Plotting Privacy as Intimacy

Heidi Reamer Anderson, Florida Coastal School of Law
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Heidi Reamer Anderson *

ABSTRACT

This Article introduces a two-dimensional Venn diagram on which to plot and evaluate a subset of privacy law decisions. In each plotted case, the general question was whether a person’s action should be afforded legal protection as private. How the court answered that question can be explained by examining whether the specific facts of the case fall within or outside two circles of intimacy. One circle represents the intimacy of the space in which the action occurs. This spatial intimacy is based primarily on the proximity of the identified space to a secluded area of the home. Within the other circle is bodily intimacy, which depends largely on the physically intimate nature of the act itself, i.e., how closely connected the act is to one’s own sexual or otherwise intimate body parts. When the facts of a single case are contained within the overlap of both circles of intimacy, legal privacy protection should be at its highest level.

Plotting cases based on spatial intimacy and bodily intimacy is useful in at least three other ways. First, the plot helps to explain why certain cases are relatively easy for courts to decide and, conversely, why other cases are more difficult. Second, by focusing on the two types of intimacy, one can reconcile certain privacy decisions that initially appear contradictory. Third, the intimacy plot supports, and is supported by, recent scholarly calls to unify privacy law by focusing on “outrageousness” or “intrusiveness.” Ultimately, plotting privacy cases based on their intimacy-dependent facts illustrates how intimacy likely should be one of the core interests that privacy law should seek to protect.

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"[T]he right of an individual to conduct intimate relationships in the intimacy of his or her home seems to me to be at the heart of the Constitution’s protection of privacy.”

INTRODUCTION

The search for a legal definition of privacy is approaching an end as unsatisfying as that famously reached by Justice Stewart regarding pornography—“[P]erhaps I could never succeed in intelligibly” defining it “[b]ut I know it when I see it.” This perceived inability of privacy scholars to agree on a definition of privacy has led some to suggest that we abandon the quest. Before taking that drastic step, I suggest that we re-examine some of the canonical privacy law cases across multiple disciplines in search of a core value that all of them agree is worthy of privacy protection. Continuing this search is essential because what makes an expectation of privacy reasonable should not be how closely it reflects public opinion. Rather, it should be how closely that

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1 Bowers v. Hardwick, 478 U.S. 186, 208 (1986) (Blackmun J., dissenting). In Bowers, the Court rejected due process and privacy-based arguments challenging the constitutionality of a Georgia statute criminalizing sodomy. Id. at 194-96. The Supreme Court later reversed course in Lawrence v. Texas, which is discussed in detail in Part II.A.ii, infra. 539 U.S. 558, 578 (2003) (“Bowers v. Hardwick should be and now is overruled.”)

2 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”); see Linda C. McClain, The Sacred Body in Law and Literature: Inviolability and Privacy: The Castle, The Sanctuary, and the Body, 7 YALE J.L. & HUMAN. 195, 200 (1995) (“Considerable disagreement exists among privacy theorists over exactly what the core of the right of privacy is, whether such a core holds together its tort law and constitutional law manifestations, and what falls inside and outside of it.”).

3 See, e.g., Rosa Ehrenreich, Privacy and Power, 89 GEO. L.J. 2047, 2047-48 (2001) (“I am inclined to think that attempts to find an abstract and neutral definition of privacy are doomed, at least if they purport to offer an explanation of how threats to abortion rights, neighborhood peeping toms, and electronic cookies are really all ‘the same thing.’”); Sheena Foye, Understanding Privacy, 9 J. OF HIGH TECH. LAW 23, (“[C]rafting an exact definition of exactly what privacy is has proven to be extremely challenging and has stumped even the brightest of scholars.”); Daniel J. Solove, UNDERSTANDING PRIVACY 8 (2008) (concluding that “the attempt to locate the ‘essential’ or ‘core’ characteristics of privacy has led to failure”).

4 John D. Castiglione, Human Dignity under the Fourth Amendment, 2008 WIS. L. REV. 655, 657 (2008) (positing that, at least in the Fourth Amendment context,
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expectation aligns with a core interest.\(^5\) Isolating a core “area” of privacy protection also is critical given the Supreme Court’s recent proclamation in *Jones* that a privacy violation initially depends on whether the government is “physically intruding in a constitutionally protected area.”\(^6\)

In this Article, I nominate and evaluate intimacy as one of the core, unifying interests that privacy law has aimed to, and should aim to, protect.\(^7\) The most obvious source for this nomination is Justice Blackmun’s dissent in *Bowers v. Hardwick*.\(^8\) Justice Blackmun declared that, to him, “the heart of the Constitution’s protection of privacy” was “the right of an individual to conduct intimate relationships in the intimacy of his or her home.”\(^9\) This Article

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\(^5\) Chemerinsky, *supra* note 4, at 1 (“Courts make an intuitive sense about whether people expect privacy in particular instances. But the question should not be about what people actually expect, but what they *should* be entitled to expect under the Fourth Amendment). Otherwise, an individual’s right to privacy would be subject to the desires and whims of the so-called reasonable majority, or worse yet, the individual whim of a court or legislature. Chemerinsky, *supra* note 4, at 1 (“One key problem with the ‘reasonable expectation of privacy’ test is that the government seemingly can extinguish it just by telling people not to expect any privacy in a particular area.”).

\(^6\) See *U.S. v. Jones*, 132 S. Ct. 945, 951 (2012) (“Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred.”). In *Jones*, the Court considered whether the warrantless use of a GPS tracking device attached to a suspect’s vehicle violated the Fourth Amendment’s protections from unreasonable searches and seizures. *Id.* at 948. The Court ultimately ruled that the use of the device was a “search,” primarily because it involved a “physical intrusion” into an area that was historically “sacred.” *Id.* at 949.

\(^7\) As further described in Part I, *infra*, my use of intimacy is more objective, and less reliant on relationships, than other privacy scholars’ use of the term. See, e.g. Julie C. Inness, PRIVACY, INTIMACY AND ISOLATION (1992) (focusing on “privacy’s protection of intimate decisions,” an inherently more subjective inquiry). As discussed in Part I, *infra*, what makes some relationships feel intimate likely is the space in which the relationship is shared and the connection of the relationship to one’s intimate body. See *infra* notes ___ - ___ and accompanying text (defining “spatial intimacy” and “bodily intimacy”).

\(^8\) 478 U.S. 186, 199-214.

\(^9\) *Bowers v. Hardwick*, 478 U.S. 186, 208 (1986) (Blackmun J., dissenting). Intimacy also has been evaluated by other privacy scholars but not via the
evaluates whether Justice Blackmun’s intuitive appreciation of intimacy is reflected in other canonical cases and, if so, how it could be used to guide and predict future privacy law decisions.\textsuperscript{10}

To begin evaluating intimacy as an objective core of privacy, I introduce a basic, two-dimensional Venn diagram called the Intimacy Plot.\textsuperscript{11} In Part I of this Article, I define and justify the two overlapping circles of the Intimacy Plot—spatial intimacy and bodily intimacy.\textsuperscript{12} In Part II, I plot a small sample of cases to show how some cases involving the most intimacy-dependent facts are among those most worthy of legal protection while other cases lacking such facts are mere outliers.\textsuperscript{13} Next, in Part III, I show how the Intimacy Plot developed in Part II moves us closer to achieving the following three goals: (i) it explains why certain cases are relatively easy for courts to decide and, conversely, why other privacy cases, such as abortion cases, are more difficult to decide; (ii) it reconciles certain privacy decisions that initially appear contradictory; and (iii) it supports recent scholarly calls to unify privacy law by focusing on “outrageousness” or “intrusiveness.”\textsuperscript{14} Finally, I conclude that plotting privacy cases as a function of intimacy illustrates how intimacy is one of the core interests that privacy law should seek to protect.\textsuperscript{15}

objective, two-dimensional, and detailed analysis used in this Article.

\textsuperscript{10} Intimacy also is a good starting point in the search for a core interest because intimacy automatically appeals to most Americans’ sense of what privacy means. See Ehrenreich, supra note 3, at 2050 (“Most Americans, if asked to offer an off-the-cuff, lay definition of ‘privacy,’ would probably find themselves referring to notions of intimacy, the body, sexuality, exposure, and shame. I would guess that most Americans first hear the word ‘privacy’ as small children, when they ask why Mommy has started closing the bathroom door, or why Daddy insists that you have to knock before you enter his bedroom: You have to respect people’s ‘privacy,’ the child is told. Though people come, later in life, to apply the term privacy to an expanding group of issues and claims, it remains, for the most part, rooted in the corporeal and intimate realm.”); see also Jeffrey Rosen, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 3 (2000) (characterizing the privacy problem as one in which “intimate personal information . . . is increasingly vulnerable to being wrenched out of context and exposed to the world”).

\textsuperscript{11} See infra notes \_\_\_ and accompanying text.

\textsuperscript{12} See infra notes \_\_\_ and accompanying text.

\textsuperscript{13} See infra notes \_\_\_ and accompanying text.

\textsuperscript{14} See infra notes \_\_\_ and accompanying text.

\textsuperscript{15} See infra notes \_\_\_ and accompanying text.
I. THE INTIMACY PLOT DEFINED

In defining intimacy, social scientists typically assess a person’s subjective feelings of intimacy and document how such feelings vary across different types of relationships. In contrast, when courts decide whether one’s privacy rights have been violated, they typically rely on objective tests meant to be good indicators of subjective feelings. For example, the Fourth Amendment test for excluding the results of warrantless, electronic searches asks whether the defendant possessed a subjective expectation of privacy and an objectively reasonable expectation of privacy. Similarly, in First Amendment cases, the Supreme Court has rejected laws that punish causation of purely subjective, emotional harm. Even the intentional infliction of emotional distress privacy tort, which recognizes purely emotional harm as compensable, requires that the conduct that caused such harm be objectively “extreme and outrageous.”

Thus, when reexamining various privacy cases for a core interest worthy of protection, the goal should be to identify a core interest that can be identified and measured objectively. One

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17 See *Katz v. U.S.*, 389 U.S. 347 (1967) (Defendant “[first must] have exhibited an actual (subjective) expectation of privacy, and (ii) “second, . . . the expectation [must] be one that society is prepared to recognize as ‘reasonable.’” *Id.* at 361 (Harlan, J., concurring)). In *Katz*, the Court interpreted the Fourth Amendment to require a warrant prior to the government wiretapping a phone and recording conversational content.
19 *RESTATEMENT (SECOND) OF TORTS § 46 (1) (1977) (“One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”).
20 Although no legal test ever can be 100% objective, pursuit of more objective standards is possible. See Chemerinsky, *supra* note 5, at 1 (“Whether people actually have an expectation of privacy in a particular instance is an empirical issue that can be measured.”). Such a pursuit also advisable in the privacy context in order to avoid perceived and actual manipulation of more subjective standards. See Castiglione, *supra* note 4, at 659 (concluding that “[i]t has become
cannot merely ask whether the affected person subjectively felt like her intimacy had been invaded. Nor can one merely ask whether a reasonable person would feel like her intimacy had been violated. Inquiries of that nature simply would replace the word “privacy” with “intimacy,” which is not helpful.\(^{21}\) It also is not particularly helpful to focus on the intimacy of certain relationships, as some other legal scholars have done, because judging the intimacy of a relationship is inherently subjective as well.\(^{22}\) Instead, the most helpful and proper inquiry should focus on one or two objectively measurable indicators of intimacy.

The objective indicators I have chosen are spatial intimacy and bodily intimacy. Spatial intimacy and bodily intimacy form both circles in the two-dimensional Intimacy Plot. Plotting cases in this fashion permits comparison via the objective criteria chosen and allows one to spot both clusters and outliers in a way that mere words do not allow.\(^{23}\) As Laurence Tribe has noted, the Supreme Court in \textit{Lawrence v. Texas} was looking beyond a fixed, one-dimensional list of fundamental rights defined by the activity itself (such as “speaking, praying...using contraceptives”) and instead “lifting the discussion to a different and potentially more instructive plane.”\(^{24}\) Although I agree with Professor Tribe that “the Constitution

\(^{21}\) Solove, \textit{UNDERSTANDING PRIVACY} 36 ("Without limitations in scope, the word ‘intimacy’ is merely a different word for ‘privacy’ and is certainly not sufficient to determine which matters are private.").

\(^{22}\) Legal scholars discussing privacy as intimacy also tend to define intimacy in terms of relationships. \textit{See Solove, UNDERSTANDING PRIVACY}, 34-37 (discussing works of Inness, Fried, Rachels, and Reiman, among others). In contrast, I define intimacy using the more objective standards of spatial intimacy and bodily intimacy. \textit{See infra notes} \___ - \___ and accompanying text.

\(^{23}\) \textit{See Laurence H. Tribe, Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name}, 117 HARV. L. REV. 1893, 1925 (2004) (considering whether Bowers v. Hardwick was “destined to be regarded as an outlier, to be relegated to the dustbin of discarded judicial blunders once fear of the ‘other’ ceased to ‘blind us to certain truths’ about how ‘laws once thought necessary and proper in fact serve only to oppress’").

\(^{24}\) Tribe, \textit{supra} note 23, at 1899. Professor Tribe later suggests moving beyond a presumably two-dimensional “Euclidian plane” and towards “more complex geometries” because “the geometry of constitutional law is nothing if not complex.” Tribe, \textit{supra} note 23, at 1925.
is not Flatland," I think it prudent to examine the two-dimensional landscape of privacy cases before moving on to a three-dimensional sphere. Accordingly, I propose using the simple Venn diagram depicted below.

Each circle of the Intimacy Plot is further described in Sub-parts A and B and the Intimacy Plot is populated with cases in Part II.

A. Spatial Intimacy

The parameters of one circle of the Intimacy Plot are defined by the intimacy of the space in which the action occurs. This spatial intimacy is based primarily on the proximity of the identified space to a secluded area of the home. Defining spatial intimacy with

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25 One perhaps could use the nature of the relationship involved as that third dimension, as Professor Tribe seems to suggest when he asserts that prominent privacy cases “would have benefited from a broader, diachronic focus on the intimate relationships that the challenged law placed within the state’s regulatory jurisdiction.” Tribe, supra note 23, at 1925.

26 Portions of this sub-part II.A are excerpted, with modification, from my prior
reference to the home has its roots in the English Common Law decision known as Semayne’s Case, in which the aptly named Castle Doctrine was established. Under the Castle Doctrine, a man’s home is his castle—a defined space protected from intrusion by the government and other outsiders.

In The Right to Privacy, Samuel Warren and Louis Brandeis seized upon the Castle Doctrine as support for their then-novel ideas, declaring that the common law “has always recognized a man’s house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands.” Since that time, the Castle Doctrine’s emphasis on space has been relied upon in various contexts, including Fourth Amendment search and seizure cases, homicide cases involving self-defense, and privacy tort cases. Among those case types, the emphasis on proximity to one’s home is most pronounced in Fourth Amendment warrantless search cases.

In the Fourth Amendment context, the Supreme Court has declared that, “in the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes.” Even a search of one’s home by electronic means may be

work, The Mythical Right to Obscurity, 7 ISJLP 1243 (2012), in which I documented privacy law’s emphasis on space as part of a broader thesis regarding privacy in public.

27 In Semayne’s Case, Lord Coke stated, “For a man’s house is his castle, & domus sua cuique est tutissimum refugium; for where shall a man be safe, if it be not in his house?” See David I. Caplan & Sue Wimmershoff-Caplan, Postmodernism and the Model Penal Code v. the Fourth, Fifth and Fourteenth Amendments and the Castle Privacy Doctrine in the Twenty-First Century, 73 UMKC L. Rev. 1073, 1090 (2005) (citations omitted).


29 See Samuel D. Warren and Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 220 (1890); see also Anderson, supra note 26, at Part I.B.1, for a lengthy discussion of how Warren and Brandeis defined the public versus private distinction in spatial and other terms.

30 See generally Caplan & Wimmershoff-Caplan, supra note 27 (discussing concept in various tort and criminal contexts).

31 This emphasis on spatial privacy in search and seizure cases is understandable given that the text of the Fourth Amendment uses the word “houses.” U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . .”).

32 Kyllo v. United States, 533 U.S. 27, 37 (2001); see also United States v.
deemed to invade someone’s reasonable expectation of privacy in a physical space.  

As the search location moves away from the inside of one’s home, the objective reasonableness of the privacy expectation becomes more remote. For example, the Supreme Court has endorsed warrantless searches of one’s property from an aircraft in public air space and of one’s garbage bags placed at the curb. This is because as the search moves away from a person’s home, it becomes more likely that the person has voluntarily consented to having the information made available to others. Most recently, in Jones, the Court majority opined that an important threshold inquiry in privacy cases should be whether the government “intrude[s]” on a traditionally “protected area.” These consistent references to the proximity of the search location to the defendant’s home support defining spatial intimacy via reference to the home.

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33 See, e.g., Kyllo, 533 U.S. at 34–35 (finding that authorities’ warrantless use of heat-sensing technology not in general public use to obtain information about the inside of defendant’s home invaded his reasonable expectation of privacy).

34 The four factors to be used to determine whether a space falls within a home’s “curtilage,” and thus is entitled to heightened Fourth Amendment protection, are: “(1) the proximity of the area to the home; (2) whether the area is within an enclosure surrounding the home; (3) the nature and uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by passersby.” Dunn, 480 U.S. at 1139 (finding that barn was not part of home’s curtilage in part because it was not used for intimate activities).


36 See Greenwood, 486 U.S. at 39 (reasoning that defendants had no expectation of privacy in their garbage bags placed at the curb in part because such bags “left on or at the side of a public street are readily accessible to animals, children, scavengers, snoopers and other members of the public.”).


38 See Payton v. New York, 445 U.S. 573, 590 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house."). Although it is true that the Katz majority declared that "the Fourth Amendment protects people, not places," Katz, 389 U.S. at 351, "what protection it affords to those people . . . generally . . . requires reference to a ‘place.’" Id. at 361 (Harlan, J., concurring). In other words, whether one’s expectation of privacy is deemed “reasonable” often depends in large part upon where one was located at the time and how much that place was like one’s home. See Dunn, 480 U.S. at 334–35. For a recent and thorough critique of the Supreme Court’s focus on the home and one’s proximity
In addition to the Fourth Amendment cases, privacy tort cases also define privacy in part via references to space. This is most pronounced in the publicity to private facts tort, which suggests no liability “when the defendant merely gives further publicity to information about the plaintiff that is already public” or for “what the plaintiff himself leaves open to the public eye.” Similarly, in the intrusion upon seclusion tort, an invasion of one’s personal physical area, or its equivalent, is required. Implicit in this element is that there must be some legitimately secluded space in which the other party is intruding—a private, versus public, space. Under the Restatement, one only has an intrusion claim if the intrusion occurs in the home or other traditionally secluded place, such as a hotel room. The spatial part of the private versus public distinction also is evident in the voluminous cases interpreting the intrusion and other privacy torts that both preceded and followed Prosser’s famous Privacy article. Ultimately, these varied sources all support...
defining spatial intimacy, at least in part, via reference to the home or a home-like setting.\textsuperscript{43}

\textbf{B. Bodily Intimacy}

The borders of the second circle of the Intimacy Plot are based on bodily intimacy. Unlike spatial intimacy, which depends on where a privacy intrusion occurs (\emph{e.g.}, the bedroom versus the break-room), this type of intimacy depends on the bodily nature of the intrusion. Specifically, something has a high degree of bodily intimacy if the intrusion involves one’s own intimate body parts or activities—primarily, one’s sexual organs or inner thoughts—that usually are kept most private, even when outside of the home.\textsuperscript{44}

\textsuperscript{43} In this article, I primarily use spatial intimacy to refer to actual, physical spaces to which information was contained prior to a later intrusion and/or exposure. However, the concept of intimacy also encompasses data-sharing scenarios such as when one performs a Google search of one’s own medical symptoms from a home computer. In the latter scenario, the information may be thought of as less intimate because it was shared with a third party outside of the home but, upon further thought, be deemed spatially intimate because of where it was shared (\emph{e.g.}, a home computer) and bodily intimate because it relates to one’s innermost thoughts. See infra notes \textsuperscript{\ldots} and accompanying text. I hope to further address the application of the intimacy plot to more purely data-related cases in a future work.

\textsuperscript{44} In defining bodily intimacy via reference to the body rather than to a more abstract sense of personhood, I hope to promote the distinction urged by Kendall Thomas in his work, \textit{Beyond the Privacy Principle}, which preceded \textit{Lawrence v. Texas} but presciently hinted at how such a case would or should be decided via reference to the body. See Kendall Thomas, \textit{Beyond the Privacy Principle}, 92 COLUM. L. REV. 1431, 1460 (1992) (“Hence, I believe that it would be a mistake to view \textit{Hardwick} as a case about the state’s power to regulate sexual intimacy or personal morality. Rather, \textit{Hardwick} ought to be understood as a case about Michael Hardwick’s right to be protected from state-sanctioned invasion of his corporal integrity, that is, of his very bodily existence. From this perspective, \textit{Hardwick} casts the limitations of the theory of the subject in which privacy principle is grounded into stark, unflattering relief. The ‘personhood’ privileged in privacy analysis relies too heavily on an abstract image of the human subject as a moral self. The ‘personhood’ at stake in \textit{Hardwick}, however, calls for a more materialist view of the human subject as an embodied self. \textit{Hardwick} powerfully underscores the fact that the interests privacy analysis seeks to defend are initially, and indispensably, body-generated.”). For more insight into how thoughts can be subject to intimate intrusions, see Julie E. Cohen, \textit{DRM and Privacy}, 18 BERKELEY TECH. L.J. 575 576-77 (2003) (“Properly understood, an individual’s interest in intellectual privacy has both spatial and informational aspects. At its core, this
The appreciation of bodily intimacy as a category distinct from spatial intimacy is reflected in privacy scholarship from both vintage and recent sources. In his 1941 *Handbook of the Law of Torts*, William Prosser acknowledged that “a difference may at least be found between a harmless report of a private wedding and the morbid publication of the picture of a deformed child.” In the 1970s, Richard Posner posited that bodily-intimate information was different than other information people view as private because the reason people seek to keep their naked bodies private (something indefinable) is different from why they seek to keep other information about themselves private (to protect their reputations). Most recently, Laura A. Rosenbury and Jennifer E. Rothman have urged that privacy protection should be provided to activities involving one’s sexual organs, regardless of whether they are used as part of an “emotionally intimate” relationship.

The most succinct statement of why we need to consider the body in crafting privacy-related legal protections was made by Alan Hyde in his book, *Bodies of Law*:

> What we need is not a new right, but...alternatives that always treat people as embodied, that do not shy away from pain, sex, or other embodied experiences, that replace the metaphors of property, machine, or privacy right with a language of bodily presence or embrace.

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46 Richard A. Posner, *The Right to Privacy*, 12 GA. L. REV. 393, 400 (1978). Specifically, Posner stated: “Some private information that people desire to conceal is not discreditable. In our culture, for example, most people do not like to be seen naked, quite apart from any discreditable fact that such observation might reveal.” *Id.*

47 Laura A. Rosenbury and Jennifer E. Rothman, *Sex in and out of Intimacy*, 59 EMORY L.J. 809, 811 (2011). Rosenbury and Rothman proposed “a new theory for extending legal protection to a wider range of consensual sexual activities” than those activities intertwined with relationships or emotional bonds. *Id.* at 810-11. I agree that relationship intimacy should not be a prerequisite for privacy protection. Rather, the focus should be on the intersection of bodily intimacy and spatial intimacy, as set forth in Part II, *infra*.

Some may feel uncomfortable or disgusted saying it outright, but what makes various intrusions into one’s personal space so innately troubling is that they also involve bodily intimacy. To put Alan Hyde’s wise advice in action, we no longer should “shy away” from analyzing whether the conduct involves intimate parts of our “embodied” selves. Rather, when deciding whether conduct should be protected as private, we should ask whether the conduct involves bodily intimacy.

Bodily intimacy is what distinguishes a picture of one’s face in the paper from a picture of one’s genitals in the same newspaper. It is what distinguishes a city government’s recording of an entrance to a popular nightclub from a similar recording of the nightclub’s restrooms. Ultimately, if an intrusion interferes with one’s “embodied self,” it involves bodily intimacy. To measure that type of intrusion objectively, we should ask whether a governmental or private action intrudes upon one’s intimate body parts or intimate thoughts.

the terms for understanding how the laws it assesses mark the flesh-and-blood bodies of real, actual individuals....In my view, in order to develop a sufficiently precise conception of the human beings whose ‘personhood’ is the target of homosexual sodomy statutes, we need a ‘concrete’ rather than an ‘abstract’ understanding of the body.”).

49 See William N. Eskridge, Jr., Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion, 57 FLA. L. REV. 1011, 1023 (2005) (discussing how courts generally view all sex with disgust). In further discussing the “disgust” concept, Professor Eskridge discusses the work of Paul Rozin. Id. at 1023 (“Paul Rozin maintains that our most primordial disgust responses arise out of emotional efforts to humanize our animal bodies and distance ourselves from physical functions that are ‘reminders of our animal vulnerability.’ Like prejudices, feelings of disgust are nonrational responses to physical phenomena, yet they may be underlying motivations for our rational discourses. Sexuality is an obvious situs for disgust. Almost anything related to sex is disgusting to some people; some sexual practices are disgusting to almost all people; and almost all people feel their disgust intensely.”).

50 Thomas, supra note 44, at 1435 (“The lack of close attention to the actual human beings whose bodies are touched by laws like that challenged in Hardwick deprives privacy analysis of an important and indispensable conceptual resource.”).

51 See McNamara v. Freedom Newspapers, Inc., 802 S.W.2d 901, 905 (Tex. App. 1991) (holding that accidental yet accurate depiction of male soccer player’s genitalia in newspaper photo was not a violation of privacy due to newsworthiness of the event). The plaintiff had argued that publishing the photo “violated the bounds of public decency.” Id. I would characterize this argument as one involving significant bodily intimacy.

52 Although sex is an important part of bodily intimacy, the concept of bodily
II. CATEGORIZING AND PLOTTING PRIVACY CASES BASED ON INTIMACY

In Part I, I defined the two circles of intimacy within which privacy law cases may be plotted—spatial intimacy and bodily intimacy. In this Part II, I use those circles of intimacy to plot a small sample of recent Supreme Court cases. Cases that fall within the overlapping areas of spatial intimacy and bodily intimacy—are referred to as the “Overlap Cases”—are those most worthy of privacy protection. Cases that fall outside of both circles are the “Outlier Cases,” which are least worthy of privacy protection. Each category is discussed in turn below.

A. The Overlap Cases

In this sub-part A, I begin to populate that portion of the Intimacy Plot in which spatial intimacy and bodily intimacy overlap. To do so, I dissect two well-known Supreme Court cases—Stanley

intimacy is broader than mere sexual intimacy. As Professor Eskridge has pointed out, “In Union Pacific Railway Co. v. Botsford, the Court recognized bodily integrity as a species of constitutionally protected liberty and ruled that the state could not require a personal injury plaintiff to submit to a medical examination.” Eskridge, supra note 49, at 1054. The concept of “bodily integrity” applies outside of the realm of sexual intercourse and outside the realm of one’s sexual organs. See, e.g., Rochin v. California, 342 U.S. 165, 172 (1952) (finding that police officers’ formed pumping of a drug suspect’s stomach “shocked the conscience” due to their “illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach’s contents”).

53 In selecting cases, I purposefully excluded cases typically not viewed as part of privacy canon, such as those involving prostitution, due to lack of consent and other distinguishing facts. The Supreme Court in Lawrence distinguished those cases as follows: “The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” Lawrence, 539 U.S. 558, 578 (2003). See supra notes ___ - ___ and accompanying text for a detailed discussion of Lawrence.

54 By “well-known cases,” I mean cases to which legal scholars have devoted significant attention or cases that are more generally high-profile due to the attention devoted to them by the public at large. I also purposefully chose a mix of cases—some traditionally thought of as privacy cases and some not. Of course, the cases discussed herein are not intended to be exhaustive. Rather, they merely are examples chosen to illustrate the potential utility of considering bodily intimacy
v. Georgia and Lawrence v. Texas. In discussing each case in this and later subparts, I focus on the same three tasks to keep the discussions consistent for comparison purposes. First, I describe the conduct at issue that was or was not protected from state intrusion. Second, I share the reasoning used by the Court to rule that such conduct was or was not worthy of legal privacy protection. Finally, I show how both the conduct and reasoning in the case revolved around intimacy-dependent facts (or the lack thereof).

i. Stanley v. Georgia

In Stanley v. Georgia, the conduct at issue was the possession of three eight-millimeter film reels containing obscene material. The precise location of the film reels was “a desk drawer in an upstairs bedroom.” Police found the film reels during a search for evidence of illegal bookmaking or gambling activity. Based on his bedroom-based possession of the reels, Mr. Stanley was convicted under a Georgia statute stating that “[a]ny person who…shall knowingly have possession of…any obscene matter” was guilty of a felony.

Stanley challenged his conviction on First Amendment grounds, arguing that he had a First Amendment right to view the reels’ content in the privacy of his own home. Georgia argued that the criminal statute promoted the state’s interests in protecting Stanley’s mind from obscenity and in preventing deviant sexual behavior that may result from exposure to obscene materials. The Court rejected the first interest as impermissible thought control and the second as too tenuous and broad, analogizing it to banning

and spatial intimacy and the intersection thereof.

56 394 U.S. at 558.
57 Id.
58 Id.
59 Id. at 559 (citing GA. CODE ANN. § 26-6301 (Supp. 1968)).
60 Id.
61 Id. at 565.
62 Id. at 567-68. Georgia also argued that it was necessary to prohibit possession in order to enforce its laws against distribution. Id. at 567. The Court rejected this argument because, even if true, that state interest would not “justify infringement of the individual's right to read or observe what he pleases.” Id.
63 Id. at 566 (“Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.”).
chemistry books because they might lead someone to concoct "homemade spirits."\textsuperscript{64} In its 9-0 decision, the Court ultimately held that criminalizing the "mere private possession of obscene material" violated the First Amendment. The First Amendment right infringed upon was a "[fundamental] right to receive information and ideas"\textsuperscript{65} or, more specifically, "the right to read or observe what [one] pleases."\textsuperscript{66}

Although often viewed as a First Amendment case, \textit{Stanley} also should be viewed as a privacy case that turned on its intimacy-dependent facts and reasoning. For plotting purposes, \textit{Stanley} falls within the area in which the spatial intimacy and bodily intimacy circles overlap. It earns a high spatial intimacy designation because the film reels were discovered in the defendant’s home; indeed, they were found in the most intimate space within the home itself—the bedroom.\textsuperscript{67}

The Court relied upon this high spatial intimacy in distinguishing \textit{Stanley} from other obscenity cases, like \textit{Roth v. United States} and \textit{Ginsberg v. New York}.\textsuperscript{68} In \textit{Roth} and \textit{Ginsberg}, the Court upheld defendants’ convictions related to the distribution of obscene materials. The \textit{Stanley} Court distinguished those cases because they “dealt with the power of the State and Federal Governments to prohibit or regulate certain public actions taken or intended to be taken with respect to obscene matter.”\textsuperscript{69} In contrast, \textit{Stanley} involved the “constitutional implications of a statute forbidding mere private possession of [obscene] material.”\textsuperscript{70} In making this public versus private spatial distinction, the \textit{Stanley} court was recognizing

\textsuperscript{64} \textit{Id.} at 567 ("Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.")

\textsuperscript{65} \textit{Id.} at 564.

\textsuperscript{66} \textit{Id.} at 565.

\textsuperscript{67} \textit{Id.} at 558.

\textsuperscript{68} \textit{Roth}, 354 U.S. 476, 480 (1957) (considering constitutionality of federal statute barring the mailing of "obscene, lewd, lascivious, or filthy" materials); \textit{Ginsberg}, 390 U.S. 629, 631 (1968) (considering constitutionality of state obscenity statute prohibiting the sale of obscene materials to minors).

\textsuperscript{69} 394 U.S. at 561 & n.7 (documenting previous obscenity cases involving public sale, distribution and other "non-public" uses) (emphasis added). The \textit{Roth} line of cases also was different because such cases involved an “important [government] interest in the regulation of commercial distribution of obscene material.” \textit{Id.} at 563-64.

\textsuperscript{70} \textit{Id.} at 561 (emphasis added).
the importance of spatial intimacy in deciding whether conduct should be afforded legal protection from state intrusion.\textsuperscript{71}

The \textit{Stanley} case also earns a high bodily intimacy designation. The case involves significant bodily intimacy because the state was attempting to regulate individual thought, which takes place in the intimacy of one’s own mind. The \textit{Stanley} Court suggested that such an intrusion was especially problematic because it would violate the “well established...right to receive information and ideas” that exists “regardless of [the ideas’] social worth.”\textsuperscript{72} Although left unsaid by the Court, the fact that the conduct being regulated involved viewing of sex-related materials further enhanced the bodily intimate nature of the conduct.\textsuperscript{73} Ultimately, the Court recognized that the facts presented in \textit{Stanley} involved an “added dimension”\textsuperscript{74} due to the conduct occurring “in the privacy of a person’s own home.”\textsuperscript{75} I believe that that as-yet-unidentified “added dimension” was a function of the high levels of spatial and bodily intimacy involved.

\textbf{ii. \textit{Lawrence} v. Texas}

In \textit{Stanley}, the Supreme Court stated, “If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”\textsuperscript{76} In \textit{Lawrence} v. \textit{Texas}, the Court considered whether the state had any “business” telling a man, alone in his house with another man, that his preferred type of physical intimacy was criminal.\textsuperscript{77} As I did with \textit{Stanley}, I will discuss the conduct involved in \textit{Lawrence} before sharing the Court’s reasoning and

\textsuperscript{71} This should not be surprising given the public versus private distinction discussed, \textit{infra}, at notes ____ - ____ and accompanying text.

\textsuperscript{72} \textit{Id.} at 564. Intertwined with that right is “the right to be let alone.” \textit{Id.} at 564 (citing \textit{Olmstead} v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

\textsuperscript{73} Note, however, that the bodily intimate nature of the conduct was what made it obscene and criminal in Georgia.

\textsuperscript{74} \textit{Id.} at 564 (“Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person’s own home—that right takes on an \textit{added dimension}. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.”) (emphasis added).

\textsuperscript{75} \textit{Id.} at 564.

\textsuperscript{76} \textit{Id.} at 565.

\textsuperscript{77} 539 U.S. 558 (2003).
explaining how both the conduct and reasoning were intimacy-dependent.

The conduct at issue in Lawrence was a consensual, anal sex act between two men, John Lawrence and Tyron Garner. The location of the act was Lawrence’s Texas apartment home, which the police entered upon their observation of the sexual act. The defendants were charged with violating the Texas Penal Code, which declared that “[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” Intercourse was “deviate” if it, among other things, involved “the penetration of the genitals or the anus of another person with an object.” After a trial de novo, both defendants were convicted of a misdemeanor and assessed a fine.

At the Supreme Court, the defendants argued that their convictions violated their equal protection rights and their substantive due process rights under the Fourteenth Amendment. The state argued that the law was justified given the government’s interest in promoting morality. A five-justice majority held that the Texas law violated the defendants’ due process rights. In doing so, the Court overturned an earlier decision involving similar facts, Bowers v. Hardwick. Although often thought of as a substantive due process or liberty case, Lawrence also can be thought of as a privacy case, as discussed below.

The intimacy-dependent conduct and reasoning in Lawrence

78 Id. at 563.
79 Id. at 562-63. The exact location within the apartment was not referenced in the Supreme Court’s opinion. Id. The officers initially planned to investigate the apartment in response to a reported “weapons disturbance.” Id. at 562.
80 Id. at 563 (citing TEX. PENAL CODE ANN. § 21.06(a) (2003)).
81 Id. (citing TEX. PENAL CODE ANN. § 21.01(1) (2003)).
82 Id.
83 Id. at 563-64.
84 Id. at 582 (O’Connor, J., concurring).
85 Id. at 578 (“Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”). A sixth justice, Justice O’Connor, concurred in the judgment but viewed the statute as a violation of the equal protection clause versus substantive due process. Id. at 582 (“Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”).
86 Id. at 578. The Georgia statute in Hardwick applied to same sex and well as heterosexual acts. The Texas statute in Lawrence applied only to members of the same sex. Id. at 565.
strongly support its placement within the overlap area. High spatial intimacy was involved due to the place in which the government intrusion occurred—Lawrence’s private residence. The majority recognized the importance of this spatial intimacy when it stated as follows: “Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home.” This emphasis on the home appeared in the very first sentence of the majority opinion. In that same paragraph, the Court declared that the case involved “liberty of the person both in its spatial and more transcendent dimensions.” The Court again emphasized spatial intimacy when it later declared that the Texas law had “more far-reaching consequences” than other laws because it “touch[ed] upon…the most private of places, the home.” Thus, the fact that the criminalized conduct occurred in the home appears to have contributed significantly to the Court’s holding.

Spatial intimacy alone was not enough to make the conduct in Lawrence worthy of legal protection. Rather, what made the state’s intrusion so troubling was that it “involve[d] liberty of the person both in its spatial and more transcendent dimensions.” That additional “dimension,” like in Stanley, was significant bodily intimacy. The conduct in Lawrence was bodily intimate because it involved the most intimate of body parts—sexual organs—and the most intimate of actions—sexual intercourse. The Court recognized the importance of bodily intimacy in its reasoning. First, the Lawrence Court noted that the government had “touch[ed] upon the most private human conduct, sexual behavior…. The Court further explained that protecting bodily intimacy was important because, “when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal

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87 Id. at 562.
88 Id. at 562.
89 Id.
90 Id. at 567.
91 As the Court itself stated, “Freedom extends beyond spatial bounds.” Id. at 562.
92 Id. at 562.
93 Id. at 578 (“The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives.”).
94 Id. at 567.
bond that is more enduring.”

The bodily intimate nature of the criminalized conduct also was what connected *Lawrence* to supporting precedent. For example, in defining substantive due process to include the conduct in *Lawrence*, the Court first referenced its abortion-related decision, *Casey*, to confirm that the Constitution protects “a realm of personal liberty which the government may not enter.” It then decided that “[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” The Court ultimately concluded that cases like *Casey* “show[ed] an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”

### iii. Plotting Stanley and Lawrence

As noted above, both Stanley and Lawrence involved high levels of spatial intimacy and bodily intimacy. Accordingly, they populate the overlap area of the Intimacy Plot, shaded below. Grouping these two cases together is consistent with the intimacy-dependent conduct and reasoning in both cases. For example, in *Lawrence*, the Court protected the plaintiffs’ conduct because it “touch[ed] upon the most private human conduct, sexual behavior, and in the most private of places, the home.”

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95 Id. at 567.
96 Id. at 578 (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)). In *Casey*, the Court considered challenges to the constitutionality of a Pennsylvania law requiring “a woman seeking an abortion give her informed consent” and requiring minor women to obtain a parent’s consent, subject to a possible judicial bypass”). *Casey*, 505 U.S. at 844.
97 539 U.S. at 578.
98 Id. at 571-72. In *Casey*, the Court drew parallels between the abortion-related restrictions at issue in that case and the “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education” that previously were awarded constitutional protection. *Casey*, 505 U.S. at 851 (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”).
99 539 U.S. at 567 (emphasis added). The *Lawrence* Court also equated the intimate sexual conduct involved in *Lawrence* with the intimate thoughts at issue in
involves high levels of both spatial intimacy and bodily intimacy, privacy protection is and should be at its highest. A simple, graphical representation of the Intimacy Plot so far is below.

B. The Outlier Cases

The second category of cases, the Outlier Cases, featuring low spatial intimacy and low bodily intimacy, is reviewed in this Sub-

Stanley, stating that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.". Id. at 562.

Professor Eskridge highlighted this intersection of interests as follows: "The Court's sexual privacy precedents guarantee his freedom to make decisions regarding intimate relations, and its privacy-of-the-home precedents guarantee his freedom against state intrusion into certain places." Eskridge, supra note 49, at 1033-34. Professor Eskridge's recap of the Bowers v. Hardwick dissent illustrates this point well: "Speaking for four dissenters, Justice Blackmun argued that the case was "no more about 'a fundamental right to engage in homosexual sodomy,' . . . than Stanley v. Georgia . . . [had been] about a fundamental right to watch obscene movies." Eskridge, supra note 49, at 1033. Of course, the state remains capable of showing that its interests outweigh the intimacy interests. However, its burden should be greater when both types of intimacy are threatened.
part B. The companion cases discussed herein are *Whalen v. Roe*¹⁰¹ and *NASA v. Nelson*.¹⁰² These cases, like those in Sub-part A, will be dissected in three steps: (i) a description the conduct that was or was not protected from state intrusion; (ii) an account of the reasoning used by the Court to rule that such conduct was or was not protected; and (iii) an analysis how both the conduct and reasoning revolved around intimacy-dependent facts (or the lack thereof).

### i. *Whalen v. Roe*

In *Whalen*, the Supreme Court considered whether New York’s prescription recording system for patients using Schedule II drugs¹⁰³ violated the privacy rights of the patients or their doctors.¹⁰⁴ The allegedly private conduct was the use of prescribed drugs without fearing that one’s use would be shared with, and possibly misused by, the state.¹⁰⁵ In *Stanley and Lawrence*, the state intrusion was a statute criminalizing the associated conduct.¹⁰⁶ In *Whalen*, the state statute did not criminalize the use of the prescribed drugs. Rather, the statute merely required the patient’s doctor to provide a copy of the prescription to the state, which then would enter the information into a database to be used to identify possible illegal activity, such as multiple prescriptions to the same person or unauthorized refills.¹⁰⁷ The information collected about each patient included name, address, and type of drug prescribed.¹⁰⁸ The law also mandated measures to protect the information collected and penalized unlawful disclosures.¹⁰⁹

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¹⁰³ *Id.* at 593. “Schedule II” drugs included “opium and opium derivatives, cocaine, methadone, amphetamines, and methaqualone.” *Id.* at 593. Although the recreational use of these drugs generally is prohibited by law, their use was permitted in “the amelioration of pain and in the treatment of epilepsy, narcolepsy, hyperkinesia, schizo-affective disorders, and migraine headaches.” *Id.*
¹⁰⁴ Plaintiffs in the case were patients regularly prescribed Schedule II drugs, some of the doctors who prescribed them, and two physicians’ associations. *Id.* at 595. The intimacy analysis contained herein focuses on the privacy-related arguments of the patient plaintiffs.
¹⁰⁵ *Id.* at 595.
¹⁰⁶ *See supra* notes ___ - ___ and accompanying text.
¹⁰⁷ *Id.* at 593.
¹⁰⁸ *Id.*
¹⁰⁹ *Id.* at 594-95.
The *Whalen* plaintiffs argued that New York’s prescription-reporting system violated a “zone” of privacy due to the shock, stigma and fear to which the system exposed patients.\(^{110}\) They further argued that the system interfered with their right to make certain decisions without government intrusion.\(^{111}\) The Supreme Court disagreed and instead held that the prescription-reporting system was a reasonable exercise of state power.\(^{112}\)

In reaching that holding, the Court found that plaintiffs’ reliance on certain prior privacy-related cases was misplaced. The cases plaintiffs cited included *Roe v. Wade*, *Loving v. Virginia*, *Griswold v. Connecticut*, *Pierce v. Society of Sisters*, and *Meyer v. Nebraska*.\(^{113}\) The Court previously had grouped these listed cases together into a special category because the conduct in those cases was related to “marriage, procreation, contraception, family relationships, and child rearing and education.”\(^{114}\) In short, those cases were special because they involved conduct and relationships that were particularly intimate, either due to bodily intimacy (abortion in *Roe*), spatial intimacy (home contraception in *Griswold*) or something in between (marriage in *Loving*, children’s schooling in *Pierce* and *Meyer*).\(^{115}\) Because the conduct in *Whalen* involved no such intimacy-dependent facts, the cases plaintiffs cited were

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\(^{110}\) Id. at 595.

\(^{111}\) Id. at 600 (“Thus, the statute threatens to impair both their interest in the nondisclosure of private information and also their interest in making important decisions independently.”). The District Court had agreed with plaintiffs’ arguments. Id. at 596 (“The District Court held that ‘the doctor-patient relationship is one of the zones of privacy accorded constitutional protection’ and that the patient-identification provisions of the Act invaded this zone with ‘a needlessly broad sweep,’ and enjoined enforcement of the provisions of the Act which deal with the reporting of patients’ names and addresses.”).

\(^{112}\) Id. at 598.

\(^{113}\) 410 U.S. 113; 388 U.S. 1; 381 U.S. 479; 268 U.S. 510; 262 U.S. 390.

\(^{114}\) 429 U.S. at 600 & n. 26 (citing *Paul v. Davis*, 424 U.S. 693, 713, for characterization of those decisions “as dealing with ‘matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas, it has been held that there are limitations on the States’ power to substantively regulate conduct.’”).

\(^{115}\) Although none of these cases featured levels of spatial intimacy and bodily intimacy at levels equal to *Stanley* and *Georgia*, the combination of high spatial intimacy and high bodily intimacy is not the only combination worthy of protection. Rather, my theory merely is that when those two types of privacy intersect, privacy protection should be particularly high. See supra notes ___ - ___ and accompanying text. The theory does not exclude other factors from similarly triggering a high level of privacy protection.
inapplicable.\textsuperscript{116}

Having distinguished the \textit{Whalen} conduct from the conduct in plaintiffs’ cited cases, the Court next concluded that New York’s prescription-reporting system was more like other “invasions of privacy that are associated with many facets of health care” that were “unpleasant” but not unconstitutional.\textsuperscript{117} These other permissible invasions included the “disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies” as “an essential part of modern medical practice.” \textsuperscript{118} Such disclosures were acceptable “even when the disclosure may reflect unfavorably on the character of the patient.”\textsuperscript{119} Outside of the health care realm, the Court found that mandated collection of the \textit{Whalen} plaintiffs’ information actually was more akin to the reporting requirements imposed on political donors, whose privacy and First Amendment concerns were rejected by the Court only a few years earlier.\textsuperscript{120} Ultimately, the \textit{Whalen} Court found that the state’s intrusion into the non-intimate conduct of plaintiffs was not enough of a threat to be a constitutional violation.\textsuperscript{121}

The most direct connection between the lack of intimacy-
dependent facts and the result in *Whalen* was drawn by Justice Stewart in his concurrence. Therein, Justice Stewart critiqued the concurrence of Justice Brennan, who had suggested that “[b]road dissemination by state officials of [the information collected by New York State]... would clearly implicate” a more general right to privacy.\(^\text{122}\) Justice Stewart argued that the two cases relied upon by Justice Brennan—*Griswold* and *Stanley*—were distinguishable from the instant case. Specifically, he noted that *Griswold* was dependent on its intimacy-related facts of conduct “in the home” (spatial intimacy)—namely, contraception during sex (bodily-intimacy).\(^\text{123}\) Justice Stewart similarly distinguished *Stanley*, discussed supra, from the instant case because the *Stanley* decision “protects a person’s right to read what he chooses” (bodily intimacy) “where that choice poses no threat to the sensibilities or welfare of others” (spatial intimacy).\(^\text{124}\) Absent intimacy-dependent facts like those in *Griswold* and *Stanley*, neither the majority nor concurring justices were willing to afford legal protection to the allegedly private conduct in *Whalen*.

**ii. NASA v. Nelson**

The lack of intimacy-dependent facts in *Whalen* contributed to the Court’s unanimous decision to not bar confidential reporting of Schedule II drug information to the state.\(^\text{125}\) Over thirty years later, the Supreme Court considered a case with similar facts, *NASA v. Nelson*.\(^\text{126}\) At issue in *Nelson* was whether the federal government could require certain contract employees to report any “treatment or counseling for recent illegal-drug use” and ask the employees’ “designated references” certain “open ended questions.”\(^\text{127}\) The Ninth Circuit had rejected the treatment and counseling questions asked of the employee and the open-ended questions asked of the references as not “narrowly tailored.”\(^\text{128}\) However, the Supreme Court, like in *Whalen*, unanimously decided not to afford legal

\(^{122}\) Id. at 608-09.
\(^{123}\) Id. at 609. Given this combination, *Griswold* likely is another good example of a case that falls within the overlapping circles of the Intimacy Plot.
\(^{124}\) Id.
\(^{125}\) See notes __ - __ and accompanying text.
\(^{126}\) 131 S. Ct. 746 (2011). Like *Whalen*, the NASA opinion was a unanimous decision with two concurrences. Id.
\(^{127}\) Id. at 754.
\(^{128}\) Id. at 754.
privacy protection.\textsuperscript{129}

The Nelson plaintiffs were employed by a non-federal institution that contracted with the Jet Propulsion Laboratory of the National Aeronautics and Space Administration ("NASA"), an independent federal agency.\textsuperscript{130} The exact conduct for which the Nelson plaintiffs sought protection was their refusal to participate an allegedly privacy-intrusive background check progress known as the National Agency Check with Inquiries ("NACI").\textsuperscript{131} As part of NACI, employees must answer whether they have "used, possessed, supplied, or manufactured illegal drugs" in the last year.\textsuperscript{132} If the employee responds "yes," he also must report "information about 'any treatment or counseling received.'"\textsuperscript{133} Employees further must consent to the government sending their references a questionnaire asking whether they "have 'any reason to question' the employee's 'honesty or trustworthiness,' or have 'adverse information' concerning a variety of other matters."\textsuperscript{134} Records collected pursuant to the NACI process may not be disclosed without the individual's written consent.\textsuperscript{135}

The Nelson Court held that the NACI process did not violate the plaintiffs' asserted informational privacy rights.\textsuperscript{136} Although the Court's decision depended in part on the fact that plaintiffs were prospective employees versus "citizens at large,"\textsuperscript{137} the lack of

\textsuperscript{129} Id. at 751.

\textsuperscript{130} Id. at 751-52. Plaintiffs' employer was the California Institute of Technology. \textit{Id.} at 748. The Jet Propulsion Laboratory is a facility that handles "deep-space robotics and communications" for various projects, including the Mars Rovers. \textit{Id.} at 752.

\textsuperscript{131} Id. at 752. The background checks were initiated in response to the recommendations of the 9/11 Commission, tasked with improving security at federal facilities. \textit{Id.} at 751. They are the same type of investigation used to examine "all prospective civil servants." \textit{Id.} at 752.

\textsuperscript{132} Id. at 753.

\textsuperscript{133} Id. at 753.

\textsuperscript{134} Id. at 749.

\textsuperscript{135} Id. at 753-54.

\textsuperscript{136} Both the Whalen Court and the Nelson Court reached their decisions without deciding whether a right to informational privacy existed, a point with which Justice Scalia vehemently disagreed in his Nelson dissent. \textit{Id.} at 756 ("As was our approach in \textit{Whalen}, we will assume for present purposes that the Government's challenged inquiries implicate a privacy interest of constitutional significance."); \textit{see id.} at 757 (Scalia, J., concurring) (suggesting that the majority's "Alfred Hitchcock line of our jurisprudence" "harms [the Court's] image, if not our self-respect, because it makes no sense").

\textsuperscript{137} Id. at 757-58 ("Time and again our cases have recognized that the
intimacy-related facts was a subtle yet important basis for the decision as well. The Court found the NACI process constitutional based on three key facts: (i) the questions asked were “reasonable,” (ii) the questions were asked by the government in its role as an employer, and (iii) the information collected was protected against disclosure. The reasonableness and employer-related facts are discussed further below.

The questions were reasonable in part because they did not inquire into one’s bodily intimacy or spatial intimacy. Instead, the bulk of the questions sought information regarding “basic biographical information: name, address, prior residences, education, employment history, and personal and professional references” as well as “citizenship, selective-service registration, and military service.” Asking for such information invades neither one’s personal space nor one’s bodily integrity. The other questions that plaintiffs found particularly troubling from a privacy perspective, i.e., those regarding drug use and related treatment, also invaded neither bodily intimacy nor spatial intimacy.

First, from a spatial intimacy perspective, having to fill out a form does not invade one’s home or home-like personal space. If the government had instead insisted on inspecting employees’ homes for evidence of drug use, the analysis would be different due to the invasion of spatial intimacy. The nature of the questions themselves also was not particularly invasive from a bodily intimacy perspective. Although it is true that consumption of drugs involves using one’s body, that fact alone does not transform the government’s general inquiry into one focused on bodily intimate matters. Rather, for significant bodily intimacy to be at stake, the government would have had to ask employees to report when they last had sex and whether that sex was with a person of the same or

Government has a much freer hand in dealing “with citizen employees than it does when it brings its sovereign power to bear on citizens at large.”). This fact strengthened the government’s claim to a compelling interest. Id. at 758-59.

138 Id. at 756-57 (“We hold, however, that, whatever the scope of this interest, it does not prevent the Government from asking reasonable questions of the sort included on SF-85 and Form 42 in an employment background investigation that is subject to the Privacy Act’s safeguards against public disclosure.”).

139 Id. at 753.

140 Id. at 762 (“Respondents in this case, like the patients in Whalen and former President Nixon, attack only the Government’s collection of information on SF-85 and Form 42.”).
opposite sex.\textsuperscript{141} No such bodily intimate inquiry was made.\textsuperscript{142}

In addition to relying upon overall reasonableness, the Nelson Court also relied upon the well-intentioned purpose of the questions in its analysis. Specifically, the government had “good reason to ask” questions regarding actual drug use because “questions about illegal-drug use are a useful way of figuring out which persons are "reliable, law-abiding persons who will "efficiently and effectively" discharge their duties."\textsuperscript{143} This purposeful connection distinguishes such questions from questions about bodily-intimate matters like sex, which bear no direct connection to an employee’s performance on the job.\textsuperscript{144}

\textit{iii. Plotting Whalen and Nelson}

In Whalen and Nelson, plaintiffs presented alleged privacy intrusions involving little to no spatial intimacy or bodily intimacy, as illustrated above. The lack of intimacy is particularly striking when compared to the intrusions in Stanley and Lawrence.\textsuperscript{145} Accordingly, Whalen and Nelson should be plotted outside of the

\begin{quote}
\textsuperscript{141} Or, the questions would have had to ask what book the applicant last read and what she thought about it. These are not the only examples, of course, but they illustrate the importance of the nature of the information sought when evaluating the propriety of the questions.

\textsuperscript{142} One part of a form posted on the government's website did suggest the relevance of more intimate matters but it was not at issue in the case. \textit{id.} at 754 ("In the Ninth Circuit, respondents also challenged...a document, which had been temporarily posted on the [NASA] intranet, that listed factors purportedly bearing on suitability for federal employment...[including] 'indecent exposure,' ‘voyeurism,' ‘indecent proposal[s],' and 'carnal knowledge’"). The other form also stated "that while ‘homosexuality,' ‘adultery,' and ‘illegitimate children' were not ‘suitability' issues in and of themselves, they might pose ‘security issue[s]' if circumstances indicated a 'susceptibility to coercion or blackmail.'" \textit{id.}

\textsuperscript{143} \textit{id.} at 759-60. The government also was entitled to ask about drug "treatment or counseling" because it identifies those "who are taking steps to address and overcome their problems," which the government considers a "mitigating factor" in its analysis. \textit{id.} at 760. The "open-ended inquiries" sent to employees' references were similarly acceptable because they, “like the drug-treatment question on SF-85, are reasonably aimed at identifying capable employees who will faithfully conduct the Government's business.” \textit{id.} at 761.

\textsuperscript{144} See Posner, \textit{supra} note 46, at 414 (illustrating how bodily intimate information is different "because the individual's desire to suppress the photograph [of a body part] is not related to misrepresentation in any business or social market place").

\textsuperscript{145} See \textit{supra} notes ___ - ___ and accompanying text.
circles of bodily intimacy and spatial intimacy. An updated version of the intimacy plot is provided below.

III. THE UTILITY OF PLOTTING PRIVACY AS INTIMACY

In Part II, I categorized and plotted certain privacy cases based on their intimacy-dependent facts and reasoning or lack thereof. In this Part III, I state the additional utility of plotting cases in that fashion in three steps. First, I show how the plot helps one predict which privacy-related cases will be easier or more difficult for courts to decide. Second, I discuss how focusing on the presence or absence of intimacy-dependent facts can help reconcile seemingly inconsistent cases. Finally, I illustrate how the intimacy plot fits with other emerging theories of privacy.

A. Identifying Winners, Losers and Toss-Ups

By considering whether a particular case involves intimacy-related facts, we may be able to predict how courts will analyze the case. We also may be able to separate future cases into likely winners, losers or toss-ups. The “winners” of privacy protection most likely will be cases in which the facts involve significant bodily
intimacy and spatial intimacy. If a case involves significant bodily intimacy coupled with significant spatial intimacy—like *Stanley* and *Lawrence*—then we can predict that a court likely will find that the intimate conduct at issue has “won” legal protection as private.

In other words, when these two objective factors overlap in the same fact pattern, we should expect the law to be most protective. Conversely, cases in which there is little to no bodily intimacy or spatial intimacy likely will face the opposite fate, absent some other fundamental interest at stake. If a case involves little or no bodily intimacy or spatial intimacy—like *Whalen* and *Nelson*—we can predict that plaintiffs will “lose” out on privacy protection for the conduct at issue. Although we never can predict the result with absolute certainty, we can predict that cases involving significant levels of bodily intimacy and spatial intimacy will win unless there is a particularly significant government interest on the other side.\(^{146}\)

Categorizing cases in this binary win/lose fashion begs the following question: What about fact patterns that do not fall completely within or completely outside the overlapping circles defined in Parts I and II? We can predict that these cases will be much tougher for courts to decide and we may see other patterns, too. For example, cases that are not clear “winners” or “losers” based on intimacy may be the types of cases that lead to results perceived as inconsistent or unsatisfying over time. Consider the Supreme Court’s recent cases regarding the so-called “right to die” or its cases regarding abortion.\(^{147}\) Both types of cases typically involve significant bodily intimacy but less significant spatial intimacy than the “winner” cases identified above. The presence of a third person, whether it’s a doctor, pharmacist or fetus, further pushes the cases toward the “toss up” category.\(^{148}\) For cases like these, the goal should be to identify other objective variables, such as relationships with third parties, in order to more fully understand how

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\(^{146}\) In other words, the presence of these intimacy-dependent facts is like a thumb on the scale in favor of privacy protection. The government still may show that its interest outweighs the privacy interest. However, its burden likely will be much greater than in a case lacking such intimacy-dependent facts.


\(^{148}\) Other “toss up” cases include HIV status disclosures and gay marriage or gay adoption cases yet to come. See *FAA v. Cooper*, 132 S. Ct. 1441 (2012).
the interest balance turned out the way it did.\textsuperscript{149}

\textbf{B. Reconciliation of Seemingly Inconsistent Cases}

Focusing on a case's presence of intimacy-dependent facts also may help reconcile cases that initially appear inconsistent. For present purposes, cases are "inconsistent" when they involve two courts applying the same law to similar fact patterns and reaching opposite results. This judicial inconsistency is harmful in part because it causes some observers to question whether a particular result depended more on the judge than on the facts.\textsuperscript{150} Reconciling such cases based on theory or factual analysis can restore one's faith in the efficacy and wisdom of the law being applied and in the judge(s) applying it.

One classic example of inconsistency comes from two privacy cases involving newsgathering—\textit{Dietemann v. Time} and \textit{Desnick v. ABC}.\textsuperscript{151} In each case, the issue was whether a newsgathering journalist violated the privacy of a person providing medical-like services to the public. The inconsistent results were that the \textit{Dietemann} court found that the plaintiff's privacy had been violated while the \textit{Desnick} court found no privacy violation. However, as shown below, the cases appear much more consistent when one considers the presence of intimacy-dependent facts in \textit{Dietemann} and the lack of such facts in \textit{Desnick}.

In \textit{Dietemann}, two employees of popular \textit{Life Magazine} posed as potential patients of the plaintiff, Mr. Dietemann, an alleged "healer" who used "clay, minerals and herbs" along with "gadgets" and a "wand."\textsuperscript{152} \textit{Life} featured Mr. Dietemann as part of its story

\textsuperscript{149} See supra notes 21-23 and accompanying text (discussing two dimensional intimacy plot and possible expansion of concept to recognize third dimension of relationship intimacy).

\textsuperscript{150} In my experience, this reaction is particularly prevalent among 2\textsuperscript{nd} or 3\textsuperscript{rd} year law students, while others suggest even 1\textsuperscript{st} year law students are making such jaded assessments. See Castiglione, supra note 4, at 656-67 ("However, as any first-year law student taking a torts class can tell you, reasonableness as an analytical concept is maddeningly frustrating and often little more than a shorthanded reference for 'What would I do in this situation?'").


\textsuperscript{152} \textit{Dietemann}, 449 F.2d at 246.
Plotting Privacy as Intimacy

entitled “Crackdown on Quackery.” The magazine employees had recorded their interaction with Mr. Dietemann and had taken pictures with a hidden camera, all within his home. One of the published pictures showed Mr. Dietemann with his hand on one of the magazine employee’s breasts. The employees shared their recording with the local District Attorney’s office and other government officials, all of whom had cooperated in the “sting” operation of alleged “quack” doctors.

The facts of Desnick largely tracked the facts in Dietemann, with some important intimacy-related distinctions. In Desnick, employees of the ABC Television Network (“ABC”) hired professional actors to pose as patients at the defendants’ ophthalmology clinics and secretly record their visits. ABC used interviews and recordings to depict defendants in a segment of their popular newsmagazine show, PrimeTime Live. The gist of the PrimeTime Live story was that defendants preyed upon elderly Medicare patients by performing unnecessary cataract surgeries.

In both Dietemann and Desnick, plaintiffs sued based on the invasion of privacy tort, among other theories. The Dietemann court held that “the [clandestine] recordation and transmission of [plaintiff’s] conversation without his consent... warrant[ed] recovery for invasion of privacy” while the Desnick court ultimately held that similar recordings of conversations with the plaintiff were not an “invasion” of privacy. That the courts ruled differently is surprising given the factual parallels, as shared above. More specifically, both cases involved exposure of medical practitioners by journalists at major news outlets using surreptitious recordings of conversations to publicize serious allegations of “quackery” of potential harm to the defendants’ ignorant patients.

153 Id. at 245.
154 Id. at 245-46.
155 Id. at 246. Dietemann was examining the breast because “Mrs. Metcalf had told plaintiff that she had a lump in her breast.” Id.
156 Id. Police later arrested Dietemann for “practicing medicine without a license” though that proceeding was not part of the Ninth Circuit case. Id.
158 Id. at 1347.
159 Id. at 1349-50. ABC further alleged that the operations were unnecessary based on separate consultations with an ophthalmology professor. Id. at 1348.
160 Dietemann, 449 F.2d at 245; Desnick, 44 F.3d at 1351.
161 Desnick, 449 F.2d at 248.
162 Desnick, 44 F.3d at 1353. The court further concluded that there also “was [not] any ‘invasion of a person’s private space.’” Id. at 1352.
Although these factual parallels are striking, even more striking is how the different results in Dietemann and Desnick make much more sense when one expressly considers the concepts of bodily intimacy and spatial intimacy. The privacy “winning” result in Dietemann can be explained by the intimacy-dependent facts in the case while the privacy “losing” result in the Desnick case can be explained by the lack of such facts. In Dietemann, the Life reporters entered the home of Mr. Dietemann, which he also used to attempt to “heal” certain patients. Further, as noted above, his home could only be entered by ringing a bell and entering a locked gate. Thus, there was significant spatial intimacy. The court emphasized those spatially-intimate facts in its analysis. Specifically, the court characterized the invasion as occurring “in his den,” which “was a sphere from which he could reasonably expect to exclude eavesdropping newsmen.” Further, the reporters in Dietemann only were invited into the healer’s home upon their false statement that a “Mr. Johnson” had told them they could get help there.

In contrast, the reporters in Desnick appeared at a place of business, the ophthalmology clinic, whose doors were open to any potential passersby interested in their services. Thus, as Justice Posner noted in his Desnick opinion, their entry “was not [an] invasive” intrusion into the plaintiffs’ “ownership or possession of land.” Posner further noted that the Desnick case presented different facts from other privacy cases because “[n]o embarrassingly intimate details of anybody’s life were publicized in the present case” and “no intimate personal facts concerning [the plaintiffs] were revealed.” In Desnick, there was less spatial intimacy than there was in Dietemann. There also was no bodily intimacy like that present in Dietemann, in which the plaintiff was pictured touching a woman’s intimate body part—her breast. Overall, the comparatively smaller amount of intimacy-related facts in Desnick helps explain

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163 Dietemann, 449 F.2d at 246.
164 Id. at 249. In support of this distinction, the court distinguished the facts of Dietemann from an early yet influential privacy case, Gill v. Hearst Publishing Co., 253 P.2d 441, 444 (1953), in which the court “denied recovery for invasion of privacy to plaintiffs whose picture was taken in a public market and later published without their consent” and “stressed that the picture had not been ‘surreptitiously snapped on private grounds, but rather was taken of plaintiffs in a pose voluntarily assumed in a public market place.’” Id. at 248.
165 Id. at 246.
166 44 F.3d at 1353.
167 Id. at 1353 (emphasis added).
why no privacy violation was found, despite the apparent factual similarities between it and *Dietemann*.

C. Support for and in Emerging Theories of Privacy Reunification

The third way in which focusing on intimacy-related facts is utile is that it further supports, and is supported by, recent efforts to reunify privacy law. The two most direct examples of this overlap are the theories shared in Lior Jacob Strahilevitz’s aptly-titled work, *Reunifying Privacy*, and Jane Yakowitz Bambauer’s work, *The New Intrusion*. The connections between those pieces and the instant Article are discussed in turn below.

In *Reunifying Privacy*, Strahilevitz argues that the division among the various privacy torts was an unnecessary split.\(^{168}\) In place of the current split, he suggests a unified privacy tort\(^{169}\) with three elements—privacy, highly offensiveness, and negative effects on social welfare.\(^{170}\) Merely upon reading that list of elements, the connection between Strahilevitz’s theory and the focus on intimacy herein begins to emerge.\(^{171}\) The elements tend to trigger follow up questions regarding how to define “privacy” and “offensiveness.” The initial answer may depend on intimacy. Specifically, I suggest that what makes an invasion “offensive” likely depends in large part upon whether it intrudes into one’s spatial intimacy or bodily intimacy or both. Measuring outrageousness using these objective indicators will help ensure that what makes something “outrageous” is something more consistent than whatever a reasonable person thinks is outrageous at a particular time.

Offensiveness reappears as a key concept in another recent and important work, *The New Intrusion*, albeit under the slightly

\(^{168}\) Lior Jacob Strahilevitz *Reunifying Privacy Law*, 98 CALIF. L. REV. 2007, 2010 (2010). Strahilevitz carefully notes that he is not arguing for the reunification of decisional privacy and informational privacy. *Id.* at 2009. However, I believe it soon may be time to make and embrace that argument.

\(^{169}\) Strahilevitz, supra note 168, at 2010.

\(^{170}\) Strahilevitz, supra note 168, at 2033 (“We can embrace a reformed version of Warren and Brandeis’s unified tort for invasion of privacy. Such an invasion occurs when the defendant infringes upon (1) the defendant’s private facts or concerns, (2) in a manner that is highly offensive to a reasonable person, and (3) engages in conduct that engenders social harms that exceed the associated social benefits.”).

\(^{171}\) Strahilevitz later applied his privacy reunification theories to the facts of *NASA v. Nelson*, discussed in detail in Part II.B above, prior to the Supreme Court’s decision in the case. Strahilevitz, supra note 168, at 2041-2046.
different name of “offensiveness.” In The New Intrusion, Jane Yakowitz Bambauer advocates for increased use of the intrusion upon seclusion tort to address current privacy dilemmas in the “information age” without overly threatening other interests, such as those protected by the First Amendment. While Strahilevitz suggests three elements for his ideal privacy tort, Bambauer suggests focusing merely on two: (i) an observation, (ii) that is offensive. In distinguishing an offensive observation from one that is not offensive, Bambauer contrasts a landlord’s surreptitious video recording of an apartment tenant’s bedroom with a similar recording of an area just inside the tenant’s front door. In doing so, she is defining outrageousness by relying upon bodily intimacy and spatial intimacy. This is because what separates a bedroom intrusion from a doorway intrusion is the spatially-intimate nature of one’s bedroom and the bodily-intimate nature of the activities that take place there. Ultimately, Bambauer’s implicit reliance on intimacy provides further support for the intimacy plot while the intimacy plot lends objective criteria one can use to better define “offensive” in “the new intrusion.”

IV. CONCLUSION

One reason scholars have struggled to define privacy may be that privacy is better viewed as the cure for a particular ill rather than as the reason a cure is needed. A factual situation that involves the dual “symptoms” of bodily intimacy and spatial intimacy triggers an especially dire need for a privacy cure. Focusing on bodily intimacy and spatial intimacy is useful because it helps scholars and courts alike to objectively assess situations that feel inherently “outrageous” or “offensive.” It also helps one reconcile seemingly inconsistent cases in some instances and predict “close call” cases in other instances. Ultimately, I hope that a purposeful consideration of intimacy will help ensure that legal privacy protections address an inherent set of appreciable and objectively measurable ills rather than shift along with shifting public opinions of “reasonableness.”

173 Bambauer, supra note 172, at *4 (suggesting that such elements are advisable to ensure that “[t]he intrusion tort penalizes conduct—offensive observations— not revelations”).
174 Bambauer, supra note 172, at *31.