

COMMENTS

INFORMATIONAL PRIVACY: LESSONS FROM ACROSS THE ATLANTIC

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INTRODUCTION

The digital age sparked an explosion both in the quantity of private information that a government can gather on private citizens, and in the rapidity with which such information, once leaked, can spread across the globe.¹ As the recent controversy involving National Security Agency (“NSA”) surveillance of phone and Internet communications demonstrates, governments are eager to take advantage of this new capacity.² In such an age, citizens’ rights to privacy are increasingly crucial. The right to decisional privacy—to be free from government interference when making personal decisions about such things as procreation and sexuality—has been affirmed and clarified by the United States Supreme Court in a series of decisions over the last half century.³ But the informational aspect of this “right to be let

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1 See, e.g., Margaret B. Hoppin, *Overly Intimate Surveillance: Why Emergent Public Health Surveillance Programs Deserve Strict Scrutiny Under the Fourteenth Amendment*, 87 N.Y.U. L. REV. 1950, 1957–61 (2012) (discussing New York City’s AIC registry, which requires laboratories to report to a centralized registry the results of residents’ hemoglobin tests—9.4 million tests on 3.4 million people as of 2011—which can reveal information about individual diets, stress levels, and other lifestyle choices).

2 See, e.g., James Risen & Laura Poitras, *N.S.A. Gathers Data on Social Connections of U.S. Citizens*, N.Y. TIMES, Sep. 28, 2013, http://www.nytimes.com/2013/09/29/us/nsa-examines-social-networks-of-us-citizens.html?_r=0 (describing the NSA policy of collecting phone and e-mail logs and compiling this data to create graphs of social connections, locations, and other personal information).

3 See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (“Persons in a homosexual relationship may seek autonomy for these purposes”); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (finding that a right to privacy protects a woman’s choice to abort a pregnancy).

alone”⁴—to avoid disclosure of personal information about oneself, either to the government or to the world at large—remains on tenuous footing in the United States.⁵ Existing legislative and regulatory protections leave frightening gaps, and the text of the Constitution gives courts little material with which to fill those holes. Without a clear textual foundation, the courts have little authority to vindicate such a right when it is violated by the other two branches of government and little guidance for determining its boundaries.⁶ A series of Supreme Court cases reached inconclusive decisions that have done little to clarify the situation, leaving the lower courts to move in different directions.⁷

The situation is markedly different in Europe. There, a definitive textual basis for the right has been clarified by the European Court of Human Rights (“ECtHR”)⁸ and implemented into the laws of member states, where it has been vigorously enforced.⁹ Not only does the right possess stronger footing, but it extends further, affecting not only the responsibilities of governments, but also those of private actors such as corporations and individuals.¹⁰ Europe protects informational privacy so thoroughly for a reason: it is a fundamental human right, important to the development of self-identity and essential to the freedom to be one’s self.¹¹ In the United States, the right to in-

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

5 See, e.g., NASA v. Nelson, 131 S. Ct. 746, 751 (2011) (declining to settle whether a right to informational privacy exists, what sorts of information it might cover, and what level of scrutiny intrusions must bear, and deciding only that the circumstances before the Court did not amount to a violation).

6 See *id.* at 757 n.10 (“[W]here we have only the ‘scarce and open-ended’ guideposts of substantive due process to show us the way, . . . the Court has repeatedly recognized the benefits of proceeding with caution.” (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992))); *id.* at 767 (Scalia, J., concurring) (criticizing the majority for not clarifying the issue for the lower courts); Ingrid Schüpbach Martin, *The Right to Stay in the Closet: Information Disclosures by Government Officials*, 32 SETON HALL L. REV. 407, 422–28, 430 (2002) (arguing that federal courts are reluctant to allow claims “based solely on the Fourteenth Amendment’s general protection of life and liberty” because lack of guidance forces the court into judicial legislating to fill in the gaps and may carry it beyond its constitutional authority).

7 See Martin, *supra* note 6, at 412–27 (discussing Supreme Court jurisprudence on informational privacy and its various conflicting interpretations by the lower courts).

8 Convention for the Protection of Human Rights and Fundamental Freedoms and Protocol art. 8, Council of Europe, 4 Nov. 1950, 213 U.N.T.S. 221 [hereinafter CPHR] (codifying a “right to respect for . . . private and family life”).

9 These points will be discussed in further detail in Part II, *infra*.

10 See, e.g., *Mosley v. News Grp. Newspapers Ltd.*, [2008] EWHC 1777 (QB) (awarding damages for breach of confidence and unauthorized disclosure of private information when a newspaper printed details of a sadomasochistic orgy).

11 Koen Lemmens, *The Protection of Privacy Between a Rights-Based and a Freedom-Based Approach: What the Swiss Example Can Teach Us*, 10 MAASTRICHT J. EUR. & COMP. L. 381, 383–

formational privacy is conceived of only as an interest in avoiding embarrassment, covering less ground and deserving less protection. This Comment will attempt to show that Europe is correct to see more in privacy and that the right deserves more than an assumption to protect it. This conclusion has implications for all branches of government, but this Comment will discuss only the potential constitutional right, enforceable by the judiciary when infringed by the legislative or executive branch, as opposed to any statutory or regulatory rights governing private individuals or corporations.

Part I will discuss the state of informational privacy law in the United States. Part I.A shows that the Supreme Court has left the question open, providing little guidance to lower courts on how to deal with informational privacy cases that come before them. Part I.B describes the consequences of this indecision: variation among the circuits, ad hoc judicial decisions, confusion, and under- or over-protection, depending on your point of view. Part II traces European informational privacy jurisprudence to show that broader, clearer protections are both desirable and feasible. Part III argues that the Supreme Court should follow Europe's example in providing clear guidance on a robust right to informational privacy that protects any information in which individuals have a reasonable expectation of privacy.

I. THE STATE OF U.S. LAW

The Supreme Court has articulated two aspects of the right to privacy: the “decisional” aspect that protects a sphere of private decision-making in which the government may not interfere¹² and the “informational” aspect that protects citizens from disclosure of private information about them.¹³ However, the Court has never confirmed that this second facet exists as a bona fide constitutional right.¹⁴

84 (2003) (describing the right to privacy as a mask that allows us to create the persona we show the world *and* the individual behind it).

12 See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 564–67 (2003) (“The liberty protected by the Constitution allows homosexual persons the right to [find overt expression in intimate conduct with another person].”); *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (“In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion.”).

13 *Whalen v. Roe*, 429 U.S. 589, 599 (1977).

14 Jed Storey Crumbo, *Constitutional Law—Right to Privacy—Government Contract Employees’ Right to Informational Privacy*: *Nat’l Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746 (2011), 79 TENN. L. REV. 417, 420 (2012) (“Although the Court could have addressed the issue of whether a constitutional right to informational privacy existed at all, the majority opinion stressed that this broad issue was not before the Court.”).

Four times, an informational privacy right has come before the Court, and each time, the Court concluded that there had been no violation, but without determining whether a right existed to be violated or not.¹⁵ Nor has the Court given much indication of what sorts of information the right would protect or what sort of scrutiny any invasion would have to bear. This indecision has sparked much disagreement among academics and circuit courts.¹⁶

A. *Supreme Court Jurisprudence: It Might Protect Something, But It Doesn't Protect This*

A constitutional right to informational privacy was at first denied, obliquely, in *Paul v. Davis*.¹⁷ There, the plaintiff was arrested for shoplifting, to which he pleaded not guilty.¹⁸ Before the case was tried or his guilt established, the local police distributed fliers to local businesses labeling the plaintiff and others as “active shoplifters.”¹⁹ The plaintiff sued the police officers in a 42 U.S.C. § 1983 action, claiming that his constitutional rights had been violated.²⁰ The Court spent the bulk of its opinion denying that damage to reputation alone could be a violation of the Fourteenth Amendment’s Due Process Clause because it was not a deprivation of liberty or property.²¹ Moreover, the Court denied that there was a constitutional protection of privacy against the “public[ation of] a record of an official act such as an arrest.”²² It did not discuss whether a right to nondisclosure existed in general, so it is possible to interpret the decision as saying no more than that arrest records are too public to implicate a

15 *NASA v. Nelson*, 131 S. Ct. 746, 751 (2011) (“We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*.”); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 457 (1977) (finding no violation, but acknowledging that “public officials . . . are not wholly without constitutionally protected privacy rights in matters of personal life”); *Whalen*, 429 U.S. at 605 (finding no violation, but stating that the Court was “not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information”); *Paul v. Davis*, 424 U.S. 693, 712–13 (1976) (holding that there is no constitutional protection against disclosure of the plaintiff’s arrest on a shoplifting charge).

16 *See, e.g.*, Martin, *supra* note 6, at 439–40 (evaluating the various judicial opinions on the subject and suggesting an analytical framework for informational privacy cases).

17 *See Paul*, 424 U.S. at 712–13 (holding that there is no constitutional protection against disclosure of the plaintiff’s arrest on a shoplifting charge).

18 *Id.* at 696–97.

19 *Id.* at 695.

20 *Id.* at 694.

21 *Id.* at 699–712. The Due Process Clause guarantees, “nor shall any State deprive any person of life, liberty, or property without due process of law.” U.S. CONST. amend. XIV § 1.

22 *Paul*, 424 U.S. at 713.

privacy right.²³ The holding was phrased narrowly enough to allow for a latent right to informational privacy that protects against disclosures other than records of official acts.²⁴

On the other hand, the Court noted that other privacy cases—those in the decisional privacy line—were limited to rights that were “‘fundamental’ or ‘implicit in the concept of ordered liberty.’”²⁵ It would be odd for the Court to describe the limits of decisional privacy if it did not mean to apply those limitations to the informational privacy claim at hand. Nevertheless, after listing the spheres deemed “fundamental” rights, it stated, “In these areas it has been held that there are limitations on the States’ power to *substantively regulate conduct*.”²⁶ It did not mention any limitations to the State’s power to disclose private information.²⁷

Thus, *Paul* did not clarify whether a right to informational privacy existed. Nor did it clarify, if such a right did exist, whether it was limited to the narrow class of “fundamental” rights protected from government interference by the decisional sphere or whether a broader informational sphere could be protected as long as the information was more private than official arrest records. Later Supreme Court cases hypothesizing such a right did not deem it necessary to reconcile or overrule *Paul*.

1. *The Immaculate Conception: Whalen v. Roe*

Only one year later, the Supreme Court hypothesized the right to informational privacy into being with *Whalen v. Roe*.²⁸ In *Whalen*, the plaintiffs challenged a New York law mandating the creation of a database including the name, age, and address of everyone who was prescribed a Schedule II drug (drugs with recognized medical uses but high potential for abuse) and the doctors who prescribed them.²⁹ The Supreme Court assured plaintiffs that it was “not unaware of the threat to privacy implicit in the accumulation of vast amounts of per-

23 *See id.* at 712–13 (dismissing the privacy claim without mentioning a right to nondisclosure).

24 *Id.* at 713 (calling the instant claim “far afield” from *Roe v. Wade*).

25 *Id.* (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

26 *Id.* (emphasis added).

27 *Id.* (rejecting the claim that “the State may not publicize a record of an official act such as an arrest”).

28 429 U.S. 589, 600 (1977) (suggesting that a “sufficiently grievous threat” to the “interest in the nondisclosure of private information and . . . [the] interest in making important decisions independently” may establish a constitutional violation).

29 *Id.* at 592–93 (describing the procedure that physicians must follow to report information to the New York State Department of Health).

sonal information in computerized data banks or other massive government files.”³⁰ It recognized that an “interest in privacy” was implicated by potential disclosure of the collected information, and that “statutory or regulatory dut[ies] to avoid unwarranted disclosures . . . arguably [have their] roots in the Constitution.”³¹

However, the Court was satisfied that the information was protected from disclosure.³² The state was required to store the database in a vault, reading it only with a computer running without outside connections and surrounded by a barbed-wire fence.³³ Willful disclosure of the information was punishable by up to one year in prison.³⁴ Given these protections against dissemination of the collected information, the Court declined to find sufficient intrusion for a constitutional violation, even if a right to informational privacy existed.³⁵

The decision in *Whalen*, then, rests on an insufficient degree of risk of public disclosure. It largely ignores any potential violation from mere collection of private data.³⁶ The Court acknowledged that a handful of government agents responsible for coding the data would be able to read it, but it was enough for the Court’s majority that the degree of disclosure was little different from prior law or from the medical disclosures made to insurance companies.³⁷ The decision did not establish whether there were some sorts of information that could not be collected without disclosure, or whether an unwarranted disclosure would be a violation.

The majority of the Court thus did not find an infringement that was justified; rather, it denied an infringement in the first place.³⁸ It therefore left open the question of what level of scrutiny a violation might need to bear to pass constitutional muster: what level of competing government interest would justify a violation, and how close the relationship between the government act and the government interest must be.³⁹ It opined that New York had a “vital interest in con-

³⁰ *Id.* at 605.

³¹ *Id.*

³² *Id.* at 600–02.

³³ *Id.* at 593–94.

³⁴ *Id.* at 594–95.

³⁵ *Id.* at 603–04.

³⁶ *Id.* at 600–04 (discussing the potential effects of the disclosure of medical records but not the effects of the collection of the records).

³⁷ *Id.* at 602.

³⁸ *Id.* at 600 (“We are persuaded, however, that the New York program does not, on its face, pose a sufficiently grievous threat to either interest to establish a constitutional violation.”).

³⁹ The Court has elaborated on a variety of tests that it uses to evaluate whether the government may justifiably infringe upon a constitutional right, with tiers of scrutiny based

trolling the distribution of dangerous drugs” and that the data collection was a “reasonable exercise of [its] broad police powers,”⁴⁰ but this does not tell us whether a less vital interest would have been sufficient to justify collection, or whether the elaborate protections limiting access to the data were sufficient to make the statute’s invasion “narrowly tailored.” Furthermore, this discussion seems more like a rebuttal to the lower court’s holding that the law was overbroad than like support for its own position, as it occurs in the introductory section.⁴¹

Adding to the inconclusiveness of the decision, the majority opinion is flanked by two competing concurrences. Justice William Brennan would have held that this level of collection is acceptable because it is “familiar . . . and [is] not generally regarded as an invasion of privacy.”⁴² He insisted, however, that not only would broad disclosure of the information “clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests,” but that mere collection in a centralized computer database might rise to a constitutional violation in a more extreme case.⁴³ Justice Potter Stewart, on the other hand, concurred separately to deny any right to informational privacy.⁴⁴

upon the strength of the right. Strict scrutiny, applied to such actions as racial classifications under the Equal Protection Clause and to restrictions of free speech on the basis of the content of that speech, requires a “compelling government interest” and that the action be “narrowly tailored” so that the infringement is no greater than necessary to further that interest. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005) (“[T]he government has the burden of proving that racial classifications are narrowly tailored measures that further compelling governmental interests.” (internal quotation marks omitted)); *Republican Party of Minn. v. White*, 536 U.S. 765, 776–77 (2002) (evaluating a content-based restriction of speech for compelling state interest and narrow tailoring). Intermediate scrutiny applies to gender-based classifications, requiring that any such law be “substantially related” to “important governmental objectives.” *Craig v. Boren*, 429 U.S. 190, 197 (1976). Where the government seeks only to regulate economic activity, for instance, the Court asks no more than for the regulation to be “rationally related” to a “legitimate” interest, and is very deferential as to what might be rational. *See, e.g.*, *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

⁴⁰ *Whalen*, 429 U.S. at 598.

⁴¹ *Id.* at 596–97.

⁴² *Id.* at 606 (Brennan, J., concurring).

⁴³ *Id.* at 606–07.

⁴⁴ *Id.* at 607–08 (Stewart, J., concurring) (rejecting Justice Brennan’s proposition that “[b]road dissemination by state officials of [the information collected by New York State] . . . would clearly implicate constitutionally protected rights” (alteration in original)).

2. *Elaboration Without Clarification: Nixon and NASA*

Having left matters thoroughly unclear and somewhat unstable, the Court, in the same Term, took a second case implicating privacy. In *Nixon v. Administrator of General Services*, the Court considered the constitutionality of an act authorizing presidential archivists to read through former President Nixon's presidential papers to sort out the private ones from the millions of pages of non-private ones produced during his tenure.⁴⁵ Again, the Court noted an "interest in avoiding the disclosure of personal matters"⁴⁶ and held that Nixon had a "legitimate expectation of privacy" in some of the materials.⁴⁷ "Legitimate expectations" were not considered either in *Whalen*,⁴⁸ or later in *NASA v. Nelson*.⁴⁹ They are, however, important to search and seizure analysis under the Fourth Amendment.⁵⁰ The *Nixon* Court proceeded to analogize the question to a case of electronic surveillance.⁵¹ Therefore, it is possible that the Court was considering the case under Fourth Amendment jurisprudence rather than intending to clarify informational privacy law, although the Court has since stated that informational privacy rights were implicated.⁵²

As in *Whalen*, the *Nixon* Court concluded that the privacy claim was without merit.⁵³ It listed several factors for this conclusion: the "limited intrusion" of a screening; the fact that the vast majority of the documents were not private and could be separated out only by professional screening; the "important public interest" in the non-private documents; and the "unblemished record of the archivists for discretion."⁵⁴ There is no indication whether the Court based its de-

⁴⁵ 433 U.S. 425, 429–30 (1977).

⁴⁶ *Id.* at 457 (quoting *Whalen v. Roe*, 429 U.S. 589 at 599 (1977)) (internal quotation marks omitted).

⁴⁷ *Id.* at 458.

⁴⁸ 429 U.S. 589 (1977).

⁴⁹ *NASA v. Nelson*, 131 S. Ct. 746, 751 (2011) (holding that the Government's "questionnaire that asks employees about treatment or counseling for recent illegal-drug use" did not violate the privacy interests discussed in *Whalen* or *Nixon*).

⁵⁰ *See, e.g., Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) ("[A] person has a constitutionally protected reasonable expectation of privacy; . . . electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment . . ."). The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ." U.S. CONST. amend. IV.

⁵¹ *Nixon*, 433 U.S. at 463.

⁵² *See NASA*, 131 S. Ct. at 751 ("We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*.").

⁵³ *Nixon*, 433 U.S. at 465.

⁵⁴ *Id.*

cision on the confluence of all factors or whether any subset would have been sufficient. The Court may have considered that there was no violation because access to the files was restricted to professional archivists, or it may have considered that even this limited intrusion would have been a violation but for the “important public interest.” It is also possible that a less important interest or a less narrowly tailored act would still have passed whatever scrutiny was applied to the case.

The Supreme Court remained silent on the issue of informational privacy for thirty-three years before hearing *NASA v. Nelson*.⁵⁵ There, the question was whether a government background check violated a right to informational privacy by compelling employees to disclose past use or manufacturing of illegal drugs and any treatment that they might have undergone for that use, as well as certain open-ended questions to references.⁵⁶ Again the Court decided to “assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*.”⁵⁷ The majority opinion considered a number of factors, including: the greater scope accorded to the government in its role as employer than as sovereign; the fact that such background checks had long been performed on civil servants (but were only recently being extended to independent contractors like the plaintiffs); the government’s strong interest in ensuring that its employees are competent and reliable (for which, substance abuse is supposedly a good predictor); the important (if non-sensitive) nature of plaintiffs’ jobs; the statutory protections against data disclosure; and the assertion that the question regarding counseling was intended to mitigate a positive response to the drug use question.⁵⁸ Ultimately, the Court concluded that no right had been violated.⁵⁹

NASA answered very few questions, though. Informational privacy remained a hypothetical right, its contents and its weight unclear. The Court expressly denied that the government was obligated to justify its actions under a least restrictive means test, at least where it acted as an employer rather than a regulator.⁶⁰ However, if the government is not required to use the least restrictive means necessary, must

55 131 S. Ct. 746 (2011).

56 *Id.* at 753.

57 *Id.* at 751.

58 *Id.* at 757–60.

59 *Id.* at 763–64.

60 *Id.* at 760 (“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.”).

the means be substantially related to an important goal, or merely rationally related to a legitimate one? Or is there no need to scrutinize the choice at all because the right cannot be violated absent a significant risk of disclosure? Again, the Court analyzed the Government's interests and the reasonableness of its measures but told us only that there was no violation. It did not say whether this was because there was no infringement or because the infringement was justified, or some combination thereof.⁶¹ Nor did it say what level of justification would be required if there were an infringement.⁶² It noted that an "ironclad disclosure bar" is unnecessary to protect privacy rights.⁶³ A "remote possibility" of public disclosure and an exception for "routine use," allowing the employer's referees limited access to the information, is apparently not sufficient to be a violation.⁶⁴ But much ground remains open in the middle, and the Court has provided little guidance to clarify it.

3. *And Yet, Informational Privacy Lives On: United States v. Jones*

It may appear from the Supreme Court's jurisprudence thus far—zero for three in the cases directly referencing informational privacy—that broad protections of informational privacy are relegated to dicta and dissent. However, in *United States v. Jones*,⁶⁵ five members of the Court expressed their concern over the privacy implications of long-term GPS monitoring of a suspect's vehicle without a warrant.⁶⁶ The Court unanimously held that the tracking in that case was an unconstitutional search under the Fourth Amendment, but the majority's decision rested on the pre-*Katz* theory that any trespass followed by a gathering of information qualifies as a search.⁶⁷ Recognizing that the same level of private information could be gathered without such a trespass—for instance, by electronically activating GPS tracking devices already installed on an individual's car or smart phone—five members of the Court thought that this reasoning was insufficiently protective of individual privacy.⁶⁸

61 *Id.* at 759–60.

62 *Id.* at 763.

63 *Id.* at 762.

64 *Id.* at 763.

65 132 S. Ct. 945 (2012).

66 *Id.* at 955 (Sotomayor, J., concurring); *id.* at 964 (Alito, J., concurring).

67 *Id.* at 950 n.3 ("Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred."). In this case, the police trespassed upon the suspect's vehicle in order to attach the tracking device. *Id.* at 952.

68 *Id.* at 955 (Sotomayor, J., concurring); *id.* at 961–62 (Alito, J., concurring).

Justice Sonia Sotomayor voiced these concerns most clearly, noting the “indisputably private” information that can be gleaned from long-term GPS tracking.⁶⁹ Visits to abortion clinics, psychiatrists, places of worship, gay bars, by-the-hour motels, and so on reveal not just the person’s movements but information regarding the “fundamental” spheres protected by the decisional privacy lines of cases, and much else that most people would consider private. By storing that information, combining it with other sources, and mining it potentially years later, the government could deduce even more information with relative ease.⁷⁰ Justice Sotomayor recognized that this level of government observation has the potential to “chill[] associational and expressive freedoms.”⁷¹ Although she concurred with the majority opinion that the trespass theory of search was sufficient to decide the case at bar, she agreed with the four other concurring Justices that there should be more comprehensive privacy protections against collection of this kind of information under the “reasonable expectation of privacy” formulation of Fourth Amendment jurisprudence.⁷² There are, therefore, five Justices on today’s Supreme Court who seem to recognize the value of informational privacy. But they have provided little guidance to the lower courts regarding how to protect that value.

B. The Debate in the States: It Protects Something, But What and How?

The Supreme Court has left many unanswered questions. It has not decided whether a right to informational privacy exists; it has not decided what might constitute an infringement upon such a right; and it has not decided what level of scrutiny might be applied to such an infringement. Therefore, the lower courts have each gone their separate ways. Some courts have followed Justice Potter Stewart’s concurrence in *Whalen*, Justice Antonin Scalia’s in *NASA*, and the majority opinion in *Paul v. Davis*, finding a restricted or nonexistent right.⁷³ Others have created a broader sphere of protection, from

⁶⁹ *Id.* at 955 (Sotomayor, J., concurring) (quoting *New York v. Weaver*, 909 N.E.2d 1195, 1199 (2009)).

⁷⁰ *Id.* at 956.

⁷¹ *Id.*

⁷² *Id.* at 956–57; *id.* at 962 (Alito, J., concurring).

⁷³ *See, e.g.*, *Am. Fed’n of Gov’t Emps. v. HUD*, 118 F.3d 786, 788 (D.C. Cir. 1997) (doubting the existence of a general right to privacy, but declining to settle the question where background checks asking financial questions without risk of further disclosure would not be a violation); *Borucki v. Ryan*, 827 F.2d 836, 848 (1st Cir. 1987) (holding that a right to nondisclosure of psychological evaluations was not clearly established, and if it were, there was insufficient guidance on how to balance competing interests for this to be a vio-

medical information to anything with a legitimate expectation of privacy, but nevertheless disagree on the level of scrutiny to be applied when a right is infringed.⁷⁴ The majority, however, have ruled in favor of a relatively broad right and some form of heightened scrutiny.⁷⁵

The courts that refuse to find a constitutional right protecting informational privacy typically express two lines of reasoning. The first is that no such right has any support in the text of the Constitution, and it is inappropriate to create that right judicially.⁷⁶ The second is that an informational privacy right would be implicated in nearly eve-

lation); *Alexander v. Pepper*, 993 F.2d 1348, 1350 (8th Cir. 1983) (“Therefore, we hold that to violate Appellant’s constitutional right of privacy the information disclosed must be either a shocking degradation or an egregious humiliation . . . or a flagrant breach of a pledge of confidentiality which was instrumental in obtaining the personal information.”); *J.P. v. DeSanti*, 653 F.2d 1080, 1089–90 (6th Cir. 1981) (refusing to find a general constitutional right to nondisclosure except where fundamental liberties are infringed).

⁷⁴ *See, e.g.*, *Coffman v. Indianapolis Fire Dep’t*, 578 F.3d 559, 566 (7th Cir. 2009) (acknowledging that a right to confidentiality of medical records exists, but declining to establish an appropriate level of scrutiny where the state’s interests were compelling); *Donohue v. Hoey*, 109 F. App’x 340, 360–61 (10th Cir. 2004) (finding a protected privacy right to nondisclosure where there is a legitimate expectation of privacy that may be infringed only in the least intrusive means necessary to advance a compelling state interest); *Tucson Women’s Clinic v. Eden*, 379 F.3d 531, 551 (9th Cir. 2004) (applying a balancing test regarding informational privacy that considers five factors: the type of information, the potential harm of disclosure, the adequacy of safeguards against unwarranted disclosure, the need for access, and the existence of a statutory mandate or public policy interest); *James v. City of Douglas*, 941 F.2d 1539, 1541, 1544 (11th Cir. 1991) (finding that a clearly established right to nondisclosure of private information was violated by police officers who viewed a tape of the plaintiff’s sexual relations); *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990) (holding that a right to informational privacy protects any information to which the individual has a reasonable expectation of privacy and can only be overridden by a compelling interest); *Barry v. City of New York*, 712 F.2d 1554, 1560–62 (2d Cir. 1983) (applying intermediate scrutiny to the forced disclosure of financial information by public employees and finding an important interest in preventing conflicts of interest sufficient to justify disclosure and even public review after an ethics board determination that either the information was not private or it pertained to the employee’s work or potential conflicts of interest); *Fadjo v. Coon*, 633 F.2d 1172, 1174–75 (5th Cir. 1981) (holding that disclosure of unelaborated private details by the government to an insurance investigator gave rise to a cognizable claim of a constitutional violation and remanding the case with instructions to balance the invasion of privacy against any legitimate state purpose sufficiently important to outweigh the violation); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577–78 (3d Cir. 1980) (finding medical records to be entitled to constitutional protection but subject to a balancing test).

⁷⁵ On a simple count of the circuits, nine have found a right to informational privacy that extends beyond interferences with fundamental rights with at least a balancing test, while three have not. *See supra* notes 73–74 and accompanying text.

⁷⁶ *See, e.g.*, *NASA v. Nelson*, 131 S. Ct. 746, 769 (2011) (Thomas, J., concurring) (“No provision in the Constitution mentions such a right.”); *DeSanti*, 653 F.2d at 1090 (“Inferring very broad ‘constitutional’ rights where the Constitution itself does not express them is an activity not appropriate to the judiciary.”).

ry action of the government. Forcing the government to justify intrusions and asking the courts to hear those justifications would be a burden too great to bear: the courts can hear only so many cases, and every minute a government agent spends defending his actions in court is a minute spent not performing his other duties.⁷⁷ The perceived danger is that creating so broad a right would force courts to provide limited protection against individual infringements.⁷⁸ Greater scrutiny means that statutes must be more narrowly tailored and government actions must have greater countervailing interests before they are justified, potentially forcing the government to use less efficient means to accomplish its goals. Demanding narrower tailoring and greater justifications may be particularly difficult when the judicial branch has so little textual support for making such burdensome demands.

Those courts that have accepted a broad right have typically simply cited *Whalen* and the Supreme Court's other privacy decisions and announced tests.⁷⁹ The tests may reflect what Mary D. Fan refers to as the "creepiness emotional meter."⁸⁰ The gist of this concept is that there is an intuitive sense that the government should not be able to demand or divulge private information without good reason.⁸¹ Certain actions taken by government officials or legislatures can and do step beyond the pale, so there must be some constitutional protections when they do.⁸² The idea that a sex tape taken as evidence of extortion could be passed around the precinct for the viewing pleasure of the officers,⁸³ or that humiliating details of a rape—details that

77 See, e.g., *NASA*, 131 S. Ct. at 769 (Scalia, J., concurring) ("It will dramatically increase the number of lawsuits claiming violations of the right to informational privacy."); *DeSanti*, 653 F.2d at 1090 ("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.").

78 *DeSanti*, 653 F.2d at 1090 ("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.").

79 See, e.g., *Westinghouse Elec. Corp.*, 638 F.2d at 570, 576–79 (citing no constitutional provisions as a source of the right, yet accepting that, after *Whalen*, it extends to informational privacy).

80 Mary D. Fan, *Constitutionalizing Informational Privacy by Assumption*, 14 U. PA. J. CONST. L. 953, 956 (2012).

81 *Id.* at 978–80.

82 *Id.* at 956–57 (providing examples of shocking violations of the hypothetical right to privacy that have driven courts to recognize the hypothetical right over arguments of qualified immunity).

83 *James v. City of Douglas*, 941 F.2d 1539, 1540–41 (11th Cir. 1991) (finding a violation of the right to informational privacy on these facts).

the victim had not even told her husband—could be released at a press conference without public purpose,⁸⁴ is so viscerally horrifying to the courts that it seems intuitively impossible that no constitutional right exists to prevent such behavior.⁸⁵

1. Existing Protections Are Not Sufficient

The urgency of this intuitive need for protection is reinforced by the fact that state law remedies do not cover the full range of privacy issues, not even in the cases of government executive action.⁸⁶ Defamation claims may only be leveled when disclosed information is false: not when the information is true, not when the government collects private information without disclosing it, and not when the First Amendment is implicated and no malice is shown.⁸⁷ In most states, an action exists for publication of a private fact, but only if there has been disclosure of “highly offensive” matters to a wide audience: not when the disclosure is merely private but not highly offensive, or when the audience is a small but important group such as a person’s spouse, parents, or employer.⁸⁸ Nor does it exist in the fourteen states that do not have this cause of action.⁸⁹ Finally, there is a remedy for intentional infliction of emotional distress, but this reaches only the most “extreme and outrageous” disclosures, and even then, only when the disclosure is at least reckless.⁹⁰ Thus, a case in which a police officer needlessly discloses a person’s HIV status, causing that person’s entire family to be ostracized, would likely not be cognizable under any state law remedy because the information was true, disclosed only to a small audience—who later told the press—and likely not outrageous enough to be intentional infliction

84 Bloch v. Ribar, 156 F.3d 673, 676, 686 (6th Cir. 1998) (finding a violation of an informational privacy right under those facts, even though the Sixth Circuit does not recognize a general right).

85 Fan, *supra* note 80, at 956–57 (citing *James* and *Bloch* as examples of cases that were so outrageous and horrifying that courts were driven to recognize a constitutional right to privacy even though the Supreme Court had not yet recognized one).

86 Martin, *supra* note 6, at 441–42.

87 *Id.* (outlining the types of violations of privacy rights that cannot be successfully presented in defamation actions even though they intuitively should be).

88 *Id.* at 442 (quoting RESTATEMENT (SECOND) OF TORTS § 652D (1977)).

89 *Id.*

90 *Id.* at 443. Recklessness requires that the defendant be aware of a substantial risk that his behavior will cause the prohibited result—in this case, emotional distress. *E.g.* MODEL PENAL CODE § 2.02(2)(c) (1985) (“A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.”).

of emotional distress.⁹¹ Similarly, a case in which a boy commits suicide after the police threaten to tell his grandfather that he is a homosexual would be unlikely to fall under any of these state law torts.⁹²

There is some question whether the gaps left by this patchwork of state law privacy protections *should* be closed. Ingrid Schüpbach Martin argues that they should not be closed because the law should favor free dissemination of information over privacy.⁹³ In other words, she believes that society would be a better place if everyone came out of the closet and had a frank discussion about their lifestyle. She worries that allowing someone to sue for disclosure of their sexual orientation officially acknowledges that that status is shameful and embarrassing.⁹⁴ Martin may be right that society would be a better place if everyone came out of the closet. But to force individuals to disclose their sexual identity for our own betterment—to force them to sacrifice their privacy and suffer the real if unfortunate costs that might attend that sacrifice—may ask too much.

Martin further argues that closing the gaps left by state tort law and allowing challenges to potentially unconstitutional lawmaking could produce excessive litigation against government agents that impede their efficiency.⁹⁵ The thought that closing the gaps would produce substantially more cases than have already been dealt with over the last three decades hardly seems plausible, however. In the majority of circuits, the courts have accepted some level of protection for informational privacy rights already and must hear cases on these issues even where those protections are limited to “fundamental” rights protected by the decisional line of privacy.⁹⁶ There may even be less litigation when clear standards deter frivolous suits and a recognized, defined right reduces the incidence of violation. While such a right may cause a police officer to pause and consider whether disclosure of a particular piece of information collected in his or her investigation implicates a privacy right, the potential harm to the fact-finding process can be minimized by an appropriately deferential

91 *See Doe v. Borough of Barrington*, 729 F. Supp. 376, 385 (D.N.J. 1990) (finding a violation of the victim’s constitutional right to informational privacy in a case with those facts).

92 *See Sterling v. Borough of Minersville*, 232 F.3d 190, 197 (3d Cir. 2000) (finding a violation of the victim’s right to informational privacy in a case with those facts).

93 Martin, *supra* note 6, at 443–44.

94 *Id.* at 444 (arguing that creating a cause of action for disclosures of truthful information such as race, gender, or sexual orientation implies that such information is harmful).

95 *Id.* (arguing that public officials may become “overly cautious or confused” when trying to meet the law’s requirements and avoid lawsuits).

96 *See supra* notes 73–74 (citing cases that are examples of standards used to determine when disclosures of information rise to the level of constitutional violations).

level of scrutiny, and the mitigating benefits to privacy rights may be worthwhile.

2. *The Argument for a Judicial Solution*

Even if we accept that these holes should be filled, it would not necessarily be clear that the federal judiciary should be the one to fill them. The most obvious problem is one of democratic legitimacy: if there is no constitutional basis for the right, then the federal courts have no authority to impose a remedy. This may be why the Court has been so reluctant to make a definitive decision on the existence of a right. To step forward and acknowledge a right would be to risk judicial overreach, yet, at the same time, to step back would be to reverse three decades of jurisprudence in the lower courts and deny a right that may be desirable to protect.⁹⁷

Another problem with common law privacy protections is that, developing on a case-by-case basis, they would be less transparent and coherent than a comprehensive legislative effort.⁹⁸ This is particularly true when there is no clear principle guiding the decisions as to what should be protected and what should be sufficient justification.⁹⁹ Without guiding principles, judges are left to their own value judgments rather than uniform philosophical principles or democratically agreed-upon consensus. Furthermore, there is little basis on which to predict what activity will be deemed a violation until after a court has decided, leaving little guidance *ex ante* as to when an action should not be taken, when a right needs vindicating, and when a suit is frivolous.¹⁰⁰ These critiques apply with equal force to the current state of affairs, however, where the Supreme Court hypothesizes about a right to informational privacy while the lower courts continue to feel their way in the dark towards disparate ends.¹⁰¹ It is therefore not a reason for the Court to maintain its current course.

While the legislature may have more democratic legitimacy and greater *ex ante* perspective from which to develop a cohesive frame-

⁹⁷ Crumbo, *supra* note 14, at 434–35.

⁹⁸ *See* Martin, *supra* note 6, at 445 (arguing that the legislative process is a superior one for settling these kinds of questions).

⁹⁹ *See* Fan, *supra* note 80, at 958 (arguing that the unprincipled application of the protection allows status quo biases to sneak in and deter innovation).

¹⁰⁰ *See* *NASA v. Nelson*, 131 S. Ct. 746, 768–69 (2011) (Scalia, J., concurring) (noting five factors on which a case could differ from *NASA* that might allow it to prevail, with no guidance from the majority on which, if any, of those factors are important and how much difference would be sufficient to change the result).

¹⁰¹ *See* Fan, *supra* note 80, at 979 (“In the absence of law and defined standards, a constitutional jurisprudence of intuitions has arisen in the lower courts.”).

work, leaving the decisions on privacy rights to the political process as opposed to the judiciary is problematic from another perspective. One of the primary purposes of a constitution is to prevent the will of the majority from oppressing the minority—why else constrain the power of a democratically elected legislature?¹⁰² There is admittedly no clear minority group disfavored by a lack of privacy protections. There are undoubtedly some kinds of information each of us may consider worth protecting, and the legislatures may eventually respond to that desire.

However, legislative action is not always effective at protecting disfavored minority groups.¹⁰³ The majority may wish to oust these outsiders, or it may simply lack the motivation to overcome the inertia of the legislative process. For instance, it might be easier to pass a law that allowed the government to collect information about immigrants—ostensibly because they are more likely to be terrorists or drug runners—than to pass a law that protects homosexuals from disclosure of their sexual orientations. The right to privacy is fundamentally a minority protection, allowing a sphere of autonomous decision-making and freedom from the fear of the majority's ridicule of one's personal choices. To lay the burden of protecting this right at the feet of the majority suffers from the same problems as asking the majority to decide whether one might engage in consensual homosexual relations or join the communist party.¹⁰⁴ Recognition by the

¹⁰² See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 102–03 (1980) (arguing that judges can legitimately intervene and overrule the democratic process when that process is “malfunctioning”); *id.* at 103 (“Malfunction occurs . . . when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.”).

¹⁰³ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938) (acknowledging the possibility that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”); Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1079–80 (1993) (applying public choice theory to show that legislatures' incentives to protect the rights of disfavored minorities are minimal or contrary and that the courts must step in to protect fundamental liberties).

¹⁰⁴ While minority interests in privacy may be particularly in need of judicial intervention, that protection may be most effective if it comes in the form of a broad rule that defends the majority as well. Safeguards specifically for minorities like HIV patients can create practical difficulties and resentment towards the singled-out minority. See Hannah Fishman, *HIV Confidentiality and Stigma: A Way Forward*, 16 U. PENN. J. CONST. L. 191, 215

courts that informational privacy is an important right with constitutional dimensions could help ensure that the courts will scrutinize such infringements, whether affirmatively enacted by the legislature or committed by the executive in the absence of legislative protections. The idea that so important a right can exist on so shaky a ground—or indeed not exist at all—is fundamentally problematic.

In addition, these gaps in legislative protections for the right to privacy have persisted for a very long time, and it is not altogether clear that the gears are turning to close them now.¹⁰⁵ Even if legislative clarity is preferable to judicial clarity, one clear answer from the Supreme Court is preferable to twelve vague ones from the circuits.

The current uncertainty has several detrimental effects. First, insofar as there is a “correct” answer to the question, a circuit split implies that one side or the other is “incorrect.” Either constitutional rights are being underenforced in jurisdictions that improperly narrow the right, or nonexistent rights are being enforced in jurisdictions that improperly broaden it.

Second, this assumed, but unconfirmed, right leaves the lower courts, government actors, and potential claimants with little guidance. As Justice Scalia suggested in his concurrence in *NASA v. Nelson*, this encourages an endless stream of hopeful plaintiffs to flood the courts with claims that are different on one or another dimension from decided cases because they have no grounds on which to determine whether those differences are relevant.¹⁰⁶ A vague right may therefore result in even more litigation than a broad but clear one.

Another possibility is that, for fear of prosecution, government agencies will be unwilling to cross a boundary whose location is uncertain and will be deterred from beneficial policies that approach but do not step over that boundary.¹⁰⁷ The question should be settled, one way or the other, and the Supreme Court may be the only institution that can settle it.

(2013) (“By singling out HIV as a disease in need of additional protection, legislators bring attention to negative perceptions about people with HIV. Treating the HIV-positive community as ‘different’ reinforces the alienating stigma society already focuses on people struggling with the disease.”).

105 See generally, e.g., The FISA Improvements Act of 2013, available at http://www.intelligence.senate.gov/pdfs113th/113fisa_improvements.pdf (codifying the NSA practice of bulk collection of communications metadata). The FISA Improvements Act was voted out of committee on Oct. 31, 2013, by a vote of 11-4. Press Release, Dianne Feinstein, United States Senator for California, Senate Intelligence Committee Approves FISA Improvements Act (Oct. 31, 2013), <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=3aa4ed70-e80b-4c2b-afd6-dc2e5bc75a7b>.

106 *NASA v. Nelson*, 131 S. Ct. 746, 768–69 (2011) (Scalia, J., concurring).

107 Fan, *supra* note 80, at 958.

II. THE STATE OF EUROPEAN LAW

If the Court is to settle the question, it must decide how much protection is desirable, how much protection is feasible, and how much protection is acceptable within the limits of the Constitution. Perhaps surprisingly, we can learn much from the European experience with privacy, even on the third question of acceptability within the U.S. Constitution. Although some Justices consider foreign materials to be at best irrelevant and at worst illegitimate,¹⁰⁸ others have cited European precedents, particularly when seeking to gauge the view of the wider world on matters of human rights.¹⁰⁹ U.S. constitutional jurisprudence is not bound by the decisions of other courts or the texts of other constitutions, but this does not preclude us from “looking beyond our borders” at the logic and experience of wise jurists in foreign countries.¹¹⁰

European courts have long dealt with issues of informational privacy. Their experiences can teach us both about the importance of the right and the practicality of enforcing it.¹¹¹ Even Justice Scalia, a man generally against the use of foreign materials to aid interpretation of the U.S. Constitution, is willing to acknowledge that it has a

¹⁰⁸ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 624–28 (2005) (Scalia, J., dissenting) (arguing that the majority’s use of international precedents to support its argument was illegitimate, particularly where it was not consistent in doing so).

¹⁰⁹ See, e.g., *id.* at 578 (Kennedy, J., majority) (“It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”); *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003) (looking to European law in considering the constitutionality of criminalizing homosexual sodomy).

¹¹⁰ Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1, 8–9 (2003) (applauding the Court’s increasing examination of foreign law sources); see also Sandra Day O’Connor, Assoc. Justice, U.S., Keynote Address at the Ninety-Sixth Annual Meeting of the American Society of International Law (March 16, 2002), in 96 AM. SOC’Y INT’L L. PROC. 348, 350 (2002) (“[T]here is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here.”); Antonin Scalia & Stephen Breyer, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519, 523–26 (2005) (arguing on Justice Breyer’s side that foreign jurists grapple with similar issues and may have cogent arguments and explanations that would be helpful to the American jurist, and on Justice Scalia’s side that it is irrelevant both to what the Framers meant and to what modern American society thinks the Constitution should mean).

¹¹¹ See Scalia & Breyer, *supra* note 110, at 526, 537 (arguing on Justice Scalia’s side that foreign law can be cited to show that “the sky will not fall” if a similar interpretation is taken, and on Justice Breyer’s side that it could be cited to show that a “particular interpretation of similar language in a similar document had had an adverse effect on free expression”).

place as evidence of the consequences of a possible decision.¹¹² And just as in *Lawrence v. Texas*, the importance and universality of the right in Europe may also be evidence of its fundamentality in the United States.¹¹³

In Europe, the right to privacy is firmly grounded in Article Eight of the Convention for the Protection of Human Rights and Fundamental Freedoms:

Article 8—Right to respect for the private and family life

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.¹¹⁴

This right is directly enforceable in the ECtHR.¹¹⁵ Not only does the European privacy right have more textual support than the U.S. privacy right considered in *Whalen* and *NASA*, but it is broader and deeper, protecting more information from less serious invasions.

One area of broader coverage involves the storage of private data. In contrast to *Whalen*, where the Court focused on the protections against public disclosure and did not even clearly require a balancing test when the data were merely collected and stored,¹¹⁶ the ECtHR has long held that the act of storing private data alone implicated Article 8.¹¹⁷ In *Leander v. Sweden*, the ECtHR considered that Article 8 was implicated by the collection of information about the plaintiff in a secret police-register to which he did not have access, but which

112 *Id.* at 526 (“Of course, you can cite foreign law to show—Justice Breyer gave an example—to show that if the Court adopts this particular view of the Constitution, the sky will not fall.”).

113 *See Lawrence*, 539 U.S. at 573 (considering that the protections for homosexuals embodied in the European Convention on Human Rights show that “our Western Civilization” considers those rights to be substantial).

114 CPHR, *supra* note 8, at art. 8.

115 *Id.* at art. 34 (“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.”).

116 *Whalen v. Roe*, 429 U.S. 589, 600–04 (1977).

117 *See, e.g., Leander v. Sweden*, App. No. 9248/81, Eur. Ct. H.R. 1, 18 (1987), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57519> (finding that Article 8 rights were implicated by the storage of a secret police file on the plaintiff, coupled with a refusal to allow him to review and rebut its contents).

caused him to lose a potential job on a naval base.¹¹⁸ Similarly, in *S. & Marper v. United Kingdom*, the court considered that “the mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8.”¹¹⁹

The decision in *Leander* also illustrates the greater depth of protection afforded to privacy in Europe. Although the court deemed the interference excused, it applied a three-part test under paragraph two requiring any infringement (a) be in pursuit of a legitimate interest (here, national security); (b) be “in accordance with the law”; and (c) be “necessary in a democratic society.”¹²⁰

The requirement that the interference be in accordance with the law is broader than it would appear on its face, demanding not just statutory authority but notice and foreseeability to the individual of the sorts of actions that might be taken.¹²¹ Thus, the Court went beyond the text to ensure that citizens would be forewarned—at least constructively—that their information might be collected or disclosed before they act in a way that they would not want revealed or that might trigger such disclosure.

The necessity requirement was glossed with a “margin of appreciation,” demanding only that there be proportionality between the legitimate aim and the infringement and safeguards against abuse instead of a more literal interpretation that would allow sovereigns to infringe only when there was no alternative.¹²² However, in *Marper*, the court found that a blanket policy of indefinite retention of DNA and fingerprints in a police database—even when only trained professionals with special equipment could access it—was disproportionate insofar as it applied equally to those acquitted or convicted of both large and small crimes.¹²³

The protected sphere is also larger under European jurisprudence than under U.S. informational privacy doctrine. Article 8 protects the usual spheres of private information such as sexuality and medical records just as in the United States.¹²⁴ However, the ECtHR,

¹¹⁸ *Id.* at 4–5.

¹¹⁹ *S. & Marper v. United Kingdom*, App. Nos. 30562/04 and 30566/04, Eur. Ct. H.R. 1, 20–21 (2008) (considering that DNA and fingerprints collected by the police following an arrest implicated Article 8 rights) (internal citation omitted).

¹²⁰ *Leander*, App. No. 9248/81, Eur. Ct. H.R., at 18–21.

¹²¹ *Id.* at 19–20.

¹²² *Id.* at 21.

¹²³ *Marper*, App. Nos. 30562/04 and 30566/04 Eur. Ct. H.R. at 207–09.

¹²⁴ *See, e.g., Christine Goodwin v. United Kingdom*, App. No. 28957/95 Eur. Ct. H.R. 21–22 (2002) (holding that the United Kingdom was obligated to make certain changes to the legal treatment of transsexuals, inter alia, to facilitate keeping their prior gender secret

in *Niemietz v. Germany*, found a violation of Article 8 even in the search of a lawyer's offices, conducted with a warrant.¹²⁵ It considered that a person develops relationships in his work life that are included within his private life, and therefore, his place of work must be included in the protected private sphere irrespective of the word "home" in the text of the convention.¹²⁶ Therefore, the search and the warrant authorizing it were too broad to pass the "necessary" requirement, and the court found a violation.¹²⁷

Perhaps the biggest difference in the protection provided by Article 8 relative to U.S. privacy rights is that Article 8 applies to private individuals, not just state action. In the United Kingdom, for instance, the House of Lords has held that "the values enshrined in articles 8 and 10 are now part of the cause of action for breach of confidence."¹²⁸ Internalization of those values allowed the courts to extend the breach of confidence action to situations where no formal relationship of confidentiality actually existed, but where the confidante ought to know that information he has received is "confidential," and to extend the privileges of confidentiality to information that implicates privacy even when it strains the use of the word.¹²⁹ For example, in *Attorney-General v. Guardian Newspapers*, the House of Lords extended a duty of confidence not just to a former MI-5 agent not to disclose confidential information that came to him in that capacity, but to the publishers who circulated that information knowing that to do so was a breach of the agent's duty.¹³⁰

Campbell v. Mirror Group Newspapers extended this further to allow an action against the newspaper for publishing a story about a famous fashion model's struggles with drug addiction, including a photograph of her leaving a Narcotics Anonymous meeting.¹³¹ The picture was taken in a public street and was in no way embarrassing; nevertheless, its publication was found to have infringed her privacy in a

from employers); *Z v. Finland*, App. No. 22009/93, Eur. Ct. H.R. 1, 16–22 (1998) (holding that disclosure of medical records and HIV status implicated Article 8, and that while it was justified with respect to applicant's husband's state of mind in a rape prosecution, it was not justified as to the applicant herself; nor was a ten-year limit on the records' confidentiality).

125 *Niemietz v. Germany*, App. No. 13710/88, Eur. Ct. H.R. 1, 12 (1993).

126 *Id.* at 10–12; CPHR, *supra* note 8, at art. 8.

127 *Niemietz*, App. No. 13710/88 Eur. Ct. H.R. at 12.

128 *Campbell v. Mirror Grp. Newspapers*, [2004] 2 A.C. 457 (H.L.) 465 (appeal taken from U.K.).

129 *Id.* at 465–66.

130 *Attorney-General v. Guardian Newspapers*, [1990] 1 A.C. 109 (H.L.) 284 (appeal taken from U.K.).

131 *Campbell*, 2 A.C. at 500–02.

way that was not justified by any public interest in exposing her false claims regarding her past drug use. On the other hand, the plaintiff did not challenge publication of the bare fact of her drug problem, so it is possible—perhaps even probable—that such a publication would have been considered justified.¹³² Regardless, the United Kingdom applies a constitutional form of privacy right even to private actors in order to ensure maximum protection.

III. LESSONS FROM ACROSS THE POND

A. *Broader Protections Are Feasible*

There are two primary lessons to draw from European jurisprudence on the right to privacy. The first is that a broader right is feasible. The United Kingdom is an illustrative test case. Like the United States, the United Kingdom did not initially (and arguably still does not) have a constitutional right to action for invasion of privacy.¹³³ Instead, it had common law torts such as breach of confidence, with gaps if invasions were not intentional and where no relationship existed between the confider and the confidante.¹³⁴ Subsequently, when Article 8 came into effect and was eventually implemented through the U.K. Human Rights Act of 1998, it substantially closed those gaps.¹³⁵

Today, U.K. courts will hear cases for invasions of privacy by both private and public actors whenever the claimant possesses a “reasonable expectation of privacy” in information that is disclosed or even

¹³² See *id.* at 457 (“She accepted that the newspaper was entitled to publish the fact of her drug addiction and the bare fact that she was receiving treatment . . .”).

¹³³ Basil Markesinis et al., *Concern and Ideas About the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)*, 52 AM. J. COMP. L. 133, 134–36 (2004) (describing how the United Kingdom has expanded old privacy torts to fill the gaps in common law privacy protections and arguing for the development of a new, independent tort of privacy); Cheng Lim Saw & Gary Chan, *The House of Lords at the Crossroads of Privacy and Confidence*, 35 HONG KONG L.J. 91, 99 (2005) (“English courts are not yet ready to recognize a general and comprehensive tort of invasion of privacy and prefer instead to safeguard the individual’s informational autonomy through a modern interpretation of the long-established action for breach of confidence.”). While the United Kingdom does not have a formal written constitution the way the United States does, constitutional principles like democracy and human rights operate on an informal level, in this case, encouraging U.K. judges to expand existing torts to better protect privacy.

¹³⁴ *Guardian Newspapers*, 1 A.C. at 281.

¹³⁵ See Markesinis, *supra* note 133, at 133–34 (acknowledging expansion of privacy protections, but arguing that stretching old causes of action to fill the gaps leads to inadequate protection and doctrinal confusion).

stored.¹³⁶ Apart from some opposition from the press to the “celebrity privacy” line of cases (a line which would of course be impossible to follow in the United States due to the state action doctrine)¹³⁷ there is little indication of a desire to turn back.¹³⁸ Add this to the fact that nine of twelve circuits have been protecting a broad right in the United States for three decades without the sky falling, and the argument already made in Part I.B that a clearer doctrine might actually reduce litigation even if the right were broadened and strengthened, and it would seem that fairly broad protections are feasible.

B. Broader Protections Are Desirable

The European situation also demonstrates why broader protections are desirable. The differences in privacy protection between the United States and Europe can be traced to a somewhat differing conception of the right to privacy. In the United States, privacy is a right against the government, a right to prevent the state from interfering in personal decisions—including the decision not to disclose certain information.¹³⁹ The focus of informational privacy, however, is limited to protecting citizens from harms that may result from the disclosure of certain kinds of information: extreme embarrassment that may result from disclosure of sexual habits or medical data, or risks to safety from disclosure of identifying information.¹⁴⁰ In Eu-

136 See *Mosley v. News Grp. Newspapers*, [2008] EWHC 1777, (7) Q.B. (“The law now affords protection to information in respect of which there is a reasonable expectation of privacy . . .”); *S. & Marper v. United Kingdom*, App. No. 30562/04 and 30566/04, Eur. Ct. H.R. 208–09 (2008) (finding a violation for storage of DNA and fingerprints).

137 See *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) (holding that the Constitution regulates only the actions of states and cannot even be used as a source of authority for Congress to regulate the actions of private individuals).

138 See *Markesinis*, *supra* note 135, at 153 (calling for further expansion of English privacy law over the “welcome developments” thus far); *Saw & Chan*, *supra* note 133 (“There is hope that the courts are now taking informational privacy more seriously.”). Consider also the continued expansion of the U.K. privacy right between *Guardian Newspapers*, 1 A.C. at 109, *Campbell v. Mirror Grp. Newspapers*, (2004) 2 A.C. 457 (appeal taken from U.K.), and *Mosley*, EWHC 1777. Given that extension of privacy rights to protect against private actors is likely impossible in the United States and certainly beyond the scope of this paper, opposition of newspapers to that extension is irrelevant. See *supra* note 137.

139 See *Fan*, *supra* note 80, at 959 (arguing that privacy rights are a tool to allow the judiciary to regulate the balance of power between individuals and the state).

140 Compare *Sterling v. Borough of Minersville*, 232 F.3d 190, 194–97 (3d Cir. 2000) (finding a violation of the right to informational privacy in disclosure of sexual orientation, even when homosexual sodomy could still be constitutionally criminalized), with *J.P. v. DeSanti*, 653 F.2d 1080, 1082, 1088 (6th Cir. 1981) (finding no violation in the disclosure of “social histories” of juvenile defendants including information from school records, court records, family members, and “any other information that the probation officer thinks is relevant to the disposition of a case” without consent of the defendant).

rope, privacy is a right to personality—“a right to be rather than a right to be *left alone*.”¹⁴¹ It is not just a freedom to choose without interference from the state; it is the recognition that the mere possibility that our choices may be recorded and publicized affects those choices and interferes with our ability to autonomously construct our identities—both the private lives we live for ourselves and the personas we show the world.¹⁴²

Professor James Whitman explains the differing conceptions of privacy in the United States and Europe as the result of different emphases: “liberty” in the United States versus “dignity” in Europe.¹⁴³ Thus, Americans demand a sphere into which the government may not enter—the home—and insist upon exclusion of illegally seized evidence and freedom from government interference in their choice of baby names.¹⁴⁴ On the other hand, they are quite willing to allow *private* actors to delve into their credit history or even more personal information through civil discovery mechanisms, and outside the home, they have few qualms about arresting people for choosing to sunbathe topless or about allowing the state to search their workplaces.¹⁴⁵ In contrast, Europeans focus on the right to control one’s public image—“rights to guarantee that people see you the way you want to be seen”—through controlling the information that is disclosed.¹⁴⁶ Europeans therefore care far less whether the intruder is a state or private actor, or whether the intrusion occurs in the home or at work. They are willing to allow the state to veto the name they decide to give their children, or to tap their phones tens or even hundreds of times more frequently than the U.S. Government does, because these things have little to do with their public image. But they are not willing to allow even private actors like newspapers, civil litigants, or would-be creditors to intrude on their privacy even in the workplace.¹⁴⁷

This stark difference in viewpoint requires a different kind of protection. For “liberty,” individuals need only for the government to stay away, but for “dignity,” they require affirmative protection from the intrusions of others. This distinction is similar to Isaiah Berlin’s

141 Lemmens, *supra* note 11, at 384.

142 *See id.* at 383 (“[P]rotection of privacy enables us to present and to control a ‘we’ that we ourselves create.”).

143 James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1160–62 (2004).

144 *Id.* at 1159, 1161–62.

145 *Id.* at 1156, 1158.

146 *Id.* at 1161.

147 *Id.* at 1156–59.

ideas of positive and negative liberty.¹⁴⁸ The U.S. idea of privacy is a “negative” liberty, a freedom from interference by the government, while the European conception is positive, a freedom to choose for oneself rather than allow others to dictate what personal information will be disclosed.¹⁴⁹ The European system creates a kind of legal claim that lets an individual call upon the force of the state to aid him in enforcing his right to choose.¹⁵⁰ This expands his options to include choices he could not have selected without state backing. It may be seen as restricting the option of others to infringe upon each other’s privacy rights. However, when a balancing test is employed, net social utility necessarily increases (at least on the assumption that the court gets the balance right).¹⁵¹

The difference between the United States and European systems is a difference not just in degree but in kind: the European right is broader because its goal is to facilitate an individual’s ability to mold a persona to his or her own specifications, not merely to prevent the government from molding it.¹⁵² It also reflects a difference in the importance placed on the right. European courts are willing to wade into suits between private individuals to ensure the maximum scope of the privacy sphere. U.S. courts, on the other hand, are reluctant to allow even suits against the abuses of government agents wielding government authority.¹⁵³ The U.K. courts have refused to presume that privacy rights are any less worthy of protection than freedom of expression, long hallowed in U.S. jurisprudence.¹⁵⁴ The question, then, is which side has the better answer?

The Supreme Court has long recognized the importance of privacy rights, even if it has not yet held that privacy extends beyond the decisional sphere.¹⁵⁵ What the Court must acknowledge is that priva-

148 Isaiah Berlin, *Two Concepts of Liberty*, in *LIBERTY: ISAIAH BERLIN* 166 (Henry Hardy ed., 2002).

149 *See id.* at 169, 178 (defining negative and positive liberty).

150 *See Lemmens, supra* note 11, at 390 (describing personality rights as “similar to rights in rem,” but expressing uneasiness with the lack of clearly demarcated “res”).

151 *See Campbell v. Mirror Grp. Newspapers*, [2004] 2 A.C. 457 (H.L.) 474 (arguing that when freedom of the press is curtailed only where there is a countervailing privacy interest and when privacy interests are curtailed only when there is a countervailing public interest in disclosure, then there is often no conflict, and the stronger interest will prevail when there is).

152 *See Lemmens, supra* note 11, at 384 (describing both a “defensive right” against “unwanted intrusions” and an “offensive” one facilitating an “aspiration of autonomy”).

153 *See, e.g., Paul v. Davis*, 424 U.S. 693, 701 (1976) (refusing to “make of the Fourteenth Amendment a font of tort law”).

154 *See Campbell*, 2 A.C. at 464.

155 *See Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted govern-

cy is as easily trammled by social pressures—and indeed by the fear of potential social pressure—as it is by government intrusion. When the government collects information in a way that makes us change our decision-making, it has interfered with that decision-making as surely as if it had made the decision for us. When it divulges information that we would rather keep secret, social stigma and pressure to conform interfere with both our decision-making and our right to structure our relationships as we see fit.¹⁵⁶ At the very least, then, constitutional protections must exist when information collection and disclosure implicate the fundamental freedoms of the decisional sphere of privacy. Informational privacy, like decisional privacy, is a liberty interest as much as a privacy interest.¹⁵⁷ It would be very useful to make these constitutional protections sufficiently clear that government actors can predict when they have crossed the line into protected freedoms and be called to account for doing so.

But more than that, if the goal of autonomous decision-making can be recognized as more than simply keeping the government out of one's backyard, then limiting the right to informational privacy to issues of family, sexuality, and child-rearing simply is not enough. The greater the range of information that might be collected and disclosed by the government without warning or justification, the lesser the range in which people are truly free to decide for themselves—to *be* themselves—without fear of opprobrium, be it expressed actively or passively, by government or by society. Where a legitimate expectation of privacy is not fulfilled and private information is collected or disclosed, individuals' ability to construct their personae and social connections—to live their lives autonomously—is damaged. The United States and Europe may have different conceptions of privacy, but the interest in constructing our public face is as important to our liberty as it is to our dignity. Privacy protects our ability to act without embarrassment, not just our ability to avoid being embarrassed.

The law should therefore protect confidentiality of information to the full extent of legitimate expectations and abrogate those protections only when a public interest at least as strong counterbalances

mental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (finding a zone of privacy created by penumbras and emanations of enumerated rights).

156 See *Lawrence v. Texas*, 539 U.S. 558, 572–74 (2003) (finding that a constitutional right to structure private relationships was infringed by a law against homosexual sodomy).

157 See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (relying on “liberty” rather than *Roe*’s “privacy” to protect a woman’s right to an abortion).

the right deprived. Legitimate expectations of privacy are particularly well-suited as a dividing line, because they serve not just as a consensus view of what is “private” but as a warning to individuals of where they must be wary of watchful eyes and where they may act freely. The usual criticism that the test is circular—the government may pass a law allowing a practice of performing particular kind of search or may itself establish such a practice, thus rendering any expectation of privacy against that search necessarily illegitimate¹⁵⁸—may be a positive benefit in the informational privacy context. It gives the democratically elected legislature a little more freedom to establish the limits of a right without clear textual guideposts, so long as it provides sufficient notice that society internalizes those limits. If autonomy must be curtailed by collecting or disclosing information, “legitimate expectations” at least ensure that individuals are forewarned so that they can minimize the damage. A balancing test would recognize that not all information is equally damaging to an individual’s interests in privacy, and therefore, not all disclosures should require the same level of countervailing government interest to justify them. The European Courts, in other words, seem to have it right.

The question then becomes from where this protection should come. As already argued, legislatures and regulators have left gaps in this protection and may continue to do so indefinitely.¹⁵⁹ The Fourth Amendment protects against “unreasonable searches and seizures”¹⁶⁰ but, at the very least, gives no guidance on whether information that was lawfully obtained may be disclosed. This forces a court recognizing a right to informational privacy to rely on the same sorts of “penumbras”¹⁶¹ that created protected zones for childbirth and sexuality absent express textual authority.¹⁶² But when the right to privacy is seen for its true potential as a right to personality, such an extension

158 See, e.g., *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (Harlan, J., concurring) (recognizing the circularity of the legitimate expectations test).

159 See *infra* Part II.B.

160 U.S. CONST. amend. IV.

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

162 See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (holding that the Constitution protects the liberty of homosexuals to engage in sodomy); *Casey*, 505 U.S. at 846 (relying on a “substantive component” absent from the literal text of the due process clause to protect the right to an abortion); *Roe v. Wade*, 410 U.S. 113, 152 (1973) (recognizing a “guarantee of certain areas or zones of privacy” that protects that right despite the lack of an explicit basis); *Griswold*, 381 U.S. at 484–85 (holding that such penumbras in the First, Third, Fourth, Fifth, and Ninth Amendments protect the right of married partners to use contraception).

of existing privacy and liberty rights no longer seems so far from established precedents.

Ideally, the legislature would provide clearly defined privacy rights that protect individuals from infringements by the executive. If a general privacy right existed, the Equal Protection Clause could provide at least some protection to minority groups whose privacy is singled out. But in the absence of such a law, executive actors may act with impunity in circuits that have not found a constitutional right. And in the absence of any guidance from the Supreme Court, circuit courts continue to reach disparate results based on intuition instead of coherent principles. Following the European model, the Supreme Court could provide clear guidance to the lower courts on how and when to review executive action. “Legitimate expectations of privacy” would allow actions clearly authorized by statute to escape scrutiny altogether because there can be no legitimate expectation that a statute will not be enforced. But “legitimate expectations” would give the lower courts something more concrete to guide them than the hypothetical right and conflicting opinions they have now. Government action could receive deferential review appropriate to the reality that collecting and disseminating information can often be very useful to the government, but courts could still punish the egregious violations like purposeless disclosure of rape details,¹⁶³ HIV status,¹⁶⁴ or sex tapes.¹⁶⁵ And recognition that informational privacy is an important right could affect the Court’s decision-making when it balances that right against others.¹⁶⁶ Regardless of what the legislature does, the law would benefit from a clear statement by the Court that the Constitution protects informational, and not just decisional, privacy.

CONCLUSION

European jurisprudence on informational privacy shows us that the right has the potential to be larger and more important than the

¹⁶³ Bloch v. Ribar, 156 F.3d 673, 676, 686 (6th Cir. 1998).

¹⁶⁴ Doe v. Barrington, 729 F. Supp. 376, 385 (D.N.J. 1990).

¹⁶⁵ James v. Douglas, 941 F.2d 1539, 1541, 1544 (11th Cir. 1991).

¹⁶⁶ See, e.g., Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496–97 (1975) (invalidating a law preventing the publication of the names of rape victims because the privacy interest of the victims was insufficient to support even the modest restriction of free press). The decision in *Cox Broadcasting* turned on the fact that the name published was included in the public court record and therefore was no longer strictly private, *id.*, but if privacy rights had stronger backing, the Court might have given greater weight to the state’s interest in protecting victims’ right to limit disclosure of such information to the few who scrutinize court records instead of the many who read the newspaper.

United States currently allows it to be. It is about more than simply avoiding embarrassment and keeping the government out of our bedrooms. It is about allowing individuals to keep secrets and to act without fear of being watched. Without such a right, they are not free to behave as they wish for fear of being judged. When this is recognized, it becomes apparent that existing state laws designed to protect only against falsities, broad disclosures, or extreme embarrassment are insufficient.

It is easy to understand why the lower courts have been eager to find a constitutional protection of privacy. But leaving the interpretation up to the lower courts is a flawed solution. Without guidance on the scope or even the existence of the right, the lower courts have produced a morass of conflicting positions and left a hazy line that tells neither the government agent contemplating action nor the victim contemplating suit what side of that line a given action falls on. Without higher authority, many circuits are reluctant to extend the right as far as is deserved.

Europe has benefitted from clear, legitimate, textual support for its right to privacy. The United States would benefit from a similar level of guidance and protection. The right to informational privacy is not so distinct from decisional privacy, the liberty right to an autonomous space in which we are free to act without fear of intrusion either by government regulation or by prying eyes. Only by protecting both can we fully realize the complete right of privacy, that "most comprehensive of rights and the right most valued by civilized men."¹⁶⁷ When this is recognized, it no longer seems so implausible that the Constitution should protect that right any less than it protects a woman's right to choose or a man's right to romance another man.

¹⁶⁷ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).