

**CONSTITUTIONALIZING INFORMATIONAL PRIVACY BY
ASSUMPTION**

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ABSTRACT

For more than three decades, the hypothetical constitutional right of informational privacy has governed by assumption in the lower courts. The Supreme Court assumed the right into being in two cases decided in 1977, Whalen v. Roe and Nixon v. Administrator of General Services, and persisted in assuming the right exists without deciding recently in NASA v. Nelson. In the fertile murk of indecision, a hodgepodge of standards from interest-balancing all the way up to strict scrutiny and a quasi-constitutional law of intuitions have arisen in the lower courts. What constitutes a violation of this assumed right? The law struggles for a standard to define a violation, but we know it when we feel it.

The Article contends that the very fuzziness of the hypothetical right comes from its nature as an affectively saturated moral intuition regarding the proper balance of state and citizen power and unease over incursions in times of social change. The Article is also about how to translate the powerful moral intuition that the Constitution should have something to say (even if its text does not quite say it) when the government does something creepy or outrageous with our intimate information into respectable law that helps sort out the manifold meritless claims predicated on privacy as knee-jerk reaction rather than right and allows policy innovation in the laboratories of states and political branches. The article argues that privacy is a transitional lens that opens up our vision of the liberty and freedoms safeguarded in the Constitution. We need not invent or recognize a new atextual right of informational privacy. Rather the concept of informational privacy is a lens that brings into focus a richer vision of the scope of textually inscribed constitutional freedoms and what it means to vindicate them.

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Like many other desirable things not included in the Constitution, “informational privacy” seems like a good idea—wherefore the People have enacted laws . . . restricting the [G]overnment’s collection and use of information. But it is up to the People to enact those laws, to shape them, and, when they think it appropriate, to repeal them. A federal constitutional right to “informational privacy” does not exist.

—Justice Antonin Scalia, concurring in *NASA v. Nelson*¹

INTRODUCTION

The hypothetical constitutional right to informational privacy has governed by assumption in the lower courts for more than three decades. What constitutes a violation of this assumed right? The law struggles to define the metes and bounds of the claimed constitutional right and a standard for when it is transgressed.² But we know it when we feel it. This Article contends that the very fuzziness of the hypothetical right comes from its nature as an affectively saturated moral intuition regarding the proper balance of state and citizen power and unease over incursions in times of social change. This Article is also about how to translate into respectable law the powerful moral intuition that the Constitution should have something to say (even if its text does not quite say it) when the government does something creepy or outrageous with our intimate information.

Beyond assuming the right into being, the Supreme Court has never found a violation.³ The three cases where the Court assumed a

¹ 131 S. Ct. 746, 764 (2011) (Scalia, J., concurring).

² See, e.g., *In re The Paternity of K.D.*, 929 N.E.2d 863, 869 (Ind. Ct. App. 2010) (observing that “neither the Supreme Court nor the Seventh Circuit has articulated a precise test for an alleged violation of the right to confidentiality or defined the boundaries of that right”).

³ See *Nelson*, 131 S. Ct. at 751 (assuming without deciding that the Constitution protects information privacy but holding that government background checks of NASA contractors do not violate the assumed right); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 459–60, 464 (1977) (rejecting President Richard Nixon’s claim that retention of his presidential papers violated his constitutional right to privacy, explaining that the archive and review of papers served “important national interests” and “less restrictive means” were un-

hypothetical right to informational privacy did not ring the emotional meters of concern so typical in decisional privacy cases nor give much colorable cause to find a violation, even assuming the right exists. After thirty-three years of silence, the most recent case involves a claim described by Justice Scalia as “utter silliness”—that privacy shields NASA government contractors working with very important, expensive equipment from routine background checks into drug use and treatment.⁴ The second case, decided in 1977, involved President Richard Nixon suing to prevent the archiving of the Presidential papers of his administration because some personal papers may have been mixed in and had to be screened out for return.⁵ Justice Brennan, writing for the Court, was not sympathetic to Nixon, though he was sympathetic to the hypothesized right of informational privacy in unspecified other (and probably more compelling) contexts.⁶

The only case that gave the Court significant pause—and the genesis of the assumed right—was the earliest case, *Whalen v. Roe*, also decided in 1977, a few months before *Nixon*. *Whalen* involved a New York statute that required record-keeping on purchases of certain dangerous prescription drugs such as methadone and cocaine.⁷ Then, as now, we had a wealth of literature warning that technological advances were shaking up the balance of power between citizen and the state, enabling the state to maintain vast databases of information in creepy fashion.⁸ The hypothetical right to informational

available to separate out private papers for return); *Whalen v. Roe*, 429 U.S. 589, 605–06 (1977) (explaining that even “[r]ecognizing that *in some circumstances*” the government may “arguably” have a constitutional duty of nondisclosure for certain private information, New York’s scheme for surveilling the identity of persons purchasing prescription medicines did not run afoul of “any right or liberty protected by the Fourteenth Amendment” (emphasis added)).

⁴ *Nelson*, 131 S. Ct. at 769 (Scalia, J., concurring).

⁵ *Nixon*, 433 U.S. at 430–32, 459.

⁶ *See infra* Part I.

⁷ *Whalen*, 429 U.S. at 591, 604–05. Cocaine, a drug currently considered such a scourge that it is subject to mandatory minima when distributed even in low quantities, used to be available by prescription. *Compare* 21 U.S.C. § 841(b)(1)(B)(ii)(II) (2006) (setting ten-year mandatory minimum for possessing five kilograms or more of cocaine) *with* 21 U.S.C. § 841(b)(1)(B)(vii) (2006) (providing that the ten-year mandatory minimum is not triggered for marijuana unless 1000 kilograms or more are distributed).

⁸ *Compare, e.g.*, ARTHUR R. MILLER, THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS 43 (1971) (arguing that more than any other time in our history, Americans (back then, already) were being pervasively monitored and their electronic footprints tracked and stored because of advances in modern technology) *and* Vern Countryman, *The Diminishing Right of Privacy: The Personal Dossier and the Computer*, 49 TEX. L. REV. 837, 839–47, 853–62 (1971) (expressing concern over the rise of privately compiled and governmentally compiled digital dossiers) *with, e.g.*, HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 21–55 (2010) (theo-

privacy arose out of the intuition that there ought to be limits, though they had not been overstepped yet. The *Whalen* Court concluded its opinion dismissing the claims of opiate buyers with “a final word about issues we have not decided,” noting “[w]e are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files.”⁹

In the lower courts, where the right has flourished by assumption over the decades, however, potential violations have been found, most frequently in cases of alleged abuses of official power that register high on the outrage or creepiness emotional meter. Examples include law enforcement officials aggressively outing HIV-positive people and trying to get them fired or harming their familial relations and the ability of their children to attend school;¹⁰ or threatening to disclose a teenager’s gay sexual orientation to his grandfather after arresting him for suspected underage drinking, causing the youth to commit suicide;¹¹ or “gratuitously and unnecessarily” releasing humiliating details of a rape for no other purpose than to retaliate against the rape victim for criticizing an ineffectual investiga-

rizing a context-sensitive approach to curtailing the reach and threat of vast and deep information databases); CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 13, 169–86 (2007) (proposing solutions to rein in the technologically abetted surveillance state); DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 8–9, 13–28, 43–46 (2004) (theorizing the threat posed by the rise of aggregated and commercialized public record information dissemination); A. Michael Froomkin, *The Death of Privacy?*, 52 *STAN. L. REV.* 1461, 1472–1501 (2000) (illuminating the threat to privacy posed by the routinization of information collection and the regularization of privacy-destroying technologies).

⁹ *Whalen*, 429 U.S. at 605.

¹⁰ See, e.g., *Herring v. Keenan*, 218 F.3d 1171, 1172–73, 1180–81 (10th Cir. 2000) (finding a potential violation where a probation officer tried to get a probationer fired from his job at a café because she believed an HIV-positive person should not be in a food-preparation position, but holding that the right was not clearly established at the time for purposes of vitiating qualified immunity); *A.L.A. v. West Valley City*, 26 F.3d 989, 990 (10th Cir. 1994) (noting there is a constitutional right against information disclosure in a case where a police officer discovered a positive HIV test result in plaintiff’s wallet and told his sister, housemates, and others, causing friends and family to shun the plaintiff); *Doe v. Borough of Barrington*, 729 F. Supp. 376, 378–79, 382 (D.N.J. 1990) (finding a violation of the constitutional right to information privacy in a civil suit against a police officer who learned about the plaintiff’s husband’s seropositive HIV status during a traffic stop and proceeded to track down the plaintiff’s neighbors, to tell them of his HIV status—information that spread to the school of plaintiff’s children where some parents withdrew their children and complained to the media).

¹¹ *Sterling v. Borough of Minersville*, 232 F.3d 190, 197 (3d Cir. 2000) (holding that a police officer’s assertion of qualified immunity due to factual insufficiency was not recognizable in an interlocutory appeal of a civil suit).

tion;¹² or keeping a sex videotape featuring an extortion victim in a desk drawer and allegedly viewing it, inviting other officers to view it, and reproducing it for personal gratification rather than any public purpose.¹³ The hypothetical right is so powerful that it has sometimes overridden qualified immunity and been deemed “clearly established” despite the Supreme Court’s persistent eschewal of clearly recognizing, much less establishing, any such right.¹⁴

After the Court again ducked on deciding whether the right that has flourished in the lower courts even exists, Justice Scalia wrote a vigorous concurrence listing the harms of nondecision, including: (1) an “Alfred Hitchcock line” of jurisprudence based on a coy assumption that gives the Court cover to pontificate about privacy when it has no business further opining for lack of a constitutional right to vindicate; (2) the harm to the Court’s image, and perhaps its self-respect, done by the jurisprudential incoherence of trying to define a hypothetical standard to govern a hypothetical right; (3) the lack of guidance to lower courts; and (4) the risk of a dramatic increase in the number of lawsuits asserting violations of the right to informational privacy that, though meritless, are “slightly less absurd” than the *Nelson* claimants’ and therefore will drain judicial resources for no good reason.¹⁵ The assumption has persisted for more than three decades and the sky has not fallen, Justice Alito, for the majority, wrote back in wry rejoinder.¹⁶ True enough, and the exchange makes for lively reading.

But even if the sky has not fallen, the approach of regulation by fog and assumption has costs beyond even those Justice Scalia enumerated. This Article argues that the additional harms include the risk of chilling policy innovations by the political branches and an inability to, and an inconsistency in, separating out or even defining meritorious claims from the vast pool of chaff that should be rapidly sorted out at the threshold. The courts—including the Supreme

12 Bloch v. Ribar, 156 F.3d 673, 686–87 (6th Cir. 1998) (finding a “cognizable” violation of the right to privacy but not of a clearly established constitutional right sufficient to vitiate qualified immunity, though warning that “public officials in this circuit will now be on notice that such a privacy right exists”).

13 James v. City of Douglas, 941 F.2d 1539, 1540–41, 1544 (11th Cir. 1991) (finding a violation of “a clearly established constitutional right [to privacy]” in light of a breach of the duty of confidentiality and a promise of discretion in exchange for cooperation in an arson investigation).

14 See *infra* Parts II and III.

15 *NASA v. Nelson*, 131 S. Ct. 746, 766–69 (Scalia, J., concurring).

16 *Id.* at 756 n.10 (“[T]here is no evidence that those decisions have caused the sky to fall.”).

Court—have wavered and seesawed between flexible reasonableness interest-balancing all the way up to what looks like strict scrutiny.¹⁷

It is high time to call out the assumption for the hazy moral intuition that it is and situate the moral intuition in law, and as law, insofar as it is supportable. Resting a protection—even a hazy hypothetical protection—on a moral intuition is dangerous from a pragmatic as well as principled perspective. Moral intuitions are akin to “naïve theories” and heuristics—error-prone and intuition-guided generalizations—that suffer from the manifold cognitive biases identified in the judgment and decision making literature.¹⁸ Status quo bias is an example of a cognitive bias with the potential to chill policy innovations if we persist in an intuitive, feels-wrong approach to determining violations.¹⁹ New ideas rouse vague feelings of unease and disquiet because they disrupt the status quo, to which we are intuitively attached. We cannot always trust and use as a guide the affective sense that a particular policy seems disquieting in the change it wreaks. Moreover, inability to distinguish the chaff risks demeaning an important guide and principle for understanding what the liberty explicitly safeguarded by the Constitution means.

This Article argues that the work of privacy as a constitutional concept is to adapt the idea of liberty in times of social change. Insofar as constitutionally relevant, the idea of informational privacy helps further define, and should be informed by, the freedoms safeguarded in the Constitution, such as the protections for liberty under procedural and substantive due process. There is a principled reason for distinguishing between the cases of HIV and sexual orientation outings by the state with the aim of marring employment, family, and friendships and cases where state employees want a job representing an important public trust but do not want to get drug tested like the rest of us. And it is more than the crude rule of thumb that we know a violation when we feel it.

17 Compare *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 458 (1977) (balancing an invasion of privacy with the public interest) (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Camara v. Municipal Court*, 387 U.S. 523, 534–39 (1967)), with *Whalen v. Roe*, 429 U.S. 589, 606 (1977) (Brennan, J., concurring) (writing that broad dissemination of medical information “would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests” (citations omitted)), and *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) (applying strict scrutiny). But see *Nelson*, 131 S. Ct. at 759–60 (balancing interests and rejecting necessity standard).

18 See Jonathan Baron, *A Psychological View of Moral Intuition*, 5 HARV. REV. PHIL., 36, 36–39 (1995) (explaining that moral intuitions are heuristics and are akin to naïve theories vulnerable to cognitive biases and resultant errors and thus cannot be “the royal road to moral truth”).

19 See *infra* Part II.

This Article proceeds in three parts. Part I analyzes the role of privacy as a constitutional concept that helps calibrate the balance of power between citizen and state—and the space for liberty—amid social change. This Part argues that privacy’s power is its ability to hedge and gesture to many different constitutional interests, particularly liberty, thus allowing transition in vision to a richer conception of liberty. Part II argues that the fog of standards surrounding the amorphous assumed right of informational privacy points to the need to translate into law the fuzzy moral intuitions surrounding the constitutional right. Part III explains how to translate our intuitions about the right to informational privacy into respectable constitutional law that can better help screen out the manifold meritless claims predicated on privacy as a knee-jerk reaction to any change in the status quo rather than right and permit space for policy innovation by the political branches.

I. LIBERTY’S PRECURSOR: PRIVACY, SOCIAL CHANGE, AND THE BALANCE OF POWER

Constitutional privacy law’s rapid growth in the twentieth century demonstrates its plasticity and power in giving the judiciary a role in managing the balance of power between citizen and state amid social change. The affectively saturated prismatic concept of privacy has been a vehicle for expressing and sometimes vindicating our yearning for judicial intervention to curb the encroaching state, particularly in times of social change. The jurisprudence of decisional privacy took root in a time of social change in our sexual mores. The shadow jurisprudence of informational privacy that is still fumbling to take root emerged and continues to unfurl in a time of disquiet over the shifting power and role of the state in an information society. The concept of privacy is powerful in times of change precisely because of its prismatic nature to suggest an array of potential rationales during a transitional moment regarding the full scope and nature of rights.

A. *Decisional Privacy and Shifting Sexual Mores and Technologies*

The first concept of constitutionalized privacy to take root arose to calibrate the proper balance between the citizen and the state amid changes in social mores and technological advances that the Facebook and sexting generation takes for granted—sexual liberation and contraception. Sexual mores were in rapid evolution in the late

1960s and 1970s.²⁰ Chemical engineers had braved the disdain of the scientific community for the “disreputable” line of research into birth control and the prospect of religious boycotts and succeeded in developing hormonal contraceptives, bringing birth control under women’s control and a matter of planning removed from the sex act.²¹ Activists were advocating for autonomy outside the constraints of traditional forms of marriage, motherhood, and the nuclear family.²²

To gain a toehold and open up the transition in this time of foment, decisional privacy law got its start in the guise of safeguarding a certain kind of sexual autonomy—that of the husband and wife. In the landmark case of *Griswold v. Connecticut*, finding a right to privacy in the “penumbras” of the First, Third, Fourth, Fifth, and Ninth Amendments was about the right of a married couple to seek contraceptive advice.²³ At the outset of the opinion, Justice Douglas underscored in italics that this was a case about counseling “*married persons*” about contraceptive devices and the challenged law criminalizing use of a contraceptive device or aiding and abetting such use “operates directly on an intimate relation of husband and wife.”²⁴ He ruled that the doctors prosecuted for providing advice had standing “to raise the constitutional rights of the married people with whom they had a professional relationship,” reasoning that otherwise “[t]he rights of husband and wife, pressed here, are likely to be diluted or adversely affected.”²⁵ The model of monogamy was such a strong shaper of the opinion that Justice Douglas reiterated that this case was about the right of the “married” seven times.²⁶

Nowhere did the generally applicable criminal law target merely married people. The challenged laws applied to “[a]ny person.”²⁷

20 See Norval D. Glenn & Charles N. Weaver, *Attitudes Toward Premarital, Extramarital, and Homosexual Relations in the U.S. in the 1970s*, 15 J. SEX RES. 108, 111–12, 117–18 (1979) (examining the liberalization of American attitudes toward sexual relations).

21 See Claudia Flavell-While, *Engineering the Sexual Revolution*, CHEMICAL ENGINEER, June 2010, at 46, 47 (“The sexual revolution would have been impossible without a method of contraception that was under the woman’s control and divorced from the sex act.”).

22 See John Leo, *The Revolution Is Over*, TIME, Apr. 9, 1984, at 74, 77 (discussing previously popular activities of the Sexual Revolution).

23 *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

24 *Id.* at 480, 482.

25 *Id.* at 481.

26 *Id.* at 480–86.

27 CONN. GEN. STAT. § 53-32 (1958) (“Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars Or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.”); *id.* at § 54-196 (“Any person who assists, abets, counsels, causes, hires or

But in the bold move of birthing a constitutional right to privacy, Justice Douglas took pains to portray the protection as about the intimacies of married life. In justifying the recognition of a right found nowhere explicitly in the Constitution, Justice Douglas analogized to prior protection of the intimacies of family life. He first invoked *Pierce v. Society of Sisters*, which had recognized the parental right to determine how to educate one's children.²⁸ He concluded by wrapping the newborn privacy right in the mantle of preserving the sacrosanct marital relationship:

Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.²⁹

Concurring, Justice Goldberg, writing for Justices Warren and Brennan, further characterized the unconstitutional intrusion as “upon the right of marital privacy,” bringing the state into “the marital relation and the marital home.”³⁰ He allied this notion of “marital privacy” with “the right . . . to marry, establish a home, and bring up children.”³¹ The constitutional right to privacy would be a respectable monogamous one, closely allied to the autonomy of familial decisions—albeit perhaps a nascent one that wanted to exercise a little control in determining when the family would come into being. It was forged on the notion, earlier laid down in the childrearing autonomy cases of *Pierce* and *Meyer v. Nebraska*, that there is a “private realm of family life which the state cannot enter.”³²

In this ode to marriage and the import of preserving the privacy and intimacy of the marital relationship, nowhere was there mention of the liberties of the libertines having sex outside marriage. The Court was on the cusp of the “sexual revolution” that began in the

commands another to commit any offense may be prosecuted and punished as if he were the principal offender.”).

28 *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (cited in *Griswold*, 381 U.S. at 482).

29 *Griswold*, 381 U.S. at 485–86.

30 *Id.* at 486, 495 (Goldberg, J., concurring).

31 *Id.* at 486, 488 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

32 *Griswold*, 381 U.S. at 495 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

“swinging 60s”—but not quite there yet.³³ In the hang-ups and hangover of the straitlaced 1950s, premarital and extramarital sex were frowned upon severely. Opinion polls in 1937 and 1959 reveal stability in negative attitudes toward premarital sex, with a majority of 55% in 1937 and a majority of 54% in 1959 of people surveyed in a Roper Poll indicating they did not believe it was acceptable for parties to a marriage to have had previous sexual experience.³⁴ The notion that parties to a marriage be virgins seems quite remarkable today. *Griswold* left unclear whether the interests of the silent fraction of such sexually active people were to be sub silentio left outside the scope of the newly delineated privacy right. The Court did not answer the question definitively until seven years later, in the 1972 case of *Eisenstadt v. Baird*.³⁵

By the end of the 1960s, premarital sex had come out of the cloisters full-swing. Public opinion surveys indicate that approval of premarital sex had begun rising in the 1960s and even out-of-wedlock children had gained widespread acceptance by 1970.³⁶ In 1969, a majority of people surveyed in a Gallup Poll—68.8%—still thought premarital sex was wrong but by 1973 this view had dropped to 47%.³⁷ Approval of sex education in schools had been rising since the 1960s and by the 1970s approval of teaching teens about birth control began rising, “reaching an approval level of more than 85%” by the 1980s.³⁸ The rise in sexual permissiveness was cutting across racial, class, and geographic lines and becoming a national cultural phenomenon.³⁹

In April 1967, the spring of the year some view as the start of the sexual revolution,⁴⁰ William R. Baird gave a lecture by invitation to two thousand Boston University students about the relative merits of

33 See, e.g., Karl King et al., *The Continuing Premarital Sexual Revolution Among College Females*, 39 J. MARRIAGE & FAM. 455, 455 (1977) (stating the “premarital sexual revolution” began in the late 1960s and accelerated in the 1970s); Tom W. Smith, *The Sexual Revolution?*, 54 PUB. OPINION Q. 415, 415 (1990) (reviewing media coverage and concluding that the mass media “discovered” the sexual revolution in 1963–1964 and the revolution began in the early 1960s).

34 Smith, *supra* note 33, at 421.

35 405 U.S. 438 (1972).

36 Smith, *supra* note 33, at 416–17.

37 *Id.* at 422.

38 *Id.* at 418.

39 See B. K. Singh, *Trends in Attitudes Toward Premarital Sexual Relations*, 42 J. MARRIAGE & FAM. 387, 391 (1980) (discussing increasingly positive attitudes toward premarital sexual relations across these population categories).

40 See, e.g., Erica Jong, *Foreword to SEXUAL REVOLUTION*, xxxvii (Jefferey Escoffier ed., 2003) (marking 1967 as the start of the sexual revolution).

various forms of contraception.⁴¹ He used various kinds of contraceptives as exhibits and after the lecture invited students up to help themselves to the contraceptives.⁴² After he handed an “unmarried adult woman a package of vaginal foam” he was arrested for violating a felony provision of Massachusetts law criminalizing exhibiting or giving away contraception-averting devices, drugs, or medicines.⁴³ After *Griswold*, the law had an exception for physicians and pharmacists dispensing contraceptives to married persons but Baird was not a physician or pharmacist and the student was unmarried.⁴⁴ The Massachusetts Supreme Court had read *Griswold* to mean that privacy surrounds the marital relationship—but the state remained free to regulate the “sexual lives of single persons” because of the legitimate state interest in “discouraging . . . extra-marital relations.”⁴⁵

Reviewing Baird’s federal habeas petition, the First Circuit addressed the anomaly allowing state interference in the sexual lives of unmarried but not married persons in ringing terms, making the issue one of “human rights”:

To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights.⁴⁶

Though noting the First Circuit’s ringing language, the Supreme Court hedged⁴⁷ and took a more conservative course, couching its decision upholding the right to contraception for the unmarried in the logic of symmetry of rights and equal protection rationality between the married and unmarried.⁴⁸

41 *Commonwealth v. Baird*, 247 N.E.2d 574, 575 (Mass. 1969).

42 *Baird v. Eisenstadt*, 429 F.2d 1398, 1399 (1st Cir. 1970).

43 *Id.* at 1399 & n.1 (quoting MASS. GEN. LAWS ch. 272, § 21 (1992)).

44 *Eisenstadt*, 429 F.2d at 1399 n.1.

45 *Sturgis v. Att’y Gen.*, 260 N.E.2d 687, 690 (Mass. 1970).

46 *Eisenstadt*, 429 F.2d at 1402.

47 See Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 475–78 (2010) (terming the analytical move in which the boundaries between the chosen basis of decision and a secondary rationale as “hedging”); see also Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-“Alien” Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905, 935 (2011) (noting that hedging “may plant the seeds of an alternate rationale to blossom later, when the transition has been eased with an approach that has a broader base of support at the time”).

48 *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (explaining that “whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike”).

The newfound privacy right blossomed to fuller power and scope a year later in *Roe v. Wade*.⁴⁹ In *Roe*, women came out as plaintiffs to speak for themselves.⁵⁰ Two of the plaintiffs, Marsha and David King, renamed Mary and John Doe, fit the married couple paradigm familiar from the victory in *Griswold v. Connecticut*.⁵¹ The third plaintiff, however, Norma McCorvey, represented the changing times and needs—she was unmarried, pregnant, twenty-one years old and had already given birth to two children and relinquished both.⁵²

The landmark privacy case of *Roe v. Wade* was decided under Norma McCorvey's pseudonym Jane Roe. Roe's case challenged a Texas statute that dated to 1857 and barred all abortions unless necessary to save the woman's life.⁵³ In *Roe*, the right to privacy that got its early start arising from the sanctities and intimacies of the marital relationship in *Griswold*⁵⁴ morphed into something with much broader promise for the autonomy of all women, including unmarried young pregnant women like Norma McCorvey:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. . . . Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.⁵⁵

Privacy had dramatically grown and changed posture to meet the changes and new social needs of the 1960s and 1970s women's rights and sexual revolutions.

49 410 U.S. 113 (1973).

50 *See id.* at 120 (describing plaintiff Jane Roe, "a single woman" who "wished to terminate her pregnancy").

51 *See id.* at 121 (introducing Mary and Jane Doe); *see also Griswold*, 381 U.S. 479, 481 (1965) (categorizing the appellants as a married couple); LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 3–4, 22–25, 224 (Linda Greenhouse & Reva B. Siegel eds., 2010) (explaining the motivations and history behind the national effort to legalize the provision of abortions).

52 GREENHOUSE & SIEGEL, *supra* note 51, at 224.

53 *Roe*, 410 U.S. at 117–18.

54 *Griswold*, 381 U.S. at 484–86.

55 *Roe*, 410 U.S. at 153.

Privacy is a transitional lens that helps us view liberty in a new light. It also helps in facilitating what Nelson Tebbe and Robert Tsai have termed “hedging.”⁵⁶ Hedging involves the blurring between a palette of possible rationales to build consensus and plant the seeds of alternate rationales when social support for a decision is uncertain or rocky.⁵⁷ The power of privacy as a transitional concept stems from what is often portrayed as its greatest embarrassment—its ability to gesture at and arise from different constitutional values and its “protean capacity to be all things to all lawyers.”⁵⁸ A privacy rationale contains within it multiple potential avenues of rationales and implants a proliferation—some might say confusion—of seeds with potential to blossom.⁵⁹

After breaking ground, the idea of decisional privacy is discreetly slipping off stage and liberty is coming to the forefront. Jamal Greene would go further—he recently pronounced the demise of constitutional privacy and the ascendancy of liberty as the operative rationale for anchoring privacy’s enduring contributions to constitutional law, pointing to *Lawrence v. Texas*⁶⁰ as the “mortal blow.”⁶¹ In *Lawrence*, Justice Kennedy, writing for the majority, invalidated a Texas law criminalizing same-sex sodomy on substantive due process grounds, to vindicate the liberty secured by the Due Process Clause of the Fourteenth Amendment.⁶² Almost entirely eschewing the privacy language prominent in *Bowers v. Hardwick*,⁶³ including Justice White’s famously curt rejection of the idea that the “right of privacy . . . extends to homosexual sodomy,”⁶⁴ Justice Kennedy instead underscored that much deeper autonomy interests were at stake.⁶⁵ He wrote eloquently:

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohi-

56 Tebbe & Tsai, *supra* note 47, at 475–78.

57 *Id.* at 475–76.

58 Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 234 (1977).

59 *See, e.g.*, Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1448 (1992) (noting “the penumbral justification” is “much-maligued [sic]”).

60 539 U.S. 558 (2003).

61 Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715, 729–30 (2010).

62 *Lawrence*, 539 U.S. at 562, 573–74.

63 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. at 577.

64 *Bowers*, 478 U.S. at 190.

65 *See Lawrence*, 539 U.S. at 574 (“Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”).

bit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, *touching upon the most private human conduct, sexual behavior, and in the most private of places, the home*. The statutes do *seek to control a personal relationship* that, whether or not entitled to formal recognition in the law, *is within the liberty of persons to choose* without being punished as criminals.⁶⁶

Privacy may have stepped off center stage, but that was because it had done its work in opening up the vision of liberty to include the shared value of autonomy and space from the state to make autonomous decisions. Privacy was a lens that opened up the Court's vision to the autonomy interest at stake and the impairment of liberty when the State seeks to impinge on "the most private human conduct, sexual behavior, and in the most private of places, the home."⁶⁷

B. Informational Privacy and the Management of Information as Power

From its start, informational privacy was linked to decisional privacy from the common concern of state interference with autonomy of choice. In the foundational case that assumed a right to informational privacy, *Whalen v. Roe*, patients with opiate prescriptions sued over a New York law requiring collection of identity data on purchasers of certain potentially dangerous prescription drugs such as cocaine and methadone.⁶⁸ The patients argued that they feared the computerized data, despite safeguards, would be misused and that they would "be stigmatized as drug addicts."⁶⁹ The patients contended that the "mere existence . . . of the information" about their use of the drugs roused fear that the information may become public and hurt their reputations, rendering them "reluctant to use, and some doctors reluctant to prescribe, such drugs even when their use is medically indicated."⁷⁰ While the patients apparently conceived of decisional privacy and informational privacy as separate headings of rights, the Court's characterization of their argument shows the shared concern was interference with their autonomy choice.

The linkage between privacy and autonomy is explicit in District Court Judge Robert L. Carter's learned opinion, which explained:

The concept of privacy is an affirmation of the importance of certain aspects of the individual and his desired freedom from needless outside interference. It is sometimes described as a sphere of space that a man may

⁶⁶ *Id.* at 567 (emphasis added).

⁶⁷ *Id.*

⁶⁸ *Whalen v. Roe*, 429 U.S. 589, 593, 595 (1977).

⁶⁹ *Id.* at 595 (internal quotation marks omitted).

⁷⁰ *Id.* at 600.

carry with him which is protected from unwarranted outside intrusion, as the right of selected disclosures about oneself and as a right of personal autonomy.⁷¹

Judge Carter was influenced by Louis Henkin's article *Privacy and Autonomy*. Henkin argued that privacy was a misnomer for what the Court was recognizing.⁷² Henkin explained that "[w]hat the Supreme Court has given us, rather, is something essentially different and farther-reaching, an additional zone of autonomy."⁷³ As Amitai Etzioni has illuminated, privacy's connotation of "exemption from *scrutiny*" heavily influenced by Louis Brandeis and Samuel Warren's canonical *The Right to Privacy*⁷⁴ is different from the Court's constitutional privacy jurisprudence, which is about "exemption from *control by the State*."⁷⁵ *Whalen* shows why we might care about information disclosure and informational privacy as a constitutional matter—because of the potential impingement on liberty of choice.⁷⁶

The potential impingement the *Whalen* plaintiffs alleged was speculative and indirect, however, because it was based on the potential for data misuse—even though the statute had safeguards, including criminalization of public disclosure of the identity of patients and limits on who could access the database and for what purposes.⁷⁷ Perhaps unsurprisingly, while doctors had helped pioneer the decisional privacy cases in the contraception and abortion context, the medical profession's support of this informational privacy claim was lukewarm. The section on psychiatry of the New York State Medical Society apparently declined to support the suit though other physicians' associations joined.⁷⁸ Ultimately, the Supreme Court concluded that the New York data-gathering program did not "pose a sufficiently grievous threat to either [decisional or informational privacy] . . . to establish a constitutional violation."⁷⁹ The Court noted

71 *Roe v. Ingraham*, 403 F. Supp. 931, 936 (S.D.N.Y. 1975) (citing Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1419, 1424–26 (1974)).

72 Henkin, *supra* note 71, at 1410–11.

73 *Id.* at 1411.

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

75 Amitai Etzioni, *A Communitarian Perspective on Privacy*, 32 CONN. L. REV. 897, 897 (2000).

76 *Cf.* Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 555 (2006) (noting that "*Whalen* illustrates how decisional interference relates to disclosure" and "how decisional interference bears similarities to increased accessibility, since the existence of information in a government database can increase the potential accessibility of that information").

77 *See Whalen v. Roe*, 429 U.S. 589, 594–95 (1977) (noting that "[w]illful violation of these prohibitions" against public disclosure was "punishable by up to one year in prison and a \$2,000 fine").

78 *Id.* at 595 n.16.

79 *Id.* at 600.

that “an essential part of modern medical practice” involved health information disclosures to public health agencies among other entities and cited as an example venereal disease reporting requirements.⁸⁰

The District Court had invalidated the New York program on the ground that while it served a legitimate purpose, the scheme had “a needlessly broad sweep” in identifying patients to prevent people from amassing drugs to distribute illegally.⁸¹ In twenty months of operation, only one such case of a patient potentially going from doctor to doctor to amass drugs had been identified.⁸² The court concluded the yield was too small for the privacy price paid (neglecting that benefits cannot just be denominated in transgressors caught because, for example, cost-effective deterrence at the outset may also be a benefit).⁸³ The Supreme Court read the district court as imposing a necessity requirement and underscored that there is no longer such requirement.⁸⁴ “State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part,” the Court observed.⁸⁵ The Court also reiterated its frequent recognition “that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern.”⁸⁶ The Court thus demonstrated concern at the outset in its informational privacy jurisprudence that policy innovation among the States and political branches not be chilled.

The Court concluded the prospect of harmful disclosure the plaintiffs imagined was simply too remote and speculative. There was no support for the “assumption that the security provisions [regarding the data would] . . . be administered improperly” and there was only a “remote possibility” that judicially supervised evidentiary use of the information might “provide inadequate protection against unwarranted disclosures.”⁸⁷ The Court also observed that the case was weak because there was no indication “that any individual has been deprived of the right to decide independently, with the advice of his

80 *Id.* at 602 & n.29.

81 *Roe v. Ingraham*, 403 F. Supp. 931, 937 (S.D.N.Y. 1975).

82 *Id.*

83 *Id.* *Cf. Whalen*, 429 U.S. at 598 n.21 (“The absence of detected violations does not, of course, demonstrate that a statute has no significant deterrent effect.”).

84 *Whalen*, 429 U.S. at 596–97.

85 *Id.* at 597.

86 *Id.*

87 *Id.* at 601–02.

physician, to acquire and to use needed medication.”⁸⁸ This was not a case where “the State require[s] access to these drugs to be conditioned on the consent of any state official or other third party.”⁸⁹ Any autonomy impingement was thus insufficiently substantial. *Whalen* therefore concluded “neither the immediate nor the threatened impact of the patient-identification requirements . . . is sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment.”⁹⁰

If the claim of impingement was so insubstantial, why did it give the Court such pause? The *Whalen* Court’s concluding caveat both sketched the potential right of informational privacy and explained what roused the Court’s concern. Part IV of the Court’s opinion was: “A final word about issues we have not decided.”⁹¹ The Court wrote: “We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files.”⁹² Noting the modern administrative state collected masses of data for an array of public purposes, from taxes, to welfare, to criminal justice and national security, the Court observed that the power to collect data was “typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures.”⁹³ In an oft-cited sentence that has become the foundation for the assumed right to informational privacy, the Court concluded: “Recognizing that in *some circumstances* that duty *arguably* has its roots in the Constitution, nevertheless New York’s statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual’s interest in privacy.”⁹⁴

Even back then, in the dawning of the information society, commentators were warning about the encroachment on liberty posed by government data aggregation and the threat of disclosure. The Court cited work by Arthur Miller arguing that while government data aggregation often serves salutary public purposes, the dark side is monitoring of lawful dissidence and civil rights organizations such as the National Association for the Advancement of Colored People

88 *Id.* at 603.

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

90 *Id.* at 603–04.

91 *Id.* at 605.

92 *Id.*

93 *Id.*

94 *Id.* (emphasis added).

(“NAACP”) and the American Civil Liberties Union (“ACLU”).⁹⁵ Miller was worried that such surveillance of lawful activities would chill freedom of expression because of fear the information could be used to harm or harass.⁹⁶ Legislators and scholars of the era were worried that the rise of digital dossiers were “an invitation to a police state or return to McCarthyism.”⁹⁷

Under bombardment over its controversial decisional privacy opinions, the Court was not ready to engraft a new constitutional privacy arm. Justice Stevens’ opinion for the majority hedging on the issue left room to vindicate visions on either extremes, neatly captured by the two concurring justices: Justice Brennan, a supporter of strong strict scrutiny protection against unwarranted broad dissemination of information and Justice Stewart, who opposed the notion of even the existence of any such right.⁹⁸ *Whalen* is written cryptically enough that it can be read by learned individuals as either explicitly recognizing a constitutional right to informational privacy or stopping short of doing so.⁹⁹

Concurring in *Whalen*, Justice Brennan argued that broad dissemination by state officials of medical information “would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests.”¹⁰⁰ *Whalen* was decided in late February 1977. By the spring, in late June of the same year, the Court issued another informational privacy decision, *Nixon v. Administrator of General Services*.¹⁰¹ This time, Justice Brennan was writing for the majority. Amid the mishmash of standards and language in *Nixon*, what becomes clear is that Justice Brennan had to stitch together different visions to make his majority on the issue of

95 Arthur R. Miller, *Computers, Data Banks and Individual Privacy: An Overview*, 4 COLUM. HUM. RTS. L. REV. 1, 4 (1972); *Whalen*, 429 U.S. at 605 n.34 (citing Arthur Miller).

96 Miller, *supra* note 95, at 5–6.

97 *Id.* at 6; see Countryman, *supra* note 8, at 853–56 (noting the FBI’s surveillance and data compiling activities). See generally *Hearings on Federal Data Banks, Computers and the Bill of Rights Before the S. Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 92d Cong. at 61–68 (1971) (expressing concerns over police surveillance).

98 *Whalen*, 429 U.S. at 606–07 (Brennan, J., concurring); *id.* at 608–09 (Stewart, J., concurring).

99 Compare, e.g., *Slayton v. Willingham*, 726 F.2d 631, 635 (10th Cir. 1984) (reading *Whalen* and *Nixon* as “explicitly recogniz[ing] that the constitutional right to privacy encompasses an ‘individual interest in avoiding disclosure of personal matters’” (quoting *Whalen*, 429 U.S. at 599)) with William J. Winslade & Judith Wilson Ross, *Privacy, Confidentiality, and Autonomy in Psychotherapy*, 64 NEB. L. REV. 578, 598 (1985) (reading *Whalen* as “stop[ping] short of recognizing a constitutional right in informational privacy”).

100 *Whalen*, 429 U.S. at 606 (Brennan, J., concurring) (citing *Roe v. Wade*, 410 U.S. 113, 155–56 (1973)).

101 433 U.S. 425 (1977).

whether there is a right to informational privacy and what standard applies.

Nixon involved a suit by President Richard Nixon over legislation directing an executive official to take custody of his Presidential papers and tape recordings.¹⁰² Among a grab bag of arguments, Nixon claimed a right against disclosure of private information. He argued that private papers were mixed in the collection, and archival screening to determine what should be returned violated the right.¹⁰³ Writing for the majority in dismissing Nixon's informational privacy claim, Justice Brennan cited the flexible interest-balancing standard from the Fourth Amendment administrative search and *Terry* stop context.¹⁰⁴ He wrote that the "test" was that "any intrusion must be weighed against the public interest in subjecting the Presidential materials . . . to archival screening."¹⁰⁵

Despite citing the government-deferential interest-balancing cases from the Fourth Amendment context in defining his test, however, Justice Brennan's analysis of the facts of the case also used language that drew on terms reminiscent of intermediate or strict scrutiny. He concluded that "the archival review procedure involved here is designed to serve important national interests . . . and the unavailability of less restrictive means necessarily follows from the commingling of the documents."¹⁰⁶ This blur of language may seem puzzling but it was artful in that it planted a hook for potential strict scrutiny for the fledgling twilight right brought into being that year.

Nixon's case may seem a rather ironic one for the development of a potential right of informational privacy against the surveillance state disrupting the balance of power. He was, after all, the embodiment of the State obsessed with amassing information in stealth and thereby aggregating power. Indeed, one is reminded of the irony of the National Socialists on trial after World War II arguing that their criminal prosecution violated the *nullum crimen sine lege* principle—the idea that there can be no crime and punishment without preexisting law—when the National Socialists famously believed in the principle of *nullum crimen sine poena*—no crime without punish-

102 *Id.* at 429, 459.

103 *Id.* at 459.

104 *Id.* at 458 (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Camara v. Mun. Court*, 387 U.S. 523, 534–39 (1967)).

105 *Nixon*, 433 U.S. at 458.

106 *Id.* at 464.

ment.¹⁰⁷ There was also a metaphoric power, however, to using Nixon's case as a vehicle for planting the seeds of the protection. After Watergate, the alarmist and seemingly somewhat paranoid vision of the State amassing information to cement power and control seems a lot less alarmist and paranoid. Rather, it brings into focus the risks posed by information aggregation and why informational privacy may be something a democracy and its central charter defining and calibrating the proper balance of power should care about.

II. THE FOG OF INDECISION: ON INTUITIONS AND EMOTIONS VERSUS LAW

In producing decisions that could not quite decide if the constitutional right exists and offering a Rorschach blot of standards that might govern if it did, the Court punted to the lower courts to sort things out. The lower courts do not have the luxury of sifting and carefully choosing where to grant certiorari. The coy suggestion that a right exists without clarification has led to informational privacy claims in a spate of suits challenging such socially useful policies as financial disclosure requirements for government workers and legislators to prevent corruption,¹⁰⁸ or for officers, directors, and shareholders of taxi corporations to ensure sufficient funds in the event of liability for serious injury,¹⁰⁹ and background checks for police officers to ensure mental stability.¹¹⁰ It has also been used to challenge highly popular policies addressing serious public concerns and dangers such as sex offender proximity information under Megan's Law,¹¹¹ and routine basic practices such as requiring bankruptcy fil-

¹⁰⁷ See, e.g., CARL SCHMITT, ON THE THREE TYPES OF JURISTIC THOUGHT 93 (Joseph W. Bederky trans., 2004) (arguing that "the bold and imaginatively endowed criminal" could rely on "the phrase *nulla poena sine lege*" to render the *Rechtsstaat* a "laughingstock").

¹⁰⁸ See *Barry v. City of New York*, 712 F.2d 1554, 1558–59 (2d Cir. 1983) (addressing government workers' privacy rights in the context of financial disclosure policies); *Plante v. Gonzalez*, 575 F.2d 1119, 1132 (5th Cir. 1978) (confronting the question of the extent of the privacy rights state senators enjoy in the face of financial disclosure requirements).

¹⁰⁹ *Statharos v. N.Y.C. Taxi & Limousine Comm'n*, 198 F.3d 317, 319 (2d Cir. 1999) (seeking a preliminary injunction to bar financial disclosure requirements "promulgated by the New York City Taxi and Limousine Commission").

¹¹⁰ *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 107 (3d Cir. 1987) (challenging the constitutionality of a questionnaire promulgated by the Police Department regarding "applicants' medical history, gambling habits and alcohol consumption").

¹¹¹ *Paul P. v. Farmer*, 227 F.3d 98, 107 (3d Cir. 2000) (holding that a resident's privacy interests in his or her residence, for example a street name, was "substantially outweighed by the state's compelling interest in disclosing Megan's Law information to the relevant public . . . [and] individuals within the court-authorized notification zone").

ings to indicate social security numbers.¹¹² Justice Scalia might characterize several of the claims as “utter silliness.”¹¹³

Courts nonetheless have to treat even silliness seriously in the absence of a clear statement about whether there is a constitutional informational privacy right, and if so, its scope and applicable standards. And legislatures and administrative agencies enacting useful policies must nonetheless operate within the fog of ambiguity and the risk that an assumed right with unclear standards may lead to invalidation. If suits are brought even in the relatively less controversial context of drug background checks and financial disclosure laws, then governmental policies and actions in new contexts such as investigating and warning the public about a possible serial HIV spreader¹¹⁴ may be chilled by the vague possible constitutional right of informational privacy and its uncertain scope.

After all, in the confusion after *Whalen* and *Nixon*, a district court even enjoined the Department of Defense (“DOD”) and the Department of Housing and Urban Development (“HUD”) from administering questionnaires asking about illegal drug use and financial history, among other issues, to employees in positions of public trust in order to protect against the risk of misconduct.¹¹⁵ The questionnaire vetted people in sensitive positions “involving policymaking, major program responsibility, law enforcement duties, or other duties demanding the highest degree of public trust; and positions involving access to or operation or control of unclassified confidential or financial records, with a relatively high risk for causing grave damage or realizing a significant personal gain.”¹¹⁶

112 See *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999) (agreeing that “indiscriminate public disclosure of [Social Security Numbers] . . . may implicate the constitutional right to informational privacy”).

113 See *NASA v. Nelson*, 131 S. Ct. 746, 769 (Scalia, J., concurring) (characterizing claims by NASA government contractors trying to avoid a background screen for drug testing and treatment based on a claimed constitutional right to information privacy as “utter silliness” and “[r]idiculous”).

114 Cf. Mary D. Fan, *Sex, Privacy, and Public Health in a Casual Encounters Culture*, 45 U.C. DAVIS L. REV. 531, 531–32 (2011) (proposing preventative privacy-piercing for repeat STD spreaders to enable better-informed consent to sex when need outweighs privacy concerns); Jeffrey D. Klausner et al., *Tracing a Syphilis Outbreak Through Cyberspace*, 284 J. AM. MED. ASS’N 447 (2000) (discussing the challenges of investigating and alerting the public to a potential chatroom user linked to an outbreak of several syphilis and HIV cases).

115 *Am. Fed’n of Gov’t Employees, AFL-CIO v. Perry*, 944 F. Supp. 958 (D.D.C. 1996); *Am. Fed’n of Gov’t Employees, AFL-CIO v. Dep’t of Hous. & Urban Dev.*, 924 F. Supp. 225 (D.D.C. 1996), *rev’d*, *Am. Fed’n of Gov’t Employees, AFL-CIO v. Dep’t of Hous. & Urban Dev.*, 118 F.3d 786 (D.C. Cir. 1997).

116 Designation of Public Trust Positions and Investigative Requirements, 61 Fed. Reg. 398 (Jan. 5, 1996) (codified at 5 C.F.R. § 731.302 (1996)).

Ultimately, the D.C. Circuit reversed the order enjoining the DOD and HUD from conducting basic checks on appointees to such sensitive positions of public trust. The D.C. Circuit began its “analysis by expressing [its] . . . grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information.”¹¹⁷ The Court would have preferred simply to make clear that such a right did not exist, but was inhibited from doing so by the “recurring dicta” by the Supreme Court, which the D.C. Circuit surmised addressed the issue without resolving it.¹¹⁸ Remarkably, *Whalen* and *Nixon* were not only unclear as to whether the right existed, but also whether it was recognizing the right or just assuming it.

The D.C. Circuit quoted at length and approvingly from the decision of the Sixth Circuit, which also expressed doubt that any such right existed and was troubled by the ramifications if the judiciary were to breathe life into such a notion as a constitutional matter. The Sixth Circuit in *J.P. v. DeSanti*, a case oft-cited in the informational privacy jurisprudence, opined:

Virtually every governmental action interferes with personal privacy to some degree Courts called upon to balance virtually every government action against the corresponding intrusion on individual privacy may be able to give all privacy interests only cursory protection. The Framers rejected a provision in the Constitution under which the Supreme Court would have reviewed all legislation for its constitutionality. They cannot have intended that the federal courts become involved in an inquiry nearly as broad—balancing almost every act of government, both state and federal, against its intrusion on a concept so vague, undefinable, and all-encompassing as individual privacy.

Inferring very broad “constitutional” rights where the Constitution itself does not express them is an activity not appropriate to the judiciary. In this context, we note that of the cases cited holding that there is a constitutional right to nondisclosure of private information, none cites a constitutional provision in support of its holding.¹¹⁹

Despite expressing its misgivings and view that no such right existed, the D.C. Circuit nonetheless followed the tack of the Supreme Court in assuming without deciding, because even if the right existed, the plaintiff’s claim did not state a violation.¹²⁰

Sorting through the suits over the decades, the majority of the federal courts of appeals and a number of state courts have gone further and accorded the idea of informational privacy constitutional

117 *AFL-CIO*, 118 F.3d at 791.

118 *Id.*

119 *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981) (citations omitted) (internal quotation marks omitted) (quoted in *AFL-CIO*, 118 F.3d at 792–93).

120 *AFL-CIO*, 118 F.3d at 793.

stature.¹²¹ A constitutional right created out of fog cannot help but be murky in its application and in terms of what standards apply, however. The guessing games that courts are forced to play regarding what potential standard applies to the assumed right are sometimes downright embarrassing. Consider, for example, the Second Circuit's guessing game over the right standard:

The nature and extent of the interest recognized in *Whalen* and *Nixon*, and the appropriate standard of review for alleged infringements of that interest, are unclear. See *J.P. v. DeSanti*, 653 F.2d 1080, 1087–91 (6th Cir.1981) (questioning whether *Whalen* and *Roe* created any general right to non-disclosure of personal information against which infringing gov-

121 See, e.g., *Sterling v. Borough of Minersville*, 232 F.3d 190, 194 (3d Cir. 2000) (reading *Whalen* as recognizing a privacy right against the “divulgence of highly personal information”); *Herring v. Keenan*, 218 F.3d 1171, 1173 (10th Cir. 2000) (recognizing that there is a constitutional right of information privacy that protects against disclosure of information such as health records); *Denius v. Dunlap*, 209 F.3d 944, 958 (7th Cir. 2000) (finding a clearly established information nondisclosure right for the purposes of vitiating qualified immunity in a suit based on employment termination for refusal to authorize an extensive background check of a teacher at state-run program for drop-outs); *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999) (recognizing that the Constitution protects an “individual interest in avoiding disclosure of personal matters” referred to generally by courts as the right to “informational privacy” (internal quotation marks omitted)); *James v. City of Douglas*, 941 F.2d 1539, 1543–44 (11th Cir. 1991) (vitiating qualified immunity in a suit alleging a violation of the constitutional right to information privacy); *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990) (reading *Whalen* as recognizing that the constitutional right to privacy also extends to the “individual interest in avoiding disclosure of personal matters”); *Borucki v. Ryan*, 827 F.2d 836, 846 (1st Cir. 1987) (noting that “as of June 1983 a majority of courts considering the question had concluded that a constitutional right of confidentiality is implicated by disclosure of a broad range of personal information, [though] courts were not unanimous in that view”); *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) (reading *Whalen* and *Nixon* to signify that there is an information privacy right protected by strict scrutiny); *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983) (noting that most courts “appear to agree that privacy of personal matters is a protected interest . . . and that some form of intermediate scrutiny or balancing approach is appropriate as the standard of review” and applying such intermediate scrutiny to a financial disclosure requirement for government employees), *cert. denied* 464 U.S. 1017 (1983); *Plante v. Gonzalez*, 575 F.2d 1119, 1132–34 (5th Cir. 1978) (indicating the Court has recognized another strand of the right to privacy, “the individual interest in avoiding disclosure of personal matters,” albeit remaining unclear as to the standard that applies to the right (internal quotation marks omitted)); *In re Paternity of K.D.*, 929 N.E.2d 863, 869 (Ind. Ct. App. 2010) (reading *Whalen* as signifying that the Supreme Court has “recognized a constitutional right to information privacy under the Fourteenth Amendment . . . though its contours continue to be refined” (internal citations omitted)). *But see, e.g., AFL-CIO*, 118 F.3d at 793 (expressing doubt about a general constitutional protection for nondisclosure, though assuming without reaching a conclusion); *Alexander v. Peffer*, 993 F.2d 1348, 1350 (8th Cir. 1993) (holding that to violate the constitutional right of privacy based on disclosure “the information disclosed must be either a shocking degradation or an egregious humiliation . . . or a flagrant breach of a pledge of confidentiality”); *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981) (expressing doubt about “very broad constitutional” protections against the disclosure of confidential information (internal quotation marks omitted)).

ernment actions have to be balanced). Most courts considering the question, however, appear to agree that privacy of personal matters is a protected interest . . . and that some form of intermediate scrutiny or balancing approach is appropriate as a standard of review The Supreme Court itself appeared to use a balancing test in *Nixon* Moreover, an intermediate standard of review seems in keeping both with the Supreme Court's reluctance to recognize new fundamental interests requiring a high degree of scrutiny for alleged infringements, and the Court's recognition that some form of scrutiny beyond rational relation is necessary to safeguard the confidentiality interest.¹²²

It hardly becomes the dignity of an appellate court to have to say maybe it is intermediate scrutiny, maybe it is balancing, maybe strict scrutiny (though unlikely) and maybe rational relation (though probably more). A "law" hardly merits the honorary appellation if courts must first guess at whether it exists and then feel around for what standard seems to apply among a menu of very different standards. If this is true for mere law, it is all the more troubling for a constitutional right. It hardly becomes the dignity of a constitutional right for courts to have to speculate as to whether it even exists, and further speculate as to what standard applies if it does.

What is also problematic for policy innovation in the laboratories of the states and political branches to meet new challenges¹²³ is that some courts have appeared to apply strict scrutiny, or, at least the language of strict scrutiny in evaluating claims. Thus, for example, the Tenth Circuit in *Mangels v. Pena* has read *Whalen* to mean that the Due Process Clause protects against disclosure of certain personal matters and forbids disclosure of certain information unless it "advance[s] a compelling state interest which, in addition, must be accomplished in the least intrusive manner."¹²⁴ Other courts have applied a form of intermediate scrutiny or at least the language of intermediate scrutiny.¹²⁵ Because of the mixed language in the Court's cases, it is understandable why courts may, out of caution, migrate toward the higher standard suggested by the language to hedge their bets in the event their case is the one where the Court finally grants certiorari to decide whether the right exists and what

¹²² *Barry*, 712 F.2d at 1559 (citations omitted).

¹²³ *See, e.g., Oregon v. Ice*, 555 U.S. 160, 171 (2009) ("We have long recognized the role of the States as laboratories for devising solutions to difficult legal problems." (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))).

¹²⁴ *Mangels*, 789 F.2d at 839; *cf. Paul P. v. Farmer*, 227 F.3d 98, 107 (3d Cir. 2000) (concluding that the interest of sex offenders in keeping their addresses hidden "is substantially outweighed by the state's compelling interest").

¹²⁵ *See, e.g., Barry*, 712 F.2d at 1559 (concluding that Supreme Court precedent and prior case law support intermediate scrutiny).

standard applies. Yet, beyond being a wish of Justice Brennan in a concurrence in *Whalen* and suggestive flourishes in his opinion for the majority in *Nixon*, strict or even intermediate scrutiny does not find much support in the dicta on which the assumed right and its hypothetical standard are founded. As the Sixth Circuit observed, all sorts of regulations to further the community interest may arguably affect privacy interests. To suggest the threat of strict or intermediate scrutiny is to chill policy innovation. Moreover, civil libertarians who want strong protection for privacy may have cause to be concerned that heightened scrutiny leads to potential front-end deterrence in recognizing privacy interests lest the tough scrutiny apply. This dilution would impact not only judicial recognition but the politics of recognition in the legislative arena, where protections are best calibrated and crafted.

I have written elsewhere about some of the dialogue-inducing and deliberation-triggering virtues of standards that have blurry boundaries to give political actors incentive to evaluate whether their actions fit within the scope of the standards.¹²⁶ A standard with blurry boundaries for a clear right such as the Eighth Amendment prohibition against cruel and unusual punishment is far different, however, than a quasi-constitutional law of assumed rights with no clear standard. It is salutary, particularly in certain sensitive gray areas where legislative actions push against the scope of constitutional safeguards, to have legislatures deliberate over whether the actions cross the line in view of a standard. It is innovation-chilling and unprincipled, however, to simply have courts guess at whether a right exists or not—even sometimes abrogating qualified immunity to vindicate the assumed right—and further guess or pick what standards might apply.

Such a quasi-constitutional law of assumptions without defined standards casts the courts adrift to try to discern whether there may be violations of a hypothetical right. Lower courts have observed,

it is not clear from *Whalen* whether, to be constitutionally protected by a right of nondisclosure, personal information must concern an area of life itself protected by either the autonomy branch of the right of privacy or by other fundamental rights or whether, to the contrary, the right of confidentiality protects a broader array of information than that implicated by the autonomy branch of the right of privacy.¹²⁷

The result may be that while we cannot define the right, or what it covers, or the standard, or what a violation would be, we sometimes

¹²⁶ See Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 101 (forthcoming 2012) (exploring the utility of uncertainty).

¹²⁷ *Borucki v. Ryan*, 827 F.2d 836, 841 (1st Cir. 1987).

know it when we see it because it feels wrong and we want to provide protection and give a remedy.

The result is a puzzling mishmash jurisprudence. Our medical and disease information feels deeply private and is usually protected, requiring interest-balancing or maybe even passing intermediate or strict scrutiny before disclosure¹²⁸—unless one is a prisoner. Disclosure of a prison inmate’s HIV status or the contents of a psychological evaluation may or may not implicate the constitutional right to informational privacy¹²⁹—but we are surer the right applies and is violated when we think corrections officers are being irresponsible jerks about it.¹³⁰ Revealing to the public details disclosed in the course of an investigation is not a violation of the constitutional right to informational privacy¹³¹—except sometimes, particularly if we think

128 See, e.g., *Norman–Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269–70 (9th Cir. 1998) (holding there is a protected informational privacy interest in test results related to syphilis, pregnancy and the sickle cell trait); *Doe v. Att’y Gen.*, 941 F.2d 780, 796 (9th Cir. 1991) (holding there is a protected informational privacy interest in HIV/AIDS test results); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (“There can be no question that an employee’s medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection.”); see also Anita L. Allen, *Confidentiality: An Expectation in Health Care*, in *PENN CENTER GUIDE TO BIOETHICS* 127, 128 (Vardit Ravitsky et al. eds., 2009) (discussing the deeply held feeling among the polity that medical information should be private).

129 See, e.g., *Anderson v. Romero*, 72 F.3d 518, 523 (7th Cir. 1995) (expressing doubt about whether seropositive inmates have constitutional privacy rights that protect against the disclosure of their medical records or information as part of prison safety screenings); *Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir. 1994) (holding that the disclosure of a prison inmate’s HIV-positive status does not violate a constitutional right to privacy). Compare *Harris v. Thigpen*, 941 F.2d 1495, 1513 (11th Cir. 1991) (assuming “*arguendo* that seropositive prisoners enjoy some significant constitutionally-protected privacy interest in preventing the non-consensual disclosure of their HIV-positive diagnoses”) with *Dean v. Roane Gen. Hosp.*, 578 F. Supp. 408, 409 (S.D. W. Va. 1984) (holding that a sheriff’s disclosure of a prisoner’s medical records indicating his diabetic condition did not violate a constitutional right to privacy).

130 See, e.g., *Powell v. Schriver*, 175 F.3d 107, 112–13 (2d Cir. 1999) (holding that “gratuitous disclosure of an inmate’s confidential medical information as humor or gossip—the apparent circumstance of the disclosure in this case—is *not* reasonably related to a legitimate penological interest, and it therefore violates the inmate’s constitutional right to privacy” though the right was not clearly established enough at the time to vitiate qualified immunity).

131 See, e.g., *Bailey v. City of Port Huron*, 507 F.3d 364, 365–66, 369 (6th Cir. 2007) (holding “there is no constitutional right to privacy for a criminal suspect who claims that ‘the State may not publicize a record of an official act’” and thus there was no privacy violation where personal information of an undercover deputy sheriff and his wife was released to the public in the course of an investigation into a drunken driving accident (quoting *Paul v. Davis*, 424 U.S. 693, 713 (1976))); *Scheetz v. Morning Call, Inc.*, 946 F.2d 202, 206 (3d Cir. 1991) (finding there is no constitutionally protected privacy interest in information disclosed in police report); *Olivera v. Vizzusi*, No. CIV. 2:10-1747 WBS GGH, 2011 WL 1253887, at *1, *3–4 (E.D. Cal. Mar. 31, 2011) (holding police officers have no rights to

the police are behaving badly.¹³² This jurisprudence of constitutional intuitions is so steered by the feels-wrong approach, that the Sixth Circuit, the biggest hold-out in recognizing the assumed constitutional right of informational privacy,¹³³ has, nonetheless recognized a violation based on disclosure—albeit characterized as a violation of a “fundamental right of privacy”—in a case of disclosure of details of a rape disclosed to police.¹³⁴ Even though the Sixth Circuit had previously held that disclosure of details given to police in the course of an investigation does not implicate a privacy right, the court was quite evidently offended by the facts of the case, wherein a sheriff allegedly disclosed humiliating facts of the rape to the public after the victim criticized his investigation.¹³⁵

In the absence of law and defined standards, a constitutional jurisprudence of intuitions has arisen in the lower courts. The Eighth Circuit’s standard is perhaps the most open about the affectively influenced unconstitutional-if-it-feels-wrong test. The Eighth Circuit has held that “the information disclosed must be either a shocking degradation or an egregious humiliation . . . or a flagrant breach of a pledge of confidentiality” to violate the constitutional right of privacy.¹³⁶ The Eighth Circuit has also openly identified the affectively influenced intuition that helped give rise to the potential constitutional right to informational privacy. The Eighth Circuit explained in *Eagle v. Morgan*, “the Supreme Court foresaw on the horizon abuses that might emanate from governmental collection of vast amounts of personal data We echo these concerns. It is disquieting to think that [the governmental actors engaged in the actions alleged in the case].”¹³⁷ The quasi-constitutional law of informational privacy that has arisen is a shadow constitutional law of intuitions founded on the

information privacy in information uncovered in an investigation into their potential misconduct); *see also* Paul v. Davis, 424 U.S. 693, 713 (1976) (declining to enlarge the notion of constitutionally protected privacy to prevent police from publicizing the “record of an official act such as an arrest”); Powers v. Coe, 728 F.2d 97, 100–01, 105–07 (2d Cir. 1984) (holding that the leak of grand jury information to the press by a prosecutor was not actionable because the release of stigmatizing information does not establish a due process claim).

132 *See, e.g.*, Bloch v. Ribar, 156 F.3d 673, 686–87 (6th Cir. 1998) (finding a potential constitutional violation of the right to privacy but not of a clearly established right sufficient to vitiate qualified immunity, though warning “public officials in this circuit will now be on notice that such a privacy right exists”).

133 *See supra* text accompanying note 119.

134 *Bloch*, 156 F.3d at 686.

135 *Id.* at 676.

136 *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) (quoting *Alexander v. Peffer*, 993 F.2d 1348, 1350 (8th Cir. 1993)) (alteration in original).

137 *Id.* at 627.

sensation of disquiet over possible governmental overreaching amid social change.¹³⁸

Intuition is a double-edged sword in steering our judgments. A new wave of social psychology has shed insights on how intuition and affect subtly steer our perception, judgment, and decision making.¹³⁹ Intuition can be a powerful guide to steering judgment, because it incorporates the insights of experience that may be hard to translate into words.¹⁴⁰ Indeed studies have indicated that the calls of nurses on impending heart failure, or chess masters on the right move, or ball players are better when steered by intuition and instinct and may be hard to reduce to words or even marred when an explanation is required.¹⁴¹ But intuitions, and the emotions that affect them, can also lead us astray. Intuitions are shaded by what Melissa Finucane, Ellen Peters, and Paul Slovic have dubbed “the affect heuristic,” the idea that our judgment of a situation is impacted by our emotional reaction to it, or at a level of reaction even before emotion, the general sense of goodness or badness about it.¹⁴² Moral intuitions also suffer from the general problems with heuristics and biases—cognitive rules of thumb that may lead us astray. Jonathan Baron has analyzed how overvaluation of the status quo—and greater demands for justification when the status quo is changed, termed status quo bi-

138 See also, *Walls v. City of Petersburg*, 895 F.2d 188, 194–95 (4th Cir. 1990) (“In the past few decades, technological advances have provided society with the ability to collect, store, organize, and recall vast amounts of information about individuals in sophisticated computer files. This database capability is already being extensively used by the government, financial institutions, and marketing research firms to track our travels, interests, preferences, habits, and associates. Although some of this information can be useful and even necessary to maintain order and provide communication and convenience in a complex society, we need to be ever diligent to guard against misuse. Some information still needs to be private, disclosed to the public only if the person voluntarily chooses to disclose it.”).

139 See, e.g., Melissa L. Finucane, Ellen Peters & Paul Slovic, *Judgment and Decision Making: The Dance of Affect and Reason*, in EMERGING PERSPECTIVES ON JUDGMENT AND DECISION RESEARCH 327, 327–29 (Sandra L. Schneider & James Shanteau eds., 2003) (setting forth a theory on the role of affect in judgment and decision making that is supported with empirical research).

140 *Preface to INTUITION IN JUDGMENT AND DECISION MAKING* ix (Henning Plessner et al. eds., 2008).

141 See generally ROBIN M. HOGARTH, *EDUCATING INTUITION* (2001) (collecting such studies); Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1449–50 (2003) (same); Markus Raab & Joseph G. Johnson, *Implicit Learning as a Means to Intuitive Decision Making in Sports*, in INTUITION IN JUDGMENT AND DECISION MAKING *supra* note 140 (analyzing the phenomenon in the context of sports); see also MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 13, 29, 39 (2005) (describing the process as rapid cognition and offering myriad examples).

142 Finucane et al., *supra* note 139, at 340–41.

as—can impact people’s moral decisions in potentially irrational ways.¹⁴³ Baron has accordingly warned against reliance on moral intuitions to guide us to the right result.¹⁴⁴ If moral intuitions are not the “royal road to moral truth”¹⁴⁵ they cannot be the foundation for creating a broad amorphous constitutional right, at least unclothed in colorable constitutional text.

III. PRIVACY’S LENS: SEEING THE SUPPLE TEXT WE HAVE, NOT INVENTING ANEW

Whither forward? After thirty-three years of letting the constitutional right of informational privacy live a vigorous life by assumption in the lower courts, the Supreme Court recently decided again not to decide whether the right exists in *NASA v. Nelson*.¹⁴⁶ Noting the government had not asked the Court to find there is no constitutional right to informational privacy, the Court declined to consider the question, instead following the approach of *Whalen* and *Nixon* of assuming without deciding that the right existed to dispose of a claim.¹⁴⁷ The Court therefore declined to render legitimate (or not) the jurisprudence of quasi-constitutional law based on assumption.

Despite the odd posture of fleshing out and clarifying the applicable standard (for a potentially nonexistent right), *NASA v. Nelson* did help introduce some more clarity to the standard that should apply if the right exists. The Court noted: “We reject the argument that the Government, when it requests job-related personal information in an employment background check, has a constitutional burden to demonstrate that its questions are ‘necessary’ or the least restrictive means of furthering its interests.”¹⁴⁸ The Court thus defused Justice Brennan’s planting of the strict scrutiny possibility in his *Whalen* concurrence and in some of the suggestive language in his majority opinion in *Nixon*.¹⁴⁹

In doing so, the *Nelson* court ameliorated but did not altogether cure the potential for chilling policy innovations in the laboratories

143 See generally JONATHAN BARON, JUDGMENT MISGUIDED: INTUITION AND ERROR IN PUBLIC DECISION MAKING (1998) (discussing myriad examples of the impact of status quo bias); see also Jonathan Haidt & Selin Kesebir, *In the Forest of Value: Why Moral Intuitions Are Different*, in INTUITION IN JUDGMENT AND DECISION MAKING *supra* note 140, at 210 (collecting studies).

144 Baron, *supra* note 18, at 39–40.

145 *Id.* at 38.

146 131 S. Ct. 746, 756 & n.10 (2011).

147 *Id.* at 756 n.10.

148 *Id.* at 760.

149 See *supra* notes 98–101 and accompanying text and references.

of the states and political branches. Taking the prospect of strict scrutiny out of the picture, at least in the background check context, is salutary. But the substantial ambiguity over the scope and contours of the standard remain a significant chilling factor. As Justice Scalia argued, the Court's context-specific analysis of a claim that, at any rate, was "utter silliness" leaves ample room for distinguishing any limits.¹⁵⁰ What if at issue is not background checks but a carefully calibrated program of disease control and information-sharing with safeguards, for example?

In playing on the theme of Justice Scalia's concurrence in *Whalen*, which characterizes the interest in informational privacy as a hypothetical constitutional right, I do not mean to undervalue it. I believe that Justice Scalia's vigorous arguments that the Court has the duty to say what the law is on this important issue are compelling and convincing. I have made two more arguments in favor of correcting the murk of indecision, the first based on how indecision and ambiguity chills policy innovation in the laboratories of the states and political branches and the second based on the need to enunciate a standard by which courts can consistently and coherently sort the cases and translate intuition into law.¹⁵¹ But Justice Scalia also believes that we should leave informational privacy to the political branches to calibrate.¹⁵² In Justice Scalia's view, there is no right to informational privacy, period, so courts should stop sounding off.

In contrast, I argue that the idea of informational privacy has a constitutional role to play and is not merely a good idea for the political branches to implement alone. As Anita Allen has illuminated, privacy is more than a popular preference but a "foundational good to which liberal societies must have a substantive commitment, as they do to freedom and equality."¹⁵³ This Article has argued that the protean idea of privacy is a lens that helps bring into focus the meaning of the supple text of the Constitution. As a constitutional concept, privacy suffers from the frequent charge that it is an atextual invention. I believe the course of privacy's career in constitutional law

150 *Nelson*, 131 S. Ct. at 769 (Scalia, J., concurring).

151 See discussion *supra* at notes 108–45.

152 *Nelson*, 131 S. Ct. at 765 (Scalia, J., concurring) ("I would simply hold that there is no constitutional right to 'informational privacy.' Besides being consistent with constitutional text and tradition, this view has the attractive benefit of resolving this case without resort to the Court's exegesis on the Government's legitimate interest in identifying contractor drug abusers and the comfortably narrow scope of NASA's 'routine use' regulations.").

153 Anita L. Allen, *Unpopular Privacy: The Case for Government Mandates*, 32 OKLA. CITY U. L. REV. 87, 93 (2007).

has shown it not to be a standalone atextual invention, but rather a concept that helps enrich our understanding of the freedoms explicitly safeguarded in the Constitution.¹⁵⁴

The provenance of privacy in constitutional law has been a matter of embarrassment, sometimes elided or only alluded to in the way polite company referred to illegitimacy in the days of old. But the embarrassment of privacy in constitutional law arises only if it is regarded as a separate stand-alone right lacking a textual anchor. In contrast, the course of privacy's career in constitutional law indicates it is a concept rich with meaning that lubricates and keeps supple our understanding of the terms and ideas enshrined in the Constitution. There is no need to invent; the Constitution's terms are supple enough, if only we are able to see them. Privacy describes interests and harms that open up our vision so we can better implement and vindicate the Constitution's freedoms and protections as social contexts change.

The standards that apply to the manifold and myriad contexts lumped for adjudication under the hypothetical right of informational privacy depend, therefore, on the particular transgression alleged. Take, for example, the cases where state actors egregiously and aggressively out someone's disease status. In *Doe v. Borough of Barrington*, for example, police officers learned about the HIV-positive status of the plaintiff's husband during a traffic stop when he warned them not to touch him because he had HIV and "weeping lesions."¹⁵⁵ The defendant officer Smith told the plaintiff Does' neighbors, the DiAngelos, about Mr. Doe's HIV status, and told Mrs. DiAngelo that she should use disinfectant to protect herself.¹⁵⁶ Mrs. DiAngelo, a school district employee who had children in school with the Doe children, became upset and contacted the media and other parents, some of whom withdrew their children from school rather than allowing them to be educated alongside the Doe children.¹⁵⁷ The District of New Jersey vitiated qualified immunity and allowed a civil rights suit under 42 U.S.C. § 1983 to proceed on the theory that the officer's disclosure violated the privacy rights of Mr. Doe and his family.¹⁵⁸ In characterizing this case as one about the constitutional

154 In this regard, the First Circuit in *Borucki v. Ryan* aptly traced the constitutional right to information privacy to "the autonomy branch of the privacy right." 827 F.2d 836, 841 n.8 (1st Cir. 1987). As I argued in Part I, the "autonomy branch of the privacy right" is in turn about enriching our understanding of the meaning of liberty. See *supra* Part I.B.

155 729 F. Supp. 376, 378 (D.N.J. 1990).

156 *Id.*

157 *Id.* at 378-79.

158 *Id.* at 382.

right to informational privacy, the court remarkably held that a right not yet even definitively held to exist is clearly established.

Our intuitions tell us in these cases that surely there should be some protection against such disturbing governmental conduct in the Constitution and a remedy. The question is how to translate intuitions of justice into respectable law. The answer is that the Due Process Clause and its jurisprudence on informational branding supplies an answer—or at least safeguards to curb such official misconduct.

Part of the unease with how much information the State can disclose may be concern over the amplified voice and authority of the State.¹⁵⁹ In many circumstances, the State does not merely disclose information; it brands individuals with a mark of disgrace. Informational branding by the State has a long history, both literary and actual. It is not categorically unconstitutional. Indeed, sometimes such information disclosure may serve important social interests. But the Court has long held that some process is due before “such a stigma or badge of disgrace” may be affixed by the State.¹⁶⁰

The Supreme Court’s decision in *Wisconsin v. Constantineau* is illustrative. At issue in *Constantineau* was a remarkable form of community policing to deal with the social ills and externalities wreaked by someone who “by excessive drinking of intoxicating liquors, or fermented malt beverages . . . expose[s] himself or family to want,” or imposes on the community the burden of supporting him or his family, or endangers the safety and health of himself or others.¹⁶¹ Under the Wisconsin law, “the wife of such person” and other officials, including the Chief of Police or the District Attorney, “may, in writing signed by her, him or them, forbid all persons knowingly to sell or give away to such person any intoxicating liquors or fermented malt beverages, for the space of one year.”¹⁶² In *Constantineau*’s case, the Hartford Chief of Police ordered the dissemination of notices to all Hartford retail liquor outlets forbidding sale of liquor to him without prior notice or hearing where he had an opportunity to be heard.¹⁶³

The question was what process is due before the State attaches “such a stigma or badge of disgrace.”¹⁶⁴ The Court ruled:

159 I thank Jason Schulz for raising this concern at a workshop.

160 *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971).

161 *Id.* at 434 n.2 (quoting WIS. STAT. ANN. §176.26 (West 1967)).

162 *Constantineau*, 400 U.S. at 434 n.2 (quoting WIS. STAT. ANN. § 176.26 (West 1967)).

163 *Id.* at 435.

164 *Id.* at 436.

Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. "Posting" under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. Under the Wisconsin Act, a resident of Hartford is given no process at all. This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.¹⁶⁵

No justice thought a naked delegation of power to "a man's wife [and other minor officers]"¹⁶⁶ to so shame him and restrict his liberty without prior notice and hearing was constitutional on its face. The three dissenting justices mainly wanted to afford state courts an opportunity to first construe the statute and perhaps narrow it.¹⁶⁷ Justice Black, joined by Justice Blackmun, underscored the sentiment of the Court deploring the grant of "such arbitrary and tyrannical power in the hands of minor officers and others" and likened it to a bill of attainder that "can be issued ex parte, without notice or hearing of any kind or character."¹⁶⁸ He dissented because he wanted to give the Wisconsin Supreme Court the first shot at invalidating the statute, explaining, "[i]t is impossible for me to believe that the Supreme Court of Wisconsin would uphold any such boundless power over the lives and liberties of its citizens."¹⁶⁹

As for the HIV-outing cases in the prison inmate contexts, as the Seventh Circuit has suggested, the Cruel and Unusual Punishment Clause of the Eighth Amendment would prevent prison officials from "disseminat[ing] humiliating but penologically irrelevant details of a prisoner's medical history."¹⁷⁰ Indeed, in one such case of "gratuitous

¹⁶⁵ *Id.* at 437. Interestingly, in this vein, the *Whalen* Court cited Judge Skelly Wright's opinion in *Utz v. Cullinane*, wherein Judge Wright observed: "Due process obligates the government to accord an individual the opportunity to disprove potentially damaging allegations before it disseminates information that might be used to his detriment." 520 F.2d 467, 480 (D.C. Cir. 1975) (cited in *Whalen v. Roe*, 429 U.S. 589, 605 n.34 (1977)).

¹⁶⁶ *Constantineau*, 400 U.S. at 444.

¹⁶⁷ *See Constantineau*, 400 U.S. at 440 (Burger, J., dissenting) (predicating the dissent on the possibility that the Wisconsin courts, which had not yet ruled on the validity of the statute at issue, could find that the statute violates the state constitution, thus eliminating the need to rule on the issue of federal constitutionality); *id.* at 443-44 (Black, J., dissenting) (arguing that where the state court might confine the state law's meaning so as not to have any constitutional infirmity, the case should be remanded with directions to withhold court proceedings to enable appellee to file a state court action challenging the validity of the statute).

¹⁶⁸ *Id.* at 444.

¹⁶⁹ *Id.*

¹⁷⁰ *Anderson v. Romero*, 72 F.3d 518, 523 (7th Cir. 1995).

disclosure of an inmate's confidential medication information"—that she was an HIV-positive transsexual—for “humor or gossip,” the Second Circuit found an informational privacy violation, but it was the Eighth Amendment that did the remedial work.¹⁷¹ The Second Circuit explained that the right to confidentiality in medical information varies with condition but is at its zenith when it comes to HIV status and secret transsexualism.¹⁷²

The choice to allow others to know of one's disease status and sexual identity is a choice one makes for oneself, not a decision that the State makes for us, the Second Circuit reasoned.¹⁷³ The Second Circuit distinguished this right of “confidentiality” from “the right to autonomy and independence in decision making for personal matters.”¹⁷⁴ But the root interest—why the law should care—is about the denial of the basic liberty of intimate decision making. Ultimately, the Second Circuit recognized a right to the confidentiality of medical information but held the right was not sufficiently “clearly established” to vitiate qualified immunity.¹⁷⁵ But the Second Circuit concluded that under certain circumstances, the state's outing of an HIV-positive prisoner—particularly accompanied by the outing of transsexualism—put the prisoner at substantial risk of harm, thereby violating clearly established Eighth Amendment law and overriding qualified immunity.¹⁷⁶ The Second Circuit based its Eighth Amendment holding on the risk of violence by other inmates due to the disclosure.¹⁷⁷ The informational privacy lens also magnifies other aspects of the harm based on the daily humiliation, ridicule, and harassment even short of serious physical injury by stripping Devilla of the basic autonomy to decide whether and to whom she would reveal her transsexualism and HIV status. The informational privacy lens also helps magnify the risk as sufficient to constitute cruel and unusual punishment even before the harm of serious physical injury occurs. We need not invent new rights to vindicate our sense of justice.

171 *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999).

172 *Id.* at 111.

173 *Id.*

174 *Id.* (internal quotation marks omitted).

175 *Id.* at 114.

176 *See id.* at 114–15 (explaining that the pre-existing law made it sufficiently clear that the Eighth Amendment barred prison officials from disclosing an inmate's transsexualism in certain situations where it could be reasonably foreseen that such disclosure would subject the plaintiff to inmate-on-inmate violence).

177 *Id.* at 115.

What about intrusive background checks, or indiscriminate disclosure of medical information, or financial disclosure laws? Some of the lower courts have indicated that the assumed right of constitutional privacy is implicated by such laws—but they have passed muster under even heightened intermediate scrutiny given the nature of the privacy interest on the one hand and the often important public interest on the other.¹⁷⁸ In these domains, populist privacy can do far more than the Court in calibrating the right balance. But where the political branches disturb the status quo balance of power in terms of what we may hold secret from the State sufficiently to present issues implicating liberty, then due process balancing of interests would be implicated. Here, again, informational privacy is a lens to help us see how information is power, and how certain liberty-invasive forms of mandated disclosure may disrupt the balance of power and thereby warrant due process interest-balancing.

178 See, e.g., *Seaton v. Mayberg*, 610 F.3d 530, 532, 539 (9th Cir. 2010) (holding that even assuming a prison inmate about to be released has a right to privacy of medical information, disclosure of medical information obtained for civil commitment purposes does not violate any such right); *Denius v. Dunlap*, 209 F.3d 944, 948–49, 956–58 (7th Cir. 2000) (holding that a mandate which required teachers at a state-run, federally-funded program for high school drop-outs to release medical records for background check violated students' right of confidentiality, although granting qualified immunity to director for required authorization for release of financial records); *Walls v. City of Petersburg*, 895 F.2d 188, 189–90, 192–94 (4th Cir. 1990) (holding that background check questionnaire for city police department employee contained questions that implicated the privacy interest in avoiding disclosure of personal matters, but allowing the policy to pass muster because the city had a compelling interest in checking its police and had exercised sufficient caution to prevent disclosure); *Barry v. City of New York*, 712 F.2d 1554, 1556, 1559, 1564 (2d Cir. 1983) (holding that financial disclosure laws affecting city employees making \$25,000 or more passed intermediate scrutiny in light of the city's interests in preventing corruption and conflicts of interest); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 572, 577, 580 (3d Cir. 1980) (holding that while mandated disclosure of medical records to the National Institute of Occupational Safety and Health implicated constitutional privacy interests, such mandate passed muster under the balancing test); *Plante v. Gonzalez*, 575 F.2d 1119, 1121–22, 1134 (5th Cir. 1978) (balancing interests and ruling that financial disclosure laws for state senators pass muster). But see, e.g., *Lee v. City of Columbus*, 636 F.3d 245, 248, 261 (6th Cir. 2011) (holding that sick leave procedure that required city employees to state nature of illness to supervisors did not implicate any informational privacy right recognized by the Sixth Circuit); *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 107, 112–18 (3d Cir. 1987) (balancing interests and ruling that background questionnaire for Special Investigations police applicants that asked intrusive intimate questions without data protections may unconstitutionally impinge on the applicant's privacy interest under an interest-balancing test).

CONCLUSION

The Constitution's text is robust and supple enough to capture the most concerning harms that arouse our intuitive sense of wrong that the lower courts have been cramming into the assumed constitutional right of informational privacy. There is no need to persist in a jurisprudence of assumption for fear that the pressures of advances in technology and other new social challenges have exposed gaps that we need to fix through a secondary structure of a quasi-constitutional law of posturing.

"Liberty finds no refuge in a jurisprudence of doubt," the Court has penned eloquently, in another context where privacy had laid the groundwork for a richer understanding of liberty, and then slipped off-stage once an enriched vision of liberty could come to the fore.¹⁷⁹ It is time to dispel the doubt and allow a richer vision of the meanings of constitutional freedoms to come to the fore, brought into focus by the lens of informational privacy, not as an invented right, but as a way to see how supple and well-suited for governing through social change the Constitution's text is.

179 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992).