I plot a small sample of cases to show how some cases involving the most intimacy-dependent facts are among those most worthy of legal protection, whereas other cases lacking such facts are mere outliers.¹⁴ In Part III, I show how the Intimacy Plot developed in Part II moves us closer to achieving the following three goals: (i) it explains why certain cases are relatively easy for courts to decide and, conversely, why other privacy cases, such as abortion cases, are more difficult to decide; (ii) it reconciles certain privacy decisions that initially appear contradictory; and (iii) it supports recent scholarly calls to unify privacy law by focusing on “outrageousness” or “intrusiveness.”¹⁵ Finally, I conclude that plotting privacy cases as a function of intimacy illustrates how intimacy is one of the core interests that privacy law should seek to protect.

I. THE INTIMACY PLOT DEFINED

In defining intimacy, social scientists typically assess a person's subjective feelings of intimacy and document how those feelings vary across different types of relationships.¹⁶ In contrast, when courts decide whether one's privacy rights have been violated, they typically rely on objective tests meant to be good indicators of subjective feelings. For example, the Fourth Amendment test for excluding the results of warrantless, electronic searches asks whether the

11. Intimacy also is a good starting point in the search for a core interest because intimacy automatically appeals to most Americans' sense of what privacy means. See JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 3 (2000) (characterizing the privacy problem as one in which “intimate personal information . . . is increasingly vulnerable to being wrenched out of context and exposed to the world”); see also Ehrenreich, *supra* note 3, at 2050 (“Most Americans, if asked to offer an off-the-cuff, lay definition of ‘privacy,’ would probably find themselves referring to notions of intimacy, the body, sexuality, exposure, and shame. I would guess that most Americans first hear the word ‘privacy’ as small children, when they ask why Mommy has started closing the bathroom door, or why Daddy insists that you have to knock before you enter his bedroom: You have to respect people's ‘privacy,’ the child is told. Though people come, later in life, to apply the term privacy to an expanding group of issues and claims, it remains, for the most part, rooted in the corporeal and intimate realm.”).

12. See Fig. 1, *infra* page 315.

13. See *infra* notes 16-57 and accompanying text.

14. See *infra* text accompanying notes 58-171.

15. See *infra* text accompanying notes 172-218.

16. See, e.g., Lois M. Haggard & Carol M. Werner, *Situational Support, Privacy Regulation, and Stress*, 11 BASIC & APPLIED SOC. PSYCHOL. 313, 313-37 (1990).

defendant possessed a subjective expectation of privacy and an objectively reasonable expectation of privacy.¹⁷ Similarly, in First Amendment cases, the Supreme Court has rejected laws that punish causation of purely subjective, emotional harm.¹⁸ Even the intentional infliction of emotional distress privacy tort, which recognizes purely emotional harm as compensable, requires that the conduct that caused such harm be objectively “extreme and outrageous.”¹⁹

Thus, identifying and objectively measuring a core interest should be the goal when reexamining privacy cases for the purpose of determining core interests worth protecting.²⁰ One merely cannot ask whether the affected person subjectively felt like her intimacy had been invaded. Nor can one merely ask whether a reasonable person would feel like her intimacy had been violated. Inquiries of that nature simply would replace the word “privacy” with “intimacy,” which is not helpful.²¹ It also is not particularly helpful to focus on the intimacy of certain relationships, as some other legal scholars have done, because judging the intimacy of a relationship is inherently subjective as well.²² Instead, the most helpful and proper inquiry should focus on one or two

17. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (noting that a defendant “first must have ‘exhibited an actual (subjective) expectation of privacy and, second, . . . the expectation [must] be one that society is prepared to recognize as ‘reasonable’”). In *Katz*, the Court interpreted the Fourth Amendment to require a warrant prior to the government wiretapping a phone and recording conversational content. *Id.* at 357-59.

18. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 414 (1992) (“The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.”); Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1345 (2010) (“[A] hallmark of modern American First Amendment jurisprudence is that hurt feelings alone cannot justify the suppression of truthful information or opinion.”).

19. RESTATEMENT (SECOND) OF TORTS § 46 (1965) (“One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”).

20. Although no legal test ever can be 100% objective, pursuit of more objective standards is possible. See Chemerinsky, *supra* note 4 (“Whether people actually have an expectation of privacy in a particular instance is an empirical issue that can be measured.”). Such a pursuit also is advisable in the privacy context in order to avoid perceived and actual manipulation of more subjective standards. See Castiglione, *supra* note 4, at 659 (“It has become increasingly clear, though, that reasonableness jurisprudence, governed by the totality of the circumstances ‘test,’ is not currently up to the challenge of providing a coherent methodology for the creation of consistent decisions reflective of the underlying philosophical and moral structure of the Fourth Amendment and the Constitution.” (footnote omitted)).

21. SOLOVE, *supra* note 3, at 36 (“Without limitations in scope, the word ‘intimacy’ is merely a different word for ‘privacy’ and is certainly not sufficient to determine which matters are private.”).

22. Legal scholars discussing privacy as intimacy also tend to define intimacy in terms of relationships. See *id.* at 34-37 (discussing works of Inness, Fried, Rachels, and Reiman, among others). In contrast, I define intimacy using the more objective standards of spatial intimacy and bodily intimacy. See *supra* notes 16-21, *infra* notes 23-57 and accompanying text.

objectively measurable indicators of intimacy.

This Article identifies spatial and bodily intimacy as objective indicators. Spatial intimacy and bodily intimacy form both circles in the two-dimensional Intimacy Plot. Plotting cases in this fashion permits comparison via the objective criteria chosen and allows one to spot both clusters and outliers in a way that mere words do not allow.²³ As Laurence Tribe has noted, the Supreme Court in *Lawrence v. Texas* looked beyond a fixed, one-dimensional list of fundamental rights defined by the activity itself (such as “speaking, praying . . . using contraceptives”) and, instead, “lifted the discussion to a different and potentially more instructive plane.”²⁴ Although I agree with Professor Tribe that “the Constitution is not Flatland,”²⁵ I think it prudent to examine the two-dimensional landscape of privacy cases before moving onto a three-dimensional sphere.²⁶ Accordingly, I propose using Figure 1’s depiction of a simple Venn diagram.

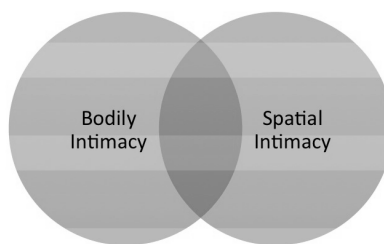


Figure 1

Subparts A and B further describe each circle of the Intimacy Plot, and the cases in Part II populate the Intimacy Plot.

23. See Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1925 (2004) (considering whether *Bowers v. Hardwick* was “destined to be regarded as an outlier, to be relegated to the dustbin of discarded judicial blunders once fear of the ‘other’ ceased to ‘blind us to certain truths’ about how ‘laws once thought necessary and proper in fact serve only to oppress’”) (quoting *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003)).

24. *Id.* at 1898-99. Professor Tribe later suggests moving beyond a presumably two-dimensional “Euclidian plane” and towards “more complex geometries” because “the geometry of constitutional law is nothing if not complex.” *Id.* at 1925.

25. *Id.* at 1924.

26. One perhaps could use the nature of the relationship involved as that third dimension, as Professor Tribe seems to suggest when he asserts that prominent privacy cases “would have benefited from a broader, diachronic focus on the intimate relationships that the challenged law placed within the state’s regulatory jurisdiction.” *Id.* at 1925.

A. Spatial Intimacy

The intimacy of the space in which the action occurs defines the parameters of one circle of the Intimacy Plot. The proximity of the identified space to a secluded area of the home is the primary basis of spatial intimacy.²⁷ Defining spatial intimacy with reference to the home has its roots in the English Common Law decision known as *Semayne's Case*,²⁸ which established the aptly named Castle Doctrine.²⁹ Under the Castle Doctrine, a man's home is his castle—a defined space protected from intrusion by the government and other outsiders.³⁰

In *The Right to Privacy*, Samuel Warren and Louis Brandeis seized upon the Castle Doctrine as support for their then-novel ideas, declaring that “[t]he common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands.”³¹ Since that time, various contexts, including Fourth Amendment search and seizure cases, homicide cases involving self-defense, and privacy tort cases have relied on the Castle Doctrine's emphasis on space.³² Among those case types, the emphasis on proximity to one's home is most pronounced in Fourth Amendment warrantless search cases.³³

In the Fourth Amendment context, the Supreme Court has declared, “In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.”³⁴ Even a search of one's home by

27. Portions of this Part II.A are excerpted, with modification, from my prior work, Heidi Reamer Anderson, *The Mythical Right to Obscurity: A Pragmatic Defense of No Privacy in Public*, 7 I/S: J. L. & POL'Y FOR INFO. SOC'Y 543 (2012), where I documented privacy law's emphasis on space as part of a broader thesis regarding privacy in public.

28. (1604) 77 Eng. Rep. 194 (K.B.).

29. David I. Caplan & Sue Wimmershoff-Caplan, *Postmodernism and the Model Penal Code v. the Fourth, Fifth, and Fourteenth Amendments—and the Castle Privacy Doctrine in the Twenty-First Century*, 73 UMKC L. REV. 1073, 1090 (2005). In *Semayne's Case*, Lord Coke stated, “For a man's house is his castle, & domus sua cuique est tutissimum refugium; for where shall a man be safe, if it be not in his house?” *Id.* (footnote omitted).

30. Nicholas J. Johnson, *Self-Defense?*, 2 J.L. ECON. & POL'Y 187, 199-200 (2006) (discussing connections between courts' interpretation of the Fourth Amendment and courts' application of the concept of self-defense).

31. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 220 (1890); see also Anderson, *supra* note 27, at 554-57, for a lengthy discussion of how Warren and Brandeis defined the public versus private distinction in spatial and other terms.

32. See generally Caplan & Wimmershoff-Caplan, *supra* note 29 (discussing the concept of the Castle Doctrine in various tort and criminal contexts).

33. This emphasis on spatial privacy in search and seizure cases is understandable given that the text of the Fourth Amendment uses the word “houses.” U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

34. *Kyllo v. United States*, 533 U.S. 27, 37 (2001); see also *United States v. Dunn*, 480 U.S. 294, 300 (1987) (“[T]he Fourth Amendment protects the curtilage of a house and that the extent

electronic means may be deemed to invade someone's reasonable expectation of privacy in a physical space.³⁵ As the search location moves away from the inside of one's home, the objective reasonableness of the privacy expectation becomes more remote.³⁶ For example, the Supreme Court has endorsed warrantless searches of one's property from an aircraft in public air space³⁷ and of one's garbage bags placed at the curb.³⁸ This is because as the search moves away from a person's home, it becomes more likely that a reviewing court will find that the person claiming a privacy violation has voluntarily consented to having the information made available to others.³⁹ Most recently, in *Jones*, the Court majority opined that a determination as to whether the government intrudes on a traditionally "protected area" is an important threshold inquiry in privacy cases.⁴⁰ These consistent references to the proximity of the search location to the defendant's home support defining spatial intimacy via reference to the home.⁴¹

of the curtilage is determined by . . . whether the area harbors the 'intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886))).

35. See, e.g., *Kyllo*, 533 U.S. at 34–37 (finding that authorities' warrantless use of heat-sensing technology not a permitted general public use to obtain information about the inside of defendant's home invaded his reasonable expectation of privacy).

36. There are four factors to use when determining whether a space falls within a home's "curtilage," and, thus, is entitled to heightened Fourth Amendment protection: "[1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by." *Dunn*, 480 U.S. at 301, 302–05 (finding that barn was not part of home's curtilage in part because it was not used for intimate activities).

37. See *Florida v. Riley*, 488 U.S. 445, 450–52 (1989) (holding that police examination of partially-open greenhouse from aircraft in navigable airspace was not a search that violated defendant's reasonable expectation of privacy).

38. See *California v. Greenwood*, 486 U.S. 35, 39–41 (1988) (holding that garbage is not entitled to Fourth Amendment protection because individuals "expose[] . . . it to the public").

39. See *Greenwood*, 486 U.S. at 40 (reasoning that defendants had no expectation of privacy when placing their garbage bags at the curb in part because such bags "left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public." (footnotes omitted)).

40. See *United States v. Jones*, 132 S. Ct. 945, 951 (2012).

41. See *Payton v. New York*, 445 U.S. 573, 590 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house."). Although it is true that the *Katz* majority declared that "the Fourth Amendment protects people, not places," *Katz v. United States*, 389 U.S. 347, 351 (1967), "what protection it affords to those people . . . [g]enerally . . . requires reference to a 'place.'" *Id.* at 361 (Harlan, J., concurring). In other words, whether one's expectation of privacy is deemed "reasonable" often depends in large part upon where one was located at the time and how much that place was like one's home. See *Dunn*, 480 U.S. at 334–35. For a recent and thorough critique of the Supreme Court's focus on the home and one's proximity thereto in determining the scope of one's Fourth Amendment rights, see generally Stephanie M. Stern, *The Inviolable Home*:

In addition to the Fourth Amendment cases, privacy tort cases also define privacy in part via references to space. This is most pronounced in the publicity to private facts tort, which suggests no liability “when the defendant merely gives further publicity to information about the plaintiff that is already public” or for “what the plaintiff himself leaves open to the public eye.”⁴² Similarly, in the “Intrusion Upon Seclusion” tort, an invasion of one’s personal physical area, or its equivalent, is required.⁴³ Implicit in this element is that there must be some legitimately secluded space in which the other party is intruding—a private, versus public, space. Under the Restatement, one only has an intrusion claim if the intrusion occurs in the home or other traditionally secluded place, such as a hotel room.⁴⁴ The spatial part of the private versus public distinction is also evident in the voluminous cases interpreting intrusion and other privacy torts that both preceded and followed William Prosser’s famous article, *Privacy*.⁴⁵ Ultimately, these varied sources all support defining spatial intimacy, at least in part, via reference to the home or a home-like setting.⁴⁶

Housing Exceptionalism in the Fourth Amendment, 95 CORNELL L. REV. 905 (2010).

42. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977).

43. See RESTATEMENT (SECOND) OF TORTS § 652B (1977); see also *Stien v. Marriott Ownership Reports, Inc.*, 944 P.2d 374, 376-77, 379 (Utah Ct. App. 1997) (rejecting invasion of privacy claim based on edited video footage of employees shown at company party because reasonable people would have seen it as a joke, as it was intended, and the plaintiff did not even appear in the video).

44. See RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1977) (suggesting that “invasion may be by physical intrusion into” a hotel room or home, or some other examination—such as of one’s mail, wallet, or bank account); *id.* cmt. c (“Nor is there liability for observing him or even taking his photograph while he is walking on the public highway.”); *id.* illus. 6–7 (distinguishing drunken behavior on public street from having one’s skirt blown over her head to expose underwear).

45. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960), available at http://www.californialawreview.org/assets/pdfs/misc/prosser_privacy.pdf; see also SOLOVE, *supra* note 3, at 164 (“U.S. courts recognize intrusion-upon-seclusion tort actions only when a person is at home or in a secluded place. This approach is akin to courts recognizing a harm in surveillance only when it is conducted in private, not in public.” (footnote omitted)); see also Lyrrisa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 204 (1998) (“Intrusion is designed to protect an individual’s sphere of privacy, whether spatial or psychological . . .”). Prosser’s influence on case law is well-documented; thus, this Article does not reexamine the many privacy tort cases here. Rather, it is sufficient to note that the private versus public distinction also is evident in the cases interpreting Prosser’s torts. See Neil M. Richards & Daniel J. Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1906 (2010) (“Based on our familiarity with several hundred privacy tort cases from the 1960s to the present, the overwhelming majority of courts have adopted wholesale the specific language of either the Restatement or Prosser’s other works in defining the privacy torts.”); SOLOVE, *supra* note 3, 161–62, 164 (discussing intrusion in other countries).

46. In this Article, I primarily use spatial intimacy to refer to actual, physical spaces in which information was contained prior to a later intrusion and/or exposure. However, the concept of

B. Bodily Intimacy

The borders of the second circle of the Intimacy Plot are based on bodily intimacy. Unlike spatial intimacy, which depends on where a privacy intrusion occurs (*e.g.*, the bedroom versus the break-room), this type of intimacy depends on the bodily nature of the intrusion. Specifically, something has a high degree of bodily intimacy if the intrusion involves one's own intimate body parts or activities—primarily, one's sexual organs or inner thoughts—that usually are kept most private, even when outside of the home.⁴⁷

Privacy scholarship from both historical and recent sources reflects an appreciation of bodily intimacy as a category distinct from spatial intimacy. In his 1941 *Handbook of the Law of Torts*, William Prosser acknowledged, “[A] difference may at least be found between a harmless report of a private wedding and the morbid publication of the picture of a deformed child.”⁴⁸ In the 1970s, Richard Posner posited that bodily-intimate information was different from other information people view as private because the reason people seek to keep their naked bodies private (something indefinable) is different from why they seek to

intimacy also encompasses data-sharing scenarios such as when one performs a Google search of one's own medical symptoms from a home computer. In the latter scenario, the information may be thought of as less intimate because it was shared with a third party outside of the home but, upon further thought, be deemed spatially intimate because of where it was first shared (*e.g.*, a home computer) and bodily intimate because it relates to one's innermost thoughts. I hope to further address the application of the intimacy plot to more purely data-related cases in a future work.

47. In defining bodily intimacy via reference to the body rather than to a more abstract sense of personhood, I hope to promote the distinction urged by Kendall Thomas in his work, *Beyond the Privacy Principle*, which preceded *Lawrence v. Texas* but presciently hinted at how courts should decide a case via reference to the body. See Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1460 (1992) (“Hence, I believe that it would be a mistake to view *Hardwick* as a case about the state's power to regulate sexual intimacy or personal morality. Rather, *Hardwick* ought to be understood as a case about Michael Hardwick's right to be protected from state-sanctioned invasion of his corporal integrity, that is, of his very bodily existence. From this perspective, *Hardwick* casts the limitations of the theory of the subject in which privacy principle is grounded into stark, unflattering relief. The ‘personhood’ privileged in privacy analysis relies too heavily on an abstract image of the human subject as a *moral* self. The ‘personhood’ at stake in *Hardwick*, however, calls for a more materialist view of the human subject as an *embodied* self. *Hardwick* powerfully underscores the fact that the interests privacy analysis seeks to defend are initially, and indispensably, *body-generated*.” (italics and emphases added)). For more insight into how thoughts can be subject to intimate intrusions, see Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L.J. 575, 576-77 (2003) (“Properly understood, an individual's interest in intellectual privacy has both spatial and informational aspects. At its core, this interest concerns the extent of ‘breathing space,’ both metaphorical and physical, available for intellectual activity.”).

48. Richards & Solove, *supra* note 45, at 1897 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 1062 (1st ed. 1941)).

keep other information about themselves private (to protect their reputations).⁴⁹ Most recently, Laura A. Rosenbury and Jennifer E. Rothman have urged that courts should extend privacy protection to activities involving one's sexual organs, regardless of whether they are used as part of an "emotionally intimate" relationship.⁵⁰

The most succinct statement of why we need to consider the body in crafting privacy-related legal protections was made by Alan Hyde in his book, *Bodies of Law*: "[W]hat we need is not a new right, but . . . alternatives that always treat people as embodied, that do not shy away from pain, sex, or other embodied experiences, that replace the metaphors of property, machine, or privacy right with a language of bodily presence or embrace."⁵¹ Some may feel uncomfortable or disgusted saying it outright,⁵² but what makes some intrusions into one's personal space so innately troubling is that they also involve bodily intimacy.⁵³

49. Richard A. Posner, John A. Sibley Lecture, *The Right of Privacy*, 12 GA. L. REV. 393, 400 (1978), available at http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1021&context=lectures_pre_arch_lectures_sibley. Specifically, Posner stated, "Some private information that people desire to conceal is not discreditable. In our culture, for example, most people do not like to be seen naked, quite apart from any discreditable fact that such observation might reveal." *Id.*

50. Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 811 (2011). Rosenbury and Rothman proposed "a new theory for extending legal protection to a wider range of consensual sexual activities" than those activities intertwined with relationships or emotional bonds. *Id.* I agree that relationship intimacy should not be a prerequisite for privacy protection. Rather, the focus should be on the intersection of bodily intimacy and spatial intimacy, as set forth in Part II, *infra*.

51. ALAN HYDE, *BODIES OF LAW* 6 (1997) (cited in Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 365 n.15 (2000)) ("suggesting . . . alternatives to treating the body as a property or a privacy right"); see also Thomas, *supra* note 47, at 1457, 1459 ("That is to say, in its extant formulations, privacy analysis lacks the terms for understanding how the laws it assesses mark the flesh-and-blood bodies of real, actual individuals. . . . In my view, in order to develop a sufficiently precise conception of the human beings whose 'personhood' is the target of homosexual sodomy statutes, we need a 'concrete' rather than an 'abstract' understanding of the body.").

52. See William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1023 (2005) (discussing how courts generally view all sex with disgust). In further discussing the "disgust" concept, Professor Eskridge discusses the work of Paul Rozin. *Id.* at 1023 ("Paul Rozin maintains that our most primordial disgust responses arise out of emotional efforts to humanize our animal bodies and distance ourselves from physical functions that are 'reminders of our animal vulnerability.' Like prejudices, feelings of disgust are nonrational responses to physical phenomena, yet they may be underlying motivations for our rational discourses. Sexuality is an obvious situs for disgust. Almost anything related to sex is disgusting to some people; some sexual practices are disgusting to almost all people; and almost all people feel their disgust intensely." (footnote omitted)).

53. Thomas, *supra* note 47, at 1435 ("[T]he lack of close attention to the actual human beings whose bodies are touched by laws like that challenged in *Hardwick* deprives privacy analysis of an

To put Alan Hyde's wise advice in action, we no longer should "shy away" from analyzing whether the conduct involves intimate parts of our "embodied" selves.⁵⁴ Rather, when deciding whether courts should protect conduct as private, we should ask whether the conduct involves bodily intimacy.

Bodily intimacy is what distinguishes a picture of one's face in the newspaper from a picture of one's genitals in the same newspaper.⁵⁵ It is what distinguishes a city government's recording of an entrance to a popular nightclub from a similar recording of the nightclub's restrooms.⁵⁶ Ultimately, if an intrusion interferes with one's "embodied" self, it involves bodily intimacy. To measure that type of intrusion objectively, we should ask whether a governmental or private action intrudes upon one's intimate body parts or intimate thoughts.⁵⁷

II. CATEGORIZING AND PLOTING PRIVACY CASES BASED ON INTIMACY

Part I defined the two circles of intimacy within which privacy law cases may be plotted: spatial intimacy and bodily intimacy. Part II uses those circles of intimacy to plot a small sample of recent Supreme Court cases.⁵⁸ Cases that fall

important and indispensable conceptual resource." (*italics added*)).

54. HYDE, *supra* note 51, at 6.

55. See *McNamara v. Freedom Newspapers, Inc.*, 802 S.W.2d 901, 905 (Tex. App. 1991) (holding that accidental yet accurate depiction of male soccer player's genitalia in newspaper photo was not a violation of privacy due to newsworthiness of the event). The plaintiff had argued that publishing the photo "violated the bounds of public decency." *Id.* I would characterize this argument as one involving significant bodily intimacy.

56. Jane Yakowitz Bambauer, *The New Intrusion*, 88 NOTRE DAME L. REV. 205, 237 (2012) (contrasting landlord's use of a camera in tenants' bedrooms versus using the same camera at the front door).

57. Although sex is an important part of bodily intimacy, the concept of bodily intimacy is broader than mere sexual intimacy. As Professor Eskridge pointed out, "In *Union Pacific Railway Co. v. Botsford*, the Court recognized bodily integrity as a species of constitutionally protected liberty and ruled that the state could not require a personal injury plaintiff to submit to a medical examination." Eskridge, *supra* note 52, at 1054 (*italics added*). The concept of "bodily integrity" applies outside of the realm of sexual intercourse and outside the realm of one's sexual organs. See, e.g., *Rochin v. California*, 342 U.S. 165, 172 (1952) (finding that police officers' forced pumping of a drug suspect's stomach "shocks the conscience" due to their "illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents").

58. In selecting cases, I purposefully excluded cases typically not viewed as part of privacy canon, such as those involving prostitution, due to lack of consent and other distinguishing facts. The U.S. Supreme Court in *Lawrence* distinguished those cases as follows:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

within the overlapping areas of spatial intimacy and bodily intimacy—referred to as the “Overlap Cases”—are those most worthy of privacy protection. Cases that fall outside of both circles are the “Outlier Cases,” which are least worthy of privacy protection. This Article discusses each category in the following sections below.

A. *The Overlap Cases*

In this subpart, the Article begins to populate that portion of the Intimacy Plot in which spatial intimacy and bodily intimacy overlap. To do so, the Article dissects two well-known⁵⁹ U.S. Supreme Court cases, *Stanley v. Georgia*⁶⁰ and *Lawrence v. Texas*.⁶¹ In discussing each case in this and later subparts, this Article focuses on the same three tasks to keep the discussions consistent for comparison purposes. First, the Article describes the conduct at issue that the Court does or does not protect from state intrusion. Second, this Article shares the reasoning the Court uses to rule that such conduct was or was not worthy of legal privacy protection. Finally, this Article shows how both the conduct and reasoning in the case revolves around intimacy-dependent facts (or the lack thereof).

1. *Stanley v. Georgia*.—In *Stanley*, the conduct at issue was the possession of three eight-millimeter film reels containing obscene material.⁶² The precise location of the film reels was “a desk drawer in an upstairs bedroom.”⁶³ Police found the film reels during a search for evidence of illegal bookmaking or gambling activity.⁶⁴ Based on the possession of the reels in his bedroom, Mr. Stanley was convicted under a Georgia statute stating that “[a]ny person who . . . shall knowingly have possession of . . . any obscene matter” was guilty of a felony.⁶⁵

Stanley challenged his conviction on First Amendment grounds, arguing that he had a First Amendment right to view the reels’ content in the privacy of his own home.⁶⁶ The State argued that the criminal statute promoted the State’s

Lawrence v. Texas, 539 U.S. 558, 578 (2003). See *infra* notes 86-114 and accompanying text for a detailed discussion of *Lawrence*.

59. By well-known cases, I mean cases to which legal scholars have devoted significant attention or cases that are more generally high-profile due to the attention devoted to them by the public at large. I also purposefully chose a mix of cases—some traditionally considered as privacy cases and some not. The cases discussed herein are not intended to be exhaustive. Rather, they merely are examples chosen to illustrate the potential utility of considering the intersection between bodily intimacy and spatial intimacy.

60. 394 U.S. 557 (1969).

61. 539 U.S. 558 (2003).

62. *Stanley*, 394 U.S. at 558.

63. *Id.*

64. *Id.*

65. *Id.* at 558 n.1 (quoting GA. CODE ANN. § 26-6301 (Supp. 1968)).

66. *Id.* at 559, 565.

interests in protecting Stanley's mind from obscenity⁶⁷ and in preventing "deviant sexual behavior" that may result from exposure to obscene materials.⁶⁸ The Court rejected the first interest as impermissible thought control⁶⁹ and the second as too tenuous and broad, analogizing it to banning chemistry books because they might lead someone to concoct "homemade spirits."⁷⁰ In its unanimous decision, the Court ultimately held that criminalizing the "mere private possession of obscene material" violated the First Amendment⁷¹—"the right to receive information and ideas"⁷² or, more specifically, "the right to read or observe what [one] pleases."⁷³

Although often viewed as a First Amendment case, *Stanley* also should be viewed as a privacy case that turned on its intimacy-dependent facts and reasoning. For plotting purposes, *Stanley* falls within the area in which the spatial intimacy and bodily intimacy circles overlap. It earns a high spatial intimacy designation because police discovered the film reels in the defendant's home; indeed, obscene material was found in the most intimate space within the home itself—the bedroom.⁷⁴

The Court relied upon this high spatial intimacy in distinguishing *Stanley* from other obscenity cases, like *Roth v. United States*⁷⁵ and *Ginsberg v. New York*.⁷⁶ In *Roth* and *Ginsberg*, the Court upheld defendants' convictions related to the distribution of obscene materials.⁷⁷ The *Stanley* Court distinguished those cases because they "dealt with the power of the State and Federal Governments to prohibit or regulate certain *public* actions taken or intended to be taken with respect to obscene matter."⁷⁸ In contrast, *Stanley* involved the constitutional

67. *Id.* at 565.

68. *Id.* at 566-68. The State also argued that it was necessary to prohibit possession to enforce its laws against distribution. *Id.* at 567. The Court rejected this argument because, even if true, it would not "justify infringement of the individual's right to read or observe what he pleases." *Id.* at 568.

69. *Id.* at 566 ("Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.").

70. *Id.* at 567 ("Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.").

71. *Id.* at 561.

72. *Id.* at 564.

73. *Id.* at 565.

74. *Id.* at 558.

75. 354 U.S. 476, 491 (1957) (considering constitutionality of federal statute barring the mailing of "obscene, lewd, lascivious, or filthy" materials).

76. 390 U.S. 629, 631 (1968) (considering constitutionality of state obscenity statute prohibiting the sale of obscene materials to minors).

77. *Roth*, 354 U.S. at 493-94; *Ginsberg*, 390 U.S. at 644.

78. *Stanley*, 394 U.S. at 561, 562 n.7 (emphasis added) (documenting previous obscenity

implications “of a statute punishing mere *private* possession of obscene material.”⁷⁹ In making this public versus private spatial distinction, the *Stanley* Court recognized the importance of spatial intimacy in deciding whether conduct should be afforded legal protection from state intrusion.⁸⁰

The *Stanley* case also earns a high bodily intimacy designation because the State was attempting to regulate individual thought, which takes place in the intimacy of one’s own mind.⁸¹ The *Stanley* Court suggested that such an intrusion was especially problematic because it would violate the “well established . . . right to receive information and ideas” that exists “regardless of [the ideas’] social worth.”⁸² Although left unsaid by the Court, the fact that the conduct being regulated involved viewing of sex-related materials further enhanced the bodily intimate nature of the conduct.⁸³ Ultimately, the Court recognized that the facts presented in *Stanley* involved an “added dimension”⁸⁴ due to the conduct occurring “in the privacy of a person’s own home.”⁸⁵ I believe that the as-yet-unidentified “added dimension” was a function of the high levels of spatial and bodily intimacy involved.

2. *Lawrence v. Texas*.—In *Stanley*, the U.S. Supreme Court stated, “If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”⁸⁶ In *Lawrence v. Texas*,⁸⁷ the Court considered whether the state had any “business” telling a man, in his own house with another man, that his preferred type of physical intimacy was criminal.⁸⁸ As I did with *Stanley*, I will discuss the conduct involved in *Lawrence* before sharing the Court’s reasoning and explaining how both the conduct and reasoning were intimacy-dependent.

Lawrence involved conduct constituting a consensual, anal sex act between

cases involving public sale, distribution and other “non-public” uses). The *Roth* line of cases also was different because such cases involved an “‘important [government] interest’ in the regulation of commercial distribution of obscene material.” *Id.* at 563-64.

79. *Id.* at 561 (emphasis added).

80. This should not be surprising given the public versus private distinction discussed *supra* notes 27-46 and accompanying text.

81. *Stanley*, 394 U.S. at 564 (discussing the “right to receive . . . ideas”).

82. *Id.* Intertwined with that right is “the right to be let alone.” *Id.* (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

83. Note, however, that the bodily intimate nature of the conduct was what made it obscene and criminal in Georgia. *Id.* at 558 n.1.

84. *Id.* at 564 (“Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person’s own home—that right takes on an *added dimension*. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.” (emphasis added)).

85. *Id.*

86. *Id.* at 565.

87. 539 U.S. 558 (2003).

88. *See generally id.*

two men, John Lawrence and Tyron Garner.⁸⁹ The location of the act was Lawrence's Texas apartment home.⁹⁰ The police entered the home, and upon entering, witnessed the sexual acts.⁹¹ The defendants subsequently were charged with violating the Texas Penal Code, which declared that "[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."⁹² Intercourse was "deviate" if it, among other things, involved "the penetration of the genitals or the anus of another person with an object."⁹³ After a trial *de novo*, both defendants were convicted of a misdemeanor and assessed a fine.⁹⁴

At the U.S. Supreme Court, the defendants argued that their convictions violated their equal protection rights and their substantive due process rights under the Fourteenth Amendment.⁹⁵ The State argued that the law was justified given "the government's interest in promoting morality."⁹⁶ A five-justice majority held that the Texas law violated the defendants' due process rights.⁹⁷ In doing so, the Court overturned an earlier decision involving similar facts, *Bowers v. Hardwick*.⁹⁸ Although often thought of as a substantive due process or liberty case, *Lawrence* also can be thought of as a privacy case, as discussed below.

The intimacy-dependent conduct and reasoning in *Lawrence* strongly support its placement within the overlap area. The case involved high spatial intimacy due to the place in which the government intrusion occurred—Lawrence's private residence.⁹⁹ The majority recognized the importance of this spatial intimacy when it stated as follows: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In

89. *Id.* at 562-63.

90. *See id.* The Supreme Court's opinion did not reference the exact location within the apartment.

91. *See id.* at 562. The officers initially planned to investigate the apartment in response to a reported "weapons disturbance."

92. *Id.* at 563 (quoting TEX. PENAL CODE ANN. § 21.06(a) (2003)).

93. *Id.* (quoting TEX. PENAL CODE ANN. § 21.01(1) (2003)).

94. *Id.*

95. *Id.* at 564.

96. *Id.* at 582 (O'Connor, J., concurring).

97. *Id.* at 578 (majority opinion) ("Their right to liberty under the *Due Process Clause* gives them the full right to engage in their conduct without intervention of the government." (emphasis added)). A sixth justice, Justice O'Connor, concurred in the judgment but viewed the statute as a violation of the equal protection clause versus substantive due process. *Id.* at 582 (O'Connor, J., concurring) ("Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.").

98. *Id.* at 578; *see also* 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003). The Georgia statute in *Hardwick* applied to same sex and heterosexual acts. The Texas statute in *Lawrence* applied only to members of the same sex. *Lawrence*, 539 U.S. at 563, 566.

99. *Lawrence*, 539 U.S. at 562.

our tradition the State is not omnipresent in the home.”¹⁰⁰ This emphasis on the home appeared in the very first sentence of the majority opinion.¹⁰¹ In that same paragraph, the Court declared that the “case involve[d] liberty of the person both in its spatial and in its more transcendent dimensions.”¹⁰² The Court again emphasized spatial intimacy when it later declared that the Texas law had “more far-reaching consequences” than other laws because it “touch[ed] upon . . . the most private of places, the home.”¹⁰³ Thus, the fact that the criminalized conduct occurred in the home appears to have contributed significantly to the Court’s holding.

Spatial intimacy alone was not enough to make the conduct in *Lawrence* worthy of legal protection.¹⁰⁴ Rather, what made the state’s intrusion so troubling was that it “involve[d] liberty of the person both in its spatial and in its more transcendent dimensions.”¹⁰⁵ That additional “dimension,” like in *Stanley*,¹⁰⁶ was significant bodily intimacy. The conduct in *Lawrence* was bodily intimate because it involved the most intimate of body parts—sexual organs—and the most intimate of actions—sexual intercourse.¹⁰⁷ The Court recognized the importance of bodily intimacy in its reasoning. First, the *Lawrence* Court noted that the government had “touch[ed] upon the most private human conduct, sexual behavior.”¹⁰⁸ The Court further explained that protecting bodily intimacy was important because “when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”¹⁰⁹

The bodily intimate nature of the criminalized conduct also was what connected *Lawrence* to supporting precedent. For example, in defining substantive due process to include the conduct in *Lawrence*, the Court referenced its abortion-related decision, *Casey*, to confirm that the Constitution protects “a realm of personal liberty which the government may not enter.”¹¹⁰ It then decided that “[t]he Texas statute furthers no legitimate state interest which can

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 567.

104. As the Court itself stated, “Freedom extends beyond spatial bounds.” *Id.* at 562.

105. *Id.* at 562.

106. See *supra* notes 81-85 and accompanying text.

107. See *Lawrence*, 539 U.S. at 578 (“The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives.”).

108. *Id.* at 567.

109. *Id.*

110. *Id.* at 578 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992)). In *Casey*, the Court considered challenges to the constitutionality of a Pennsylvania law requiring “a woman seeking an abortion give her informed consent” and requiring minor women to obtain a parent’s consent, subject to a possible “judicial bypass”. *Casey*, 505 U.S. at 844.

justify its intrusion into the personal and private life of the individual.”¹¹¹ The Court ultimately concluded that cases like *Casey* “show[ed] an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”¹¹²

3. *Plotting Stanley and Lawrence*.—As noted above, both *Stanley* and *Lawrence* involved high levels of spatial intimacy and bodily intimacy. Accordingly, they populate the overlap area of the Intimacy Plot, shaded below. Grouping these two cases together is consistent with the intimacy-dependent conduct and reasoning in both cases. For example, in *Lawrence*, the Court protected the plaintiffs’ conduct because it “touch[ed] upon the most private human conduct, sexual behavior, and in the most private of places, the home.”¹¹³ Overall, when a case involves high levels of both spatial intimacy and bodily intimacy, privacy protection is, and should be, at its highest.¹¹⁴ Below is a simple, graphical representation of the Intimacy Plot so far.

111. *Lawrence*, 539 U.S. at 578.

112. *Id.* at 572. In *Casey*, the Court drew parallels between the abortion-related restrictions at issue in that case and the “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education” that the Court had previously awarded constitutional protection. *Casey*, 505 U.S. at 851.

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. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id.

113. *Lawrence*, 539 U.S. at 567 (emphasis added). The *Lawrence* Court also equated the intimate sexual conduct involved in *Lawrence* with the intimate thoughts at issue in *Stanley*, stating that “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.” *Id.* at 562.

114. Professor Eskridge highlighted this intersection of interests: “The Court’s sexual privacy precedents guarantee his freedom to make decisions regarding intimate relations, and its privacy-of-the-home precedents guarantee his freedom against state intrusion into certain places.” Eskridge, *supra* note 52, at 1033-34. Professor Eskridge’s recap of the *Bowers v. Hardwick* dissent illustrates this point well: “Speaking for four dissenters, Justice Blackmun argued that the case was ‘no more about a fundamental right to engage in homosexual sodomy . . . than *Stanley v. Georgia* [had been] about a fundamental right to watch obscene movies.’” Eskridge, *supra* note 52, at 1033 (alterations in original) (italics added) (internal quotation marks omitted). Of course, the state remains capable of showing that its interests outweigh the intimacy interests. However, its burden should be greater when both types of intimacy are threatened.

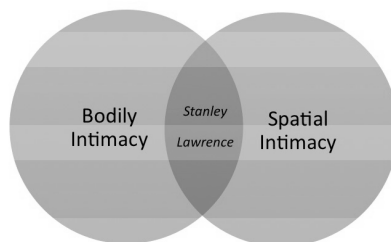


Figure 2

B. The Outlier Cases

The second category of cases, the Outlier Cases, featuring low spatial intimacy and low bodily intimacy, is reviewed in this subpart B. The companion cases discussed herein are *Whalen v. Roe*¹¹⁵ and *National Aeronautics & Space Administration v. Nelson*.¹¹⁶ Similar to subpart A, this Article dissects these cases in three steps: (i) a description of the conduct that was or was not protected from state intrusion; (ii) an account of the reasoning used by the Court to rule that such conduct was or was not protected; and (iii) an analysis of how both the conduct and reasoning revolved around intimacy-dependent facts (or the lack thereof).

1. *Whalen v. Roe*.—In *Whalen*, the Supreme Court considered whether New York’s prescription recording system for patients using Schedule II drugs¹¹⁷ violated the privacy rights of the patients or their doctors.¹¹⁸ The allegedly private conduct was the use of prescribed drugs without fearing that one’s use would be shared with, and possibly misused by, the state.¹¹⁹ In *Stanley* and *Lawrence*, the state intrusion was a statute criminalizing the associated conduct.¹²⁰ In *Whalen*, the state statute did not criminalize the use of the prescribed drugs.¹²¹ Rather, the statute merely required the patient’s doctor to provide a copy of the prescription to the state, which then would enter the

115. 429 U.S. 589 (1977).

116. 131 S. Ct. 746 (2011).

117. See *Whalen*, 429 U.S. at 593. “Schedule II” drugs included “opium and opium derivatives, cocaine, methadone, amphetamines, and methaqualone.” *Id.* at 593 n.8. Although law generally prohibits the recreational use of these drugs, their use was permitted in “the amelioration of pain and in the treatment of epilepsy, narcolepsy, hyperkinesia, schizo-affective disorders, and migraine headaches.” *Id.*

118. Plaintiffs in the case were patients regularly prescribed Schedule II drugs, some of the doctors who prescribed them, and two physicians’ associations. *Id.* at 595. The intimacy analysis contained herein focuses on the privacy-related arguments of the patient plaintiffs.

119. *Id.*

120. See *supra* notes 62-112 and accompanying text.

121. *Whalen*, 429 U.S. at 603.

information into a database for the purpose of identifying possible illegal activity, such as multiple prescriptions to the same person or unauthorized refills.¹²² The information collected about each patient included name, address, and type of drug prescribed.¹²³ The law also mandated measures to protect the information collected and penalized unlawful disclosures.¹²⁴

The *Whalen* plaintiffs argued that New York's prescription-reporting system violated a "zone" of privacy due to the shock, stigma, and fear to which the system exposed patients.¹²⁵ They further argued that the system interfered with their right to make certain decisions without government intrusion.¹²⁶ The Supreme Court disagreed and, instead, held that the prescription-reporting system was a reasonable exercise of state power.¹²⁷

In reaching this holding, the Court found that plaintiffs' reliance on certain prior privacy-related cases was misplaced. The cases plaintiffs cited¹²⁸ included *Roe v. Wade*,¹²⁹ *Loving v. Virginia*,¹³⁰ *Griswold v. Connecticut*,¹³¹ *Pierce v. Society of the Sisters of the Holy Name of Jesus and Mary*,¹³² and *Meyer v. Nebraska*.¹³³ The Court previously had grouped these listed cases together into a special category because the conduct in those cases was related to "marriage, procreation, contraception, family relationships, and child rearing and education."¹³⁴ In short, those cases were special because they involved conduct and relationships that were particularly intimate, either due to bodily intimacy (abortion in *Roe*), spatial intimacy (home contraception in *Griswold*), or something in between (marriage in *Loving*, children's schooling in *Pierce* and

122. *See id.* at 592-93.

123. *Id.* at 593.

124. *Id.* at 594-95.

125. *See id.* at 595-96.

126. *See id.* at 600 ("Thus, the statute threatens to impair both their interest in the nondisclosure of private information and also their interest in making important decisions independently."). The District Court had agreed with plaintiffs' arguments. *Id.* at 596 ("The District Court held that 'the doctor-patient relationship intrudes on one of the zones of privacy accorded constitutional protection' and that the patient-identification provisions of the Act invaded this zone with 'a needlessly broad sweep,' and enjoined enforcement of the provisions of the Act which deal with the reporting of patients' names and addresses.").

127. *See id.* at 598, 606.

128. *See* Appellees' Brief at **15-16, 31, *Whalen v. Roe*, 429 U.S. 589 (1977) (No. 75-839) (discussing the cases listed in plaintiffs' argument).

129. 410 U.S. 113 (1973).

130. 388 U.S. 1 (1967).

131. 381 U.S. 479 (1965).

132. 268 U.S. 510 (1925).

133. 262 U.S. 390 (1923).

134. *Whalen v. Roe*, 429 U.S. 589, 600 n.26 (1977) (quoting *Paul v. Davis*, 424 U.S. 693, 713 (1976) (characterizing those decisions "as dealing with 'matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas, it has been held that there are limitations on the States' power to substantively regulate conduct.'")).

Meyer).¹³⁵ Because the conduct in *Whalen* involved no such intimacy-dependent facts, the cases the plaintiffs cited were inapplicable.¹³⁶

Having distinguished the *Whalen* conduct from the conduct in the plaintiffs' cited cases, the Court next concluded that New York's prescription-reporting system was more like other "invasions of privacy that are associated with many facets of health care" that were "unpleasant," but not unconstitutional.¹³⁷ Other permissible invasions included the "disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies" as "an essential part of modern medical practice."¹³⁸ Such disclosures were acceptable "even when the disclosure may reflect unfavorably on the character of the patient."¹³⁹ Outside of the health care realm, the Court found that mandated collection of the *Whalen* plaintiffs' information was more akin to the reporting requirements imposed on political donors, whose privacy and First Amendment concerns were rejected by the Court only a few years earlier.¹⁴⁰ Ultimately, the *Whalen* Court found that the State's intrusion into the plaintiffs' non-intimate conduct was not enough of a threat to be a constitutional violation.¹⁴¹

Justice Stewart's concurrence drew the most direct connection between the

135. Although none of these cases featured levels of spatial intimacy and bodily intimacy at levels equal to *Stanley* and *Georgia*, the combination of high spatial intimacy and high bodily intimacy is not the only combination worthy of protection. Rather, my theory merely is that when those two types of privacy intersect, privacy protection should be particularly high. The theory does not exclude other factors from similarly triggering a high level of privacy protection.

136. See *Whalen*, 429 U.S. at 598-600. Additionally, the *Whalen* Court swiftly rejected arguments regarding the law's threat to the allegedly intimate relationship between the doctor and patient because no doctor-patient privilege was recognized in the common law and statutory privilege is subject to many exceptions and waivers. *Id.* at 602, 602 n.28.

137. *Id.* at 602 ("Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.").

138. *Id.*

139. *Id.*

140. See *id.* at 601 n.27 ("Just last [t]erm in *Buckley v. Valeo*, . . . we rejected a contention that the reporting requirements of the Federal Election Campaign Act of 1971 violated the First Amendment rights of those who contribute to minority parties . . .").

141. See *id.* at 600-04. The Court also rejected plaintiffs' attempts to equate the state's intrusion into their conduct to a physical invasion of privacy, such as that involved in the seminal Fourth Amendment wiretapping case, *Katz*, and to an invasion of their association rights, such as in *NAACP v. Alabama*. See *id.* at 602-04. The Court rejected these comparisons to spatial (*Katz*) and bodily (*Alabama*) intrusions. *Id.* at 604 n.32 ("But those cases involve affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations. Likewise the Patient appellees derive a right to individual anonymity from our freedom of association cases such as . . . *NAACP v. Alabama*, 357 U.S. 449, 462 [(1958)] that] protect 'freedom of association for the purpose of advancing ideas and airing grievances,' not anonymity in the course of medical treatment." (italics added) (internal citations omitted)).

lack of intimacy-dependent facts and the result in *Whalen*.¹⁴² Therein, Justice Stewart critiqued the concurrence of Justice Brennan,¹⁴³ who had suggested that “[b]road dissemination by state officials of [the information collected by New York State] would clearly implicate” a more general right to privacy.¹⁴⁴ Justice Stewart argued that the two cases relied upon by Justice Brennan—*Griswold*¹⁴⁵ and *Stanley*¹⁴⁶—were distinguishable from the instant case.¹⁴⁷ Specifically, he noted that *Griswold* was dependent on its intimacy-related facts of conduct “in the home” (spatial intimacy)—namely, contraception during sex (bodily-intimacy).¹⁴⁸ Justice Stewart similarly distinguished *Stanley* from the instant case because the *Stanley* decision “protects a person’s right to read what he chooses” (bodily intimacy) “where that choice poses no threat to the sensibilities or welfare of others” (spatial intimacy).¹⁴⁹ Absent intimacy-dependent facts like those in *Griswold* and *Stanley*, neither the majority nor concurring justices were willing to afford legal protection to the allegedly private conduct in *Whalen*.¹⁵⁰

2. *National Aeronautics & Space Administration v. Nelson*.—The lack of intimacy-dependent facts in *Whalen* contributed to the Court’s unanimous decision to not bar confidential reporting of Schedule II drug information to the state.¹⁵¹ Over thirty years later, the Supreme Court considered a case with similar facts, *National Aeronautics & Space Administration v. Nelson*.¹⁵² At issue in *Nelson* was whether the federal government could require certain contract employees to report any “treatment or counseling for recent illegal-drug use” and ask the employees’ “designated references” certain “open-ended questions.”¹⁵³ The Ninth Circuit rejected the treatment and counseling questions asked of the employee and the open-ended questions asked of the references because they were not “narrowly tailored.”¹⁵⁴ However, the *Nelson* Court, as in *Whalen*, unanimously decided not to afford a legal privacy protection.¹⁵⁵

The *Nelson* plaintiffs were employed by a non-federal institution that

142. *Whalen*, 429 U.S. at 607 (Stewart, J., concurring).

143. *Id.* at 606 (Brennan, J., concurring).

144. *Id.* at 608 (Stewart, J., concurring).

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

146. *Stanley v. Georgia*, 394 U.S. 557 (1969).

147. *Whalen*, 429 U.S. at 608-09 (Stewart, J., concurring).

148. *Id.* at 609. Given this combination, *Griswold* likely is another good example of a case that falls within the overlapping circles of the Intimacy Plot.

149. *Whalen*, 429 U.S. at 609.

150. *See id.* at 599 (majority opinion); *id.* at 607 (Brennan, J., concurring); *id.* at 608-09 (Stewart, J., concurring).

151. *See supra* notes 115-27 and accompanying text.

152. 131 S. Ct. 746 (2011). Like *Whalen*, the *NASA* opinion was a unanimous decision with two concurrences. *Id.* at 751 (majority opinion); *id.* at 764 (Scalia, J., concurring); *id.* at 769 (Thomas, J., concurring).

153. *Id.* at 751 (majority opinion).

154. *Id.* at 754.

155. *Id.* at 751.

contracted with the “Jet Propulsion Laboratory” of the National Aeronautics and Space Administration (“NASA”), an independent federal agency.¹⁵⁶ The *Nelson* plaintiffs sought protection from their refusal to participate in an allegedly privacy-intrusive background check process known as the National Agency Check with Inquiries (“NACI”).¹⁵⁷ As part of the NACI, employees must answer whether they have “‘used, possessed, supplied, or manufactured illegal drugs’ in the last year.”¹⁵⁸ If the employee responds “yes,” he also must report “‘information about ‘any treatment or counseling received.’”¹⁵⁹ Further, each employee must consent to the government sending a questionnaire to the employee’s references, which asks “whether they have ‘any reason to question’ the employee’s ‘honesty or trustworthiness,’ or have ‘adverse information’ concerning a variety of other matters.”¹⁶⁰ Records collected pursuant to the NACI process require the individual’s written consent for disclosure.¹⁶¹

The *Nelson* Court held that the NACI process did not violate the plaintiffs’ asserted “informational privacy” rights.¹⁶² Although the Court’s decision depended, in part, on the fact that plaintiffs were prospective employees versus “citizens at large,” the lack of intimacy-related facts was a subtle yet important basis for the decision as well.¹⁶³ The Court found the NACI process constitutional based on three key facts: (i) the questions asked were “reasonable”; (ii) the government asked the questions in its role as an employer; and (iii) the information collected was protected against disclosure.¹⁶⁴ This Article discusses

156. *Id.* at 751-52. Plaintiffs’ employer was the “California Institute of Technology.” *Id.* at 752. The Jet Propulsion Laboratory is a facility that handles “deep-space robotics and communications” for various projects, including the Mars Rovers. *Id.*

157. *Id.* at 752, 754. The background checks were initiated in response to the recommendations of the 9/11 Commission, tasked with improving security at federal facilities. *Id.* at 752. The NACI is the standard investigation for examining all “prospective civil servants.” *Id.*

158. *Id.* at 753.

159. *Id.*

160. *Id.* at 749.

161. *Id.* at 753-54.

162. *Id.* at 756 & n.6, 763-74. Both the *Whalen* Court and the *Nelson* Court reached their decisions without deciding whether a right to informational privacy existed, a point with which Justice Scalia vehemently disagreed in his *Nelson* dissent. *Id.* at 756 (“As was our approach in *Whalen*, we will assume for present purposes that the Government’s challenged inquiries implicate a privacy interest of constitutional significance.”); *see id.* at 767 (Scalia, J., concurring) (suggesting that the majority’s “Alfred Hitchcock line of our jurisprudence . . . harms [the Court’s] image, if not [the Court’s] self-respect, because it makes no sense”).

163. *Id.* at 757-58 (majority opinion) (“Time and again our cases have recognized that the Government has a much freer hand in dealing ‘with citizen employees than it does when it brings its sovereign power to bear on citizens at large.’” (quoting *Engquist v. Oregon Dep’t of Agric.*, 553 U.S. 591, 599 (2008))). This fact strengthened the government’s claim to a compelling interest. *Id.* at 758-59.

164. *See id.* at 756-57 (“We hold, however, that, whatever the scope of this interest, it does not prevent the Government from asking reasonable questions of the sort included on SF-85 and

the reasonableness and employer-related facts in greater detail below.

The questions were reasonable in part because they did not inquire into one's bodily intimacy or spatial intimacy. Instead, the bulk of the questions sought information regarding "basic biographical information: name, address, prior residences, education, employment history, and personal and professional references," as well as "citizenship, selective-service registration, and military service."¹⁶⁵ Asking for such information invades neither one's personal space nor one's bodily integrity. The other questions that plaintiffs found particularly troubling from a privacy perspective, i.e., those regarding drug use and related treatment,¹⁶⁶ also invaded neither bodily intimacy nor spatial intimacy.

First, from a spatial intimacy perspective, having to fill out a form does not invade one's home or home-like personal space.¹⁶⁷ If the government had instead insisted on inspecting employees' homes for evidence of drug use, the analysis would be different due to the invasion of spatial intimacy. The nature of the questions themselves also was not particularly invasive from a bodily intimacy perspective. Although it is true that consumption of drugs involves using one's body, that fact alone does not transform the government's general inquiry into one focused on bodily intimate matters. Rather, for significant bodily intimacy to be at stake, the government likely would have had to ask employees to report when they last had sex and whether that sex was with a person of the same or opposite sex.¹⁶⁸ No such bodily intimate inquiry was made.¹⁶⁹

In addition to relying upon overall reasonableness, the *Nelson* Court also relied upon the well-intentioned purpose of the questions in its analysis. Specifically, the government had "good reason to ask" questions regarding actual drug use because "[q]uestions about illegal-drug use are a useful way of figuring out which persons" are "reliable, law-abiding persons who will 'efficiently and effectively' discharge their duties."¹⁷⁰ This purposeful connection distinguishes

Form 42 in an employment background investigation that is subject to the Privacy Act's safeguards against public disclosure.").

165. *Id.* at 753.

166. *Id.* at 760-61.

167. *See id.* at 762 ("Respondents in this case, like the patients in *Whalen* and former President Nixon, attack only the Government's *collection* of information on SF-85 and Form 42.").

168. These are not the only examples, of course, but they illustrate the importance of the nature of the information sought when evaluating the propriety of the questions.

169. One part of a form posted on the government's website did suggest the relevance of more intimate matters, but it was not at issue in the case. *Id.* at 754 n.5 ("In the Ninth Circuit, respondents also challenged . . . a document, which had been temporarily posted on the [NASA] intranet, that listed factors purportedly bearing on suitability for federal employment . . . includ[ing] 'indecent exposure,' 'voyeurism,' 'indecent proposal[s],' and 'carnal knowledge'" (last alteration in original) (internal citations omitted)). The other form "also stated that while 'homosexuality,' 'adultery,' and 'illegitimate children' were not 'suitability' issues in and of themselves, they might pose 'security issue[s]' if circumstances indicated a 'susceptibility to coercion or blackmail.'" *Id.* (alteration in original).

170. *Id.* at 759-60 (internal quotation marks omitted). The government also was entitled to

such questions from questions about bodily-intimate matters like sex, which bear no direct connection to an employee's performance on the job.¹⁷¹

3. *Plotting Whalen and Nelson.*—In *Whalen* and *Nelson*, plaintiffs presented alleged privacy intrusions involving little to no spatial intimacy or bodily intimacy, as illustrated above. The lack of intimacy is particularly striking when compared to the intrusions in *Stanley* and *Lawrence*. Accordingly, *Whalen* and *Nelson* should be plotted outside of the circles of bodily intimacy and spatial intimacy. Figure 3 depicts an updated version of the intimacy plot.

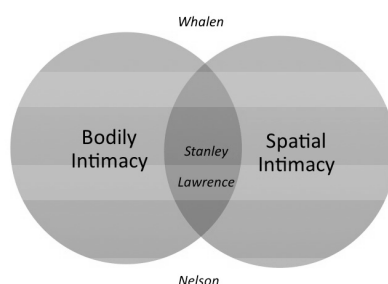


Figure 3

III. THE UTILITY OF PLOTTING PRIVACY AS INTIMACY

In Part II, this Article categorized and plotted certain privacy cases based on their intimacy-dependent facts and reasoning or lack thereof. Part III states the additional utility of plotting cases in that fashion in three steps. First, it shows how the plot helps one predict which privacy-related cases will be easier or more difficult for courts to decide. Second, it discusses how focusing on the presence or absence of intimacy-dependent facts can help reconcile seemingly inconsistent cases. Finally, this Article illustrates how the intimacy plot fits with other emerging theories of privacy.

A. *Identifying Winners, Losers and Toss-Ups*

Considering whether a particular case involves intimacy-related facts may help predict how courts will analyze the case. Doing so may also help separate future cases into likely winners, losers, or toss-ups. The “winners” of privacy

ask about drug “treatment or counseling” because it identifies those “who are taking steps to address and overcome their problems,” which the government considers a “mitigating factor” in its analysis. *Id.* at 760. The “open-ended inquiries” sent to employees’ references were similarly acceptable because they, “like the drug-treatment question on SF-85, are reasonably aimed at identifying capable employees who will faithfully conduct the Government’s business.” *Id.* at 761.

171. See Posner, *supra* note 49, at 414 (illustrating how bodily intimate information is different “because the individual’s desire to suppress the photograph [of a body part] is not related to misrepresentation in any business or social market place”).

protection most likely will be cases in which the facts involve significant bodily intimacy and spatial intimacy. If a case involves significant bodily intimacy coupled with significant spatial intimacy—such as *Stanley v. Georgia*¹⁷² and *Lawrence v. Texas*¹⁷³—then we can predict that a court likely will find that the intimate conduct at issue has “won” legal protection as private.

In other words, when these two objective factors overlap in the same fact pattern, we should expect the law to be most protective. Conversely, cases in which there is little to no bodily intimacy or spatial intimacy likely will face the opposite fate, absent some other fundamental interest at stake. If a case involves little or no bodily intimacy or spatial intimacy—like *Whalen*¹⁷⁴ and *Nelson*¹⁷⁵—we can predict that plaintiffs will “lose” out on privacy protection for the conduct at issue. Although we never can predict the result with absolute certainty, we can predict that cases involving significant levels of bodily intimacy and spatial intimacy likely will earn privacy protection unless there is a particularly significant government interest on the other side.¹⁷⁶

Categorizing cases in this binary win/lose fashion begs the following question: what about fact patterns that do not fall completely within or completely outside the overlapping circles defined in Parts I and II? These cases will be much tougher for courts to decide, and other patterns may emerge. For example, cases that are not clear “winners” or “losers” based on intimacy may be the types of cases that lead to results perceived as inconsistent or unsatisfying over time. Consider the U.S. Supreme Court’s recent cases regarding the so-called “right to die” or its cases regarding abortion.¹⁷⁷ Both types of cases typically involve significant bodily intimacy but less significant spatial intimacy than the “winner” cases. The presence of a third person—whether it’s a doctor, pharmacist, or fetus—further pushes the cases toward the “toss up” category.¹⁷⁸

172. 394 U.S. 557 (1969).

173. 539 U.S. 558 (2003).

174. *Whalen v. Roe*, 429 U.S. 589 (1977).

175. *Nat’l Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746 (2011).

176. In other words, the presence of these intimacy-dependent facts is like a thumb on the scale in favor of privacy protection. The government still may show that its interest outweighs the individual’s privacy interest. However, its burden likely will be much greater than in a case lacking such intimacy-dependent facts.

177. See *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 265 (1990) (upholding constitutionality of Missouri law requiring “clear and convincing” evidence of one’s wish to end life-supporting treatment); cf. *Washington v. Glucksberg*, 521 U.S. 702, 706, 720-21 (1997) (finding that Washington statute criminalizing assisted suicide was constitutional under the Due Process Clause).

178. Other “toss up” cases include HIV status disclosures and gay marriage or gay adoption cases yet to come. See, e.g., *Fed. Aviation Admin. v. Cooper*, 132 S. Ct. 1441, 1446-47 (2012) (holding the Social Security Administration’s failure to adhere to regulations regarding confidential management of records by disclosing a pilot’s medical records—revealing his positive HIV status—to the FAA did not create “actual damages” because the Privacy Act does not include “damages for mental or emotional distress”).

For cases like these, the goal should be to identify other objective variables, such as relationships with third parties, in order to more fully understand how the interest balance turned out the way it did.

B. Reconciliation of Seemingly Inconsistent Cases

Focusing on a case's presence of intimacy-dependent facts also may help reconcile cases that initially appear inconsistent. For present purposes, cases are "inconsistent" when they involve two courts applying the same law to similar fact patterns but reach opposite conclusions. This judicial inconsistency is harmful in part because it causes some observers to question whether a particular result depended more on the judge than on the facts.¹⁷⁹ Reconciling such cases based on theory or factual analysis can restore faith in the efficacy and wisdom of the law being applied and in the judge(s) applying it.

One classic example of inconsistency comes from two privacy cases involving newsgathering—*Dietemann v. Time, Inc.*¹⁸⁰ and *Desnick v. American Broadcasting Cos.*¹⁸¹ In each case, the issue was whether a newsgathering journalist violated the privacy of a person providing medical-like services to the public.¹⁸² The inconsistent results were that the *Dietemann* court found that the plaintiff's privacy had been violated,¹⁸³ while the *Desnick* court found no privacy violation.¹⁸⁴ However, as shown below, the cases appear much more consistent when one considers the presence of intimacy-dependent facts in *Dietemann* and the lack of such facts in *Desnick*.

In *Dietemann*, two employees of popular *Life Magazine* posed as potential patients of the plaintiff, Mr. Dietemann, an alleged healer who used "clay, minerals, and herbs" along with "gadgets" and a "wand."¹⁸⁵ *Life* featured Mr. Dietemann as part of its story, "Crackdown on Quackery."¹⁸⁶ The magazine employees had recorded their interaction with Mr. Dietemann and had taken pictures with a hidden camera, all within his home.¹⁸⁷ One of the published pictures showed Mr. Dietemann with his hand on one of the magazine

179. In my experience, this reaction is particularly prevalent among second or third year law students, while others suggest even first year law students are making such jaded assessments. See Castiglione, *supra* note 4, at 656-57 ("However, as any first-year law student taking a torts class can tell you, reasonableness as an analytical concept is maddeningly frustrating and often little more than a shorthanded reference for 'What would I do in this situation?'").

180. 449 F.2d 245 (9th Cir. 1971).

181. 44 F.3d 1345 (7th Cir. 1995); see also Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. 2007, 2014 (2010) (characterizing *Dietemann* and *Desnick* as "arguably the most famous pair of American privacy tort law opinions").

182. See *Dietemann*, 449 F.2d at 247; *Desnick*, 44 F.3d at 1348, 1351.

183. See *Dietemann*, 449 F.2d at 250.

184. *Desnick*, 44 F.3d at 1352-53.

185. *Dietemann*, 449 F.2d at 245-46.

186. *Id.* at 245.

187. *Id.* at 245-46.

employee's breasts.¹⁸⁸ The employees shared their recording with the local District Attorney's office and other government officials, all of whom had cooperated in the sting operation of alleged "quack" doctors.¹⁸⁹

The facts of *Desnick* largely tracked the facts in *Dietemann*, with some important intimacy-related distinctions.¹⁹⁰ In *Desnick*, employees of the ABC Television Network ("ABC") hired professional actors to pose as patients at the defendants' ophthalmology clinics and secretly record their visits.¹⁹¹ ABC used interviews and recordings to depict defendants in a segment of their popular news magazine show, *PrimeTime Live*.¹⁹² The gist of the *PrimeTime Live* story was that defendants preyed upon elderly Medicare patients by performing unnecessary cataract surgeries.¹⁹³

In both *Dietemann* and *Desnick*, plaintiffs sued based on the invasion of privacy tort, among other theories.¹⁹⁴ The *Dietemann* court held "that clandestine . . . recordation and transmission of [plaintiff's] conversation without his consent . . . warrant[ed] recovery for invasion of privacy,"¹⁹⁵ while the *Desnick* court ultimately held that similar recordings of conversations with the plaintiff were not an "invasion" of privacy.¹⁹⁶ That the courts ruled differently is surprising given the factual parallels, as shared above. More specifically, both cases involved the exposure of medical practitioners by journalists from major news outlets, who surreptitiously recorded conversations to publicize the serious allegations of the defendants' "quackery" and the potential harm the defendants could cause their ignorant patients.

Although these factual parallels are striking, even more striking is how the different results in *Dietemann* and *Desnick* make much more sense when one expressly considers the concepts of bodily intimacy and spatial intimacy. The intimacy-dependent facts in *Dietemann* explain the case's privacy "winning" result, while the lack of facts in similar *Desnick* explains the case's "losing" result. In *Dietemann*, the *Life* reporters entered the home of Mr. Dietemann, which he also used as his facility for attempting to "heal" certain patients.¹⁹⁷ Further, as noted above, the reporters could only enter Mr. Dietemann's home by

188. *Id.* at 246. Dietemann was examining the breast because "Mrs. Metcalf had told plaintiff that she had a lump in her breast." *Id.*

189. *Id.* at 245-46. Police later arrested Dietemann for "practicing medicine without a license" though that proceeding was not part of the Ninth Circuit case. *Id.* at 246.

190. *See Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1353 (7th Cir. 1995).

191. *See id.* at 1348.

192. *Id.* at 1347.

193. *Id.* at 1348-50. ABC further alleged that the operations were unnecessary based on separate consultations with an ophthalmology professor. *Id.* at 1348.

194. *See Dietemann*, 449 F.2d at 245; *Desnick*, 44 F.3d at 1351.

195. *Dietemann*, 449 F.2d at 248.

196. *Desnick*, 44 F.3d at 1353. The court further concluded that there also "was [not] any 'inva[sion of] a person's private space.'" *Id.* at 1352 (second alteration in original) (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1229 (7th Cir. 1993)).

197. *Dietemann*, 449 F.2d at 246.

ringing a bell and entering a locked gate.¹⁹⁸ Thus, there was significant spatial intimacy. The court emphasized those spatially-intimate facts in its analysis.¹⁹⁹ Specifically, the court characterized the invasion as occurring “in his den,” which “was a sphere from which he could reasonably expect to exclude eavesdropping newsmen.”²⁰⁰ Further, the reporters in *Dietemann* only were invited into the healer’s home upon their false statement that a “Mr. Johnson” had told them they could get help there.²⁰¹

In contrast, the reporters in *Desnick* appeared at a place of business, the ophthalmology clinic, whose doors were open to any potential passersby interested in their services.²⁰² Thus, as Justice Posner noted in his *Desnick* opinion, their “entry was not [an] invasive” intrusion into the plaintiffs’ “ownership or possession of land.”²⁰³ Posner further noted that the *Desnick* case presented different facts from other privacy cases because “[n]o embarrassingly intimate details of anybody’s life were publicized in the present case” and “no intimate personal facts concerning the . . . plaintiffs . . . were revealed.”²⁰⁴ In *Desnick*, there was less spatial intimacy than there was in *Dietemann*. There also was no bodily intimacy like that present in *Dietemann*, in which the plaintiff was pictured touching a woman’s intimate body part—her breast.²⁰⁵ Overall, the comparatively smaller amount of intimacy-related facts in *Desnick* help explain why no privacy violation was found, despite the apparent factual similarities between it and *Dietemann*.

C. Support for and in Emerging Theories of Privacy Reunification

The third way in which focusing on intimacy-related facts is utile is that it further supports, and is supported by, recent efforts to reunify privacy law. The two most direct examples of this overlap are the theories shared in Lior Jacob Strahilevitz’s aptly-titled work, *Reunifying Privacy Law*,²⁰⁶ and Jane Yakowitz Bambauer’s work, *The New Intrusion*.²⁰⁷ The connections between those pieces

198. *Id.*

199. *See id.*

200. *Id.* at 248-49. In support of this distinction, the court distinguished the facts of *Dietemann* from an early, yet influential privacy case, *Gill v. Hearst Publishing Co.*, 253 P.2d 441, 444 (Cal. 1953). In *Gill*, the court “denied recovery for invasion of privacy to plaintiffs whose picture was taken in a public market and later published without their consent” and “stressed that the picture had not been ‘surreptitiously snapped on private grounds, but rather was taken of plaintiffs in a pose voluntarily assumed in a public market place.’” *Dietemann*, 449 F.2d at 248 (quoting *Gill*, 253 P.2d at 444).

201. *Dietemann*, 449 F.2d at 246.

202. *See Desnick*, 44 F.3d at 1352.

203. *Id.* at 1353.

204. *Id.* (emphases added).

205. *See Dietemann*, 449 F.2d at 246.

206. *See Strahilevitz*, *supra* note 181.

207. Bambauer, *supra* note 56.

and the instant Article are discussed in turn below.

In *Reunifying Privacy Law*, Strahilevitz argues that the division among the various privacy torts was an unnecessary split.²⁰⁸ In place of the current split, he suggests a unified privacy tort²⁰⁹ “with three . . . elements—privacy, highly offensiveness, and negative effects on social welfare.”²¹⁰ Merely upon reading that list of elements, the connection between Strahilevitz’s theory and the focus on intimacy herein begins to emerge.²¹¹ The elements tend to trigger follow-up questions regarding how to define “privacy” and “offensiveness.”²¹² The initial answer may depend on intimacy. Specifically, I suggest that what makes an invasion “offensive” likely depends in large part upon whether it intrudes into one’s spatial intimacy, or bodily intimacy, or both. Measuring outrageousness using these objective indicators will help ensure that what makes something “outrageous” is something more consistent than whatever a reasonable person thinks is outrageous at a particular time.

Offensiveness reappears as a key concept in another recent and important work, *The New Intrusion*, albeit under the slightly different name of “offensiveness.”²¹³ In *The New Intrusion*, Jane Yakowitz Bambauer advocates for increased use of the intrusion upon seclusion tort to address current privacy dilemmas in the “information age” without overly threatening other interests, such as those protected by the First Amendment.²¹⁴ While Strahilevitz suggests three elements for his ideal privacy tort,²¹⁵ Bambauer suggests focusing merely

208. Strahilevitz, *supra* note 181, at 2010. Strahilevitz carefully notes that he is not arguing for the reunification of decisional privacy and informational privacy. *Id.* at 2009. However, I believe it soon may be time to make and embrace that argument.

209. *Id.* at 2011, 2032.

210. *Id.* at 2011.

We can embrace a reformed version of Warren and Brandeis’s unified tort for invasion of privacy. Such an invasion occurs when the defendant infringes upon (1) the defendant’s private facts or concerns, (2) in a manner that is highly offensive to a reasonable person, and (3) engages in conduct that engenders social harms that exceed the associated social benefits.

Id. at 2033.

211. Strahilevitz later applied his privacy reunification theories to the facts of *NASA v. Nelson*, discussed in detail in Part II.B above, prior to the Supreme Court’s decision in the case. Strahilevitz, *supra* note 181, at 2041-46.

212. Strahilevitz, *supra* note 181, at 2013 (explaining the offensive nature of a defendant’s “conduct must be manifest” and that courts should “focus on the offensiveness of the information gathering in the intrusion context and the information dissemination in the public disclosure context”). See *id.* at 2011 (discussing how “[a] unified tort with three essential elements—privacy, highly offensiveness, and negative effects on social welfare—offers a sensible analytical framework for analyzing privacy harms involving publication or intrusion”).

213. Bambauer, *supra* note 56, at 245-46.

214. *Id.* at 258, 275.

215. Strahilevitz, *supra* note 181, at 2010, 2033.

on two: (i) an observation, (ii) that is offensive.²¹⁶ In distinguishing an offensive observation from one that is not offensive, Bambauer contrasts a landlord's surreptitious video recording of an apartment tenant's bedroom with a similar recording of an area just inside the tenant's front door.²¹⁷ In doing so, she is defining outrageousness by relying upon bodily intimacy and spatial intimacy. This is because what separates a bedroom intrusion from a doorway intrusion is the spatially-intimate nature of one's bedroom and the bodily-intimate nature of the activities that take place there. Ultimately, Bambauer's implicit reliance on intimacy provides further support for the intimacy plot, while the intimacy plot lends objective criteria one can use to better define "offensive" in "the new intrusion."²¹⁸

CONCLUSION

One reason scholars have struggled to define privacy may be that privacy is better viewed as the cure for a particular ill rather than as the reason a cure is needed. A factual situation that involves the dual symptoms of bodily intimacy and spatial intimacy triggers an especially dire need for a privacy cure. Focusing on bodily intimacy and spatial intimacy is useful because it helps scholars and courts alike to objectively assess situations that feel inherently outrageous or offensive. It also helps one reconcile seemingly inconsistent cases in some instances and predict close call cases in other instances. Ultimately, I hope that a purposeful consideration of intimacy will help ensure that legal privacy protections address an inherent set of appreciable and objectively measurable ills rather than change along with shifting public opinions of "reasonableness."

216. Bambauer, *supra* note 56, at 207 (suggesting that such elements are advisable to ensure that "[t]he intrusion tort penalizes conduct—offensive observations— not revelations").

217. *Id.* at 236-37.

218. *See generally id.*