

## A TYPOLOGY OF PRIVACY

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### ABSTRACT

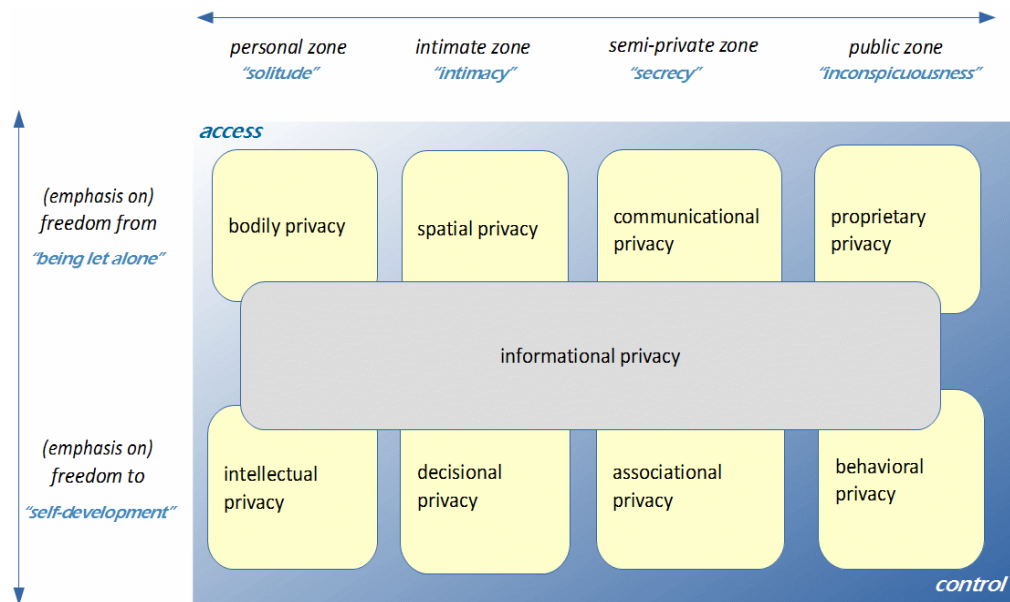
Despite the difficulty of capturing the nature and boundaries of privacy, it is important to conceptualize it. Some scholars develop unitary theories of privacy in the form of a unified conceptual core; others offer classifications of privacy that make meaningful distinctions between different types of privacy. We argue that the latter approach is underdeveloped and in need of improvement. In this Article, we propose a typology of privacy that is more systematic and comprehensive than any existing model.

We developed our typology by, first, conducting a systematic analysis of constitutional protections of privacy in nine jurisdictions: the United States, Canada, the United Kingdom, the Netherlands, Germany, Italy, the Czech Republic, Poland, and Slovenia. This analysis yields a broad overview of the types of privacy that constitutional law seeks to protect. Second, we studied literature

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from privacy scholars in the same nine jurisdictions in order to identify the main dimensions along which privacy has been, or can be, classified.



This analysis enables us to structure types of privacy in a two-dimensional model, consisting of eight basic types of privacy (bodily, intellectual, spatial, decisional, communicational, associational, proprietary, and behavioral privacy), with an overlay of a ninth type (informational privacy) that overlaps, but does not coincide, with the eight basic types.

Because of the comprehensive and large-scale comparative nature of the analysis, this Article offers a fundamental contribution to the theoretical literature on privacy. Our typology can serve as an analytic tool and explanatory model that helps to understand what privacy is, why privacy cannot be reduced to informational privacy, how privacy relates to the right to privacy, and how the right to privacy varies, but also corresponds, across a broad range of countries.

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## 1. INTRODUCTION

Privacy is notoriously hard to capture, but that does not mean we should refrain from conceptualizing what privacy is, or what ought to be contained within its scope for purposes of legal protection. Many scholars attempt to improve our theoretical understanding of what privacy means. These attempts are generally twofold. Various scholars, such as Nissenbaum,<sup>1</sup> Moore,<sup>2</sup> and Cohen,<sup>3</sup> develop a unitary conception of privacy in the form of a unified conceptual core. Others offer typological or pluralist conceptions of privacy by making meaningful distinctions between different types of privacy.<sup>4</sup> The more unitary accounts of privacy often argue for legal recognition of privacy based on normative claims about the definition and value of privacy. In contrast, typological approaches tend to be largely descriptive, often based on what a particular legal system actually protects.

While both attempts are important, the typological approach is relatively scarce in the literature and in need of improvement. This Article presents a systematically developed typology of privacy, informed by a comparative analysis of constitutional privacy law and theoretical literature across nine countries. Our findings push back on the trend, visible since the 1960s, to focus predominantly on informational privacy and data protection, as such a focus neglects other types of privacy that remain protection-worthy even in

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<sup>1</sup> See generally HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* (2010) (outlining a theory of privacy as “contextual integrity” and arguing that people who claim a violation of their privacy generally understand that the sharing of information is crucial to social life and that their real concern is the inappropriate and improper sharing of information).

<sup>2</sup> See ADAM D. MOORE, *PRIVACY RIGHTS: MORAL AND LEGAL FOUNDATIONS* 16 (2010) (“A privacy right is an access control right over oneself and information about oneself.”).

<sup>3</sup> See generally Julie E. Cohen, *What Privacy is for*, 126 HARV. L. REV. 1904, 1907 (2013) (summarizing the debate about privacy).

<sup>4</sup> See e.g., DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* (2008) (describing privacy as a multifaceted concept with several dimensions); Rachel L. Finn, David Wright, & Michael Friedewald, *Seven Types of Privacy*, in *EUROPEAN DATA PROTECTION: COMING OF AGE 4* (Serge Gutwirth, Ronald Leenes, Paul de Hert, Yves Poullet eds., 2013) (arguing that taxonomy of privacy should include seven different types of privacy); Roger Clarke, *Introduction to Dataveillance and Information Privacy, and Definitions of Terms*, ROGER CLARKE’S HOME-PAGE (July 26, 2016), <http://www.rogerclarke.com/DV/Intro.html> [https://perma.cc/A74H-KQ6C] (last visited Oct. 31, 2016) (providing definitions for concepts related to privacy as a whole).

a digitized world. Our typology can serve as an analytic and evaluative tool to help assess the impact of new technologies, social practices, and legal measures on broader privacy interests.<sup>5</sup>

Existing typologies or taxonomies of privacy provide a useful starting point but have drawbacks. Solove's taxonomy, arguably the most-cited and best-known classification in recent privacy literature,<sup>6</sup> is actually not a classification of *privacy* but of *privacy harms*. Solove argues that privacy is "too complicated a concept to be boiled down to a single essence[.]"<sup>7</sup> so instead, he aims to sketch out contexts and actions that cause privacy-related problems. As Solove's goal is "simply to define the activities and explain why and how they can cause trouble[.]"<sup>8</sup> the result is a list of possibly harmful actions.<sup>9</sup> While this is highly relevant, it is a different exercise than what we attempt in this Article: to classify privacy as such. Where Solove argues privacy cannot be captured by a single concept, we argue that privacy *can* be captured by a set of related concepts that together constitute privacy. Therefore, in this Article we do not engage with Solove's taxonomy – or other classifications of privacy harms or privacy intrusions<sup>10</sup> – but propose a typology of privacy itself than can stand alongside taxonomies of privacy harms.

Those classifications that exist of privacy itself have the drawback that they are often embedded in a single legal culture (based on, e.g., US doctrine) and are not necessarily generalizable outside their own jurisdiction. Moreover, authors often cite and draw from the work of a handful of prominent, largely U.S.-based, scholars,

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<sup>5</sup> Indeed, this is what Wright and Raab suggest a typology should achieve, although we argue that our typology is more comprehensive and has more explanatory power than the typology they rely on in their analysis of privacy impact assessments. See David Wright & Charles Raab, *Privacy Principles, Risks and Harms*, 28 INT'L REV. L. COMPUTERS & TECH. 277 (2014) (identifying concepts in privacy related to impact assessments).

<sup>6</sup> Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PENN. L. REV. 477, 488-91 (2006) (providing a taxonomy for privacy problems).

<sup>7</sup> *Id.* at 485.

<sup>8</sup> *Id.*

<sup>9</sup> Solove provides four main categories, and each main category contains a list of sub-categories, which are the following: information collection (surveillance, interrogation); information processing (aggregation, identification, insecurity, secondary use, exclusion); information dissemination (breach of confidentiality, disclosure, exposure, increased accessibility, blackmail, appropriation, distortion); and invasion (intrusion, decisional interference). *Id.* at 490-91.

<sup>10</sup> See e.g., Wright & Raab, *supra* note 5, at 282-83 (classifying types of privacy).

possibly obscuring or understating important cultural variation. In addition, existing classifications often seem somewhat haphazard and not based on clear-cut distinctions, resulting in a list of relevant privacy aspects rather than a typology.<sup>11</sup> In this Article, we develop a more comprehensive and consistent typology in the form of a set of types of privacy that are meaningful in themselves (i.e., that have explanatory power for why a certain type requires privacy protection, e.g., communicational privacy or privacy of the body) and, as far as possible, mutually exclusive.<sup>12</sup> Our aim is thus mainly descriptive—mapping types of privacy in a systematic manner—rather than normative. This implies that we do not grapple substantially with the lengthy literatures on the value or function(s) of privacy, such as the individual versus social value of privacy,<sup>13</sup> the social dimensions of privacy,<sup>14</sup> or how individuals actually manage private information.<sup>15</sup> The function of our typology is not to define privacy or to prescribe how we should understand privacy or what its relevance is; rather, the typology serves as an analytic tool that can assist in structuring and clarifying the privacy debate. For this reason, we also do not use one specific definition of privacy, but rather examine how the various constitutions and national literatures that we survey use privacy-related terms in each different cultural and legal context.

To develop our typology, we conducted desk-based legal research, using three principal sources. First, we mapped existing

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<sup>11</sup> See *infra* Section 3 (describing existing typologies and taxonomies related to privacy).

<sup>12</sup> Overlap between types can never be completely avoided, since privacy remains a relatively fluid concept. We therefore aim at identifying ideal types rather than ‘real’ types.

<sup>13</sup> Compare e.g., MOORE, *supra* note 2, at 47-49 (discussing the social value of privacy), with AMITAI ETZIONI, PRIVACY IN A CYBER AGE: POLICY AND PRACTICE 101-12 (2015) (discussing an approach to analyzing the balance between security and privacy).

<sup>14</sup> See Valerie Steeves, *Reclaiming the Social Value of Privacy*, in LESSONS FROM THE IDENTITY TRAIL: ANONYMITY, PRIVACY AND IDENTITY IN A NETWORKED SOCIETY 191, 191-208 (Ian Kerr, Valerie Steeves, & Carole Lucock eds., 2009) (arguing that current conceptions of privacy ignore social contexts), available at [http://www.idtrail.org/files/ID%20Trail%20Book/9780195372472\\_kerr\\_11.pdf](http://www.idtrail.org/files/ID%20Trail%20Book/9780195372472_kerr_11.pdf) [<https://perma.cc/A77F-RXKJ>]; see generally SOCIAL DIMENSIONS OF PRIVACY: INTERDISCIPLINARY PERSPECTIVES (Beate Roessler & Dorota Mokrosinska eds., 2015) (providing a variety of perspectives on privacy).

<sup>15</sup> See e.g., Sandra Petronio, *Communication Privacy Management Theory*, in INTERNATIONAL ENCYCLOPEDIA OF COMMUNICATION THEORY AND PHILOSOPHY (Klaus Bruhn Jensen ed., 2015).

classifications from academic literature, trying to integrate them where possible. Second, we surveyed national constitutions in nine countries<sup>16</sup> to identify how these jurisdictions articulate various types of privacy within constitutional privacy protection. We rest this analysis on the assumption that the most important types of privacy will have crystallized into constitutional protection in one form or another, so that looking at a sufficiently large set of constitutions will yield a relatively comprehensive overview of types of privacy that the right to privacy aims to protect.<sup>17</sup> Third, we examined the privacy scholarship in the nine countries mentioned, and identified how authors conceptualize the various dimensions of privacy (as a legal right or a philosophical concept). These methods overcome the drawback of developing a typology embedded in a particular legal culture. Based on the types and distinctions emerging from the three sources, we have developed a typology of privacy.

By developing a consistent and meaningful typology of privacy, we hope to contribute to the overall academic effort to conceptualize privacy, and therewith to improve our understanding of what privacy means in all its variety, how the right to privacy relates to the different types of privacy, what gaps exist in current legal protection, and how the law can better protect privacy in the future. This is important to help address the many challenges that privacy protection faces in light of current and emerging socio-technological developments.

This Article proceeds as follows: in Section 2, we discuss and distinguish the related concepts of privacy (broadly speaking, as a fundamental or philosophical concept) and the legal right to privacy. In Section 3, we explain what typologies and taxonomies are, and provide an overview of the most influential typological classifications of privacy in privacy scholarship. In Section 4, we present a comparative analysis of privacy-related provisions from the constitutions of nine primary countries and the European Convention

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<sup>16</sup> Canada, Czech Republic, Germany, Italy, the Netherlands, Poland, Slovenia, the United Kingdom, and the United States. The choice of these countries is explained *infra* Section 4.1.

<sup>17</sup> Note that *privacy* and the *right to privacy* are distinct concepts. We develop a typology of privacy by means of studying types of the right to privacy, on the assumption that the right to privacy aims to protect privacy and that therefore the overall set of rights to privacy should ideally cover all types of privacy. The typology of the right to privacy (*infra* Section 4.8) can be developed into a typology of privacy (*infra* Section 6) using insights from privacy theory (*infra* Section 5).



on Human Rights. To ensure comprehensiveness of this overview of constitutional protection, we also refer, where relevant, to constitutional provisions from a larger set of countries that we used as a backup group. Within the comparative constitutional analysis, we group privacy-related provisions into five broad clusters (based on similarities) and develop a typology of the objects that the constitutional rights to privacy protect. In Section 5, we identify the major doctrinal and theoretical dimensions of privacy within scholarly literature from the nine primary countries. In Section 6, we integrate all findings into an original typology of privacy—identifying eight basic privacy types, each with overarching connections to informational privacy. In Section 7, we discuss the value of our typology for future privacy scholarship, and note some limitations of our approach.

## 2. CONCEPTUALIZING PRIVACY AND THE RIGHT TO PRIVACY

Privacy theory, in both law and the social sciences, is widespread and highly varied. Scholars argue over how we should define privacy, what interests it does or should protect, what constitutes an intrusion of privacy, and whether privacy has inherent or merely instrumental value.<sup>18</sup> The umbrella term *privacy* itself encompasses both the concept of what privacy *is* and how it should be *valued* as well as a (generally) narrower *right to privacy* outlining

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<sup>18</sup> See Judith Wagner DeCew, *The Feminist Critique of Privacy: Past Arguments and New Social Understandings*, in SOCIAL DIMENSIONS OF PRIVACY: INTERDISCIPLINARY PERSPECTIVES 85, 87–88 (Beate Roessler & Dorota Mokrosinska eds., 2015) (arguing that while retaining the concept of privacy, social considerations of context may be understood “in a way that justifies appropriate invasions of privacy to enhance the public and collective value of privacy and social well-being”); James B. Rule, *Privacy: The Longue Durée*, in SOCIAL DIMENSIONS OF PRIVACY: INTERDISCIPLINARY PERSPECTIVES 11, 11 (Beate Roessler & Dorota Mokrosinska eds., 2015) (noting the dispute between privacy scholars); Daniel J. Solove, *The Meaning and Value of Privacy*, in SOCIAL DIMENSIONS OF PRIVACY: INTERDISCIPLINARY PERSPECTIVES 71, 73–74 (Beate Roessler & Dorota Mokrosinska eds., 2015) (arguing that privacy should be understood as a plurality of many distinct yet related things); SOLOVE, *supra* note 4, at 1–2 (introducing the concept of privacy as a multifaceted concept with several dimensions); Willam M. Beaney, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROBS. 253, 255 (1966) (attempting to construct a conception of privacy from different threads of legal thought); Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2087 (2001) (arguing about the concept of privacy); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1153–60 (2004) (describing the differences between European and American conceptions of privacy).

the extent to which privacy is or ought to be legally protected.<sup>19</sup> Prominent scholars have explored these questions through various philosophical lenses, injecting a range of libertarian/individualistic and communitarian approaches to liberal, republican, and feminist theory (to name just a few) into the literature. As stated succinctly by Cohen, “[p]rivacy has an image problem.”<sup>20</sup>

Various scholars have developed essentialist or unitary theories of privacy that seek to identify a meaningful conceptual core—that is, “a common set of necessary and sufficient elements that single out privacy as unique from other conceptions.”<sup>21</sup> Others have adopted reductionist approaches that define privacy as instrumental to realizing a more basic human value, such as liberty, autonomy, property, or bodily integrity.<sup>22</sup> Still others have altogether resisted the idea that privacy can be defined through a conceptual core or reduced to some other overarching value(s),<sup>23</sup> instead focusing on developing pluralistic accounts of privacy interests or forms of intrusion to identify “cluster[s] of problems” that share family resemblances.<sup>24</sup> Some approach privacy theory primarily “from a philosophical, ethical, or moral point of view,” while others develop theories of privacy designed to impact law and legal protections.<sup>25</sup> On a more practical level, policymakers and profes-

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<sup>19</sup> See DANIEL J. SOLOVE & PAUL M. SCHWARTZ, *INFORMATION PRIVACY LAW* 39 (3d ed. 2009) (“While instructive and illuminative, law cannot be the exclusive material for constructing a concept of privacy.”); Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 36 (1967) (“The law does not determine what privacy is, but only what situations of privacy will be afforded legal protection, or will be made private by virtue of legal protection.”).

<sup>20</sup> Cohen, *supra* note 3, at 1904.

<sup>21</sup> SOLOVE, *supra* note 4, at 14.

<sup>22</sup> See, e.g., Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295, 312-13 (1975) (arguing that every right in the right to privacy cluster is also in some other right cluster); see also MOORE, *supra* note 2, at 14-16 (discussing the reductionist account of privacy).

<sup>23</sup> See Cohen, *supra* note 3, at 1907-08 (“Definitions of privacy grounded in core principles, however, inevitably prove both over- and underinclusive when measured against the types of privacy expectations that real people have”) (citation omitted).

<sup>24</sup> SOLOVE, *supra* note 4, at 40.

<sup>25</sup> See ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967); Charles Fried, *Privacy*, 77 YALE L.J. 475, 477 (1968) (arguing “privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust.”); Bert-Jaap Koops & Ronald Leenes, ‘Code’ and the Slow Erosion of Privacy, 12 MICH. TELECOMM. TECH. L. REV. 115, 123 (2005) (noting that many accounts of privacy try to define privacy from a philosophical, ethical, or moral point of view) (citation

sional organizations have also developed (sometimes influential) privacy principles or best-practice guidelines that, at least since the 1960s, have focused largely on informational privacy and data protection issues.<sup>26</sup>

A specific kind of theoretical conceptualization of privacy can be seen in the attempt to map privacy as a legal notion – the *right to privacy*. Privacy as a legal concept has often been pictured (and has surfaced historically<sup>27</sup>) as associated with what is “private” in the sense of personal freedom (and/or as an element of property law in common-law jurisdictions). The “private” was seen as connected to individuals, and to claim respect for someone’s “private life” was to affirm their right to live as they choose, as opposed to being controlled, alienated, or estranged from society or from themselves.<sup>28</sup> Thus, the right to privacy has strong connections to notions stemming from non-legal conceptualizations of privacy, such as liberty, personal freedom, individuality, autonomy, personality, and human dignity.<sup>29</sup> Furthermore, it constitutes a right protected by different areas of law with distinct legal effects and instruments – for example, private or tort law, criminal law, constitutional law, and international or supranational law. A broad legal notion of privacy is, therefore, just as multifaceted as the philosophical conceptualization of privacy.

The expression “the right to privacy” emerged in 1890 with the influential article by Warren and Brandeis.<sup>30</sup> The recognition of a right to privacy as a unitary right, at least in comparative constitutional law, is a late phenomenon.<sup>31</sup> It was preceded by specific

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omitted); James Rachels, *Why Privacy is Important*, 4 PHIL. & PUB. AFF. 323 (1975) (investigating why we find privacy important by conceptualizing it as a freedom against certain kinds of intrusions).

<sup>26</sup> Wright & Raab, *supra* note 5, at 277-78.

<sup>27</sup> GLORIA GONZÁLEZ FUSTER, THE EMERGENCE OF PERSONAL DATA PROTECTION AS A FUNDAMENTAL RIGHT OF THE EU 24 (2014).

<sup>28</sup> *Id.* at 22.

<sup>29</sup> See Annabelle Lever, *Privacy Rights and Democracy: A Contradiction in Terms?*, 5 CONTEMP. POL. THEORY 142, 142 (2006) (describing a democratic and political interest in privacy); Andrew Roberts, *A Republican Account of the Value of Privacy*, 14 EUR. J. POL. THEORY 320, 320 (2015) (distinguishing republican accounts of privacy from liberal accounts).

<sup>30</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196, 214 (1890).

<sup>31</sup> See Carlos Ruiz Miguel, *La configuración constitucional del derecho a la intimidad* (June 15, 1992) (unpublished Ph.D. dissertation, Universidad Complutense de Madrid) available at <http://eprints.ucm.es/2164/1/S0002101.pdf> [<https://perma.cc/5YR4-2679>]; see also FUSTER, *supra* note 27 at 23.

provisions on the inviolability (“sanctity”) of the home and the confidentiality of correspondence. A “general” right to privacy as an umbrella right<sup>32</sup> emerged only later, sometimes subsuming previous specific provisions, sometimes supplementing these. Particularly in the European context, international law supplied fundamental points of reference for discussions on the right to privacy. The 1948 Universal Declaration of Human Rights (“UDHR”) established a general right to privacy, stating that “[n]o one shall be subjected to arbitrary interference with his privacy,<sup>33</sup> family, home or correspondence, nor to attacks upon his honour and reputation.”<sup>34</sup> However, the most important binding international instrument in this field, the 1950 European Convention on Human Rights (“ECHR”), built upon and yet deviated from the UDHR. Article 8 of the ECHR uses the notion of “respect for private and family life” rather than privacy, and does not mention “honor” or “reputation,” supposedly considering the terms too vague.<sup>35</sup> After many ratifications and decades of case law, the European Court of Human Rights (ECtHR) developed powerful influence on securing a very wide and legally binding understanding of the notion of “respect for private life” – or, simply, the right to privacy – in Europe.

### 3. TYPOLOGIES AND TAXONOMIES

The terms “typology” and “taxonomy” vary in precision across fields, and some commentators use the terms interchangeably. Both are widely acknowledged as being essentially methods of classification. Nevertheless, there is a meaningful difference as to what typologies and taxonomies classify. Typologies are typically set apart from other classification methods in that they are multi-dimensional and conceptual.<sup>36</sup> In contrast, taxonomies deal with

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<sup>32</sup> See Solove, *supra* note 6, at 485 (characterizing privacy as an umbrella term).

<sup>33</sup> In French *vie privée* (private life) is an expression used already in the *Loi relative à la presse* (law of the press) of 11 May 1868.

<sup>34</sup> G.A. Res. 217 (III) A art.12, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>35</sup> FUSTER, *supra* note 27, at 38.

<sup>36</sup> KENNETH D. BAILEY, *TYPLOGIES AND TAXONOMIES: AN INTRODUCTION TO CLASSIFICATION TECHNIQUES* 4–5 (1994), available at <https://www.researchgate.net/file.PostFileLoader.html?id=54c946c7cf57d7772d8b46cf&assetKey=AS%3A273684877512704%401442262968252> [<https://perma.cc/DLX3-M35J>].

classifying empirical entities.<sup>37</sup> In this sense, typologies approach the realm of the abstract and the theoretical, whereas taxonomies deal with constructive, concrete, and often empirical entities. This is not to say that typologies are completely divorced from the empirical. Typologies typically work with and through Weber's "ideal type" which is "formed by the one-sided *accentuation* of one or more points of view[.]"<sup>38</sup> Comprehending the theoretical role of typologies requires an understanding of *ideal types* and Weber's term "accentuation." These can be explained through the analogy of the magnifying glass,<sup>39</sup> which magnifies the features of ideal types to the extreme. In that sense, ideal types are not purely hypothetical or imaginary constructs, as they can exist, but are extreme examples that demonstrate certain characteristics very clearly. These ideal types are fixed firmly in typological space; that is to say, not arbitrarily moveable by the researcher. Rather than being hypothetical, ideal types constitute the criterion against which empirically observed cases can be compared. Bailey thus notes that such types should: a) possess all of the relevant features or dimensions of the type, and b) exhibit extreme clarity on all features.<sup>40</sup>

Furthermore, when sufficiently developed and clear enough, a typology can become a theory in its own right—constituting a unique form of theory building, rather than a mere classification scheme.<sup>41</sup> This requires, however, a more restrictive definition of what constitutes a typology, connecting it with criteria that it must fulfill in order to qualify as a theory. Specifically: "(a) constructs must be identified, (b) relationships among these constructs must be specified, and (c) these relationships must be falsifiable."<sup>42</sup>

### 3.1. Existing Classifications

In this section, we discuss several key attempts to classify pri-

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<sup>37</sup> *Id.* at 6.

<sup>38</sup> MAX WEBER, *METHODOLOGY OF SOCIAL SCIENCES* 90 (Edward A. Shils & Henry A. Finch eds., trans., 1949) (alteration in original).

<sup>39</sup> BAILEY, *supra* note 36, at 19-21.

<sup>40</sup> *Id.* at 19.

<sup>41</sup> See D. Harold Doty & William H. Glick, *Typologies as a Unique Form of Theory Building: Toward Improved Understanding and Modeling*, 19 *ACAD. MGMT. REV.* 230, 231 (1994) (explaining how typologies can become their own theories).

<sup>42</sup> *Id.* at 233 (citations omitted).

vacy that have been influential in the literature.<sup>43</sup> We have selected these based on the authors' claim to distinguish between different types of privacy—regardless of whether the authors explicitly referred to this as a typology or taxonomy. We do not discuss all existing classificatory attempts, but offer a chronological overview of the relevant scholarly work most recognized in privacy research.

### 3.1.1. Alan Westin's Four Privacy States

In the 1960s, Alan Westin drew from William Prosser's now famous classification of civil privacy violations ("torts" in common-law language) recognized by U.S. courts<sup>44</sup> and developed a broad theory of privacy, including a description of four states of privacy that are relevant for our present analysis. Westin defines four basic states of privacy, focusing on the individual and individual experience in daily life. These states are, in increasing level of the individual's involvement with the public sphere: solitude, intimacy, anonymity and reserve.<sup>45</sup>

**Solitude** exists when an individual is separated from others—regardless of other physical, sensory stimuli, or "psychological intrusions" such as the belief that he is watched by a God or some supernatural force, or even a secret authority. Solitude also subjects a person to "the inner dialogue with mind and conscience"—another definitive marker of solitude. According to Westin, solitude is the most complete state of privacy an individual can achieve.

**Intimacy** refers to a state where the individual is acting as part of a small unit, allowed seclusion to achieve a close, relaxed, and frank relationship between one or more additional individuals. Westin's definition of intimacy is broader than the everyday meaning of the word, referring not only to the intimate relations be-

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<sup>43</sup> Note that we only consider classifications of *privacy*; taxonomies of *privacy harms*, such as Solove's, are left aside as a different issue. See *supra* note 6 and accompanying text.

<sup>44</sup> See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960) (identifying and proposing four categories: "1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs. 2. Public disclosure of embarrassing private facts about the plaintiff. 3. Publicity which places the plaintiff in a false light in the public eye. 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness").

<sup>45</sup> WESTIN, *supra* note 25 at 31.

tween lovers or spouses, but also to family, friends, and work colleagues. Westin emphasizes that the result of close contact, be it relaxed or hostile, is not definitive of the state—instead, the state of intimacy is the prerequisite for that close contact, whatever its results may be.

**Anonymity** is a state where the individual is in public places but still seeks and finds freedom from identification and surveillance. Anonymity branches out into two sub-categories, or “sub-states.” The first occurs when an individual is in public spaces with the knowledge that others may observe him or her. However, the person does not necessarily expect to be personally identifiable and thus held to the full rules of expected social behavior by those observing. The second kind state can be found in anonymous publication: communicating an idea without being readily identifiable as the author—especially by state authorities. Westin notes that both states of anonymity are characterized by the desire of the individual for “public privacy.”

**Reserve**, the final state of privacy, involves what Westin calls the creation of a psychological barrier against unwanted intrusions—when the need to limit communication about oneself is protected by the willing discretion of those surrounding him or her. This is based on the need to hold some aspects of ourselves back from others, either as too personal and sacred or as too shameful and profane to express. Reserve, according to Westin, expresses the individual’s choice to withhold or disclose information—a “dynamic aspect of privacy in daily interpersonal relations.”

Westin’s categorization of privacy differs from Prosser’s (and Warren and Brandeis’s) purely harm-based, legal interpretation to a turn to privacy *types*. Westin links privacy directly to the needs of individuals, and his classification captures key elements of what privacy is by relating it to specific values that can help to explain privacy and to examples of situations in which privacy is threatened.

### 3.1.2. Roger Clarke’s Classification

In 1992, Clarke developed an “updated” system of thinking about privacy that, he argued, could withstand new technological development in society—specifically, the computer and the first

sketches of a commercial Internet.<sup>46</sup> Clarke does not explicitly call his classification a taxonomy or typology, but develops conceptual categories that he refers to as dimensions of privacy. He argues that privacy has different connotations depending on the scholarship taken as a starting point, also pointing out the difference between harm-based legal approaches and more conceptual approaches to privacy. Clarke bases his categorization of privacy on Maslow's pyramid of values. Taking the core values of this categorization of life-needs—Self-Actualization, Status (or Self-Esteem), Love or Belonging, Safety, and Physiological or Biological Needs<sup>47</sup>—Clarke transforms them into privacy needs, leading to a system of “privacy-values” based around the individual. Clarke argues that, “interpreted most broadly, privacy is about the integrity of the individual. It therefore encompasses all aspects of the individual's social needs.”<sup>48</sup> Clarke's categories are the following.

**Privacy of the Person.** Also referred to as bodily privacy. This means the physical body and its physical privacy, linked to the physiological and safety-related needs from Maslow's pyramid. Examples include physical and unsolicited harms to the body: “compulsory immunization, blood transfusion without consent, compulsory provision of samples of body fluids and body tissue, and compulsory sterilization.”<sup>49</sup>

**Privacy of Personal Behavior.** Clarke is not entirely clear here in explaining what he means by personal behavior. He links it to the belonging and self-esteem needs of Maslow's hierarchy, and perhaps to self-actualization. Also, links are made to media privacy and defamation. However, Clarke also refers here to a type or set of personal actions and behaviors that should remain private, requiring protection from infringement. These actions and behaviors are part of something called a *private space*, including “the home and toilet cubicle.” This sort of private space is also relevant in public places, as Clarke argues that “casual observation by the few people in the vicinity is very different from systematic obser-

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<sup>46</sup> See generally Clarke, *supra* note 4 (providing definitions for concepts related to privacy as a whole).

<sup>47</sup> See Abraham Harold Maslow, *A Theory of Human Motivation*, 50 *Psych. Rev.* 370 (1943) (explaining the pyramid in Maslow's theory on the hierarchy of needs).

<sup>48</sup> Roger Clarke, *What's 'Privacy'?*, ROGER CLARKE'S WEB-SITE (July 27, 2006), <http://www.rogerclarke.com/DV/Privacy.html> [https://perma.cc/WU96-Q8FS].

<sup>49</sup> *Id.*



vation and the recording of images and sounds.”<sup>50</sup>

**Privacy of Personal Communications.** This is the freedom to communicate without interception and/or routine monitoring of one’s communication by others. Clarke sees this as linked to the values of “Belonging and Self-Esteem . . . and perhaps to Self-Actualisation as well.”<sup>51</sup> This type of privacy can be violated by, for example, eavesdropping on or intercepting messages or conversations of others, whether mediated or not.

**Privacy of Personal Data.** The last category made by Clarke in his early work resonates with the concept of informational privacy. However, Clarke sees informational privacy as closely linked to personal communication, whereas the privacy of personal data is more concerned with the protection of the data, or content, itself. Linked to record-keeping and Western forms of bureaucracy, this privacy type resonates with current notions of data protection (and data abuse), in which the collection, storage, and processing of personal data are at issue. It relates to the highest layers of the pyramid, being self-actualization and status or self-esteem.

In 2013, Clarke added a fifth category, **Privacy of Personal Experience**, after realizing that Web 2.0 and mobile media had had a severe and unforeseen impact in society, and thus also on privacy.<sup>52</sup> Many of our experiences in contemporary society are mediated through screens, which produce media that shape our experiences; yet these media do not belong to us, but rather to corporations. Moreover, these screen-mediated interactions influence our experience from a distance. Without explaining clearly how this category is different from (combinations of) his previous categories, Clarke makes the point that our *experiences* are now a place of privacy infringements as well.<sup>53</sup> The privacy of personal experience may also serve as a proxy for the privacy of personal thought, which is indirectly under assault through the monitoring of what individuals read and view.<sup>54</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Clarke, *supra* note 4.

<sup>53</sup> *Id.*

<sup>54</sup> Roger Clarke, *A Framework for Analysing Technology’s Negative and Positive Impacts on Freedom and Privacy*, 40 DATENSCHUTZ UND DATENSICHERHEIT 79, Appendix 3 (2016), available at <http://www.rogerclarke.com/DV/Biel15-DuDA.html#App3> [<https://perma.cc/9X79-PK75>] (explaining the threat to individual privacy posed by the collection of data on what individuals read and view).

Clarke critically examines his own classification, as well as the efficacy of attempts to make list-based taxonomies or typologies of privacy.<sup>55</sup> According to Clarke, the saturation of networked digital technologies suggests that privacy should also be explained in terms of networks, webs, or other forms of non-static lists, to make sense of what is happening in society. Additionally, the translation of Maslow's system of values to a system of privacy levels or types proves difficult, with categories potentially overlapping to such an extent that using the pyramid as a basis for a privacy taxonomy is not entirely productive.

### 3.1.3. Anita Allen's "Unpopular Privacy"

Combining legal scholarship with a perspective rooted in feminist studies, Allen takes a different approach by basing privacy classification in moral and social values. Allen argues that governments should impose certain "unpopular" privacy laws and duties to protect the common good—even if this means forcing privacy on individuals who might not want it—while also not allowing individuals to opt-out or waive their privacy rights.<sup>56</sup> She identifies several categories of privacy,<sup>57</sup> without systematically structuring these beyond identifying and describing them briefly. She readily notes that some are "hybrid forms" that overlap with each other, or represent the overlap of two other categories.

**Physical or spatial privacy** refers to the privacy expectations in and around one's home, for example. A privacy intrusion here is, for example, the peeping tom invading the privacy of two people's intimate life by looking through the bedroom window and taking photographs.

**Informational privacy** is a broader concept, encompassing information/data/facts about persons or their communications. An example of a *hybrid category* would be "locational" privacy—the privacy of information about someone's physical (geographic) location. Allen also identifies decisional, proprietary, and associational privacy as alternative categories, and mentions Neil Rich-

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<sup>55</sup> Clarke, *supra* note 4.

<sup>56</sup> See generally ANITA L. ALLEN, UNPOPULAR PRIVACY: WHAT MUST WE HIDE? 6-11, 25-26 (New York: Oxford University Press, 2011).

<sup>57</sup> *Id.* at 4.

ards's concept of "intellectual privacy"<sup>58</sup>—adding that, in her conception, this is a complex hybrid between associational and informational privacy.<sup>59</sup>

**Decisional privacy**, in Allen's reading, is largely a protection against state intrusions against citizens' right to make certain intimate choices regarding their lives and the way they choose to live, including choices about same-sex marriage or assisted suicide.<sup>60</sup>

**Proprietary privacy** pertains to reputation. It is similar to "the right to one's honor" found in certain constitutions discussed below.<sup>61</sup> To explain this category, Allen uses an example of a publisher using a large family's portrait without permission, to illustrate an amusing story about experiments with caffeine to enhance sperm motility—thereby breaching (expectations of) reputational or "proprietary" privacy.<sup>62</sup>

**Associational privacy** is somewhat more complex, as it pertains to groups and their internal relationships of association—arguably including their values and criteria for inclusion and exclusion. In Allen's view, this not only includes a member's right to have his or her association and membership in groups remain private, but also (arguably) the group's right to determine whom to include or exclude, and what grounds they may use for doing so.

The added value of Allen's approach can be found in the attempt to map and delineate different types of privacy while also admitting, or allowing, for overlap and hybrid forms. However, this division contains no definitions of the delineations of the ideal types (e.g. what they are, what they encompass, and what they do not). Second, Allen mixes units of analysis due to these overlaps and she does not always clearly differentiate between the concept of privacy and the right to privacy when describing her categories.

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<sup>58</sup> See generally Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387 (2008) (introducing the concept of "intellectual privacy" and exploring privacy and the First Amendment as protectors of the integrity of our intellectual activities).

<sup>59</sup> Intellectual privacy is a hybrid of associational and informational privacy: it encompasses what people read, think, plan, and discuss with their personal or business associates.

<sup>60</sup> ALLEN, *supra* note 56, at 4.

<sup>61</sup> See *Infra* § III(E)(4) (comparing and contrasting privacy provisions in various constitutions).

<sup>62</sup> ALLEN, *supra* note 56, at 4.

### 3.1.4. *Finn, Wright, and Friedewald's Types of Privacy*

Finn, Wright, and Friedewald present a typology,<sup>63</sup> developed against the backdrop of EU legislation, designed to address modern technology-related threats to privacy in the twenty-first century. Working from an EU data protection perspective, they address data subjects as the unit of analysis. In making their typology, they primarily build on Clarke's and Solove's work. Attempting to anticipate developments in bio-informatics and privacy breaches facilitated by other emerging technologies such as drones, they divide privacy into the following seven types.

**Privacy of the person.** By this, the authors mean a right to "keep body functions and body characteristics (such as genetic codes and biometrics) private."<sup>64</sup> The mentioning of biometrics and genetic code anticipate, for instance, iris scanning at a distance and the potential growth of bio-informatics.

**Privacy of behavior and action.** As described by Clarke, this type entails activities that happen in both public and private places, and encompasses sensitive issues such as religion, politics, or sexual preferences.

**Privacy of communication.** An actor violates this type of privacy by, for example, intercepting personal communications (such as opening or reading mail or using bugs), eavesdropping, or accessing stored communications without consent.

**Privacy of data and image.** Here the authors express concerns about automated forms of data and image sharing, and the ease at which third parties may access data without the data subject's knowing. They express the sentiment that people should be able to "exercise a substantial degree of control over that data and its use."<sup>65</sup>

**Privacy of thoughts and feelings.** According to Finn et al., Warren and Brandeis's claim that privacy is as much about harm done to feelings as it is to physical intrusions, leads to a need to protect the privacy of thoughts and feelings. Near-future technologies, such as brain-computer interfaces, may make it possible to access others' thoughts and feelings. This makes the domain of

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<sup>63</sup> See generally Finn, Wright & Friedewald, *supra* note 4 (arguing that taxonomy of privacy should include seven different types of privacy).

<sup>64</sup> *Id.* at 8.

<sup>65</sup> *Id.* at 5.

thoughts and feelings a new area of privacy-concern, “because individuals should be able to think whatever they like.”<sup>66</sup>

**Privacy of location and space.** In public and semi-public space, individuals should be able to move around freely and anonymously. Smart CCTV, Wi-Fi tracking, and face-recognition software, to name a few examples, make this increasingly difficult. The authors note that “this conception of privacy also includes a right to solitude and a right to privacy in spaces such as the home, the car or the office.”<sup>67</sup>

**Privacy of association.** In the sense that individuals should be able to freely connect and associate with whomever, or with whichever group, they choose without being monitored, the authors note that “this has long been recognised as desirable (necessary) for a democratic society as it fosters freedom of speech, including political speech, freedom of worship and other forms of association.”<sup>68</sup> Yet, new forms of digital vigilantism and the recording of “problematic” groups in public space place this right under pressure.

This typology extends Clarke’s classification by adding privacy of thoughts and feeling and of association. The overall result, however, remains somewhat confusing. Sometimes the authors talk about privacy harms in the sense of “that which needs to be protected” while on other occasions they talk about a privacy right and sometimes about potential impacts of new technologies on a privacy type. This renders the typology varying in what it addresses, and it can be confusing to discern if each privacy type mentioned is actually linked to a privacy right or to a privacy threat, or an aspect of privacy that needs attention or regulation. Additionally, there is no real system of coherence within the types. This typology, built around recent and relevant examples, seems to incorporate many previous attempts at classification. Yet, as the attempts that precede it, it feels more like a list than a typology, lacking a unifying underlying logic or structure.

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<sup>66</sup> *Id.* at 9.

<sup>67</sup> *Id.* at 5.

<sup>68</sup> *Id.* at 6.

### 3.2. *Conclusions*

We conclude that a first common limitation in current typological attempts is that it is not always clear whether the classification is a typology, a taxonomy, or simply an enumerative list. Second, there is quite often a lack of distinction between privacy as such on the one hand, and the right to privacy on the other. Perhaps the most pertinent problem, however, is that the types are often not clearly defined as “ideal types,” nor positioned along dimensions in a typological system.

Due to the confusion and overlap of the right to privacy, often linked to a harms-based approach, on the one hand, with conceptual definitions of privacy, involving a discussion of what privacy ought to be about, on the other, it is difficult to project these classifications onto current socio-technical and legal challenges surrounding privacy in the 21<sup>st</sup> century. Nonetheless, the discussed attempts all describe valuable elements which we think merit inclusion as parts of a systematic classification of privacy.

In attempting to develop our own, more systematic, typology, which builds on the classes and distinctions described above, we turn to national constitutions, assuming that constitutional law will provide a useful frame to understand what aspects of privacy are seen as especially important and relevant in Western democratic societies. By looking at the constitutions of various countries, we hope to find key common concepts and dimensions of privacy, as well as important differences between cultures. By analyzing the constitutional protections for privacy, we attempt to connect the types distinguished in the above-described classifications with a firmer legal and methodological grounding.

## 4. CONSTITUTIONAL TYPES OF PRIVACY

### 4.1. *Methodology and Country Selection*

In this section, we attempt to identify types of privacy through analyzing the way in which privacy is protected at the constitutional level in various countries. This analysis provides a comparative overview of the types of objects that the right to privacy pro-

sects. Constitutional provisions provide a particularly interesting lens to study types of privacy, since most constitutions often include a compact indication of the main, protection-worthy aspects of privacy, in the form of an enumeration or a list of diverse privacy rights. As the right to privacy has developed over the past 120 years or so, one may assume that the most important types of privacy have condensed into constitutional protection in one form or another, and looking at a sufficiently large set of constitutions is likely to yield a relatively comprehensive overview of types of privacy rights, and thus also of types of privacy that the right to privacy aims to protect. This is not the only methodology that could be employed for these ends, but it does provide a systematic process by which to better understand how privacy is conceptualized and protected from a comparative perspective—something that is largely lacking in prior attempts to classify privacy.

We have analyzed the constitutional protection of privacy in nine primary countries. We have chosen countries that are central to a large-scale project we are conducting on protecting privacy in the 21<sup>st</sup> century, which aims at reinventing legal protection of citizens against private-life intrusions in the age of ubiquitous data.<sup>69</sup> The project involves comparative legal research of privacy protection in substantive criminal law, criminal procedure, and constitutional law. The selection of countries for the comparative analysis is based on two criteria. First, given the purpose of addressing a particular societal challenge (robust private protection in the face of manifold technological changes), countries should be chosen that are facing the same problem;<sup>70</sup> we therefore selected countries featured in the top 50 of the ITU ICT Development Index,<sup>71</sup> where legal discussions and case law associated with privacy and socio-technical change are most likely to emerge. Second, a practical constraint was the good availability of sources (language; signifi-

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<sup>69</sup> See generally VICI project 'Privacy in the 21<sup>st</sup> century', 2014-2019, <http://www.privacyspaces.org/news/privacy-spaces-website/> [<https://perma.cc/Z536-W9EC>] (funding for project by Netherlands Organisation for Scientific Research (NWO)).

<sup>70</sup> See Gerhard Danneman, *Comparative Law: Study of Similarities or Differences?*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 384, 403 (Mathias Reimann & Reinhard Zimmermann eds., Oxford/New York: Oxford University Press, 2006) (stating that similarity of problems should be a key consideration in selecting jurisdictions for comparison).

<sup>71</sup> MEASURING THE INFORMATION SOCIETY REPORT 2014, 42 (Geneva: International Telecommunication Union, 2014).

cant body of academic literature) and of expert contacts in our network, since studying foreign law requires a “local guide.”<sup>72</sup> Among the countries facing the same challenges, we looked for differences to find new and inspiring solutions without losing sight of similarities because solutions are most useful if the context is otherwise largely comparable.<sup>73</sup> We chose three common-law systems: the United States and the United Kingdom as leading countries and Canada as a large jurisdiction bridging American and European perspectives. For civil-law systems, we chose three Continental European systems that have generally similar constitutional frameworks: the Netherlands as the project’s home country, Germany as a major jurisdiction with a strong constitutional and doctrinal tradition in privacy, and Italy as a third major continental jurisdiction that is close to the German model in terms of legal doctrine.<sup>74</sup> In addition, to enhance the possibility of finding inspiring different approaches, we included three countries with a different legal history and context: Czech Republic, Poland, and Slovenia (as countries that are close to the main Continental European traditions, in particular the German legal tradition, and have undergone a recent transition from states with distinct state surveillance practices and limited guarantees of human rights to states embracing the European human-rights standards and enshrining a more robust body of human-rights guarantees in their constitutional orders). Together, this country selection provides an adequate mix of similarities and differences that can offer interesting insights into how various constitutional traditions have shaped privacy.

We have analyzed the constitutions of the selected countries (and, since seven of these are part of the European Union and the Council of Europe, also the ECHR and the EU Charter of Fundamental Rights), and identified privacy-related provisions in these constitutions.<sup>75</sup> The identification was based not only on the for-

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<sup>72</sup> Thomas Weigend, *Criminal Law and Criminal Procedure*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 214, 219 (Jan M. Smits ed., 2006).

<sup>73</sup> See Danneman, *supra* note 70, at 389–98, 403–04, 408 (discussing the importance of comparing jurisdictions which share both similarities and differences).

<sup>74</sup> Two reasons for choosing Italy rather than France is that Italy has a more pronounced constitutional development of the right to privacy, and that the criminal procedure system (which is a major factor in privacy protection) of Italy is closer to the German system than France’s system is. See generally Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 233 (2000) (discussing recent changes in Italian criminal procedure).

<sup>75</sup> CONSTITUTION ACTS 1867 to 1982 (Can.), available at <http://laws-lois.justice.gc.ca/eng/Const/page-15.html> [<https://perma.cc/7VB7-2W3E>] [here-



mulation of the provisions (e.g., containing words similar to “privacy”), but also on case-law analysis and doctrinal analysis of what are considered privacy-related protections in the separate countries. This led to excluding provisions that seemed to fit a traditional type of privacy but that are not considered to be privacy-related in the country itself, and to including provisions that are not privacy-related at face value but that case-law or doctrine considers to contain elements of privacy protection.

We then clustered the identified provisions, starting from the clustering that emerged from our analysis of existing typologies and, depending on the used terms and the relation between terms, organically redefining the clusters and sub-clusters as we went along. The clustering used the assumption that elements that are closer together in constitutional provisions are more closely con-

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inafter CA]; THE CONSTITUTION OF THE CZECH REPUBLIC Dec. 16, 1992, *available at* <http://www.hrad.cz/en/czech-republic/constitution-of-the-cr.shtml> [https://perma.cc/X2SW-N3DN]; CHARTER OF FUNDAMENTAL RIGHTS AND BASIC FREEDOMS [CONSTITUTION] Dec. 16, 1992, *available at* <http://www.hrad.cz/en/czech-republic/constitution-of-the-cr.shtml> [https://perma.cc/2NHX-4ADJ] (The constitution and the charter of fundamental rights make up the constitutional framework in the Czech Republic. The charter has the same legal power and stance as the constitution. For simplicity reasons, reference to the Czech constitution below is to the entire constitutional framework.) [both documents referenced hereinafter CZ]; BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY [CONSTITUTION] Sept. 23, 1990, *available at* <http://www.verfassungen.de/de/gg.htm> [https://perma.cc/XM63-9YWE] [hereinafter DE]; CONSTITUTION OF THE ITALIAN REPUBLIC 2007, *available at* [http://en.camera.it/application/xmanager/projects/camera\\_eng/file/THE\\_CONSTITUTION\\_OF\\_THE\\_ITALIAN\\_REPUBLIC.pdf](http://en.camera.it/application/xmanager/projects/camera_eng/file/THE_CONSTITUTION_OF_THE_ITALIAN_REPUBLIC.pdf) [https://perma.cc/A3MV-48GB] [hereinafter IT]; THE CONSTITUTION OF THE KINGDOM OF THE NETHERLANDS Oct. 20, 2008, *available at* <https://www.rijksoverheid.nl/documenten/brochures/2008/10/20/the-constitution-of-the-kingdom-of-the-netherlands-2008> [https://perma.cc/5DRW-WN3V] [hereinafter NL]; CONSTITUTION OF THE REPUBLIC OF POLAND OF 1997 Oct. 21, 2006, *available at* <http://www.legislationline.org/documents/action/popup/id/16683/preview> [https://perma.cc/5YWX-SU93] [hereinafter PL]; THE CONSTITUTION OF THE REPUBLIC OF SLOVENIA May 26, 2007, *available at* [http://www.servat.unibe.ch/icl/si00000\\_.html](http://www.servat.unibe.ch/icl/si00000_.html) [https://perma.cc/S4RS-K72P] [hereinafter SI]; HUMAN RIGHTS ACT OF 1998 [CONSTITUTION] Nov. 9, 1998 (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/1998/42/contents> [https://perma.cc/L473-TTSV] [hereinafter UK]; CONSTITUTION OF THE UNITED STATES OF AMERICA May 18, 1992, *available at* <https://www.law.cornell.edu/constitution/overview> [https://perma.cc/7429-MQVQ] [hereinafter US]; CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS [ECHR CONVENTION] June 1, 2012, *available at* [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) [https://perma.cc/B4B2-USLJ] [hereinafter ECHR]; Charter of Fundamental Rights of the European Union [EU Charter] Dec. 18, 2000, *available at* [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf) [https://perma.cc/N3N4-WWTY] [hereinafter EU Charter of Fundamental Rights].

nected, and thus more likely to form one type of the right to privacy, than elements that are further apart. For example, elements enumerated in one sentence are likely to be more closely connected than elements spread across paragraphs of a provision or across separate provisions.<sup>76</sup>

This resulted in a clustering of privacy types and sub-types. Given that we based this clustering on a relatively small set of countries, and hence the clustering might contain outliers (elements that do not feature in most other constitutions) or be incomplete, we subsequently checked a sample of around 27 other jurisdictions from all continents (except Antarctica) as a backup group.<sup>77</sup> We consulted the English translations of the constitutions of these countries available from the Constitution Finder<sup>78</sup> and Comparative Constitutions Project,<sup>79</sup> to see to what extent our initial results were representative of constitutional protection of privacy more broadly. In this wider sample, we did not find major differences: the types and sub-types found in our nine countries were also seen in various other jurisdictions, and we did not find substantially different (sub)types (with one possible exception<sup>80</sup>). We did, however, encounter interesting details and nuances that put the (sub)types in our clustering into a more refined perspective. Since this additional check was based on a superficial reading, using English translations and not consulting doctrinal literature, we have not based our ultimate conclusions on the other countries' constitutional framings of privacy, relying instead on the constitutions of the nine core countries. However, we will mention some details from the other constitutions below where they are interest-

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<sup>76</sup> Of course, this depends on the legislative technique used and the density of privacy-related elements – if privacy is regulated in a single paragraph (such as in art. 8 ECHR), an enumeration in one sentence can be indicative of different types, while if privacy is regulated in four separate provisions, elements in different paragraphs of the same provisions are likely to indicate sub-types of one type rather than different types.

<sup>77</sup> Argentina, Australia, Belgium, Brazil, Chile, Croatia, Denmark, Estonia, Finland, France, Ghana, Greece, India, Israel, Japan, Malta, Nigeria, Norway, Russian Federation, Senegal, South Africa, South Korea, Spain, Sweden, Switzerland, Uruguay, and Vietnam.

<sup>78</sup> Constitution Finder, <http://confinder.richmond.edu/> (last accessed 1 September 2015).

<sup>79</sup> Comparative Constitutions Project, <https://www.constituteproject.org/> (last accessed 1 September 2015).

<sup>80</sup> See *infra* section 4.2 (noting possible differences in regards to constitutional protections for behavioral privacy).

ing for illustrative purposes or where they can serve as starting points for follow-up research.<sup>81</sup>

Importantly, one core country under investigation, the United Kingdom, does not have a written (or “codified”) constitution. For our UK analysis, we relied specifically on the privacy-related provisions embedded in the Human Rights Act of 1998, a legislative response to British commitments under the ECHR that has obtained constitutional status (subject, however, to parliamentary sovereignty)<sup>82</sup>—and mirrors the relevant provisions of the Conven-

<sup>81</sup> NATIONAL CONSTITUTION OF THE ARGENTINE REPUBLIC 1994, *available at* [http://pdba.georgetown.edu/Constitutions/Argentina/argen94\\_e.html](http://pdba.georgetown.edu/Constitutions/Argentina/argen94_e.html) [<https://perma.cc/T7C5-SHX7>] [hereinafter AR]; CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL 1988, *available at* [http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte\\_en\\_us/anexo/constituicao\\_ingles\\_3ed2010.pdf](http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf) [<https://perma.cc/S5PT-2L95>] [hereinafter BR]; CONSTITUTION OF THE REPUBLIC OF CHILE 1980, *available at* <http://confinder.richmond.edu/admin/docs/Chile.pdf> [<https://perma.cc/625C-FE9K>] [hereinafter CL]; CONSTITUTION OF THE REPUBLIC OF CROATIA OF 1990, *available at* [http://www.servat.unibe.ch/icl/hr00000\\_.html](http://www.servat.unibe.ch/icl/hr00000_.html) [<https://perma.cc/4NK7-JLWN>] [hereinafter CR]; THE CONSTITUTIONAL ACT OF DENMARK June 5, 1953, *available at* <http://www.legislationline.org/download/action/download/id/1587/file/c57ee1ef8edd6198a252e187fdf2.htm/preview> [<https://perma.cc/5DGS-MDQW>] [hereinafter DK]; CONSTITUTION OF THE REPUBLIC OF ESTONIA 1992, *available at* <https://www.president.ee/en/republic-of-estonia/the-constitution/#15> [<https://perma.cc/R8XD-ZMVM>] [hereinafter EE]; CONSTITUTION OF FINLAND 1999, *available at* [http://www.servat.unibe.ch/icl/fi00000\\_.html](http://www.servat.unibe.ch/icl/fi00000_.html) [<https://perma.cc/4GRM-FDCG>] [hereinafter FI]; CONSTITUTION OF GREECE 2001, *available at* <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf> [<https://perma.cc/KR4E-BUHL>] [hereinafter GR]; BASIC LAW: HUMAN DIGNITY AND LIBERTY [CONSTITUTION] Mar. 17, 1992 (Isr.), *available at* [http://www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm) [<https://perma.cc/4YPW-NXCY>] [hereinafter IL]; CONSTITUTION OF 1947 (Japan), *available at* [http://japan.kantei.go.jp/constitution\\_and\\_government\\_of\\_japan/constitution\\_e.html](http://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html) [<https://perma.cc/6XW6-76BF>] [hereinafter JP]; THE CONSTITUTION OF THE RUSSIAN FEDERATION Dec. 12, 1993, *available at* <http://www.departments.bucknell.edu/russian/const/constit.html> [<https://perma.cc/8JYJ-LC4>] [hereinafter RU]; CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 1996, *available at* <http://www.thehda.co.za/uploads/images/unpan005172.pdf> [<https://perma.cc/44HW-C8V9>] [hereinafter ZA]; CONSTITUTION OF 1978 Oct. 31, 1978 (Spain), *available at* [http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist\\_Normas/Norm/const\\_espa\\_texto\\_ingles\\_0.pdf](http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf) [<https://perma.cc/GJ7Y-V4JZ>] [hereinafter ES]; CONSTITUTION OF 1999 (Switz.), *available at* [http://www.servat.unibe.ch/icl/sz00000\\_.html](http://www.servat.unibe.ch/icl/sz00000_.html) [<https://perma.cc/9KH7-B6PH>] [hereinafter CH]; CONSTITUTION OF THE ORIENTAL REPUBLIC OF URUGUAY 1966, *available at* <http://www.refworld.org/docid/3ae6b5600.html> [<https://perma.cc/D9C6-UE9C>] [hereinafter UR].

<sup>82</sup> See ANTHONY KING, *THE BRITISH CONSTITUTION* 127, 131-32 (Oxford/New York: Oxford University Press, 2009) (explaining that the Human Rights Act functions as a British Bill of Rights and is “in constitutional terms, entrenched in all but name”).

tion.<sup>83</sup>

In the following sub-sections, we discuss the results of our analysis, structured by the main clusters we have identified. For each cluster, we briefly indicate the main relevant constitutional provisions, identifying the main type(s) as well as, where appropriate, relevant sub-types of privacy encountered within the cluster. We also indicate where clusters overlap or have close links to other clusters.

#### 4.2. Cluster 1: Privacy in General

While privacy types generally consist in a specific aspect of privacy, it is useful to start with how privacy is captured in its most basic form, i.e., the general formulation of the right to privacy. All countries in our selection have some form of a general constitutional right to privacy, but the form and formulation differ. The most visible difference is that some countries have an explicitly formulated right in their constitution, while others have construed a right to privacy based on one or more provisions. Among the countries with an explicitly formulated right to privacy, Slovenia uses a term that most closely resembles the English term “privacy” (*zasebnost* in Slovenian),<sup>84</sup> guaranteeing the inviolability of the privacy of every person.<sup>85</sup> More frequently, terminology connected to private life is used. The Netherlands has a “right to respect for the personal sphere of life,”<sup>86</sup> which is a synonym for

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<sup>83</sup> English courts, however, have had some difficulty adapting the requirements of section 8 of the Human Rights Act into pre-existing case law, and the courts have sometimes prioritized UK court decisions over the ECtHR’s interpretations of Article 8 of the ECHR. *See, e.g., Murray v. Express Newspapers*, [2007] EWHC 1908, para. 62 (2007) (applying UK precedent rather than a conflicting ECtHR interpretation of Article 8 of the ECHR); *see also* Bryce Clayton Newell, *Public Places, Private Lives: Balancing of Privacy and Freedom of Expression in the United Kingdom*, 51 PROCEEDINGS OF THE 77TH ASSOCIATION FOR INFORMATION SCIENCE AND TECHNOLOGY (ASIS&T) 1, 7-9 (DOI: 10.1002/meet.2014.14505101029), available at <http://onlinelibrary.wiley.com/doi/10.1002/meet.2014.14505101029/epdf> (providing an overview of the conflict that is created between privacy law and other laws when applying international versus domestic UK precedent).

<sup>84</sup> The older term *osebno življenje*, meaning ‘private life’ (literally: personal life), is still used in the Code of Obligations, but it refers to the personality right protected by civil law; the widely used term *zasebnost* is a fitting translation of the human right to privacy.

<sup>85</sup> SI (art. 35).

<sup>86</sup> NL (art. 10(1)). The official translation uses “privacy,” which is less precise

“private life.” In Poland, as in the constitutional formulations at the European level, private life is connected with family life in the fixed expression “private and family life.”<sup>87</sup> Interestingly, the Czech Constitution protects both “privacy” and “private and family life”; the former is connected to the inviolability of the person,<sup>88</sup> the latter serving as a general right to privacy.<sup>89</sup> Although very closely connected to the protection of private life (and thus the general right to privacy), we consider the protection of family life to be a distinct type, which can conceptually be seen as a form of relational privacy.<sup>90</sup>

In contrast to countries with an explicit right to privacy, the other countries in our selection have construed a general right to privacy from other rights in their constitutional catalog. The United States and Canada recognize a right to privacy at the constitutional level, connected most strongly to the protection against unreasonable search and seizure<sup>91</sup> or the right to make certain fundamental choices without the interference of government,<sup>92</sup> but

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but in line with the common usage of the English term “privacy” in Dutch (both in common speech and in most doctrinal literature); the term “personal sphere of life” (*persoonlijke levenssfeer*) is used almost exclusively in legislation and case-law.

<sup>87</sup> CoE (art. 8), EU (art. 7), PL (art. 47).

<sup>88</sup> CZ (art. 7(1)) (“The inviolability of the person and of her privacy is guaranteed”).

<sup>89</sup> See CZ (art. 10(2)) (“Everyone has the right to be protected from any unauthorized intrusion into her private and family life”); CZ (art. 10(1)) (“human dignity, personal honor, and good reputation”).

<sup>90</sup> See *infra*, section 4.4. (explaining different forms of relational privacy).

<sup>91</sup> U.S. Const. amend. IV; Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, § 8, being Schedule B to the Canada Act, 1982, c 11 (U.K.).

<sup>92</sup> United States case law on this issue is fairly substantial and settled in many respects. See *e.g.* *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (establishing marital privacy as within a zone of privacy created by several constitutional guarantees); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“[The] right to privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”); *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (holding that private consensual sexual activity between two individuals of the same sex warrants protection under the constitutional right to privacy). There is some indication that Canadian law also protects privacy in the context of intimate decisions under the Canadian Charter of Rights and Freedoms. See *e.g.*, *Zarzour v. Canada*, (2000) 268 N.R. 235, para. 68 (Can.) (directing that the charges relating to the plaintiff’s participation in a theft from the canteen, his involvement in an attack on a fellow inmate and an allegation regarding storage of tobacco obtained as the result of his involvement in illegal activities be struck from his record); *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 36 (Can.) (“[T]he right to liberty contained in the [Canadian Charter of Rights and Freedoms] guarantees to every individual a degree of personal autonomy over

also find anchors in other constitutional rights as well.<sup>93</sup>

In Germany, the Constitution uses neither the term privacy nor private life, and these terms are also not used in legal practice where the term *Privatsphäre* is employed to describe a combination of constitutional rights,<sup>94</sup> which include the general personality right<sup>95</sup> as well as the protection of the home and mediated communications. In Italy, the constitutional right to privacy was initially considered to be an amalgam of various privacy-related rights spread across its Constitution (including liberty of the person, protection of home and correspondence, presumption of innocence, and family life) but has subsequently been determined to be a stand-alone right or “unitary value” that finds its basis in art. 2 of the Constitution, which “guarantees the inviolable rights of the person” in general.<sup>96</sup> It is interesting to note here that the term

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important decisions intimately affecting their private lives.”); *R. v. Mills*, [1999] 3 S.C.R. 668, 672 (Can.) (“Privacy rights will be most directly at stake where a record concerns aspects of one’s individual identity or where confidentiality is crucial to a therapeutic or trust-like relationship.”); *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 (“Dignity has never been recognized by this Court as an independent right but has rather been viewed as finding expression in rights, such as equality [and] privacy . . . Indeed, dignity is often involved where the ability to make fundamental choices is at stake.”); *R. v. Plant*, 3 S.C.R. 281, 293 (1993) (“In fostering the underlying values of dignity, integrity and autonomy, it is fitting that [the Canadian Charter of Rights and Freedoms] should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.”); see also CRAIG FORCSE & AARON FREEMAN, *THE LAWS OF GOVERNMENT: THE LEGAL FOUNDATIONS OF CANADIAN DEMOCRACY* 528-29 (2005) (providing a comprehensive summary on the law of Canadian democracy).

<sup>93</sup> Both countries could find anchors in the right to freedom of belief and expression, for instance, see the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, § 2(b), being Schedule B to the Canada Act, 1982, c 11 (U.K.) and the U.S. Constitution amendment I. Both could also root privacy protection in the privilege against self-incrimination, for instance, see the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, § 11(c), being Schedule B to the Canada Act, 1982, c 11 (U.K.) and the U.S. Constitution amendment V.

<sup>94</sup> Christian Geminn & Alexander Roßnagel, “*Privatheit*” und “*Privatsphäre*” aus der Perspektive des Rechts – ein Überblick, 70 JURISTEN ZEITUNG 703 (2015).

<sup>95</sup> The German Constitutional Court built up on the general personality right to introduce a set of privacy rights, including the right to informational self-determination, the right to absolute protection of the core area of the private life, and the right to the confidentiality and integrity of information-technological systems, see DE (Art. 2.1).

<sup>96</sup> Corte Cost. 12 April 1973, *Foro italiano* 1973, I, 1708. See Ferrando Mantovani, DIRITTO PENALE. PARTE SPECIALE I. DELITTI CONTRO LA PERSONA 588 (5

most commonly used in Italian doctrine for privacy is *riservatezza* (i.e., reservedness),<sup>97</sup> and the right to privacy is thus usually called the right to reservedness (*diritto alla riservatezza*). (It is also interesting to observe terms used for privacy in other languages, such as the Spanish *intimidad* and Portuguese *intimidade*, i.e., intimacy,<sup>98</sup> since such terms indicate different, although connected, values associated with privacy; these various associations are also visible in other formulations of the right to privacy in our backup group: e.g., Israel protecting a “right to privacy and to intimacy”<sup>99</sup> and Russia protecting the right to inviolability of “personal and family secrets,” alongside the inviolability of private life.<sup>100</sup> However, conclusions can only be drawn from these connotations and associations on the basis of a more thorough linguistic and legal-doctrinal analysis, which is outside the scope of this paper.)

In the constitutions in our backup group, we did not find substantially different formulations of the general right to privacy, with one exception. Argentina and Uruguay do not protect private life but rather private actions. In the Argentinian formulation:

The private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempted from the authority of judges. No inhabitant of the Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit.<sup>101</sup>

A right to protection of private actions rather than of private

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ed., s.l.: CEDAM, 2013) (discussing the constitutionalization of a general and unitary right to privacy).

<sup>97</sup> Italian literature also uses other terms, such as “private life” (*vita privata*) and “privateness” (*privatezza*), but these terms are less common. An interesting explanation of why “reservedness” is preferred over “private life” is that “private life” refers to an ensemble of facts (rather than a value) and as such cannot be the essence of what is protected by the right to privacy; in contrast, “reservedness” denotes what is to be protected in private life by the right to privacy.

<sup>98</sup> See, e.g., CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 18(1) (Spain) (protecting the right to *intimidad personal y familiar*, or personal and family intimacy); Constituição Federal [C.F.] [Constitution] art. 5(x) (Braz.) (protecting the inviolability both of *intimidade*, or privacy, and of private life).

<sup>99</sup> BASIC LAW: HUMAN DIGNITY AND LIBERTY, 5752-1992), SH No. 1391 p. 150 (Isr.).

<sup>100</sup> RU art. 23(1) (“Everyone shall have the right to privacy, to personal and family secrets, and to protection of one's honor and good name”).

<sup>101</sup> AR (art. 19); see also UR (art. 10) (providing the Uruguayan formulation).

life seems to suggest a close association of privacy with autonomy and self-development and thus, although formulated as a negative right, to put emphasis on the positive aspect of liberty (a freedom to do something). This seems to come close to the behavioral privacy that was distinguished in the typology of Finn, Wright, and Friedewald.<sup>102</sup> This finding stands in contrast to most other constitutions, which protect privacy as a fenced-off sphere immune from intrusion, and thus emphasize the negative aspect of liberty (a freedom from constraints on behavior). Although the aim of the provision is to define an abstract private sphere in which the government should not interfere, without particular spatial connotations, in theory a right to respect for private *actions* might have interesting implications for the protection of privacy in public space. Privacy framed as a fenced-off sphere of private life does not obviously extend to people moving in public space (since what you do “in public” is not obviously part of your private life), but privacy framed as freedom of private actions allows extending privacy to public space, as long the private action taking place in public does not offend others or public morals. Thus, one could expect the Westinian states of privacy as anonymity and privacy as reserve (which are states in which persons expect some level of privacy while acting in more or less public spheres) to be more easily covered by a general right to privacy formulated in terms of freedom of private actions than by a general right to privacy formulated as a negative liberty in most constitutions in our country selection.

### 4.3. Cluster 2: Privacy of Places and Property

#### 4.3.1. Protection of the Home and other Places

All countries protect the home and, to a lesser extent, certain other places where private life takes place.<sup>103</sup> Spatial privacy is clearly one of the cornerstones of constitutional privacy protection

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<sup>102</sup> See Finn, Wright & Friedewald, *supra* note 4, quoting NISSENBAUM, *supra* note 1 at 82 (distinguishing behavioral privacy from Finn, Wright and Friedewald’s privacy typology on the basis of a freedom to act versus a protection from invasive actors).

<sup>103</sup> CoE (art. 8); EU (art. 7); CA (s. 8); CZ (art. 12); DE (art.13); IT (art. 14); NL (art. 12); PL (art. 50); SI (art. 36); US (Am. IV).



with the protection of the home as the classic example. Some constitutions mention the dwelling (place of residence or habitation) or house (the classic dwelling) as the focal point of protection,<sup>104</sup> while others use the term of *home*,<sup>105</sup> which likewise denotes the place of habitation but also has a more abstract connotation that it can be any place where one *lives*, not limited to dwellings. The difference is in formulation only, because the countries using the term “dwelling” or “house” interpret this broadly as any place that serves as a “home.”<sup>106</sup>

Whereas all constitutions protect the home, some also protect other, non-residential places. Not only do Poland and Slovenia protect the inviolability of the home in general, but they also protect *premises* – and, in Poland, *vehicles* – against unlawful entry or search.<sup>107</sup> This may be simply an explication of what other countries may also protect, implicitly, in their broad understanding of “home.” For example, business premises can sometimes also fall under the notion of “home” in the ECHR, in German, and in Italian law, if what happens there is linked to someone’s private life.<sup>108</sup>

We consider the protection of places other than the home to be part of the same type of privacy. We can call this spatial privacy:

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<sup>104</sup> CZ (art. 12) (“obydlí”); DE (art. 13) (“Wohnung”); (NL, art. 12) (“huis”); PL (art. 50) (“mieszkanie”); SI (art. 36) (“stanovanje”); US (Am. IV) (“houses”).

<sup>105</sup> CoE (art. 8) (“home”), EU (art. 7) (“home”); IT (art. 14(1)) (“domicilio”). In Canada, a subjective expectation of privacy is presumed for activities taking place within a “home.” For example, see *R. v. Gomboc*, 2010 SCC 55, para. 25 (2010), *citing* *R. v. Patrick*, 2009 SCC 17, para. 37 (2009). Canadian courts also refer to constitutional protections for “dwelling houses.” For example, in *R. v. Feeney*, 2 S.C.R. 13 (1997).

<sup>106</sup> See e.g., for NL, Bert-Jaap Koops, Hanneke van Schooten & Merel Prinsen, *Recht naar binnen kijken. Een toekomstverkenning van huisrecht, lichamelijke integriteit en nieuwe opsporingstechnieken*, 43, vol. 70 ITeR (Den Haag: Sdu, 2004).

<sup>107</sup> PL (art. 50) (“The inviolability of the home shall be ensured. Any search of a home, premises or vehicles may be made only in cases and in a manner specified by statute”); SI (art. 36) (“(1) Dwellings are inviolable. (2) No one may, without a court order, enter the dwelling or other premises of another person, nor may he search the same, against the will of the resident . . . .”); see also Estonia at Ch. 2, §33 (protecting someone’s “dwelling, real or personal property under his or her control, or place of employment” against unreasonable search and seizure, emphasis added).

<sup>108</sup> See ECtHR 16 December 1992, *Niemietz v Germany*, App. 13710/88; for Germany, see BVerfG, Oct. 13, 1971, BVerfGE 32, 54, 1 BvR 280/66 (Oct. 13, 1971) <69 ff.>; for Italy see also Mantovani, *supra* note 96 at 539-40 (holding that commercial places can count as home during closing hours, and indicating that doctrine is divided over the question whether industrial establishments fall within the scope of the notion of home).

the protection of the privacy of people in relation to the places where they enact their private life. Classically, this is the dwelling or house, but it can stretch to other “places of private life”. Thus, the constitutions generally use the same type of boundary-marker here: private *places* with discernable boundaries. However, which places count as private for the purposes of protecting spatial privacy is somewhat variable between the countries.

#### 4.3.2. Protection of Property

Some constitutions protect the property of persons against unreasonable search and seizure: the US Fourth Amendment stipulates the right of people to be secure in their effects<sup>109</sup> (i.e., goods and chattels, movable property<sup>110</sup>), and similar protection is included in Canadian and UK constitutional law.<sup>111</sup> We also encountered protection of privacy in relation to property of persons in constitutions in our backup group, such as in Estonia, Japan, and

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<sup>109</sup> For example, the Supreme Court has defined “effects” to mean “personal property” rather than property more generally (i.e., excluding “real property”), see *Oliver v. United States*, 466 U.S. 170, 177 n.7 (1984).

<sup>110</sup> THE SHORTER OXFORD ENGLISH DICTIONARY (3rd ed., Oxford: Clarendon Press, 1973), <https://en.oxforddictionaries.com/definition/effect> [<https://perma.cc/C6LC-FGA9>] (defining effects as ‘personal belongings’).

<sup>111</sup> In Canadian law, constitutional protections against search and seizure of personal property are limited to situations where the person would have a “reasonable expectation of privacy” *vis-à-vis* a police officer or other government agent. See Lisa M. Austin, *Information Sharing and the 'Reasonable' Ambiguities of Section 8 of the Charter*, 57 U.T.L.J. 499, 499 (2007) (stating that an articulation of privacy as property may be inadequate); *Hunter v. Southam*, 2 S.C.R. 145 at para. 23 (1984), citing *Katz v. United States*, 389 U.S. 347 (1967) (“The Fourth Amendment protects people, not places”); Hamish Stewart, *Normative Foundations for Reasonable Expectations of Privacy*, 54 SUP. CT. L. REV. 335 (2011) (“ [T]he Canadian Charter of Rights and Freedoms applies only where the Charter applicant has a reasonable expectation of privacy in the place searched or the information obtained”). In England and Wales, the Police and Criminal Evidence Act 1984 (PACE) regulates police searches and seizure of persons, homes, and personal property. Despite coming into force well before the Human Rights Act 1998 (and the fact that PACE is not necessarily part of the UK’s uncodified constitutional law), PACE is now read in the light of requirements set out by Article 8 of the HRA and, to some extent as limited by domestic judicial precedent, by the European Convention on Human Rights. See POLICE AND CRIMINAL EVIDENCE ACT 1984: CODE B (REVISED): CODE OF PRACTICE FOR SEARCHES OF PREMISES BY POLICE OFFICERS AND THE SEIZURE OF PROPERTY FOUND BY POLICE OFFICERS ON PERSONS OR PREMISES 3 (London: Home Office, Policing Powers and Protection Unit, 2013) (codifying and providing legal justification for searches and seizures).

South Africa,<sup>112</sup> so this element of privacy is not limited to common-law countries. Although this kind of protection partly serves the function of protecting property as such (a property-based interest), it also partly serves to protect the information that may be derived from the property (an informational privacy interest). In common-law countries, protection of property is often closely connected to protection of privacy,<sup>113</sup> and the link is explicitly made in the South African Constitution, where the right not to have property searched is mentioned as a specific element of the right to privacy.<sup>114</sup>

Although the protection of property against unreasonable search and seizure is, in most constitutions, proximate to the protection of places or persons against unreasonable search and seizure, it should be considered a different type than the privacy of places or the privacy of persons. The enumeration of elements that are protected against unreasonable search and seizure, at least for example in US law, provides a general protection of privacy, in which the elements (persons, houses, papers, and effects) function as distinct types.<sup>115</sup> Also the fact that the civil-law constitutions in

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<sup>112</sup> See EE, Ch. 2, §33 (protecting someone's "dwelling, real or personal property under his or her control, or place of employment" against unreasonable search and seizure); JP, art. 35 (the "right of all persons to be secure in their homes, papers and effects against entries, searches and seizures"); ZA, art. 14 ("Everyone has the right to privacy, which includes the right not to have: a. their person or home searched; b. their property searched; c. their possessions seized; . . .").

<sup>113</sup> See e.g., *United States v. Jones*, 565 U.S. 400, 951 (2012) (citing *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) ("[T]he Court's very definition of 'reasonable expectation of privacy' [has been] said to be an expectation that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."); *Florida v. Jardines* 133 S.Ct. 1409, 1414 (2013) (citing *Soldal v. Cook County*, 506 U.S. 56, 64 (1992)) ("Property rights are not the sole measure of Fourth Amendment violations, and while this may add to the baseline, it does not subtract anything from the Amendment's protections when the Government does engage in a physical intrusion of a constitutionally protected area."); *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring) ([T]he Fourth Amendment protects against governmental invasions of a person's reasonable '[expectations] of privacy,' even when those invasions are not accompanied by physical intrusions . . . [W]hen the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment even if the information could have been obtained by other means.").

<sup>114</sup> ZA, art. 14, *supra* note 112.

<sup>115</sup> The distinction in types is also visible in the South African Constitution, where property is mentioned in a different sub-paragraph than persons and

our country selection, while having very similar protections of private places, do not contain protection of property as a privacy interest, pleads against considering property-based (what we call "proprietary") privacy as being so closely associated to spatial privacy as to warrant integrating them into one type of privacy.

Although we think proprietary privacy should be considered a type in itself, it can nevertheless be associated to some extent with spatial privacy, in the sense that the protection of homes also has a property-based element: proprietors or residents have the right to exclude others from entering the home against their will. This *ius excludendi* is a common feature of spatial privacy and proprietary privacy, and thus it can make sense to consider both to belong to a same, broader cluster. This is why we included the protection of property in this same section as protection of the home under the broad moniker of "protection of places and property."

#### 4.3.3. Protection of Computers

A relatively recent development in privacy protection, which we think could signal the emergence of a new (sub)type of privacy protection, is the constitutional protection of computer systems. This has been most notably recognized by the German Constitutional Court, in the form of a fundamental right to the confidentiality and integrity of computer systems.<sup>116</sup> The general German right to personality<sup>117</sup> guarantees elements of personality that are not covered by specific freedoms in the Constitution and which are compatible with these freedoms, which enables new guarantees to arise in light of technological developments or changed social relations.<sup>118</sup> In a recent case, which involved a state law to perform

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homes, see ZA, art. 14, *supra* note 112. On the other hand, the Estonian formulation equates property more closely with dwellings and places of employment and hence seems to consider property protection to be of the same type as protection of places, see EE, *supra* note 81. It is a point for further research to identify whether, and if so how, other constitutions protect property as a privacy interest and how closely this is associated to spatial privacy.

<sup>116</sup> BVerfGE [Federal Constitutional Court] 27 February 2008, 1 BvR 370/07, ECLI:DE:BVerfG:2008:rs20080227.1bvr037007 (Ger.).

<sup>117</sup> DE (art. 1(1) ("Human dignity shall be inviolable. . ."); 2(1) ("Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law").

<sup>118</sup> BVerfGE, *supra* note 116 at § 169.

covert online investigations (by inserting Trojan horses on personal computer systems), the Constitutional Court determined that, because of the important new opportunities and threats that computer systems now present for personal development, the right to personality also involves a right to confidentiality and integrity of computer systems.<sup>119</sup> Indeed, the court held that the particular threats of covert online investigations of personal computers are not sufficiently covered by the inviolability of the home nor by the secrecy of telecommunications, and this gap in legal protection must therefore be covered by the open-ended right to personality.<sup>120</sup>

A similar development, although not yet clearly established at the constitutional level, is visible in Italy, where the inclusion of the criminalization of unlawful access to computer systems (closely modelled on the criminalization of trespass)<sup>121</sup> in the section on inviolability of the home has led to an assumption that the constitutional protection of the home now also extends to computers (an “informatic home,” or *domicilio informatico*). However, since the protected computers are not limited to “home computers,” a more pertinent framing of the newly emerging legal good that is protected in Italian law is “informatic privacy” (*riservatezza informatica*), which, together with the protection of informatic security, comes quite close to the German fundamental right to confidentiality and integrity of computer systems.<sup>122</sup>

The Supreme Court of Canada has also recognized an enhanced privacy interest in computers because of the “vast amounts of information” potentially contained within a computer system.<sup>123</sup> This right to privacy, found under section 8 of the Canadian Charter of Rights and Freedoms, has also been extended to other per-

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<sup>119</sup> *Id.* at §§166 – 206.

<sup>120</sup> *Id.*

<sup>121</sup> *Codice penale* [C.p.] [Criminal Code] art. 615-ter (It.), available at <http://www.brocardi.it/codice-penale/libro-secondo/titolo-xii/capo-iii/sezione-iv/art615ter.html> [<https://perma.cc/CF9L-BHMS>].

<sup>122</sup> See Lorenzo Picotti, *La tutela penale della persona e le nuove tecnologie dell'informazione* [Criminal Protection of the Person and New Information Technologies], in *TUTELA PENALE DELLA PERSONA E NUOVE TECNOLOGIE* [CRIMINAL PROTECTION OF THE PERSON AND NEW TECHNOLOGIES] 60-61 (Lorenzo Picotti, ed., CEDAM, 2013) (discussing the use of “computer space” and “cyberspace”).

<sup>123</sup> See *R. v. Vu*, [2013] S.C.R. 657, 659 (2013) (Can.) (“Computers potentially give police access to vast amounts of information that users cannot control, that they may not even be aware of or may have chosen to discard and which may not be, in any meaningful sense, located in the place of the search.”).

sonal computing devices, such as cell phones (whether smart or not).<sup>124</sup> In a similar vein, the US Supreme Court has identified a privacy interest under the Fourth Amendment in cellphones (not explicitly extending its holding to computers in general), requiring police to obtain warrants prior to searching cellphones seized incident to arrest.<sup>125</sup> The Court also connected this to the traditional protection of the home, observing that smartphones now contain many documents that used to be kept at home, but also noting that computer searches may also be even more intrusive than home searches.<sup>126</sup> Other federal appellate courts have also found searches of personal computers to raise significant privacy concerns under the Fourth Amendment.<sup>127</sup>

Thus, we see computers starting to become the object of constitutional privacy protection, which can be situated somewhere in between the traditional protections of the home and that of communications. *Informatic privacy* is partly as an extension of spatial privacy because computers are a new “place” where information related to private life is stored, partly an application of proprietary privacy, and partly an extension of communicational privacy, since computers (and in particular smartphones) tend to store sent and received communications to a much larger extent than correspondence traditionally used to be kept.<sup>128</sup>

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<sup>124</sup> See *R. v. Fearon*, [2014] 3 S.C.R. 621, 700 (2014) (Can.) (finding that the search of a cell phone incident to arrest violated the Charter, but that infringement did not warrant exclusion of evidence).

<sup>125</sup> *Riley v. California*, No. 13 – 132, slip op. at 25 (U.S. June 25, 2014) (“[A] warrant is generally required before . . . a search [of information on a cell phone], even when a cell phone is seized incident to arrest.”).

<sup>126</sup> See *Id.*, slip op., at 20, 28 (“Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house . . . With all they contain and all they may reveal, they hold for many Americans ‘the privacies of life’”).

<sup>127</sup> See *U.S. v. Cotterman*, 709 F.3d 952, 964 (9th Cir. 2013) (“Laptop computers, iPads, and the like are simultaneously offices and personal diaries. They contain the most intimate details of lives.”).

<sup>128</sup> See *infra* section 4.4.2 (noting the extension of privacy doctrine to both the establishment of social relations and the abstinence from social relationships).

#### 4.4. Cluster 3: Privacy of Relations

##### 4.4.1. Protection of Family Life

Family life is one of the core aspects of privacy. As observed in the discussion on the general right to privacy, at the European level, and in some national constitutions, family life is protected in close proximity to private life, in a fixed expression of “private and family life.”<sup>129</sup> It can nevertheless be considered a separate (if proximate) type since family life and private life do not always go together: people may, for example, want to keep secrets from their spouse or family members.<sup>130</sup> Protection of family life means that not only can people choose with whom they want to share and build up their life, but also that family ties are to be respected against interferences. The Czech Constitution connects “private and family life” to dignity, honor, and reputation,<sup>131</sup> which seems to emphasize that the intimate relations people engage in (e.g., sexual relations in/outside of wedlock, having a homosexual relationship) that might have repercussions for their position in society. The right to privacy, in that sense, aims to protect a sphere of intimate life that is relatively immune from societal judgment.

Family life is not purely a subtype of privacy; it is also protected by constitutional rights that are specifically dedicated to guaranteeing the right to build a family or children’s right to a family<sup>132</sup> (and is connected to the decisional privacy right, in the US context, to make decisions about intimate family matters such as sexual relations, abortions, and contraceptive use). These rights might be seen as the positive freedom to build a family and to have publicly recognized family ties, while familial privacy protects the freedom

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<sup>129</sup> See *supra* section 4.2 (describing certain conceptions of privacy). The term also features in constitutions in our backup group, e.g., in Croatia (art. 35) and Estonia (§ 26). In Greece, the protection of the home also refers to “private and family life” (art. 9).

<sup>130</sup> See e.g. GRUNNLUVEN [Constitution], art. 102 (Nor.) (refraining from using the term “private and family life” in favor of “private life and family life,” indicating that it is not a two-in-one concept (hendiadys) but a combination of different aspects). The official translation uses the term “privacy and private life,” but the original *privatliv og familieliv* better translates as “private life and family life”.

<sup>131</sup> See *supra* note 89 (stating protections from unauthorized intrusion into private life).

<sup>132</sup> See e.g., CZ, art. 32; Arts. 29 – 31 Cost. (It.); PL, Rozdział II, art. 48.

against interferences with the intimate sphere of family life.

#### 4.4.2. Protection of the Establishment of Social Relations

Primarily in Europe—under the ECHR—privacy also protects “the right to establish and develop relationships with other human beings and the outside world.”<sup>133</sup> All of the European countries selected as core jurisdictions in our study are parties to the ECHR (the United States and Canada are the outliers), which is an international instrument applicable at national level, and national courts are obliged to apply the Convention in domestic cases. As early as 1992, in *Niemietz*, the ECtHR stated that it would be too restrictive to limit the notion of “private life” to an “inner circle” within which an individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle.<sup>134</sup> The *Niemietz* court concluded that, “[r]espect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.”<sup>135</sup> Thus, the court extended private life protection beyond intimate activities to also encompass “activities of a professional or business nature,” because, in the court’s estimation, “it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world.”<sup>136</sup>

Two years later, the court confirmed this holding in *Burghartz*, further extending protection from professional and business relationships to other contexts as well.<sup>137</sup> The court also emphasized this aspect of the right to private life in 2002 in *Mikulić*, stating that private life “includes a person’s physical and psychological integrity and can sometimes embrace aspects of an individual’s physical and social identity.”<sup>138</sup> Consequently, “respect for “private life”

<sup>133</sup> *Munjaz v. United Kingdom*, 30 Eur. Ct. H.R. (2012).

<sup>134</sup> *Niemietz v. Germany*, 10 Eur. Ct. H.R. (1992).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Burghartz v. Switzerland*, 6 Eur. Ct. H.R. (1994) (finding that “the right to establish and develop relationships with other human beings, in professional or business contexts as in others” also applies to academic life, since “retention of the surname by which, according to him, he has become known in academic circles may significantly affect his career”).

<sup>138</sup> *Mikulić v. Croatia*, [2002] 1 F.C.R. 720, para. 53 (2002).



must also comprise to a certain degree the right to establish relationships with other human beings.”<sup>139</sup> In *Bensaid* the ECtHR connected this aspect of the right to private life to moral integrity and mental health. As article 8 protects a right to identity and personal development, which includes the right to establish and develop relationships with other human beings and the outside world in general, the *Bensaid* court stated that it regarded mental health to be a crucial part of private life and an aspect of moral integrity. The preservation of mental stability is in that context, namely, an “indispensable precondition to effective enjoyment of the right to respect for private life.”<sup>140</sup>

Despite some difference in application at the national level, this aspect of private life generally has clear connections to communicational privacy and the right to secrecy of communications. The right not only prohibits unlawful interception of communications, but also guarantees the freedom to communicate and, as such, is also aimed at enabling, maintaining, and deepening relations with other people and the outside world in general (not just at excluding others from a private sphere).<sup>141</sup>

#### 4.4.3. Protection of Communications

All countries in our study protect the secrecy of communications in their constitution; the civil-law countries do so explicitly, while Canada and the US interpret the general protection against unreasonable search and seizure to include protection against interception of communications.<sup>142</sup> Communicational privacy, alongside spatial privacy, is arguably one of the cornerstones of constitutional privacy protection. The terminology differs, but constitutions generally focus on *mediated* communications (i.e., communications transported—generally by post or telecommunications providers—between the sender and receiver through a channel of communications). The ECHR uses the older term “cor-

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<sup>139</sup> *Id.*

<sup>140</sup> *Bensaid v. the United Kingdom*, 82 Eur. Ct. H.R. (2001).

<sup>141</sup> Goran Klemenčič, *Komentar k členu 37*, in KOMENTAR USTAVE REPUBLIKE SLOVENIJE 524 (Lovro Sturm ed., 2002).

<sup>142</sup> Eur. Conv. on H.R., art. 8; E.U. Charter of Fundamental Rights, art. 7; Can. Charter of Rights and Freedoms, s. 8; CZ, art. 13; GG, art.10 (Ger.); Art. 15, Cost. (It.); GW., art. 13 (Neth.); PL, art. 49; SI, art. 37; U.S. CONST., amend. IV.

respondence" for this, which is classically associated with letters but is interpreted broadly to include newer forms of communication at a distance, such as telephone calls and email. This is reflected in the EU Charter of Fundamental Rights, whose privacy clause closely resembles that of the ECHR but uses the term "communications" instead (as does the Polish Constitution).<sup>143</sup> In a similar vein, Italy and Slovenia protect correspondence and other forms of communication.<sup>144</sup>

Some countries enumerate different media. For example, the Czech Constitution protects "letters" as well as "communications sent by telephone, telegraph, or by other similar devices,"<sup>145</sup> similar to the Dutch Constitution that protects "letters" and, with lower safeguards against intrusions, "telegraphy and telephony."<sup>146</sup> The German Constitution mentions the protection of letters alongside the protection of "post and telecommunications," thus distinguishing letters from other correspondence sent through (snail) mail.<sup>147</sup>

Generally, these constitutions protect two aspects of communications: the freedom to communicate (including, for example, the right against destruction or disruption of communications) and the secrecy of the contents of a communication. Some countries combine these into one right,<sup>148</sup> while others protect the secrecy of communications in a separate provision (and might associate the freedom to communicate primarily with the freedoms of expression or association rather than with the protection of privacy). Although there is some difference in the precise wording—countries generally use a term associated with secrecy<sup>149</sup>—the aim

<sup>143</sup> E.U. Charter of Fundamental Rights, art. 7; PL, art. 49.

<sup>144</sup> Art. 15, Cost. (It.) ("correspondence and . . . every other form of communication"); SI, art. 37 ("correspondence and other means of communication").

<sup>145</sup> CZ, art. 13.

<sup>146</sup> See GW., art. 13(1) (Neth.) (using "letters"); GW., art. 13(2) (using "telephony" and "telegraphy"). A Bill is pending to adapt art. 13. See *Kamerstukken II* [Dutch Parliamentary Papers, Second Chamber] 2013-14, 33989, n. 2 (proposing to combine both—with the same level of safeguards—into a protection of letters and telecommunications).

<sup>147</sup> GG, art. 10 (Ger.).

<sup>148</sup> See Eur. Conv. on H.R., art. 8 ("respect for . . . correspondence" is interpreted in case-law as respecting both the act of communication and the secrecy of the communications); Art. 15, Cost. (It.) ("Freedom and confidentiality of correspondence and of every other form of communication is inviolable"); PL, art. 49 ("The freedom and privacy of communication shall be ensured").

<sup>149</sup> See CZ, art. 13 (using "*tajemství*"); GG, art.10 (using "*Geheimnis*"); Art. 15, Cost. (It.) (using "*segretezza*"); GW., art. 13 (Neth.) (using "*geheim*"); PL, art. 49 (using "*tajemniczy*"); SI, art. 37 (using "*tainost*"). Note that the official translations

of the protection appears to be the same: preventing unauthorized persons (usually including the transport provider) from taking knowledge of the contents of the communication.<sup>150</sup>

While all jurisdictions protect the secrecy of mediated communications at the constitutional level, we see a difference when it comes to protecting the secrecy of unmediated communications (i.e., conversations held in each other's presence and not relying on some form of technological mediation).<sup>151</sup> The secrecy of communications provisions in the ECHR and the Italian Constitution both protect unmediated communications.<sup>152</sup> In Italy, both mediated and unmediated communications are protected, as "every . . . form of communication" is protected.<sup>153</sup> This is also the case in Poland, where the Constitution protects communication defined very broadly as any form of interpersonal contact.<sup>154</sup> In other jurisdictions, however, unmediated communications may be constitutionally protected, but as part of the general right to privacy or private

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tend to use the term "privacy" or "confidentiality" here, but the original terms literally translate more correctly as "secrecy," see *supra* note 74.

<sup>150</sup> Some jurisdictions also consider the fact that a communication takes place, and more broadly the traffic data associated with communications, to be part of the constitutional protection of the secrecy of communications, while others do not.

<sup>151</sup> This is sometimes referred to as "oral communications," with the intrusion being called "oral interception," but we prefer the more general term unmediated communications, both because this covers, e.g., conversations in sign language (which are not literally "oral") and because it emphasizes the difference with communications at a distance, namely that there is no channel over which the communication has to be transported.

<sup>152</sup> Filippo Donati, *Commentario Costituzione - Art. 15*, in LEGGI D'ITALIA (s.a.), §2.2. Other countries, such as Canada and the USA, also protect unmediated oral communications from interception, but they do so at a statutory—rather than constitutional—level in their federal criminal codes. See Canadian Criminal Code R.S.C., c. C-46, § 183 (1985) (Can.) (giving protection to "private communication" defined as "oral communication, or any telecommunication, that is made by an originator who is in Canada or is intended by the originator to be received by a person who is in Canada and that is made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it . . ."); 18 U.S.C. § 2511 (2008) ("Except as otherwise specifically provided in this chapter any person who . . . intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication . . . shall be punished . . .").

<sup>153</sup> Art. 15, Cost. (It.). See *supra* text accompanying note 151.

<sup>154</sup> See Wyrok Trybunału Konstytucyjnego [Polish Constitutional Tribunal] July 2, 2007, No. K 41/05 (III-5.1) (Pol.).

life, not as part of the protection of communications.<sup>155</sup> These countries protect mediated communications in particular based on the rationale that they are entrusted to a third party for transport, which makes the communications more vulnerable to be read or listened to (and more difficult for conversation partners to protect against eavesdropping than is the case with unmediated communications). Thus, the protection of communications is particularly a protection of communication *channels* in these countries, in contrast to Italy where it is a protection of communications *qua* communication.<sup>156</sup> Seeing this difference in constitutional approach, we think the protection of unmediated communications cannot be completely integrated with the protection of mediated communications as a single type of privacy; rather, both function as closely associated but distinct types of communications protection.

Another type of communications protected in some jurisdictions is the right to have legal counsel in private. This is distinctly recognized as a form of constitutional protection in Canada and the US (although its contours vary in each jurisdiction),<sup>157</sup> but is also considered part of the regular constitutional protection of communications in European jurisdictions, at least for mediated communications, where higher safeguards apply to intercepting privileged communications than other forms of communications. We can see this as a sub-form of the more general protection of communications.<sup>158</sup>

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<sup>155</sup> For instance, in the Netherlands unmediated communications (referred to as the “live conversation”) are considered to be covered by art. 10(1), the right to protection of private life, and explicitly excluded from art. 13. See *Kamerstukken II* [Dutch Parliamentary Papers, Second Chamber] 2013-14, 33989, n. 3 at 9-10, 13; in Slovenia they are also protected under the general right to privacy in art. 35 with the Slovenian Constitutional Court referring to the “right to one’s own voice,” e.g. *Ustavno Sodišče*, case Up-472/02, ECLI:SI:USRS:2004:Up.472.02 [2004] (SI)

<sup>156</sup> Most of the other constitutions we studied as a backup group seem to use the approach of mediated communications, evidenced by terminology that refers to (more or less specified) means of communications. An approach similar to that Italy was found in the Israeli Basic Law, where art. 7(d) protects the “confidentiality of conversation”.

<sup>157</sup> See U.S. CONST, amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense”). In practice this occurs in private. See Canadian Charter of Rights and Freedoms, art. 10 (1982) (Can.) (“Everyone has the right on arrest or detention . . . to retain and instruct counsel without delay and to be informed of that right . . .”).

<sup>158</sup> In Italy, the right to legal counsel in private is considered to be connected to the presumption of innocence (Art. 27(2) Cost.(It.)), since being presumed innocent implies that the conversation between a defendant and an attorney has a claim to privacy; in this sense, the presumption of innocence is also considered to

#### 4.4.4. *Protection of Documents*

The Czech Constitution extends the protection of the secrecy of letters to documents in general: “No one may violate the confidentiality of letters or other papers or records, whether privately kept or sent by post or by some other means.”<sup>159</sup> Although this is not the case in the other Continental European jurisdictions in our country selection, we encountered this combination of correspondence and documents in several countries in our backup group,<sup>160</sup> so the protection of documents can be seen as a regular type of privacy protection. It seems closely connected, in the Czech formulation, to the protection of communications. However, we encounter the protection of “papers” also as a separate element in the US Constitution,<sup>161</sup> where it is a stand-alone right alongside the protection of persons, houses, and effects (property). We therefore think that the protection of documents (papers, records) should be seen as an associated but distinct type—rather than as a sub-type—of the protection of communications.

It is not immediately obvious where we should place the protection of documents in relation to other forms of privacy protection. On the one hand, there is a clear link with the protection of communications, as evidenced in the Czech provision (and in some of the constitutions of the backup group). This link might be explained conceptually by seeing the protection of documents as a corollary of the protection of communications as such (i.e., apart

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be one of the special manifestations of the right to privacy in Italian constitutional law. See Mantovani, *supra* note 96 at 588 (suggesting that the presumption of innocence could not not include a guarantee also of privacy).

<sup>159</sup> CZ, art. 13.

<sup>160</sup> See Art. 18, CONSTITUCION NACIONAL [CONST. NAC.] (Arg.) (“the written correspondence and private papers [may not be violated]”); CONSTITUCION POLITICA DE LA REPUBLICA DE CHILE [C.P.] art. 19(4) (“private communications and documents”); DK, § 72 (“examination of letters and other papers . . . shall not take place . . .”); Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391,, art. 7(d) (Isr.) (“There shall be no violation of the confidentiality of conversation, or of the writings or records of a person . . .”); UR, art. 28 (“The papers of private individuals, their correspondence, whether epistolary, telegraphic, or of any other nature, are inviolable . . .”).

<sup>161</sup> U.S. CONST., amend. IV (“[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . .”).

from protecting communications *channels*), since communications reveal possibly intimate exchanges of thoughts or feelings between people who choose to keep their communications private. Additionally, this sensitivity exists both for letters that are not transported via communications providers (e.g., an unsent letter “to my surviving relatives” stored in a drawer) and for letters that have been delivered and are subsequently stored—see the formulation “whether privately kept or sent by post.”<sup>162</sup> Conceptually, both communications and (written) documents are also both expressions of people’s thoughts, ideas, and feelings. Freedom of expression can thus be linked both to the secrecy of communications and to the secrecy of documents: public expressions and private expressions are two sides of a coin, and the secrecy of communications and of documents can be seen as a necessary precondition (to gather information, to test one’s thoughts) for being able to exercise freedom of expression.

On the other hand, the link with freedom of expression also suggests an association between the secrecy of documents and freedom of thought and mental integrity, given that documents can be private manifestations of people’s thinking. Additionally, keeping such private manifestations of one’s thoughts secret can in turn be important for self-development and for preserving one’s reputation. These various elements circle around the privacy of the person rather than around the privacy of relations, and so the protection of documents may not only be conceptually linked to relational privacy (the cluster we are discussing here) but also to intellectual or reputational privacy (in the next cluster).

#### 4.5. *Cluster 4: Privacy of the Person (Body, Mind, and Identity)*

All constitutions in our sample protect, in various ways, the privacy of the person, in the sense of protecting the privacy of individuals as human beings, to ensure respect of their body, mental faculties, and identity. This protection is often closely connected to the general formulation of the protection of privacy, but most countries distinguish particular elements of privacy of the person (body, mind, and identity), so that we consider these elements to form a cluster of their own, rather than a part of the general right

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<sup>162</sup> CZ, art. 13.

to privacy (as discussed in cluster 2). We have identified four main elements as separate—although closely interconnected—types of privacy of the person: the physical person, thoughts, autonomy, and identity.

#### 4.5.1. *Protection of the (Body of the) Person*

At its core, this cluster involves the protection of persons as physical entities. In two linked paragraphs, the Czech Constitution safeguards the “inviolability of the person” (alongside the inviolability of privacy, so this is closely connected to the general right to privacy in Czech law),<sup>163</sup> followed by the protection against torture and cruel, inhuman, or degrading treatment, as an important *specialis* of the inviolability of the person which, unlike the general provision, is absolute.<sup>164</sup> The Dutch Constitution has a separate provision, inserted between the general right to privacy and the protection of the home, that safeguards the inviolability of the body.<sup>165</sup> This is a protection against physical intrusions; although it was recognized that bodily and mental integrity cannot be clearly separated, the legislature considered intrusions upon mental integrity to only be covered by the inviolability of the body if the act of intrusion involved physically touching the body; otherwise they fall under the general right to privacy.<sup>166</sup> The Dutch provision was partly modelled on the German right to “physical integrity,” which the German Constitution protects along with the right to life and inviolability of freedom of the person.<sup>167</sup> In contrast, the Slovenian Constitution safeguards the “inviolability of the physical and mental integrity” in an integrated way, and, like the Czech Constitution, connects this to the general protection of privacy. The Slovenian Constitution also mentions “personality rights” as part of the same provision, suggesting a close connection between privacy,

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<sup>163</sup> CZ, art. 7(1) (“The inviolability of the person and of her private life is guaranteed. They may be limited only in cases provided for by law”).

<sup>164</sup> CZ, art. 7(2) (“[N]o one may be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”).

<sup>165</sup> GW, art. 11 (Neth.). The official translation uses the term “inviolability of the person,” but the original uses the more precise term “body” (*lichaam*).

<sup>166</sup> *Kamerstukken II* [Dutch Parliamentary Papers, Second Chamber] 1978/79, 15463, no. 4 at 2. See Koops, van Schooten & Prinsen, *supra* note 106, at 120.

<sup>167</sup> GG, art. 2(2) (Ger.).

inviolability of the person, and autonomy of the person.<sup>168</sup> On the other hand, the EU Charter places a similar “right to respect for . . . physical and mental integrity”<sup>169</sup> in the title on “Dignity,” rather than the title on “Freedoms” (which includes privacy).

The US Constitution protects the right of people to be “secure in their persons” against unreasonable search and seizure, which also to some extent covers the inviolability of the body.<sup>170</sup> Slovenian law also protects the security of the person, but does so separately than the general right to privacy and personal integrity and more closely connected to the dignity of the person.<sup>171</sup> In Canada, the Canadian Charter includes, besides the right to be secure against unreasonable search and seizure,<sup>172</sup> the right to security of the person, which is connected to the right to life and liberty of the person.<sup>173</sup> Here, we see that inviolability of the person connects to another aspect: the classic notion of *habeas corpus*, which protects people against being unlawfully taken and held by the government. The Italian Constitution does not protect the inviolability of the body as such, but rather the inviolability of “personal liberty,” connected to the right not to be unlawfully detained, inspected, or searched,<sup>174</sup> which is considered, besides the protection of the home and of correspondence, one of the special manifestations of the constitutional right to privacy in Italy.<sup>175</sup>

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<sup>168</sup> See SI, art. 35 (“The inviolability of the physical and mental integrity of every person, his privacy and personality rights shall be guaranteed.”).

<sup>169</sup> E.U. Charter of Fundamental Rights, art. 3.

<sup>170</sup> See, e.g., *United States v. Gray*, 669 F.3d 556, 564 – 65 (5th Cir. 2012) (finding an anal probe for drugs unreasonable under the Fourth Amendment, as a violation of the “personal privacy and bodily integrity” of the individual); *Winston v. Lee*, 470 U.S. 753, 758–66 (1985) (finding that a warrantless surgery to retrieve a bullet would “violate respondent’s right to be secure in his person [as] guaranteed by the Fourth Amendment”); but see *Rodrigues v. Furtado*, 950 F.2d 805, 807 (1st Cir. 1991) (searching of a woman’s vagina, pursuant to a warrant, was found not reasonable “by its very nature”); *Bell v. Wolfish*, 441 U.S. 520, 544–62 (1979) (ruling that body cavity searches of inmates do not, by themselves, violate any constitutional guarantees); *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 n. 4 (1985) (upholding visual and manual cavity searches of border entrants under the border search exception).

<sup>171</sup> See SI, art. 34 (“Everyone has the right to personal dignity and security”).

<sup>172</sup> Canadian Charter of Rights and Freedoms, s. 8.

<sup>173</sup> See *Id.*, s. 7 (“Everyone has the right to life, liberty and security of the person . . .”). In the U.S. Constitution, this is covered by the Fifth Amendment and in Europe, it is covered by article 5 of the Eur. Conv. On H.R. and article 6 of the E.U. Charter.

<sup>174</sup> Art.13, Cost. (It.).

<sup>175</sup> Mantovani, *supra* note 96, at 588.



Altogether, we see that a number of constitutions protect various aspects of inviolability of the person. We can group these provisions together as a type of privacy that protects persons (as physical entities) against being touched, harmed, detained, or taken away against their will.

#### 4.5.2. *Protection of Thought*

While the Slovenian Constitution connects physical with mental integrity,<sup>176</sup> the protection of the body of the person is not usually directly associated with protecting the exercise of mental faculties (unless this has a physical component). Rather, countries tend to connect the protection of the mind to other constitutional rights, particularly to freedom of conscience, thought and religion, and the freedom of expression. Not all jurisdictions would conceive of this as a form of privacy protection—in the European tradition, freedom of thought and freedom of expression are often considered stand-alone rights distinct from the right to privacy. In the American tradition, however, the freedom of religion and of thought is often considered to also protect privacy.<sup>177</sup> However, the link is also made in Italy, since “the freedom to manifest thoughts is also the freedom to *not* manifest one’s own thought or to manifest it to some and not to others” and hence freedom of speech is also considered to be one of the special manifestations of

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<sup>176</sup> SI, art. 35 (“[t]he inviolability of the physical and mental integrity of every person his privacy and personality rights shall be guaranteed.”).

<sup>177</sup> U.S. CONST, amend. I (“[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . .”); see also *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J. concurring) (noting that the founders fathers recognized “it is hazardous to discourage thought”); *Weiman v. Updegraff*, 344 U.S. 183, 194 (1952) (Black, J., concurring) (“the Framers rested our First Amendment on the premise that the slightest suppression of thought, speech, press, or public assembly is still more dangerous” than dangers arising from disparagement of the government); Louis Henkin, *Privacy and Autonomy*, 74 COLUMBIA L. REV. 1410, 1420 (1974) (discussing freedom of religion as it relates to privacy); see generally Jerome A. Barron, *Access to the Press: A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) (arguing that the Framers’ conception of the press as “the champion[s] of new ideas and the watch dog[s] against governmental abuse are romantic in “an era marked by extraordinary technological developments in the communications industry”); NEIL M. RICHARDS, *INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE* (New York: Oxford University Press, 2015) (discussing the right to privacy and its inherent conflict with the right to free speech).

the right to privacy in Italian constitutional law.<sup>178</sup> Likewise, the proximity of the right to freedom of thought, conscience, and religion, which immediately follows the right to privacy in the ECHR, seems to suggest at least some connection with the right to privacy.

Another constitutional right in which protection of the mind manifests itself is the privilege against self-incrimination, since the right of defendants not to be forced to give statements against themselves is a form of allowing people to keep to themselves what is in their minds.<sup>179</sup> In the American tradition, the privilege against self-incrimination is considered to also serve as a form of privacy protection.<sup>180</sup>

Thus, the protection of thought, although embedded in rights different from classic privacy-related rights, is connected in several constitutional frameworks to (also) serve as a form of privacy protection: intellectual privacy. We can consider this a separate, although not universally recognized, type of privacy protection.

#### 4.5.3. *Protection of Personal Decision-making (Autonomy)*

Decisional privacy, one of the major forms of constitutional privacy protection in the US, is related to intellectual privacy, but with a different emphasis. While intellectual privacy can be seen

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<sup>178</sup> Mantovani, *supra* note 96, at 588 (our translation, emphasis in original).

<sup>179</sup> Note, however, that it may also link to personal (including bodily) integrity. In the fourth and final constitution of the Socialist Federalist Republic of Yugoslavia, of which Slovenia was part until 1991, the privilege against self-incrimination (in the form of a prohibition of extorting confessions or statements) was linked to the inviolability of the integrity of one's personality, private and family life and other personality rights. For the text of the former constitution, see the Constitution of the Socialist Federal Republic of Yugoslavia, Feb 20, 1974, arts. 176(1) & 176(2) (Yugoslavia).

<sup>180</sup> U.S. CONST, amend. V (“[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . .”); see also *United States v. Nobles*, 422 U.S. 225, 233 (1975) (“The Fifth Amendment privilege against compulsory self-incrimination. . . protects ‘a private inner sanctum of individual feeling and thought’” quoting *Couch v. United States*, 409 U.S. 322, 327 (1973)); *Pennsylvania v. Muniz*, 496 U.S. 582, 595–96 (1990) (“the privilege is asserted to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government”); *Boyd v. United States*, 116 U.S. 616, 630 (1886) (“The principles laid down in this opinion . . . apply to all invasions on the part of the government and its employees of the sanctity of a man’s home and the privacies of life.”); Robert B. McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 206, 210–11 (1967) (providing a legal analysis of the privilege against self-incrimination).

as a negative right (freedom from intrusions on the functioning of the mind), decisional privacy can be seen as the positive version of intellectual privacy: the freedom to exercise one's mind. As a positive right, it is arguably separate from, although closely related to, the protection of thoughts.

In the US, decisional privacy primarily protects the right of individuals to make certain personal decisions—specifically those decisions related to sex, sexuality, and child rearing.<sup>181</sup> The right does not appear in the text of the US Constitution itself, but the Supreme Court has held that it flows from the “penumbras” of rights embedded in the Bill of Rights.<sup>182</sup> An influential line of Supreme Court decisions have held that decisional privacy encompasses the use of contraceptives by married<sup>183</sup> and unmarried<sup>184</sup> couples, decisions about whether or not to abort pregnancy,<sup>185</sup> the private possession of (some) obscene material,<sup>186</sup> and the right to engage in sexual activity inside one's home without the interference of the state,<sup>187</sup> as well as to avoid the related “disclosure of personal matters.”<sup>188</sup>

Although European legal thinking does not use the term “decisional privacy,” procreative decisions are an important part of the

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<sup>181</sup> See SOLOVE, *supra* note 4, at 165 – 66 (giving a modern history of the concept of privacy—particularly as it is discussed by philosophers and legal theorists).

<sup>182</sup> *Id.* at 165.

<sup>183</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965) (“Yet if, upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.”).

<sup>184</sup> See *Eisenstadt v. Baird*, 405 U.S. 438, 452 – 55 (1972) (“Nor can the statute be sustained simply as a prohibition on contraception *per se*, for, 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.”).

<sup>185</sup> See *Roe v. Wade*, 410 U.S. 113, 164 (1973) (“A state criminal abortion statute of the current Texas type, that excepts from criminality only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage *and without recognition of the other interests involved*, is violative of the Due Process Clause of the Fourteenth Amendment.”) (emphasis added).

<sup>186</sup> See *Stanley v. Georgia*, 394 U.S. 557, 560 – 68 (1969) (“The First Amendment as made applicable to the States by the Fourteenth prohibits making mere private possession of obscene material a crime.”).

<sup>187</sup> See *Lawrence v. Texas*, 539 U.S. 558, 564 – 79 (2003) (holding that a state law criminalizing homosexual sodomy was unconstitutional).

<sup>188</sup> *Whalen v. Roe*, 429 U.S. 589, 599 – 600 (1977)

right to privacy in Europe as well: the right to “private life . . . incorporates the right to respect for both the decisions to become and not to become a parent.”<sup>189</sup> More generally, article 8 ECHR “also protects a right to personal development,” and “the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.”<sup>190</sup> The right to privacy thus also manifests itself as a “right to self-determination,” protecting “personal autonomy in the sense of the right to make choices about one's own body” and, more broadly, “the ability to conduct one's life in a manner of one's own choosing.”<sup>191</sup> The Polish Constitution explicitly recognizes this right to self-determination in the form of a person's right “to make decisions about his personal life,” mentioned in the same provision as the general right to private and family life.<sup>192</sup> More generally, the German Constitution establishes a general personality right (*allgemeines Persönlichkeitsrecht*) in the form of a person's “right to free development of his personality”;<sup>193</sup> this is broader than privacy, but has served as the foundation (along with human dignity) of the right to informational self-determination, which is one of the main constitutional manifestations of informational privacy.<sup>194</sup>

Altogether, although the term itself is not widely used outside the American legal tradition, we can consider decisional privacy to be a distinct type of privacy, which protects the autonomy of persons to make decisions about their body or other aspects of their private life.

#### 4.5.4. Protection of Identity

Another aspect of privacy of the person is the respect for peo-

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<sup>189</sup> See *Evans v. United Kingdom*, App. No. 6339/05, Eur. Ct. H.R. at 71 (2007) (“The Grand Chamber agrees with the Chamber that ‘private life’, which is a broad term encompassing, *inter alia*, aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world [citation omitted], incorporates the right to respect for both the decisions to become and not to become a parent.”).

<sup>190</sup> *Pretty v. United Kingdom*, App. No. 2346/02, Eur. Ct. H.R. at 61 (2002).

<sup>191</sup> *Id.* at 61–62, 66.

<sup>192</sup> PL, art. 47.

<sup>193</sup> GG, art. 2(1) (Ger.).

<sup>194</sup> See *infra* section 4.6 (describing the privacy of personal data).

ple's (sense of) identity, in the broad sense of how people perceive themselves, and how they think that others perceive them.<sup>195</sup> Some instantiations of this right put emphasis on the person's sense of identity as an individual (a first-person perspective, which also has connections to mental integrity), while others focus more on the person's standing in social life (a third-person perspective centering on someone's reputation, which is also related to the freedom to develop oneself in a social context).

The Czech Constitution enumerates several aspects of this right in part of the provision stipulating the general right to privacy (and, interestingly, anteceding the general privacy right): human dignity, honor, good reputation, and name.<sup>196</sup> Similarly, the Polish Constitution protects "honour and good reputation," alongside the general right to privacy.<sup>197</sup> Although the other national constitutions do not feature these aspects, we found them in quite a number of countries in our backup group, – often enumerated together with the general right to privacy,<sup>198</sup> suggesting that aspects of identity and reputation are not universally but nevertheless quite broadly recognized as an important part of privacy protection. These elements are also an integral part of article 8 ECHR, which encompasses "a person's right to protection of his or her reputation."<sup>199</sup> This is because someone's reputation "forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her 'private life.'"<sup>200</sup>

While these aspects see more to the person's identity in social

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<sup>195</sup> Identity is a relational concept: someone's sense of self develops according to how she perceives others perceive her. See WP7, D7.14A: WHERE IDEM-IDENTITY MEETS IPSE-IDENTITY. CONCEPTUAL EXPLORATIONS (Mireille Hildebrandt, Bert-Jaap Koops, and Katja De Vries, eds., Frankfurt: FIDIS, 2008) ("identity is fundamentally relational: one's relations with the rest of the world may constrain the self but these relations are also constitutive of identity.").

<sup>196</sup> CZ art. 10(1) ("Everyone has the right to demand that his human dignity, personal honor, and good reputation be respected, and that his name be protected."). The right to private and family life is established in art. 10(2), see *Základních práv a svobod* [Charter of Fundamental Rights and Basic Freedoms], *ÚSTAVA ČESKÉ REPUBLIKY* [CONSTITUTION OF THE CZECH REPUBLIC], Dec. 12, 1992, art. 10(2).

<sup>197</sup> PL art 47.

<sup>198</sup> BR art. 5 ("the privacy, private life, honour and image of persons"); CR art. 35 ("private and family life, dignity, reputation and honour"); FI art. 10(1); RU art. 23(1) ("the right to privacy, to personal and family secrets, and to protection of one's honor and good name"); ES B.O.E. n. 18(1) ("right to honour, to personal and family privacy and to the own image").

<sup>199</sup> *Pfeifer v. Austria*, App. No. 12556/03, Eur. Ct. H.R. at 35, (2008).

<sup>200</sup> *Id.*

life, the sense of identity from a first-person perspective (knowing “who you are,” both literally and figuratively) is also covered by the right to respect for private life in European case law. This covers many aspects of identity; for example, “a person’s name or picture,”<sup>201</sup> knowing the identity of one’s natural parents,<sup>202</sup> and the “right of transsexuals to personal development.”<sup>203</sup> More generally, “respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual’s entitlement to such information is of importance because of its formative implications for his or her personality.”<sup>204</sup>

Thus, protection of identity, both in the form of protecting people’s honor and reputation in social life and in the form of protecting people’s capacity to know who they are and to become who they want to be, is an important part of privacy. We distinguish this as a separate type of privacy, which can be called *ipseital* privacy (as denoting the privacy in relation to the *ipse*; or *ipseity*,<sup>205</sup> as individuality and sense of self). Although the proximity of this right in many constitutional formulations to the general right to privacy suggests that it might be considered a sub-type of the general right to privacy, we think it conceptually clearer to situate it in the cluster of privacy of the person. After all, people’s identity is, in a sense, the core of the human person, and the sense of self requires protection particularly in order to safeguard mental integrity as well as to facilitate people’s autonomous decision-making, so there are also close connections to other types in this cluster.

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<sup>201</sup> *Id.* at 33.

<sup>202</sup> *Mikulić v. Croatia*, App. No. 53176/99 Eur. Ct. H.R. at 64 (2002) [hereinafter *Mikulić*] (finding that “the interests of the individual seeking the establishment of paternity must be secured” if not by DNA testing then by some alternative means).

<sup>203</sup> *Goodwin v. United Kingdom*, App. No. 28957/95 Eur. Ct. H.R. at 90, (2002).

<sup>204</sup> *Mikulić supra* note 202 at 54.

<sup>205</sup> The Merriam-Webster Online Dictionary defines “ipseity” as “individual identity [or] selfhood,” see MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/ipseity> (last visited Nov. 2, 2016) [<https://perma.cc/38AT-6AK8>].

#### 4.6. Cluster 5: Privacy of Personal Data

A final cluster is the protection of personal data. Constitutional law protects personal data in most European countries – although not in Italy – as well as at the European level. Most jurisdictions use the term “personal data,”<sup>206</sup> though some use the term “(personal) information.”<sup>207</sup> It is a stand-alone right, being regulated in a provision separate from that containing the right to privacy, most famously in the EU Charter but also in Poland and Slovenia.<sup>208</sup> The Czech Republic and the Netherlands also regulate the right to data protection in a separate paragraph of the provision containing the general right to privacy.<sup>209</sup> The constitutionalization of data protection as a separate right suggests, to some extent, that such protection is a fundamental right in itself (though it does not only, or always, protect privacy, since not all personal data relates to private life). However, the fact that it is either regulated in the same provision as the right to privacy (CZ, NL), or is included in the enumeration of privacy-related rights (immediately following the right to privacy (EU) or at the end of the privacy-rights catalogue (PL, SI)), demonstrates that it is still closely connected to privacy in the constitutional framing, and therefore can be seen as a distinct type of privacy – informational privacy. (The close connection

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<sup>206</sup> Charter of Fundamental Rights of the European Union, art. 8; CZ art. 10(3); NL art. 10, sub. 2, 3; SI art. 38.

<sup>207</sup> See DE (using the term “informational self-determination”); BVerfGE [Federal Constitutional Court] (Ger.) 15 December 1983, 1 BvR 209/83; 1 BvR 269/83; 1 BvR 362/83; 1 BvR 420/83; 1 BvR 440/83; 1 BvR 484/83; PL, art 51 (“information concerning [a] person”). In the UK, the tort of misuse of information is also considered to have a constitutional dimension, at least insofar as it has emerged as a new form of protection required by the UK’s commitments under the Eur. Conv. of H.R. and the requirement of the Human Rights Act 1998. See *Google v. Vidal-Hall*, [2015] EWCA Civ 311 (recognizing that the Human Rights Act 1998 and article 8 have left questions in need of resolution surrounding privacy torts).

<sup>208</sup> Charter of Fundamental Rights of the European Union, art. 8; PL art 51; SI art. 38. We see this also in countries in our backup group. See e.g., GR art. 9A (“All persons have the right to be protected from the collection, processing and use, especially by electronic means, of their personal data, as specified by law. The protection of personal data is ensured by an independent authority, which is constituted and operates as specified by law.”).

<sup>209</sup> CZ art. 10(3); NL art. 10, sub. 2, 3. We see this also in countries in our backup group. See e.g., BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 13(2) (Switz.) (“Every person has the right to be protected against abuse of personal data”).

with privacy is also visible in countries in our backup group that protect personal data explicitly in relation to privacy: Russia protects “information on the private life” of persons against processing without consent,<sup>210</sup> while Spain protects “data processing in order to guarantee the honour and personal and family privacy of citizens”).<sup>211</sup>

The form and scope of the right to data protection varies considerably. Some jurisdictions use a brief, general formulation, such as the Czech provision that protects people “from the unauthorized gathering, public revelation, or other misuse” of personal data,<sup>212</sup> while others, such as Poland, have an extensive provision listing many elements of the right to data protection.<sup>213</sup> In terms of the traditional data protection principles,<sup>214</sup> we encounter the collection limitation principle,<sup>215</sup> the purpose specification<sup>216</sup> and use limitation principle,<sup>217</sup> one aspect of the security safeguards principle in the form of protection of confidentiality,<sup>218</sup> the individual participation principle in the form of a right to access,<sup>219</sup> or to be informed<sup>220</sup> of data processing and the right to have data corrected<sup>221</sup> or deleted,<sup>222</sup> and the accountability principle in the form of oversight by an independent authority<sup>223</sup> or judicial protection<sup>224</sup>—

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<sup>210</sup> RU art. 24(1)

<sup>211</sup> ES, B.O.E. n. 18(4).

<sup>212</sup> CZ art. 10(3).

<sup>213</sup> PL, Rozdział [Chapter] II, art 51.

<sup>214</sup> See ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), GUIDELINES GOVERNING THE PROTECTION OF PRIVACY AND TRANSBORDER FLOWS OF PERSONAL DATA (2013) available at [http://www.oecd.org/sti/ieconomy/oecd\\_privacy\\_framework.pdf](http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf) [<https://perma.cc/3DRG-3F72>] (establishing data protection principles to promote respect for privacy as a fundamental value and a condition for the free flow of personal data across borders).

<sup>215</sup> CZ art. 10(3); PL Rozdział [Chapter] II, art 51(2).

<sup>216</sup> Charter of Fundamental Rights of the European Union, art. 8(2), Dec. 7, 2000 (“Such data must be processed fairly for specified purposes. . .”).

<sup>217</sup> SI art. 38(1).

<sup>218</sup> SI art. 38(2).

<sup>219</sup> Charter of Fundamental Rights of the European Union, art. 8(2), Dec. 7, 2000 (“. . . Everyone has the right of access to data which has been collected concerning him or her. . .”; PL, Rozdział [Chapter] II, art 51(3); SI art. 38(3).

<sup>220</sup> NL art. 10, sub. 3.

<sup>221</sup> NL art. 10, sub. 3; PL, Rozdział [Chapter] II, art 51(4).

<sup>222</sup> PL, Rozdział [Chapter] II, art 51(4).

<sup>223</sup> Charter of Fundamental Rights of the European Union, art. 8(3), Dec. 7, 2000 (“Compliance with these rules shall be subject to control by an independent authority”).



however, there is little commonality in the specification of these elements.

The variety in the form of the right is also interesting. Some jurisdictions formulate data protection as a negative liberty, most clearly seen in our backup group in the Swiss provision: “[e]very person has the right to be protected against abuse of personal data.”<sup>225</sup> Poland has a special form of negative liberty: “[n]o one may be obliged, except on the basis of statute, to disclose information concerning his person.”<sup>226</sup> The EU applies a formulation (“the right to the protection of personal data”) that suggests, although not very explicitly, a negative liberty.<sup>227</sup> In contrast, Germany phrases data protection as a positive liberty: the right to informational self-determination.<sup>228</sup> Other jurisdictions do not formulate data protection as an individual right, but as a positive obligation for the state to pass data protection legislation.<sup>229</sup> Some countries have both a negative liberty and a positive state obligation.<sup>230</sup>

While data protection at the constitutional level is primarily found in Europe, and not in the United States, informational privacy is constitutionally recognized in Canada as well, in the form of the Charter protecting (intimate) information that touches upon a person’s “biographical core.”<sup>231</sup> Thus, although privacy of personal data is not universally recognized at the constitutional level, as a type of privacy it is relatively firmly established – albeit with considerable variety in scope.

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<sup>224</sup> SI art. 38(3).

<sup>225</sup> CH, SR 101, art. 13(2); *see also* CZ art. 10(3) (a person has the “right to be protected from...misuse of his personal data”).

<sup>226</sup> PL, Rozdział [Chapter] II, art 51(1).

<sup>227</sup> Charter of Fundamental Rights of the European Union, art. 8(1), Dec. 7, 2000.

<sup>228</sup> BVerfGE, *supra* note 207.

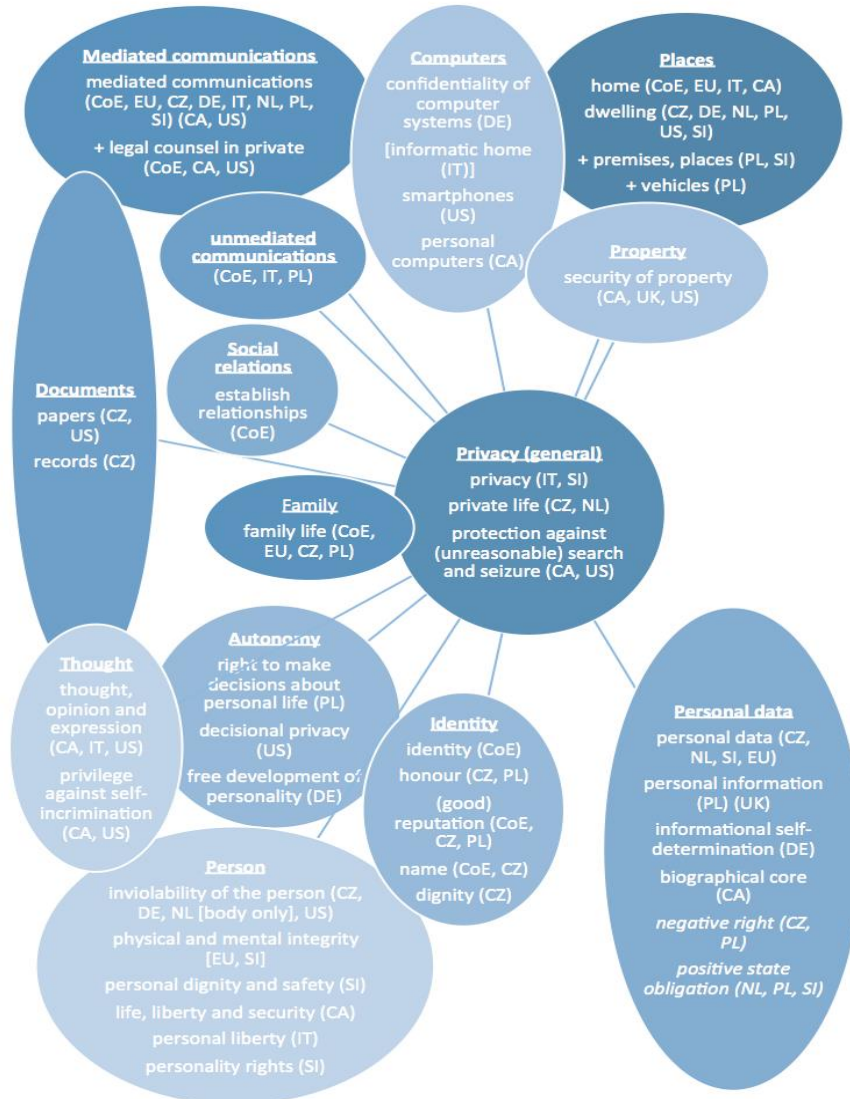
<sup>229</sup> NL [CONSTITUTION] art. 10, sub. 2,3 (Neth.).

<sup>230</sup> PL, Rozdział [Chapter] II, art 51(1) (negative liberty); PL, Rozdział [Chapter] II, art 51(5) (state obligation to legislate); SI art. 38(1) negative liberty); SI art. 38(1) (state obligation to legislate).

<sup>231</sup> *See Regina. v Cole*, [2012] 3 SCC 34,35 (holding that “everyone in Canada is constitutionally entitled to expect privacy” vis-a-vis the state in “information that is meaningful, intimate, and touching on the user’s biographical core”).

*4.7. Objects of Protection in Constitutional Rights to Privacy*

In this section, we map the objects of protection in constitutional rights to privacy. We have identified many objects, loosely grouped in clusters but with some overlap between clusters, as conceptually distinct, although sometimes closely connected, types. In Figure 1, we use overlapping ellipses to indicate where types, although distinct, are conceptually related, and we have used shade to suggest an indication of the prevalence of the type: the darker the shade, the more widely the object is protected in constitutional rights to privacy. The map reflects our analysis of the nine countries we selected, and may not be completely generalizable; however, since a quick scan of constitutions from our backup group did not materially affect the identification of substantially different objects of protection, we think this concept map is largely comprehensive.

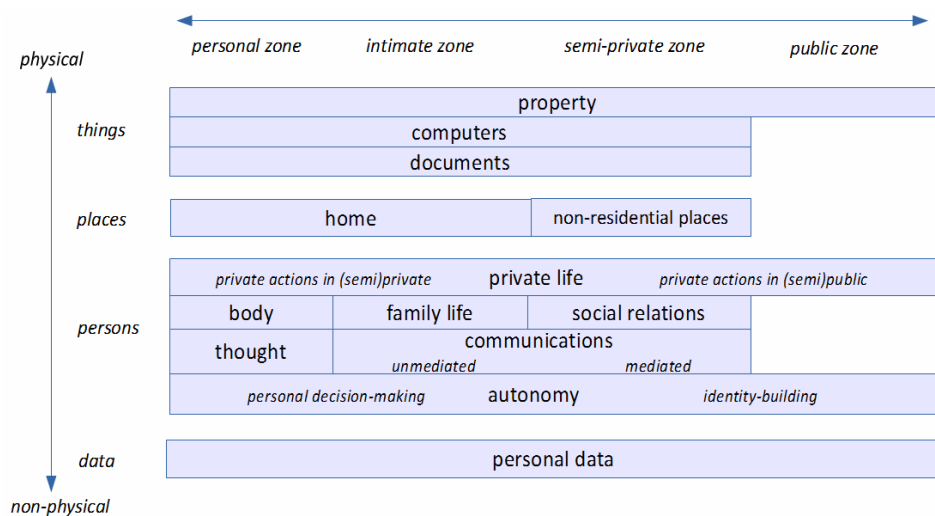


**Figure 1. Objects of protection in the constitutional rights to privacy in the nine primary countries**

#### 4.8. A Typology of the Objects of the Right to Privacy

Since the concept map of Figure 1 is not structured along dimensions and uses overlapping categories, it is not yet a typology.

Therefore, as the next step in our analysis, we have developed a related typology of objects of the right to privacy (see Figure 2 below), in which the objects of protection are presented more clearly, and—as befits a typology—positioned along relevant dimensions. In this typology, we use the horizontal spectrum from the personal zone to the public zone developed in Parts IV and V below and integrate this with the findings from the previous constitutional analysis. On the vertical axis, we utilize a dimension that ranges from physical to non-physical things. Thus, we can separate the objects in four categories: things, places, persons, and data. The objects identified in the constitutional analysis of Part III (Figure 1) are then placed along both axes. In this model, we see how the various physical and non-physical objects often have privacy relevance along various parts of the private/public spectrum.



**Figure 2. Typology of objects of the right to privacy**

The objects of the right to privacy can be placed on the vertical spectrum from physical to non-physical. On one end of the spectrum we place things, the physical objects: property, computers, and documents. Further down the spectrum we put places: home and non-residential places that enjoy privacy protection. While these are still largely defined by their physical boundaries, spaces are less tangible than physical objects earning a placement further

down the spectrum. Next we place the person, which is protected both in its physical aspects: private actions and the body; in aspects that have physical and non-physical nature: family life, social relations and communications; and aspects that are almost non-physical: thought, autonomy, identity. At the non-physical end of the spectrum, we place personal data (which are representations of the above). That is not to say that personal data are not represented in a physical form; however, what is protection-worthy from the privacy perspective is not the physical form, but rather the information that it contains.

In terms of things, we have distinguished between property, documents, and computers as objects identified in the literature and the constitutional law that we analyzed. Property (especially in common law jurisdictions), an inherently physical object (excluding intellectual property from our analysis), plays an important role as an object or proxy for privacy interests in various types of privacy identified in Figure 3. Documents, a related concept, also protect a range of privacy interests in constitutional law. Computers, as physical things or artifacts, have emerged as an interesting sort of hybrid proxy for informational privacy and proprietary privacy interests.

Constitutional privacy provisions also protect homes (in particular dwellings) and other, non-residential private places. Persons are protected by a variety of objects and in various contexts at various points along the horizontal spectrum, including private actions and behavior, bodily integrity, family life, social relations, thought, communications, and personal or intimate decision-making. Within the category of persons, we can see distinctions between more physical and less physical objects. For example, a body is a more physical object of protection than, say, thought or personal decision-making. Finally, personal data—or information about persons, things, or places—exists as a more ephemeral and intangible object of protection. It is related to the concept of informational privacy, but is often protected as an object in its own right.

#### 4.9. Conclusion

In this section, we have developed a typology of objects that the right to privacy protects. We did this with the assumption that

identifying the various objects of protection of the right to privacy can help distinguish the most relevant types of privacy. The mapping exercise corroborates this assumption to some extent, but only up to a point. Some types of objects of the right to privacy coincide relatively clearly with a type of privacy, e.g., protection of the home and other private places coincides with spatial privacy. However, it is not always clear which type of privacy is related to the protection of a certain object. The protection of documents, for example, relates to communicational privacy but also to intellectual privacy, and the emerging constitutional protection of computers seems a hybrid manifestation of spatial, proprietary, and communicational privacy.

This suggests that we may not yet have a sufficiently sharp understanding of the different types of privacy – the clustering seems too coarse and too focused on *objects* of actual privacy protection rather than the underlying *type* of privacy that is supposed to be protected. The right to privacy tends to protect objects that serve as proxies for a type of privacy, but proxies are not always precise and, through socio-technological change, may become less precise than they were in the past. Thus, there may be, at points, gaps between what the right to privacy protects and the types of privacy that can be theoretically distinguished. Therefore, in order to cluster types of privacy more clearly, finding ideal types of privacy rather than proxies of privacy protection, we need to delve deeper into the theoretical accounts of privacy and its various dimensions identified in the literature.

## 5. THEORETICAL/DOCTRINAL DIMENSIONS OF PRIVACY

To put the above-identified objects of the right to privacy into a theoretical framework that enables identifying ideal types of privacy, we have analyzed important theoretical privacy scholarship from each jurisdiction. By studying how authors distinguish various forms of privacy, from both doctrinal and philosophical points of view, we can derive what scholarship considers the main dimensions along which different forms of privacy can be positioned. Using an inductive approach, we have first studied the literature from each jurisdiction to identify distinctions made; subsequently, we zoomed in on distinctions that we repeatedly encountered; and

finally, we tried to aggregate where possible these distinctions into overarching dimensions. This resulted in identifying four conceptual dimensions that we present below and that will help to structure our typology of privacy in section 6. Importantly, where we refer to *dimensions of privacy*, we do not refer to the contours or outlines of a specific *type of privacy*, but rather to axes along which the identified types can be positioned in a typological model. Moreover, as our model focuses on defining *ideal types*, we have not broken down each dimension into every possible manifestation, but rather limit ourselves to identifying the types that demonstrate the characteristics at different positions along the spectrum most clearly.

### 5.1. The Public/Private Spectrum

One very common, although somewhat criticized, dimension of privacy is the public/private dichotomy.<sup>232</sup> Along the spectrum between purely private (secluded, secret, etc.) and fully public (publicized, etc.), authors have identified several interesting possibilities for privacy and, in theory, what is (or what ought to be) private. We take Westin's four states of privacy (solitude, intimacy, anonymity, and reserve) as our starting point, although we modify his categorization somewhat as we incorporate inputs from additional scholarship. In our model,<sup>233</sup> we draw the spectrum as starting from a private zone (solitude), moving to an intimate zone (intimacy), a semi-private zone (secrecy) and ending with a public zone, (inconspicuousness).

The notion of privacy "zones," in our framing, draws upon contributions from Polish scholarship, which identified various zones (or spaces) along a spectrum from common/public zones (or public space) to semi-public zones/spaces, semi-intimate zones (excluded space, private family space), and intimate zones and private space.<sup>234</sup> We find similar trends within the literature else-

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<sup>232</sup> See e.g., Nissenbaum, *PRIVACY IN CONTEXT* *supra* note 1, at 90-91 (pointing out "at least three ways in which the private/public dichotomy has shaped the way *privacy* is defined" and dismissing the public/private dichotomy of privacy as a foundational basis for normative conceptions of privacy).

<sup>233</sup> Our model, or typology of privacy, is explained *infra* in Part 6.

<sup>234</sup> See Anna Agata Kantarek, *O prywatności*, in *CZASOPISMO TECHNICZNE* 1-A, 70-71 (2007).

where as well. Lever has conceptualized privacy as involving combinations of “seclusion and solitude, anonymity and confidentiality, and intimacy and domesticity.”<sup>235</sup> German authors present the *Sphärentheorie*<sup>236</sup> (spheres theory) and the *Zwiebelmodelle*<sup>237</sup> (onion model), which distinguish the spheres/layers of life from personal intimacy, to intimate relations, and finally the social/societal sphere. Steeves has argued for a model of “privacy as informational control” that defines *solitude*—on one end of the spectrum—as a state of non-disclosure lacking information flow, moving to *intimacy* as information flow and disclosure “within relationships of trust,” and finally—at the spectrum’s far end—*participation*, as a general state of disclosure “to general society unless reserve [is] respected by others.”<sup>238</sup>

### 5.1.1. The Private Zone (Solitude)

*Solitude* has been referenced by many authors as an important, even foundational, aspect of privacy.<sup>239</sup> We find connections in the literature between solitude and bodily privacy, spatial privacy, property-based privacy interests, and intellectual privacy. Several authors discuss states of privacy defined by physical distance and

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<sup>235</sup> Annabelle Lever, *Privacy, Democracy and Freedom of Expression in SOCIAL DIMENSIONS OF PRIVACY: INTERDISCIPLINARY PERSPECTIVES* 162, 165 (Beate Roessler and Dorota Mokrosinska, eds., Cambridge, UK: Cambridge University Press, 2015).

<sup>236</sup> See e.g., Geminn and Roßnagel, *supra* note 94 (referring to the private sphere (*Privasphäre*) as an important element of *Sphärentheorie*, which explains the spheres of life as concentric circles, from identity, intimacy, and bodily integrity to the private and then the social spheres of life).

<sup>237</sup> See Beate Röessler, *DER WERT DES PRIVATEN* 18 (Frankfurt am Main: Suhrkamp, 2001) (distinguishing layers of personal (bodily) intimacy and privacy, family or other intimate relations, and the societal, or state layer).

<sup>238</sup> See Steeves, *Reclaiming the Social Value of Privacy*, *supra* note 14, at 201 (Table 11.2) (providing a visual depiction of the spectrum).

<sup>239</sup> See e.g., Prosser, *supra* note 44, at 389 (identifying intrusion upon a person’s “seclusion or solitude”); Röessler, *supra* note 237; Geminn and Roßnagel, *supra* note 94 (identifying private spheres, somewhat akin to solitude, as the most basic layers of privacy); Lever, *supra* note 235 at 165 (connecting solitude to seclusion); Kantarek, *supra* note 234 at 71-72 (connecting solitude to seclusion); Darhl M. Pedersen, *Dimensions of Privacy*, 48 *PERCEPTUAL & MOTOR SKILLS* 1291, 1293 (1979) (identifying three dimensions relating to Westin’s solitude: reserve or “unwillingness to be with others,” isolation or “a desire to be alone and away from others,” and solitude or “being alone by oneself and free from observation by others”).



the possession of space,<sup>240</sup> (physical) inaccessibility and separation from others,<sup>241</sup> or repose (meaning, “calm, peace, and tranquility”),<sup>242</sup> some linking this state to absolute informational self-determination.<sup>243</sup> Other authors also separately identify freedom of thought as an aspect of privacy,<sup>244</sup> or describe privacy as *sanctuary* (or the prohibition on “other persons from seeing, hearing, and knowing”).<sup>245</sup> Mantovani connects privacy to a state where “no one knows,” stating that “the legal object [i.e., what is being protected by the right to privacy] cannot be ‘private life,’ but the ‘privateness’ of life and, more elegantly, the ‘privacy’ of private life.”<sup>246</sup> Mantovani also states that this “privacy of private life” includes, as aspects of solitude and isolation,

all those multiple aspects of private life that, by their nature, allow a total isolation (domiciliary life, diaries, memoirs, etc.) or, in any case, do not suppose any relation with other persons.<sup>247</sup>

The link to domiciliary life and its protection has been made by others, emphasizing its enabling function for individuals to find

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<sup>240</sup> Kantarek, *supra* note 234 at 69-77.

<sup>241</sup> Janez Čebulj: Varstvo informacijske zasebnosti v Evropi in Sloveniji [Protection of Informational Privacy in Europe and Slovenia], 1992; Tomáš Sobek, *Svoboda a soukromí*, 37-48 in *PRÁVO NA SOUKROMÍ*, (Vojtěch Šimíček, ed., Brno, 2011) (connecting privacy to a Warren and Brandeisian notion of being left alone); Peter Blok, *HET RECHT OP PRIVACY. EEN ONDERZOEK NAAR DE BETEKENIS VAN HET BEGRIIP ‘PRIVACY’ IN HET NEDERLANDSE EN AMERIKAANSE RECHT*, 280-81 (2002) (defining the private sphere as a sphere in which persons are shielded from the outside world).

<sup>242</sup> Gary L. Bostwick, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 *CAL. L. REV.* 1447, 1451 (1976).

<sup>243</sup> DeCew has argued that “privacy of accessibility” includes the possibility of a person to be let alone, in a state where no one has physical or informational access to her, see Judith Wagner DeCew, *IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY* 76-77 (1997). Wagnerová connects privacy to space in which an individual enjoys absolute informational self-determination, see Eliška Wagnerová, *Právo na soukromí: Kde má být svoboda, tam musí být soukromí*, in *PRÁVO NA SOUKROMÍ* 49-62 (Vojtěch Šimíček ed., 2011).

<sup>244</sup> Bostwick, *supra* note 242 at 1451; Jan Filip, *Úvodní poznámky k problematice práva na soukromí*, at 14, in *PRÁVO NA SOUKROMÍ* 16-17 (Vojtěch Šimíček, ed., 2011); Finn, et al., *supra* note 4 at 8-9 (“People have a right not to share their thoughts or feelings or to have those thoughts or feeling revealed. Individuals should have the right to think whatever they like.”).

<sup>245</sup> Bostwick, *supra* note 242 at 1456.

<sup>246</sup> Mantovani, *supra* note 96 at 584 (authors’ translation).

<sup>247</sup> *Id.* at 585 (translated).

oneself and become autonomous beings,<sup>248</sup> and its function in providing a boundary from unwanted interference and the “right to be let alone.”<sup>249</sup> Motyka identifies a form of “attentional privacy” that protects solitude and seclusion by ensuring against unwanted contact, for example disturbing a person’s rest or intruding upon a person through burdensome or unwanted marketing practices (phone, mail, email, etc.).<sup>250</sup> Steeves recognizes solitude as a baseline aspect of privacy, while also arguing that other dimensions are necessary, stating that when a person’s solitude is invaded, “the individual experiences a sense of trespass, as he or she is unable to negotiate the desired level of aloneness.”<sup>251</sup>

### 5.1.2. *The Intimate Zone (Intimacy)*

Westin’s concept of the intimate zone refers to a state where the individual is acting as part of a small unit. His definition is not limited to intimate sexual relationships, but also to intimacy with family, friends, and work colleagues. References to “intimate” zones or spaces appear in the literature from multiple countries, many of them with similar meanings (although, in some the term “intimate” may also encapsulate elements of seclusion and solitude).<sup>252</sup> We have identified elements of spatial and proprietary

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<sup>248</sup> See Alenka Šelih, *Zasebnost in nove oblike kazenskopravnega varstva* [Privacy and New Forms of Protection in Criminal Law], 1979.

<sup>249</sup> See, e.g., Anna Banaszewska, *Prawo do prywatności we współczesnym świecie*, 13 BIAŁOSTOCKIE STUDIA PRAWNICZE 127, 127-29 (2013); Daphne Gilbert, *Privacy’s Second Home: Building a New Home for Privacy Under Section 15 of the Charter*, in LESSONS FROM THE IDENTITY TRAIL: ANONYMITY, PRIVACY AND IDENTITY IN A NETWORKED SOCIETY 139-155, 141 (Ian Kerr et al. eds., 2009) (connecting a form of “territorial privacy,” as protected by section 8 of the Canadian Charter, to private action within the walls of a person’s home).

<sup>250</sup> Krzysztof Motyka, *Prawo do prywatności* [The Right to Privacy], 85 ZESZYTY NAUKOWE AKADEMII PODLASKIEJ W SIEDLCACH 25-26 (2010).

<sup>251</sup> Steeves, *supra* note 14, at 206.

<sup>252</sup> See, e.g., Judith DeCew, *Privacy*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY at § 3.3 (Edward N. Zalta ed.), available at <http://plato.stanford.edu/archives/spr2015/entries/privacy/> [<https://perma.cc/5T3Y-FT2A>] (summarizing multiple conceptions of intimacy or intimate zones in prior privacy literature and explaining that without privacy there would be no intimacy); Čebulj, *supra* note 241; MATEJ KOVAČIĆ, NADZOR IN ZASEBNOST V INFORMACIJSKI DRUŽBI [SURVEILLANCE AND PRIVACY IN AN INFORMATIONAL SOCIETY] 2006, 39-40; Rachels, *supra* note 25 (describing the importance of privacy as to intimate societal relationships); Edward Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964) (divulging into the social value privacy

privacy interests appearing within this range of the spectrum, as well as varieties of associational privacy and decisional privacy (which has some overlap with bodily privacy insofar as the latter regulates intimate access to the person's body) (see Figure 3).

As mentioned earlier, Steeves defines the intimate zone as a state of limited information flow within trusted relationships.<sup>253</sup> The "spheres theory" and "onion model" posited by Geminn/Roßnagel and Rössler, respectively, define intimate spheres of private life, and numerous other authors also present varying definitions of what intimacy—as a zone of privacy protection—ought to encompass.<sup>254</sup> Some of these definitions encompass broader forms of intimacy, while others are defined by reference to family life, decisional privacy, or sexual relationships.<sup>255</sup> The ECHR and some of the European constitutions—and associated case law—examined in Part III, differentiate somewhat between forms of "private life" and "family life," and each contains elements that fit clearly within the intimate zone.<sup>256</sup>

Wagnerová argues that the passive sphere of private life encompasses a personal sphere, which is immanent to humanity, such as human dignity, as well as the inner need for social contacts

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holds); CHARLES FRIED, *AN ANATOMY OF VALUES* 142 (1970) (investigating the value of privacy and social choices and stating that "privacy grants the control over information which enables us to maintain degrees of intimacy."); Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977) ("But privacy is the necessary, limiting condition of much or all that we value in our intimate lives."); Robert S. Gerstein, *Intimacy and Privacy*, 89 ETHICS 76 (1978) (arguing intimate relationships would not exist at all without privacy); JEAN L. COHEN, *REGULATING INTIMACY: A NEW LEGAL PARADIGM* (2002) (arguing that norms and rights of privacy are legally constructed rather than areas that should be left alone from legal intervention); JULIE INNESS, *PRIVACY, INTIMACY AND ISOLATION* (1992) (redefining privacy relative to intimacy).

<sup>253</sup> Steeves, *supra* note 14, at 201.

<sup>254</sup> See e.g., Lever, *supra* note 235 (holding people are allowed to keep true facts about themselves to themselves); Sandra Seubert, *Der gesellschaftliche Wert des Privaten*, 36 DATENSCHUTZ UND DATENSICHERHEIT 100, 100-04 (2012); Wagnerová, *supra* note 243; Filip, *supra* note 244; Kantarek, *supra* note 234 at 71 ("intimate space"); Banaszewska, *supra* note 249 at 127-128 ("intimate sphere" and "family life"); Šelih, *supra* note 248 at 3 (early notions of privacy revolved, in part, around questions of family life").

<sup>255</sup> See Filip, *supra* note 244 at 16-17 (distinguishing the "intimate" (solitude-like) circle from the "family" circle); Pedersen, *supra* note 239 at 1293 (including as privacy factors "intimacy with family" and "intimacy with friends"); Bostwick, *supra* note 242 at 1466 ("zone of intimate decision").

<sup>256</sup> See Wagnerová, *supra* note 243 at 52-53; Filip, *supra* note 244 at 14; text of Czech Charter art. 10; ECHR art. 8.

and belonging.<sup>257</sup> Blok argues that “intimate life” is what the general right to privacy protects in the Dutch context.<sup>258</sup> Based on comparative legal analysis of Dutch and US law, Blok also concludes that both systems have the same understanding of the core of the private sphere of life: this comprises the home, intimate life, and confidential communications, supplemented with certain parts of the body, in particular the “private parts.”<sup>259</sup> Other authors emphasize the value of privacy in enabling the autonomous creation of new and deeper connections with others,<sup>260</sup> and “different sorts of relationships with different levels of intimacy.”<sup>261</sup> Similarly, Goold has connected the intimate and broader social aspects of privacy—those that might be implicated in the “semi-private” or “public” zones discussed below—by arguing that, “[w]ithout privacy, it not only becomes harder to form valuable social relationships—relationships based on exclusivity, intimacy, and the sharing of personal information—but also to maintain a variety of social roles and identities.”<sup>262</sup>

### 5.1.3. *The Semi-Private Zone (Secrecy)*

Within the semi-private zone, the interests in privacy as a means to enable relationships remains important—and some aspects of intimacy, as discussed in the previous subsection, may fall into the semi-private zone—but we also find the emergence of privacy interests in reputation<sup>263</sup> and identity-building on a broader

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<sup>257</sup> Wagnerová, *supra* note 243 at 54.

<sup>258</sup> Blok, *supra* note 241 at 58.

<sup>259</sup> *Id.* at 290.

<sup>260</sup> Šelih, *supra* note 248 at 30-31.

<sup>261</sup> Kirsty Hughes, *The Social Value of Privacy, the Value of Privacy to Society and Human Rights Discourse*, in *SOCIAL DIMENSIONS OF PRIVACY: INTERDISCIPLINARY PERSPECTIVES* 225, 226 (Beate Roessler & Dorota Mokrosinska, eds., 2015); *see also* Rachels, *supra* note 25, at 326 (developing “an account of the value of privacy based on the idea that there is a close connection between our ability to control who has access to us and to information about us, and our ability to create and maintain different sorts of social relationships with different people.”).

<sup>262</sup> Benjamin J Goold, *Surveillance and the Political Value of Privacy*, 1 *AMSTERDAM L. F.* 3, 4 (2009).

<sup>263</sup> Reputation is explicitly recognized in some jurisdictions as an element of privacy worthy of constitutional legal protection. *See* Wagnerová, *supra* note 243 at 52-53; Czech Charter, art. 10. (“Everyone has the right to demand that his human dignity, personal honor, and good reputation be respected, and that his name

scale. Otherwise “private” communications through mediated forms of technology may become less intimate and more public because they are stored, transmitted, and (possibly) analyzed by the third-party intermediary (often a commercial entity, e.g., Facebook or Google).<sup>264</sup> In the physical world, actions and communication within this zone also occurs in semi- or quasi-public spaces. Wagnerová differentiates between the “social sphere” – which encompasses societal, civil and professional associations, where informational self-determination may be restricted under certain conditions – and the “public sphere” – which exists at the outer edge of the social sphere, and which is accessible to everyone.<sup>265</sup> Filip also differentiates between circles of accessibility involving public, semi-public (workplace), family, and intimate access to the self.<sup>266</sup> Others do not mark explicit divides between the semi-public and public spheres,<sup>267</sup> but we find keeping the two apart helps to account for some variation in the broader comparative constitutional analysis.

As mentioned above, some aspects of Westin’s states of “anonymity” and “reserve” exist within this zone as well. Westin defines *anonymity* as a state where the individual is in public (or at least not private) places but still seeks and finds freedom from identification and surveillance.<sup>268</sup> Westin’s *reserve*, on the other hand, involves the creation of a psychological barrier against unwanted intrusions, and expresses the individual’s choice to withhold or disclose information – a “dynamic aspect of privacy in daily interpersonal relations.”<sup>269</sup> Interestingly, Mantovani separates

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be protected”).

<sup>264</sup> Blok argues that “confidential communications” ought to be protected, and this falls within this zone of mediated communications not intended for full public disclosure, see Blok, *supra* note 241, at 283. Other authors argue the same point, for examples, see Finn et al., *supra* note 4 and Charles Raab & Benjamin Goold, PROTECTING INFORMATION PRIVACY: EQUALITY AND HUMAN RIGHTS COMMISSION RESEARCH REPORT 69, 9-11 (2011).

<sup>265</sup> Wagnerová, *supra* note 243 at 55.

<sup>266</sup> Filip, *supra* note 244 at 16-17. Cf. Blok, *supra* note 241 (arguing that case law does not support the conclusion that the place of work as such is part of the personal sphere of life).

<sup>267</sup> See e.g., Rössler, *supra* note 237 at 18 (distinguishing between “intimate” and the “societal/state” layers, but not between semi-public and public); cf. Geminn & Roßnagel, *supra* note 94 at 705-706 (including in their definition of the public sphere reference to reputational interests, and also not making the explicit distinction between semi-public and public spheres).

<sup>268</sup> WESTIN, *supra* note 25, at 31.

<sup>269</sup> *Id.*, at 32.

privacy and secrecy—in the Italian context—in a way that comes down to associating privacy with Westin’s states of solitude, intimacy, and anonymity, and secrecy with Westin’s state of reserve.<sup>270</sup> Mantovani defines secrecy as “characterized . . . by situations of private life that imply . . . relations with other persons who participate in the legitimate knowledge of these (e.g., the professional in the professional secret, the telegraphic operator in the telegraphic secret).”<sup>271</sup> In relation to ideas of withholding and disclosing embedded in Westin’s writings, Altman argues that privacy is “an interpersonal boundary process by which a person or a group regulates interaction with others.”<sup>272</sup> Steeves modifies Altman’s position, arguing that more general social interactions exist along a spectrum, and that privacy is “a dynamic process that is exhibited by the individual in social interaction with others, as the individual withdraws from others into solitude or moves from solitude to intimacy and general social interaction.”<sup>273</sup> Cohen ties some of these concerns into her argument that the “spatial dimension” of privacy includes an “interest in avoiding or selectively limiting *exposure*,” and that concerns for privacy in the public and semi-private zones must also account for “the structure of experienced space.”<sup>274</sup>

#### 5.1.4. *The Public Zone (Inconspicuousness)*

The public zone encompasses privacy interests in private actions in public spaces, broad identity-building and developing autonomy, and restricting use of or access to property and personal data in public-space environments. It also draws on aspects of Westin’s notions of anonymity and reserve. The importance of privacy in public is being able to remain inconspicuous in public spaces, and thus being able to be oneself even when exposed to the public view. An important mechanism here is “civil inattention,”—that is, the norms of seeing but not taking notice (or perhaps rather, demonstrating not to take notice), for instance by

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<sup>270</sup> Mantovani, *supra* note 96 at 584-85.

<sup>271</sup> *Id.* at 585

<sup>272</sup> IRWIN ALTMAN, *THE ENVIRONMENT AND SOCIAL BEHAVIOR* 6 (1975).

<sup>273</sup> Steeves, *supra* note 14, at 206.

<sup>274</sup> Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181, 181 (2008) (emphasis added).

averting one's eyes.<sup>275</sup> On one hand, some jurisdictions refuse to recognize privacy rights in public space or publicly situated activities and communication on the theory that "[i]f the place . . . is not in fact secure against the world in general, then it is not secure against agents of the state in particular, and so any expectation that the state [or others] will not intrude is not reasonable."<sup>276</sup> Blok concludes that Dutch law does not exclude the existence of a right to privacy in public, but that the courts seldom assume a violation of this right when people are observed in public; the most classic case (*Edamse bijstandsmoeder*) concerned observation of public space in order to determine whether two people lived together, and thus concerned intimate life.<sup>277</sup>

On the other hand, many scholars reject this rigid private/public boundary.<sup>278</sup> Rössler also describes a model (separate from the onion model discussed earlier) where even things done in the public are private matters when done by private persons.<sup>279</sup> The private sphere expands beyond privacy, on some accounts, to cover all situations that have potential to generate information about a person.<sup>280</sup> In Steeves's view, by not collapsing privacy merely into solitude, privacy can maintain relevance "throughout the full range of human experience," including "general social interaction" in non-private places:<sup>281</sup>

An individual who moves through public spaces in high

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<sup>275</sup> ERVING GOFFMAN, BEHAVIOR IN PUBLIC PLACES: NOTES ON THE SOCIAL ORGANIZATION OF GATHERINGS 83-88 (1963); see generally Gary T. Marx, *Coming to Terms: The Kaleidoscope of Privacy and Surveillance*, in SOCIAL DIMENSIONS OF PRIVACY: INTERDISCIPLINARY PERSPECTIVES 32 (Beate Roessler & Dorota Mokrosinska, eds., 2015) (rising levels of surveillance are challenging the practical ability to ensure civil inattention, especially in urban spaces).

<sup>276</sup> Hamish Stewart, *Normative Foundations for Reasonable Expectations of Privacy*, 54 S.C.L.R. (2d) (2011); see also Wagnerová, *supra* note 243 at 55 (establishing "public sphere" as accessible to everyone).

<sup>277</sup> Blok, *supra* note 241.

<sup>278</sup> See e.g., Cohen, *supra* note 274 (defining privacy in terms of a spatial dimension and informational dimension rather than in terms of a public realm and private realm); Finn, et al., *supra* note 4, at 9 ("[I]ndividuals have the right to move about in public or semi-public space without being identified, tracked or monitored. This conception of privacy also includes a right to solitude and a right to privacy in spaces such as the home, the car or the office.").

<sup>279</sup> Rössler, *supra* note 237 at 18.

<sup>280</sup> See Stefano Rodotà, *Riservatezza*, in ENCICLOPEDIA ITALIANA - VI APPENDICE (2000), available at [http://www.treccani.it/enciclopedia/riservatezza\\_\(Enciclopedia-Italiana\)/](http://www.treccani.it/enciclopedia/riservatezza_(Enciclopedia-Italiana)/).

<sup>281</sup> Steeves, *supra* note 14, at 197, 206.

proximity with others but who remains relatively closed to them can achieve privacy through anonymity or reserve. Excessive crowding may impinge on these states but, as Westin's work indicates, societies that experience physical crowding develop psychological mechanisms to maintain social distance.<sup>282</sup>

The ECtHR has also held that the right to a private life under Article 8 of the ECHR does not require seclusion. Specifically, the right may exist in purely private actions occurring in public space, even for public figures.<sup>283</sup>

### 5.2. *Physical versus Non-physical (Informational) Privacy*

The literature also describes a dimension from physical to non-physical privacy, which reflects the vertical axis of our typology of objects of the right to privacy (§ III(H)). Most importantly, a clear distinction is visible between physical types of privacy and informational privacy. Many authors, when distinguishing various types of privacy, include informational privacy as a separate and distinct type of privacy.<sup>284</sup> Blok, however, argues that informational privacy should not be put alongside relational, spatial, and communicational privacy, but rather should be seen as the other side of the coin. All (more or less) physical types of privacy lie on one side, and informational privacy on the other. The privacy of home life, intimate relations, and confidential communications (also) requires protection against the spread of information.<sup>285</sup> In oth-

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<sup>282</sup> *Id.* at 207; see also MOORE, *supra* note 2, at 47 ("Although privacy may be linked to free will, the need for separation provides an evolutionary first step. It is the capacity of free will that changes mere separation into privacy.").

<sup>283</sup> Von Hannover v. Germany, [2005] 40 EHRR 1 (2004) (finding a violation of the right to a private life under Article 8 of the European Convention on Human Rights in a case about tabloid publication of photographs of Von Hannover in public spaces by holding that scenes from daily life, involving activities such as engaging in sport, out walking, leaving a restaurant or on holiday were of a purely private nature).

<sup>284</sup> For examples of authors who distinguish informational privacy, see Motyka, *supra* note 250 at 35; Wagnerová, *supra* note 243, at 55; Rössler *supra* note 237, at 25; Finn, et al., *supra* note 4; ALLEN, *supra* note 56; Marx, *supra* note 275; Čebulj, *supra* note 241; KOVAČIĆ, *supra* note 252.

<sup>285</sup> Blok, *supra* note 241 at 283 (arguing that informational privacy is the other side of the coin of other types of privacy).



er words, informational privacy can be seen as a derivative or added layer of, or perhaps a precondition to, other forms of privacy.

Agreeing with Blok, we think it important to make a clear distinction between informational privacy relating to personal data and “physical privacy” understood in a broad sense. The latter encompasses bodily privacy, spatial privacy, communicational privacy and proprietary privacy, as well as less tangible types of intellectual privacy, decisional privacy, associational privacy, and behavioral privacy. While it may seem counter-intuitive to refer to all of these as “physical” types of privacy, what is meant here is that these types of privacy refer to the actual objects of privacy that can be directly “watched” or intruded upon, for example violating the privacy of the body, listening to private communications or observing someone’s behavior in public. In contrast, informational privacy does not protect the body, space, communications, behaviors, etc., directly, but protects the information about these. Often, the protection of such information is also a precondition to protecting the underlying physical privacy type.

Cohen nicely illustrates the distinction between physical types of privacy and informational privacy, when she writes that spatial privacy is (also) an interest in avoiding or selectively controlling the conditions of exposure. According to her,

[t]he body of constitutional privacy doctrine that defines unlawful ‘searches’ regulates tools that enable law enforcement to ‘see’ activities as they are taking place inside the home more strictly than tools for discovering information about those activities after they have occurred.<sup>286</sup>

Here, Cohen makes the distinction between physical privacy (direct observation of activities) and informational privacy (discovering information about these activities indirectly), at the same time recognizing their interdependence.<sup>287</sup>

Geminn and Roßnagel also distinguish between two forms of privacy. First, the physical sphere of private life, guaranteeing an autonomous sphere of private life and a space for personal development; and, second, an informational sphere of private life, guaranteeing individuals’ ability to decide themselves how they want to present themselves to others.<sup>288</sup> The latter protects the way in

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<sup>286</sup> Cohen, *supra* note 274 at 123.

<sup>287</sup> *Id.*

<sup>288</sup> Geminn & Roßnagel, *supra* note 94 at 705.

which the former is represented to and by others. Rössler, when defining privacy in terms of controlling access to private actions, private space, and private knowledge, also makes a distinction between physical and non-physical aspects of privacy. The term *access* can mean direct physical access (for example to spaces or the body), but also metaphorical access (for example attention, access to private knowledge or personal information).<sup>289</sup>

### 5.3. *Privacy and Positive/Negative Freedom*

In the countries within our study, scholars often conceptualize privacy in negative or positive terms, or connect privacy to the concepts of negative and positive freedom—frequently referred to as “freedom from” and “freedom to,” respectively. Berlin’s famous separation of negative and positive freedoms has faced substantial criticism,<sup>290</sup> however. MacCallum suggests a triadic relationship between these concepts of freedom, stating that “freedom is thus always *of* something (an agent or agents), *from* something, *to* do, not do, become, or not become something.”<sup>291</sup> While we agree with MacCallum that freedom is always a combination of someone’s freedom *from* something *to* something, we nevertheless consider it fruitful, considering the aim of this paper, to use freedom as a spectrum along which types of privacy can be aligned. Some types of privacy highlight the element of “freedom from,” while other types emphasize the element of “freedom to.” Following authors in our selected countries who make the distinction between negative and positive freedom, we thus place various types of privacy along the spectrum of freedom, one side emphasizing freedom *from something* (to do something) and the other side emphasizing freedom (from something) *to do something*.

Some authors consider privacy exclusively in negative terms. An example here is Peter Blok:

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<sup>289</sup> Rössler, *supra* note 237, at 23-24.

<sup>290</sup> See, e.g., Gerald C. MacCallum, Jr., *Negative and Positive Freedom*, 76 PHIL. REV. 312 (1967) (arguing that the distinction between negative and positive freedoms is unclear, based on confusion, and draws attention away from ideas that truly deserve analysis); Adam Swift, POLITICAL PHILOSOPHY: A BEGINNERS’ GUIDE FOR STUDENTS AND POLITICIANS, 52-68S (Polity Press, 2nd ed. 2006) (“Berlin was wrong to think that there are two concepts of liberty, and very wrong if he thought that there was any difference between ‘freedom from’ and ‘freedom to.’”).

<sup>291</sup> MacCallum, *supra* note 290 at 314.

the qualification of privacy as a negative right makes clear that privacy is a right to resist and that everyone is supposed to enjoy privacy, as long as they are let alone.<sup>292</sup>

Most authors in our selection, however, write of both negative and positive freedom when discussing privacy. Vedder identifies the normative roots of modern privacy in terms of the protection of the domain of individual freedom against intrusions by governments, social institutions and other citizens, and in the notions of freedom of will, moral independency and self-determination,<sup>293</sup> linking these ideas to both negative and positive freedom, respectively. Wagnerová argues that privacy encompasses active self-determination as well as a passive sphere of private life, immanent to humanity and not to be intruded upon by others. She also relates private life to both someone's internal and external life,<sup>294</sup> referring, in various places, to privacy rights as being both negative rights and positive rights.<sup>295</sup> Various other authors identify elements of privacy related to positive and negative freedom, linked to actors,<sup>296</sup> spaces,<sup>297</sup> and exclusion and control.<sup>298</sup>

In our typology, we place "freedom from" and "freedom to" on the vertical axis, based on how these types are frequently referred to in the literature. Negative terminology is generally invoked to discuss privacy interests (e.g. "being let alone") involving bodily, spatial, communicational, and proprietary privacy. Positive terminology (such as that focusing on "self-development" and self-determination) often refers to intellectual, decisional, associational, and behavioral privacy. However, in making these classifications, the triadic relationship between these concepts should be borne in mind: the negative and positive aspects of freedom are connected (freedom *from* something *to* something), suggesting that the types

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<sup>292</sup> Blok, *supra* note 241 at 37 (translation).

<sup>293</sup> Anton Vedder, *Privacy 3.0*, in *INNOVATING GOVERNMENT: NORMATIVE, POLICY AND TECHNOLOGICAL DIMENSIONS OF MODERN GOVERNMENT* 17, 20 (Simone van der Hof & Marga M. Groothuis eds., 2011).

<sup>294</sup> Wagnerová, *supra* note 243, at 54.

<sup>295</sup> *Id.* at 54-56.

<sup>296</sup> Filip, *supra* note 244, at 17-18.

<sup>297</sup> Kantarek, *supra* note 234, at 70.

<sup>298</sup> See, e.g., Rodotà, *supra* note 280 (asserting that privacy involves not only the traditional power to exclude but also increasingly the power to control); Bostwick, *supra* note 242 at 1466 ("The privacy of intimate decision is an eminently dynamic privacy concept compared to repose and sanctuary. . . This privacy is less 'freedom from' and more 'freedom to.'").

of privacy on the negative and positive sides of the spectrum may be implicated at the same time. Thus, for example, communicational privacy (freedom from eavesdropping) is connected to associational privacy (freedom to choose communication partners). Therefore, violations of privacy on the negative side of the model can also implicate violations of privacy on the positive side of the model, and vice versa.

#### 5.4. *Restricted Access and Information Control*

Privacy is often defined in terms of control or restricted access.<sup>299</sup> We find that the spectrum between *access* and *control* provides another useful dimension, expressed as a spectrum from restricting initial access to controlling information after access has been granted. Importantly, the concept of *control* has been used as both a definitional aspect of privacy (e.g. privacy means the right to control access to personal information) as well as an instrumental mechanism to realize valuable outcomes or states of affairs (even when not defining privacy as necessarily reliant on control). This has been true of both consequentialist accounts and deontological approaches.<sup>300</sup> Some authors argue that defining privacy in

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<sup>299</sup> See KOVAČIĆ, *supra* note 252, at 39-40 (separating control of information about oneself and restricting access to oneself); Marx, *supra* note 275, at 33 (explaining that privacy involves a subject who restricts access to personal data); MOORE, *supra* note 2, at 16 (defining privacy as a right to control access to and uses of personal information, locations, or persons); Bryce Clayton Newell, Cheryl A. Metoyer & Adam D. Moore, *Privacy in the Family*, in SOCIAL DIMENSIONS OF PRIVACY: INTERDISCIPLINARY PERSPECTIVES 104, 106 (Beate Roessler and Dorota Mokrosinska eds., 2015) (defining the right to privacy as "a right to control access to, and uses of, places, bodies, and personal information."); Priscilla M. Regan, *Privacy and the Common Good: Revisited*, in SOCIAL DIMENSIONS OF PRIVACY: INTERDISCIPLINARY PERSPECTIVES 50, 53 (Beate Roessler and Dorota Mokrosinska eds., 2015) (explaining differing views about definition of privacy); WESTIN, *supra* note 25, at 7; Adam D. Moore, *Toward Informational Privacy Rights*, 44 SAN DIEGO L. REV. 809, 812-13 (2007) ("Controlling access to ourselves affords individuals the space to develop as they see fit."); Bryce Clayton Newell, *Rethinking Reasonable Expectations of Privacy in Online Social Networks*, 17 RICH. J. L. & TECH., no. 4, 2011, at 8,10 [<https://perma.cc/ML3U-X68Y>] (discussing theories of privacy); DeCew, *Privacy*, *supra* note 252 (discussing differing views about privacy); Rodotà, *supra* note 280 (defining privacy in terms of the right to maintain control over one's personal information).

<sup>300</sup> See, e.g., Fried, *supra* note 25 (arguing "privacy is not just one possible means among others to insure some other value, but ... is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and

terms of control also supports self-development and autonomy.<sup>301</sup> In some cases, theories of control and restricted access are treated as synonymous or closely linked while in others, they are more clearly separated.

In this paper, we present these two concepts as situated on a continuum from restricted access—meaning *exclusion*, or the right to exclude access to persons, places, things, or persons, or to information about any of these—to control over the subsequent use of information/persons/places/things after some access, whether explicit or implied, has been granted.<sup>302</sup> At one end of this spectrum, privacy protects people's right to exclude access to their body, home, private space, and property, as well as personal thoughts and processes of the mind. Moving towards the other end, privacy may protect the confidentiality of communications, the secrecy of records, and control over the use of personal data—even after access has been granted—as well as activities occurring in semi-public or public zones because access is more readily facilitated by the public nature of the space (i.e., some level of *access* cannot be withheld from public activities, in a practical sense).

Many attempts to define privacy as control have not always clearly distinguished this right from the right to exclude or restrict access. In 1890, relying on concepts closely tied to control, Warren and Brandeis argued for a legal right to privacy that would protect against the publication and disclosure of information related to a person's "inviolate personality,"<sup>303</sup> including their "thoughts, sen-

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trust.); DeCew, *supra* note 252, at § 3.3 (discussing the relation between privacy and intimacy).

<sup>301</sup> See MOORE, *supra* note 2, at 17 (privacy allows "room to grow personally while maintaining autonomy"); Bryce Clayton Newell, *Crossing Lenses: Policing's New Visibility and the Role of "Smartphone Journalism" as a Form of Freedom-Preserving Reciprocal Surveillance*, 2014 U. ILL. J. L. TECH. & POL'Y 59, 76 (2014) ("defining privacy in terms of control also supports self-development and autonomy"); Cohen, *supra* note 3, at 1905-09 (arguing that privacy preserves space for autonomous exercise).

<sup>302</sup> For similar distinctions drawn elsewhere, see MOORE, *supra* note 2 (discussing the link to privacy and autonomy); Newell et al., *supra* note 299, at 106 (distinguishing right to access from right to use); Adam D. Moore, *Privacy, Speech, and the Law*, J. Info. Ethics 21 (2013) (discussing the right to free speech and the right to privacy as a tenuous relationship); Moore, *supra* note 299, at 813 ("the former would afford individuals a right to control access to their bodies and places, while the latter yields a right to control access to personal information, no matter how it is instantiated.").

<sup>303</sup> Warren & Brandeis, *supra* note 30, at 211.

timents, and emotions.”<sup>304</sup> Their argument, they claimed, was designed to protect the “immunity of the person” and the right “to be let alone.”<sup>305</sup> This framing has been described as “a communicative right: a right to *selective* self-presentation; to control how, when, where, and to whom particular aspects of one’s life and personality are communicated.”<sup>306</sup>

Westin famously defined privacy as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”<sup>307</sup> Accordingly, Westin argues that privacy exists during, and requires allowances for, the “voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small-group intimacy or, when among larger groups, in a condition of anonymity or reserve.”<sup>308</sup> Other scholars, like Fried, Parent, and Moore have also argued for defining privacy in terms of control.<sup>309</sup> Relatedly, a number of theorists define privacy in terms of its ability to restrict access to persons, information, or places.<sup>310</sup>

Vedder has argued that, “inaccessibility can be spatial inaccessibility or refer to the relative absence of observation by instruments or of representation in data and information.”<sup>311</sup> Altman also argued that people could alter “the degree of openness of the

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<sup>304</sup> DeCew, *supra* note 252, at § 1.1.

<sup>305</sup> Warren & Brandeis, *supra* note 30, at 195 (quoting THOMAS M. COOLEY, COOLEY ON TORTS – OR, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT 29 (Callaghan & Company 2d ed. 1888)).

<sup>306</sup> Katayoun Baghai, *Privacy as a Human Right: A Sociological Theory*, 46 SOCIOLOGY 951, 953 (2012) (emphasis in original).

<sup>307</sup> WESTIN, *supra* note 25, at 7; see also DeCew, *supra* note 252 at § 3.1 (citing the definition given by Westin); MOORE, *supra* note 2 (defining privacy as the information on one’s self one controls); Newell, *supra* note 301, at 75 (defining privacy as a right to control access to information on one’s self).

<sup>308</sup> WESTIN, *supra* note 25, at 7.

<sup>309</sup> FRIED, *supra* note 252, at 140 (“Privacy is not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves.”); William A. Parent, *Privacy, Morality and the Law*, 12 PHIL. & PUB. AFF. 269 (1983) (describing privacy as what one can control and shape of one’s information); MOORE, *supra* note 2 (describing privacy as what one controls of one’s self and one’s information).

<sup>310</sup> See DeCew, *supra* note 252, at § 3.5 (explaining the relation between privacy and restricted access); MOORE, *supra* note 2 (using power of control over information to define privacy); Newell et al., *supra* note 298, at 118 (using right to control access to define privacy).

<sup>311</sup> Vedder, *supra* note 293, at 22.

self to others” and that, consequently, privacy is “a dynamic process involving selective control over a self-boundary[.]”<sup>312</sup> Steeves, while critical of theories that prioritize “procedural control over personal information,” generally agrees with Altman and suggests that privacy can be seen as a conscious and “negotiated interaction between social actors.”<sup>313</sup> Bok claims that privacy is “the condition of being protected from unwanted access by others—either physical access, personal information, or attention. Claims to privacy are claims to control access to what one takes—however grandiosely—to be one’s personal domain.”<sup>314</sup>

Rössler offers another definition: “something counts as private when a person herself can control the access to this ‘something.’”<sup>315</sup> She considers the protection of privacy to be the protection against unwanted access of others. This can mean direct physical access, but also metaphorical access, for example, access to private knowledge.<sup>316</sup> Similarly, Seubert also talks about privacy as control of access.<sup>317</sup>

Relatedly, Blok argues that the term “private” may refer to the notion of being fenced off, inaccessible, or shielded from the outside world, but that it may also refer to a person at the individual level, aiming for individual rather than social interests and leading his life according to his own ideas about good life, as opposed to contributing to the common good. For Blok, both meanings are connected in the term privacy: an individual can deny outsiders access to a certain sphere *because* that sphere is personal.<sup>318</sup> Cohen,

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<sup>312</sup> ALTMAN, *supra* note 272, at 6.

<sup>313</sup> STEEVES, *supra* note 14, at 206, 207.

<sup>314</sup> SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 10-11 (Oxford University Press, 1982), *cited in* Rössler, *supra* note 237 at 23.

<sup>315</sup> Rössler, *supra* note 237 at 23.

<sup>316</sup> *See* Rössler, *supra* note 237, at 23 -24 (interpreting this understanding of privacy as control of access in three respects: (1) decisional privacy and prohibiting the unwanted meddling by other parties into our decisions and actions; (2) informational privacy as the right to be protected against unwanted access in the sense violation of personal data, and also access to information that we would not want to fall in the wrong hands; and (3) local privacy, understood in a very non-metaphorical sense as a right to protection against unwanted access of others to a certain space or area).

<sup>317</sup> *See* Seubert, *supra* note 254, at 101 (defining privacy as control of access to information).

<sup>318</sup> *See* Blok, *supra* note 241, at 280-81 (stating that the problem of many privacy theories is that they only define privacy in terms of one these meanings (for example, describing privacy only in terms of inaccessibility) and therefore overlook the second meaning of the term privacy resulting in an unclear meaning of

on the other hand, takes a broad perspective of what a personal sphere might encompass when she defines the spatial aspect of privacy as “an interest in avoiding or selectively controlling the conditions of exposure,” even in public spaces.<sup>319</sup>

Privacy can also be thought of as control over personal information or information pertaining to private matters. Sobek argues that this sort of control can be understood in two ways: (1) control in a lesser sense: the voluntary disclosure of information to selected persons is not a loss of control, but its realization; and (2) control in stricter sense: even voluntary disclosure of private information is loss of control, because the individual does not have sole power to disclose the information once others have it.<sup>320</sup> Mantovani argues that, beyond individual interests in the “exclusivity of knowledge,” a collective interest in “control of information” has emerged.<sup>321</sup> Rodotà states that the concept of privacy has been redefined, now not only incorporating the traditional power to exclude, but also, and ever more importantly, the power to control information.<sup>322</sup>

We find elements of control embedded into privacy laws in Europe that (supposedly) have something to do with preserving individual respect and human dignity;<sup>323</sup> for example, the German right to informational self-determination, described by Whitman as “the right to control the sorts of information disclosed about oneself,”<sup>324</sup> includes control-elements that appear to fit neatly into the concept of privacy as selective self-presentation.

Various authors have also argued that privacy is valuable because it fosters self-development, intimacy, and/or social relationships.<sup>325</sup> On these accounts, intimacy as well as non-intimate rela-

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what privacy is and the concept of privacy being invoked in many legal problems that could equally, or better, be dealt with by other concepts.).

<sup>319</sup> Cohen, *supra* note 274, at 194.

<sup>320</sup> Sobek, *supra* note 241, at 41-42.

<sup>321</sup> Mantovani, *supra* note 96 at 583.

<sup>322</sup> Rodotà, *supra* note 280 (section entitled “Verso una ridefinizione del concetto di privacy”).

<sup>323</sup> See Whitman, *supra* note 18, at 1160-61 (contrasting continental European and American sensibilities in privacy context); Post, *supra* note 18, at 2087 (distinguishing the difference between connection of privacy to dignity and connection of privacy to freedom).

<sup>324</sup> Whitman, *supra* note 18, at 1161 (citing Edward J. Eberle, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 87-92 (Praeger, 2002)).

<sup>325</sup> See, e.g., FRIED, *supra* note 252, at 142 (“Privacy grants the control over in-



tionships could not occur, or would not flourish absent privacy.<sup>326</sup> Interestingly, many of these accounts also utilize *control* (both to withhold and determine who has access to personal information) as instrumental to realizing intimacy or developing social relationships with others. As summarized by DeCew, both Fried's and Rachels's accounts hold that: "privacy is valuable because it allows one control over information about oneself, which allows one to maintain varying degrees of intimacy... control our relationships with others."<sup>327</sup>

DeCew also points to an interesting aspect of Rachels's argument, namely that privacy "is not merely limited to control over information. Our ability to control both information and access to us allows us to control our relationships with others. Hence privacy is also connected to our behavior and activities."<sup>328</sup>

Despite the influence of control-based definitions in many of the scholarship referred to in the preceding paragraphs, some scholars are critical of such a position. Julie Cohen is particularly suspicious of at least a narrow reading of control-based definitions of privacy.<sup>329</sup> According to Cohen, privacy cannot "be reduced to a fixed condition or attribute (such as seclusion or control) whose boundaries can be crisply delineated by the application of deductive logic[.]" but is rather dynamic and "shorthand for breathing room to engage in the processes of boundary management that enable and constitute self-development."<sup>330</sup>

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formation which enables us to maintain degrees of intimacy."); Gerety, *supra* note 252, at 245 ("But privacy is the necessary, limiting condition of much or all that we value in our intimate lives."); Gerstein, *supra* note 252, at 76 (discussing the relation between privacy and intimacy); Cohen, *supra* note 3, at 1905 (arguing that privacy shelters dynamic, emergent subjectivity from the efforts of commercial and government actors); Rachels, *supra* note 25, at 323-25 (illustrating common scenarios where privacy is paramount); DeCew, *supra* note 252, at § 3.4 (explaining the relation between privacy and social relationships).

<sup>326</sup> See sources cited *supra* note 324 and accompanying text.

<sup>327</sup> DeCew, *supra* note 252, at § 3.3.

<sup>328</sup> *Id.* at § 3.4.

<sup>329</sup> See Cohen, *supra* note 3, at 1906 (privacy cannot "be reduced to a fixed condition or attribute...").

<sup>330</sup> *Id.*

## 6. INTEGRATION: A TYPOLOGY OF PRIVACY

Above, we have sought to identify the objects of privacy protection in constitutional privacy law (Section 4) and relevant dimensions of privacy identified by privacy scholars (Section 5). In this section, we integrate the findings from these two separate lines of inquiry to develop a typology of privacy (see Figure 3 below). We first explain the axes along which the privacy types are positioned, and then present the ideal types of privacy and their position in the model.

6.1. *A Typology of Privacy*

Our typology of privacy contains two primary dimensions. The horizontal axis moves along a spectrum from the personal or completely private zone to intimate, semi-private, and public zones. Importantly, by using the terms “public” and “private” we do not simply refer to *spaces* – as in public or private space – but rather to the nature and character of inter-personal association (if any). Thus, the ideal types of each identified type of privacy differ in their degree of *privateness* by reference to their degree of social engagement or isolation, the nature of the engagement and the pre-existing or developing relationships between participants, and the nature of the space in which the engagement takes place.

As discussed in Section 5.1, the *personal zone* is typified by solitude or isolation. The *intimate zone* is characterized by a shift towards social engagement, albeit limited to intimate partners, family members, and close friends, as well as activities that take place in private and fenced-off spaces, such as the home where people share their life with intimate partners and family. The *semi-private zone* includes social interaction with a wider range of actors, including acquaintances, work colleagues, and professional relationships (e.g., interacting with a doctor, service provider or shop), and activities that occur in more quasi-public space. The *public zone* is typified by activities occurring in public – for example, in a public square, on public transportation, or on publicly accessible electronic platforms – where the privacy interest is characterized by the desire to be inconspicuous despite being physically or virtually visible in public space. This zone sits at the edge of the outer layer of privacy and social life.

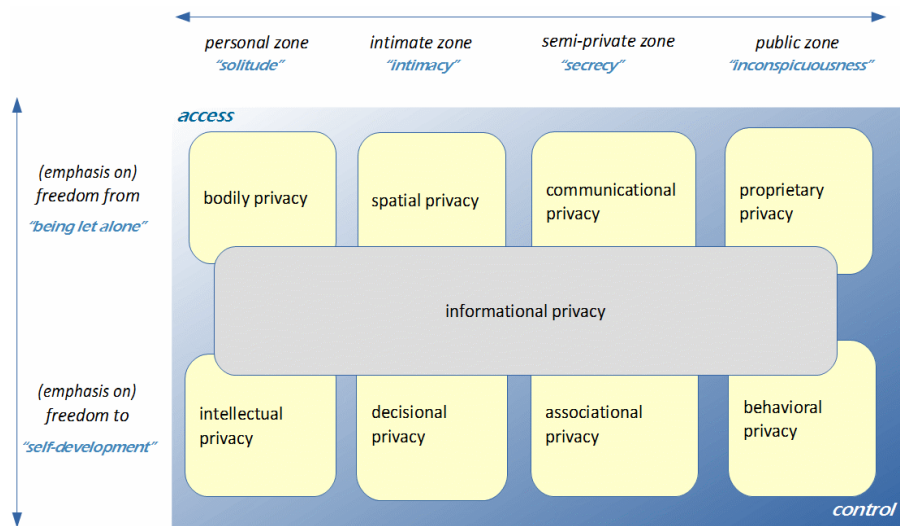
On the vertical axis, based on Section 5.3, we use the spectrum of negative and positive freedom, which can be characterized by the key terms of “being let alone” (emphasis on negative freedom) and “self-development” (emphasis on positive freedom). Although there is no sharp boundary between *freedom from* and *freedom to*, presenting ideal type along this spectrum aids our understanding of the variation that occurs within privacy.

As discussed above in Section 5.4, there is a third dimension that draws from distinctions drawn in the literature between restricted access and subsequent control after access has been granted. This dimension is not independent from the other two, but rather combines both in the sense that restricted access is associated more (but not exclusively) with the private than with the public zone, and more with negative freedom than with positive freedom, while control after access is more significant in the semi-private and public zones and has more the character of a positive freedom (self-determination). Thus, this dimension runs across both axes from upper left to lower right. For example, any privacy interest in a person’s behavior in public space has more to do with controlling the use of information about that activity than it does with restricting access (since some access has already been granted by the nature of the space itself). On the other hand, bodily privacy is typically (although not always) a question of access, rather than control.

We present these concepts as situated on a continuum from restricted access—meaning *exclusion*, or the right to exclude access to persons, places, things, persons, or information about any of these—to control over the subsequent use of information/persons/places/things after some access, explicit or implied, has been granted. At one end of this spectrum, privacy protects the right of a person to exclude access to her body, home (and other private places), and property, as well as personal thoughts and processes of the mind. Moving towards the other end, privacy may protect the confidentiality of communications, the secrecy of records, and control over the use of personal data—even after access has been granted—as well as activities occurring in semi-public or public zones, because access can be more readily inferred based on the public nature of the space (i.e., access cannot be withheld from public activities, in a practical sense).

### 6.2. Eight Plus One Primary Types of Privacy

Along the two primary axes, with four zones of life and two aspects of freedom, we can position eight primary ideal types of privacy. At this point, the fourth dimension from the literature, as discussed in Section 5.2, becomes relevant, as it enables distinguishing between the “physical” layer of privacy and the informational layer of privacy. Thus, we position eight primary ideal types of privacy in the model, each overlapping with informational privacy as an overlay related to each underlying type (in other words, serving as the “other side of the coin”).



**Figure 3. A typology of privacy**

We define each of these various types by reference to an *ideal type*, rather than by reference to every possible manifestation of each type. Together, these types cover most of the basic forms of privacy identified in the literature. It is not comprehensive in the sense that it covers all possible types of privacy, nor is it meant to be a rigid classification in the sense that each privacy type fits only in the zone and freedom to which it is allocated. As befits a typology (see section 3), we portray ideal types in which the characteristics of the two dimensions are magnified and are most sharply visible, in order to highlight the differences between the various types.

The eight primary ideal types of privacy we have identified are

bodily, spatial, communicational and proprietary (or property-based) privacy, which can be associated with an emphasis on the negative aspect of freedom (being able to exclude others to these aspects of life); and intellectual privacy, decisional privacy, associational privacy and behavioral privacy, which can be associated with an emphasis of the positive aspect of freedom (self-determination or self-development). The ideal types can be characterized as follows.

**Bodily privacy:** typified by individuals' interest in the privacy of their physical body. The emphasis here is on negative freedom: being able to exclude people from touching one's body or restraining or restricting one's freedom of bodily movement.

**Spatial privacy:** typified by the interest in the privacy of private space, by restricting other people's access to it or controlling its use. Although spatial privacy may extend beyond the intimate zone (see Figure 2), we find its ideal type best situated in this position because of the role that private space plays in preventing access to intimate activities. The home is the prototypical example of the place where spatial privacy is enacted, closely associated with the intimate relations and family life that take place in the home.

**Communicational privacy:** typified by a person's interests in restricting access to communications or controlling the use of information communicated to third-parties. Communications may be mediated or unmediated, which involve different ways of limiting access or controlling the communicated messages.

**Proprietary privacy** (referring to property-based interests, rather than Allen's reference to image management and reputational privacy): typified by a person's interest in using property as a means to shield activity, facts, things, or information from the view of others. For example, a person can use a purse to conceal items or information they prefer to keep private while moving in public spaces.

**Intellectual privacy:** typified by a person's interest in privacy of thought and mind, and the development of opinions and beliefs. While this can have important associational aspects, it is suitable as an ideal type of the personal zone, as the mind is where people can be most themselves.

**Decisional privacy:** typified by intimate decisions, primarily of a sexual or procreative nature, but also including other decision-making on sensitive topics within the context of intimate

relationships. As with spatial privacy, decisional privacy as an ideal type within the intimate zone is closely related to family life.

**Associational privacy:** typified by individuals' interests in being free to choose who they want to interact with: friends, associations, groups, and communities. This fits in the semi-private zone since the relationships often take place outside strictly private places or intimate settings, in semi-public spaces such as offices, meeting spaces, or cafés.

**Behavioral privacy:** typified by the privacy interests a person has while conducting publicly visible activities. These relate to Westin's states of anonymity and reserve and to Cohen's concerns with exposure and transparency. In contrast to items people carried with them in public (which can be hidden and therefore to some extent excluded from others' view), one's personal behavior in public spaces is more difficult to exclude others from observing, and thus is an ideal type of privacy where the need for control after access has been granted is most pressing. "Being oneself" in public can be achieved if others respect privacy through civil inattention, but otherwise control can only be exercised by trying to remain inconspicuous among the masses in public spaces.

Finally, as mentioned above, we conceptualize **informational privacy**<sup>331</sup> as an overarching aspect of each underlying type, typified by the interest in preventing information about one-self to be collected and in controlling information about one-self that others have legitimate access to. Despite the frequency at which informational privacy has been classified as a separate type of privacy alongside, and thus on the same level as, other types, we think it should be represented instead as an overarching aspect. This conclusion is informed by Blok's argument that information privacy is better understood as the "other side of the coin" rather than a separate type.<sup>332</sup> After all, each ideal type of privacy

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<sup>331</sup> Some scholars (e.g., Clarke, *supra* Section 3.1.2) may prefer to speak of "data privacy", given that data is the more basic concept and that information can be conceptualized as meaningful data, or data in context. We use the term "informational privacy," since the privacy interest ultimately sees to data that may say something about a person, hence information. While the *right to privacy* often covers personal data (Section 4.6), the *type of privacy* thus is more concerned with personal information. Note also that jurisdictions protecting personal data tend to define data in terms of information. For example, see the Council Regulation 2016/679, art. 4(1), 2016 O.J. (L119) 1, 33 (EU) [<https://perma.cc/C358-E8YH>], which defines "personal data" as "any *information* relating to an identified or identifiable natural person" (emphasis added).

<sup>332</sup> See *supra* text accompanying note 285.

contains an element of informational privacy—that is, a privacy interest exists in restricting access or controlling the use of information about that aspect of human life. For example, bodily privacy is not limited to restricting physical access to the body, but also to restricting and controlling information about the body (e.g., health or genetic information). Since informational privacy combines both negative freedom (excluding access to information) and positive freedom (informational self-determination), which moreover can regard information relating to any of the four zones of life, informational privacy is depicted in our model as an overlaying concept that touches each of the primary types.

## 7. DISCUSSION

### 7.1. *The Value of the Typology*

In this Article, we have argued that the typological approach is relatively scarce in the privacy literature and in need of improvement. Current classifications are not typologies in the proper sense, as they are not really systematic attempts at identifying constructs that are multi-dimensional (structured along two or more dimensions), conceptual, and embedded in a generalizable account of what privacy means.<sup>333</sup> We systematically developed a typology of conceptual privacy types by mapping privacy rights in many constitutions and structuring the identified forms of privacy along the major dimensions that we derived from theoretical privacy scholarship. The value of our typological approach lies in three elements.

First, our typology is more comprehensive than previous classification schemes of privacy.<sup>334</sup> It includes, in its horizontal axis, Westin's states of privacy,<sup>335</sup> (albeit with some modifications), and

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<sup>333</sup> See *Supra* Section 3 (reviewing and explaining the different privacy typologies).

<sup>334</sup> We reiterate that our model does not incorporate Solove's taxonomy of privacy harms, nor Clarke's later category of the privacy infringement of personal experience (Section 2.1.2). Our typology presents types of *privacy*, not types of privacy *intrusions*, and therefore has a different character and function than Solove's model, which can stand independently alongside our model.

<sup>335</sup> See *Supra* Section 3.1.1 (describing Westin's spheres of privacy).

encompasses all of Allen's types.<sup>336</sup> The most comprehensive privacy typology to date, the seven types distinguished by Finn, Wright, and Friedewald (which incorporated Clarke's types),<sup>337</sup> are included in our model. The added value of our model is not only that it includes two more types (proprietary and decisional privacy), but also, more importantly, that it structures the types along three major dimensions, which shows how the types relate to each other and in which major aspects they differ.

Indeed, we would argue that our typology is comprehensive, in that the conceptual model is likely to be able to embrace all relevant types of privacy. This is not to claim it is exhaustive, as our ideal types are the major, clearest types but not necessarily the only types in their category (see Section 7.2). However, other or new types of privacy can, we think, be positioned well within our model by considering to which zones of life and aspects of freedom they most pertain. In this sense, our model serves not to identify the largest common denominator of privacy, i.e., the largest set of types that (almost) all legal systems have in common. Rather, it presents the *smallest common multiple* of privacy, i.e., the smallest possible set that encompasses any privacy type encountered in different legal systems. Whether it really *is* comprehensive, remains to be determined, however, by future research.

Second, our model is valuable as an analytic tool that can help to structure the privacy debate. In addition to current unitary or very general accounts of privacy, our multi-dimensional model demonstrates the multi-faceted nature of privacy more sharply than just stating that privacy is "ambiguous" or "multi-faceted" — it shows what the main facets actually are that give particular colors to privacy in different situations (being let alone or developing one-self in different states of solitude, intimacy, secrecy, or inconspicuousness). The placing of the third dimension, the spectrum from restricted access to information control, diagonally across the model also may be useful to help understand how different types of privacy call for different forms of protection, depending on how easy or difficult it is for persons to restrict access to that particular aspect of their life. For example, the model shows how body, mind, and home fall largely within the access side of the spectrum, while persons' associations and behavior are harder to fence off

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<sup>336</sup> See *Supra* Section 3.1.3 (explaining Allen's typology of privacy).

<sup>337</sup> See *Supra* Section 3.1.4 (describing the seven types of privacy distinguished by Finn, Wright, and Friedewald).



and therefore lay more on the control side of the spectrum.

Moreover, our model suggests a conceptual link between various types of privacy. In particular, between the negative and positive aspects of privacy as a freedom from something to do something: being let alone and developing one-self can be seen as two sides of a coin—often, they are both at stake. However, the emphasis may be more on one than on the other in different situations. This also shows interesting links between the negative and positive types of privacy in each zone: bodily and intellectual privacy are two sides of a coin for privacy of the person; spatial privacy and decisional privacy often go together in the intimate zone of home life; and communicational privacy and associational privacy emphasize different aspects of the same need of persons to have social relationships beyond the intimate sphere. Only proprietary privacy and behavioral privacy in the public zone do not seem clearly related, which might indicate that other ideal types could be placed in this zone as well. However, it can also be an indicator that the notion of privacy in public is underdeveloped (certainly in constitutional protections of privacy) or plays a different role than privacy does in other zones of life.

Perhaps the most valuable aspect of the model as an analytic tool for the privacy debate is that it visualizes how informational privacy is related to, yet distinct from, all basic types of privacy. In contrast to most previous typological accounts, in which informational privacy is just another type, our model shows that privacy always has an informational aspect, but that at the same time information always relates to a certain aspect of persons' lives and that this aspect also has a privacy element that is separate from its informational content. We hope that this visualization can serve as a corrective to the overly dominant role that informational privacy has come to play in the privacy debate, and that it may help to reinstate the importance of the physical element of privacy in its many guises.<sup>338</sup>

Third, our model is valuable in underlining the point that privacy is not the same as the right to privacy. The ideal types in our typology (Figure 3) can be associated with the objects of the right to privacy (Figure 2), but they do not match one-on-one. When writing this Article, we found we had to develop these two typologies in tandem since what the constitutional rights to privacy actu-

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<sup>338</sup> See *supra* section 5.4 (explaining and describing both physical and non-physical (or informational) privacy).

ally protect is not always clearly related to an underlying or associated type of privacy. Analyzing the differences between the two typologies is outside the scope of this Article, but will be a relevant line of future research. We think the model may help illuminate challenges to legal protection when there is an imperfect match between what a certain right to privacy actually protects in relation to the type(s) of privacy at stake. For example, the right to privacy is relatively underdeveloped in the public zone (Figure 2), and most legal systems have no clear legal protection of behavioral privacy in public. The model shows behavioral privacy to be a relevant type in the public zone, which arguably until recently was safeguarded largely by people's factual ability to remain relatively inconspicuous in public space. As people become more conspicuous through ubiquitous tracking and recognition technologies, however, the lack of legal protections for the privacy of behavior in public becomes an issue.

### *7.2. Limitations and Issues for Further Research*

The typology we have developed aims to offer a comprehensive and structured overview of types of privacy. Although we think the model succeeds in this aim, we acknowledge that certain limitations may derive from our methodology in developing the typology.

First, using constitutional rights to privacy as a source implies a focus on individual rights, which may bias the model towards types befitting the individual value of privacy rather than privacy's social dimension. However, we do not think this is the case. Constitutional rights to privacy do not only serve individual interests, but also the collective interest in ensuring that society benefits from people having a space of their own. For instance, intellectual and communicational privacy are linked to freedom of expression (see Section 4.4.4), and associational privacy is relevant not only for self-development but also for freedom of assembly. In fact, the model elucidates how for each zone of life, classic negative rights (associated with the privacy types in the model's top half), which are particularly relevant for individuals' interests, can be linked to positive rights (associated with the types in the bottom half), which often have an important social value as well.

Second, the country selection focused on Western countries,

implying that the model may not reflect privacy as embedded in non-Western cultures. This is a fair point, which requires further study. Tentatively, however, we would argue that the model is not necessarily overly “Western.” We have looked at constitutions of several non-Western countries in our backup group, and these did not include substantially different types of privacy rights. Moreover, the dimensions along which we structured the model apply globally. Non-Western societies also usually have a spectrum stretching from personal to public zones, and freedoms with negative emphasis as well as with positive emphasis. What differs will be the *interpretation* of what is considered private or public, or where along the spectrum certain actions are placed. Different cultures will also attach different *weights* to the needs of keeping things private or to self-development. This, however, is not to say that the *types* as such will be different; rather, how a type is colored and given shape will differ among cultures—but that equally applies to “Western” societies, which also have significant cultural differences. Whether substantially different *types* of privacy would emerge if non-Western cultures were studied, therefore remains to be demonstrated.

A third possible limitation is that we identify ideal types rather than “real” types. The ideal types do not necessarily reflect how certain aspects of privacy are actually understood in societies and by individuals. This is not really a limitation of our typology: it is inherent to typologies that they are conceptual constructs, and this is what distinguishes typologies from taxonomies.<sup>339</sup> Empirical research of privacy perceptions and privacy practices is important, but concerns a different exercise than we performed in this Article. Indeed, it would be interesting if empirical researchers would develop a taxonomical account of privacy alongside our typological account and to study the relationship between these two. Similarly, an interesting exercise would be to combine Solove’s taxonomical account of privacy harms with our typological account of privacy types, although that might lead to a four- or five-dimensional model that would be hard to visualize.

The ideal type-based model does have an important limitation that should be emphasized, however: it is not exhaustive. We identified eight primary ideal types, each of which is especially suitable to show the characteristics of how privacy takes shape in a

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<sup>339</sup> See *supra* Section 2.2 (explaining the differences between typologies and taxonomies).

particular zone (on the horizontal axis) and with a particular aspect of freedom (on the vertical axis). While these are important—and arguably the main—privacy types that together span the whole range of privacy, there are other privacy types that could be positioned within the model as well. For example, in the intimate zone, the negative aspect of freedom is most poignantly illustrated by spatial privacy, in particular privacy of the home; yet also familial privacy—the privacy of family life—is a type of privacy that would fit here. Also, in the semi-private zone, we have illustrated the positive aspect of privacy through associational privacy. Yet, one could also position a type such as “reputational privacy” here, reflecting the constitutional protection of reputation as an element of the protection of people’s identity and self-development, as was explained in Section 4.5.4. As the model is not exhaustive, further research would be useful to identify other relevant types of privacy (preferably with an “ideal type” characteristic of displaying sharp features) and see where they can be positioned within the model.

Fourth, it might be objected that the model is reductionist or inflexible given that it presents privacy types in a fixed model partly based on analysis of generally backward-looking constitutions. Of course the model is reductionist, as all models by definition are; but that is not to say that it reduces privacy to fixed or static categories. Being a conceptual model, it presents ideal types; it does not pretend that privacy in practice can be neatly reduced to any single ideal type. Rather, the model has the function of facilitating an analysis how privacy in practice reflects an ideal type of a certain aspect of privacy. We also think that the model is not particularly inflexible or static, in that it would be a picture of privacy as of 2017. We acknowledge that many privacy scholars note the ambiguity of the concept of privacy itself,<sup>340</sup> some arguing that privacy should remain somewhat ambiguous<sup>341</sup> so as not to exclude

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<sup>340</sup> See SERGE GUTWIRTH, *PRIVACY AND THE INFORMATION AGE* 30 (Rowman & Littlefield, 2002) (“Even within the Western parameters, privacy has many meanings, remains relative, and is forcibly linked to a context.”); COLIN J. BENNETT, *REGULATING PRIVACY: DATA PROTECTION AND PUBLIC POLICY IN EUROPE AND THE UNITED STATES* 13 (Cornell University Press, 1992) (“Privacy is a highly subjective notion, whose interpretation changes over time and space.”); Whitman, *supra* note 18, at 1153-54 (noting that privacy takes different forms from society to society); Debbie V. S. Kasper, *The Evolution (or Devolution) of Privacy*, 20 *SOC. F.* 69, 72 (Springer, 2005) (noting that most scholars introduce their work by citing the difficulty of defining privacy).

<sup>341</sup> See Finn, Wright & Friedewald, *supra* note 4, at 26 (discussing the “merit of elusiveness,” arguing “that privacy is an inherently heterogeneous, fluid and mul-

newly emerging forms or dimensions due to technological and social changes over time. However, we argue that a solid typology of privacy, consisting of a multi-dimensional model of ideal types, can also help to understand privacy in a longitudinal sense. As with the cultural argument, the interpretations and weights attached to certain privacy types will shift over time; but the types in themselves will be relevant over relatively long periods of time. An interesting line of further research would be to study how particular types of privacy, such as spatial privacy, have manifested themselves in different periods, and which implications future socio-technological developments would have for these types.

## 8. CONCLUSION

In this Article, we have developed a typology of privacy that is more systematic and comprehensive than any other model proposed to date. Earlier attempts often lacked systematic development and, even if they were developed systematically, their development was not transparently presented or explained. Many prior classifications also relied on the national doctrine of a very limited sample of countries, often just the United States. Our model, on the other hand, has been systematically developed through reference to constitutional law in nine primary jurisdictions—and a number of additional constitutions analyzed more briefly from our backup group—as well as important literature from privacy scholars in these same primary jurisdictions. Although these authors often cite influential American authors in their privacy analyses, we find rich variation in the descriptions of various dimensions of privacy.

Because of the comprehensiveness and comparative nature of the analysis presented above, we think our model has external validity and can be used and tested in future studies of privacy. The model should be subjected to testing and validation in future work, and we hope that our continuing research will further refine and develop the typology as a useful and explanatory model for explaining privacy, the right to privacy, and the objects used in the law to protect privacy interests.

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tidimensional concept,” and that “this multidimensionality may be necessary to provide a platform from which the effects of new technologies can be evaluated.”).