

1-1-2017

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### Recommended Citation

Chris Sewrattan, "Can You Hear Me Now? Conceptions of Privacy in Section 8" (2017) 15:1 CJLT.

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# Can You Hear Me Now? Conceptions of Privacy in Section 8

Chris Sewrattan\*

## INTRODUCTION

Meet Jenny. She's a 20-year-old woman who lives on her smartphone. If you were given 10 minutes with Jenny's phone you would have a pretty good feel for who she is. You'd be able to see a list of Jenny's friends through the Facebook app; Jenny's dating history through the Tinder app; Jenny's futile attempts to get a job through her emails, and Jenny's relationship with her family through her text messages. If you went through Jenny's pictures, you'd see a side of her that even her family doesn't know about.

Jenny is a drug dealer. Or, really, her estranged boyfriend is a drug dealer and Jenny helps him out. The line is a bit blurry. Jenny's boyfriend is a high-level cocaine dealer. Jenny buys cocaine from him and sells it at a profit to lower level dealers. Jenny sometimes takes a picture of the cocaine on her phone. She coordinates the sale with the BlackBerry messaging app. It is difficult to intercept these messages. But it is easy if you have Jenny's phone.

Many people want access to Jenny's phone. The police want to comb through the phone to convict the members of the cocaine dealing operation of which Jenny is a part. Jenny's estranged boyfriend has been bothered for months about her use of the Tinder app. He wants to see who she's talking to. And Jenny's mother wants to see what characters her discrete daughter is associating with.

What privacy should Jenny expect to have over the contents of her phone? And more importantly, why? Some would assert that Jenny's phone should enjoy a right to be left alone, particularly from the prying eyes of the state. Some might defer the question to Jenny to determine what extent she discloses the contents of her phone, and to whom. For example, Jenny should be able to message her boyfriend about a cocaine deal and expect that the police will not be able to read that message without a warrant. Others would assert the opposite: the contents of Jenny's phone should not enjoy any privacy because the full disclosure of information contained on it is necessary for the efficient operation of society. Jenny's boyfriend, in his mind, needs to know if she has another romantic partner. The police need to know who is dealing cocaine so that they can reduce illegal trafficking. A final segment of society might be concerned about the chilling effect of searching Jenny's phone. Although Jenny commits criminal acts with her phone, she lives the rest of her life on it as well. In the process of

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messaging her friends, making lists, and taking pictures, Jenny develops her personality. Such development might be stuttered if Jenny was haunted with the spectre of the police searching her phone.

This article will examine the different conceptions of privacy that are present in the jurisprudence of s. 8 of the *Canadian Charter of Rights and Freedoms*.<sup>1</sup> Section 8 guarantees that everyone has the right against unreasonable search and seizure. As a constitutional right, the protection covers the privacy relationship between the state and the individual. It confers privacy over information for which there exists a reasonable expectation of privacy. The article will analyze a taxonomy of four privacy conceptions present in the literature and discuss their presence in s. 8 case law.<sup>2</sup> It will then examine two criticisms that arise from the philosophical foundations of these privacy conceptions and suggest a step for reform.

Note from the outset that this taxonomy is an analytical tool. The four conceptions of privacy are interrelated. They are best understood when considered individually, but always applied in conjunction.

## I. THE RIGHT TO BE LET ALONE

### (a) The Conception of Privacy

Samuel Warren and Louis Brandeis famously articulated this conception of privacy in their 1890 article “The Right to Privacy”.<sup>3</sup> Privacy is a free standing right to be let alone based on a notion of one’s “inviolable personality”:

These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed.<sup>4</sup>

To arrive at this conclusion, Warren and Brandeis combed through a number of precedential cases across a variety of subject matters and found “privacy principles” within each. The authors argued that these cases were better explained by a common principle of privacy protection rather than by the reasons given by the authoring justices.<sup>5</sup> The existence of “privacy principles” shows that there has always been a distinct “right to be let alone” in American common law. Despite the right’s existence, it had never been articulated

<sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

<sup>2</sup> See Richard B Bruyer, “Privacy: A Review and Critique of the Literature” (2006) 43 *Alta L Rev* 553–588.

<sup>3</sup> Samuel D Warren & Louis D Brandeis, “The Right to Privacy” (1890) 4 *Harv L Rev* 193.

<sup>4</sup> *Ibid* at 205 cited in Bruyer, *supra* note 1 at para 12.

<sup>5</sup> *Ibid* at 198–214.

explicitly. In addition, Warren and Brandeis believed that the right to be let alone is needed as a policy matter to guard against changing social conditions. Those conditions are still applicable today: “mass literacy, the rise of a popular press, the crowded conditions of modern life, and the increased personal sensitivity that supposedly accompanied higher general standards of education.”<sup>6</sup>

**(b) Application in the Case Law**

The right to be let alone frames the procedure for search and seizure authorized by s. 8 of the *Charter*. In *Hunter v Southam*, the Supreme Court of Canada unanimously held that every individual has the right to be let alone against unreasonable searches and seizures from the state.<sup>7</sup> The state cannot automatically interfere with a person’s reasonable expectation of privacy. Instead judicial authorization, where feasible, is a precondition for a valid search or seizure.<sup>8</sup> Although the court’s requirement for judicial authorization has been attenuated in the 31 years since *Hunter v Southam*,<sup>9</sup> the substance of the decision remains. Under the present law, warrantless searches are presumptively unreasonable. The state must rebut this presumption by demonstrating on a balance of probabilities that a search is authorized by a reasonable law and conducted in a reasonable manner.<sup>10</sup>

In *Hunter*, the court ascribed a prophylactic character to s. 8 of the *Charter*, ensuring that its practical application respects the right to be let alone. The precondition of judicial authorization, where feasible, institutes a system “to intercept unjustified searches or seizures before they . . . take place.”<sup>11</sup> If this precondition were not present an individual would be unable to assert their privacy right until after their privacy was invaded. In the court’s view:

Such a *post facto* analysis would, however, be seriously at odds with the purpose of s. 8. That purpose is, as I have said, to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of prior authorization, not one of subsequent validation.<sup>12</sup>

<sup>6</sup> Thomas C Grey, “Langdell’s Orthodoxy” (1983) 45:1 U Pitt L Rev 1 at 32.

<sup>7</sup> *Hunter v Southam Inc.*, 1984 CarswellAlta 121, 1984 CarswellAlta 415, [1984] 2 SCR 145 (SCC) [*Hunter*].

<sup>8</sup> *Ibid.*

<sup>9</sup> See e.g. the majority decision in *R v MacDonald*, 2014 SCC 3, 2014 CarswellNS 16, 2014 CarswellNS 17, [2014] 1 SCR 37 (SCC).

<sup>10</sup> *R v Collins*, 1987 CarswellBC 699, 1987 CarswellBC 94, [1987] 1 SCR 265 (SCC).

<sup>11</sup> Lorne Neudorf, “Home Invasion by Regulation: Truckers and Reasonable Expectations of Privacy under Section 8 of the Charter” (2012) 45 UBC L Rev 551 at para 11.

<sup>12</sup> *Hunter*, *supra* note 7 at 160 [emphasis in original].

The court has not embraced the right to be let alone in the classical orthodox manner. The *Charter* conferred a new and specific privacy right onto the *Constitution Act, 1982*.<sup>13</sup> In determining the procedure authorized by s. 8 in *Hunter*, the court noted that there is no “particular historical, political or philosophic context capable of providing an obvious gloss on the meaning of the guarantee.”<sup>14</sup> Nevertheless, the procedure set out is principled and predictable in the manner envisioned by classical orthodox legal scholars.

## II. CONTROL OVER PERSONAL INFORMATION

### (a) The Conception of Privacy

Leading legal theorists of this conception assert that “privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”<sup>15</sup> The locus is the ability of a person to control information about them. Professor Charles Fried, a leading scholar on this issue, explains that “[p]rivacy is not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves.”<sup>16</sup>

Privilege captures this conception of privacy. A litigant may wish to disclose information to their lawyer but not wish for that information to be released to the general world. Privilege allows an individual to control when, how, and to what extent information about them is communicated to others by a person to whom they have disclosed their confidences.<sup>17</sup>

Privacy as the “control over information” finds support in multiple disciplines. Harvard psychologist and philosopher William James published *The Principles of Psychology* in the same year as Warren and Brandeis’ “The Right to Privacy”.<sup>18</sup> James posited that by controlling the release of personal information to others, “a man has as many social selves as there are individuals who recognize him and carry an image of him in their mind . . . We do not show ourselves to our children . . . as to our own masters and employers as to our intimate friends.”<sup>19</sup> Philosophy professor Helen Nissenbaum adds a gloss to this conception of privacy. According to Nissenbaum, context is essential when determining to whom private information should be disclosed.<sup>20</sup> Reasonable

<sup>13</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11.

<sup>14</sup> *Hunter*, *supra* note 7 at 155.

<sup>15</sup> Alan F Westin, *Privacy and Freedom*, 1st ed (New York: Atheneum, 1967) at 7, cited in Daniel J Solove, “Conceptualizing Privacy” (2002) 90 Cal L Rev 1087 at 1109–1110 [Solove].

<sup>16</sup> Charles Fried, “Privacy” (1968) 77:3 Yale LJ 475 at 482–483 [Fried], cited in Solove, *supra* note 15 at 1110.

<sup>17</sup> Fried, *ibid* at 488.

<sup>18</sup> See William James, *The Principles of Psychology*, vol. 1 (New York: Henry Holt and Company, 1890).

<sup>19</sup> *Ibid* at 294 [emphasis in original].

people would condemn the idea of a camera being set up to monitor the activity an 18-year-old university student in her dorm room. The same people might agree with the idea of a camera monitoring the activity of a toddler in her bedroom. For Nissenbaum, “context includes such things as ‘the nature of the information in relation to that context; the roles of agents receiving information; their relationships to information subjects; on what terms the information is shared by the subject; and the terms of further dissemination.’”<sup>21</sup>

**(b) Application in the Case Law**

The Supreme Court has adopted the locus of the “control over personal information” conception of privacy: individuals have the ability to control whether they disclose personal information to the state. In *R v Duarte*, the police rented an apartment for a police informant who was working with an undercover police officer in a drug trafficking investigation.<sup>22</sup> Audio-visual recording equipment was installed in the wall. The police informer and undercover officer consented ahead of time to recording their conversations in the room. The accused and two other men attended the room and discussed a cocaine transaction with the police informant and undercover officer. Unbeknownst to the accused, the conversation was audio recorded. After the conversation, the undercover officer made notes about the conversation based on his review of the audiotape. The accused was charged with conspiracy to import a narcotic. At trial, he challenged the surreptitious recording of this conversation as a breach of his s. 8 *Charter* right. He argued, ostensibly, that although he chose to disclose information about the conspiracy with the attending parties, he did not choose to allow that information to be electronically recorded by the state.<sup>23</sup>

The Supreme Court resoundingly agreed. There is a qualitative difference in the surreptitious electronic recording by a private citizen and the state:

The reason for this protection is the realization that if the state were free, at its sole discretion, to make permanent electronic recordings of our private communications, there would be no meaningful residuum to our right to live our lives free from surveillance. The very efficacy of electronic surveillance is such that it has the potential, if left unregulated, to *annihilate any expectation that our communications will remain private*. A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our words

<sup>20</sup> Helen Nissenbaum, “Privacy as Contextual Integrity” 79 *Wash L Rev* 119 at 155, cited in Stephen B Wicker, *Cellular Convergence and the Death of Privacy* (New York: Oxford University Press, 2013) at 59..

<sup>21</sup> *Ibid.*

<sup>22</sup> *R v Duarte*, [1990] 1 SCR 30, 1990 CarswellOnt 77, 1990 CarswellOnt 986, [1990] 1 SCJ No. 2, *sub nom. R v Sanelli* (SCC) [Duarte].

<sup>23</sup> The case was litigated with reference to the warrant provision for this type of surveillance under what was then s 178.11(2)(a) of the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*]. For the purpose of this discussion the analysis of that section is not relevant.

every time we opened our mouths might be superbly equipped to fight crime, but would be one in which *privacy no longer had any meaning*.<sup>24</sup>

For the Supreme Court, the definition of privacy is the ability to control the disclosure of private information to the state, or at least it is with regard to s. 8 of the *Charter*. The court was careful to distinguish, however, between invalid electronic recordings of communications by the state, which are warrantless and without the consent of all parties, and the disclosure of information to a member of the public who then passes that information along to the state. The latter is not constitutionally protected.<sup>25</sup> As the court colourfully noted, “the *Charter* is not meant to protect us against a poor choice of friends.”<sup>26</sup> It is also open to the state to obtain a search warrant under the *Criminal Code* if it wants to electronically record a conversation without the consent of all parties.<sup>27</sup>

In some instances, s. 8 of the *Charter* will protect against the state conscripting information about a suspect from a third-party company. *R v Gomboc* is an interesting example.<sup>28</sup> In *Gomboc*, the police asked an electricity company to monitor the accused’s electricity consumption with a digital recording ammeter (DRA) without a warrant.<sup>29</sup> A DRA allows electricity use to be recorded, and allows disclosure of electricity use patterns closely associated with marihuana grow operations. The DRA data was obtained by the electricity company and forwarded to the police. The police used the DRA data along with its own observations to obtain a search warrant for the accused’s residence. The warrant’s execution resulted in the finding of a marihuana grow operation in the accused’s residence.

Seven of the nine justices of the Supreme Court found that the accused’s s. 8 *Charter* right against unreasonable search and seizure was not violated. A plurality of the court ruled, however, that absent a reasonable law, the state could not conscript the electricity company to provide the DRA data relating to one of its customers. Writing in dissent, Chief Justice McLachlin and Fish J. held that the accused had a reasonable expectation of privacy in the DRA data. In their view, when people subscribe for public services they “do not authorize the police to conscript the utilities concerned to enter our homes, physically or electronically, for the purpose of pursuing their criminal investigations without prior judicial authorization.”<sup>30</sup> McLachlin C.J.C. and Fish J. likened the conduct of the utility employees to undercover police officers.<sup>31</sup>

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<sup>24</sup> *Supra*, note 22 at para. 24 [emphasis added].

<sup>25</sup> *Ibid* at para. 22.

<sup>26</sup> *Ibid* at para. 60.

<sup>27</sup> See *ibid* at para. 50.

<sup>28</sup> *R v Gomboc*, 2010 SCC 55, 2010 CarswellAlta 2269, 2010 CarswellAlta 2270 (SCC) [*Gomboc*].

<sup>29</sup> *Ibid*.

<sup>30</sup> *Ibid* at para. 102.

<sup>31</sup> *Ibid*.

Three other justices agreed in principle. Abella J., writing for herself, Binnie J. and LeBel J. concurred, that the accused had a reasonable expectation of privacy over his DRA data.<sup>32</sup> However, in their view the provincial legislation allowed for the disclosure of this information to the state. The legislation allowed the accused to request confidentiality over his information from the electricity company, but he declined to do so. If the accused had availed himself of this option, the police's conscription of the DRA data would have been in violation of s. 8 of the *Charter*. Abella J. was not willing to invoke confidentiality when the accused had the option under the legislation and declined to do so himself.<sup>33</sup> Nevertheless, Abella J.'s analysis is premised on the idea that s. 8 allows a person to control the disclosure of information that they provide to a third-party company.

More recently, the Supreme Court affirmed *Gomboc* and held that individuals have the right to expect that if they disclose information to a third party for which there is a reasonable expectation of privacy, then they can control whether that information is shared with the state.<sup>34</sup> If the state wishes to obtain information from a third party, and there is a reasonable expectation of privacy over the information, the state must act in accordance with a reasonable law or obtain a warrant. Accordingly, police officers seeking to link an Internet Protocol (IP) address to a suspect must now obtain a search warrant to obtain IP address' subscriber information, depending on the internet service provider's terms of use.<sup>35</sup>

Section 8 does not allow a person to control the disclosure of information that they have abandoned. The Supreme Court has held repeatedly that there is no reasonable expectation of privacy in something that a person "knowingly exposes to the public . . . or abandons in a public place."<sup>36</sup> For example, there is no s. 8 privacy interest in garbage located on public land.<sup>37</sup> By contrast, there may be a privacy interest against the state in something that is stolen. In *R v Law*, a locked safe containing confidential documents was stolen from the accused. The police found the safe and decided to scrutinize the documents inside, resulting in the accused being charged with tax offences. The Supreme Court held that the accused never acted in a manner inconsistent with the privacy interest in the information contained in the safe. As a result, the police's search of the safe violated s. 8 of the *Charter*.

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<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid* at para. 81.

<sup>34</sup> *R v Spencer*, 2014 SCC 43, 2014 CarswellSask 342, 2014 CarswellSask 343 (SCC) at para. 65.

<sup>35</sup> *Ibid.* But see *R v Ward*, 2012 ONCA 660, 2012 CarswellOnt 12133, 97 CR (6th) 377 (CA).

<sup>36</sup> *R v Tessling*, 2004 SCC 67, 2004 CarswellOnt 4351, 2004 CarswellOnt 4352 (SCC) at para. 40.

<sup>37</sup> *R v Patrick*, 2009 SCC 17, 2009 CarswellAlta 481, 2009 CarswellAlta 482 (SCC).



The Supreme Court may soon be forced to decide whether a person has a privacy interest against the state in information disclosed to another private person. In *R v Pelucco*,<sup>38</sup> the accused arranged through text messages to an associate, Guray, to sell a kilogram of cocaine. Guray was arrested and the police seized his cell phone. The accused was eventually arrested through the use of the information found on Guray's phone. The police located a one-kilogram brick of cocaine in the accused's trunk and more drugs at his residence. The accused argued that Guray was unlawfully arrested and the search of the text messages on Guray's cell phone violated his own right against unreasonable search and seizure. The Crown argued that since the accused had no control over Guray's cell phone he had no reasonable expectation of privacy in the text messages from him that were recorded on it. The trial judge and majority of the British Columbia Court of Appeal agreed with the accused. Writing for the majority of the British Columbia Court of Appeal, Groberman J. found that a sender has a reasonable expectation that a message will remain private in the hands of its recipient.<sup>39</sup> The accused was reasonable to believe that the police would not search Guray's cell phone without authorization.<sup>40</sup>

This analysis stands in contrast to the American experience. In the United States there is a line of appellate authority on the Fourth Amendment finding no reasonable expectation of privacy in email correspondence once it has reached its intended recipient. For instance, there is no reasonable expectation of privacy in a letter once it is sent.<sup>41</sup> Likewise there is no reasonable expectation of privacy when an email has reached the intended recipient.<sup>42</sup> American jurisprudence typically confers such an expectation of privacy only when the recipient has a legal duty of confidentiality toward the sender.<sup>43</sup> The dissenting judge in *Pelucco* adopted the American line of authority, holding that the accused did not have a reasonable expectation of privacy in the text messages sent to Guray's cell phone.

The Ontario Court of Appeal recently disagreed with the majority in *Pelucco*. In *R v Marakah*, the majority of the court held that there is no reasonable expectation of privacy in a text message sent to another person's phone.<sup>44</sup> *Marakah* has been appealed to the Supreme Court of Canada. The issue will be settled in the near future.

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<sup>38</sup> *R v Pelucco*, 2015 BCCA 370, 2015 CarswellBC 2386, 327 CCC (3d) 151 (CA) [*Pelucco*].

<sup>39</sup> *Ibid* at para 68.

<sup>40</sup> *Ibid* at para 68.

<sup>41</sup> See *ibid* at para 110.

<sup>42</sup> *United States v Lifshitz*, 369 F. 3d 137 (USCA, 2d Cir., 2004) at 190.

<sup>43</sup> See e.g. *U.S. v Knoll*, 16 F. 3d 1313 (USCA, 2d Cir., 1994) at 1321.

<sup>44</sup> *R v Marakah*, 2016 ONCA 542, 2016 CarswellOnt 10861, 338 CCC (3d) 269 (CA).

### III. CONCEALMENT OF DISCREDITABLE INFORMATION

#### (a) The Conception of Privacy

An economic theory of privacy advanced by Richard Posner holds that privacy is the “right to conceal material facts about themselves.”<sup>45</sup> A claim to personal privacy is the assertion of a right to withhold discreditable information as a form of self-interested economic behaviour.<sup>46</sup> Directly addressing Warren and Brandeis’ “right to be let alone,” Posner suggests that people do not want to be let alone. Rather, they seek to manipulate society through the “selective disclosure of facts about themselves.”<sup>47</sup> Privacy is a form of self-interested economic behaviour through which a person can conceal harmful but true facts about themselves.<sup>48</sup>

The selective disclosure of information is inefficient and undesirable. Privacy ought to allow for full disclosure of information:

An analogy to the world of commerce may help to explain why people should not — on economic grounds, in any event — have a right to conceal material facts about themselves. We think it wrong (and inefficient) that the law should permit a seller in hawking his wares to make false or incomplete representations as to their quality. But people “sell” themselves as well as their goods. They profess high standards of behaviour in order to induce others to engage in social or business dealings with them from which they derive an advantage but at the same time they conceal some of the facts that these acquaintances would find useful in forming an accurate picture of their character.<sup>49</sup>

The “control over personal information” conception of privacy is turned on its head. Posner’s conception of privacy is cynical, and asks that privacy as a concept is discarded for the sake of social efficiency.<sup>50</sup> This has been subject to considerable criticism. Professor Julie Cohen challenges the conception as reductive:

On the one hand, the understanding of ownership that applies to, say, cars or shoes just seems a crabbed and barren way of measuring the importance of information that describes or reveals personality. But there is also a strong conviction that ownership as an intellectual concept doesn’t encompass all of the legally relevant interests that an informed privacy policy should consider — that framing the privacy debate in terms of proprietary rights elides something vitally important

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<sup>45</sup> Richard A Posner, “Sibley Lecture Series: The Right to Privacy” (1978) 12 Ga L Rev 393 at 399, cited in Bruyer, *supra* note 2 at 562.

<sup>46</sup> Wicker, *supra* note 20 at 63.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> Posner cited in Bruyer, *supra* note 2 at 562.

<sup>50</sup> Bruyer, *supra* note 2 at para. 20.

and conceptually distinct about the interests that the term “privacy” denotes.<sup>51</sup>

As Cornell University Professor Stephen Wicker notes, privacy is “more of a natural right, and less like a suitcase of twenty-dollar bills.”<sup>52</sup>

### (b) Application in the Case Law

This conception of privacy has found a place in the debate regarding the existence of a privacy interest in illegal material. On the one hand, individuals in possession of illegal material, for example drugs, have asserted a privacy interest over this material. On the other hand, law enforcement agents and prosecutors have invoked Posner’s economic theory and asserted that the efficiency of the justice system requires that a person be prohibited from hiding their criminality behind a privacy interest.

Posner’s conception of privacy has been disavowed in Canada and accepted in America. The Supreme Court of Canada has consistently held that evidence connecting a person to criminality is “very personal” biographical information worthy of a privacy interest.<sup>53</sup> When determining whether a reasonable expectation of privacy exists, the issue is framed “in terms of the privacy of the area or thing being searched and the potential impact of the search on the person being searched, not the nature or identity of the concealed items.”<sup>54</sup> This follows from the court’s early adoption of the dictum that s. 8 of the *Charter* protects people, not places. The court has never gone so far as to call Posner’s conception of privacy reductive, but clearly it recognizes the reductive nature of the logic. In *R v Wong*, the court held that gamblers who “retire to a hotel room and close the door behind them have a reasonable expectation of privacy” despite engaging in illegal activity once inside.<sup>55</sup> Moreover, the court has found a privacy interest in:

- a home despite the presence of a drug inside;<sup>56</sup>
- an office despite the existence of incriminating documents;<sup>57</sup>
- an automobile despite the discovery of incriminating evidence<sup>58</sup> or drugs;<sup>59</sup>

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<sup>51</sup> Julie E Cohen, “Examined lives: Informational Privacy and the Subject as Object” (2000) 52 *Stan L Rev* 1373 at 1378, cited in Wicker *supra* note 20 at 64.

<sup>52</sup> Wicker, *supra* note 20 at 64.

<sup>53</sup> *Gomboc*, *supra* note 28 at para. 130.

<sup>54</sup> *Patrick*, *supra* note 37 at para. 32.

<sup>55</sup> *R v Wong*, 1990 CarswellOnt 1008, 1990 CarswellOnt 58, [1990] SCJ No. 118 (SCC) at para. 20, quoted in *Patrick*, *supra* note 37 at para. 32.

<sup>56</sup> *R v Evans*, 1996 CarswellBC 996, 1996 CarswellBC 996F, [1996] 1 SCJ No. 1 (SCC) at para. 42.

<sup>57</sup> *Thomson Newspapers Ltd. v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, 1990 CarswellOnt 92, 1990 CarswellOnt 991, [1990] SCJ No. 23.

- the contents of a duffel bag found in a locker in a bus depot despite the presence of marihuana;<sup>60</sup>
- a student's backpack despite the presence of marihuana;<sup>61</sup>
- electricity consumption patterns despite their creation through the cultivation of marihuana.<sup>62</sup>

The court's rationale also accounts for practical policing implications. Denying a privacy interest to criminal material opens the door to after-the-fact justifications for illegal searches that result in the discovery of contraband. This has the potential to institutionalize constitutional violations and exacerbate racial profiling.

#### IV. CREATION AND PRESERVATION OF PERSONHOOD

##### (a) The Conception of Privacy

Privacy provides the setting in which a person can define themselves through trial and error.<sup>63</sup> Without privacy a person is less inclined to experiment and make bad choices.<sup>64</sup> Accordingly, privacy is needed to guard against conformity, ridicule, punishment, and unfavorable decisions. For advocates of this conception of privacy, privacy is a precondition to personhood and human dignity:

The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual.<sup>65</sup>

This conception of privacy is a nuanced synthesis of the right to be let alone and the ability to control personal information.

<sup>58</sup> *R v Wise*, 1992 CarswellOnt 71, 1992 CarswellOnt 982, [1992] 1 SCJ No.16 (SCC) at 533.

<sup>59</sup> *M. (K.) v M. (H.)*, 1992 CarswellOnt 841, 1992 CarswellOnt 998, [1992] SCJ No. 85 (SCC).

<sup>60</sup> *R v Buhay*, 2003 SCC 30, 2003 CarswellMan 230, 2003 CarswellMan 231 (SCC).

<sup>61</sup> *R v Brown*, 2008 SCC 18, 2008 CarswellAlta 523, 2008 CarswellAlta 524, *sub nom. R v Kang-Brown* (SCC).

<sup>62</sup> *Gomboc*, *supra* note 28.

<sup>63</sup> Bruyer, *supra* note 2 at 566.

<sup>64</sup> *Ibid* at 566–567.

<sup>65</sup> Edward J Bloustein, “Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser” (1964) 39 NYUL Rev 962 at 1003, as cited in Bruyer, note 2 at 566.

Michel Foucault explores the exercise of power over human bodies in *Discipline and Punish: The Birth of the Prison*.<sup>66</sup> Famously, he discussed Jeremy Bentham's concept of the panopticon, the idea that a person knows that they are constantly visible to observers but never knows when the observers are watching. It matters not whether the person is actually watched. The knowledge of permanent visibility is sufficient to foster an internalization of discipline.<sup>67</sup> The internalization of discipline results in a body that is both docile and economically useful: "Thus discipline produces subjected and practiced bodies, 'docile' bodies. Discipline increases the forces of the body (in economic terms of utility) and diminishes these same forces (in political terms of obedience)."<sup>68</sup> Privacy can help to guard against Foucault's spectre of docility. An individual expecting their conduct to remain private is more likely to experiment with ideas. An individual not expecting their conduct to remain private is less likely to experiment. Indeed, Professor Dawn Schrader, a moral psychologist at Cornell University, has commented on the impact of surveillance and observation on knowledge acquisition patterns in children. A child under surveillance is intellectually docile and less likely to experiment.<sup>69</sup>

#### **(b) Application in the Case Law**

This conception of privacy has been generally endorsed in the case law, but the courts have divided over its application. Most recently in *R v Fearon*,<sup>70</sup> the court sharply disagreed on whether the warrantless search of a cell phone interferes with the creation and preservation of personhood. The majority of the court held that the search does not interfere with the potentially deep privacy interest in a cell phone for three reasons.<sup>71</sup> First, the search of the cell phone may be circumscribed to text messages or pictures, though, the court acknowledged, this may not always be the case. Second, the person being searched will have already been arrested, giving them a lower expectation of privacy. Third, the search must be linked to a valid law enforcement objective.

Karakatsanis J. strongly disagreed. Writing for the minority of the court, she asserted that privacy "gives us a safe zone in which to explore and develop our identities and our potential both as individuals and as participants in our society."<sup>72</sup> Cell phones, as modern day computers, diaries, photo albums, and more, are important conduits through which personal identities are formed. In

<sup>66</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1995).

<sup>67</sup> Wicker, *supra* note 20 at 67.

<sup>68</sup> Foucault, *supra* note 67 at 138, cited in Wicker, *supra* note 20 at 68.

<sup>69</sup> Dawn E Schrader, "Intellectual Safety, Moral Atmosphere, and Epistemology in College Classrooms" (2004) 11:2 *J Adult Development* 87, cited in Wicker, *supra* note 20 at 68.

<sup>70</sup> *R v Fearon*, 2014 SCC 77, 2014 CarswellOnt 17202, 2014 CarswellOnt 17203 (SCC) [*Fearon*].

<sup>71</sup> *Ibid* at paras. 54–57.

addition to being a vehicle for expressing thoughts to the world, cell phones are spaces in which thoughts can be protected from disclosure:

On our digital devices, we may choose to investigate an idea on the Internet without wishing to attach ourselves to it. We may take pictures in the context of an intimate relationship, but not wish that these pictures be seen by others and redefine our public image. We may debate controversial ideas through text message or email, but not intend to commit to the opinions expressed.<sup>73</sup>

For the minority of the Supreme Court, cell phones could not be searched without a warrant following an arrest because the act of doing so would interfere with the ability of individuals to develop their thoughts on their phones in confidence.<sup>74</sup>

## V. CRITICISMS

The four conceptions of privacy are not mutually exclusive. Indeed, there is considerable overlap between three of the four. Sharing common elements, all four conceptions are susceptible to two criticisms.<sup>75</sup>

First, these conceptions of privacy are based on a notion of intuitionism, an assumption that people have a common understanding of what privacy is. The difficulty is that there is no such consensus. Professor James Whitman is a leading critic of the intuitionist privacy approach:

[T]he typical privacy article rests its case precisely on an appeal to its reader's intuitions and anxieties about the evils of privacy violations. Imagine invasions of your privacy, the argument runs. Do they not seem like violations of your very personhood? Since violations of privacy seem intuitively horrible to everybody, the argument continues, safeguarding privacy must be a legal imperative, just as safeguarding property or contract is a legal imperative.<sup>76</sup>

This criticism has plagued the conception of privacy since 1890 when Warren and Brandeis first articulated the right to be let alone. Those authors premised the privacy right on the protection of a person's "inviolable personality" but never defined what that personality was. Likewise, the Supreme Court of Canada has endorsed the "creation and preservation of personhood" conception of privacy but divided over its application. The absence of consensus about the underlying concept of privacy renders each conception of privacy incoherent. A consensus

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<sup>72</sup> *Ibid* at para. 112.

<sup>73</sup> *Ibid* at para. 113.

<sup>74</sup> *Ibid* at para. 145.

<sup>75</sup> These flaws are drawn from Bruyer, *supra* note 2.

<sup>76</sup> James Q Whitman, "The Two Western Cultures of Privacy: Dignity Versus Liberty" (2004) 113 Yale LJ 1151 at 1154, quoted in Bruyer, *supra* note 2 at 570.

can only reach coherence if and when there is agreement on its underlying concepts.<sup>77</sup>

Second, the conceptions of privacy are premised on a notion of liberty. However, in rights jurisprudence, liberty is a form of licence, which grants permission to act as one pleases against the state's wishes.<sup>78</sup> As a result, privacy, like other manifestations of liberty, is balanced against the wishes of the state and other competing liberty interests. To be sure, there is nothing inherently wrong with balancing privacy against other interests. But, it is problematic. Balancing assumes that there is a consensus about the importance of privacy relative to other state or liberty interests.

## VI. CONCLUSION

Remember Jenny? She's still texting, emailing and Facebook-ing with her phone — and using it to re-sell cocaine to drug dealers. We can better appreciate the privacy concerns over Jenny's phone now. And we know what trappings we fall into when we assume a consensus of understanding about what constitutes privacy.

First, the legal orthodoxists, Warren and Brandeis, assert that an individual has a right to be let alone. This conception of privacy is the basis of the presumptive requirement for a warrant whenever there is a reasonable expectation of privacy. Second, there is the assertion that an individual has the right to control what information is disclosed about them, when, and to whom. This conception of privacy has been accepted in the case law with an acknowledgement that it is a difference of kind rather than degree when an individual discloses information to the public and wishes that it not be intercepted by the state. Third, Posner asserts that privacy can be a conduit to nefarious enterprise and should be disregarded for the sake of efficiency. While this view has found favour in the United States, it has been disavowed in Canada. Fourth, there is an assertion that privacy is needed to create and preserve personhood. It guards against conformity, ridicule, punishment, and unfavorable decisions. This idea has been accepted in the case law but its application has been the subject of debate between judges.

Disagreement about the application of a conception of privacy in part stems from two factors. Each conception assumes a consensus about what privacy is and allows for privacy to be balanced against other state and liberty interests. There is no consensus about what privacy is nor is there consensus about its balancing. The result is an inconsistent conception of privacy and an inconsistent application of the privacy right.

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<sup>77</sup> Bruyer, *supra* note 2 at 569.

<sup>78</sup> *Ibid* at 573. at 37.