

**Zones of Privacy:
A New Analytical Framework**

**Daniel Bednarski
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“That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society.” -- Samuel D. Warren and Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890).

I. Introduction

The right to privacy has been one of the most controversial legal subjects during the past century, whether in case law, politics, or popular culture. There are often knee-jerk reactions, sides taken, and lines drawn when the phrase is uttered with nary a constructive debate provided. In that time, a jurisprudence developed that generally has recognized there is a broad Constitutional right of privacy distributed through different zones of privacy that protect the different contexts of a person's life. Even then, many questions remain unanswered regarding whether a right to privacy was ever intended by the founding fathers when they wrote the Constitution and set up our first government. These open questions tell us a healthy debate is still necessary.

One thing I have observed while preparing this paper is how arguments for the right to privacy ebb and flow based on the technology then available and in reaction to contemporary advancements to that technology. Each time a new technology is developed that increases the ability of government and private parties to snoop, follow, and know more about an individual's every thought, the more likely a paper is written, a speech is delivered, and a case regarding privacy is decided.

It appears that historical privacy rights extend from a time before the Constitution. When the country was founded, the writers of the Constitution provided privacy protections to the parts of life

they felt were most threatened as a result of their experience under British rule. Contemporary technology was very limited and rudimentary. The government was required to use active, physical means if it wanted to search or seize a person, their house, papers, or effects. The founders could not have imagined the advances in technology that would occur within a century, let alone those we take for granted in our modern life. Reflecting the limited nature of technology at the time, the privacy protections provided by the Constitution were similarly rudimentary and limited in scope, and they were intended to allow a person to be secure in their own person, papers, house, and effects. But what do these Constitutional privacy protections mean more than two centuries later?

The right to privacy, as it is known today, first appeared in an 1890 law review article by Louis Brandeis and Samuel Warren in reaction to then-recent advancements in camera technology that enabled surreptitious photographs and innovation in mass printing technologies that made it possible for those photographs to be included in newspapers and distributed widely.¹ Since that time, arguments for a right to privacy have sprung up in response to many different technological innovations that have drastically transformed the life of the people. One such argument for a right to privacy came in response to government agents wiretapping telephone lines to secretly listen in on private conversations as if they were in the same room.² Another argument was related to medical innovations that brought about safer abortion surgeries,³ pregnancy tests, birth control pharmaceuticals,⁴ and life-saving technologies that provide earlier viability for a fetus that otherwise in an earlier decade would have died. Likewise, the Digital Age we live in today has brought renewed cries for a Constitutional right to privacy.

Borrowing a phrase from Warren and Brandeis, digital devices “have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the

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

2. *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J. dissenting).

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

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

prediction that "what is whispered in the closet shall be proclaimed from the housetops."⁵ That statement remains true even after substituting digital devices for instantaneous photographs and newspaper enterprise.

We now live in an era with whole new ways to communicate, faster computers, better encryption standards, and gigantic databases of personal information compiled by corporations and governments. In response to cries for privacy protection triggered by these Digital Age advancements, Scott McNealy of Sun Microsystems famously quipped: "You have zero privacy, get over it!"⁶ What Mr. McNealy did not consider is that privacy is contextual. A person may have no privacy in one context, but they may have or want to have privacy in another. This paper explores those contexts and provides a framework that is applicable to the different layers and dimensions of those contexts.

The goal of this paper is two-fold. The first goal is to create and introduce a more responsive framework that considers privacy interests and helps the dialog regarding the right to privacy. The second goal is to demonstrate how the framework can be utilized when considering privacy rights and how it can serve as a useful tool to bring clarity and candor to various types of analysis.

II. History of the Right to Privacy/ Zones of Privacy

The right to privacy initially was associated with the large overreaching "right to be let alone." Over time, it has evolved to include several layers of interests that are protected separately. Each layer of privacy interest can then be seen as a zone around a person.

An implied right to privacy is a relatively recent phenomenon, first argued in an 1890 law review article penned by Louis Brandeis and Samuel Warren.⁷ In it, they assailed private actors, the

5. Original quote: "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the housetops.'" Warren & Brandeis, *supra* note 1, at 195.

6. Polly Sprenger, *Sun on Privacy: 'Get Over It'*, WIRED NEWS, Jan. 26, 1999 (<http://www.wired.com/politics/law/news/1999/01/17538>)(last visited May 13, 2008)

7. Warren & Brandeis, *supra* note 1.

press, who used technological advances in photography and printing presses to invade personal privacy and spread gossip.⁸ Brandeis and Warren argued for a broad and overarching right to privacy and labeled it the “right to be let alone.”⁹ Such a right provided protection to the privacy of a person's thoughts, sentiments, and emotions.¹⁰ It also limited the ability of newspapers to publish photos of people without their consent.¹¹

Later, as an Associate Supreme Court Justice, Brandeis made one of the earliest arguments for implied Constitutional rights to privacy in a Supreme Court opinion. His dissent in *Olmstead* echoed the arguments he had voiced thirty years before.¹² *Olmstead* was the first case in front of the Court to challenge a wiretap of telephone conversations. The court held that since wiretapping did not require the police to enter the home, it did not require the higher standard of probable cause.¹³ Brandeis disagreed and argued that “The makers of our Constitution ... sought to protect Americans in their **beliefs, their thoughts, their emotions and their sensations**” (emphasis added).¹⁴ Wiretapping allowed the government to intrude upon private telephone conversations and expressions of thought and emotion that otherwise would require a person to be in the same room as the participants to hear.¹⁵

In his 1890 article with Warren, Brandeis had argued for a right to privacy to protect against private actors.¹⁶ However, in *Olmstead*, Brandeis limited the right to be let alone to the government. The founders “conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, **every unjustifiable intrusion by the government upon the privacy of the individual**, whatever the means employed,

8. “latest advances in photographic art have rendered it possible to take pictures surreptitiously” Warren & Brandeis, *supra* note 1, at .

9. Warren & Brandeis, *supra* note 1.

10. Warren & Brandeis, *supra* note 1.

11. Warren & Brandeis, *supra* note 1.

12. *Olmstead v. United States*, 277 U.S. at 478.

13. *Id.*

14. *Id.* at 478 (Brandeis, J. dissenting).

15. *Id.*

16. Warren & Brandeis, *supra* note 1.

must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.” (emphasis added).¹⁷ It wasn't until nearly forty years later in *Katz* that a majority of justices agreed with Brandeis that electronic surveillance such as wiretapping required a higher burden on the government, and that wiretapping otherwise violated a right to privacy protected by the Fourth Amendment.¹⁸

It was fitting that when Brandeis retired, eleven years after *Olmstead*, his replacement was William O. Douglas, who picked up the torch and echoed Brandeis in calls from the bench for a right to be let alone. It was Douglas who nurtured and promoted the concepts that became the zones of privacy.

The first case in which separate zones of privacy appeared was *Pollak*. In that case, Douglas broke down the broad and overarching right to privacy into two different zones: that which protected the home and that which protected the mind.¹⁹ In *Pollak*, the Court sustained a challenge to a policy that allowed a public bus to play a local radio station over speakers.²⁰ Douglas dissented, arguing that forcing bus riders to listen to the local radio station violated the sanctity of thought and belief.²¹ His dissent built on what Brandeis had to say in *Olmstead*. Douglas argued that a right to privacy is found in the Fourth Amendment, which protects the home from invasion, as well as the First Amendment, which respects the thoughts and beliefs of people.²² These became the basis for his zones of privacy.

Five years after *Pollak* and toward the end of the McCarthy era, Douglas gave a series of lectures at Franklin and Marshall College which he later published as a book entitled *THE RIGHT OF THE PEOPLE*.²³ In the second section of the book, “The Right to be Let Alone,” Douglas espoused his

17. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting).

18. *Katz v. United States*, 389 U.S. 347 (1967).

19. *Public Utilities Commission of District of Columbia v. Pollak*, 343 U.S. 451 (1952)(Douglas, J. dissenting).

20. *Id.* at 467-68.

21. *Id.*

22. “The right to be let alone is indeed the beginning of all freedom. Part of our claim to privacy is in the prohibition of the Fourth Amendment against unreasonable searches and seizures. It gives the guarantee that **a man's home is his castle** beyond invasion either by inquisitive or by officious people. ... The First Amendment in its **respect for the conscience** of the individual honors the **sanctity of thought and belief**. To think as one chooses, to believe what one wishes are important aspects of the constitutional right to be let alone. *Id.* at 467.

23. William O. Douglas, *THE RIGHT OF THE PEOPLE* (1958)

thoughts about privacy, thoughts he later used in his *Griswold* opinion less than ten years later. Douglas focused on privacy related to the conscience, the person and body, and home.²⁴ Much of the book was aimed at excessive government interference in the private affairs of individuals through abusive behaviors of Congressional investigations, as well as those of the Executive branch during the McCarthy era.²⁵

Douglas discussed what he termed a natural right to privacy underlying the Bill of Rights. In this natural right, some rights are written into the constitution and others are found in the penumbra of the Bill of Rights.²⁶ Douglas picked up the idea from a dissent in *Olmstead* by Justice Holmes that penumbras, or shadows, of the Bill of Rights are potential origins of privacy rights.²⁷

Ultimately, Douglas concluded that privacy extends to: matters of conscience, sanctity of the home, and sanctity of the person and body.²⁸ He felt strongly the right to privacy was foundational to other rights explicitly provided by the Constitution.²⁹

In *Griswold*, his opinion for the court put into practice much of what Douglas had discussed in *THE RIGHT OF THE PEOPLE*. And it was in *Griswold* that Douglas introduced “zones of privacy” into the lexicon. Douglas, writing for the majority, built on ideas he discussed in *THE RIGHT OF THE PEOPLE*. He specifically identified penumbras of the Bill of Rights as origins of the zones of privacy, with privacy lying within the First, Third, Fourth, Fifth, and Ninth Amendments.³⁰ The First Amendment created a

24. Douglas, *supra* note 23.

25. *Id.* at 89.

26. The natural rights “have a broad base in morality and religion to protect man, his individuality, and his conscience against direct and indirect interference by government. Some are written explicitly into the Constitution. Others are to be implied. The penumbra of the Bill of Rights reflects human rights which, though not explicit, are implied” *Id.* at 89.

27. “My brother BRANDEIS has given this case so exhaustive an examination that I desire to add but a few words. While I do not deny it I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them.” *Olmstead v. United States*, 277 U.S. at 469 (Holmes, J. dissenting).

28. William O. Douglas, *THE RIGHT OF THE PEOPLE* (1958), *supra* note 23.

29. “Much of this liberty of which we boast comes down to the right of privacy. It is reflected in the folklore, which goes back at least as far as Sir William Staunford, that “**my house is to me as my castle.**” But this right of privacy extends to the **right to be let alone in one's belief and in one's conscience**, as well as in one's home.” Douglas, *supra* note 23.

30. “Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.” *Griswold v. Connecticut*, 381 U.S. at 484.

zone of privacy through the right of association, itself a right not explicitly provided for in the Constitution.³¹ The Third Amendment created a zone of privacy from government intrusion through its “prohibition against the quartering of soldiers ‘in any house’ in time of peace without the consent of the owner.”³² This supported a right to privacy in the home.³³ The Fourth Amendment created a zone of privacy because it explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”³⁴ The Fifth Amendment's Self-Incrimination Clause “creates a zone of privacy which government may not force person to surrender to his detriment.”³⁵ And lastly, Douglas argued, the Ninth Amendment also supports a right to privacy because it “provides: ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’”³⁶ To Douglas, the right to privacy did not need to be explicitly provided for in the Constitution because all people had a natural right to privacy, as he wrote in his earlier tome.

Next in the progression establishing zones of privacy were the companion abortion cases, *Roe v. Wade* and *Doe v. Bolton*. *Roe* confirmed that there are zones of privacy.³⁷ It provided that “only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ are included in this guarantee of personal privacy.”³⁸ Privacy is just such a right and that it “has some extension to activities relating to marriage, procreation, contraception, family relationships, child rearing and education.”³⁹ In that regard, the zones of privacy are broad enough to protect a woman's right to abortion, but it is not an absolute right. It also confirmed that roots of the right to privacy lie in

31. *Griswold v. Connecticut*, 381 U.S. 479

32. *Id.* at 484.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. “[R]ecognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.” *Roe v. Wade*, 410 U.S. 113, 152 (1973).

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

39. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

the First, Fourth, and Fifth Amendments, in the penumbras of the Bill of Rights, the Ninth Amendment, and concepts of liberty guaranteed by the first section of the Fourteenth Amendment.⁴⁰

In *Doe*, Justice Douglas penned a concurring opinion in which he broadened his initial zones of privacy from THE RIGHT OF THE PEOPLE to be more inclusive. He also provided more definition than in *Griswold*. His model continued to have three zones which roughly correspond with the earlier zones; however, he provided more detail to broaden the scope of each. “First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality.”⁴¹ This corresponds to the privacy right regarding matters of conscience. “Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.”⁴² This corresponds to the earlier zone regarding sanctity of home. “Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.”⁴³ This final zone corresponds to the privacy right that extends to the sanctity of body/person.

Cases immediately following *Roe & Doe* reflected the existence of different zones of privacy. They include independence to make important decisions and are broad enough to protect a woman from state interference when she chooses to abort a pregnancy.⁴⁴ Other cases focused on the explicit rights of privacy provided by the Fourth and Fifth Amendments.⁴⁵ “In none [of these decisions] is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home.”⁴⁶ On the other hand, some cases have refused to define certain aspects of life,

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

41. *Doe v. Bolton*, 410 U.S. 113 (1973).

42. *Doe v. Bolton*, 410 U.S. 113 (1973).

43. *Doe v. Bolton*, 410 U.S. 113 (1973).

44. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

45. *Payton v. New York*, 45 U.S. 573 (1980).

46. *Payton v. New York*, 45 U.S. 573 (1980).

such as bank records, within a zone of privacy.⁴⁷ Also, the Court has drawn lines in the sand to limit the reach of the zones of privacy. In *Bowers v. Hardwick*, the court limited the right to privacy in a home to legal rights; sexual freedom in the bedroom deemed illegal was not protected from government interference.⁴⁸

The future of the zones of privacy, as they stand today, is at best uncertain. This is because the Constitutional zones of privacy rely on implicit rights from the Bill of Rights and thus are vulnerable to change based on the whim of a judge or the Supreme Court sitting at that moment. Since the time of *Griswold*, there has been a group of unhappy dissenters who have argued strongly against an implicit right to privacy. In more recent years, four justices specifically argued against a general right to privacy in *Casey*,⁴⁹ and most recently, three justices did the same in *Lawrence v. Texas*.⁵⁰ That sentiment is summed up best by Justice Thomas in his dissent in *Lawrence v. Texas*: “I 'can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy,” ... or as the Court terms it today, the 'liberty of the person both in its spatial and more transcendent dimensions.'”⁵¹ It is possible that, with a few additional votes, Justice Thomas's interpretation will succeed and the clock will be reversed to 1964, pre-*Griswold*.

III. A New Framework With Which to Work

A. An Early Model: Concentric Circles

In the past, the zones of privacy have been described in terms of concentric circles. The closer

47. *U.S. v. Miller*, 425 U.S. 435 (1976).

48. “The right pressed upon us here [conduct occurring in the privacy of the home] has no similar support in the text of the Constitution, and it does not qualify for recognition under the prevailing principles for construing the Fourteenth Amendment. ... Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home.” *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986); *Bowers* was overruled 17 years later in *Lawrence v. Texas*, 539 U.S. 558 (2003).

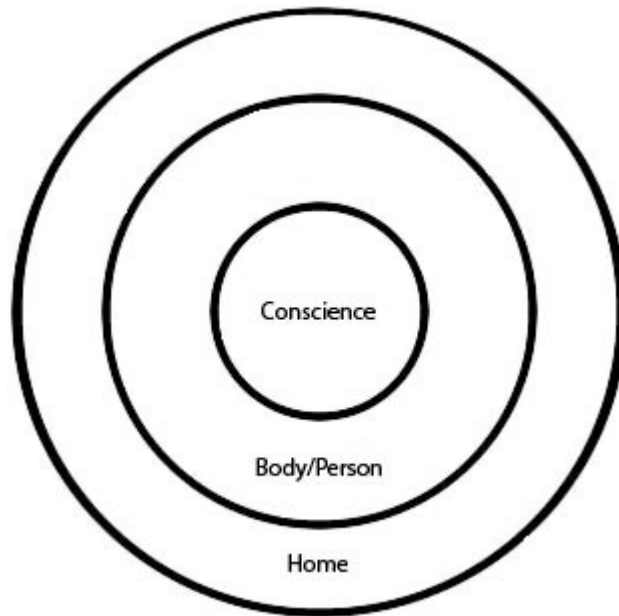
49. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

50. “I 'can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy,” ... or as the Court terms it today, the 'liberty of the person both in its spatial and more transcendent dimensions.'” *Lawrence v. Texas*, 539 U.S. 558, 605-06 (2003)(Thomas, J. dissenting).

51. *Lawrence v. Texas*, 539 U.S. 558, 605-06 (2003)(Thomas, J. dissenting).

one goes toward the center, the more protected that privacy interest is. This model of concentric circles may have origins as early as the Brandeis and Warren article, which spoke of intrusion upon the domestic circle.⁵² In the case of the zones of privacy from Griswold, privacy interests move outward from conscience, to body, to home.⁵³

Figure 1: Zones of Privacy in the Griswold opinion



Similarly, Charles A. Reich has described the concentric circles surrounding property rights as providing privacy protections to an individual. The essence of property as a legal institution is to create and protect certain private rights.⁵⁴ One function of property, as a legal institution, is to “draw a boundary between public and private power.”⁵⁵ Property “draws a circle around the activities of each private individual or organization.”⁵⁶ This circle then provides privacy protections since “[w]ithin that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his

52. “To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.” Warren & Brandeis, *supra* note 1, at .

53. See Figure 1

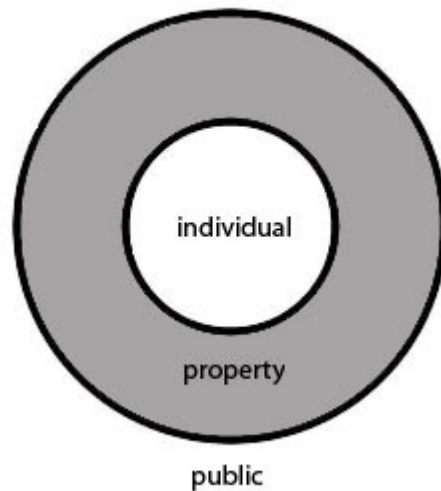
54. Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733, 771 (1964).

55. Reich, *supra* note 54, at 771.

56. Reich, *supra* note 54, at 771.

actions, and show his authority. Within, he is master, and the state must explain and justify any interference.”⁵⁷ This idea was echoed by the Supreme Court in *Payton* when it said that in no Court decision “is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home.”⁵⁸

Figure 2: Zones of Privacy provided by Property



In addition, the same model has been used to describe the broadened zones of privacy Justice Douglas described in his concurring opinion in *Doe v. Bolton*.⁵⁹ In that opinion, Douglas broadened his original zones of privacy from *Griswold* to encompass broader freedoms enjoyed in life. These zones of privacy move outward from an autonomy of the mind, to freedom of basic life decisions, and to freedom of health and movement.⁶⁰

57. Reich, *supra* note 54, at 771.

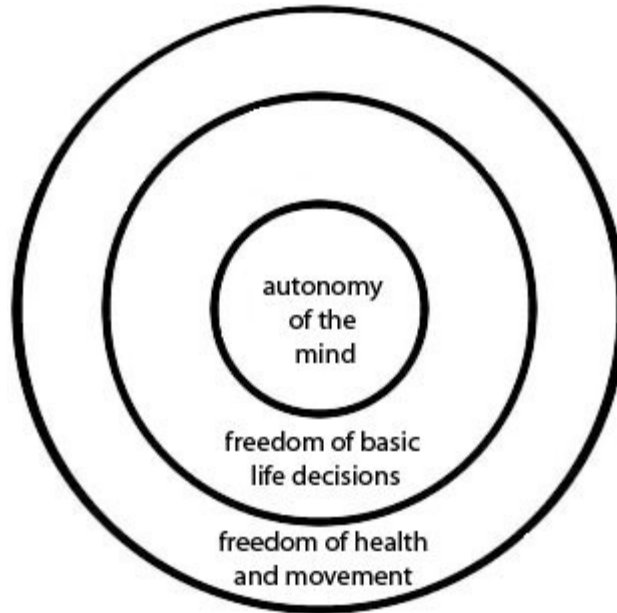
58. *Payton v. New York*, 45 U.S. 573 (1980).

59. *Doe v. Bolton*, 410 U.S. 113 (1973).

60. See Figure 3; *Doe v. Bolton*, 410 U.S. 113 (1973).

Figure 3: Zones of Privacy in Douglas's

Doe v. Bolton Concurring Opinion



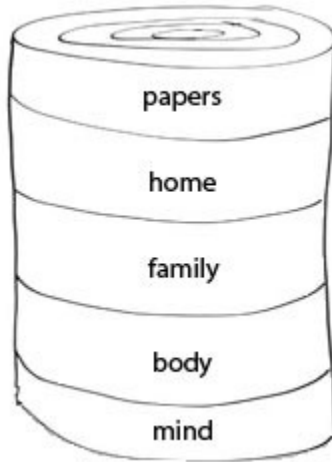
B. A New Model: Stacks

I believe a better way to visualize the variety of privacy interests is to picture a stack of compact discs. Each compact disc represents a different privacy interest or zone stacked atop one another. This visual model can serve as a framework for further identifying and analyzing the zones of privacy.

A. Interests Stacked

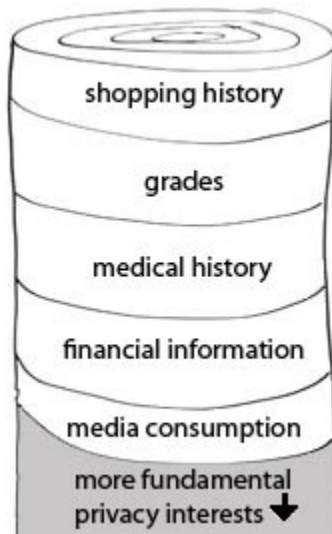
In a stack framework, the more fundamental interests reside at the bottom, or foundation, of the stack. In my version of the stack, the most fundamental rights and privacy interests belongs to the mind, then the body, and on up.

Figure 4: Stack of Privacy Interests



A stack is a more scalable framework with which to consider privacy interests. In addition to the interests in Figure 4, additional interests can be added as they arise.⁶¹ Figure 5 shows how these additional interests sit on top of the more fundamental interests displayed in Figure 4.

Figure 5: Stack of Additional Privacy Interests



A stack can be broken down into generic, high level categories or, like Figure 5, take a sectoral approach that considers privacy on a more granular level. An example that utilizes more generic levels

61. Figure 5 shows how these additional interests sit on top of the more fundamental interests displayed in Figure 4.

of privacy interests are the levels Douglas discussed in *THE RIGHT OF THE PEOPLE*.⁶²

Figure 6: Stack of More Generic Privacy Interests⁶³



C. Cross-Sections

A stack, if viewed as a cylinder, also serves as a multi-dimensional framework. A cross section of each interest can be divided into concentric circles based on the relation to the person in question. I follow the relationships because the right to privacy protects people, not places.⁶⁴

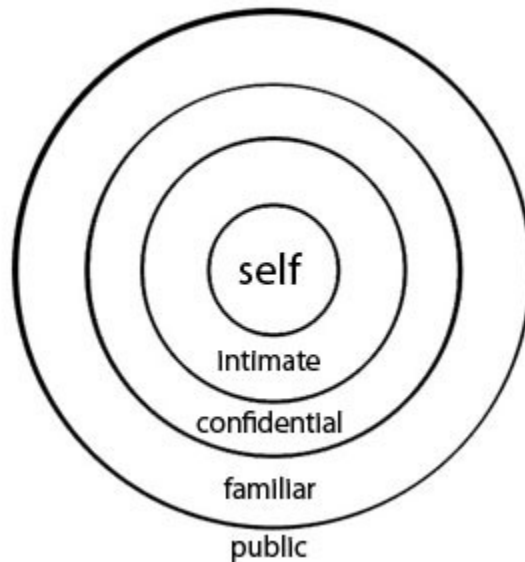
At the center is the individual, labeled Self. This is the relationship an individual has with him or her self, and, it is realized in his or her mind, body, and personal papers and effects. The relationships I propose, moving outward from the center, can be described as: Intimate, Confidential, Familiar, and Public.

62. Figure 6; Douglas, *supra* note 23.

63. Based on the privacy interests cited by Douglas in *THE RIGHT OF THE PEOPLE*. Douglas, *supra* note 23.

64. "[T]he Fourth Amendment protects people, not places." *Katz v. United States*, 389, 411 U.S. 347 (1967).

Figure 7: Rings of the Cross-Section



Intimate relationships, in the first ring from the center, include relationships with a spouse, immediate family members, very close friends who regularly serve as confidants, and special relationships with other people subject to traditional protection in the rules of evidence such as priest, lawyer, and doctor. Essentially, intimate relationships are characterized by intimate acts, conversations, services, or the disclosure of the most sensitive personal information that would make an ordinary person blush or recoil at the thought of neighbors and coworkers discovering. In addition, these intimate relationships extend to relationships involving information that is held on behalf of an individual by agents, such as banks, accountants, email service providers, and secure document storage providers. This level of protection as a result of an agency relationship would be limited to information that is used solely on behalf of the individual and for truly administrative activities. Transformative uses of the individual's information, papers, or effects would not be considered part of an Intimate relationship.

A Confidential relationship, in the second ring from the center, is one in which the person knows some personal details about the individual's life and is invited into that individual's close space, but may not be privy to the most intimate or personal details of that individual's life. Confidential relationships may include extended family, friends, neighbors, and close co-workers. In the business context, these include companies with which the individual does business and that knows and collects some details about that individual. For example, the airline company that the individual travels with would fall under this category.

A Familiar relationship, in the third ring from the center, is also most often called an acquaintance relationship. These relations have some personal knowledge of the individual through casual contact. This relationship might include the grocery store clerk an individual regularly encounters while shopping and who knows little else about that individual, and the friend-of-a-friend who hikes and talks with the individual during a backpacking expedition, but who has limited knowledge of that person.

A Public relationship, in the outer-most layer, is one that commonly occurs on the street, the man you pass and might say hello to, and the police officer who patrols your neighborhood. The Public relationship is characterized by any facet of a person that is open for public inspection, but is distinguished by a lack of knowledge of that person.

D. Piercing the Relationships

Even under the rights explicitly granted in the Constitution, the government's interests are sometimes greater than an individual's. Generally, the government interest is more powerful based on the context of the case. For example, the First Amendment provides freedom of speech. However, the Supreme Court has determined that there are times in which the government interest is stronger than the individual's; therefore, the government may restrict or punish certain expressions.⁶⁵ In such a way,

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First Amendment jurisprudence provides a powerful analogy for the concept of the right to privacy analyzed using the stack framework.

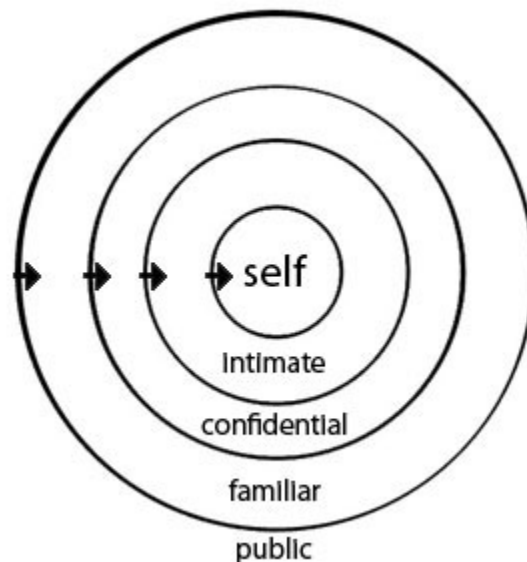
Similarly, with regard to privacy, the government and other parties should have the ability to pierce the boundaries between relationships based on context. Borrowing the levels of scrutiny from Equal Protection jurisprudence, there are multiple levels of scrutiny dependent upon the context in which the privacy right is asserted. Like Equal Protection analysis, privacy is a flexible concept that requires an analysis along a spectrum, or series of spectrums, rather than compartments that are fixed in depth and breadth. Although not universally well loved and, at times, seemingly arbitrary, the three standards of review employed by courts to analyze state action in Equal Protection cases properly fit an analysis of a right to privacy under the stack framework. A court would look at a combination of the several dimensions the stack framework provides in analyzing privacy interests. Those dimensions include how fundamental the interest is, the location in the stack, and the distance of the relationship of the individual to the encroaching party. Ultimately, the closer to the center of the cross-section and the more fundamental the right the more stringent the requirements that are required to breach the boundaries between the relationships. Another option is to follow the lead of Justices Marshall and Stevens to use a sliding scale rather than a more rigid three level scrutiny test.

Strict scrutiny, the highest level standard of review, requires the state's action be necessary to promote a compelling government interest. The more fundamental privacy interests in the lower levels of the stack would require strict scrutiny. Under strict scrutiny, a police officer who demonstrates to a judge that he or she has probable cause to believe an individual is running a criminal operation likely has met the burden of showing a compelling government interest to access that individual's home and file cabinets. Intermediate scrutiny, the second level, requires the state's action have substantial relation to an important governmental interest. Somewhere in the middle of the stack, where the relationships are less strong, the courts should provide intermediate scrutiny to any review of state action. I have not

come up with a good example of the intermediate scrutiny in action.

Rational Basis, the lowest level of scrutiny, only requires the state's action bear a rational relationship to a legitimate governmental interest. A police officer who cites a couple in violation of the local laws after he or she stumbles upon an amorous exchange in the middle of a field in Golden Gate park is likely to meet the rational basis test. Of course, the citation must be based on specific, objective facts based on what the police officer witnesses.⁶⁶ However, as with other fundamental rights, animus toward an affected class or bare desire to harm a politically unpopular group are not legitimate state interests.

Figure 8: Piercing the Relationships in a Cross-Section of the Privacy Interests Stack

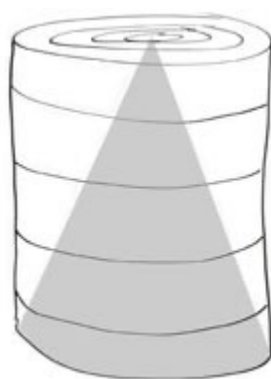


Starting from the very top of the stack where the fundamental privacy interest is weakest, the only protection, if any at all, is at the very center of the Self layer in the cross-section. All a party will need to do to pierce the relationships at this high level in the stack is to meet a rational basis test which requires the inquiry bear a rational relationship to a legitimate interest. As we move down the stack, the

66. “the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.” *Brown v. Texas*, 443 U.S. 47, 51 (1979)

fundamental privacy interests increase in strength, and the zone of privacy will expand until it covers all rings of the most fundamental privacy interest: the mind. At this foundational level, any and all attempts to cross the boundaries between relationships will receive strict scrutiny which requires the inquiry be necessary to promote a compelling interest akin to (or potentially stronger than) probable cause. In that regard, the shadow cast upon the stack by the stronger privacy interests of the individual over the state will resemble a cone.⁶⁷

Figure 9: A Cone of Privacy Interests



The argument remaining, which will be argued through the political process of the courts, is where each remaining privacy interest falls within the stack and at what levels within the stack of privacy interests will the three tests be used. That will require the courts to balance the interests of both parties. Or, as Justice O'Connor said it in *Casey* regarding substantive due process rights, “Neither the Bill of Rights nor the specific practices of States at the time of the Fourteenth Amendment's adoption marks the outer limits of the substantive sphere of such 'liberty.' Rather, the adjudication of substantive due process claims may require this Court to exercise its reasoned judgment in determining the boundaries between the individual's liberty and the demands of organized society.”⁶⁸ Similarly, applying the right to privacy will require reasoned judgment to determine the boundaries between the

67. As depicted in Figure 9.

68. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

individual's privacy interest and the demands of our organized society.

Ultimately, there are three primary questions when using the stack framework analysis. First, where in the stack is this privacy interest? In other words, how fundamental is the privacy interest. Second, where in the cross-section is the relationship? Third, what level of scrutiny should be applied?

V. Examples and Analytical Exercise

It does no good to provide a framework and not show how it works. The following examples provide how I believe the framework should operate. As this is newly developed, consider my examples with an open mind and explore for yourself how this framework would operate in your ideal world; together, our visions through dialog will produce the optimal analytical usage.

The stack framework is scalable and can provide a tool with which to analyze the different privacy interests under different contexts. The original goal, and the impetus behind the creation of the framework, was to create an analytical tool that could be used to analyze privacy interests affected by new technologies. But additionally, the framework also can be used to analyze with traditional privacy interests such as those regarding family life.

A. Privacy Interests Affected by Advancing Technology

As discussed earlier, arguments for the right to privacy ebb and flow with the introduction of new technological advances and innovations that probe more deeply into an individual's private life, whether it be in the home, the family, or even the mind.

1. Telephone

Innovation in the technology behind personal communications has been at the forefront of the call for privacy rights for nearly a century. With the advent of the telephone, two individuals a long distance away from each other could have a conversation with each other as if they were in the same room. The expectation was that the telephone conversation was confidential, and only heard by the two

people on the opposite lines of the conversation. This was the expectation at issue in *Olmstead*.⁶⁹

Using the stack framework analysis, the privacy interests in a telephone conversation between two people would depend on the context of the conversation. For purposes of this example, ignore what is currently in statute and common law and consider a telephone conversation in a legal vacuum. There is a difference in the privacy interests in a conversation between two people who are each in the privacy of their own home and two people who are conversing while one is speaking loudly in a fairly quiet restaurant.

a. Telephone Conversation Between Two People, Each in Their Own Homes

In the first example, two individuals are speaking to each other through a telephone while in their own respective homes. The first question we ask is where in the stack does each telephone call participant's privacy interest lie. In this case, each participant will have a privacy interest in his or her home that covers the telephone conversation. Each would be treated as if either was in the other participant's home, chatting away. The privacy interest in the home lies near the bottom of the stack framework in one of the more foundational levels, tipping the balance in favor of the two telephone call participants.

Second, we need to determine where the relationships between the eavesdropper and each of the participants are in the cross-section. In this case, it is an agent of the government which has a public relationship with the participants. It should not matter what the relationship is between the participants. What matters is the relationship each has with the government. If one participant happens to be an undercover government agent, then the government itself will sit in the shoes of its agent in regard to the relationship with the other participant.

Third, we need to ask: what level of scrutiny would the government need to satisfy for it to pierce the boundaries of its relationship with the participants and listen in on their telephone

69. *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

conversation? Since the privacy interest is related to the home, a foundational interest, and since the government is reaching across the boundaries in its relationship, the government will therefore need to show that wiretapping the telephone line and listening in is necessary to promote a compelling government interest. This strict scrutiny is realized as the requirement for probable cause which the government will need to meet before it is granted a warrant.

b. Telephone Conversations Between Two People, One in the Home and the Other in a Quiet Restaurant

In the second example, two individuals are speaking together over a telephone. One participant is at home, while the other is speaking loudly into his mobile phone in a quiet restaurant filled with patrons.

The first question is where in the stack lies the privacy interests of the two participants of the telephone call. Like the first example, the person at home has an expectation of privacy tied to his or her home. This expectation can change based on whether they know or should know the other phone call participant is speaking loudly in a public place. On the contrary, the person in the restaurant has a more limited privacy interest, related to privacy in a public place. The portion of the conversation in the restaurant is public and is not protected by the privacy interest of the person who is in the privacy of his or her own home. The privacy interest of the phone call participant sitting in the restaurant would be greater if he or she instead takes reasonable care not to be heard, such as speaking softly while in a telephone booth.

Second, we need to ask where in the cross-section lies the relationship between the government agent listening in to the conversation and the two participants. The first participant has a similar relationship as in the first scenario. The second participant who is speaking loudly into his mobile phone has a public relationship with the government and those in the restaurant who hear his or her end of the conversation. If this second participant takes reasonable care not to be heard, then the

relationship with those around would still be public, but greater protection of the privacy interest would be deserved.

Third, we must ask what level of scrutiny should be applied. With regard to the participant at home, the scrutiny applied would be similar to that used in the first example since he or she is at home. With the second participant, the government would only need to show that its actions bear a rational relationship to a legitimate governmental interest, if even. Since the second participant's side of the conversation is public and around others with whom he has a public relationship, the government might not even need to justify an intrusion since there wasn't one.

2. Email

More recently, the concerns about personal communication have been rekindled by calls for a right to privacy in email communication. Similar to the telephone conversation, the privacy interests in email likewise is controlled by context. Ignore what is currently in statute and common law for a moment and consider an email in a legal vacuum. An email is an electronic communication containing text and pictures that is sent via the Internet. It is analogous to a letter sent via the post office and thus also to personal papers.⁷⁰ Not all letters and packages received through the postal service are treated the same. Some are immediately discarded or shredded, depending on sensitivity, while others are stored at home, in a safety deposit box, with an attorney for safe keeping, or any number of places individuals choose to handle an item of mail received. Likewise, email is treated differently by the recipient based on context. Some email is deleted immediately while other email is left on the email server, stored indefinitely within the email account, and in some cases forwarded on to others. In this way, email is similar to regular mail received through the postal service and should receive a similar level of privacy protection.

70. "The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant." *Ex parte Jackson*, 96 U.S. 727 (1877).

Let us continue viewing email in a legal vacuum, this time providing analysis using the stack framework. An email sent between two individuals using personal email accounts and downloaded from a personal network to each individual's personal computer will fall within the privacy interests regarding personal papers and personal effects. These interests are closer to the foundation of the stack where privacy protections are greater. The privacy interest in personal papers and effects is protected by the Fourth Amendment protections for an individual “in his person, ... papers, and effects.”⁷¹ If the relationship with the sender of the email is intimate, whether it be a spouse, family member, or attorney, the email will receive a greater amount of protection since the relationship shared by the two individuals is Intimate. However, if the sender sent unsolicited commercial email (i.e. spam), then the relationship is public and not very close so the email would not receive much protection considering it from the cross-section. A government agent requesting access to email sent between two individuals would need to meet strict scrutiny by showing probable cause and securing a warrant before getting access to their email.

On the flip side, email sent by an individual to public listserv forum would be provided very little, if any, protection. First, the email was sent to the public so it no longer falls within personal papers or effects in the stack framework. At best, it belongs some place much higher up in the stack framework. At worst, it is not a privacy interest represented in the stack because there is no real expectation of privacy. Also, the individual's relationships with the recipients are Public in the cross-section and no boundaries between relationships need to be crossed. A government agent seeking access to the email will not need to meet any burden to access such email.

In between the two above scenarios fall Web-based email services such as Yahoo! Mail, Gmail, and Hotmail, also referred to as webmail. In the webmail context, individuals have email accounts with the webmail provider of their choice. The webmail provider stores email on its servers so the individual

71. U.S. CONST. amend. IV.

may access their personal email whenever they would like, and from any computer connected to the Internet. There are two possible scenarios.

a. Webmail Provider, Not an Agent

In this first scenario, the email provider does not serve as the agent of the individual when processing or storing email and may use the email for other, potentially transformative purposes.

We begin by asking where the privacy interest lies in the stack. In this scenario, the email does not qualify as personal papers because the webmail provider can use the email for purposes beyond processing and storing it. Some privacy interest may still remain if the webmail company does not disclose the email contents to others, although it is not clear where that privacy interest is until we know what the company does. A use that is highly transformative of the purpose of the email decreases the privacy interest in the email for the individual. For example, using the email contents and contacts to serve targeted advertisements based on what the webmail provider determines about the individual is highly transformative, in which case, the privacy interest would weaken and move up further in the stack.

Next, we determine what type of relationship exists between the government, the sender, and the recipient. Generally, the government relationship is public with both the individual and the web mail provider. Here, the relationship between the individual and webmail provider is likely Confidential.

Lastly, we need to determine the level of scrutiny a court will apply in allowing the government access to the email. Since the overall privacy interest is intermediate, somewhere in the middle of the stack, and the relationship between the individual and web mail company is Confidential, then the government will need to meet an intermediate scrutiny and show the request for the email (state action) has a substantial relation to an important governmental interest. It is also possible, depending on how transformative the web mail provider's use of the individual's email, is that the government merely

needs to provide a rational basis for its request for the email, only needing to show the request bears a rational relationship to a legitimate interest.

b. Webmail Provider, Operates as an Agent

In this second scenario, the webmail provider may serve as the agent of the individual, in which case it processes and stores email solely on behalf of the individual. In such a case, the relationship between the individual and webmail provider is covered by the privacy interest related to personal papers, a foundational privacy interest protected by the Fourth Amendment. The individual and webmail provider have an Intimate relationship, since the web mail provider is acting as the agent of the individual in the processing and storage of the personal papers with no other independent right to use the content. This would allow the email to remain personal papers and retain the privacy interest attached to personal papers. Since email is protected by a fundamental privacy interest level in the stack and the relationship is Intimate, the government will need to meet a strict scrutiny test and show probable cause to a judge and be granted a warrant before receiving access to the content of the email.

There are likely some arguments that the relationship between an individual and their agent should not be considered Intimate and that these agents do not fill a similar role as a spouse, attorney, or priest. In response, I would like to point out that it is very difficult to get by in our modern society without relying on service providers to provide certain complex tasks such as operating an email service. Using an agent to provide such a fundamental service should not strip an individual bare of privacy protections granted by the Fourth Amendment. For that reason, relationships with agents who handle highly confidential personal papers and effects and the information they produce need to be protected as would a relationship with a spouse, attorney, or priest.

B. Traditional Privacy Interests

In addition to considering technological advancements, the stack framework can be utilized in more traditional privacy arenas. One privacy interest that has been well established is the interest

regarding family life. In *Roe*, the court said that decisions by the Court “make it clear that the right [to privacy] has some extension to activities relating to marriage, ... procreation, ... contraception, ... family relationships, ... and child rearing and education,⁷² That sentiment has been confirmed more recently in *Casey*⁷³ and *Lawrence*⁷⁴

These privacy interests regarding family life provide several interesting scenarios with which to test the stack framework, particularly the upbringing and education of children and abortion of a pregnancy. Each provides an interesting contrast and counter balance to the other.

1) Parents, Choice Regarding How a Child is Educated – Interests of Child versus Parent

The liberty ... of parents in the care, custody, and control of their children ... is perhaps the oldest of the fundamental liberty interests recognized by” the Supreme Court.⁷⁵ A parent's right to direct the upbringing and education of children under their control without government interference is also one of the most cited of implicit privacy rights. This privacy right was clearly laid down, seemingly in stone, in *Meyer v. Nebraska*,⁷⁶ was repeated in *Pierce v. Society of Sisters*,⁷⁷ and has been repeated many times since. Implicit in all of those cases that relied on this right is the ability of the state to stand in to represent the privacy interests of the children involved. Even in the time of *Meyer*, all states had compulsory education laws that required some form of education for children.⁷⁸ The right that inhered in the parents or guardians was and is the decision about who may educate a child. The state is entrusted

72. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)).

73. “Our precedents 'have respected the private realm of family life which the state cannot enter.' 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.” *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. at 851 (1992).

74. Confirmed *Casey* which held: “that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.” *Lawrence v. Texas*, 539 U.S. 558, 574 (2003)

75. *Troxel v. Granville*, 530 U.S. 57, 65 (2000)

76. *Meyer v. Nebraska*, 262 U.S. 390 (1923)

77. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)

78. “Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.” *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

with ensuring reasonable guidelines and systems to provide the qualified instruction of children.

One recent development in California shone a spotlight on this implied privacy right to control a child's education. A state appellate court ruled in February 2008 that parents who home school their own children must have credentials to teach in California, otherwise they violate state laws and regulations regarding instruction.⁷⁹ It also added that “parents do not have a constitutional right to home school their children.”⁸⁰ That ruling set off a slew of news articles and set home school activists in motion who decried the ruling as a Constitutional violation.⁸¹

In the California case, the parents enrolled their children in a private school that is specifically set up to provide assistance to families who home school their own children.⁸² The class room is set up at home and the mother provides the instruction.⁸³ A lawyer appointed to represent the interests of the children in an abuse complaint asked the court place the children in a public or private school where adults can monitor their well-being.⁸⁴ One of the arguments was that the mother is not qualified to teach the children.⁸⁵

Such a case represents a fine balance between the privacy interests of the parents pertaining to a child's rearing and education, and the state which seeks to represent the interests of the child. I also believe this a fitting example with which to test the privacy stack framework.

The first task is to identify the privacy interest and its location in the stack. In the stack framework, the privacy interest of parents in making educational choices for their family is near the bottom of the stack where the fundamental layers lie. The child also has a privacy interest in his or her own mind and body which is likewise near the bottom of the stack.

79. *In re Rachel L.*, No. B192878 (Cal. Ct. App. 2008)(unpublished, available at: <http://www.courtinfo.ca.gov/cgi-bin/opinions.cgi>)(last visited May 13, 2008).

80. *Id.* at 3.

81. The court has since rescinded its opinion and set the case for a rehearing in June 2008.

82. *In re Rachel L.*, at 12.

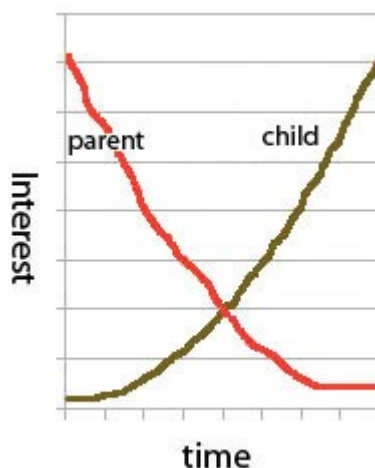
83. *Id.*

84. *Id.* at 3.

85. *Id.* The mother lacks a high school diploma, last completing eleventh grade.

Left unsaid in the line of cases since Meyer is that the parent's privacy interest is only temporary and decreases with time. Early in children's lives parents' interest in the decision making regarding children education is strong and outweighs children's own privacy interest in their mind and body and in directing their own life. children's interest grows progressively as they age and mature until children are legally considered able to make decisions for themselves, whether as emancipated minors or adults.

Figure 10: Interests of Parents and Children



Next, we need to determine where the relationships lie in the cross section. Like most of the other situations discussed in this paper, the relationship between the parents and government is distant and out in the Public realm. However, the relationship between the child and parent is Intimate. Generally, the state is unable to reach into the decision making of the parent unless it is forced to step into the shoes of the child to represent the child's interests. In the California case, the state was asked to step into the shoes of the child by an attorney appointed to represent the interests of the child in a child abuse case. As a result, the state entered as a representative of the child in that child's educational interests. In such a role, the state does not have full access into the private life of the parents but can require particular responsibilities of parents, specifically that the child must be enrolled in a school

environment and receive a minimum education. An additional way the state could step into the shoes of the child and pierce the relationship with the parents is if the parents flagrantly violated the reasonable guidelines enacted by the state and held back the child from systems that provide the qualified instruction. For example, if the child is caught committing petty crimes during school hours and it is found the parents did not educate the child at all or send him to school, then the state could step into the shoes of the child to enforce the child's interests.

Lastly, we need to determine the level of scrutiny to be applied by a court using the stack framework. It is nearly impossible to avoid a case-by-case balancing test to consider the conflicting interests of two individuals, in this case, the parents and the state via the interests of the child. The parents have a privacy right to decide or choose the education of their child. The child, likewise, has a privacy right, this one regarding control over mind and body. I would also argue the child has a fundamental right to attend school against his or her parents' wishes. Although the Supreme Court has expressly rejected the argument for a fundamental right to an education in *San Antonio Independent School District v. Rodriguez*, that case can be differentiated from a case regarding a privacy interest.⁸⁶ Rodriguez involved a question about what level of education a state must provide under an Equal Protection challenge. A case regarding a child's privacy interest is about whether the parents are providing the minimal level of education required by the state. In Rodriguez, the question revolved around state actors and in the question here regarding whether a parent may home school their own child revolves around a private actor, the parent.

Because this is a case of fundamental interests of individuals conflicting, I would argue the state would need to satisfy a level of intermediate scrutiny, which requires the state to ensure stepping into the shoes of the child to represent the child's interest is necessary to promote a compelling government interest. "The American people have always regarded education and acquisition of knowledge as

86. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

matters of supreme importance which should be diligently promoted,⁸⁷ and it is well established that the government has a compelling interest in providing and requiring education to accomplish that goal.⁸⁸

The State of California provides four broad educational choices for parents of mainstream children.⁸⁹ The first option is for parents to enroll their child in the traditional public school.⁹⁰ The State pays, through tax dollars, for teachers and a facility.⁹¹ It sets guidelines for curriculum, educational levels of teachers, and tests students.⁹² The second option allows parents to make arrangements with a local school district to enroll the child in an independent study program operated by that local school district.⁹³ The child will not attend the local public school but will receive instruction at home or elsewhere with assistance and materials supplied through the school district.⁹⁴ It also requires the child's education be supervised, if lightly, by a credentialed teacher and the child undergo success testing with their peers.⁹⁵ The third option allows parents to enroll a child into a private school for full-day instruction.⁹⁶ The fourth option allows credentialed teachers, whether parents or private tutors, to teach the child at home without much interference from the government.⁹⁷ The person providing instruction must be credentialed in the subject level being taught.⁹⁸

In the California case, the parents enrolled their children in a private school that provided an independent study program that allowed the mother to provide instruction at home without qualifying for a teaching credential.⁹⁹ The parents' choice is outside the scope of the four options provided by the

87. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

88. My source is the California Department of Education web site (<http://www.cde.ca.gov/>). I misplaced my direct links.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. My source is the California Department of Education web site (<http://www.cde.ca.gov/>). I misplaced my direct links.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *In re Rachel L.* at 12-14.

State. The parents likely argue their interest in directing their children's education is an absolute right. However, there are no truly absolute rights.¹⁰⁰ The government's interests are sometimes greater than an individual's, even with regard to the rights explicitly granted in the Constitution. Even in the earliest cases which discussed a privacy interest in parents in the care, custody, and control of their children, the State was provided an ongoing role in regulating education of children. In *Pierce v. Society of Sisters*, it was accepted that the State has the power to reasonably “regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.”¹⁰¹ In this regard, the State has a right to provide some regulation that affects even private schools or, more appropriate in this case, a home schooling environment to ensure children are receiving a minimum level of instruction.¹⁰² Under the stack framework, the state represents the interests of a child, so it is likely the state will succeed in meeting its burden using the stack framework if it is found the parents did not enroll their child in a qualified program and the state was reasonable in its regulations and programs it provided.

2) Woman's Choice to Abort a Pregnancy – Interests of Woman Versus Fetus

A nice contrast to the privacy interests of parents in the education of their child is the privacy interests of a woman in her body regarding abortion.

When viewing a woman's privacy interests in her body, we need to first look at where in the stack her interest lies. It is one of the two layers at the very bottom of the stack, deserving of the highest level of protection. This right of personal privacy also includes “the interest in independence in

100.

101. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

102. “Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto.” *Meyer v. Nebraska*, 262 U.S. 390 (1923).

making certain kinds of important decisions.”¹⁰³ One example is “[t]he decision whether or not to beget or bear a child.”¹⁰⁴

The second question is where in the cross-section the woman's interest lies in relation to the government. As elsewhere in this paper, the relationship between a woman and government are weak. In this situation, because it is in herself that this interest lies, it is at the furthest distance from the government. Considering the cross-section of a privacy interest under the stack framework, the further the intruding party is from the center, the more that is required to pierce the veil between each relationship. If you add in a fetus to the equation, the relationship changes. This is because the interest of the state in the viability of a fetus has been found to reach into a woman's interest in her body that is protected by a right to privacy.¹⁰⁵ Early in the pregnancy, the interest of the woman in her body and procreation decision making are stronger than the state's interest in the fetus. However, the State's interest grows with the progression of the pregnancy and the relationship grows closer between the state's interest in a viable fetus, and the woman.

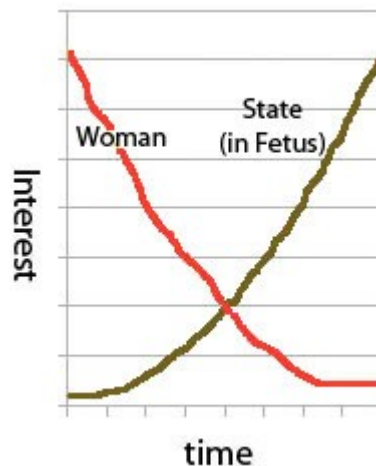
Figure 11: Interests during pregnancy¹⁰⁶

103. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

104. That decision “is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy.” *Carey v. Population Services*, 431 U.S. 678, 685 (1977)

105.

106. The relationship between the woman and state grows lock-step with the interest of the state through the fetus during pregnancy. The further the pregnancy progresses, the closer the relationship between the woman and the state, as a



Lastly, we need to look at the level of scrutiny the state must overcome to reach beyond the boundaries of its normal relationship with the woman and represent the interests of the fetus. The level of scrutiny is likely to follow its interests in the fetus in reverse. As the fetus progresses, the state's interests grow, and as the state's interests grows, the scrutiny its action will receive will drop from strict, to intermediate, to rational basis, and possibly no scrutiny at all.

VI. Extending the Stack Framework

Although this paper directly addresses the government intruding upon individuals' privacy, the framework likewise can be used to analyze the actions of private actors taken against individuals. In addition, the meaning of individual could also be broadened to include all legal person, including citizens, residents, illegal residents, corporations, etc.

It is conceivable that under this framework, individuals and companies that specialize in aggregating personally identifiable data no longer will be able to operate without a more direct relationship with the individual. The relationship with the individual in the cross-section of the stack will be at its greatest distance, in the Public area. Without a direct relationship, such private actors will representative of the fetus, grows. This is visualized in Figure 11.

find it difficult to cross the boundaries between the relationships.

A lack of direct relationship is not essential; however, such companies will need to provide full access to their databases so that individuals may view, correct any inconsistencies, and control access to such data held by the data aggregator. Without a more direct relationship, such companies can collect personal information that is public, but will not have the ability to collect data from entities that hold a closer relationship with an individual.

Likewise, companies that have a closer relationship with the individual will need consent to share individuals' personal information with each additional entity, even related entities such as subsidiaries. Contracts of adhesion that provide a Hobson's choice in requiring consent to do business with the entity will not be enforceable and should not be considered as adequate or informed consent. Of course, the individual's interest would vary based on where it is in the stack. For example, financial information that is collected through banks and other financial institutions is a stronger interest for an individual than real property purchase records which are public records and available for review in county offices.

VII. Conclusion

This paper introduces a more responsive framework with which to consider privacy interests and help the dialog regarding the right to privacy, and it demonstrates how the framework can be utilized when considering privacy rights. The best way to develop the framework further is for others to test it by applying the framework to specific situations, both real and fictional.

Such an analytical tool is important because the future of the current zones of privacy is at best uncertain. The zones of privacy under the Constitution currently rely on implicit rights from the Bill of Rights, and thus are vulnerable to change based on the whim of a judge or the Supreme Court then sitting. Since the time of *Griswold*, a group of unhappy dissenters noted earlier have argued strongly

against an implicit right to privacy. In more recent years, four justices have specifically argued against a general right to privacy in *Casey*¹⁰⁷ and most recently three justices in *Lawrence*.¹⁰⁸

In addition, the framework is flexible enough to use with regard to private actors if privacy laws were extended to apply to such parties.

107. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

108. Justice Thomas, in dissent: "I can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy," ... or as the Court terms it today, the "liberty of the person both in its spatial and more transcendent dimensions." *Lawrence v. Texas*, 539 U.S. 558, 606 (2003)(Thomas, J. dissenting).