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PRIVACY'S PLACE AT THE TABLE: A REFLECTION ON  
RICHARD TURKINGTON'S APPROACH TO VALUING  
AND BALANCING PRIVACY INTERESTS

DORIS DELTOSTO BROGAN\*

I. INTRODUCTION

- Regarding NSA mass data collection: *"If you have something to hide, then I'd be worried. Otherwise, who cares?"*<sup>1</sup>
- Regarding the hacking and publication of naked pictures of Jennifer Lawrence: *"Moral to the story. Don't have any pictures taken that you don't want the world to see. Simple as that."*<sup>2</sup>
- Regarding Google's unauthorized collection of Wi-Fi signals from tens of millions of homes: *"No harm, no foul."*<sup>3</sup>
- Regarding the question of how much privacy should be sacrificed in order to safeguard the United States from foreign attacks: *"Frankly, I have long ago given up the idea that my life is private."*<sup>4</sup>
- Regarding privacy generally: *"Privacy as we knew it in the past is no longer feasible . . . How we conventionally think of privacy is dead."*<sup>5</sup>

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\* Professor of Law, Villanova University Charles Widger School of Law. My thanks to Villanova Law School for its support, and to my research assistants, Hayley Lenahan and Aya Samra, for their invaluable assistance.

1. Kevin A. Kepple, Jeff Dionise & George Petras, *Sacrifice Privacy for Security? Your Say*, USA TODAY (June 9, 2013, 6:59 PM), <http://www.usatoday.com/story/opinion/2013/06/09/nsa-leak-phone-records-your-say/2406103/> [<http://perma.cc/QWG7-WD2G>] (featuring Facebook comment written by Maggie Diaz Saldivar).

2. Sue Bibbens Barkley, Comment to *Nude Photos of Jennifer Lawrence Leaked Online by Hacker*, FACEBOOK (Sept. 1, 2014, 2:22 PM), <https://www.facebook.com/FoxNews/posts/10152460635396336> [<https://perma.cc/BG4F-H8Z6>].

3. Martha Neil, *Google in Potential Showdown over Wi-Fi Data Debacle; 'No Harm, No Foul,' Says CEO*, A.B.A. J. (May 19, 2010, 12:21 AM), [http://www.abajournal.com/mobile/article/google\\_in\\_potential\\_showdown\\_over\\_wifi\\_data\\_debacle\\_no\\_harm\\_no\\_foul\\_says\\_ce/](http://www.abajournal.com/mobile/article/google_in_potential_showdown_over_wifi_data_debacle_no_harm_no_foul_says_ce/) [<https://perma.cc/N3NF-YAVS>] (quoting Eric Schmidt, CEO of Google) (internal quotation marks omitted).

4. Geri Spieler, *What Price Safety over Privacy: A Slippery Slope*, HUFFINGTON POST, [http://www.huffingtonpost.com/geri-spieler/what-price-safety-over-pr\\_b\\_1666772.html](http://www.huffingtonpost.com/geri-spieler/what-price-safety-over-pr_b_1666772.html) [<http://perma.cc/WEC6-6G6E>] (last updated Sept. 26, 2012).

5. Richard Carter, *Privacy Is Dead, Harvard Professors Tell Davos Forum*, YAHOO! (Jan. 22, 2015), <https://www.yahoo.com/tech/s/privacy-dead-harvard-professors-tell-davos-forum-144634491.html?nf=1> [<https://perma.cc/7WX8-2B2F>] (alteration in original) (quoting Margo Seltzer, Harvard Computer Science Professor) (internal quotation marks).

PRIVACY has gone from a somewhat esoteric topic that rarely arose outside of academic circles to a topic that dominates the news cycle, social media, legislative debates, and our daily conversation. Much of the discussion treats this critical, complex issue with glib simplicity. This will not do. Drawing primarily on one of two privacy articles by Professor Richard Chase Turkington published in the *Villanova Law Review*, this Essay seeks to anchor these important conversations about privacy with a more informed conceptualization of privacy, and to suggest employing a method for considering how best to accommodate privacy and other very real competing interests in a rational and effective way that gives all competing interests their due.

Professor Richard Turkington,<sup>6</sup> published two articles dealing with privacy in the *Villanova Law Review: Confidentiality Policy for HIV-Related Information: An Analytical Framework for Sorting Out Hard and Easy Cases (Hard and Easy Cases)*,<sup>7</sup> and *Legal Protection for the Confidentiality of Health Care Information in Pennsylvania: Patient and Client Recovery for Unauthorized Extra-Legal Disclosure*.<sup>8</sup> I will focus primarily on the former piece, *Hard and Easy Cases*.

First, I will explore what Turkington called the condition of privacy. I agree with privacy expert Daniel Solove that no tight, all-encompassing definition of privacy can be articulated.<sup>9</sup> Instead, an evolving conceptualization extrapolated from specific contexts provides the most useful foundation for ongoing considerations of privacy.

Second, I take the position that invading or disrupting that condition of privacy must be understood as a harm in and of itself, regardless of

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6. Richard Turkington joined the Villanova Law School faculty in 1977 and taught until weeks before his untimely death in 2004. Over his twenty-seven years here at Villanova Law, he contributed several articles to the *Villanova Law Review*. He also worked with the *Villanova Law Review* in putting together several important symposia focusing on torts, privacy, and other areas. After his death, Richard Turkington's scholarship was the focus of a symposium on the law of privacy in the new millennium, a program that drew some of the great thinkers in the dynamic area of privacy law to reflect and build upon his pioneering work in privacy law. The proceedings of that symposium were published in Issue 4 of Volume 51 of the *Villanova Law Review*. The article this Essay considers, and a second article on confidentiality of medical records, contributed to the *Villanova Law Review's* reputation, having been cited in dozens of judicial opinions, and in leading journals, including those of NYU, Cornell, Wisconsin, Texas, and the Harvard Journal on Legislation. In short, Turk's contributions to the law review spanned almost half of the six decades of publication we now celebrate and were invaluable to the *Villanova Law Review's* evolution and maturation.

7. Richard C. Turkington, *Confidentiality Policy for HIV-Related Information: An Analytical Framework for Sorting Out Hard and Easy Cases*, 34 VILL. L. REV. 871 (1989) [hereinafter *Hard and Easy Cases*].

8. Richard C. Turkington, *Legal Protection for the Confidentiality of Health Care Information in Pennsylvania: Patient and Client Recovery for Unauthorized Extra-Legal Disclosure*, 32 VILL. L. REV. 259 (1987) [hereinafter *Confidentiality for Health Care Information*].

9. See Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1088 (2002).

whether negative consequences result. That is, there is an importance to protecting privacy that is distinct from and at least as important as that defined by a consequentially-focused analysis. I mean to turn the analysis away from the default approach that focuses on harmful outcomes—for example, disclosing a long-ago criminal conviction that causes an individual to lose a job offer or publicizing a naked photo that embarrasses the subject—and toward an analysis that recognizes that whether or not harmful consequences ensue, the fact of disruption of the condition of privacy in and of itself is a harm worth recognizing. In my analysis, I fall somewhere between Ronald Dworkin's absolute, intrinsic-value position which Turkington endorses, although not fully,<sup>10</sup> and Solove's more instrumentally- or pragmatically-based approach to privacy.<sup>11</sup>

Building on this, I will challenge the careless, often casual way the word *privacy* is tossed about in the contentious debates of our day by experts and ordinary citizens. Whether opining in newspaper or magazine articles, holding forth in Congress or in board rooms, arguing in a bar or over dinner, or engaging in punditry in any of the many social-media venues, so many speak with such absolute certainty, and characterize one of society's most vexing topics with a glib simplicity that cannot capture its important intricacies and nuances. This over-simplification distorts the discussion in dangerous ways. Individuals, courts, legislators, policy makers, and corporate entities, to name a few, make far-reaching decisions that implicate crucial privacy interests daily. Should we not have a better understanding of what we are talking about? While I have few illusions that this modest Essay will influence Buzzfeed, Upworthy, or similar clickbait websites, the discussion is worth having for the thoughtful among us, and especially for those who would shape opinion, set policy, and make and interpret our laws.

From here, I argue that in addition to more clearly and carefully conceptualizing privacy, we must raise the profile of privacy so that in debates where privacy interests are in play, those interests are given adequate consideration from the start. That is, in these important discussions, we start with privacy at the table—recognizing with greater sensitivity when a privacy interest is involved and ensuring that privacy interests figure accurately into the equation.

Against this background, I will apply the analytical framework Turkington proposed in his 1989 article, *Hard and Easy Cases*—a balancing reminiscent of Learned Hand's negligence formula in *United States v. Carroll Towing Co. (Carroll Towing)*<sup>12</sup> and see how well it stands up in 2015, transferring it from the AIDS/HIV controversy where he set it to some of today's hot button issues.

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10. See *Confidentiality for Health Care Information*, *supra* note 8, at 268 n.8 (citing RONALD DWORIN, TAKING RIGHTS SERIOUSLY 22–28 (1978)); see also *Hard and Easy Cases*, *supra* note 7, at 874.

11. See Solove, *supra* note 9, at 1145–55.

12. 159 F.2d 169, 173 (2d Cir. 1947).

This idea of balancing does not seem revolutionary—and some will say that we already do that. Of course we do . . . *sometimes*. As noted above, however, my concern is that in too many of the most important conversations, privacy is not even considered, and even if it is, privacy interests are dismissed too facilely. Applying Turkington’s balancing formula, along with a clarified understanding of privacy and its value, will provide a paradigm for ensuring that privacy interests are calculated appropriately into the equation as we accommodate important interests.

## II. PIONEERING PRIVACY

Richard Chase Turkington was a teacher, a scholar, and a mentor; he was a deep, incisive thinker. He brought to his teaching and to his scholarship the richness of multiple conceptual lenses: he taught Torts, Constitutional Law, Administrative Law, Conflict of Laws, and eventually Privacy, a course of his own creation.<sup>13</sup> A course on privacy was quite unheard of in law school curricula in the early seventies when it was introduced at Villanova.<sup>14</sup> In addition to his depth in law, Turkington was a serious student of philosophy—crucial to his understanding of privacy.

Greg Magarian described Turkington as having an “omnivorous mind [that] reached across disciplines and doctrines to generate unprecedented insights about . . . privacy . . . .”<sup>15</sup> That omnivorous mind and Turkington’s insatiable intellectual curiosity shaped his conception of privacy—those qualities gave him a compound vision that helped make him one of the early privacy prophets. Again, in Magarian’s words, Turkington was a “towering influence” among those most “responsible for expanding and deepening our understanding of . . . privacy . . . .”<sup>16</sup> Turkington’s idea of privacy embraced so much more than the simplistic formula of four ill-fitting torts that Prosser distilled from the landmark Warren and Brandeis privacy article, *The Right to Privacy*.<sup>17</sup> Unfortunately, Prosser’s distillation likely stunted the growth of a fully evolved concept of privacy for decades. Turkington was among the scholars who broke out of the confines of that cramped understanding to envision privacy as a rich, nuanced, and vexing concept woven into the very fabric of what it means to be human.

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13. In fact, he told me that back in the era where faculty taught around the curriculum, he even taught Antitrust once.

14. See Meeting Minutes from Villanova Law School Faculty Meeting (Apr. 4, 1978) (on file with the Villanova Law School Dean’s office). The course was first taught as a seminar, and expanded to a three-credit traditional course in 1978.

15. Gregory P. Magarian, *Privacy Law in the New Millennium: A Tribute to Richard C. Turkington*, 51 VILL. L. REV. 787, 787 (2006).

16. *Id.*

17. See, e.g., Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, reprinted in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 156, 158 (Ferdinand David Schoeman ed., 1984).

III. *HARD AND EASY CASES*

In 1989, when Turkington wrote *Hard and Easy Cases*, AIDS had been identified as a distinct disease or syndrome for only eight years. Medical experts called it one of the most devastating infectious diseases to have emerged in recent history.<sup>18</sup> It was, as Turkington described it, “the first full-blown transnational plague of the electronic age.”<sup>19</sup> AIDS killed; while medicine had begun to identify how it could be transmitted, the experts did not speak definitively, so ignorance fed fear. Prejudice, rooted in myths that science actually rebutted, had become so firmly embedded in the popular psyche that it could not be dislodged. Further, the populations first identified as most at risk were already at the margins—at best, disrespected, and at worst, disdained: homosexuals, prostitutes, and illegal intravenous drug-users. But the virus spread beyond these populations. Prejudice and fear manifested in despicable labels that segregated those exposed to HIV into two groups—*innocent victims*—individuals infected through blood transfusions and babies who contracted AIDS from infected mothers—and the blameworthy, whose fate before the advent of the red ribbon was of little concern, or worse, perceived as justice done.

People were not sure of all the ways the virus might be transmitted. Was it transferred through coughing? Toilet seats? Doorknobs? Utensils? In addition, they did not trust the experts.<sup>20</sup> Even the so-called innocent victims were targeted: children with AIDS were barred from school. District of Columbia police officers raided a homosexual social club wearing gloves, facemasks, and bulletproof vests to “protect themselves from a lethal threat.”<sup>21</sup> “The director of a Chicago AIDS . . . hotline [fielded] a phone call from a [ ] motorist who had run over a pedestrian he believed to be gay[.]” seeking information on “how to decontaminate his car.”<sup>22</sup> In short, fear and hysteria dominated the debate, and eclipsed fact and reason.

In addition to popular demands to quarantine AIDS victims, there were compelling calls to disclose information, including the identities of those diagnosed with HIV/AIDS. The most rational of these requests

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18. See generally F. Barré-Sinoussi et al., *Isolation of a T-Lymphotropic Retrovirus from a Patient at Risk for Acquired Immune Deficiency Syndrome (AIDS)*, 220 *SCI.* 868 (1983); Robert C. Gallo et al., *Frequent Detection and Isolation of Cytopathic Retroviruses (HTLV-III) from Patients with AIDS and at Risk for AIDS*, 224 *SCI.* 500 (1984); Mikulas Popovic et al., *Detection, Isolation, and Continuous Production of Cytopathic Retroviruses (HTLV-III) from Patients with AIDS and Pre-AIDS*, 224 *SCI.* 497 (1984).

19. *Confidentiality for Health Care Information*, *supra* note 8, at 882 (footnote omitted).

20. See George J. Church, *Not an Easy Disease to Come By*, *TIME* (Sept. 23, 1985), available at <http://content.time.com/time/magazine/article/0,9171,959894,00.html> [<http://perma.cc/9XD5-JS48>].

21. See Emma Mustich, *A History of AIDS Hysteria*, *SALON* (June 5, 2011, 2:01 PM), [http://www.salon.com/2011/06/05/aids\\_hysteria/](http://www.salon.com/2011/06/05/aids_hysteria/) [<http://perma.cc/JCU7-L3VL>] (internal quotation marks omitted).

22. *Id.*

called for the notification of and by sexual partners and caregivers who tested positive,<sup>23</sup> and the most extreme of these requests called for metaphorically affixing a “[s]carlet [l]etter”—quite literally according to one commentator who called for tattoos on those infected so that members of the public could protect themselves.<sup>24</sup> Turkington set his discussion of a balancing approach to accommodating privacy and other interests in this vortex.

Positing that all medical information deserves protection, Turkington located HIV/AIDS-related information at the far end of the continuum. Turkington believed that such sensitive information deserved the most protection due to the additional stigma that an HIV/AIDS diagnosis carried (that is, the information was so much more volatile than most other medical information). On the other side of the scales, of course, were compelling reasons for disclosure: protection of sexual partners, first responders, doctors, patients, and others who might be exposed to the fluids that transmit the virus, all fueling a pressing popular hue and cry for mandatory testing and disclosure of HIV status.<sup>25</sup>

Turkington posed the question as follows: “Do the special medical and social facts about [HIV/]AIDS warrant stricter confidentiality policies for health care information that identifies someone as having [HIV/AIDS] . . . ?”<sup>26</sup>

Turkington began with a broad and nuanced conceptualization of privacy, stating his own view that “privacy [is] . . . an inextricable part of what it is to be a person in our legal system.”<sup>27</sup> He argued that privacy stands on its own as an intrinsic right or interest and concluded that “the essence of the right to privacy is grounded in what Dworkin refers to as principle-based arguments that come from society’s sense of justice and morality.”<sup>28</sup> He also recognized that privacy serves very real instrumental purposes as well. For example, he traced the evolution of doctor/patient confidentiality to an instrumentalist tradition that understands confidentiality as “an essential condition for treatment and care because it promotes the unfettered exchange of information.”<sup>29</sup> Thus, Turkington concluded,

23. See, e.g., Ronald Bayer & Kathleen E. Toomey, *HIV Prevention and the Two Faces of Partner Notification*, 82 AM. J. PUB. HEALTH 1158, 1158 (1992).

24. See, e.g., William F. Buckley Jr., Op-Ed., *Crucial Steps in Combating the Aids Epidemic; Identify All the Carriers*, N.Y. TIMES (Mar. 18, 1986), available at <https://www.nytimes.com/books/00/07/16/specials/buckley-aids.html> [<https://perma.cc/AKB3-D4MJ>].

25. See, e.g., *Hard and Easy Cases*, *supra* note 7, at 888–91. Turkington analyzed only the more modest suggestions of disclosure, not the “scarlet letter” approach advocated at the height of the hysteria. See *id.*

26. *Id.* at 872.

27. *Id.* at 874.

28. *Id.* at 875 n.9. “[T]he right to privacy has a force in legal argument that ranges from either ‘trumping’ other worthwhile interests that are at stake in the case, or at least requiring that privacy be given important weight in the decision-making process.” *Id.* at 875 (footnote omitted).

29. *Id.*

privacy protects what is essential to personhood, and it preserves and enables the integrity of especially important relationships (e.g. doctor/ patient, lawyer/client).

In *Hard and Easy Cases*, Turkington developed his concept of privacy as it relates to HIV/AIDS information in light of two essential characteristics: first, the extremely intimate and personal nature of the information involved and how this goes to the heart of privacy as an intrinsic value, and second, the need for complete candor between doctor and patient, candor that will be facilitated by patients' confidence that information shared with a caregiver will be protected. Applying his concept of privacy specifically to HIV/AIDS information, Turkington concluded that whether we consider either intrinsic or consequential values, the publication of HIV/AIDS-related information constitutes the most serious invasion of privacy. This conclusion inescapably follows from both the medical and social facts about the disease and from research into the realities of treating and containing the virus.<sup>30</sup>

Turkington then turned to the very real societal interests on the other side—the pressing and often persuasive arguments for forcing disclosure—and focused on what he identified as the three most significant interests: “the interest in preventing physical harm to others[,]”<sup>31</sup> the interest in providing “peace of mind” to others,<sup>32</sup> and “the interest [of advancing the] truth-seeking” process in courts where HIV/AIDS-related information is sought, for example, to establish a cause of action for negligence in medical treatment.<sup>33</sup>

With the issue joined, Turkington proposed “an analytical structure for evaluating confidentiality policies for HIV-related information[:]”<sup>34</sup>

[T]he scope of legal protection for the confidentiality of health care information ought to be determined by the careful evaluation and accommodation of: (1) the extent of the loss of privacy that would occur if there were to be public disclosure of the specific information; (2) the extent to which the integrity of the professional[/]patient relationship requires immunity from public access to the information; and (3) the extent to which important governmental and private interests would be furthered by disclosure of such information.<sup>35</sup>

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30. *See id.* at 886. “Confidentiality not only furthers the intrinsic good of the right to privacy and the pragmatic good of treatment and diagnosis, but also the pragmatic good of protecting the public safety by limiting transmission of the virus.” *Id.*

31. *Id.* at 888.

32. *Id.* at 889. Turkington provides examples such as legislative proposals “to require [ ] testing . . . employees” and disclosure to employers, and “[testing] of homeowners” and disclosure of results to potential homebuyers. *Id.*

33. *See id.* at 897–902.

34. *Id.* at 877.

35. *Id.* at 877–78.



Turkington proposed nothing revolutionary here—this is a fairly straightforward balancing test, which is, as noted above, reminiscent of Learned Hand’s formula in *Carroll Towing*.

In *Hard and Easy Cases*, however, Turkington argued for and relied upon important concepts: that privacy matters, that it has both intrinsic and instrumental worth, that interests in privacy must be accommodated, that this can only be done if we understand and value the competing interest accurately, and that a process of balancing interests provides a reliable method for shaping important policies.

Applying this to the interests advanced for forced disclosure of HIV status, Turkington first concluded that the interest in providing peace of mind to others was per se unpersuasive as it was based on hysteria and irrational fears that contradicted what was already known about transmission of the virus.<sup>36</sup> Second, he concluded that the interest in preventing physical harm to others comes into play only if “the recipient of the information is at significant risk of infection *and* disclosure will significantly reduce or eliminate that risk[.]”<sup>37</sup> noting that in those cases, the interest in disclosure was strong,<sup>38</sup> and third, that the interest of advancing the truth-seeking process in court was also a strong interest, although the strength of that interest was diminished by the availability of other means of accomplishing the truth-seeking end.<sup>39</sup> From these conclusions, Turkington developed his “hard and easy” analysis, positing that cases presenting a colorable interest in disclosure (as contrasted with the per se unpersuasive peace-of-mind rationale) may be categorized as either hard or easy.<sup>40</sup> In easy cases, either the interest involved can be furthered without disclosure, that is, by other means, or disclosure would not further the interest (for example, where evidence shows individuals would not alter behavior based on making information available, such as in the case of intravenous drug users sharing needles).<sup>41</sup> Disclosure should not be permitted in these cases. Contrast hard cases. Hard cases are “hard” because there is “a true conflict between values supporting confidentiality and important governmental and private interests.”<sup>42</sup> In these hard cases, a bal-

36. *See id.* at 889. For example, Turkington noted legislative proposals that “require the testing [of employees] and disclosure [to employers], and [testing] of homeowners [and disclosure of results] to [potential home buyers.]” *Id.*

37. *Id.* (emphasis added).

38. *See id.* at 887–88.

39. *See id.* at 897–902.

40. *See generally* Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958), reprinted in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 76, 77 (1963). Again, reflecting the value of Turkington’s multiple conceptual lenses, this echoes Currie’s Interest Analysis approach to choice of law. *See id.* Even using Currie-esque language, Turkington states in *Hard and Easy Cases* that it is an easy case “[when] there is not a true conflict between positive interests.” *Hard and Easy Cases*, *supra* note 7, at 891.

41. *Hard and Easy Cases*, *supra* note 7, at 885–86. Turkington cites evidence that addiction overpowers logic for intravenous drug users. *See id.* at 884–85.

42. *Id.* at 891.

ance must be struck, but the conflicting interests must be evaluated carefully and candidly. Considering these hard cases, Turkington reasoned that “[g]iven the medical and social facts about AIDS, powerful reasons support providing strict confidentiality for HIV-related information in order to protect privacy and preserve trust in professional–client relationships.”<sup>43</sup> On the other side of the equation, he noted, “[i]n some instances important interests like preventing physical harm to others are furthered by disclosing HIV-related information. These hard cases may ultimately require disclosure.”<sup>44</sup>

This structured analytical approach—identifying the competing interests and their value or weight, and then balancing the interests while carefully and candidly considering the factual context and the actual effectiveness of the proposed approach—provides a useful method for addressing today’s compelling issues. While courts faced with challenges to laws or policies that implicate privacy interests do often effectively apply a balancing approach,<sup>45</sup> those who make our laws, shape our policy, and drive popular discourse often do not. Perhaps by refreshing Turkington’s approach with a more vivid conceptualization of privacy and its value, and a clearer call to ensure privacy interests are given robust consideration and appropriate weight early and always when such interests are at risk, we can change that.

#### IV. DESCRIBING AND VALUING PRIVACY

We begin by attempting to “conceptualize” privacy.<sup>46</sup> As noted above, I agree with Daniel Solove and others who suggest that we cannot (and frankly need not) come up with a single definition that serves all, or even most, purposes. Efforts by philosophers, legal scholars, legislators, and jurists often work well enough in the context of the particular matter at hand, but either cannot capture the full meaning of the condition of privacy in the broader context, or worse, by the manner of defining privacy, actually imply that other conceptualizations are foreclosed. Thus, Solove argues for an evolving, functional approach to conceptualizing privacy. We begin, as most discussions of privacy do, with the Warren and Brandeis article.

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43. *See id.* at 908.

44. *Id.*

45. *See, e.g.,* Am. Civil Liberties Union v. Clapper, 785 F.3d 787, 826 (2d Cir. 2015). *Clapper* exemplifies “the increasing complexity of balancing . . . interest[s] in . . . security [with] [privacy interests].” *Id.* *See also* Bartnicki v. Vopper, 532 U.S. 514, 534–37 (2001); U.S. Dep’t of Justice v. Reporters Comm. For Freedom of the Press, 489 U.S. 749, 776 (1989); Prudential Locations LLC v. U.S. Dep’t of Hous. & Urban Dev., 739 F.3d 424, 430 (9th Cir. 2013).

46. *See* Solove, *supra* note 9, at 1115. Daniel Solove so titled his ambitious effort to wrestle to the ground an understanding of the meaning of privacy.

In their landmark *Harvard Law Review* article, *The Right to Privacy*, Warren and Brandeis called for legal recognition of a right to privacy.<sup>47</sup> While they were not the first to posit the notion, they certainly had the most impact on launching privacy as an interest worth protecting through the legal system.<sup>48</sup> Virtually all discussions, whether in academic writings, in judicial opinions, or in the popular media, peg the genesis of privacy law to the Warren and Brandeis article.<sup>49</sup> Still, as Turkington pointed out in a symposium celebrating the centennial of the article, the authors were well aware of, and no doubt influenced by, discussions of privacy in literature, philosophy, and, at some level, in the conversations of their peers that reflected the intuitive morality of the day.<sup>50</sup> Warren and Brandeis used Judge Thomas Cooley's term as shorthand for their idea of privacy, calling it a right "to be let alone[.]"<sup>51</sup> But Warren and Brandeis added an important dimension by also describing it as a right that protected something essential to our humanity, and our "inviolable personality."<sup>52</sup> Nonetheless, in the wake of their groundbreaking article, capturing all privacy means has proven to be no mean feat for legal scholars and philosophers. Confusion reigns; it is like "a haystack in a hurricane."<sup>53</sup>

As an example, Turkington and co-author Anita Allen threw out sixteen possible definitions of privacy culled from a broad range of sources in the introduction to their privacy text, ranging from something as simple as "control over information about ourselves," to control over who can "sense us"<sup>54</sup> to longer, more functional definitions such as:

Privacy exists where the persons whose actions engender or become the objects of information retain possession of that information and any flow outward of that information from the

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47. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

48. For example, Judge Thomas Cooley described a right to privacy as "the right to be let alone" before Warren and Brandeis did in *The Right to Privacy*. See THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS, OR, THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (2d ed. 1888).

49. See Richard C. Turkington, *Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy*, 10 N. ILL. U. L. REV. 479, 481–82 (1990) [hereinafter *Legacy*]. *Legacy* stated that *The Right to Privacy* "had as much impact on the development of law as any single publication in legal periodicals[.]" and "is [ ] one of the most commented upon and cited articles." *Id.* at 481–82.

50. See *id.* at 482–83.

51. Warren & Brandeis, *supra* note 47, at 195 (internal quotation marks omitted). For a further discussion of Judge Thomas Cooley's terms in the privacy context, see *supra* note 48.

52. See *id.* at 205 (footnote omitted).

53. *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481, 485 (3d Cir. 1956).

54. See RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRIVACY LAW: CASES AND MATERIALS* 72–73 (West Group ed. 1999) (citations omitted).

persons to whom it refers (and who share it where more than one person is involved) occurs on the initiative of its possessors.<sup>55</sup>

Often, efforts to define privacy carve it into two realms: informational privacy and decisional privacy. For example, Thomas Crocker notes that some explanations of privacy define it as “a matter of establishing [ ] boundaries between self and other[s].”<sup>56</sup> Privacy in this conceptualization is about control of information about oneself and perhaps the space around oneself.<sup>57</sup> To be sure, any understanding of privacy must include control over information, but a comprehensive understanding of privacy must encompass so much more. Edward Bloustein argued that privacy serves spiritual, as well as, or actually *instead* of, the more property and reputational-based interests, reasoning that what “is at issue is not . . . trauma, [or] mental . . . distress, but rather individuality or freedom.”<sup>58</sup> From this understanding flows the autonomy conceptualization of privacy, a conceptualization that requires blending the decisional and informational characterizations. It is this more nuanced conceptualization that the United States Supreme Court invoked in the *Griswold v. Connecticut*<sup>59</sup> and *Roe v. Wade*<sup>60</sup> line of cases. This understanding makes the Court’s use of privacy as the hook for its holdings both understandable and persuasive.

In addition to the informational/decisional dichotomy, privacy is often characterized in either instrumentalist terms or as having intrinsic value. Many argue that we must think of privacy functionally or instrumentally. That is, protecting privacy serves a societal function and its value is described by the importance of that function.<sup>61</sup> Others, and I am in this group, contend that while the instrumentalist conceptualization of privacy is important, we must also recognize privacy’s intrinsic value.

Charles Fried argues against relying on only the instrumentalist approach. He reasons that this approach, which he describes as amounting to a mere cataloging of potential disadvantages flowing from disruption of privacy, makes privacy vulnerable to being overridden too easily by virtually any competing goals, or to being dismissed by assumptions that privacy can be protected effectively through other legal means—that is, protec-

55. *Id.* at 73 (citing Edward Shils, *Privacy: Its Constitution and Vicissitudes*, 31 LAW & CONTEMP. PROBS. 281, 282 (1967)).

56. See Thomas P. Crocker, *Ubiquitous Privacy*, 66 OKLA. L. REV. 791, 792 (2014); see also Charles Fried, *Privacy [A Moral Analysis]*, reprinted in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 209–10 (Ferdinand David Schoeman ed., 1984).

57. See, e.g., Anita L. Allen, *Privacy-as-Data Control: Conceptual, Practical, and Moral Limits of the Paradigm*, 32 CONN. L. REV. 861, 863 (2000); see also Crocker, *supra* note 56, at 795.

58. See Bloustein, *supra* note 17, at 187.

59. 381 U.S. 479 (1965).

60. 410 U.S. 113 (1973).

61. See, e.g., Solove, *supra* note 9, at 1144–45.

tions of rights and interests other than privacy rights and interests themselves.<sup>62</sup> Fried argues powerfully that “privacy is not just one possible means among others to insure some other value,” but rather that it is crucial to the human condition—necessary for essential intimacies such as “respect, love, friendship and trust.”<sup>63</sup> Privacy, he contends, provides the atmosphere, the “oxygen [necessary] for combustion” of all that makes us human.<sup>64</sup> Fried therefore insists that privacy must be recognized as having intrinsic value.<sup>65</sup> But even Fried’s approach has an instrumentalist flavor: If society values fully-evolved and functioning humans, that is, humans engaging in the essential intimacies Fried describes, protecting privacy advances this societal interest; thus, even this conceptualization can have an instrumental purpose. Nonetheless, Fried makes a powerful case for protecting privacy for its own sake as essential to our humanness.

Philosopher Stanley Benn also makes a compelling case for the intrinsic value of privacy, reasoning that privacy protects personhood. Benn notes that privacy acknowledges a “cluster of immunities” that restricts others from doing things to people that, if done to mere objects, would not be objectionable.<sup>66</sup> As an example, Benn uses unrelenting observation. Such observation of a bird or a glacier would hardly seem inappropriate. But what about unrelenting observation of a person? Most would find this unacceptable. Benn acknowledges that such observation of a person can have practical impacts, noting, “[o]f course, there is always a danger that information [gathered by unrelenting observation] may be used to harm a man in some way.”<sup>67</sup> He adds, “[t]he more one knows about a person, the greater one’s power to damage him.”<sup>68</sup> But Benn continues, arguing that it is not only that such observation might do damage, but also that “a general principle of privacy [should] be grounded on the more general principle of respect for persons.”<sup>69</sup> Turkington agreed, and frequently used his E.T. hypothetical to illuminate this: If E.T. landed on a law school campus and, pointing to a student, said to another student, “[t]hat is an interesting bag of skin and bones,” the second student

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62. See Fried, *supra* note 56, at 205. This approach, in some ways, is what handicaps Prosser’s concept of privacy. Indeed, several commentators do argue that privacy does not exist conceptually, but rather is adjective to other legal interests and protections. See Crocker, *supra* note 56, at 792–93; *infra* notes 86–88 and accompanying text.

63. See Fried, *supra* note 56, at 205.

64. *Id.*

65. See *id.*

66. See Stanley I. Benn, *Privacy, Freedom and Respect for Persons*, reprinted in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 225 (Ferdinand David Schoeman ed., 1984).

67. *Id.* at 226.

68. *Id.*

69. *Id.* at 228.

would undoubtedly say, “that is a person,” and E.T. might then ask, “[w]hat is the difference . . . ?”<sup>70</sup> The second student would respond:

A person has a name, an identity, a personality, and certain basic rights as against the government and other individuals. . . . The most central are the right to decide fundamental matters for yourself, the right to a minimum amount of respect from the government and other individuals, and the right to privacy. When these rights are provided to someone, then we say that individual has human dignity.<sup>71</sup>

Thus, privacy is essential to what makes us human. The late Senator Hubert Humphrey made a case for this sort of intrinsic value for privacy: “We act differently if we believe we are being observed. [A]ll our actions will be altered and our very character will change.”<sup>72</sup>

Thomas Emerson is best known for his compelling advocacy of the value of individual expression as not only essential to a functioning democracy, but also, and as important, essential for human flourishing. Emerson recognizes a similar value for privacy: “The proper end of man is the realization of his character and potentialities as a human being,” and to achieve this, Emerson concludes, “[man’s] mind must be free.”<sup>73</sup> Emerson continues by explaining that an individual must “separate himself from the pressures and conformities of collective life” in order to fully engage in self-expression. Emerson cites Edward Bloustein’s work on privacy to support this assertion.<sup>74</sup>

Alan Westin sharpens this point, stating that the individual “requires time for sheltered experimentation and testing of ideas, for preparation and practice in thought and conduct, without fear of ridicule or penalty.”<sup>75</sup> In short, people need to have the opportunity to try out unscrutinized first drafts. Westin argues this serves society by permitting individuals to think deeply to develop opinions and to make important decisions.

Julie Cohen posits a similar value for privacy, locating its source in autonomy. Cohen explains that autonomy must be nurtured, that “[a]utonomous individuals do not [just] spring [forth] full-blown . . . .”<sup>76</sup> Individuals must process information and draw conclusions. Similar to Emerson,

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70. *Legacy*, *supra* note 49, at 485.

71. *Id.* at 485–86.

72. Benn, *supra* note 66, at 241 (quoting Hubert H. Humphrey, *Foreword to EDWARD V. LONG, THE INTRUDERS: THE INVASION OF PRIVACY BY GOVERNMENT AND INDUSTRY*, at viiii (1967)).

73. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970).

74. *Id.* at 546.

75. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 34 (1967).

76. See Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 *STAN. L. REV.* 1373, 1424 (2000).

Cohen concludes that “[a]utonomy . . . requires a zone of relative insulation from outside scrutiny and interference . . . .”<sup>77</sup>

The development of autonomy, of thoughts, of ideas, of opinions, and our ability to engage in self-expression all require privacy in order to flourish—indeed, to exist. Autonomy and the flourishing of a fully-evolved ‘self’ seem to justify the intrinsic-value approach to privacy. But, as we see from most of the commentators, our society does value, at least theoretically, individuality, autonomy, and carefully developed, diverse thoughts and opinions for what they contribute to the commonweal, especially in a functioning democracy. Therefore, these arguments for protecting privacy as an intrinsic value actually take on a strong tinge of instrumentalism; nonetheless, privacy must stand on its own with an intrinsic value. Emerson makes this point in the context of freedom of expression. He contends that while freedom of expression promotes important societal goals such as advancing knowledge and discovering truth, participation in decision-making by all members of society, and promoting greater cohesion in society, its value should not be measured only by whether or how it promotes society’s goals; rather, he argues that “is a good in itself . . . .”<sup>78</sup> The same is true for personal privacy. Similarly, Cohen concludes that privacy “promotes important noninstrumental values, and serves vital individual and collective ends.”<sup>79</sup> Thus, in the end, we must value privacy’s essential and intrinsic importance.

Former Czech President and playwright Vaclav Havel described how “[i]ndependent thinking and creation retreated to the trenches of deep privacy” when beset by constant surveillance in a totalitarian state.<sup>80</sup> While Emersonian in its rationale, the idea of “deep privacy” has a literary feel that expresses a fundamental human yearning. Cultural theorist and poet Édouard Glissant advocated for the right to opacity. Anchored in his searing analysis of race relations, difference, diversity, and his anti-colonialist activism, Glissant proposed “opacity”—to wit, that a person (as well as a people) has a right to be opaque, a right *not* to be understood on other’s terms—indeed, a right to be misunderstood.<sup>81</sup> Of course, Glissant’s notions of opacity spoke to larger themes of international politics, globalization, racism, and postcolonial western imperialism, but the essential premise—that everything does not necessarily have to be illuminated and explained and understood by others—springs from a core human instinct of protecting what is elemental to our being from unwanted observation.

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77. *Id.* The title of Cohen’s article, *Examined Lives: Informational Privacy and the Subject as Object*, places her analysis in the context of informational privacy. The analysis, however, applies to privacy more generally. *See id.* at 1423.

78. *See* EMERSON, *supra* note 73, at 8.

79. Cohen, *supra* note 76, at 1423.

80. Crocker, *supra* note 56, at 794–95 & n.12 (alteration in original) (quoting VACLAV HAVEL, *DISTURBING THE PEACE* 120 (Paul Wilson trans., 1991)).

81. *See, e.g.,* CELIA M. BRITTON, *EDOUARD GLISSANT AND POSTCOLONIAL THEORY: STRATEGIES OF LANGUAGE AND RESISTANCE* 18–20 (1999).

Glissant's at-once beautiful and harrowing cry for opacity proves the transcendence and universality of an intrinsic value of privacy as essential to our humanness.

Of course, not all scholars embrace privacy—whether an intrinsic or instrumentalist conceptualization—as important, valuable, or worth the time to conceptualize. Ferdinand Schoeman, in his introduction to the book *Philosophical Dimensions of Privacy: An Anthology*, cites privacy critics who write that “privacy . . . creat[es] the context in which both deceit and hypocrisy may flourish: [i]t provides the cover under which most human wrongdoing takes place[ ] and then [ ] protects the guilty.”<sup>82</sup> Anita Allen, one of the most influential voices advocating for a vibrant understanding of and protection for privacy, has explored how accountability and privacy interact. She notes that while privacy is important, so is accountability. Allen, too, recognizes that privacy can allow deceit and immunize lying, and while she still strongly advocates for privacy, she does not take an absolutist position. Rather, Allen recognizes when the need for accountability will at times outweigh the preference for privacy.<sup>83</sup> But as Allen demonstrates, this tendency does not diminish the importance of privacy; instead, it figures into how the balance is struck (an approach consistent with Turkington's).

Posner applies his market-based economic analysis to privacy and finds that there is little value for personal privacy, and of course, no intrinsic value for privacy. He concludes that protecting personal privacy will only allow individuals to create a false persona and so manipulate others to engage in social or business dealings while concealing facts that would, if not concealed, influence others in their dealings with the individual. This concealment would increase transaction costs “much as if we permitted fraud in the sale of goods.”<sup>84</sup> Posner argues that the usual discussions of privacy have it exactly backwards. Instead of protecting *personal* privacy, and so enabling deceit and fraud, he contends we must protect *organizational* privacy. For example, he would protect business information and “trade . . . secrets [that allow] businessmen [to] exploit their superior knowledge or skills,” but not facts about individuals that permit only deceit and manipulation.<sup>85</sup> He would, however, limit the means by which information about individuals is gathered, avoiding, but not prohibiting,

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82. Ferdinand Schoeman, *Privacy: Philosophical Dimensions of the Literature*, reprinted in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY I* (Ferdinand David Schoeman ed., 1984).

83. See Anita L. Allen, *Privacy Isn't Everything: Accountability as a Personal and Social Good*, 54 *ALA. L. REV.* 1375, 1377 (2003); see also ANITA L. ALLEN, *WHY PRIVACY ISN'T EVERYTHING: FEMINIST REFLECTIONS ON PERSONAL ACCOUNTABILITY passim* (2003).

84. See Richard A. Posner, *An Economic Theory of Privacy*, reprinted in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 331, 339 (Ferdinand David Schoeman ed., 1984) (“To the extent that personal information is concealed in order to mislead, the case for giving it legal protection is . . . weak.”).

85. *Id.* at 341.



“[e]avesdropping and other forms of intrusive surveillance . . . .”<sup>86</sup> Posner’s market-based analysis, of course, is anchored in a purely instrumentalist approach to privacy. Indeed, that such a “cost of transaction” analysis can be undertaken, and that it leads to such an obvious outcome (similar to Jonathan Swift’s *Modest Proposal*)<sup>87</sup> provides the strongest argument for protecting the intrinsic value of privacy: privacy matters not because it promotes efficient transaction costs, but because it is essential to our humanity.

Judith Thomson concludes that there is no need to spend time and effort on describing a right to privacy, because, under her analysis, there really is no freestanding concept of privacy. What some refer to as privacy, she explains, is actually a cluster of rights that parasitize onto other recognizable and protected interests. Privacy itself is not a distinct interest. Any injury we might call privacy actually resides in another cluster of rights, such as the torts-based right to be free from injury, the liberty-based right to do as one chooses, or the property-based right to ownership of one’s image and in one’s reputation. Privacy, therefore, is derivative of these other rights and interests in the sense that “it is possible to explain [the right or interest] . . . without ever once mentioning . . . privacy.”<sup>88</sup> Yet, as Warren and Brandeis pointed out in *The Right to Privacy*, the existing legal remedies found in property, defamation, and personal injury regimes do not adequately cover the full range of interests a true concept of privacy contemplates.<sup>89</sup> Privacy must stand as an independent interest.<sup>90</sup>

Feminists criticize traditional applications of privacy, noting that especially as applied to the home-as-castle doctrine, privacy is often used to thwart efforts to prevent and punish domestic violence. Privacy arguments were used to condone spousal rape for centuries. Catharine MacKinnon did not mince words: “[W]hile the private has been a refuge for some, it has been a hellhole for others, often at the same time.”<sup>91</sup> Privacy, she explains, provides “an effective shield behind which sexual abuse can be

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86. *See id.*

87. *See generally* JONATHAN SWIFT, A MODEST PROPOSAL FOR PREVENTING THE CHILDREN OF POOR PEOPLE FROM BEING A BURTHEN TO THEIR PARENTS OR THE COUNTRY, AND FOR MAKING THEM BENEFICIAL TO THE PUBLICK (2d ed. Dublin, 1729).

88. JUDITH JARVIS THOMSON, RIGHTS, RESTITUTION, & RISK: ESSAYS IN MORAL THEORY 133 (William Parent ed., 1986).

89. *See The Right to Privacy*, *supra* note 47, at 218–19.

90. *See, e.g.*, Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, reprinted in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 300, 309–14 (Ferdinand David Schoeman ed., 1984) (dismissing Thomson’s view and asserting that right to privacy “protects the individual’s interest in becoming, being, and remaining a person”); *see also* Benn, *supra* note 66, at 224–25, 228–29; Fried, *supra* note 56, at 205.

91. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991).

kept invisible, its impunity ever more effectively sealed.”<sup>92</sup> Suzanne Kim notes “[t]he ‘rhetoric of privacy’ has been described as the ‘most important ideological obstacle to legal change and reform’ regarding male abuse of women.”<sup>93</sup> However, other feminist scholars, while candidly acknowledging that privacy has been used to shield reprehensible behavior, and indeed to allow the subjugation of women and children, argue for reforming rather than abandoning privacy. They have reconstructed traditional applications of privacy doctrines to address these concerns, and to bring women and children into privacy’s protection. For example, Anita Allen argues that valuing privacy has done much to help women challenge the constraints of traditional patriarchal society by recognizing constitutional protections for decisional privacy. She calls on those marginalized by traditional constructs, such as women, feminists, lesbian women, gay men, and transgendered persons, to redraw the lines, to challenge the notion that the contours and character of the private sector are set in stone, as “uncontestable Platonic” ideals reflecting a traditional patriarchal, heterosexual understanding.<sup>94</sup> She also asserts that those formerly oppressed by traditional notions of the public and private spheres themselves long for personal time and space—a space, she argues, they can define, but a space that is in fact a new version of privacy.<sup>95</sup> She insists that the lines can be “renegotiated and redrawn as necessary to further dignity, safety, and equality.”<sup>96</sup> This has been done, Allen points out, in the context of marital rape where marital privacy no longer insulates individuals who engage in non-consensual sex with their spouses.<sup>97</sup> One might add that the decisional-autonomy understanding of privacy also has been used to protect the interests of gay men and lesbian women in their intimate relations in recent Supreme Court cases.<sup>98</sup> Allen concludes that, “[w]e do better with solutions . . . that preserve conditions that afford opportunities for safe and meaningful seclusion, intimacy, and decision-making.”<sup>99</sup>

Barbara Woodhouse Bennett, a feminist and a children’s rights advocate, sees the need for a slightly different construct that would conceptual-

92. Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081, 1089 (2004).

93. Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 573 n.116 (2006) (quoting ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 87 (2000)).

94. See Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 750 (1999).

95. See *id.* at 749–50.

96. *Id.* at 750.

97. See *id.* at 746–47.

98. See *Obergefell v. Hodges*, 135 S. Ct. 1584, 2589, 2602 (2015) (concluding same-sex couples may exercise right to marry because “the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples”); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (stating that constitution promises “a realm of personal liberty which the government may not enter”).

99. Allen, *supra* note 94, at 746.

ize parents and children in a functioning family, broadly defined as bearers of mutually-reinforcing rights against uninvited state intrusion in their intimate relationships. This different approach to privacy avoids the “shield” around an entity, as described by Martha Fineman, and relies on an individual dignity model.<sup>100</sup>

Thus, Allen, Bennett, and even Fineman provide to those who criticize how privacy was misused under traditional models, alternatives to abandoning privacy completely by offering new, often radical, re-conceptualizations of the contours, character, and customs that make up privacy.

In the end, I return to Anita Allen: “[P]rivacy is a human need and moral entitlement, akin to freedom and equality,” a conclusion she backs up by citing “[t]hree decades of reflection and observation by philosophers and psychologists [that] inform this premise.”<sup>101</sup>

Therefore, while there is no cast-in-stone, Platonic concept of privacy that answers all questions and addresses all situations, we must describe privacy in order to value it, and we must value it “not only [to] illuminate[ ] what privacy is[,] but also [to] enable[ ] us to balance it with conflicting values.”<sup>102</sup>

Daniel Solove’s ambitious effort to conceptualize privacy provides a solid foundation. Although I believe Solove locates his analysis a little too firmly in an instrumentalist approach, his context-based conceptualization provides an excellent foundation for describing privacy, and his clear-eyed understanding of the need to balance privacy against other societal goods and the process for doing so is consistent with and illuminates Turkington’s formula.<sup>103</sup>

Solove posits that the best way to understand privacy is to begin by focusing on privacy in particular contexts. He applies a pragmatic “Wittgensteinian family resemblances approach,”<sup>104</sup> saying we should call it privacy when it resembles other things we have also or already called privacy.<sup>105</sup> He then sets out to extrapolate a conceptualization of privacy from a set of social contexts. His conceptualization considers privacy in terms of its value within particular practices and the impact disruption of privacy has on those practices. He unapologetically proposes an evolving approach that will change over time both because new situations occur, and because old situations transform. Looking at social context, he asks whether privacy is a dimension of the particular social practice. If it is, then we must ask whether privacy affects the process in a negative or posi-

100. See Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1260–61 (1999).

101. Anita L. Allen, *Lying to Protect Privacy*, 44 VILL. L. REV. 161, 161 (1999).

102. Solove, *supra* note 9, at 1143.

103. See *id.* at 1145.

104. *Id.* at 1126.

105. See Danielle Keats Citron & Leslie Meltzer Henry, *Visionary Pragmatism and the Value of Privacy in the Twenty-First Century*, 108 MICH. L. REV. 1107, 1111 (2010) (reviewing DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* (2008)).

tive way. If negative, then less privacy would be desirable; if positive, then more privacy should be protected.<sup>106</sup> “The way we shape practices depends upon our vision of the good, which informs how we wish to structure power in society and how we want to empower the self.”<sup>107</sup>

Solove provides an excellent foundational protocol for describing and valuing privacy. In fact, my quarrel with his instrumentalist approach may be more about semantics than about the substance of his argument. My purpose in advocating for assigning privacy an intrinsic value in addition to an instrumentalist value is, as noted above, to remove the “no harm no foul” approach to dismissing privacy interests. That is, so often the fact that the breach of privacy did not result in quantifiable, harmful consequences to the individual leads irrefutably to the conclusion that no privacy interest was violated. Solove and most of the more thoughtful commentators recognize that interrupting privacy, regardless of some quantifiable negative outcome, does indeed cause harm. Solove, for example, recognizes that we value peace of mind and tranquility, and that we therefore will want to protect privacy to a greater or lesser degree in these contexts.<sup>108</sup> In short, his instrumentalist approach values the because-we-are-human argument for privacy, but only because it furthers the interests of our free, democratic society. In most instances, his approach will work, and there is a good argument to be made that we cannot engage in a rational balancing without considering privacy as it contributes to the society we want to foster. Yet, I would still take more of an intrinsic value approach to describing privacy. Recognizing that beyond whatever societal good results from protecting privacy, such as a more informed, thoughtful citizenry who bring to the table more diverse ideas, and forms of expression, the fact that we are human, and are deserving of respect and that society should recognize a zone of inviolate personal integrity, means that society must value our privacy regardless of whether we contribute some outcome of our solitary reflections to the greater good. By virtue of being human beings, our privacy is of value. To be clear, that value can be overridden by other compelling interests, and I do understand that the value I argue for will be more difficult to figure into the balance. But surely we are up to the task. We can exercise good judgment in making those decisions. This brings us back to Turkington’s equation. In the next Section, I have carried it forward and applied it to two of today’s high-profile privacy controversies, adding what I hope is a deeper understanding of privacy as an element of the analysis.

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106. See Solove, *supra* note 9 at 1143–44.

107. *Id.* at 1144.

108. *Id.* at 1130–31.

V. THE SONG REMAINS THE SAME<sup>109</sup>

Just over a quarter of a century after Turkington's consideration of how to balance privacy in the context of the HIV/AIDS pandemic—a cultural cataclysm that was billed as something different, something special, something that justified overlooking or overriding privacy interests—we have today a host of new, cultural cataclysms that also claim to be different, to be special, and to justify overlooking or overriding privacy interests. In addition, today, as throughout history, blinded by apparent urgency and the hysteria surrounding each new threat, we either jump to solutions without even considering privacy concerns, or we give privacy short shrift, and overvalue both the threat and the effectiveness of the proposed solutions.

Anita Allen observed, “[t]he spectacle of terrorism on American soil appears to have stunned some Americans into viewing privacy as a luxury we can no longer afford . . . .”<sup>110</sup> We can replace “terrorism” in Allen’s quote with police misconduct, street crime, or cyber assaults on children, and it rings just as true. Here I will apply Turkington’s proposed formula to two of today’s compelling issues—NSA data mining and law enforcement use of body cameras.

## VI. TURKINGTON’S FORMULA APPLIED TO TWO MODERN EXAMPLES

## A. NSA Data Sweeping

The National Security Agency (NSA) secretly gathered metadata on vast numbers of calls under its wildly broad interpretation of Section 215 of the USA PATRIOT Act (Act). As the Second Circuit observed in *ACLU v. Clapper* (*Clapper*) when it struck down NSA practices as inconsistent with even the extraordinary sweep of Section 215 of the Act: “[I]f the orders challenged by appellants do not require the collection of metadata regarding every telephone call made or received in the United States . . . they appear to come very close . . . . The sheer volume of information sought is staggering . . . .”<sup>111</sup> The data culled included the dates and times of the calls, originating information, and the telephone numbers of all partici-

109. LED ZEPPELIN, *The Song Remains the Same*, on HOUSES OF THE HOLY (Atlantic Records 1973). See also *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 792–93 (2d Cir. 2015) (describing climate regarding national security during 1970s as “not altogether unlike today’s” and citing intelligence agency abuses of privacy rights).

110. See Allen, *supra* note 83, at 1375.

111. *Clapper*, 785 F.3d at 813 (comparing search warrants with subpoenas for business records that encompass vast amounts of data). “[T]he most expansive of such evidentiary demands are dwarfed by the volume of records obtained . . . here.” *Id.* On June 2, 2015, Congress passed the USA FREEDOM Act, which the president later signed into law. See USA FREEDOM Act of 2015, Pub. L. No. 114–23, 129 Stat. 268; 161 CONG. REC. D626–01 (daily ed. June 2, 2015). “The USA FREEDOM Act [of 2015] amends § 215 in significant ways.” *Am. Civil Liberties Union v. Clapper*, No. 14–42, 2015 WL 4196833, at \*1 (2d Cir. June 9, 2015).

pants.<sup>112</sup> While the NSA insisted that it did not look at the contents of the communications, the Second Circuit observed in *Clapper* that “the startling amount of detailed information metadata can reveal . . . is [ ] ‘often a proxy for content.’”<sup>113</sup> More disturbing, especially given the sheer volume of information, Professor Laura Donohue testified in 2013 before the U.S. Senate that judging by official efforts to explain matters, “it appears that neither the NSA nor FISC has an adequate understanding of how the algorithms [the agencies were using] operate. Neither did they understand the type of information that had been incorporated into different databases, and whether they had been subjected to the appropriate legal analysis prior to data mining.”<sup>114</sup> Defenders of the practice raised a three-tiered defense: the metadata was not private (just surface information, not content of the calls), the intrusion was harmless, and the intrusion was justified by compelling national security interests. How might this come out using Turkington’s formula?

### 1. *The Extent of Loss of Privacy*

Despite the claims of the program’s defenders, there is in fact a loss of privacy in these data sweeps. The individual bits of information may seem harmless, but there is an intrusion. Regardless of whether or not the intrusion rises to the level of a Fourth Amendment issue,<sup>115</sup> there is an impact on an individual’s privacy as I have conceptualized above with each bit captured by government prying. More important, this data mining reveals relationships and associations. Associational privacy has long been strictly protected and valued high in the hierarchy of privacy interests.<sup>116</sup> Additionally, as the Court noted in *NAACP v. Alabama ex. rel. Patterson*,<sup>117</sup>

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112. See PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT (2014), available at [https://www.pclob.gov/library/215-Report\\_on\\_the\\_Telephone\\_Records\\_Program.pdf](https://www.pclob.gov/library/215-Report_on_the_Telephone_Records_Program.pdf); see also *Continued Oversight of the Foreign Intelligence Surveillance Act: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 61–62 (2013) [hereinafter *Continued Oversight*] (statement of Professor Laura K. Donohue, Geo. Univ. Law Ctr.), available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1117&context=cong> [<http://perma.cc/TP4P-W4QU>].

113. *Clapper*, 785 F.3d at 794.

114. *Continued Oversight*, *supra* note 112, at 44.

115. See, e.g., *Maryland v. King*, 133 S. Ct. 1958, 1979 (2013); *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325, 332–33 (1985); *Oliver v. United States*, 466 U.S. 170, 180–81 (1984).

116. See e.g., *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460–62 (1958). “Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.” *Id.* at 462. Furthermore, “state action . . . curtailing [ ] freedom [of association] is subject to the closest scrutiny.” *Id.* at 460–61.

117. 357 U.S. 449 (1958).

these protections are most critical when the groups involved may be controversial or dissident.<sup>118</sup>

Further, the sheer amassing of so much information creates serious privacy concerns. Often, the real danger to privacy comes from the amalgamation and easy manipulation of information. “The [Privacy and Civil Liberties Oversight Board] is a bipartisan agency within the executive branch that was established in 2007[ ] pursuant to a recommendation from the National Commission on Terrorist Attacks Upon the United States . . . .”<sup>119</sup> In assessing the NSA data sweeping, the Board concluded, “when the government collects all of a person’s telephone records, storing them for five years in a government database that is subject to high-speed digital searching and analysis, the privacy implications go far beyond what can be revealed by the metadata of a single telephone call.”<sup>120</sup> As the Second Circuit noted in *Clapper*, it gave the NSA the closest thing to viewing actual content.<sup>121</sup> Thus, the privacy interests involved are strong, and the impact of the data sweeping is significant.

2. *The Extent to Which the Integrity of the Relationship Requires Immunity from Access to Information*

Drawing on the analysis above, the relationship we must examine is between the two entities communicating (parallel to the doctor and the patient communication Turkington described). While Turkington considered the impact of disclosing the content of the communication, here, we must analyze the impact of disclosing the mere *fact* of the communication, a fact that, as described above, discloses the association itself. Disclosing the relationship can seriously disrupt important relationships. The Privacy and Civil Liberties Oversight Board described the danger:

[B]ulk collection of telephone records can be expected to have a chilling effect on the free exercise of speech and association, because individuals and groups engaged in sensitive or controversial work have less reason to trust in the confidentiality of their relationships as revealed by their calling patterns. Inability to expect privacy vis-à-vis the government in one’s telephone communications means that people engaged in wholly lawful activities—but who for various reasons justifiably do not wish the government to know about their communications—must either forgo such activities, reduce their frequency, or take costly measures to

118. *Id.* at 462; see also PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., *supra* note 112.

119. *Clapper*, 785 F.3d at 798.

120. PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., *supra* note 112 (emphasis omitted). The panel was divided, with two of the five-member panel filing separate statements. See *id.*

121. See *Clapper*, 785 F.3d at 794. For a further discussion on the information obtained during the collection of information, see *supra* note 112 and accompanying text.

hide them from government surveillance. The telephone records program thus hinders the ability of advocacy organizations to communicate confidentially with members, donors, legislators, whistleblowers, members of the public, and others. For similar reasons, awareness that a record of all telephone calls is stored in a government database may have debilitating consequences for communication between journalists and sources.<sup>122</sup>

The Second Circuit in *Clapper* observed that “[w]hen the government collects appellants’ metadata, appellants’ members’ interests in keeping their associations and contacts private are implicated . . . [creating a] ‘chilling effect.’”<sup>123</sup>

Thus, the impact on the relationship is significant.

3. *The Extent to Which Important Governmental and Private Interests Would Be Furthered by Disclosure, or in This Instance, Capture of Such Information*

Advocates of the program, including the Obama Administration, the NSA, and other law enforcement officials, insist that this mass collection of data has kept the United States safe in the wake of the 9/11 attacks. National security has always worked as a trump card that overrides liberty interests, including privacy, or even short-circuits the analysis entirely. But here, carefully following Turkington’s analysis provides clarity. While the NSA and at least two administrations have claimed that the data collection program has prevented numerous possible attacks, the factual support for this has been scarce. The Privacy and Civil Liberties Oversight Board concluded from its investigation that:

Based on the information provided to the Board, including classified briefings and documentation, we have not identified a single instance involving a threat to the United States in which the program made a concrete difference in the outcome of a counterterrorism investigation. Moreover, we are aware of no instance in which the program directly contributed to the discovery of a previously unknown terrorist plot or the disruption of a terrorist attack. And we believe that in only one instance over the past seven years has the program arguably contributed to the identification of an unknown terrorism suspect. Even in that case, the suspect was not involved in planning a terrorist attack and there is reason to believe that the FBI may have discovered him without the contribution of the NSA’s program.<sup>124</sup>

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122. PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., *supra* note 112, at 12–13.

123. *Clapper*, 785 F.3d at 802.

124. PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., *supra* note 112, at 11.



If the Board's conclusions are correct, then the posited national security interest does not outweigh the privacy concern. While I would not go so far as to characterize this as an easy case under Turkington's analysis, his test, to *wit*, whether disclosure would not further the interest advanced—would indicate that the mass culling of phone records *does not* advance the articulated goal, and so the disruption of privacy would not be justified. Even if we were to value the privacy interests more modestly and the national security interests as extremely strong, if the data-mining cannot be shown to be effective, then the intrusion on privacy cannot be justified.

### B. *Police Body Cameras*

A second hot-button item provides a different application of the formula and illustrates the lesson that, whenever privacy interests may be at risk, we must ensure that they are figured into the process early and accurately.

In response to the outcry after the tragic events surrounding the death of Michael Brown in Ferguson, Missouri, mere weeks after the event, police officers in Ferguson were equipped with body cameras.<sup>125</sup> Officers began using them less than a week after the body cameras were donated by two security companies.<sup>126</sup> Indeed, a spate of incidents involving police/citizen confrontations that ended in death or serious injury has raised a justifiable national furor. Body cameras do offer a means of providing reliable evidence of what actually happens when police interact with the public, especially when tragedies occur. As such, they hold great promise as a tool for ensuring police accountability and so preventing police misconduct, and alternatively, for protecting police who might be wrongfully accused.<sup>127</sup> There are, however, significant privacy interests in-

125. See Ayan Sheikh, *Ferguson Police Now Wearing Body Cameras*, PBS NEWSHOUR (Sept. 1, 2014, 2:03 PM), <http://www.pbs.org/newshour/rundown/ferguson-police-now-wearing-body-cameras/> [<http://perma.cc/E8FV-3SF7>].

126. See Denise Hollinshed, *Ferguson Police Are Using Body Cameras*, ST. LOUIS POST DISPATCH (Aug. 31, 2014), [http://www.stltoday.com/news/local/crime-and-courts/ferguson-police-are-using-body-cameras/article\\_88e0067c-d3e6-5599-a581-a58d0022f1f8.html](http://www.stltoday.com/news/local/crime-and-courts/ferguson-police-are-using-body-cameras/article_88e0067c-d3e6-5599-a581-a58d0022f1f8.html) [<http://perma.cc/PX9U-LT9U>].

127. See U.S. DEP'T OF JUSTICE, MEDIA RELEASE, JUSTICE DEPARTMENT AWARDS OVER \$23 MILLION IN FUNDING FOR BODY WORN CAMERA PILOT PROGRAM TO SUPPORT LAW ENFORCEMENT AGENCIES IN 32 STATES (Sept. 21, 2015), *available at* <http://www.justice.gov/opa/pr/justice-department-awards-over-23-million-funding-body-worn-camera-pilot-program-support-law>. According to Attorney General Loretta Lynch, "[t]his vital pilot program is designed to assist local jurisdictions that are interested in exploring and expanding the use of body-worn cameras in order to enhance transparency, accountability and credibility . . . . The impact of body-worn cameras touches on a range of outcomes that build upon efforts to mend the fabric of trust, respect and common purpose that all communities need to thrive." *Id.* (internal quotation marks omitted); see also Sara Lustbader, Op-Ed, *The Real Problem with Police Video*, N.Y. TIMES, Dec. 2, 2015, [http://www.nytimes.com/2015/12/02/opinion/the-real-problem-with-police-video.html?\\_r=0](http://www.nytimes.com/2015/12/02/opinion/the-real-problem-with-police-video.html?_r=0) [<https://perma.cc/JU4Q-FZYS>].

volved. While there are some fairly easy ways to deal with these issues, in the rush to address the crisis, privacy is often overlooked, as it probably was in the City of Ferguson's response. It is highly unlikely that the Ferguson city officials, in the week it took to hand out the cameras, and especially in light of the other pressures on officials during that period, took the time to address privacy concerns. What are these? When we think of police wearing body cameras, we think of a situation such as Ferguson, or when North Charleston police officer Michael Slager fired eight shots at an unarmed Walter Scott as he tried to get away.<sup>128</sup> A bystander's video contradicted Officer Slager's account, and Slager was dismissed from the force and charged with murder. This represents the perfect situation for body cameras to deliver accountability. Consider, however, officers responding to a domestic abuse call.<sup>129</sup> When they enter the home, the battered spouse is disheveled, her nightclothes torn exposing not only her injuries, but also her breasts.<sup>130</sup> Alternatively, consider officers responding to a rape victim, or to the scene of a grisly car accident. Is the body camera running? Is there a protocol? That is, do officers turn the cameras off and on with free discretion, or is the default that the camera is always running, or at least, always running when the officer is responding to a call? It would seem that to achieve the goal of accountability, the default should be that the camera is always running, at least when the officer is responding to a call or otherwise interacting with the public. If the camera is running, then we now have a recording of the victims in what could be extremely intimate circumstances—a bit of a hot potato. What happens to that film?<sup>131</sup> Is it routinely saved? For how long? By whom? With what safeguards? Who may access it and for what reasons? Is it available to the victim? The accused? The prosecutor and the defense attorney? Is it subject to a right-to-know claim or a state-based version of a Freedom of Information Act (FOIA) request? If the state law tracks federal FOIA, several provisions would allow the state to refuse a request to produce the video,<sup>132</sup> but at least under the federal law, it is up to the custodian of the material to raise the exception—the individual has no

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128. See Dana Ford, *South Carolina Policeman Charged with Murder After Video of Shooting Emerges*, CNN, <http://www.cnn.com/2015/04/07/us/south-carolina-officer-charged-murder/> [<https://perma.cc/EV7K-9LBQ>] (last updated Apr. 8, 2016).

129. My thanks to Marcus De Vito, graduate of Villanova Law School, Class of 2015, whose insightful seminar paper and presentation on this topic sharpened my focus on the issues involved in these cases and who first proposed the domestic abuse hypothetical. See Marcus De Vito, *Protecting Privacy with Ever Changing Technology: Police Body Cams 3* (Dec. 2014) (unpublished paper submitted for Privacy Seminar, Villanova University School of Law) (on file with author).

130. See *id.*

131. See Lustbader, *supra* note 127.

132. See, e.g., 5 U.S.C. § 552 (2012). For example, the federal FOIA statute provides exemptions to protect personal privacy and for certain law enforcement records. See *id.*

standing to do so.<sup>133</sup> Has the state considered if it will resist FOIA/right-to-know requests, and if so, under what circumstances?

Photos and videos such as this do get out, either intentionally or inadvertently. They are sensational and the very fodder Facebook, Buzzfeed, and other social media venues thrive on. For example, in 2006, California Highway Patrol (CHP) officers investigating a particularly gruesome accident in which a young woman was decapitated, took standard investigatory photographs of the scene and downloaded them onto CHP computers. Shortly after the accident, on Halloween, one of the officers sent the pictures to friends and family members as a Halloween prank. The photos were later forwarded, and according to the court's opinion in the suit that ensued, "more than 2,500 Internet websites in the United States and the United Kingdom posted the photographs."<sup>134</sup> The family was horrified. Similarly, the body camera video of an officer who resuscitated a child after a near-drowning in a family pool was posted on a newspaper's online edition, praising a hero-police officer.<sup>135</sup> Again, a tragic and intimate family moment was publicized, and was seen over and over by the family, as well as countless others.

How does the body camera issue come out under Turkington's approach?

#### 1. *The Extent of Loss of Privacy*

Depending on the circumstances, the extent of loss of privacy, or the importance of the privacy interest involved will vary. Thus, for a traffic stop on a public street, or a confrontation during a robbery, or a fight in a public place, the importance of the privacy right might not be significant. But as in the case of the battered spouse, the rape victim, the near-drowning child, or the victim in a gruesome accident, the privacy interest may be high and the impact serious.

#### 2. *The Extent to Which the Integrity of the Relationship Requires Immunity from Access to Information*

Turkington's second question does not fit the body-camera situation neatly, unless the eventual ubiquity of body cameras makes citizens reluctant to call police in some of the more intimate circumstances (such as domestic abuse, sexual assault, or molestation of a minor). In those instances, there could be a dangerous disruption of the integrity of the relationship if those in need of law enforcement hesitate or decide not to call.

133. See *e.g.*, *Chrysler Corp. v. Brown*, 441 U.S. 281, 294 (1979).

134. See *Catsouras v. Dep't of Cal. Highway Patrol*, 181 Cal. App. 4th 856, 865 (Ct. App. 2010).

135. See De Vito, *supra* note 129 (citing Philip Caulfield, *SEE IT: Camera Catches Hero Cop Saving 2-year-old Drowning Victim with CPR (VIDEO)*, N.Y. DAILY NEWS (July 17, 2014, 3:11 PM), <http://www.nydailynews.com/news/national/camera-catches-hero-saving-2-year-old-drowning-victim-cpr-video-article-1.1870873> [<https://perma.cc/ZW7X-5D3D>]).

3. *The Extent to Which Important Governmental and Private Interests Would Be Furthered by Disclosure or in This Instance, Capture of Such Information*

Body cameras on law enforcement officers do hold great potential for protecting both the public and the officers involved.<sup>136</sup> Thus, under Turkington's analysis, the governmental and, indeed, the public interests in capturing the information and, by doing so, invading individual privacy are extremely important. However, by taking the next step, and thinking about Turkington's "how effective is the method" question in a slightly different way, we might make this an easier, if not an easy, case. Careful advance consideration could increase the effectiveness of body cameras. For example, protocols could be developed for determining when cameras are on and when they may be turned off that advance the accountability interest, and minimize the impact on privacy.<sup>137</sup> Further, policies could be developed for the videos—including perhaps designating third-party custodians and positions on circumstances justifying disclosure and parties who should be involved as stakeholders in those decisions.

Before deploying body cameras on all law enforcement officers, government officials should address the questions raised above and craft balanced policies. Such policies are not hard to develop and implement and will serve all interests—accountability of both law enforcement and the individuals they encounter, and protection of important privacy rights. And this can and indeed has been done with minimum disruption to the adoption of body cameras. The Justice Department offers a "toolkit" that includes information about model policies and methods of implementing a body camera program, and the New Jersey Attorney General has created a comprehensive policy and procedures document that all law enforcement agencies in the state must follow when adopting body cameras.<sup>138</sup> All that is required is a moment's pause: a moment to consider the privacy

136. See *supra* note 125; see also David A. Harris, *Picture This: Body-Worn Video Devices (Head Cams) as Tools for Ensuring Fourth Amendment Compliance by Police*, 43 TEX. TECH L. REV. 357, 361 (2010) (discussing studies demonstrating significant benefits from use of body cams by police); Christopher Mims, *What Happens when Police Officers Wear Body Cameras*, WALL ST. J. (Aug. 18, 2014, 5:28 AM), <http://www.wsj.com/articles/what-happens-when-police-officers-wear-body-cameras-1408320244> [<https://perma.cc/7HMN-6FMD>]; Jay Stanley, *Police Body-Mounted Cameras: With the Right Policies in Place, a Win for All*, ACLU (Mar. 24, 2015), <https://www.aclu.org/police-body-mounted-cameras-right-policies-place-win-all> [<https://perma.cc/VV4T-CUD2>].

137. See, e.g., Lustbader, *supra* note 127.

138. See U.S. DEP'T OF JUSTICE, NATIONAL BODY-WORN CAMERA TOOL KIT, <https://www.bja.gov/bwc/> [<https://perma.cc/TCW8-QJGH>] (last visited Apr. 4, 2016). Similarly, New Jersey's Attorney General issued a directive in July, 2015 requiring all law enforcement agencies in the state to comply with a comprehensive set of policies and procedures developed at the state level for the use of body cameras. See State of New Jersey Attorney General Law Enforcement Directive No. 2015-1 (July 28, 2015), [http://www.state.nj.us/oag/dcj/agguide/directives/2015-1\\_BWC.pdf](http://www.state.nj.us/oag/dcj/agguide/directives/2015-1_BWC.pdf) [<https://perma.cc/6DNS-4L27>].

implications early, to value them accurately and to balance the competing interests fairly. It requires that privacy interests be recognized early and valued appropriately.

## VII. CONCLUSION

This last example provides perhaps the most persuasive evidence indicating that we must take privacy seriously—really take it seriously. That is, not just talk about how important it is, and then ignore, discount, or simply fail to see when serious threats to privacy loom. As noted above, we hear much talk about privacy. But while the public talks a good game about privacy’s importance, when push comes to shove, we all too often do not really give privacy its due. We too lightly value the impact on privacy. People seem more burdened by the inconvenience of long airport security lines and having to take off their belts and shoes, than by the fact that a machine is taking—and perhaps saving—a very intimate image of every traveler. Or we too lightly value the damage to privacy, as evidenced by the ubiquitous response when privacy concerns are raised in the context of security: “Whatever it takes to make us safe.” Or we simply do not recognize the privacy interest at all in rushing to fix a problem, demonstrated by the Ferguson body camera example. In all of these important discussions, we must start with privacy at the table—identifying with greater sensitivity when a privacy interest is involved. Moreover, we must accurately value and weigh privacy, recognizing privacy as having an intrinsic worth, and understanding that invading privacy causes harm regardless of whether quantifiable negative consequences ensue. Finally, we must fairly and candidly balance privacy interests against other interests as we shape laws, policies, and the public debate, and honestly assess the importance of the goals, and the efficacy of the proposed programs in achieving those goals.

One final note: Perhaps a heightened understanding of the core value of privacy and its importance to what makes us human will help shape a more nuanced and sensitive cultural response. Perhaps as individuals, we will each nurture a personal respect for privacy, a respect that causes us to avoid disrupting our own and one another’s privacy unnecessarily. In effect, perhaps we can learn both to avert our eyes and resist the urge to always share the sensational, the salacious, or the merely secluded pieces of our own and each other’s lives. In short, to cherish Glissant’s opacity as essential to our humanness.

2016]

REMEMBERING PETHER ON PRECEDENT:  
CROSSING (NATIONAL AND DISCIPLINARY) BORDERS

DAVID S. CAUDILL\*

I. INTRODUCTION

“[I]ntellectual biography today seems to be mainly a matter of authorial attitude or methodology as exercised in portions of a general study of a subject’s life. At its best, it is something approaching a style, less a *kind* of biography than a *quality* found in certain works.”<sup>1</sup>

UPON deciding to write this (memorial) Essay, I knew that I wanted to engage in an intellectual biographical study—albeit limited in scope to her work on precedent—of Professor Penelope Jane Pether, a “subject” whose “life” I knew well. Little did I know that the term intellectual biography is “employed rather haphazardly.”<sup>2</sup>

After all, since psychological analysis and attention to the history of ideas have become standard tools for the [ ] biographer, are not most serious biographies intellectual portraits to some extent, [i.e.,] studies of a subject’s thought, ideas, and mental processes?<sup>3</sup>

Notwithstanding such ambiguities, *intellectual biography* can refer to a particular focus “on the history of an individual’s mind, thoughts, and ideas as a means toward illuminating the subject’s life, personality, and character.”<sup>4</sup> Forsaking “the need for basic chronological structure,” an intellectual biography “develops a narrative of a life through the conceptual analysis of the subject’s motives and beliefs within the world of ideas.”<sup>5</sup>

Intellectual biographies therefore generally exclude conventional biographical sources such as “childhood, family, love, material life, and so

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1. Paul J. Korshin, *The Development of Intellectual Biography in the Eighteenth Century*, 73 J. ENG. & GERMANIC PHILOLOGY 513, 513 (1974).

2. *See id.*

3. *Id.*

4. *See id.* at 514.

5. *See* Craig Kridel, Presentation at the American Educational Research Association National Conference: An Introduction to Biographical Research (Apr. 2000), *available at* <http://www.aera.net/SIG013/ResearchConnections/IntroductiontoBiographicalResearch/tabid/15486/Default.aspx> [<https://perma.cc/RM6Z-QPUX>].

on[.]”<sup>6</sup> but it can be difficult to “rigorously distinguish between the biographical and the intellectual . . . .”<sup>7</sup> Some would say that the intellectual biographer “work[s] through [the subject’s] published texts,”<sup>8</sup> but “an entire volume on a subject’s intellect would probably cease to be a biography; it would tend to become a critical study, an interpretation, or a commentary on someone’s writings.”<sup>9</sup> I would like to avoid conventional critical commentary of an author’s work, in favor of highlighting the life—thoughts and ideas, motives and beliefs—that lies behind the author’s arguments. Indeed, I need not do a conventional commentary on Pether’s writings on precedent, because it has already been done—the *Villanova Law Review* recently published a symposium issue honoring Pether’s scholarship,<sup>10</sup> including numerous articles but, for my purposes, specifically including (i) Pether’s fifth and final manuscript on precedent<sup>11</sup> and (ii) a thoughtful commentary by Professor Marianne Constable on that very posthumous publication (*and* on Pether’s previously published four articles on precedent<sup>12</sup> that, step by step over a decade, built a foundation for that

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6. See Kas Saghafi, *A Matter of Rhythm: Benoît Peeters’s Derrida: A Biography*, L.A. REV. BOOKS (Mar. 30, 2013), <https://lareviewofbooks.org/review/a-matter-of-rhythm-benoit-peeters-derrida-a-biography> [<https://perma.cc/BDL8-A8AZ>].

7. See *id.* (citing JACQUES DERRIDA, *THE EAR OF THE OTHER* 5 (Christie V. McDonald ed., Peggy Kamuf trans., Schocken Books Inc. 1985) (1982)). Derrida, noting that the biographical is “currently undergoing a reevaluation,” thought biographies (“lives”) of philosophers problematic—we must “question[ ] the *dynamis* of that borderline between the ‘work’ and the ‘life[ ]’ . . . . This borderline . . . is neither active nor passive, neither outside nor inside.” DERRIDA, *supra*, at 5.

8. See Martin McQuillan, *The Book of the Week—Who Was Jacques Derrida? An Intellectual Biography*, TIMES HIGHER EDUC. (Dec. 31, 2009), <http://www.timeshighereducation.co.uk/books/the-book-of-the-week-who-was-jacques-derrida-an-intellectual-biography/409754.article> [<https://perma.cc/7PS5-VA3E>]. McQuillan defines *intellectual biography* as “work[ing] through an author’s published texts . . . to construct a life narrative” “in the absence of access to any of the sources necessary to write a traditional biography . . . .” *Id.* That project is, indeed, as he calls it, a “curious academic subgenre,” but I do not believe it is an exhaustive definition of intellectual biography (thus demonstrating the haphazard use of the term, see *supra* note 2 and accompanying text). See *id.*

9. Korshin, *supra* note 1, at 514.

10. Norman J. Shachoy Symposium: A Symposium in Honor of Professor Penelope J. Pether, 60 VILL. L. REV. 443–692 (2015).

11. Penelope Pether, *Strange Fruit: What Happened to the United States Doctrine of Precedent?*, 60 VILL. L. REV. 443 (2015) [hereinafter Pether, *Strange Fruit*].

12. See Penelope Pether, *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; or Why the Federal Circuits’ Nonprecedential Status Rules Are (Profoundly) Unconstitutional*, 17 WM. & MARY BILL RTS. J. 955 (2009); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004) [hereinafter Pether, *Inequitable Injunctions*]; Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1 (2007); Penelope Pether, *Take a Letter, Your Honor: Outing the Judicial Epistemology of Hart v. Massanari*, 62 WASH. & LEE L. REV. 1553 (2005) [hereinafter Pether, *Take a Letter*].

final manuscript).<sup>13</sup> The present Essay, by contrast, will attempt to explain *why* Pether chose precedent as one of her fields of scholarly inquiry.

It bears mentioning that Pether had numerous scholarly interests, represented by over seventy publications, but the controversy over federal circuit publication practices was of major importance to her. The aforementioned (posthumous) article—entitled *Strange Fruit: What Happened to the U.S. Doctrine of Precedent? (Strange Fruit)*—was a sort of *pièce de résistance* in her mind, insofar as it was the culminating chapter in a planned book collecting (and editing) her writings on precedent. Significantly, although she had plans for two scholarly, “academic” books (one on food and law, under contract and nearly completed<sup>14</sup> and one on indefinite detention, under contract but barely begun<sup>15</sup>), she wanted her book on precedent to be a “popular” publication, written not for judges, lawyers, and law professors, but for the intellectual public. This might explain why the structure of *Strange Fruit* is almost like that of Dante’s *Inferno*,<sup>16</sup> with the anticipated reader in the position of Dante Alighieri—the narrator reporting on his tour through hell—and Pether in the position of Virgil—the tour-guide who sets out to amaze and horrify Dante. In *Strange Fruit*, Pether intends to shock the reader. Just as Dante (i) faints when he is crossing the river Acheron on Charon’s ferry boat filled with miserable—wailing and cursing—souls,<sup>17</sup> (ii) faints again with pity in the second circle of hell,<sup>18</sup> (iii) cries out when he realizes what is going on in the fourth circle,<sup>19</sup> and (iv) cannot express the terror of what he sees in the ninth

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13. Marianne Constable, “*Be True to What You Said on Paper*”: Penny Pether on the Positivism of Law and Language, 60 VILL. L. REV. 549 (2015). Pether intended to revise and combine the five articles into a book, more of a popular than an academic or scholarly work, because they serially advanced a single thesis concerning a serious yet little known deficiency in the U.S. legal system.

14. Penelope Pether, *A Seat at the National Table: The Culinary Jurisprudence of Edna Lewis* (2014) (unfinished manuscript) (on file with author).

15. Penelope Pether, “Perverts,” “Terrorists,” and Business as Usual: Indefinite Detention before and After 9/11 (unfinished monograph).

16. DANTE ALIGHIERI, *Inferno*, in *THE DIVINE COMEDY* (Henry Wadsworth Longfellow trans., Ticknor & Fields 1867) (1314).

17. *See id.* Canto 3, at 19.

[Virgil:] This way there never passes a good soul . . . .  
[O]f that terror [t]he recollection bathes me still with sweat.  
The land of tears gave forth a blast of wind,  
And fulminated a vermilion light,  
Which overmastered in me every sense,  
And as a man whom sleep hath seized I fell.

*Id.*

18. *See id.* Canto 5, at 33.

And all the while one [suffering] spirit uttered this [confession],  
The other one did weep so, that, for pity,  
I swooned away as if I had been dying,  
And fell, even as a dead body falls.

*Id.*

19. *See id.* Canto 7, at 40.



circle,<sup>20</sup> Pether reveals to the reader phenomena that, to her eyes, are both breathtaking and appalling. She hoped that a thoughtful citizenry would react to her revelations in ways that most judges, lawyers, and law professors have not. Indeed, one of her primary theses in *Strange Fruit* is that most scholars of precedent have paid scant attention to the frightful development of a binary system of precedent—one genuine, for “important” parties and issues, and one quite shoddy, for the “have-nots” in society.

Briefly, Pether’s argument is that in the latter half of the twentieth century, the U.S. doctrine of precedent changed radically with the increase of unpublished opinions—e.g., 88% of merits decisions in federal appeals in 2013 were unpublished.<sup>21</sup> Most such opinions, impliedly of inferior quality, are formally nonprecedential, and some are written by unsupervised court staff, which means many citizens (e.g., prisoners, veterans, social security claimants), instead of having an authentic right of appeal, are given second-rate, assembly-line justice, while large corporations enjoy a real appellate process. This binary system is justified on pragmatic grounds and even defended in shocking pronouncements by federal judges—for example, Judge Edith Jones referred to a federal appellate “docket [ ] ‘dumbed-down’ by an overwhelming number of routine or trivial appeals,” necessitating courts to

employ staff attorneys rather than leaving initial review to individual judges. Staff attorneys often take primary responsibility for reviewing the trial court record, assessing the issues presented,

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Justice of God, ah! who heaps up so many  
New toils and sufferings as I beheld?

. . . .

My Master, now declare to me  
What people these are . . . .

*Id.* (internal quotation marks omitted).

20. *See id.* Canto 28, at 171.

Who ever could, e’en with untrammelled words,  
Tell of the blood and of the wounds in full Which now I saw . . . ?  
Each tongue would for a certainty fall short  
By reason of our speech and memory,  
That have small room to comprehend so much.

*Id.*; *see also id.* Canto 32, at 204.

If I had rhymes both rough and stridulous,  
As were appropriate to the dismal hole

. . . .

I would press out the juice of my conception  
More fully; but [ ] I have them not . . . .

*Id.*; *id.* Canto 34, at 212.

How frozen I became and powerless then,  
Ask it not, Reader, for I write it not, Because all language would be  
insufficient.

*Id.*

21. *See Pether, Strange Fruit, supra* note 11, at 446 & n.22.

and preparing memoranda that can readily be transformed into unpublished or published opinions.<sup>22</sup>

As no other common law country issues formally nonprecedential opinions, *and* given that “[m]ass processing by non-judicial personnel of specific classes of cases on the basis of their subject-matter and the type of litigant involved”<sup>23</sup> falls short of the system that precedent theorists describe, Pether questions whether we even remain a common law country! In the debate over citation (of unpublished opinions) bans, for example, it seemed reasonable to Pether for Chief Judge Holloway in the Tenth Circuit to state, “all rulings of this court are precedents, like it or not . . . .”<sup>24</sup> However, she found astounding the admission by Judge Kozinski in the Ninth Circuit:

Any nuances in language [in nonprecedential opinions], any apparent departures from published precedent, may or may not reflect the view of the three judges on the panel—most likely not—but they cannot conceivably be presented as the view of the Ninth Circuit Court of Appeals. To cite them as if they were published opinions—as if they represented more than the bare result as explicated by some law clerk or staff attorney—is a particularly subtle and insidious form of fraud.<sup>25</sup>

Pether identifies in appellate court practices a “fear” of precedent,” an anxiety about being bound to a spectral—and different—vision of the national future.”<sup>26</sup> Hence the notion that “common law” is “sufficiently principled and stable to be applied in the same way to yield the same results in the hands of different adjudicators” becomes a fantasy when “the subjects who—and material practices which—produce decision, rationale, or

22. Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1492, 1492–93 (1995). Judge Jones went on to theorize that “judges’ legal talents [are] jeopardized by a steady diet of minor appeals.” *Id.* at 1493. Pether notes the “breathhtaking arrogance” in such statements. Pether, *Strange Fruit*, *supra* note 11, at 482.

23. See Pether, *Strange Fruit*, *supra* note 11, at 480; see also Pether, *Inequitable Injunctions*, *supra* note 12, at 1492.

[T]he associated practices of “screening cases for the nonargument track” and unpublication, together with the delegation of much judicial work either to clerks or to staff attorneys who are often junior, inexperienced, minimally trained, and dissatisfied with the tasks assigned them, mean that judges often do not read any part of the record of an appeal before “signing off” on an unpublished opinion written by a staff attorney.

*Id.*

24. See *Re: Rules of the U.S. Court of Appeals for the Tenth Circuit*, 955 F.2d 36, 37 (10th Cir. 1986) (Holloway, C.J., dissenting).

25. See Letter from Alex Kozinski, Judge, U.S. Court of Appeals for the Ninth Circuit, to Judge Samuel A. Alito, Jr., Chairman, Advisory Comm. on Appellate Rules 7 (Jan. 16, 2004), available at <http://www.nonpublication.com/kozinskiletter.pdf> [https://perma.cc/U85J-SK5Y].

26. See Pether, *Strange Fruit*, *supra* note 11, at 454.

both” are unreliable.<sup>27</sup> The groundwork for those practices is traced by Pether to both an early twentieth century jurisprudential preference for liberty over equality and a mid-twentieth century tendency to see certain types of federal cases which were flooding the courts—prisoner claims, Social Security disability claims, and civil rights actions—as straightforward, vexatious, and unworthy of careful review.<sup>28</sup> The result, by the late twentieth century, was “the untethering of judicial authority from accountability or governance by [a] distinctively common law legal method.”<sup>29</sup>

As a legal scholar, Pether clearly stands in the critical legal tradition. The Critical Legal Studies movement, by the time Pether immigrated to the United States, had splintered into radical feminism, critical race theory, legal Queer Studies, and law-and-the-humanities scholarship, each of which held interest for her even before leaving Australia. Her concern for the marginalized—for women in rape prosecutions, for refugees, for indigenous Australians, for the LGBT community, for prisoners—was reflected in her writings, teaching, and involvement with law school clinics and organizations. This concern, however, would not alone explain her enduring and relatively unique interest in the so-called citation wars.<sup>30</sup> In short, there are a lot of critical legal scholars in the academy who would not have noticed the “citation wars” as signaling a much deeper jurisprudential problem.

Two aspects of Pether’s background, however, gave her a particular and critical perspective on the phenomenon of unpublished opinions, namely her status in the United States as a foreigner from another common law country and her dual graduate training in law and English Studies. (The two are related, although indirectly, in Pether’s notion of subject formation as an important and often ignored aspect of law and legal processes.) After receiving her law degree from the University of Sydney, Pether worked in two Sydney law firms and then took a position—investigating police misconduct—as executive assistant to the New South Wales Ombudsman. She then returned to the University of Sydney and taught English while completing a Ph.D. in that field<sup>31</sup> and later taught law (at Wollongong University and the University of Sydney) before immigrating to the United States in the late 1990s.

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27. *See id.* at 483.

28. *See id.* at 454 n.76 (flagging prisoner habeas and § 1983 Civil Rights Act claims, Social Security disability claims, civil rights actions arising from access to public accommodations and employment as among leading causes of increases in federal appellate caseload[,], which Wilkinson characterizes as “relatively straightforward cases” since 1950s (citing Pether, *Strange Fruit*, *supra* note 11, at 454 n.76 & J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1158–59 (1994))).

29. *Id.* at 509.

30. So named because of the controversy over rules prohibiting citation of unpublished opinions.

31. Her dissertation was entitled, *A Transcending Civilization: England and Englishness in the Works of E.M. Forster and Virginia Woolf*.

## II. A FOREIGNER

“Each time I tried to do a piece of theoretical work, it had as its starting point elements of my own experience and was always in relation to processes that I saw going on around me. It’s because I thought I could recognize in the things I saw, in the institutions that I was dealing with, in my relations with others, some cracks, mute tremors, malfunctions, that I undertook a particular piece of work—some fragments of autobiography . . . .”<sup>32</sup>

Legal scholarship is inevitably grounded in personal experiences. We look around and react to what we see “going on,” and we make judgments about what is going well and what is “malfunctioning.” A lawyer educated and trained in another country might notice malfunctions in the United States that most of us do not see. This could be explained in terms of comparative law—“an avenue to new insights about one’s own legal system.”<sup>33</sup>

It could also be explained, by analogy, in terms of Marxian theory of ideology, insofar as we

use ideological frameworks in order to interpret the material world. These ideologies act as grids for analysing experiences. They are acquired through all the processes of socialization including education and . . . linguistic skills.<sup>34</sup>

And as ideologies are typically invisible to their holders, then to the extent that there are malfunctions,

[they] will appear to be the natural order of things since they are confirmed by everyday experience. . . . [L]aws enacted according to the dictates of a dominant ideology will appear . . . as rules designed to preserve the natural social and economic order.<sup>35</sup>

In Marxian terms, the dominant ideological framework can only be demystified by the development of “a coherent ideology in opposition” to it, which is difficult because “ideological hegemony” tends to “prevent the development of alternative [ ] perspectives.”<sup>36</sup> Recasting the issue in Gramsci’s terms, how does re-education work—how is “natural” consciousness transferred to ideological class consciousness—when the “existing social order enjoy[s] the support or at least the usually unquestioned

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32. DAVID M. HALPERIN, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 234 n.61 (1995) (quoting Interview by Didier Eribon with Michel Foucault (David M. Halperin, trans.), in *Est-il donc important de penser?*, LIBÉRATION, May 30–31, 1981, at 21).

33. See Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT’L L.J. 331, 333 (1998).

34. HUGH COLLINS, MARXISM AND LAW 38 (1982).

35. See *id.* at 43.

36. See *id.* at 39, 50.

acceptance of the majority of a population[?]"<sup>37</sup> Or in Lukács's terms, not only is cognition distorted to make power relations appear natural, but "the irrational structure of capitalist society produces the need for theories to explain and justify the confusion and madness that appear[ ] on its surface."<sup>38</sup> And finally, in Fromm's psychoanalytic perspective, a dominant ideology is not so easily demystified—we are socialized by family experiences in capitalist society, which "stamp[ ] its specific [economic] structure on the child."<sup>39</sup> The link between Marxian and Freudian analyses in the work of Frankfurt School scholars such as Fromm is mirrored in neo-Marxist Louis Althusser's appropriation of neo-Freudian Jacques Lacan, who is credited with discovering how the

transition from (ultimately purely) biological existence to human existence (the human child) is achieved within the . . . Law of Culture . . . . [T]he *whole of this transition* can only be grasped in terms of . . . the law of language in which is established and presented all human order, i.e. every human role.<sup>40</sup>

Ideological *discursive* formations are here offered as examples of Lacan's symbolic order of language. How can those invisible, majoritarian ideological grids (acquired through socialization) be demystified?—how can one see alternatives?

The analogy with Pether's critique of judicial practices lies in the fact that she was socialized into a different common law system, such that the unique features of the U.S. legal system were not invisible and did not seem normal—indeed, its theoretical justifications were not compelling at all, and an alternative ideological framework was not hidden. Pether did not believe that Australian judges would behave like, or become comfortable with the practices of, the U.S. federal appellate judiciary. Moreover, an Australian judge would not *talk* like our federal appellate judges, and just as Althusser highlighted the rhetorical and discursive aspects of socialization into an ideology, Pether's persistent focus on the role of language in law generated critical insights into how judges are socialized.

### III. A LITERARY SCHOLAR

"[A]cronym, euphemism, context, signifiers, and what they signify, writing, positive law and its bureaucratic and institutional simulacra, institutional and disciplinary discourses, surprise, its absence, familiarity,

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37. See Ron Eyerman, *False Consciousness and Ideology in Marxist Theory*, 24 ACTA SOCIOLOGICA 43, 46–47 (1981) (footnote in title omitted).

38. See *id.* at 49.

39. See *id.* at 54 (quoting Erich Fromm, *The Method and Function of an Analytic Social Psychology: Notes on Psychoanalysis and Historical Materialism*, in THE ESSENTIAL FRANKFURT SCHOOL READER 477, 483 (Andrew Arato & Eike Gebhardt eds., 1978)) (internal quotation marks omitted).

40. See LOUIS ALTHUSSER, *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 142–43 (Ben Brewster trans., 2001) (1971).

shock, and outrage; and cultural stories, tropes, schemas, or plausible narratives, like the performance of both truthfulness and trauma, or what we might call their discursive construction; and the sites where law and language are evident kin . . . . [W]ork on law and language that proceeds from the premise that language is but a medium of transmission for the substance of law has been left methodologically behind by contemporary law and language scholarship . . . ."<sup>41</sup>

Pether's academic training, and her law-and-literature publications, gave her a prominent place in contemporary law and language scholarship. She did feel, however, that something was missing in the field, namely an emphasis on subject formation—the way that law students, lawyers, and especially judges, are professionalized:

Both critique and change require subjects, and the most notable gap in contemporary law and language scholarship lies in how adequately to account for subjects, and thus for agency and cultural reproduction and change, in accounts of the relationships between law and language.<sup>42</sup>

She found an explanation of the deficiencies in judicial practices, with respect to precedent, in Bourdieu:

If, on Pierre Bourdieu's account of professional subject formation, the judicial *habitus*, the embodied experience which makes professional subjects who they are and thus in turn shapes how they make the world, is *transposable*, then crafting appellate decisional texts that foreclose appeals is a result to be expected when appeals from trial courts are perceived as impossibly burdensome.<sup>43</sup>

We do not live, and judges do not write, from a position of objectivity or neutrality—"[k]nowledge is always situated in particular, partial experiences."<sup>44</sup> Pether was situated first as an outsider with respect to the U.S. legal system, able to see what went unquestioned as natural, but second as

41. Penelope Pether, *Language*, in *LAW AND THE HUMANITIES: AN INTRODUCTION* 315, 317–18 (Austin Sarat, Matthew Anderson & Catherine O. Frank eds., 2010) (discussing lawsuit).

42. *Id.* at 337.

43. See Pether, *Strange Fruit*, *supra* note 11, at 502 (emphasis added) (footnote omitted); Pether, *Take a Letter*, *supra* note 12, at 1555 n.17 ("[The national judicial habitus can be] described as the 'embodied experience' which makes members of particular cultures or professions 'who they are.'"); see also PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 53 (Richard Nice trans., Polity Press 1990) (1980). Bourdieu has written on legal professional subject formation. See generally Pierre Bourdieu & Richard Terdiman, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *HASTINGS L.J.* 805 (1987).

44. See Nan Seuffert, *Locating Lawyering: Power, Dialogue and Narrative*, 18 *SYDNEY L. REV.* 523, 526 (1996); see also DONNA J. HARAWAY, *SIMIAN, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE* 183–201 (1991).

an insider (heavily influenced by Peter Goodrich) with respect to the common law tradition, wherein “the process of reading [the law] is an inherently social and political activity.”<sup>45</sup> Yet the “rhetoric of legal reasoning hides the complex economic, political and ethical choices that the judiciary are inevitably making in their decisions about how best to apply the law.”<sup>46</sup> Again, as with ideological grids hidden in plain sight, Pether’s approach is characterized by uncovering what is hidden—that the law’s power is “far more open to manipulation, negotiation and technique generally, interpretation and abuse, than is admitted by legal doctrine.”<sup>47</sup> A covering has been provided *discursively* for the “systemic lapses of judicial propriety, accountability, ethics, and duty” that Pether hoped to reveal in her studies on precedent.<sup>48</sup>

Abuse hidden by language, manipulation of law’s power—these images of law are reminiscent of Robert Cover’s oft-quoted aphorisms linking law, language, and violence, which Pether found to be compelling:

Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur.<sup>49</sup>

Pether’s vision of law is also reminiscent of how Gustav Klimt represented “Jurisprudence” in a painting (with that title) intended for a ceiling at the University of Vienna (but never displayed there). Klimt’s initial composition study was “bright and airy,” idealizing the figure of Justice “as active and alive, swinging her sword as she swept through the air to ward off the threat of the shadowy octopus of evil and crime below.”<sup>50</sup> For various reasons, including a controversy over his two other ceiling paintings (entitled “Philosophy” and “Medicine”) that left him indignant,

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45. PETER GOODRICH, *READING THE LAW: A CRITICAL INTRODUCTION TO LEGAL METHOD AND TECHNIQUES* v (1986).

46. *Id.* at 87.

47. *Id.* at 17.

48. See Pether, *Strange Fruit*, *supra* note 11, at 518.

49. Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1601 (1986).

I have used the term ‘legal interpretation’ . . . though my argument is directed principally to the interpretive acts of judges. To this specifically *judicial* interpretation my analysis of institutional action applies with special force. Nonetheless, I believe the more general term ‘legal interpretation’ is warranted, for it is my position that the violence which judges deploy as instruments of a modern nation-state necessarily engages anyone who interprets the law in a course of conduct that entails either the perpetration or the suffering of this violence.

*Id.* at 1601 n.1.

50. CARL E. SCHORSKE, *FIN-DE-SIÈCLE VIENNA: POLITICS AND CULTURE* 247 (Vintage Books ed. 1981) (1980).

Klimt drastically altered his conception. . . . The scene has moved from the breeze-swept Heaven of version I to an airless Hell. No longer is the central figure a soaring Justice but rather a helpless victim of the law.<sup>51</sup>

The painting ended up a “frightening spectacle of the law as ruthless punishment”—in its lower half a “passive, depressed, [and] impotent” man is depicted, surrounded by three “snaky furies [who] are the real ‘officers of the law’” and showing that “law has not mastered violence and cruelty but only screened and legitimized it.”<sup>52</sup> In the upper half, “the allegorical figures of Truth, Justice, and Law” are far removed, performing “no mediating role.”<sup>53</sup>

Thus only the pretensions of the law are expressed in the ordered upper portion of the picture. It is the official social world: a denatured environment of masoned pillars and walls ornamented in mosaic-like rectilinear patterns. The judges are [also pictured] there with their dry little faces, heads without bodies. The three allegorical figures are impassive too, beautiful but bloodless in their stylized geometric drapes.<sup>54</sup>

The reality of the law, in Klimt’s vision, lies in the lower realm. And likewise, for Pether, it was always the ugly reality of the law, behind the “stylized regularity and static decorum” of the “official social world,”<sup>55</sup> that needed to be uncovered. And while Klimt was criticized (by Karl Kraus) for symbolizing *criminal law*, *not* jurisprudence,<sup>56</sup> Pether would also come to see the criminal law and prisons as the site of particularly striking injustices.<sup>57</sup> Throughout *Strange Fruit*, it is the effect of our binary system of precedent on prisoners that concerns Pether and provides her with ready examples of judicial failures.<sup>58</sup> Failures, however, can be corrected, and Pether’s project was driven by the hope that disclosure can precede change for the better.

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51. *Id.*

52. *Id.* at 250–51.

53. *Id.* at 250.

54. *Id.*

55. *Id.* at 250–51.

56. *Id.* at 251\* (asterisked footnote) (quoting Karl Kraus in his own Viennese newspaper, *DIE FACKEL*, No. 147, Nov. 21, 1903, at 10).

57. Pether taught criminal law, co-authored a criminal law casebook, and, in the last two years of her life, worked with the Inside-Out Prison Exchange Program to bring law students into prisons to take a course alongside prisoners. For reference to Pether’s co-authored criminal law casebook, see DAVID CRUMP, NEIL P. COHEN, JOHN T. PARRY & PENELOPE PETHER, *CRIMINAL LAW: CASES, STATUTES, AND LAWYERING STRATEGIES* (3d ed. 2013).

58. See, e.g., Pether, *Strange Fruit*, *supra* note 11, at 448–49, 453–62, 464–67.



IV. CONCLUSION

“Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience.”<sup>59</sup>

I have not attempted to adequately summarize Pether’s complex analysis and critique of the unfortunate precedential practices of the U.S. federal appellate judiciary. I only want to suggest that there are some reasons—perhaps obvious in retrospect—for the particular insights she brings to the theoretical and jurisprudential “table.” Her arguments have everything to do with who she was, not only as a lawyer, a law professor, a feminist, and a “crit,” but importantly as an Australian with a Ph.D. in English.

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59. *Cohen v. Brown Univ.*, 101 F.3d 155, 179 (1st Cir. 1996).