2004

Fun with Dick and Jane and Lawrence: A Primer on Education Privacy as Constitutional Liberty

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Efforts to quantify and qualify a constitutional right to privacy are not unlike the travails of King Tantalus. The King's punishment for revealing the secrets of the gods was to stand in a pool of water, shaded by a fruit tree. The water receded when he thirsted, and the fruit trees retreated when he hungered. Likewise, the more one reads about privacy, the more one realizes how many theories abound about the existence or nonexistence of a right to privacy without coming any closer to finding a sustaining theory. Privacy law has been characterized as alternatively diverse, decentralized, and dynamic. Even more elusive are efforts to find a constitutional right of privacy for children, minors under the age of eighteen. "The meaning of privacy and the right to privacy for children rarely if ever enter the debates that people wage about the ways that childcare is provided and education is organized."

Except for the treatment of limited issues on the matter of mature minors' privacy, most scholarly work on privacy addresses exclusively adult

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2. E.g., DAVID M. O'BRIEN, PRIVACY, LAW, & PUBLIC POLICY 4 (1979); see generally THE RIGHT TO PRIVACY (Ellen Frankel Paul et al. eds., 2000); David Bazelon, Probing Privacy, 12 GONZ. L. REV. 587, 588 (1977). In addition, the egocentrism of legal analysts insists on formulating new and unique theories where long-recognized principles might work as well. Ken Gormley, One Hundred Years of Privacy, 1992 WIS. L. REV. 1335, 1338 (1992); see also JULIE C. INNESS, PRIVACY, INTIMACY, AND ISOLATION 3 (1992) (describing the numerous theories of privacy as a "swamp"); Daniel J. Solove, Conceptualizing Privacy, 90 CAL. L. REV. 1087, 1088-89 (2002).
concerns. Instead, privacy of children is subsumed by or coextensive with the privacy of others, usually their families. Consequently, very little legal, scholarly literature suggests that children have—or perhaps even need—an independent privacy right. However, to ignore the privacy concerns of children is to ignore the one area of their lives that can be abused most by the absence of privacy. That area is children’s public school lives.

During the late 1960s and early 1970s, there was some movement in professional education literature about the privacy of schoolchildren and the need to better protect that privacy. This movement was the chief impetus for the passage of the Family Educational Rights and Privacy Act in 1974 (“FERPA”).6 FERPA amended the Elementary and Secondary Education Act of 1965 and conditions federal funding to educational institutions on their compliance with certain statutory requirements to protect disclosure of and access to students’ educational records. Although the legal literature suggests some fine-tuning of FERPA’s procedures and regulations to better serve students and their families, none of that literature suggests other grounds for asserting children’s privacy in schools.7 Perhaps no one perceived the need: FERPA set out guidelines for schools to follow in dealing with student records, and the system went chugging along quite nicely. For a nearly thirty-year-old statute, very few cases addressing privacy issues were actually prosecuted under FERPA. Then the whole thing derailed when the Supreme Court of the United States declared that FERPA granted no privacy rights to students in Gonzaga University v. Doe.8 As a result, the cornerstone of students’ privacy rights was gone, or at least the assumption that FERPA contained such a right was gone.

The importance of a schoolchild’s having a particular right to privacy cannot be underestimated. School is a child’s “workplace” for six to eight hours every day, but it is a workplace run by the government; hence, the dichotomy between a child being a public customer and a private being. No parent would suggest that everything that occurs in the school is a matter of “public” record merely because it is a government agency, but Gonzaga University v. Doe banished the notion that there exists any real privacy

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protection in schools. Thus, a different formulation of children’s privacy in the public school setting must be considered.

Such a privacy right already exists as a function of the American cultural and political condition and belongs to children no less than to adults: the Constitution’s liberty interest—in the Fifth and Fourteenth Amendments—assumes the existence of citizens’ privacy and the limits on governmental interference with that privacy. The Constitution’s liberty interest contains no caveats—“Adults Only”—so it takes no stretch of the imagination to extend that general privacy interest into a special category of education privacy for children. As a practical matter, such privacy is a child’s liberty interest in nearly all aspects of her life because so much of that life is spent in school—the aspects of her life when the government acts in its educational capacity.

The necessity for addressing children’s privacy in schools is imperative because more and more inroads are being made on that private realm, especially in the name of the schools’ government function. In addition to actual abuses of student information in violation of FERPA and random drug-testing without probable cause, recent state and federal legislation has further eroded student privacy, especially in increased access to otherwise confidential student records under circumstances that most adults would find incredibly invasive. Because legislative regulatory regimes, such as FERPA, are piecemeal responses to specific privacy concerns, they do not really address the fundamental issue—that children have a liberty interest in privacy that exists, not at the will of the government, but in spite of the government.

As a cognate of an adult’s privacy liberty interest, a child’s privacy interest is hard to capture because of the difficulty in articulating that interest


10. The formulation of children’s constitutional privacy in this Article does not include Fourth Amendment search-and-seizure issues that arise when schools assume a police role, especially in student drug-testing. Scholarly work on this issue usually addresses the Fourth Amendment as a distinct privacy question concerning students’ bodily integrity and is not usually tied to the schools’ educational function. See, e.g., Meg Penrose, Shedding Rights, Shredding Rights: A Critical Examination of Students’ Privacy Rights and the “Special Needs” Doctrine After Earls, 3 NEV. L.J. 411 (2002–03). Although the notion that drug-testing is somehow separate from the educational function of schools is somewhat naïve and ignores reality, that subject is better left to a different discussion.

11. The U.S.A. Patriot Act amended FERPA to allow an Assistant United States Attorney, with only an ex parte order, to collect education records considered relevant to a terrorism investigation. 20 U.S.C. § 1232j (2003). Under the Individuals with Disabilities Education Act, school authorities must transmit school records—without court order or subpoena—to police agencies. Id. § 1415(k)(9)(B). And the No Child Left Behind legislation allows the military to access certain information of students as soon as they turn sixteen, without prior parental consent. Id. § 7908.
for adults. Perhaps we are looking at the issue backwards, in that the failure to adequately address a child’s right of privacy inherently hampers the quest for an articulable right of privacy for adults.\textsuperscript{12} Whatever the confusion, the effort to quantify and qualify constitutional privacy interests was recently simplified when the Supreme Court produced a template for analysis in \textit{Lawrence v. Texas}.\textsuperscript{13} Indeed, \textit{Lawrence v. Texas} explicitly concludes that privacy is a constitutional liberty under the Due Process Clause of the Fourteenth Amendment.\textsuperscript{14} That conclusion elucidates that privacy is a constitutionally protected sphere of conduct within which the individual is free from government interference.

Considering the breadth of the language used by the Court in \textit{Lawrence v. Texas}, any number of privacy interests may be protected from government interference under the aegis of constitutional liberty. Thus, this Article posits that children are entitled to one of those protected spheres of conduct, a distinct constitutional liberty that protects their privacy in schools. This limited thesis does not suggest that children do not have a privacy liberty outside of schools; indeed, a formulation of education privacy may well inform their privacy interests outside of school. But the unique public-private dichotomy of children in schools poses special issues that arise because of the exclusive, nearly universal, embrace by a state actor of a private individual.

Any analysis of this privacy interest first requires a constitutional framework for recognition of the liberty itself.\textsuperscript{15} Thus, Part I analyzes \textit{Lawrence v. Texas}’s judicial methodology for recognizing this constitutional liberty so the decision’s limited holding can be extended to children. Such analysis necessarily includes a summary of the liberty jurisprudence itself as the foundation of the constitutional roots of privacy. Part II clarifies the underlying premise that privacy is a constitutional liberty per se and not just a piecemeal, case-by-case iteration that lurches from one adjudication to another. In so doing, Part II expands upon the \textit{Lawrence v. Texas} methodology by fashioning the broader constitutional liberty of privacy per se based on its practices, its history, and its legal traditions. Part III establishes the practices and history of children’s privacy, while Part IV explores the

\textsuperscript{12} On the other hand, the failure may be an inability of legal language to quantify or to qualify privacy as a consistent, legal precept. For example, courts speak of “expectations” of privacy with regard to searches and seizures but with wildly differing opinions on what an expectation is. See, \textit{e.g.}, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 831–32 (2002). However, attributing an “expectation” to a child is difficult, if not impossible, at ages other than high schoolers, who were the subjects of the drug-testing in \textit{Earls}.

\textsuperscript{13} 539 U.S. 558 (2003).

\textsuperscript{14} \textit{Id}.

\textsuperscript{15} The legislative attempts to ameliorate privacy concerns in schools and the failures of those attempts are multitudinous and the subject of a companion article.
inherent function of American education and its mission to encourage schoolchildren’s privacy as a function of both their development and their civic responsibilities. Last, Part V postulates the basic contours of education privacy for schoolchildren in the two primary areas of concern: the public classroom and their private information.

I. THE LESSONS OF LAWRENCE V. TEXAS

Lawrence v. Texas may well be that case changing the landscape of substantive due process—the characterization of particular rights arising from the Due Process Clause of the Fourteenth Amendment. The case has been described as an anomalous decision, departing from both the approach of defining and protecting “traditional” fundamental rights and the approach of protecting citizens’ autonomy from governmental interference. The “traditional” approach requires there be proof of specific recognition of a fundamental, particularized right through “history, legal traditions, and practices” before a court may afford it constitutional protection. The autonomist approach, on the other hand, requires “respect for the liberty of the individual” without a pronouncement of a particularized right and assumes an individual is free to act in the absence of some compelling government interest. The two approaches have clearly been at political (and arguably cultural) odds with each other for some time. Lawrence v. Texas serves as the Court’s “bridge” between these two analyses of substantive due process.

In Lawrence, the Court faced a state regulation of private conduct—sodomy—between homosexuals. The traditionalists argued—as previously set out in Bowers v. Hardwick—that there is no fundamental right to engage in homosexual conduct because historical precedent forbade the act of

16. The analytical progression of Lawrence v. Texas is the template for proving a children’s constitutional right of privacy because it is the most contemporaneous and was fashioned by the Court. Other historical studies of constitutional privacy are available. See, e.g., DARIEN A. MCWHIRTER & JON D. BIBLE, PRIVACY AS A CONSTITUTIONAL RIGHT: SEX, DRUGS, AND THE RIGHT TO LIFE 59–105 (1992); ALAN F. WESTIN, PRIVACY AND FREEDOM 330–364 (1970); Gormley, supra note 2 (a nearly encyclopedic compendium of the law of privacy).
18. Id. at 89.
sodomy; thus, the government may interfere at will. The Bowers v. Hardwick autonomists—its dissenters—argued historical precedent had no place in fashioning this constitutional privacy interest and would have protected the behavior under the “right to be let alone” within the “private sphere of individual liberty.” Lawrence v. Texas bridged the difference by usurping the traditionalist approach—the use of history, practices, and legal tradition—to support the autonomist perspective that the right to be let alone in private homosexual conduct without governmental interference has historical antecedents.

A. The Theorem of Lawrence v. Texas

Integral to the disputing approaches is the distinct recognition of “liberty” as a substantive right in the Constitution (autonomists) in contrast to the more limited, constitutional recognition of a specific “fundamental right” (traditionalists). The Lawrence Court did not elucidate a “fundamental right” to homosexual conduct; however, it did recognize the liberty not to be prosecuted for homosexual conduct. Hence, privacy is transformed into a constitutional liberty while “fundamental right” is transformed into liberty’s handmaiden, the right to be free from governmental interference with that liberty. The majority opinion clearly indicates that the underlying postulate now is the presumption of liberty from government interference and not the presumption of the correctness of government interference in the absence of a clearly articulated, affirmative right.

In fleshing out that theorem, Justice Kennedy co-opted the traditionalist approach when he made at least three distinct forays into history in the majority opinion in Lawrence v. Texas. The first foray occurred when he delineated the historical legal tradition and practices of a narrow substantive liberty interest of private sexuality under the Due Process Clause of the Fourteenth Amendment. He engaged in two additional forays into history as he attacked Bowers v. Hardwick by noting that its contrary precedent had no support under legal traditions and practices of anti-homosexuality legislation and anti-homosexuality policy. Thus, the Court fashioned a constitutional liberty of privacy that protects homosexual conduct from governmental

23. See generally Lawrence, 539 U.S. at 597–99.
25. Id. at 203–04.
26. Id.
27. Lawrence, 539 U.S. at 563–65.
28. Lawrence, 539 U.S. at 566–69.
29. Id. at 569–73.
interference not because there were affirmations that such a right existed but because, historically, there had been no governmental prohibitions.

John Geddes Lawrence and Tyron Garner were engaged in consensual, intimate, homosexual conduct when county police officers entered their apartment. They were arrested for and pleaded nolo contendere to charges of "deviate sexual intercourse," a criminal offense only when committed between persons of the same sex. The focus of their defense was an attack on the constitutionality of the Texas criminal statute. Unsuccessful in the state courts, Lawrence and Garner ultimately prevailed in the Supreme Court. The source of their success is the Due Process Clause of the Fourteenth Amendment, protecting citizens' life, liberty, and property from state interference. In that clause, the Court determined that there exists a privacy right extrapolated from the specifically enumerated liberty interest and specifically held:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence [n]or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

Specifically, the Court determined that homosexuals have the right to choose the form of their relationships free from government interference and, thereby, to choose the conduct that defines the relationship. Absent injury to others, the liberty to make such a choice and engage in such conduct is outside the purview of state control.

In Justice Kennedy's first historical foray in support of that result, he derived the backbone for this wide-ranging notion of liberty and privacy from a contemporary chronology of substantive due process cases, most dealing with opinions concerning intimate sexual behavior. The geneses of the chronology used by Kennedy were Pierce v. Society of the Sisters and Meyer v. Nebraska. The Court then began its exegesis in earnest on the substantive liberty principle with Griswold v. Connecticut and its sexuality progeny.

30. Id. at 561–64.
31. TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003).
32. Lawrence, 539 U.S. at 578.
33. Id.
34. Id.
35. 268 U.S. 510 (1925).
36. 262 U.S. 390 (1923).
37. 381 U.S. 479 (1965).
The Court extracted from *Griswold v. Connecticut* the “right of privacy” as a protected interest, in particular, the protection from government interference in the use of contraceptives.\(^{38}\) Wending its way through *Eisenstadt v. Baird*\(^{39}\)—another case concerning contraceptives—the Court then addressed *Roe v. Wade*\(^{40}\) for the proposition that a woman’s decision to have an abortion deserved protection as a function of her exercise of the liberty interest in the Due Process Clause.\(^{41}\) In so doing, the Court especially emphasized *Roe v. Wade*’s analysis that expanded the individual’s freedom beyond spatial considerations.\(^{42}\) After citing *Carey v. Population Services International*\(^{43}\) for the point that the liberty interest of the earlier cases extended to minors,\(^{44}\) the Court reached the 1986 chronological position for *Bowers v. Hardwick*, which upheld Georgia’s anti-sodomy law in the face of a constitutional challenge. And the Court overruled it.\(^{45}\)

The Court’s rejection of *Bowers* rested on two distinct notions: That the Court had previously failed to recognize the breadth of the liberty interest at stake and that its historical premises were incorrect. First, in the matter of the liberty interest, the original analysis in *Bowers* examined whether specific sexual conduct—sodomy—was protected by the Due Process Clause.\(^{46}\) However, the actual prosecution in *Bowers* was limited to homosexual sodomy.\(^{47}\) Thus, the *Bowers* Court wrongly narrowed its focus and should instead have examined the selective prosecution of homosexuality, not just of the sexual conduct. Justice Kennedy, analogizing the institutional relationship of marriage as something more than just the “right to have sexual intercourse,” extended due process protection to the nature of the relationship, not just the sexual behavior, and determined that a state’s criminalizing sodomy unconstitutionally affects the choice of relationships between homosexuals and interferes with their private lives and dignity as free

\(^{38}\) *Lawrence*, 539 U.S. at 565.

\(^{39}\) 405 U.S. 438 (1972).

\(^{40}\) 410 U.S. 113 (1973).

\(^{41}\) *Lawrence*, 539 U.S. at 565.

\(^{42}\) *Id.*


\(^{44}\) *Lawrence*, 539 U.S. at 566.


\(^{46}\) *Lawrence*, 539 U.S. at 567.

\(^{47}\) *Id.*
persons.\footnote{Id.} Having made that leap, the Court recognized that privacy as liberty encompasses more than just discrete types of behavior and does more than cast certain conduct as a fundamental right. Thus, the Court found wanting the fundamental underpinnings in \textit{Bowers} and adopted a different formula for analyzing the Texas statute.

In extending its attack on \textit{Bowers}, the Court's second and third forays into historical analysis were specifically aimed at discrediting the evidence relied on by the \textit{Bowers} Court, its legal traditions and its historical premises. Instead, the \textit{Lawrence} Court continued the conduct-relationship distinction in re-examining the historical traditions of sodomy, but this time focused on the governmental regulation of homosexuality as warranted by the facts, not just on the historical regulation of sodomy in general. First, with regard to legal traditions and practices of the proscribed sexual conduct, the historical treatment showed that English criminal laws had prohibited sodomy since at least 1533.\footnote{Id. at 568.} However, such "crime-against-nature" laws in both England and America criminalized heterosexual as well as homosexual conduct.\footnote{Id. at 568–69.} Historically, such laws were designed to protect minors of both sexes from predatory acts of adults,\footnote{Id.} but there was no discernible, historical tradition of prosecuting only homosexuals for sodomy. Second, the historical treatment noted that this Nation's anti-homosexuality regulation does not have "ancient roots."\footnote{Id. at 568.} Prohibitions against peculiarly homosexual conduct did not appear in America until the late nineteenth century—postdating the Fourteenth Amendment—and, even then, were not enforced against consenting adults engaged in private conduct.\footnote{Id. at 568.} Not until the 1970s did states begin to target homosexual relationships and to criminalize their sexual conduct.\footnote{Id. at 570.} As a consequence of this narrower historical survey, the Court determined that \textit{Bowers}'s limited recitation of historical tradition was incorrect.\footnote{Id. at 571.}

In addition, the Court relied on two interregnum cases to cast further doubt on \textit{Bowers}'s continued vitality. First, the Court quoted \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey},\footnote{505 U.S. 833 (1992).} emphasizing that the Due Process liberty interest cast broad constitutional protection over individual autonomy in marriage, family relationships, education, and child-

\begin{itemize}
\item \textit{Id.}
\item \textit{Id. at 568.}
\item \textit{Id. at 568–69.}
\item \textit{Id.}
\item \textit{Id. at 568.}
\item \textit{Id.}
\item \textit{Id. at 568.}
\item \textit{Id. at 570.}
\item \textit{Id. at 571.}
\item \textit{505 U.S. 833 (1992).}
\end{itemize}
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.  

Second, and more of a statement on changing public policy, the Court cited *Romer v. Evans*, which held that targeting homosexuals as a class of individuals unworthy of protection has no rational relationship to a legitimate governmental purpose. Based on the foregoing analysis and historical antecedents, the Court held that the Texas statute unlawfully intruded into the personal and private lives of the homosexual defendants for no legitimate state purpose.

The *Lawrence v. Texas* decision makes many important points about a discrete sexual behavior and a targeted relationship, but it goes much further than just striking down one statute and protecting a particular type of conduct. This decision also has broad implications in the construct of constitutional privacy derived from the Due Process Clause's liberty interest and is unapologetic in its sweeping statements about liberty and privacy:

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. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct . . . [with] spatial and more

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57. *Lawrence*, 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851).
59. As the Court explained, implicit in laws that have such targets is the invitation to stigmatize the targeted group and thereby demean its individual members. Such stigma would have consequences ranging far beyond the prosecution for sodomy, including registration on sex offenders lists and notation on job applications. *Lawrence*, 539 U.S. at 575. However, the Court declined to address the alternative Equal Protection argument for striking down the Texas statute. It opined that a decision on those grounds would have limited efficacy: the states would simply recriminalize sodomy between heterosexuals, and the problem would again be before the courts. *Id.*
60. *Id.* at 578–79.
transcendent dimensions.\footnote{Id. at 562; see also SANDRA PETRONIO, BOUNDARIES OF PRIVACY: DIALECTICS OF DISCLOSURE 5 (2002). “Intimacy is the feeling or state of knowing someone deeply in physical, psychological, emotional, and behavioral ways because that person is significant in one’s life. Private disclosure, on the other hand, concerns the process of telling and reflects the content of private information about others and us.” Id. at 6 (emphasis in original).}

By so stating, the Court spurned the traditionalist dimension of substantive due process that requires specific constitutional recognition of a fundamental right and relied instead on the broader and more inclusive notion of unenumerated fundamental components to the enumerated constitutional liberty:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.\footnote{Lawrence, 539 U.S. at 578-79.}

Thus, these broad pronouncements presage a recognition of constitutional privacy for its own sake, not just as an adjunct of a generalized constitutional liberty against governmental interference.

In particular, the Court’s reasoning broadens the notion of privacy from three distinct spheres—bodily integrity, decisionmaking, and even information—to a recognition of personhood\footnote{See also Jed Rubenfeld, The Right of Privacy, 102 HARV. L. REV. 737, 752-54 (1989). Rubenfeld’s exploration into personhood as the transmogrification of privacy is confined primarily to the privacy of decisionmaking. He presents personhood as intertwining the freedom to define oneself with the concern for personal identity. Id. at 753. Thus, according to this analysis, personhood as a quantifiable privacy concept is the product resulting from conformity with the law rather than from the state’s regulation of behavior. Id. at 783.} (or autonomy) and all its spiritual, mental, and philosophical dimensions. Rather than confine its language to address whether Lawrence and Garner were making choices about their conduct, were reaching decisions about the nature of their relationship, or were protecting their bodily integrity, the Court threw its net over a much broader concept. Privacy, as a constitutional liberty, bloomed to full autonomy from any particularized conduct.
B. Constitutional Liberty: The Postulate of Lawrence v. Texas

Extrapolating more encompassing notions of constitutional privacy from Lawrence v. Texas obviously requires a greater clarification of the underlying principle of constitutional liberty. Without that underlying principle, the formula for recognizing educational privacy falls apart. The Lawrence Court tacitly acknowledged the absence of historical tradition to liberty’s lineaments by observing obliquely that perhaps that absence was deliberate: “Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific.” However, the precise definition of “liberty”—as well as of “due process of law”—has been the source of dispute that goes to the very core of the Constitution itself. “Liberty” is that which is embraced by the autonomists; “due process of law” is embraced by traditionalists. Although a necessarily imprecise—and somewhat result-oriented—caricature, the autonomist presumes the historical and legal tradition of liberty, while the traditionalist presumes the historical and legal tradition of governmental regulation. Hence, an underlying tension in the legal recognition of constitutional privacy law is a rights-liberty distinction. Lawrence v. Texas came down on the liberty side of the dispute.

Constitutional liberty is expressly enumerated in the Due Process Clauses of both the Fifth and Fourteenth Amendments: “No person shall be... deprived of life, liberty, or property, without due process of law.” Pursuant to these Amendments, “liberty” is protected from both state and federal governmental deprivation without “due process of law.” However, the precise definition of “liberty”—as well as of “due process of law”—has been the source of dispute that goes to the very core of the Constitution itself. “Liberty” is that which is embraced by the autonomists; “due process of law” is embraced by traditionalists. Although a necessarily imprecise—and somewhat result-oriented—caricature, the autonomist presumes the historical and legal tradition of liberty, while the traditionalist presumes the historical and legal tradition of governmental regulation. Hence, an underlying tension in the legal recognition of constitutional privacy law is a rights-liberty distinction. Lawrence v. Texas came down on the liberty side of the dispute.

Constitutional liberty is not easily described, but does have a strong historical tradition. The traditional, American concept of liberty is based on the autonomy of the individual from the government. Liberty, as the right to

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64. Lawrence, 539 U.S. at 578.
65. U.S. CONST. amends. V, XIV.
66. Id. Because schools are regulated by both state and federal governments, the same liberty should be available to children under both the Fifth and Fourteenth Amendments.
67. The scope of this Article does not lend itself to a more in-depth analysis of the philosophical and theoretical bases for distinguishing among law and rights and liberty. See, e.g., ANNABEL S. BRETT, LIBERTY, RIGHT AND NATURE: INDIVIDUAL RIGHTS IN LATER SCHOLASTIC THOUGHT (1997). However, Thomas Hobbes envisioned liberty as an attribute of the nation-state, not of the individual. QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM 60, 61 (1998). His underlying assumption was that an individual could only be free in a free state. Id. Hobbes placed no faith in man but in the forces of government to control man. Thus, law coerces the individual to act for fear of the consequences of disobedience so the individual “freely” gives up the will to
be left alone vis-à-vis the government, is "the fundamental freedom not to have one's life too totally determined by a progressively more normalizing state." Indeed, any legal or otherwise governmental recognition of affirmative attributes of liberty—or autonomy—would likely entail defining the parameters of psycho-biological presumptions of personhood and might endanger the social concept of identity, thus endangering the concept of liberty itself. As a result of the American emphasis on autonomy, the tradition of American liberty, and hence privacy, was based on what the government could not do, not on a quantifiable, personal attribute that could be called a right. Thus, the liberty tradition developed out of a freedom from state interference and regulation.

At its most fundamental political application, the liberty tradition traces its roots to the political movement in England that sought to eradicate the absolutism of its early seventeenth-century Stuart monarchs, who sought to re-establish the divine right of kings after the reign of Elizabeth I. This nascent movement arose from the contemporary Renaissance philosophers in England, particularly those embracing the ideas of neo-Roman republican government. Such unrest eventually culminated in the second English Civil War and the rule of law through a republican Parliament under Oliver Cromwell and the Roundheads. Despite its eventual restoration, the English monarchy was never quite the same, becoming a constitutional monarchy with a Parliament that assumed more political power. However, one of the most enduring products of these English philosophers was the notion that freedom is a state of nature—a natural right—that the government is responsible for protecting and upholding. That natural right, or freedom, is invested with disobey under the rule of law. Id. at 6–8. Hobbes therefore espoused authority over liberty. D. D. Raphael, Hobbes, in CONCEPTIONS OF LIBERTY IN POLITICAL PHILOSOPHY 27, 27 (Zbigniew Pelczynski & John Gray eds., 1984). Hobbes's philosophy, it seems, was contrived as a counterpoise to the liberalism of the republican tradition espoused by Niccolo Machiavelli. SKINNER, supra, at 10. In contrast to Hobbes's notion that liberty is subject to the will of the government, Machiavelli "heretically" believed that individual freedom is a benefit of a well-ordered government. Id. at 18.

68. Rubenfeld, supra note 63, at 784; Solove, supra note 2, at 1119.
69. Rubenfeld, supra note 63, at 758, 790.
71. The neo-Roman philosophers spoke in terms of "unconstrained enjoyment of a number of specific civil rights." SKINNER, supra note 67, at 18.
72. Id. at 16.
73. Id. at 19. English philosopher Marchmont Nedham, in 1767, ascribed a particular responsibility to government to "secure enjoyment" of these "natural rights and liberties." Id. at 20. In the American tradition, these "natural rights" might have been more theoretical than actual in influencing the drafting of the Constitution. See, e.g., JOHN PHILLIP REID, I CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF LAW 90–95 (1986). Nonetheless, these natural rights coincide with the rights of Englishmen and thus also possessed by the Framers.
citizens' "equal right to ... lives, liberties and estates." 

The flight of colonists from England to America was the existential manifestation of this philosophy of freedom and liberty, and by their departure, those colonists liberalized that philosophy. Early colonists were, of course, settled in America before the English Civil Wars, but they were acutely aware of events taking place within their "homeland" government. However, colonial administrations of that homeland government increasingly reflected these principles of natural rights, or liberties, as the colonies became both philosophically and economically estranged from England, shifting from their fealty to a king-centered government to their engagement in individual-centered communities. "The vital new controlling spirit—which saw the state existing to further the ends of the individual—would not acquire the necessary legal structure to clothe itself until the Revolution, but it did exert a growing influence upon [colonial] society." And although there is no exact equation between the English legal precepts and those adapted by the colonies, the colonists worked under the assumption that English liberties were American liberties. "Liberty" may have had no more definition than a wisp of smoke to the colonists—at one point explained no more clearly than that "power must always be proved, but liberty proves itself." This vague definition of liberty has "ancient roots," and the consequent American failure to specify "rights" thereunder persisted with the drafting of the Constitution.

Any number of competing theories abound regarding which or whose philosophy of liberty was adopted by the Founding Fathers and adapted to the American political system in general and to the Constitution in particular.

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74. SKINNER, supra note 67, at 20. Those "rights" included freedoms of speech, movement, and contract. Id.
75. See also McWhirter & Bible, supra note 16, at 28 (the flight of some colonists was from the "morality" of certain segments of the English legal system).
77. Id. at 128–29.
78. Id. at 129.
79. Id. at 129–30.
81. Id. at 126, 127. One description elaborates:

[L]iberty, once lost, is lost forever, and the liberty of the most obscure member of the community, ought by the community to be as carefully preserved and as jealously watched as the liberty of the member most conspicuous for honor, wealth, and the other civil distinctions of life, because tyranny, like palsy, always first attacks the extreme parts of the body, but never leaves it till it has possession of the heart.

Id. at 127–28.
John Locke’s theory of “natural liberty” was clearly an influence. Likewise was the conception of “moral liberty” configured by Jean-Jacques Rousseau. But the historical smorgasbord of choices was somewhat overwhelming, and no particular tradition of liberty is discernible. Indeed, Alexander Hamilton seemed to discern no particular tradition when he envisioned the presence of “liberty” in the Constitution’s preamble, thereby obviating the need for a Bill of Rights. He believed that “We, the people of the United States, to secure the blessing of liberty to ourselves” was sufficient recognition of individual rights that could not be bettered by “volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.”


\[ \text{the natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of nature for his rule. The liberty of man, in society, is to be under no other legislative power, but that established by consent, in the commonwealth, nor under the dominion of any will, or restraint of any law, but what the legislative shall enact, according to the trust put in it.} \]


84. Even within the theories of natural liberty, there were competing configurations and positions. See, e.g., Tully, supra note 82, at 61–63; see generally BRETT, supra note 67; HAYEK, supra note 82, at 11–21.

85. John Stuart Mill’s On Liberty is oft-cited as the classic resolution of the task of protecting individual—and particularly minority—liberty in a democracy. JOHN STUART MILL, ON LIBERTY xiv (Elizabeth Rapaport ed., 1978). Mill’s thesis was:

The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant.

Id. at 9. Unfortunately, Mill meant to apply this principle only to mature individuals, not to children, so as to protect them from injury to themselves. Id. Mill configured this principle as a sphere of activity with three components: (1) “the inward domain of consciousness”; (2) “liberty of tastes and pursuits . . . framing the plan of our life to suit our own character”; and (3) liberty to act in concert with others for similar pursuits. Id. at 11–12. Mill’s philosophy, however, allowed for certain social pressure to encourage improvement in certain life-choices made by others. Although such oversight would ordinarily be anathema to notions of privacy, Mill believed privacy must be forsaken in matters of rational improvement of the individual. See FERDINAND DAVID SCHOEeman, PRIVACY & SOCIAL FREEDOM 28–31 (1992). Victorian values and England’s class society couldn’t help but influence Mill’s consideration of who should and who should not be improved. See generally THOMAS HARDY, JUDE THE OBSCURE (1980).

belief reflected the fear that, if the Constitution specifically enumerated certain rights but failed to specify others, some fundamental rights would go unrecognized and unprotected. In his mind, "liberty" filled the bill by encompassing all the fundamental rights of Englishmen.

The debate over a Bill of Rights eventually was won by those in favor of more specificity. But the broad perceptions of liberty played an integral role in the substance of the Bill of Rights. Substantive concerns played an especially significant role in the drafting of the Fourth and Fifth Amendments, specific bulwarks protecting the individual from the power of the government. The origins of those two amendments had more to do with substantive issues—privacy, in particular—than they had to do with criminal procedure. The Fourth Amendment was drafted to address contemporary concerns arising from English civil law, not criminal law, in response to the English government’s intrusions into homes to investigate heresy and seditious libel and to seize contraband in the enforcement of import laws. Similarly, the Fifth Amendment reflected the struggle between the individual and the state in the matter of arbitrary church and governmental inquisitorial examinations. Thus, the underlying "legislative history" of both amendments reveals they were designed to protect certain liberties not explicitly "enumerated" in their language. As an added protection, the Framers added "due process of law," with its own substantive connotations. Despite the substantive origins of the Fourth and Fifth Amendments, they were little developed in the courts during the first 100 years of the republic until their criminal applications transcended their civil origins. During the same time, the Ninth Amendment—the anticipated repository for unenumerated rights—virtually withered on the vine. That left the courts to

1937).

88. Id. at 394, 404–06.
89. LEVY, supra note 70, at 330–32.
91. See generally Stuntz, supra note 87.
92. Id. at 419–20.
93. The Ninth Amendment was meant to ameliorate concerns about the specific enumeration of rights in the Bill of Rights. E.g., HAYEK, supra note 82, at 185–86. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. Ninth Amendment jurisprudence is rarely evoked in matters of privacy, but when it is, it is construed to be a repository of personal rights not specifically named in the Constitution: Madison's intention for including the Ninth Amendment was to assuage those critics concerned that an exclusive list of specified rights would make all other "natural rights" subject to government control. Jason S. Marks, Beyond Penumbras and Emanations: Fundamental
other devices for formulating substantive jurisprudence that recognized fundamental rights and constitutional liberties without their enumeration in the Constitution.\^94

Such substantive jurisprudence arose out of the early constitutional jurisprudence that limited the government's power to regulate individual conduct. Some of these decisions were decided on "extra-constitutional" grounds. In invalidating intrusive state statutes, the early Court variously relied on "natural rights," governmental limits implied in the character of the legislature, principles of "natural justice," and the like.\^95 Thus, something outside the explicit language of the Constitution impelled the Court's decisions, something implied by the meaning and the intent of the document rather than its literal language. And what more compelling resource for that implied intent than its Framers' contemporaries? Thus, some of the early Court's deliberations had all the earmarks of implying substantive rights in the Constitution from the beginning, a legal tradition that later took full force after the Civil War in the expansive and substantive meaning attributed to the Due Process Clause of the Fourteenth Amendment.\^96

As one of the Civil War Amendments, the Fourteenth Amendment—whose Due Process Clause language mirrors the Fifth—made state governments answerable to the Bill of Rights.\^97 The Fourteenth

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\^94. See, e.g., Bolling v. Sharpe, 347 U.S. 497 (1954). While interpreting Fifth Amendment substantive due process, the Court stated:

> Although the Court has not assumed to define "liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper government objective.

\^95. TRIBE, supra note 90, at 336–38; see also Note, Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments, 90 HARV. L. REV. 945, 948–49 (1977).

\^96. TRIBE, supra note 90, at 1338.

\^97. During the post-Civil War era, three constitutional amendments—Thirteenth, Fourteenth and Fifteenth Amendments—were promulgated and ratified, which changed the relationship of the
Amendment's drafters intended to strengthen congressional powers over states to create a national framework of civil liberties and to especially protect the rights of minorities. This framework of civil liberties served as the foundation for greater efforts to attribute substantive meaning to the Constitution than previously existed in early constitutional jurisprudence. This foundation was built on the Due Process Clause and the principle that it protected substantive liberties. Thus, "due process" became more than procedural; it became the source for protecting substantive rights subsumed by, but not otherwise enumerated in, "life, liberty, and property."

Modern substantive due process, whether the origins of constitutional liberty and privacy or not, remains the battlefield for current dispute regarding Lawrence v. Texas. From its modest and early beginnings in the early Court, Fourteenth Amendment substantive due process became identified with Lochner v. New York, which made substantive due process a matter of regular federal jurisprudence. As applied in Lochner, the doctrine limited the state's police power to legislate economic relationships with its means-ends analysis and stood as the bulwark between state micromanagement and individual autonomy. Lochner principles and substantive due process later fell into disrepute until, at its nadir, the privacy decision in Griswold v. Connecticut expressly repudiated its underpinnings. However, substantive due process is reviving itself in protecting the individual from abuses of governmental power in a variety of juridical reviews, not the least of which affect the analysis of liberty and therefore of privacy. Substantive due process, under the rubric of liberty, provided the analysis for protecting privacy in Lawrence v. Texas, serving as it did to allow a broad interpretation of liberty. It should likewise serve to extend that interpretation of liberty to protect the privacy of children while they are in school.

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99. See generally TRIBE, supra note 90, at 1332–33.

100. 198 U.S. 45, 53 (1905).

101. TRIBE, supra note 90, at 1343–45. Some observers attribute substantive due process's ascendance to conservative, economic forces opposed to government imposition of labor regulations. Id. at 1345.

102. Id. at 1344–45.

103. 381 U.S. 479, 481–82 (1965); Rubenfeld, supra note 63, at 802.

104. The substantive due process analysis that most directly concerns privacy issues is the protection of the individual from state action that infringes on traditional freedoms. TRIBE, supra note 90, at 1362–63.
II. PRIVACY: THE MÖBIUS STRIP

The narrow holding of Lawrence v. Texas recognizes a particular privacy interest as a constitutional liberty, prohibiting government interference with certain sexual conduct among a narrow group of individuals. The more general postulate underlying that recognition was the Court's expansion of liberty to cover that privacy interest. To use Lawrence v. Texas as the theoretical foundation for concluding that children have a similar constitutionally protected privacy interest, one must generalize Lawrence's holding to protect privacy per se, a move that the Court has been unwilling to make. Instead, its constitutional privacy jurisprudence is a patchwork of ad hoc decisions reacting to specifically litigated government regulations. The Lawrence Court, however, has come closest to recognizing constitutional privacy per se. Such constitutional privacy—or liberty—does not need any particular dimensions. The fewer the dimensions to privacy and autonomy, the better. Such privacy is derived from liberty, to which our historical tradition ascribes no particular boundaries. If liberty—in all its vagueness—is recognized as a constitutional prerogative of longstanding historical tradition, then so too should privacy. And although such constitutional protection would be denied by those who argue privacy is not an enumerated right, "[i]t would be misleading to incorporate a right of privacy into a legal rule, it would be impoverishing to exclude it as the term of a legal principle." Consequently, the first step in recognizing educational privacy is to "prove" constitutional privacy.

As the analytical approach in Lawrence v. Texas suggests, proving that privacy per se is worthy of constitutional protection must be done through history, legal traditions, and practices. Without that tenet, a privacy interest for schoolchildren is difficult to establish because schoolchildren are surrounded by the government where "quantifying" a privacy interest is important for establishing boundaries over which that government may not cross. Although ordinarily the plethora of scholarly work would assist here, the task is somewhat more difficult because children are, for the most part, simply incapable of formulating the intellectual boundaries so prized by the philosophical and legal literature. Thus, one must examine something more deeply rooted in human experience than an artificial legal construct could

provide.

Lawrence's methodology is well suited to the examination of the history, practices, and traditions of privacy itself because it has “ancient roots” in Western civilization in general and American culture in particular. History, practices, and traditions also encompass privacy in its affirmative aspect—as a quantifiable attribute—and in its liberty aspect, the freedom from governmental regulation. Here, exploration of privacy must begin with the actual psychological and physiological “practices” of privacy in which humans have engaged. The second part of the analysis explores the historical evolution of privacy per se in America, while the third will trace its legal traditions. This exploration will demonstrate that privacy is a fundamental human practice arising from the autonomous character of human nature and that, historically, it has been protected in American legal tradition because that autonomous character is, and has been, so highly prized in this country. All three aspects of this substantive liberty interest are inextricably intertwined in the American psyche, an analytical Möbius Strip.

A. Practices of Privacy

1. “The Origin of Species”

There is something basically instinctive about privacy. In daily discourse, humans often will shrink from the touch of another unless there is some familiarity between them. Some people simply do not like to be touched, by anybody, while others jealously guard private space from intrusion. A pregnant woman is offended when some stranger familiarly pats her belly, and children will fight to get away from a relative who grabs to give them a hug.

108. See generally Washington v. Glucksberg, 521 U.S. 702 (1997). Finding historical tradition that predates the Constitution or the Bill of Rights is often constrained by the absence of similar democratic and republican institutions like the American experience. Historical tradition is somewhat easier to find for Fourteenth Amendment jurisprudence because of intervening American history.

109. What exactly is meant by “practices” for proving a constitutional right is not entirely clear from the authorities. When the Court “examined” the “practices” of physician-assisted suicide in Washington v. Glucksberg, it never really clarified what evidence proved any particular “practice” other than current state laws prohibiting such suicide—evidence that seems rather too recent to have any historical significance in the traditionalist sense that a fundamental right must have its ancient roots in common law. See Washington v. Glucksberg, 521 U.S. at 716–719. To confuse matters further, the requirement that “practices” be proved in Washington v. Glucksberg derived from the majority decision in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 848–49 (1992), which actually abjured the examination of specific practices: “Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment mark the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.” Id. at 848.
One has difficulty verbalizing this reflexive reaction, but at its very core, it intimates privacy and has roots so primitive as to be observable in animals.

Territoriality is at the root of this most rudimentary of privacies. Domestic cats are perhaps the species most identified with this "leave-me-alone" attitude; one gets along better with cats by letting them approach than by approaching them. Cats even go so far as to stake out their own "personal" territory with urine to warn off intruding cats. But this kind of "personal" territory is not confined to just cats. Most animals tend toward this type of territoriality. Animals have instinctive needs to avoid the trespass of others, both as a member of a defined group and as an individual.

A defined group's solitude functions as the regulation of the population to a certain density in a particular area; as protection of self and the group from intruders; and as isolation of the group for social sustenance of the group. Such group behavior among animals is a higher order of biological behavior that stakes out spatial territory in defense of the group against others. Human group territoriality similarly stakes out the boundaries of the group, albeit more for social rather than for biological needs.

An animal's individual isolation, however, has one major function: survival. Animal solitude is instrumental in the survival of the social organism, of the group, and of the individual. First, the social organism benefits because individual solitude allows the individual the social distance to court, mate, and rear offspring without the aggression and fighting occasioned by overpopulating a minimal space. Second, the group benefits from individual solitude because the absence of individual minimum space can threaten the survival of the group itself through "biochemical die-off,"

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110. Body language is sometimes considered among the nonverbal signs of privacy. IRWIN ALTMAN, THE ENVIRONMENT AND SOCIAL BEHAVIOR: PRIVACY, PERSONAL SPACE, TERRITORY, CROWDING 34-36 (Lawrence S. Wrightsman ed., 1975). "[T]here is a vast array of nonverbal behaviors that are potentially relevant to privacy regulation." Id. at 36.

111. WESTIN, supra note 16, at 8. Territoriality, for purposes of biological studies, is primarily referred to in terms of "property." ROBERT ARDREY, THE TERRITORIAL IMPERATIVE: A PERSONAL INQUIRY INTO THE ANIMAL ORIGINS OF PROPERTY AND NATIONS 3 (1966). Like the concept of privacy, the concept of property is an artificial principle of legal dimensions for which animals have no abstract cognizance. The nomenclature may be interchangeable with regard to human behavior because the reasons for human respect for property as well as for privacy are both driven biologically by matters of survival. Id. at 7.


113. ALTMAN, supra note 110, at 105–107.

114. Id. at 108.


when overcrowding creates metabolic stress in the population and kills some of its members. When overcrowding creates metabolic stress in the population and kills some of its members.117 Last, individual solitude is important for the survival of the individual in a manner most closely akin to human privacy, or in the existential sense, the “cognitive territoriality” that is distinctly human.118

Variously called “personal distance,” “social distance,” “intimate distance,” and “flight distance,” measured spaces between individual animals and their territorial groups serve different purposes. “Personal distance” is far enough among the members so that individuals in the group can function as part of the social organism.119 “Social distance,” on the other hand, is close enough to link the individuals to a particular group. “Intimate distance” describes the distance between family members of a particular unit. And “flight distance” is the space in which an animal will flee an individual from another species.120 These levels of individual spacing are those most analogous with human behavior.

In studies of humans at this most primitive level, individual privacy and solitude are perceived as evolutionary.121 Even with our minimal dependence on flight distance—we humans measure our flight-or-fight response on a more abstract level of danger than mere trespass—we humans do have our social spaces, our intimate spaces, and our personal spaces.122 Studies have found physiological as well as psychological responses to intrusions to those spaces.123 But the consciousness of those spaces and the abstractions of individual human privacy are more a function of a society’s enculturation rather than just evolution.124

117. Id. at 10; ALTMAN, supra note 110, at 169–70.
118. Altman describes this solitude as follows:

   Idea or cognitive territoriality . . . seems to be a distinctly human property. In the sciences, arts, and many other fields, copyrights, patents, and possession of ideas are of great importance. In fact, this territoriality applies to most people, who spend considerable time developing and defending attitudes, opinions, values, and philosophies that identify them as unique beings.

   ALTMAN, supra note 110, at 108–09.

119. WESTIN, supra note 16, at 9. This type of territoriality has also been called “individual distance” and is most closely identified with a “personal” privacy in animals. ARDREY, supra note 111, at 158–59.

120. WESTIN, supra note 16, at 9.

121. ARDREY, supra note 111, at 7. One biologist believes this territoriality instinct in humans may have been the root of the species’ very survival, as an “unencumbered intelligence.” However, he also acknowledges this trait has diminished as modern man has exerted more and more deliberate influence over his environment. Id. at 34–35.


123. ALTMAN, supra note 110, at 86–94.

124. WESTIN, supra note 16, at 10; Alexander Rosenberg, Privacy as a Matter of Taste and Right, in THE RIGHT TO PRIVACY 68, 73–74 (Ellen Frankel Paul et al. eds., 2000); see also Morton
2. Coming of Age

Both humans and animals are social creatures. An animal's need for solitude is for its very survival. Its engaging in social behavior includes not only propagation of the species but also stimulation. Similarly, humans engage in social behavior although human social orders tend to be more complex and sophisticated. This dichotomy between the social and the solitary—the public and the private—is strongly influenced by cultural privacy practices. Thus, cultural mechanisms will influence a society's privacy customs. The more elementary the society, the more rudimentary its members' privacy customs. At the end of the spectrum where "political" integration is lowest, the society functions at a more evolutionary level where group survival is more important than individual privacy. As political integration of the culture increases, individual privacy increases.

In an example of a more primitive society that placed little emphasis on privacy, Margaret Mead's studies of Samoan culture revealed that children were raised by the village members and were exposed to all aspects of life in the public arena. There was very little privacy because individuals were not "trained" to seek it, and there was, in fact, some suspicion of private behavior. Adults wore little clothing while their children wore none. Their homes had no walls, and bathing took place in public.

As the roles of society's members become more delineated and complex, measures of privacy become more delineated. The Mehinacu of central Brazil—a small, agricultural group in the tropics—has a highly exposed society: they live in thatched, windowless dwellings on an open plaza; anyone can hear what is going on in another's dwelling; gossip is rampant; and everyone knows everyone else's business. However, despite the


126. One author describes the social-solitude dichotomy of the human animal as the "dialectic nature of privacy." ALTMAN, supra note 110, at 22.

127. See generally ALTMAN, supra note 110, at 40–42.


131. Id. at 136; WESTIN, supra note 16, at 12.

132. MEAD, supra note 130, at 132; see also WESTIN, supra note 16, at 12–14.

133. Roberts & Gregor, supra note 128, at 205–07. Unfortunately, the "openness" of the
permeability of the houses, the Mehinacu who casually intrudes in another's home is discourteous. Women are threatened with gang rape if they enter the men's house, the temple cum social club in the center of the settlement. In addition, Mehinacu society has a rudimentary kinship organization within which are specific roles and relationships requiring respect of "privacy"; codes of affinal avoidance keep sacrosanct portions of the unpartitioned houses in which reside certain family members. Furthermore, several types of ceremonial seclusion account for extended periods of actual, physical isolation for individual members: maternity, first occurrence of fatherhood, coming-of-age at adolescence, and death of a spouse. Thus, even "primitive" societies have created cultural notions of privacy—both group and individual—that go beyond the simple, evolutionary survival of the group and that, if ignored, lead to punitive measures from the group.

Other rudimentary, ethnographic comparisons reveal that economic complexity also functions to increase the norms of privacy, particularly for the smaller household group. Thus, as a society progresses from the hunter-gatherer stages to more sophisticated levels of economic sustenance, so too does its household privacy increase. A particular cross-cultural and direct correlation has been noted between such domestic privacy and a society's reliance on animal husbandry and agriculture, marriage, and religion. This correlation has been traced as far back as the Neolithic era, at the dawn of modern man. Consequently, privacy as a cultural influence has its origins in both political and economic forces.

The universality of privacy derived from these cultural studies reveals that each society selects cultural norms for individual, family, and group privacy. These cultural norms—at least in Western tradition—reflect the tension between the individuation and the group socialization of the individual member. Some norms are based on the more primitive spatial-territorial concepts of privacy surrounding tangible concerns for trespass and property.

community does not eliminate social disorder: theft is a daily occurrence; most young Mehinacu are promiscuous and engage in extramarital conduct; and at least half the adult men are considered witches. Id. at 207.

134. Id. at 205, 210.
135. Id. at 210.
136. Id. at 210–11.
137. A member can be isolated for up to eight years. Id. at 211–12.
138. Id. at 200–03.
139. Id. at 203, 224–25.
140. Westin, supra note 16, at 13; see also Robert F. Murphy, Social Distance and the Veil, in Philosophical Dimensions of Privacy: An Anthology 34 (Ferdinand David Schoeman ed., 1984) (describing the maintenance of a social distance created by the Tauregs' use of veils).
141. Levine, supra note 124, at 3–4.
while others have extended this territoriality to the more sophisticated recognition of the less tangible attribute of "personal life-space." From these basic universal attributes of privacy, different societies have effectuated different privacy norms impelled by their own unique circumstances. From that universality, the American culture has adopted norms of privacy that have been greatly influenced by our unique tradition and geography.

B. Historical Tradition of American Privacy

The historical tradition of American privacy is clearly meshed with this country's unique cultural practices. From settlement until the mid-1800s, privacy as an abstraction was understood, although not articulated. By the mid-1800s, the historical tradition of privacy became more articulated, especially in the philosophical literature. The historical tradition of privacy started with the physical space of the American continent then evolved into the notion of privacy as a "tangible," metaphysical object as it became harder and harder to find and as technology advanced to the point that space and territoriality could no longer define privacy. The historical tradition of American privacy is one bound to our innate sense of self and autonomy, virtues that we perceive as inherent in our culture and in our history.

1. Where the Deer & the Antelope Play

The origins of American cultural privacy are hazy, although some reliance on its evolutionary, biological aspects is apparent in the manner by which the first settlers adapted to the new expansive country. However, evidence suggests that the nascent cultural mechanism derived from the English background of the first settlers, who valued both individual and group solitude. Puritans in particular valued privacy, especially in worship, but devalued privacy when it affected the interests of the community. Indeed, early Puritan theories of the distinction between the state and the individual suggested that the individual should be subservient to the good of the state. However, the reality of transporting colonists to a country from which ties to both governmental and religious authority were severed by distance ultimately doomed those principles.

142. See, e.g., id. at 6–9.
143. See, e.g., DAVID H. FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND 6 (1972).
144. Id. at 7.
145. Id. at 15.
147. Id. at 155–56; see also STEPHEN BOTEIN, EARLY AMERICAN LAW AND SOCIETY 18–30 (1983). The doom of these Puritan principles was marked particularly in the legal relationship of the
The new American reality was that society in general, and religion in particular, did not have the same cohesive influence on settlers more interested in individual pursuits. And although the "natural corrupt liberties" that set an individual apart from the teachings of the religious society were decried by the Puritan authorities, ultimately those liberties prevailed, especially as the colonists began to resist governance by the church. As Puritanism declined as a social influence—during the expansion of settlements throughout the colonies and westward—with it declined its religious influence over some of its basic tenets of privacy. On the other hand, the original English settlers' innate sense of autonomy, and therefore of privacy, survived, as much a function of Western humanism than as some evolutionary imperative. Indeed, this sense of autonomy became imperative for the survival of democracy.

At the time of colonization, privacy as an articulable value was just as vague as the value ascribed to democracy, liberty, and property. However, as America became more politically and economically complex, privacy became a more valued cultural norm. In the early colonial years, the social human valued interactions with friends outside the family unit and valued the creation of interdependent neighborhoods. Although these neighborhoods necessarily thrived at the expense of privacy, the neighborhood could also express disapproval for an invasion of privacy, thereby balancing the spatial and social aspects of the individual. Evolving American culture increasingly valued privacy as both its governmental formalism and its

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Within the general legal environment that English settlers tried to establish in northeastern America, perhaps the most important ideological source of disharmony was religion. At the extremes of the colonial Protestant spectrum were strict advocates of the Church of England as a state religion and radical dissenters espousing pure voluntarism. In most places at most times, however, the legal issues dividing colonists as they went about organizing their ecclesiastical affairs were more subtle. What developed eventually was a troublesome pattern of localistic deviation from English norms. The precarious role of the Church of England in colonial American was symptomatic of underlying weaknesses in the structure of transatlantic empire.

*Id.* at 18.
149. *Id.* at 153–54; BOTEIN, *supra* note 147, at 32.
150. FLAHERTY, *supra* note 143, at 17.
151. *Id.* at 6.
152. Democracy's survival depends upon individualism, and privacy is essential to the growth of that individualism. See, e.g., Bazelon, *supra* note 2, at 592.
153. FLAHERTY, *supra* note 143, at 5.
154. *Id.* at 97.
economic sophistication increased: The ideal balance for American privacy arose from "small-scale societies with patrilocal residence, subsistence through agriculture or animal husbandry, and a strong belief in a high god." 155

In addition, American privacy reflected the increased value the colonists and succeeding generations placed on autonomy and individualism, spawning the search for personal privacy as a cultural norm for colonial Americans. Improvements in economic conditions also provided opportunities for building homes that would provide more privacy and for movement away from communities to greater isolation. 156 Greater choice of territories gave greater options for manipulating one's individual environment, making the idiosyncrasies of privacy a matter of individual choice rather than of group survival. The cultural norms for American privacy therefore depended in large measure on an innate belief in individual autonomy.

Rudimentary judicial recognition of privacy mirrored this individual-community distinction: "It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends." 157 However, early privacy regulation in the colonies is a primitive pastiche of religious-based tenets that abounded in colonial New England. 158 As time passed, the colonists' innate sense of individualism took over. They became increasingly resentful of such control, and those regulations became decreasingly enforced. 159 That individualism also impelled the colonists to greater certainty that they did not want the government involved in their lives. Thus, the natural progression to an "individualist" democracy began the notion of at least partial autonomy of persons and of institutions. 160 The colonists' aversion to government regulation and surveillance of their private lives solidified into a suspicion. Hence, colonial privacy was not viewed as a quantifiable personal attribute as much as a negative attribute limiting government interference in their private lives as previously endured under the Puritans. 161

As the United States matured as a nation, individualism and privacy

155. LEVINSON & MALONE, supra note 115, at 56.
156. Id. at 244–45.
159. Id. at 187.
160. Id. at 25–26; see also FLAHERTY, supra note 143, at 243–44.
161. FLAHERTY, supra note 143, at 245–46.
flourished. Until the 1850s, this spirit was fed primarily by the territorial limitations on social intercourse—geography and space. Actual solitude and isolation were abundant for the primarily agrarian American population, who resided in rural areas with necessarily large spaces between households. This geographic isolation was even available, albeit to a lesser extent, in the urban areas. Urban areas still had relatively small populations and plentiful available space to build homes for individual families, and furthermore to build those homes with individual rooms for family members. And there still remained the Western frontier for settlement. Thus, the spaciousness of America itself and the geographic movement from the east coast to the west coast contributed to a sense of territoriality—and to a certain extent, isolationism—both of the group and of the individual that became part of the American cultural mechanisms influencing unique norms of privacy.

By the latter half of the nineteenth century, the cultural mechanisms influencing privacy changed somewhat. The American frontier was officially "dead." Settlements throughout the country became more connected by travel and communication and there developed an interconnectedness and dependence belying the rugged individualism of early settlers. Although people located in rural and sparsely populated areas often had some geographic distance between them, the growth of industry and urban centers forced more and more people to live in greater proximity to each other. As America's population increased dramatically through the twentieth century, the space decreased even more. As a consequence, privacy based solely on quantifiable territoriality became a thing of the past in most American geographical locations.

However, American privacy norms derived from our unique history remained. These "ancient roots" of privacy are based on the autonomy and individualism arising from both revolutionary zeal and space. Furthermore, the freedom associated with such autonomy goes all the way back to our historical agrarian and Jeffersonian roots. Such notions of autonomy and privacy are also unique cultural developments of our identity as America became a country of immigrants and watched the dissolution of old social orders. And even if our freedom is more a historical product than an

163. Id. at 25. Furthermore, the increasing impersonality engendered by technology has a direct impact on privacy and affects a vital component of an individual's personality. HONIGMANN, supra note 129, at 356–57.
164. CLYDE KLUCKHOHN, MIRROR FOR MAN: THE RELATION OF ANTHROPOLOGY TO MODERN LIFE 234 (1949).
165. Identity can be traced to developmental changes, sociocultural impacts, language
absolute, our privacy is no less inherent in that freedom and autonomy, whether defined as a fundamental right or as a constitutional liberty. And the practice of honoring that autonomy has "ancient roots."

2. "All men’s miseries . . ." 168

By the end of the first 100 years of the republic, the historical tradition of American privacy became less quantifiable by space and more theoretical by abstraction. Thus, this stage of the historical tradition of American privacy reflects deliberate philosophical musings rather than instinctual assumptions of wide-open spaces and solitude. Congruent with the shrinking of the sense of territory and space was the increasing American sense of individual privacy because as a fundamental adjunct to the burgeoning population was not just the loss of space but the loss of solitude and anonymity. For a while, that loss of anonymity had a community function because the trade-off was the supportive nature of the community. However, the spread of newspapers in the late eighteenth century elevated neighborly gossip into public information. 169 So as spatial privacy decreased and social interaction necessarily increased, artificial interstices between individuals and the rest of the world became necessary to create personal privacy. To a certain extent, these interstices were for the preservation of "self," a psychological identity related to autonomy. 170 Contemporary theorists, however, expressed those constructs, and psychosocial issues. JANE KROGER, IDENTITY DEVELOPMENT: ADOLESCENCE THROUGH ADULTHOOD 15, 17–23 (2000). However, historical research indicates that identity is also a social construct that created in colonial Americans a deep-seated conflict between the individual and the state. Id. at 15–16.

166. CLAUDE LEVI-STRAUSS, THE VIEW FROM AFAR 281 (Joachim Neugroschel & Phoebe Hoss trans., 1984). "By providing freedom with a supposedly rational foundation, one condemns it to eliminating [its] rich content and to sapping its own strength." Id. at 287.

167. Id. Levi-Strauss succinctly observed:

[The rights that freedom is asked to protect have a basis that is in part irrational: they consist of those minute privileges, those possibly ludicrous inequalities that, without infringing upon the general equality, allow individuals to find the nearest anchorage. True liberty is that of long habit, of preferences—in a word, of customs .... Liberty is maintained from the inside; it undermines itself when people think they can construct it from without.

Id.

168. "All men's miseries derive from not being able to sit quiet in a room alone." Blaise Pascal.

169. HIXSON, supra note 162, at 23.

170. LEVINSON & MALONE, supra note 115, at 95; Bazelon, supra note 2, at 588. Pioneer psychiatrists and psychologists—such as Sigmund Freud, Eric Erickson, and Jean Piaget—would later all depict human development as a move toward a differentiation from others, a separateness as an individual. ROBERT KEGAN, THE EVOLVING SELF: PROBLEM AND PROCESS IN HUMAN DEVELOPMENT 47 (1982).
principles in terms of philosophy and first formulated negative representations of privacy, then later formulated it into an affirmative quality.

Privacy as a negative attribute—the absence of interference—took shape as a distinct philosophical principle by the mid-1800s. The American transcendentalists encouraged the American "spirit of isolation." The philosophical reflection of contemporary privacy practices surrounding this uniquely American autonomy was synthesized by the likes of Ralph Waldo Emerson and Henry David Thoreau, who encouraged individualism and personal freedom and emphasized selfhood. These configurations of privacy were but reflections of Lockean and Jeffersonian political philosophies that human rights are best described in the negative—that the rights of citizens should not be violated by the government. And these configurations fit nicely into the rugged individualism by which Americans perceived themselves as a culture. But the connection between this

DEVELOPMENT 117 (1982). This differentiation is variously called "ego," "self," and "person" and, metaphysically, might be considered the human demarcation between an event and the reaction to that event by the individual. *Id.* at 2–3. Included in this separateness is one's identity, a tenet that has as much foundation in psychology as it does in metaphysics. JORGE J.E. GRACIA, INDIVIDUALITY: AN ESSAY ON THE FOUNDATIONS OF METAPHYSICS 38 (1988). "[A] condition that is frequently regarded as important for an understanding of individuality is identity" but only as something less than individuality itself. *Id.* at 38–39. "In one sense ... individuation demands that a person create himself, whereas identification requires only that he finds himself." HENDRIK MARINUS RUITENBEEK, THE INDIVIDUAL & THE CROWD: A STUDY OF IDENTITY IN AMERICA 41 (1964). Whether psychological, evolutionary, or cultural, this separateness, or autonomy, is assumed. Dorothy Lee, ARE BASIC NEEDS ULTIMATE?, IN PERSONALITY IN NATURE, SOCIETY, AND CULTURE 335, 339 (Clyde Kluckhohn & Henry A. Murray eds., 1971). And Americans, in particular, require this autonomy. Erik H. Erikson, Growth and Crisis of the "Healthy Personality," IN PERSONALITY IN NATURE, SOCIETY, & CULTURE 185, 204 (Clyde Kluckhohn & Henry A. Murray eds., 2d ed. 1971).

171. HIXSON, supra note 162, at 18–20; see generally Bazelon, supra note 2, at 589–591.

172. "[T]he legitimate powers of government extend to such acts only as are injurious to others." Nichol, supra note 93, at 1325 (quoting 1787 letter from Thomas Jefferson to James Madison); see also GERALD L. GUTEK, HISTORICAL & PHILOSOPHICAL FOUNDATIONS OF EDUCATION: SELECTED READINGS 162–63 (2d ed. 1997); but see Cass R. Sunstein, Lochner's Legacy, 87 COLUM. L. REV. 873, 888–89 (1987) (asserting that, although conventional wisdom is that the Constitution guarantees the negative quality—the absence of government interference—rather than affirmative rights, the reality of contouring rights is based on the natural or desirable functions of government as understood from common law baselines).

173. The literature concerning privacy might well be said to go back to the Bible, that God's second gift to man after life was "the right to be reticent before the eyes of each other." HIXSON, supra note 162, at 3. John Milton employed similar biblical references in Paradise Lost. *Id.* at 3–4. Other instances of literary "withdrawal," "seclusion," and the metaphysical nature of self exist, *id.* at 20–23. Contemporary literature continues these themes of individualism, selfhood, isolation, and the like as various authors and philosophers opine their own versions and visions of privacy. See generally Ferdinand David Schoeman, Privacy: Philosophical Dimensions of the Literature, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 1, 12–13 (Ferdinand David Schoeman ed., 1984); GEORGE ORWELL, 1984 (Signet Book 1990); see also FRANZ KAFKA, METAMORPHOSIS
philosophy and a philosophy of affirmative privacy was not really made until the end of the nineteenth century.

One of the most influential pieces of the philosophical privacy literature was the work of Robert Warren and Louis Brandeis in their 1890 Harvard Law Review article, *The Right to Privacy*. This seminal piece set out the rudiments of privacy as a positive, nearly quantifiable, concept for limiting the intrusion of technology, especially the press. In the absence of legal redress under the current common law, Warren employed his friend Brandeis to create a legal philosophy of privacy defined no more particularly than the right to be let alone. The crux of this privacy right was the creation of "bounds of propriety and of decency" over which the press could not cross. Warren and Brandeis specifically acknowledged that their proposition was a function of the loss of territoriality and the increasing interdependence of humans: "The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual."

Although the authors placed this right in the context of their abhorrence of gossip, the press, and the increasingly "sophisticated" means of invading privacy, they also recognized that what they were asking the law to do was recognize an incorporeal right—that what they were asking the law to do was recognize the "thoughts, emotions, and sensations" inevitably arising from an "intense intellectual and emotional life." And the article has significantly influenced both privacy philosophy and the American legal tradition. As

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175. Although the stories explaining Warren's crusade for privacy are apocryphal, the matter was still personal for Warren. The traditional story is that Warren was upset when the press published pictures of his daughter's society wedding without permission. Apparently, his daughter was only six years old when the article was published. Warren, nonetheless, was upset with the press when he determined on writing his piece with Brandeis. Gormley, *supra* note 2, at 1349.


177. *Id.* at 76.

178. *Id.* at 77.

179. *Id.* at 76.

the legal decisions percolated through the courts—testing, rejecting, and adopting Warren and Brandeis's theorem—the historical tradition of privacy as philosophy was fairly quiescent until the mid-twentieth century.

Privacy as philosophy and personal concern assumed urgency after World War II. During the ensuing Cold War era, privacy philosophy ratcheted up the rhetoric and the focus, symptomatic of which was pop sociologist Vance Packard's *The Naked Society* in 1964. Privacy could no longer be taken for granted; privacy had to be protected, even sought out. Both the search for a philosophy and the search for privacy itself became angst-ridden. Multiple reasons are proffered for such angst, but two in particular are worthy of note. First, there were simply more people in America and thus less actual space between them. Overcrowding in the urban areas was becoming acute. No longer were people living in individual houses in which they could seclude themselves; many were living on top of each other in apartment buildings several stories high. This cultural—and even psychological—phenomenon creates anxiety as one feels less autonomous. Indeed, this societal crowding can even lead to a feeling of social saturation and the psychological disorder of “multiphrenia,” a feeling that one’s individuality is having to share space with too many persons and experiences—perhaps the human equivalent of the animal world’s “biochemical die-off.” Thus, privacy philosophy became the outlet for objectifying a cultural norm in the highly complex American culture as Americans believed their spatial and psychological autonomies were waning.

The second impetus for privacy philosophy at this time was the era itself and the perceived government assault on Americans’ autonomy. During the

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mail and for personal privacy of letters and other confidential information. *Id.* at 1899. Similarly, protecting the disclosure of personal information by the government was standard in the nineteenth century: the government could not disclose information gleaned from the decennial census. *Id.* at 1904–05.

181. VANCE PACKARD, THE NAKED SOCIETY (1964). Packard did not so much analyze privacy itself as identify five major forces invading privacy. The first force was the increased organizational living of Americans that increased our inherent nosiness about fellow citizens. *Id.* at 16. The second force was driven by Cold War fears—but resonates today in the wake of September 11, 2001—and marked the increase in Americans’ “Garrison State Mentality,” the state of feeling and being watched. *Id.* at 19–20. The third force was the impact of trading data to increase wealth. *Id.* at 22–23. The fourth and fifth are related: the growth of the investigation industry, *id.* at 24, and the consequent creation of surveillance technology, *id.* at 29.


183. Erikson, supra note 170, at 203–04. The “superhuman organizations” in which adults find themselves can lead to “deep chronic disappointment.” *Id.* at 204. Such feelings explain the increasing and current concerns about who and what has and is controlling our personal information.

Cold War, Americans found themselves aligned against totalitarian governments, and they feared those governments’ regulation of citizens as much as their possession of the “bomb.” Fueled by George Orwell’s 1984 and Ray Bradbury’s Fahrenheit 451, the ordinary American citizen feared the control and surveillance exercised by those governments over their citizens. Then it dawned on Americans that, if other governments had the means to control their populations by surveillance and regulation, so too must the American government. And of course the computerization of society and the collection of data—both privately and by the government—challenged Americans’ egocentric views of autonomy, especially privacy. These were anathema to Americans.

Literature on the subject began to proliferate—especially in legal circles—as a means to address and control that perceived interference. Beginning in the 1960s and 1970s, several influential books and articles on privacy were published with varying philosophies to define what privacy is, what its dimensions should be, and the like. The majority of that literature is legal philosophy, trying to encapsulate privacy into neat little formulæ and trying to create positive—albeit abstract—attributes for privacy. For instance, Alan Westin’s seminal work, Privacy and Freedom, focuses on individual privacy as “personal autonomy, emotional release, self-evaluation, and limited and protected communication.” One theme recurs and is tied to a single conceptualization of a state of human existence. This conceptualization has had several labels—personhood, autonomy, identity, personal

185. Similarly to Vance Packard, David Bazelon has argued that privacy requires increased legal protection because of the following forces: (1) the development of increasingly sophisticated surveillance technology; (2) the growth of technology to store, share, and manipulate data; (3) the appetites—of business, government, academia—for information; and (4) the urge to more tightly regulate an increasingly crowded populace. Bazelon, supra note 2, at 597–600.

186. See, e.g., JOHN CURTIS RAINES, ATTACK ON PRIVACY 17–21 (1974).


188. E.g., Joel Feinberg, Autonomy, Sovereignty & Privacy: Moral Ideals in the Constitution?, 58 NOTRE DAME L. REV. 445, 447–48, 451 (1983) (personal “sovereign authority” is one of several “senses of autonomy” by which one governs one’s self within a personal moral domain); Tom Gerety, Redefining Privacy, 12 HARV. C.R.-C.L. L. REV. 233, 236 (1977). “Privacy is . . . control over the autonomy of the intimacies of personal identity.” Id. at 281.

189. See, e.g., Jonathan Kahn, Privacy as a Legal Principle of Identity Maintenance, 33 SETON
integrity, dignity, individuality, individuation—but can be reduced to a psychological state of self in which the individual needs to be free from intrusion by others. Thus, philosophy extended the American historical tradition of privacy by putting into words that which the passage of time had taken away, the historical American assumptions of and demand for space and autonomy. Consequently, the contemporary condition of American privacy is, in many respects, the psychological vestige of our culture that perhaps has more kinship to evolutionary privacy than it has to a cultural norm fed by space and political autonomy.

C. The Legal Tradition of American Privacy

The Escher-like quality of the meaning of privacy is most noticeable in the American legal tradition. The legal tradition of privacy arose from the early assumptions of American individualism and autonomy. The legal tradition also recognizes that privacy is the means for perpetuating that individualism and autonomy. The connection between the two is indissoluble.

1. “A small hard core of common agreement”

Tracing the legal tradition of privacy to support a constitutional liberty interest for schoolchildren requires an examination of the tradition for both the Fifth and Fourteenth Amendments as both the federal and state governments regulate education these days. Although legal philosophy has informed much of the historical abstractions of privacy—both Victorian and contemporary—its focus has tended more toward common law, in the vein of Warren and Brandeis’s article. The impact of that philosophy on privacy as a cultural, psychological, and legal practice cannot be underestimated. However, any overview of the legal tradition of constitutional privacy in


193. See Kahn, supra note 191, at 381–84.

194. See, e.g., Bazelon, supra note 2, at 589–91. Similar to Westin’s taxonomy of privacy, Bazelon observes four functions of individual privacy: (1) protecting one’s public image; (2) nurturing individuality itself; (3) permitting emotional release; and (4) promoting human relationships. Id. at 589–90.

195. Privacy as an existential concept—apart from the legal concept—has been defined as “both a necessary and a contingent condition of individuals’ life experiences and engagements.” O’BRIEN, supra note 2, at 17. This condition limits access to those experiences and engagements and has both intrinsic and extrinsic value. Id.

196. “Democracy is a small hard core of common agreement, surrounded by a rich variety of individual differences.” James Conant.
America must diverge somewhat and begin with the origins of the American republic.

Those origins arose from the colonists' opportunity to break from the conservative tradition of fealty to a king, as well as their opportunity to experiment with a republican government. The conjunction of both opportunities was their desire for liberty. In defining those opportunities, the Founders were moved and empowered by the works of Montesquieu, Bacon, and Locke. However, they also worked without many historical antecedents. In essence, the drafting of the Constitution created its own beginning, a new legal tradition of an enduring document that would preserve the "[b]lessings of [l]iberty to ourselves and our [p]osterity." The thrust of that document, based on its few historical antecedents, was the preservation of individual rights, an unambiguous acknowledgement of individual autonomy and, as an adjunct to that autonomy, an unspoken nod to individual privacy.

Pre-revolutionary legal concerns about privacy arose from events in Great Britain more than they did from events in the colonies. Indeed, constitutional rights adopted by the colonies were actually the assertion of the rights of Englishmen they feared losing. However, in the tradition of revolution, the colonists also asserted additional rights unique to their own status and situation: the "right to consent to taxation, the right to representation, the right to resist unconstitutional government, and the right to liberty." These latter rights—especially liberty—obviously reflected unique concerns that arose from the growing tension created by England's

198. See, e.g., Lynn D. Wardle, The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children, 27 LOY. U. CHI. L.J. 321, 343–44 (1996). Montesquieu viewed political liberty, as opposed to independence, to "consist only in the power of doing what we ought to will, and in not being constrained to do what we ought not to will." M. DE. SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 200 (David Wallace Carrithers ed., 1977). Jeremy Bentham similarly postulated that liberty is a negative concept because "its presence is always marked by the absence of something, and specifically by the absence of some measure of restraint or constraint." SKINNER, supra note 67, at 83.
199. Richards, supra note 45, at 815.
200. Id.
201. U.S. CONST. preamble; Richards, supra note 45, at 821. "The American opportunity . . . was to create a system of government that would be the result of freedom, theoretical clarity, and the exercise of collective deliberative choice. The Founders thus used the best critical historiography of the age and interpreted history in a way that advanced imaginative institutional innovations . . . ." Id. at 818. An integral part of that deliberative choice was their understanding that the enduring constitution would be subject to interpretive changes; indeed, its whole purpose was to embrace the future. Id. at 822.
202. REID, supra note 73, at 193–95.
203. Id. at 4–5.
204. Id. at 16–17.
rule over an increasingly recalcitrant colonial "union." From that tension grew a uniquely American legal tradition as revolutionary notions of liberty expanded both legal protection for the colonists' group and individual autonomy from English authoritarianism. However, the rights of Englishmen sowed the seeds of privacy in constitutional legal tradition.

English rights were considered timeless; they were not invented by a particular legal controversy but were assumed to have existed as an attribute of government noninterference. Those rights needed no articulation unless the government went too far.205 One of the English rights at the center of that assumption was the right to liberty, characterized chiefly by the right to property free from government interference: "For the citizen to be secure in individual rights, property also had to be secure."206 As a consequence, pre-constitutional legal tradition regarded as sacred the triumvirate of private property, personal liberty, and personal security.207 Thus, specific "rights" that were eventually incorporated into the Constitution—in life, liberty and property—had "ancient roots" in English law, influenced in no small part by privacy issues.208 As the colonists engrafted their own rights of Englishmen into their political and legal history, they were particularly moved by immediate privacy concerns.

Particularly worrisome to the colonists were the quartering of soldiers in private homes and the issuance of general warrants. In reality, the American colonies were in little jeopardy from these particular grievances because they were virtually unenforceable in the colonies.209 However, colonial concerns still had an impact on their political and legal standing with England. In the first instance, Parliament passed two quartering laws that concerned the Americans. Those laws prohibited billeting of British soldiers in private homes but authorized their billeting in private businesses.210 Although these laws were not actually enforced effectively, they horrified the colonists by their mere passage.211 However, the Americans were more concerned about the issuance of search warrants even though they were procedurally inapplicable to the colonial administration. The legal concern was that the

205. Id. at 24–26.
206. Id. at 37.
207. Id. at 36.
208. The Anglo-American approach to privacy seems to differ significantly from that of continental Europe where one's dignity, more than one's liberty, defines privacy issues. James Q. Whitman, The Two Western Cultures of Privacy: Dignity Versus Liberty, 113 YALE L.J. 1151, 1161 (2004).
209. REID, supra note 73, at 194–95.
210. Id. at 194.
211. Id.
English executive authority could issue general warrants without judicial supervision.\textsuperscript{212}

Those warrants became a cause célèbre in England after the King's ministers ransacked the homes of pamphleteers in order to prosecute sedition charges.\textsuperscript{213} When in 1765, the pamphleteers sued the government over these warrants, the English court pronounced them illegal. In \textit{Entick v. Carrington},\textsuperscript{214} Chief Justice Camden reasoned that privacy in one's property is presumed. In the absence of specific legal authority for the government to intrude, its use of these warrants was a trespass against an individual's personal property and therefore void.\textsuperscript{215} The Chief Justice particularly warned that such warrants, if not restrained, could be used indiscriminately to subject citizens to a search of their "secret cabinets and bureaus" at the whim of the secretary of state.\textsuperscript{216} The Chief Justice elaborated on this principle in \textit{Leach v. Money}, when he stated, "'[O]ur law holds property so sacred, that no man can set his foot on his neighbor's close without his leave.'"\textsuperscript{217} Thus, the Englishman's right to privacy was the primary motivation for ruling in favor of the pamphleteers.\textsuperscript{218}

More immediately worrisome to the colonists, and the other principle controversy that affected colonial privacy jurisprudence, was the Writs of Assistance Case.\textsuperscript{219} This case was basically an American matter but derived from English statutes that granted virtually unfettered authority for customs officials to enforce rules proscribing trade outside English "channels."\textsuperscript{220} A writ of assistance under these statutes compelled others—usually local officials—to aid customs officials in their searches for and seizures of goods.

\begin{itemize}
\item \textsuperscript{212} \textit{Id.}
\item \textsuperscript{213} Stuntz, supra note 87, at 397.
\item \textsuperscript{214} 19 How. St. Tr. 1029 (1765).
\item \textsuperscript{215} Boyd v. United States, 116 U.S. 616, 629 (1886). The \textit{Boyd} Court actually elevated \textit{Entick v. Carrington} to constitutional stature:
\begin{quote}
As every American statesmen, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.
\end{quote}
\item \textsuperscript{216} \textit{Id.} at 626–27.
\item \textsuperscript{217} \textit{Id.}
\item \textsuperscript{218} Stuntz, supra note 87, at 399–400.
\item \textsuperscript{219} \textit{Id.} at 404.
\item \textsuperscript{220} \textit{Id.} at 404–05; see generally M.H. Smith, \textit{The Wrts of Assistance Case} (1978).
\end{itemize}
imported in violation of the rules. When several Boston merchants sought to void writs served upon them, James Otis represented them, attacking the writs on both statutory and substantive grounds. In a losing cause, Otis famously argued:

Now one of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom house officers may enter our houses when they please—we are commanded to permit their entry—their menial servants may enter—may break locks, bars and every thing in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient.

Thus, the writs of assistance, too, were decried on purely privacy grounds. And that privacy was based on a substantive elucidation of liberty, that the writ was "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book." The significance of these legal controversies was not lost on Americans, who believed in Englishmen's right of liberty and sanctity of the home.

Preconstitutional legal tradition therefore recognized the meaning of English liberty and the need to protect it from the arbitrary use of government power. For the colonists, this governmental intrusion on privacy marked a progressive creep toward totalitarianism, and their archetype of liberty necessarily had to embrace the protection of privacy as an integral part of American autonomy. Thus, the precedence of privacy and autonomy over the authority of the state predates the Constitution.

221. Stuntz, supra note 87, at 405.
222. Id. at 406.
223. SMITH, supra note 220, at 344; Stuntz, supra note 87, at 406.
226. Boyd, 116 U.S. at 625. Contemporaneously, William Blackstone theorized that, while philosophers could not agree on natural rights, there existed three basic principles of law: "the right of personal security, the right of personal liberty, and right of private property." John Marquez Lundin, The Law of Equality Before Equality Was Law, 49 Syracuse L. Rev. 1137, 1180 (1999) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 70 (1765)).
228. TRIBE, supra note 90, at 1335-36.
2. A Man's House Is His Castle: Fourth and Fifth Amendments

The legal tradition became concrete with the drafting of the Constitution and the later Bill of Rights. The Founders believed that rights are retained in the people and that, after the perceived intrusions of the English sovereignty, the better government is a limited government. Therefore, the constitutional legal tradition—based in no small measure on Enlightenment philosophy—presumed rights independent of the constitutional document and placed limits on the government. The Constitution was not perceived as granting particular rights; rather, the rights were assumed, and the government had the burden of proving why it could infringe upon those rights. Consequently, the legal tradition of the Constitution was, in most respects, substantive, presuming those timeless English rights and requiring the government to carry the burden of proving its capacity to regulate. In this regard, several Amendments are considered to have substantive privacy protections: "[E]very governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution." For instance, the First Amendment protects the privacy of one's associations and beliefs whereas the Third Amendment protects private homes from nonconsensual quartering of soldiers. In each of these Amendments is the premise that privacy is an assumption of the republic in which the government may not interfere. Two Amendments in particular were ratified to protect citizens' privacy and autonomy.

The Fourth Amendment is the most obvious constitutional result of the colonial legal tradition to protect the Englishmen's timeless right of privacy, protecting as it does the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." With this language, the Founders provided a rudimentary framework of privacy with particular corporeal markers—persons, houses, papers, and effects—and emphasized the right to be free from a certain invasion of those markers by extending the spatial-territorial boundaries between the individual and the state. This language memorializes a substantive right and effectively protects a certain type of privacy.

231. Id.
232. U.S. CONST. amend. IV; see Boyd v. United States, 116 U.S. 616, 626-27 (1886); The Right to Privacy in Nineteenth Century America, supra note 180, at 1896. These protections also became integral parts of state constitutions. Id. at 1897.
234. Luther v. Borden, 48 U.S. (7 How.) 1, 66-67 (1849) ("The genius of our liberties holds in abhorrence all irregular inroads upon the dwelling-houses and persons of the citizen, and with a wise
The colonial legal tradition also infused substantive meaning into the Fifth Amendment as a guardian of autonomy, and thus, privacy. The Due Process Clause states that "[n]o person shall be... deprived of life, liberty, or property, without due process of law." These words expressed a belief in retained rights that limited the government’s power, thereby assuming substantive meaning not otherwise explicated in this statement. In fact, the Framers’ understanding of “due process of law” was its legal equivalence to "law of the land,” subsuming both procedural and substantive content.

In 1886, that legal tradition was especially memorialized in Boyd v. United States, a case that relied on legal tradition and substantively linked the Fourth and Fifth Amendments to privacy and liberty. The controversy at the heart of the case was a federal customs revenue statute authorizing a court, on motion from a federal prosecutor, to order the turnover of private books, papers, and invoices for use in evidence against criminal defendants. The Boyd court relied on and extended Entick v. Carrington to determine that both the Fourth and Fifth Amendments were implicated in the case before it because of their similar protections of liberty and privacy:

The principles laid down in [Entick v. Carrington] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court...; they 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. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes [sic] the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property... it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden’s judgment.
Thus, legal tradition in Supreme Court jurisprudence early ascribed privacy protection to the Fourth and the Fifth Amendments.

Similar concerns over privacy in the context of searches and seizure were detailed by early state court cases. In a case where illegally imported goods were seized from a stagecoach pursuant to customs statutes but without a warrant, an 1818 New Hampshire court interpreted the statute's warrant requirement to protect only those places to which individuals "ha[d] th[e] exclusive right of possession and privacy."\textsuperscript{240} Relying on the Fourth Amendment as authority, an early Louisiana court awarded damages to a homeowner for an illegal search—the searched premises were contiguous to but apart from the premises actually described in the warrant.\textsuperscript{241} In ruling for the homeowner, the court determined that the Fourth Amendment was a "principle so indispensable to the full enjoyment of personal security and private property, [it] should be enforced in its full spirit and integrity."\textsuperscript{242} Thus, the early American legal tradition of privacy—at least in case law—was the application of the Fourth Amendment, and perhaps the Fifth, to protect private property from searches and seizures. This right to be free from unreasonable searches and seizures was easily "quantifiable" because it relied on territoriality and property demarcations of privacy. And, until 1967, the Supreme Court relied on that trespass theory of intrusion with regard to searches and seizures.

Current privacy tradition under the Fourth Amendment was most affected by the 1967 decision of \textit{Katz v. United States},\textsuperscript{243} in which the Court determined that privacy under the Fourth Amendment implicitly assumes that more than tangible items and physical trespass are at stake.\textsuperscript{244} In \textit{Katz}, the government had attached surveillance devices to the outside of a public telephone booth and intercepted the defendant's transmission of wagers over

\textsuperscript{240} Jones v. Gibson, 1 N.H. 266 (1818) (emphasis added). Those places worthy of privacy protection, and thereby merit a warrant, included a dwelling, store, ship, and vessel. \textit{Id.}

\textsuperscript{241} Larthet v. Forgay, 2 La. Ann. 524 (1847).

\textsuperscript{242} \textit{Id.} (emphasis added).

\textsuperscript{243} 389 U.S. 347 (1967).

\textsuperscript{244} See also \textit{Kyllo v. United States}, 533 U.S. 27, 37 (2001) (explaining that the Fourth Amendment has never been tied to dividing privacy interests to only private activities in private areas and that the interior of a home is particularly sacrosanct, especially from warrantless thermal-imaging).
the telephone. The Court characterized that interception as a search and seizure under the Fourth Amendment because it violated the privacy upon which the defendant justifiably relied when he entered the booth. Although the government agents carefully circumscribed the reach of the surveillance, their failure to get a warrant made the search unreasonable. In reaching this conclusion, the Court relied not on a territorial protection from trespass but on a more metaphysical, spatial protection of the person. Justice Harlan, in his concurrence, deemed this a "reasonable expectation of privacy" and asserted that one's presence in a phone booth is an "expectation[ ] of freedom from intrusion." As a result, the Fourth Amendment was extended beyond mere spatial bounds to protect bodily privacy from government scrutiny. The majority opinion does not fully define privacy in terms other than the defendant's justifiable reliance that what he said would not be a matter for public interception and disclosure. But Katz diverted from the Victorian legal tradition of measuring privacy by quantifiable metes and bounds to something that more closely resembled the substantive, constitutional liberty interest intended by the Founders. This more incorporeal privacy interest would come to full flower under jurisprudence of the Due Process Clause of the Fourteenth Amendment.

3. OcKham's Razor

The legal tradition of privacy owes the greatest debt to twentieth-century jurisprudence under the Due Process Clause of the Fourteenth Amendment, substantive jurisprudence that places the onus on the government rather than

246. Id. at 353.
247. Id. at 358–59.
248. Id. at 351–52.
249. Id. at 360, 361 (Harlan, J., concurring). Commentators have criticized the tautology and circularity of that "expectations" language as a definition of privacy. See, e.g., Solveig Singleton, Privacy Versus the First Amendment: A Skeptical Approach, 11 FORDHAM INTL. PROP. MEDIA & ENT. L.J. 97, 101–02 (2000); Shaun B. Spencer, Reasonable Expectations and the Erosion of Privacy, 39 SAN DIEGO L. REV. 843, 846, 860 (2002) ("[The] expectation-driven conception of privacy is vulnerable to encroachment. Actors and groups powerful enough to influence social behavior can change society's expectation of privacy, and thereby change what the law will protect as private."). However, such analyses seem to miss the point that individual privacy was never really defined by the majority opinion of the Court; only the negative attribute of the government interference was.
250. Justice Stewart even cited to the Fifth Amendment as part of his rationale for expanding the privacy protections under the Fourth. 389 U.S. at 350 n.5 (quoting Tehan v. United States ex rel. Shott, 382 U.S. 406, 416 (1966)).
251. Ironically, William of OcKham is attributed with the first philosophical configuration of liberty as a subjective state of being. BRETT, supra note 67, at 4–5.
the individual to define not the limits of privacy but the justification for an intrusion. The results have been inconsistent, in no small measure because the focus is usually on the intrusion, not on an overarching liberty. *Lawrence v. Texas* comes closest to affording blanket recognition for a constitutional privacy congruent with individual autonomy, but the legal tradition is a little messier.

To a certain degree, the difficulty in courts' recognizing a constitutional privacy per se has been caused by the contemporary common law's framing a positive, tangible attribute of privacy for purposes of assessing damages. In disputes between private individuals, the concerns of limited government do not come into play. Rather, the common law governs duties and responsibilities between private individuals. Thus, efforts to quantify privacy as a protectible interest required the creation of a more tangible human attribute, nearly a property interest, upon which another was not allowed to trespass. Whether the distinction between a "measurable" privacy interest and an immeasurable constitutional privacy as autonomy really matters in a practical sense, this rights-liberty dichotomy has influenced the modern legal tradition, especially under the Fourteenth Amendment.

Early cases that predated the Fourteenth Amendment tended more toward the pragmatic, territorial characteristics of privacy. As early as 1826, trespass was a matter of privacy and the driving consideration in a dispute arising over a landlord's entry into a household in order to search for property reputedly stored there by someone other than the tenant.252 Even though the landlord had the assistance of a constable, the court determined that without the proper warrant such a "discretionary" visit was a violation of the sanctity of the home and thereby echoed James Otis's aphorism that "a man's house is his castle."253 Such trespass was a violation of "the right of domestic privacy and security of habitation, which the laws have always manifested a scrupulous anxiety to protect."254 Other early courts determined that such trespass should be compensated by damages for "invasion of . . . privacy"255 because "[t]he very breaking in upon the [plaintiff]'s privacy was a damage."256 One unusual 1852 case presaged *Katz*, in which a court was asked to enforce an Alabama statute that prohibited the playing of cards in a public place.257 In determining that a thick grove of woods—out of sight of the nearest store and road—was

253. Id.
not a public place, the appellate court reversed the convictions and stated:

These persons went to that hollow evidently to be out of the way of observation, to be, in fact, concealed from the public view, and it is not reasonable to hold that their being there made that retired and secluded spot a public place, merely because they went to play cards, when, as has been shown, the evil intended to be averted was not the card playing itself, but the effect of the example upon others.\(^{258}\)

In early American legal tradition, not only was real property considered sacrosanct, so was personal property. In 1811, a territorial court rendered a decision on the publication of private letters in *Denis v. LeClerc*.\(^{259}\) In that case, the plaintiff sought to enjoin the defendant from publishing a letter that the defendant had obtained by improper means.\(^{260}\) The letter was written to "a lady to whom the plaintiff was paying his addresses" and was considered of sufficient "mystery and confidence" that even the court "could not with propriety read the copy."\(^{261}\) The court granted the injunction.\(^{262}\) The defendant then attempted to get around the injunction by attaching the letter to his answer to the plaintiff's complaint.\(^{263}\) The publication was intended solely to "vex" the plaintiff.\(^{264}\) In ultimately holding the defendant in contempt for violating the injunction, the court engaged in a lengthy expostulation of history—going back to Cicero and proceeding through constitutional protections over copyrighted materials—and inveighed against the insult to privacy such publication would constitute.\(^{265}\) The court ultimately determined the letter was an object of property that remained in joint possession of the plaintiff and therefore could not be made public without his permission.\(^{266}\) The court specifically reasoned that "the communication of information, disadvantageous to a third person and affecting his reputation, is not considered as illegal when made fairly and confidentially; it is however, otherwise when made for the sole purpose of working an injury."\(^{267}\) Thus, American civil common law early recognized the value of privacy and the

\(^{258}\) Id.


\(^{260}\) 1811 WL 986 at *1.

\(^{261}\) Id. at *6.

\(^{262}\) Id. at *1.

\(^{263}\) Id. at *4–5.

\(^{264}\) Id. at *6.

\(^{265}\) Id.

\(^{266}\) Id. at *1.

\(^{267}\) Id. at *10.
harm caused by its invasion.

The first Supreme Court pronouncement of a privacy interest in a context other than the Fourth Amendment was contemporaneous with the Warren and Brandeis article. Its decision in Union Pacific Railway Co. v. Botsford\textsuperscript{268} concerned the question of whether a court could order a female plaintiff in a personal injury action to submit to a physical examination by a surgeon. After determining that federal law applied,\textsuperscript{269} the Court held that such examinations were prohibited under long-recognized common law as a violation of privacy.\textsuperscript{270} A number of archaic principles were at play in Botsford, now making it of only historical significance, but what is significant is the Court’s deliberation that the “common law” right to be let alone had a longstanding tradition in this country.\textsuperscript{271} The Court’s passage on that common law tradition is instructive:

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, “The right to one’s person may be said to be a right of complete immunity: to be let alone.” . . . For instance, not only wearing apparel, but a watch or a jewel, worn on the person, is, for the time being, privileged from being taken under distress for rent, or attachment on mesne process, or execution for debt, or writ of replevin. . . .

The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country.\textsuperscript{272}

The Court prohibited the lower court from ordering a physical

\textsuperscript{268} 141 U.S. 250 (1891).
\textsuperscript{269} Id. at 256.
\textsuperscript{270} Id. at 251.
\textsuperscript{271} Id. at 251–52.
\textsuperscript{272} Id.
examination with reasoning that mirrored English Chief Justice Camden's, that privacy is presumed and the interference must be expressly sanctioned by the law. The Court also termed it the right "to be let alone," words adopted by Warren and Brandeis.

The common law legal tradition of privacy owes much to The Right to Privacy published by Warren and Brandeis, as does the legal philosophy that developed during the twentieth century. The authors' "right to privacy," based on the slippery "right to be let alone," is congruent with the principles memorialized in the Fourth Amendment. However, Warren and Brandeis's purpose was different from that memorialized in the Constitution because it relied more on a capitalist vision of individualism, rather than the traditionally agrarian individualism associated with the Framers, particularly with Jefferson. Rather than with the Founders' desire to control authority, Warren and Brandeis were more concerned with a desire to control a "commodity."

The Right to Privacy was, after all, a challenge to interference by nongovernmental agents in the "private" lives of individuals. Warren and Brandeis were concerned about increasingly sophisticated surveillance technology and specifically attacked journalists' publications of photographs and information concerning matters that "invaded the sacred precincts of private and domestic life."

Protection against such invasion, they posited, should be subject to common law protection, and they relied on the roots of American autonomy in framing their right. However, they metamorphosed that autonomy from roots of property law so that monetary damages could be calculated for the invasion of that right. This article was instrumental in

273. Id.
274. Id. at 251.
276. KLUCKHOHN, supra note 164, at 234.
278. Warren & Brandeis, supra note 174, at 78-79; Turkington, supra note 180, at 482-83.
279. See generally Warren & Brandeis, supra note 174, at 80-86. Since the publication of The Right to Privacy, personal space has become commoditized to a particular area around a person to protect privacy, the most famous of which was delineated in Gaiella v. Onassis, 487 F.2d 986 (2d Cir. 1973). Intimacy as a basis for defining privacy has also been described as a commodity by which one creates relationships. See INNESS, supra note 2, at 81-82. Last, commodification is developing in the context of private information. See, e.g., Reno v. Condon, 528 U.S. 141, 148 (2000) (personal identifying information required for a driver's license is a "thing" for purposes of the Commerce Clause); Vera Bergelson, It's Personal But Is It Mine? Toward Property Rights in Personal Information, 37 U.C. DAVIS L. REV. 379 (2003); Julie Cohn, Examined Lives: Informational Privacy and the Subject as Object, 52 STAN. L. REV. 1373, 1378-1391 (2000); Chlapowski, supra note 189, at 133; see generally Singleton, supra note 249.
shaping a significant body of tort law. However, it also has contributed in some measure to the confusion in the patchwork nature of modern constitutional privacy, the confusion that stems from whether privacy is a commodity or is a state of being. Constitutional privacy as a state of being—a liberty—has historically prevailed.

Nearly forty years after the publication of *The Right to Privacy*, then-Justice Brandeis memorialized one of its themes in his dissent to *Olmstead v. United States*. *Olmstead* was a Fourth Amendment, wire-tapping case in which the majority determined that telephone wires did not come under constitutional protection. In dissent, Brandeis premised his version of constitutional privacy on the "right to be let alone" theme of his law review article. Instead of a corporeal measure of privacy suggested by the then-traditional trespass jurisprudence, he outlined the broad transcendental nature of individualism, a substantive version of the Constitution:

The protection guaranteed by the [a]mendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the [g]overnment, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the [g]overnment upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Indeed, Brandeis had transformed the property "interest" of the right to be left alone into an autonomy interest of constitutional significance and thereby concentrated *not* on the right, but on the government's invasion.

As the twentieth century progressed, the civil legal tradition of privacy began to reflect concerns that were less related to spatial-territorial questions

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281. *See generally* BRETT, *supra* note 67, at 3-6. There exist numerous philosophical debates between the objective characterization of a right and the subjective characterization of a liberty. *Id.*
283. 277 U.S. at 464-65.
284. *Id.* at 478-79 (Brandeis, J., dissenting)
and more related to psychic questions as Americans’ lives became more regulated in an increasingly crowded nation. As a result, plaintiffs’ suits opposing government regulation not only opposed an interference but posed the problems of how that psychic privacy was valued by the courts. Olmstead’s dissent may have most clearly postulated the substantive liberty interest, but earlier cases started the ball rolling. Lawrence v. Texas neatly packaged the chronology of those transcendental privacy-as-liberty cases, starting with Meyer v. Nebraska.

One of the earliest cases to delineate privacy and government regulation by means of substantive due process under the Fourteenth Amendment is Meyer v. Nebraska. Meyer was convicted of teaching reading in German to a ten-year-old child in violation of a Nebraska statute that criminalized the teaching of any subject in any language other than English until after the eighth grade. In overturning that conviction, the Court embarked on its perilous journey of defining the interest in teaching German as a liberty guaranteed under the Fourteenth Amendment. The Court recognized the liberties in a teacher’s right to teach and in a parents’ right to engage a teacher for such responsibility and thus to control their children’s education and concluded that government may not interfere with those liberties without having some reasonable purpose in doing so. And although conceding a state’s interest in promoting civic development through their schools, the Court particularly decried state efforts to achieve a homogeneity of children through the means that Nebraska had adopted. Instead, the statute was held

286. 262 U.S. 390 (1923).
287. Id. at 397.
288. Id. at 399.
289. Id. at 400–01. The Court extrapolated these rights by defining “liberty” in nonexclusive terms:

While this court has not attempted to define with exactness the liberty thus guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399.
290. Id. at 399–400.
291. Id. at 402.
to be an unreasonable use of the state's police power to achieve good citizens. The Court thereby created a demarcation between the power of the state and the autonomy of the individual through the liberty protected by the Fourteenth Amendment.

The Court tackled a similar issue in Pierce v. Society of Sisters. The problem posed in that case was the constitutionality of an Oregon compulsory education act that required all children between the ages of eight and sixteen to attend public schools. Two private educational institutions that were losing matriculants as a result of the statute initiated suits for injunctive relief to prohibit its enforcement. Relying on Meyer v. Nebraska, the Court determined that this statute, too, unreasonably interfered with the liberty guaranteed under the Fourteenth Amendment, most specifically acknowledging a liberty in parents to "direct the upbringing and education of children." Once again, the Constitution was the guarantor of individual autonomy: "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the [s]tate to standardize its children by forcing them to accept instruction from public teachers only."

According to the Lawrence Court, forty years passed before the next major test to conceptualize privacy in the Fourteenth Amendment arose, although it was conceptualized in a slightly different way as an explicit right of privacy in Griswold v. Connecticut. The dispute was occasioned by Connecticut's criminal statute that forbade the use of contraceptives and the counseling to provide information about contraceptives. The executive director and medical director of Connecticut's Planned Parenthood League were arrested and convicted of being accessories to the offenses as they gave information and medical devices to married couples concerning contraception. The defendants challenged the accessory statute as violative

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292. Id. at 403.
293. 268 U.S. 510 (1925).
294. Id. at 530.
295. Id. at 530–33.
296. Id. at 534–35.
297. Id. at 535. The Court then commented that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Id.
298. See generally id. at 564.
300. Griswold, 381 U.S. at 480.
301. Id.
of the Fourteenth Amendment. In an apparent sidestep to avoid criticisms inuring to substantive due process, Justice Douglas's opinion instead recognized a "right of privacy older than the Bill of Rights," the privacy inhering in the marital relationship arising from the "penumbras" of rights inherent in the Constitution. He asserted the marital relationship is within a "zone of privacy" in which the government may not interfere in such fashion as to imperil the relationship by police searches for contraceptives. Connecticut's statute instead was an unnecessarily broad use of the state's police power, a power that would adversely affect the confidential relationship between husband and wife. Thus, the legal tradition of privacy as a constitutional liberty became a bit side-tracked with Griswold.

Griswold's right to marital privacy—an enunciated and therefore measurable "group" autonomy—was mutated in Eisenstadt v. Baird to include individuals and revived, to a degree, the syllogism of privacy as autonomy. In Eisenstadt v. Baird, the defendant deliberately provoked his arrest and conviction for unlawful distribution of a contraceptive when he gave a package of vaginal foam to a young, unmarried woman as he closed a lecture on birth control at Boston University. Although the Court's

302. Id. at 481.
303. Id. at 486.
304. Id. at 485.
305. Id. at 481. Douglas's perambulation through the law to achieve this result required the recognition of a right peripheral to the specific rights secured by the Constitution and the Bill of Rights. These he dubbed "penumbral rights," rights that the Framers assumed to exist but simply did not enumerate. The legal legerdemain by which the Court could recognize these penumbras under the Fourteenth Amendment, he posited, was the breadth of the Court's previous interpretations of the First, Third, Fourth, Fifth, and Ninth Amendments. Because these Amendments had at one time or another generated controversies for which the word "privacy" was placed in an opinion, the Court had created a broad net of legal protections over a zone of privacy, or "penumbral rights of "privacy and repose." Id. at 485. Douglas's analysis of precedent included First Amendment associational privacy from NAACP v. Alabama, 357 U.S. 449 (1958); Third Amendment freedom from quartering soldiers; Fourth Amendment privacy guarantees set forth in Mapp v. Ohio, 367 U.S. 643 (1961); specific guarantees from unreasonable search and seizure; and the Fifth Amendment guarantee against self-incrimination. Griswold, 381 U.S. at 482–85. The Ninth Amendment was reserved as the catch-all: even if the right is not enumerated, the Constitution should not be construed as denying other rights. Id. at 484. The Griswold decision is more in the nature of the protection of an "unenumerated" right under the Constitution, an acceptable function of the Constitution in its "historical commitment ... as a community of enduring principle." Richards, supra note 45, at 839.

306. But see 381 U.S. at 486–87 (Goldberg, J., concurring). The concurrence of Justice Goldberg instead mentions the liberty interest set out in the Fourteenth Amendment as encompassing the right of marital privacy. Id. at 486–87 (Goldberg, J., concurring). Goldberg placed great weight on the reservation of rights in the Ninth Amendment, attempting to elevate that Amendment from flabby disuse, as an interpretive measure that the Bill of Rights is not exhaustive. Id. at 490–92 (Goldberg, J., concurring).

308. Id. at 440, 445.
decision ultimately rested on the Fourteenth Amendment's Equal Protection Clause, it also offered one significant policy rationale for striking down the statutes based on the right to privacy set forth in Griswold v. Connecticut: Griswold could not be interpreted to protect only the marital couple, but also to protect the individual member with a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."  

Eisenstadt's recognition of individual privacy set the stage for Roe v. Wade, which conceptualized personal privacy amidst the controversy over criminalizing abortions and declared that a woman has a constitutional "right of personal privacy [that] includes the abortion decision." The exact dimensions of that "right" are not set out nor is the underlying constitutional rationale very clear; Justice Blackmun's opinion is an olio of reasoning. However, he did make clear that the chief justification for striking down the Texas statute was the Fourteenth Amendment's Due Process Clause and its substantive liberty interests and declared this privacy interest a "fundamental" personal privacy right that may only be overborne by a compelling state interest.  

There followed a plethora of attacks on the personal privacy right outlined in Roe v. Wade as states kept chipping away by adding special "provisions" to a woman's private right to decide whether or not to have an abortion.

309. The Court determined that no rational ground existed for the statutes' differential treatment of unmarried individuals from that of similarly situated married couples. Id. at 446-47, 454-55.
310. Id. at 453.
312. Id. at 154.
313. Blackmun began his exegesis by acknowledging that the Constitution contains no explicit right to privacy then traced the historical development of the Court's tradition of loosely interpreting constitutional provisions to find privacy rights hidden in the Amendments. He also acknowledged Justice Douglas's "penumbras" formulation. However, he reserved most emphasis for the liberty guaranteed by the Fourteenth Amendment as originated in Meyer v. Nebraska. To this tenet he attributed discrete personal rights that are "implicit in the concept of ordered liberty." Id. at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937), overruled by Benton v. Maryland, 395 U.S. 784 (1969)). Pursuing this theme, he enumerated—as worthy of protection—marital activities, procreation, contraception, family relationships, child-rearing, and education. Id. at 152-53; see Eisenstadt v. Baird, 405 U.S. at 453-54; Loving v. Virginia, 388 U.S. 1, 12 (1967); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Skinner v. Oklahoma ex rel Williamson, 316 U.S. 535, 541-42 (1942); Pierce v. Society of the Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. at 399. Although somewhat reserved on the actual decisional fulcrum—Blackmun accepted that the Ninth Amendment might also be a basis for recognizing privacy as a reserved right—he primarily relied on the Fourteenth Amendment’s liberty interest and the congruent restrictions on government interference as the basis for his decision. Roe v. Wade, 410 U.S. at 153.
315. Id. at 155.
Pennsylvania, for example, required informed consent, a twenty-four-hour waiting period, parental consent for minors, state recordkeeping requirements, and spousal notification.\textsuperscript{316} Several abortion providers sought a declaration of that statute's unconstitutionality in Planned Parenthood of Southeastern Pennsylvania \textit{v.} Casey.\textsuperscript{317} A fractured Court struck down only Pennsylvania's spousal notification provision as an undue burden on a woman's privacy rights,\textsuperscript{318} but did reaffirm the privacy rights of \textit{Roe v. Wade},\textsuperscript{319} now more candidly described as a liberty interest:

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, . . . that definition of liberty is still questioned.\textsuperscript{320}

. . .

Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.\textsuperscript{321}

Justice O'Connor's liberty jurisprudence is firmly rooted in the Fourteenth Amendment\textsuperscript{322} and evinced no reservation that liberty is the substantive well-spring for personal autonomy,\textsuperscript{323} and therefore its ancillary value, privacy.

The imprimatur for this liberty interest—and the simplest characterization of constitutional privacy as a more general principle relying on individual autonomy—finally occurred with \textit{Lawrence v. Texas}. More than 200 years

\begin{itemize}
  \item \textsuperscript{316} Planned Parenthood \textit{v.} Casey, 505 U.S. 833, 844 (1992).
  \item \textsuperscript{317} Id.
  \item \textsuperscript{318} Id. at 898. The "undue burden" restriction on state interference in this liberty interest rejected the clear lines drawn by the trimesters framework elucidated in \textit{Roe v. Wade}. Id. at 873. This test examines whether a state's regulation of the liberty has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Id. at 877.
  \item \textsuperscript{319} Id. at 879.
  \item \textsuperscript{320} Id. at 844.
  \item \textsuperscript{321} Id. at 901.
  \item \textsuperscript{322} Id. at 846.
  \item \textsuperscript{323} "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." Id. at 851.
\end{itemize}
after the Constitution was drafted, the Court has fully embraced the Möbius Strip that the Founders were wise enough not to enumerate—liberty is autonomy is privacy is autonomy is liberty. Thus, in further Escher-like fashion, the legal tradition of privacy has come full circle. Although *Lawrence v. Texas* was limited to a particular interference with constitutional privacy, its explication of constitutional privacy as a constitutional liberty—eloquently foreshadowed by Justice O’Connor in *Casey*—serves as the singular, most easily explicated proof for the generalized constitutional protection of privacy. That template assumes that constitutional privacy is a substantive liberty, with few contours, perhaps, but necessarily so as not to have to anticipate each government interference.

It also can be summoned up to challenge the unwarranted governmental intrusions that often accompany children’s privacy interests in education. The presumption of privacy as a constitutional liberty is essential for children in school because there they are wholly embraced by the government. A couple of contours to this liberty must be sculpted, if for no other purpose than to remind the government when it is and is not in charge. But that children are entitled to expect the protection of their constitutional privacy has no less historical practice and background—albeit little legal tradition—than for adults.324

III. CHILDREN AND PRIVACY

As one studies the practices and historical traditions of childhood privacy—of which education privacy is just one part—it becomes apparent that something somewhat less metaphysical is necessary to define exactly what its legal tradition is, or should be. A child’s understanding of privacy is only slightly more abstract than that of animals. In early childhood years, the sentient notion of privacy does not go much deeper than instinct—borne more of physical autonomy than of anything else. As children mature, the abstraction is more apparent as children reach adolescence and can better verbalize ideas about themselves and their personal autonomy. However, the lack of abstraction and advanced communication skills should not deprive younger children of a right or liberty to privacy. Perhaps for those reasons, the law has done a poor job of defining exactly what children’s privacy interests should be while in school.

Regardless of the child’s “subjective” expectation of privacy, the state is

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324. Indeed, an examination of children’s practices and historical background might make explicating adult privacy a bit easier because children’s views of privacy tend to be less abstract and more practical.
still required to be protective of her privacy interests.\textsuperscript{325} For that, the \textit{Lawrence v. Texas} framework for expostulating practices, history, and legal traditions is useful in tracing a child's liberty interest in privacy as part and parcel of American autonomy, and therefore of American privacy.

The history of Western Civilization reveals that, at least until the seventeenth century, children were considered miniature adults, not as a state of mental immaturity.\textsuperscript{326} Childhood accomplishments were hailed as a mirror of adult accomplishments.\textsuperscript{327} Indeed, the recognition of childhood as a distinct social category spans only the past 400 years, developing the distinction upon the formalization of schools and the recognition of the familial social unit as separate from the larger community. By the "modern" era, the sociocultural separateness of children from adults was recognized.\textsuperscript{328}

The American colonial cultural norm of children's privacy grew primarily from the functioning of the family unit and the functioning of privacy within that unit. Bowing to the differentiated status of children, colonial adults granted them varying degrees of privacy in accordance with their ages, thus varying through the spectrum of infancy to adolescence.\textsuperscript{329} The Puritan community ethos emphasized social control over its members so surveillance of children was a family function. Thus, Puritan households tended to strictly control children so they would not misbehave. But the realities of the family's survival would not allow round-the-clock surveillance. As parents worked on the farm and in the household, children were often left to their own devices—or assumed to be self-sufficient—and had a great deal of autonomy, and thus privacy. Surveillance later became more linked to the child's own

\textsuperscript{325} \textit{See} Darryl H. v. Coler, 801 F.2d 893, 901 (7th Cir. 1986) ("A child of very tender years may not exhibit a subjective expectation of privacy in the same sense as an older child. He is, however, a human being, entitled to be treated by the state in a manner compatible with that human dignity.").

\textsuperscript{326} \textit{GERGEN, supra} note 184, at 11–12; \textit{see also} PHILIPPE ARIÈS, \textit{CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE} 32, 46 (1962) (noting that seventeenth-century art began to evoke themes of childhood \textit{qua} childhood). Medieval society lacked an awareness of the distinction between childhood and adulthood, an awareness that began to change with the practice of "coddling" children. \textit{Id.} at 128, 132. In addition, several cultures marked the movement from childhood to adulthood at puberty, a much younger age than Americans traditionally consider the onset of adulthood. \textit{See, e.g.}, Wallace J. Mlyniec, \textit{A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose}, 64 FORDHAM L. REV. 1873, 1876–77 (1996).

\textsuperscript{327} J.H. VAN DEN BERG, \textit{THE CHANGING NATURE OF MAN: INTRODUCTION TO A HISTORICAL PSYCHOLOGY} 28 (1961).

\textsuperscript{328} VAN MANEN & LEVERING, \textit{supra} note 4, at 139. The "privacy" accorded to a family unit—or at least a unit smaller than the community—may have been instrumental in separately classifying children as different from adults. This contrasts with our current beliefs that biological and psychological growth distinguishes them. \textit{Id.}

\textsuperscript{329} FLAHERTY, \textit{supra} note 143, at 49.
economic independence from the family unit. By the eighteenth century, personal autonomy arrived sooner than for today’s children as colonial adolescents became less economically dependent upon their parents and thus differentiated from the family unit and away from its surveillance. Modern views of childhood are now less linked to economic independence and more linked to chronological development, particularly with universal education until adolescence. As a result, American society’s perception of the age of autonomy has changed somewhat. Surveillance of children in the household is still prevalent as a matter for social control, but children’s privacy in modern America has also become a matter of instilling cultural norms of privacy at developmental stages. Through the agent of culture, children learn early respect for private property and “the sanctity of the person.” By the age of two, children begin to sense the distinction between autonomy and dependence. Indeed, contemporary concerns have increased awareness about the sanctity of a child’s body in the numerous “good touch-bad touch” programs conducted to prevent, or at least to assist in prosecution of, child molestation charges. During the early elementary grades, children develop more abstract privacy concerns with a significant shift in attention from simple spatial privacy to more sophisticated ideas of their own autonomy. This autonomy may exhibit itself in various perceived, albeit primitive, rights—like the right to play—that later metamorphose into other concepts of liberty, like the freedoms of movement and decisionmaking.

330. Id. at 55–57.
331. Id. at 58.
333. Frank, supra note 285, at 121. “[M]an exists as an organism in a common public world . . . but each individual lives in his private world of meanings and feelings, derived from the impact of culture that takes place in the specific personal relations between cultural agents and the child.” Id. at 122 (emphasis in original); see also Lee, supra note 170, at 339.
334. Erikson, supra note 170, at 185, 203.
335. Sexual exploitation of children is perceived as a violation of their privacy. People v. Gagnon, 997 P.2d 1278, 1282 (Colo. Ct. App. 1999); Perry v. Commonwealth, 780 N.E.2d 53, 56–57 n.5 (Mass. 2002); see also New York v. Ferber, 458 U.S. 747, 759 n.10 (1982) (determining that child pornography violates the right to avoid disclosure of personal matters); accord United States v. Sherman, 268 F.3d 539, 547 (7th Cir. 2001), cert. denied 536 U.S. 963 (2002) (chastising government entrapment procedures of disseminating child pornography during the course of a federal investigation); cf. Darryl H. v. Coler, 801 F.2d 893, 901 (7th Cir. 1986) (holding that a welfare department examination of a child for an abuse investigation is a significant intrusion on the child’s privacy and governed by the Fourth Amendment).
These chronological abstractions of privacy are, in large part, the products of children's sociocultural experience. Everyday experiences teach children about privacy as they are exposed to different interactions with themselves and their information. Children eventually experience fewer intrusions in their lives as they grow older, their social (and perhaps economic) independence increases, and their need for adult supervision decreases. Eventually, privacy is a volition for the growing child rather than a condition subject to the "whim" of her caretaker. By adolescence, children are acutely aware of the significance of privacy, both territorial and informational. Childhood privacy practices are therefore inextricably intertwined in the child's developing cultural sense of autonomy in her upbringing.

Equally important to the development of abstractions of privacy are the actual chronological and physiological experiences of growth. As opposed to the medieval views of children as miniature adults, modern biological and psychological theories conclude that childhood is a developmental stage on the path to adulthood. During that development, children's biological and psychological growth implicates the concurrent maturational and intellectual changes that lead ineluctably to their need for greater autonomy, and thus, for privacy, in order to function as adults.

One pioneer in studying children's intellectual development was Jean Piaget, who posited that knowledge is a process and that a child's knowledge changes as his cognitive abilities change. Although simplistic, Piaget's developmental stages provide some glimpse into childhood as an incremental development of the organism's sense of autonomy. Piaget based his cognitive
stages on several universal characteristics of each step, one such universality being selfhood, "coming-into-being and a being."343 Eighteen to twenty-four months is the sensorimotor stage during which children begin to view themselves as separate from their environment and therefore as autonomous beings.344 Between the ages of two and seven, the child is in her "preoperational period" during which one of the characteristics is egocentrism, the cognitive rudiments of self.345 Piaget's third period is the "concrete operational period"—between seven to eleven years—when children move from a primitive view of the world to an increasingly more logical view, internalizing representation rather than just action.346 During the last period, from eleven to fifteen, children engage in greater abstract reasoning and problem-solving, the formal operational period.347 Piaget's four developmental stages thus roughly coincide with children's absorption of increasingly sophisticated cultural norms of privacy.

Similarly, Erik Erikson formulated psychosocial stages of human development through a study of identity that is instructive in viewing the maturation of human concepts of autonomy and thus of privacy.348 Erikson's emphasis on identity dealt with the individual's understanding of self and its place in society.349 These "eight ages of man" are a function of the individual's struggle for identity, usually in balancing the individual self with its culture.350 A recurring theme in these "ages" is the increasing sense of autonomy, beginning at two years old and culminating in the teenage years. As soon as infants begin to identify "me" and "mine," they are moving toward

343. MILLER, supra note 341, at 43. The five specific characteristics of each of Piaget's stages of development are: (1) each stage is an integrated whole; (2) each stage naturally flows from the previous stage; (3) each stage follows a particular sequence of development; (4) the stages are species-universal; and (5) each stage "creates" a being. Id. at 42–43.

344. Id. at 50–53.
345. Id. at 53–59.
346. Id. at 59–62.
347. Id. at 65–68; see also Mlyniec, supra note 326, at 1878–83. Developmental phases of children have influenced judicial considerations of their ability to make decisions. Children under ten are not considered rational enough to make considered decisions while children above fourteen are considered final arbiters. Id. at 1915; Richard E. Redding, Children's Competence to Provide Informed Consent for Mental Health Treatment, 50 WASH. & LEE L. REV. 695, 726–27 (1993).

348. MILLER, supra note 341, at 160–63.
349. Id. at 163–64.
350. Erikson's eight stages of man are: (1) trust vs. mistrust (birth to one year); (2) autonomy vs. shame and doubt (two to three years); (3) initiative vs. guilt (four to five years); (4) industry vs. inferiority (six years to puberty); (5) identity vs. role confusion (adolescence); (6) intimacy vs. isolation (young adulthood); (7) generativity vs. stagnation (middle adulthood); and (8) ego integrity vs. despair (late adulthood). ERIK H. ERIKSON, CHILDHOOD AND SOCIETY 247–74 (2d ed. 1963); MILLER, supra note 341, at 165–71.
a natural autonomy from their parents. By adolescence, children are establishing a dominant ego identity and developing self-concept and self-esteem. This later stage is a particularly critical aspect of the cultural phenomenon of American identity: "[T]he functioning American, as the heir of a history of extreme contrasts and abrupt changes, bases his final ego identity on some tentative combination of dynamic polarities such as migratory and sedentary, individualistic and standardized, competitive and cooperative, pious and freethinking, responsible and cynical." Consequently, an understanding of American privacy is incomplete without an understanding of its cultural and chronological development in children.

The conclusion derived from these chronological developments is that children experience an increasing sense of autonomy in their bodies as well as in their decisionmaking. Very young children have difficulty in the conscious recognition of private space and private information. However, parallel to their psychological and social development, they learn the boundaries of personal space and the privacy of information. Eventually, children view their worlds as distinct from those of the remaining members of the family unit. They have as differing reactions to being touched as they do to being "ready" for toilet training. "No" and "mine" are articulable instances of both individuality and autonomy exhibited by children as they mature. As their intellectual development proceeds apace, their ideas become more individuated and their private space more definitive. The developments may differ by family and even by individual, but the progression is fairly uniform from concrete to abstract ideas of privacy.

A particular catalyst for a child's abstraction of privacy is secrecy. If privacy is considered a generalized zone to which access is denied, then

351. ERIKSON, CHILDHOOD & SOCIETY, supra note 350, at 82.
352. Id. at 306; KELVIN SEIFERT, EDUCATIONAL PSYCHOLOGY 116 (1983).
353. ERIKSON, CHILDHOOD & SOCIETY, supra note 350, at 286.
354. There are numerous competing theories of developmental psychology. ARCHARD, supra note 340, at 32–36; see generally MILLER, supra note 341. But Erikson and Piaget highlight the proposition that children's autonomy is a psychological as well as a social construct in modern Western culture.
355. This parallel development of notions of private space can be observed:

Those who have been around young children know that they often come too close or not close enough in different instances. Sometimes they breathe in your face as they talk; at other times they blurt out intimacies in loud voices at great distances. Children seem to learn only gradually the appropriate distances to maintain from others in different social situations. But the available research data indicate that they do learn how to manage personal space and that the learning is quite comprehensive and parallel to their learning of other social skills.

ALTMAN, supra note 110, at 67.
secrecy is the attachment of "privacy" to a particular piece of information.356 If privacy is a negative concept—the right to be left alone or refusing access to personal separateness—secrecy is a "positive" relational concept: a secret is usually a referent for something that is hidden.357 Secrets are not a bad thing,358 but they are a unique characteristic of humans. There are a multitude of secrets: "clandestine actions, sacred practices, stashing a cache, veiling one's eyes, masking an intention, covering a deception, disguising an emotion, sheltering a treasure."359 Secrecy is learned early in childhood and is exhibited in games of peek-a-boo and hide-and-seek. Children also revel in building tents and forts in the backyard and otherwise having secret hideouts and hiding places, such as closets. These secret places become the "domain" of the child in which she can engage in solitary, secret activities, such as daydreaming.360 There is also a multitude of motives for secrets, some good and some bad, with varying moods, emotions, meanings, and values ascribed to them.

Secrecy evolves congruent with privacy although children grasp earlier the concept of secrecy. Both are products of identity and development, but secrecy—as a relational experience—has more "concreteness" to a child.361 Such generalized discernment of and need for secret places eventually evolves—by kindergarten and first grade—into an understanding of how to keep a secret.362 The function of childhood secrecy eventually evolves into guilt for exposure of debt, shame for exposure of fault, and embarrassment for exposure of innocence.363 Thus, related to childhood privacy and secrecy is

356. VAN MANEN & LEVERING, supra note 4, at 69–70. Van Manen and Levering view privacy as more metaphorical than real, insofar as children are concerned. "Privacy may have more to do with what falls under the control of one’s personal sphere than with specific messages or content that are intentionally concealed." Id. at 70.

357. Id. at 10, 65; ANITA E. KELLY, THE PSYCHOLOGY OF SECRETS 4–5 (2002).

358. Unless, of course, government accountability is limited by government secrecy. Personal privacy and government secrecy have opposite roles. The greater government secrecy is hoarded, the less personal privacy is recognized. Marc Rotenberg, Privacy and Secrecy After September 11, 86 MINN. L. REV. 1115, 1126–33 (2002).

359. VAN MANEN & LEVERING, supra note 4, at 10.


361. VAN MANEN & LEVERING, supra note 4, at 90–98.

362. Id. at 107–08.

363. Id. at 142–48. Hyper-secrecy has been linked to physiological as well as psychological problems. See, e.g., KELLY, supra note 357, at 41–65. By adulthood, one of the relational experiences most identified with privacy and the government is personal secrecy, when one chooses not to reveal information about others. VAN MANEN & LEVERING, supra note 4, at 10–11. The "experiences" of this relational secrecy have been categorized as (1) existential secrecy (the inability to completely know another individual); (2) communicative secrecy (the inability to articulate one's inner life and turmoil); and (3) personal secrecy (the choice of refusing to share information with
stigma, "an undesired differentness from what we had anticipated." A child’s idea of stigma is perhaps more diffuse than particularized stigmas perceived by adults. Nonetheless, stigma remains a concern in the clash of the public-private persona of schoolchildren and the inevitable clash in the school environment where children are learning to become private while their achievements are judged in a public forum.

These practices and historical background reveal that children’s privacy, as both primitive and abstract concepts, has ancients roots sufficient to trace its existence back to colonial America. The proliferation of developmental literature has traced cultural, biological, and psychological roots of American autonomy to our children. We develop our adult conceptions of privacy and autonomy as both a function of our humanity and as a unique function of our “American-ness.” However, Americans are expected to develop much of our identity and autonomy as a function of cultural norms instilled in our schools, a place where, ironically, privacy is not afforded much recognition.

IV. THE CRÈCHE OF AMERICAN PRIVACY

The majority of American children spend their childhood in public schools. Children are private customers in a government enterprise, and sometimes their distinct privacy interests are ignored, although more by benignity than by malignity. The irony is that the unique universality of the American educational system was specifically designed to encourage that cultural autonomy forming the basis for our privacy. Personal autonomy, for its own sake, is important to the creation of good citizens, especially in principles that encourage democratic participation. As a result, modern Western educational thought developed concurrently with political thought. Indeed, they correlate: Political participation requires the nurturing of the citizen through educational participation. Several philosopher-educators were instrumental in shaping the American public school experience that encouraged individual autonomy for schoolchildren.

Enlightenment in economic, political, and legal developments included the philosophical treatment of education as a necessary corollary. John Locke and Jean-Jacques Rousseau both believed that education had a critical place in their political philosophies. In tune with his belief in the natural liberties and rights of man, Locke emphasized education’s role in giving children experience, and thus, the ability to exercise reason because, for Locke, others). Id. at 10-14. "Keeping secrets means to hide deliberately information from other people. . . . Secrecy also has been called 'active inhibition of disclosure' . . . and one's predisposition to engage in secrecy has been labeled 'self-concealment' . . . ." KELLY, supra note 357, at 3.

364. GOFFMAN, supra note 191, at 5.
freedom is the inherent result of reason. Rousseau's educational theories also reflected his political thought and emphasized the "natural" state of children and the natural progression of their development and behavior. Rousseau espoused permissiveness and allowing children the greatest freedom to express themselves. The more moderate Lockean vision of education was the one formally "adopted" in the American experience; however, Rousseau's vision facilitated that experience by encouraging child-centered education.

John Locke's vision of education most profoundly affected Thomas Jefferson's special contribution to American education. Jefferson believed that public education was the best way of inculcating his republican ideals, the rights of men, and the limits on government. His ultimate vision was to educate the common man and included both basic pedagogical goals of literacy, mathematics, and history, as well as civics instruction to train leaders and to advance liberty. Similarly, Benjamin Franklin's utilitarian view of

365. ARCHARD, supra note 339, at 6. Locke believed that adults possess the ability to exercise reason but that children do not. Reason was a state of mind, not a developmental stage: children are born with reason but require experience to exercise it. Id. Believing children are like miniature adults, he opined that, although children have the same innate cognitive ability as adults, they must be educated to exercise reason. Id. at 3–6. Locke optimistically postulated that children are willing, indeed eager, to "experience" reason through education. VAN DEN BERG, supra note 327, at 22. He also optimistically believed that children should be educated only when the inclination strikes them. JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION 134–35 (John W. Yolton & Jean S. Yolton eds., Oxford Univ. Press 1989).

366. In contrast to Locke, Rousseau believed that reason is the end effect of education, the result of children's maturation. He therefore departed from Locke's treatment of children as little adults and firmly placed them in a developmental continuum. VAN DEN BERG, supra note 327, at 23. Rousseau's theory that children are not mature adults was among the bedrock principles for encouraging their education. Id. Rousseau stressed education for its own sake; his education theory emphasized the "natural" state of children and the natural progression of their development and behavior. GUTEK, supra note 172, at 120–27. Rousseau's philosophies were later adopted by the American transcendentalists and their views on progressive education. See, e.g., CLARENCE J. KARIER, MAN, SOCIETY, AND EDUCATION 55–57 (1967) Although both Rousseau and Locke influenced modern educational practices, Rousseau's reasoning seems messy and at times contradictory. Hence, the American educational experience adopted the more moderate Lockean tradition for schools. Id. at 40. However, the Rousseau tradition influenced teaching methods.

367. Id. at 27–28; GUTEK, supra note 172, at 171.

368. GUTEK, supra note 172, at 171–74; KARIER, supra note 366, at 30–32; LAWRENCE A. CREMIN, THE GENIUS OF AMERICAN EDUCATION 5–6 (1965). The underpinnings for American public education are traceable to the public responsibility of the Puritans and early New England Poor Laws enacted to secure training for the poor. Those responsibilities and laws placed the burden on local governance to assure that parents and guardians taught their children basic literacy, religion, and a trade or occupation. Local school districts sprouted up in the seventeenth and eighteenth centuries. By the nineteenth century, Puritan theocracy had been secularized so that education thought became influenced more by Enlightenment philosophy. KARIER, supra note 366, at 11, 13–14, 21.
education abandoned the classical tradition of education in order to better serve the more secular needs of the middle class: that education is the source of success in America. 369 Neither Jefferson nor Franklin saw their ideas come to complete fruition, but their ideas sowed the seeds of the unique universality and democratic imperatives driving American education. 370

Similar altruistic and civic goals were the catalysts for nineteenth and twentieth-century American reformers who extended the principle that schools serve a fundamental governmental role to teach good citizenry and that the methods for doing so must emphasize individual autonomy. A leader of the common school movement, nineteenth-century reformer Horace Mann was motivated by humanitarian as well as Jeffersonian traditions. To Mann, schools should reflect the republican tradition of educating citizens to govern themselves and of training them to be good citizens. 371 Thus, Mann embraced two principle tenets for common schools: they should be socially integrative and they should be public. 372 These public schools would, Mann surmised, be more competitive than private schools and would teach common elements of American culture: reading, writing, arithmetic, grammar, geography, spelling, health, music, art, and history 373—subjects that remain the core of modern public school tradition. 374 American schools thereby would provide a "civic" education and make education a civic function.

The other significant influence on American educational theory was John

370. KARIER, supra note 366, at 33-35. After his efforts to reform public elementary and secondary schools in Virginia were frustrated, he turned his attention to higher education. Jefferson did live to see the first class enter the University of Virginia in 1825. GUTEK, supra note 172, at 173-74.
371. GUTEK, supra note 172, at 207.
372. Id. at 207-08; KARIER, supra note 366, at 58-61; Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1006 (1992). Although arising out of what might ordinarily be considered liberal notions, Mann's common schools adopted the ethos of Evangelical Protestantism as the underlying standard for teaching such moral values as hard work, honesty, and thrift. GUTEK, supra note 172, at 209; KARIER, supra note 366, at 63-64.
373. Mann's efforts seem to have been a compromise of the entrenched positions between the upper classes' demands for state support for their private schools and the state pauper schools for the poor. CREMIN, supra note 368, at 86; GUTEK, supra note 172, at 209; KARIER, supra note 366, at 59-61.
374. Mann is also credited with the creation of "normal" schools for teachers. Impressed with German teachers who emphasized a child-centered style of teaching without ridicule or scolding, Mann embraced normal schools for teacher education, which emphasized methodology over content. GUTEK, supra note 172, at 212; KARIER, supra note 366, at 60-61. The theories underlying these schools belonged to Johann Heinrich Pestalozzi, who embraced Rousseau's theory of the natural rights of children. KARIER, supra note 366, at 220-224.
Dewey, although his accomplishments were more about the creation of modern school curriculum than about education's influence on the democratic process. Dewey led the progressive education movement, a pragmatic approach to education. This movement's importance was its emphasis on autonomy by the use of the scientific method and its accentuation of the individual as a member of society. Dewey emphasized the nature of community and the manner in which an institution should satisfy its changing needs. Education, for Dewey, was not an end in itself; instead, it was a process of continued growth, a process of creating a common good. Dewey's instrumentalism created no dramatic changes in American education except for the curricular adoption of portions of his scientific method of teaching—"learning by doing," "problem-solving," and "children's interests and needs." But, by the institution of those methods, American schools embraced Dewey's continuing educational focus on the child as an autonomous individual.

The function of the modern public school in America remains much as envisioned by Jefferson and as affected by Mann and Dewey. Regardless of the overarching educational philosophy driving any particular educational mission, the function is to train responsible citizens. Such training

375. Dewey is primarily credited with the development of the philosophy of instrumentalism and a social psychology that emphasized the transactional relationship between man and his environment. Instrumentalism stressed the impact that social environment would have to develop human nature. Heavily influenced by the Enlightenment, it conceived of man's nature as being neither bad nor good but as rational. Man could change his environment just as the environment could change him. Therefore, man could create a better social order through the use of scientific and reflective thought. KARIER, supra note 366, at 144-45.

376. Id. at 323-26.

377. PERKINSON, supra note 369, at 208-10, 213. Dewey wrestled with the Jeffersonian duality of education for the common citizenry and for only a specialized educational class. Dewey saw no distinction in popular education for the masses and higher education for the leadership classes. Furthermore, he declaimed as anathema to democracy rote instruction by utilitarian educators. To him, education was a function of the environment by which culture could be endowed with "intellectual, moral, and aesthetic significance." CREMIN, supra note 368, at 41-44. Dewey himself stated:

All that society has accomplished for itself is put, through the agency of the school, at the disposal of its future members. All its better thoughts of itself it hopes to realize through the new possibilities thus opened to its future self. Here individualism and socialism are at one. Only by being true to the full growth of all the individuals who make it up, can society by any chance be true to itself.


378. GUTEK, supra note 172, at 327; see generally DEWEY, supra note 377; PERKINSON, supra note 369, at 211-216.

379. Barry L. Bull, The Limits of Teacher Professionalization, in THE MORAL DIMENSIONS OF TEACHING 87, 106-07 (1990). In contrast to the imperial state, which educates its citizens for mass
implicitly, if not explicitly, requires that schools inculcate the American cultural norm of autonomy. Education is a part of the democratic process that trains children to be autonomous individuals as well as citizens of the larger unit, the nation.\textsuperscript{380} Furthermore, public schools—in the existential sense—make children's autonomy possible as a forum for exploring different options in their growth toward fully integrated citizenship, a forum existing outside parental authority.\textsuperscript{381} Thus, recognizing and honoring children's constitutional rights in the classroom is as essential to their own recognition of their civic freedoms as it is to their development toward adulthood.

Autonomy is not just taught as a democratic value; it is also a value intrinsic to the American educational process. Teachers must be attentive to the development of children not only as immature members of the species, but also in their specific individuation.\textsuperscript{382} Autonomy has a fundamental role in the motivation of children and in their educational success.\textsuperscript{383} Indeed,

\begin{itemize}
\item Action, the democratic state educates for individual freedom. See Franz Boas, Education, Conformity, and Cultural Change, in Educational Patterns and Cultural Configurations: The Anthropology of Education 37, 38 (1976). Unfortunately, public schools do not always understand the mass action engendered by the function of education itself and the appeal of symbols to children. As Boas opined,

\begin{quote}
[Our public schools... instill automatic reactions to symbols by means of patriotic ceremonial, in many cases by indirect religious appeal and too often through the automatic reactions to the behavior of the teacher that is imitated. At the same time they are supposed to develop mind and character of the individual child. No wonder that they create conflicts in the minds of the young.]
\end{quote}
\textit{Id}; see also John Holt, Escape from Childhood 18 (1974) ("Schools seem to me among the most anti-democratic, most authoritarian, most destructive, and most dangerous institutions of modern society.").

\item See, e.g., Amy Gutmann, Democratic Education 25 (Rev. paperback ed. 1999). Gutman describes these two functions as "deliberative freedom and communal self-determination." \textit{Id.} at 46.

\item Woodhouse, supra note 372, at 1119.

\item Franz Alexander, Educative Influence of Personality Factors in the Environment, in Personality in Nature, Society, and Culture 421, 433 (Clyde Kluckhohn & Henry A. Murray eds., 2d ed. 1971). Developmental theories do have some applications to the functioning classroom although there exists a certain disconnectedness between theory and practice—educational psychology research is often criticized as an end in itself rather than in practical, classroom application. Educational psychologists do give an "account" of child development, but their mathematical formulae are less useful tools for classroom teaching than they are useful tools for educational politics. Bolton, supra note 342, at 165, 169, 173.

individualization is critical to primary, contemporary learning theories. Students do not progress without their teachers having some understanding of their individual development. Individualized attention to students is crucial to understanding their achievements, development, and traits. In addition, identifying particular characteristics in children predicts performance, diagnoses weaknesses, follows development, and assists in understanding one's strengths and weaknesses with relation to a particular instructional task.

Thus, cultivating autonomy has both a democratic and instructional impetus. Public schools are the delivery system for the lessons of history and the lessons of citizenship. American history and American citizenship are premised on the concept of liberty, which, to reach fruition, requires the lessons of autonomy. The mission of public schools is to promote liberty and autonomy to students, not uniformity and conformity. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Congruently, the actual pedagogical process requires teachers to treat children as autonomous individuals in order to maximize the learning experience. Intrinsic to promoting both is honoring children's constitutional privacy.

Meece eds., 1992). Perhaps the most radical of the child-centered visions was A.S. Neill's Summerhill. However, such radicalism is particularly criticized for its assumptions that a child is born good and born free—when in fact he is "helpless." See, e.g., KARER, supra note 366, at 242–44.

384. For example, the stimulus-response theory (E. L. Thorndike, B. F. Skinner) stresses the action of conditioning on the individual's learning, DON C. DINKMEYER, CHILD DEVELOPMENT: THE EMERGING SELF 115 (1965), while the field theory (Kurt Lewin) stresses the wholeness of learning as effectuated by understanding the individual learner. Id. at 116–17. The developmental theory (Piaget) stresses the active learning processes of the individual child and requires a highly individualized teaching approach similar to the humanistic theories (Abraham Maslow, Carl Rogers) that center attention on the child as an "experiencing person." Id. at 117–22; WILLIAM S. SAHAKIAN, INTRODUCTION TO THE PSYCHOLOGY OF LEARNING 365–71, 425 (2d ed. 1984)

385. A basic taxonomy identifies the interdependence of the child's past experience, the child's motivation, and the appropriateness of the instruction. BENJAMIN S. BLOOM, HUMAN CHARACTERISTICS AND SCHOOL LEARNING 10–11 (1976).


387. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637, 642 (1943) (holding that the state may not require a Jehovah's Witness adherent to salute or to pledge allegiance to the flag of the United States).
V. EDUCATION PRIVACY: A CONSTITUTIONAL LIBERTY

Why the necessity for extrapolating a distinct constitutional liberty for schoolchildren? The short answer is because nothing else protects schoolchildren. In both major spheres of educational activity, there exist no adequate protections, even by federal statute. In the classroom sphere, videotaping classes for ostensible health and safety reasons is completely unregulated. In the work-product sphere—student records—the relevant federal statutes simply do not protect the privacy of students under the age of seventeen. That leaves the formulation of constitutional privacy, a privacy that protects adults and should similarly protect children.

In the absence of any real legal tradition for education privacy, the Lawrence v. Texas liberty interest is the best resource for recognizing a schoolchild’s constitutional privacy. Unlike adult privacy, children’s privacy must encompass the “whole” of the child, not just discrete areas of privacy usually quantified by the scholarly work on adults, such as her bodily integrity, her decisions, and her information. The whole child attends school, not just her body nor just her decisions nor just her information. Young children do not entertain such abstract concepts in any case, and basing a child’s privacy interest on her maturational “expectations” would necessitate the creation of differing chronological “rights,” rather than establishing the assumption of her liberty. In addition, unlike the adult working world, the whole child is surrounded by the government function while she is in school, a government function that includes its pedagogical mission and its agency status. Thus, a couple of general contours are required for this assumption of liberty around which the government can embrace children in both its pedagogical and agency functions.

As state entities, schools are the government. “By and large, public education in our Nation is committed to the control of state and local authorities . . . . ‘The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”

388. These are discrete “types” of privacy that make up the whole of an individual as categorized by legal scholars from the case law. See generally Gormley, supra note 2. Another trio of elements of privacy has been identified by psychologists: “environmental, interpersonal, and self-ego.” Wolfe, supra note 332, at 177.

389. Schools are also increasingly exercising a police function that challenges bodily privacy. However, the legal tradition underlying that discrete form of government intrusion is generally recognized as the Fourth Amendment protections afforded to criminal investigations, searches, and seizures. Although this particular type of privacy does have peculiar dynamics in the public school setting, it is a discrete issue better addressed in the separate, Fourth Amendment literature.

Americans prefer limited government, children do not experience that at school. The all-encompassing nature of the school experience makes the wall between the state and the individual more permeable than adult interaction with the government. That permeability affects the nature of the constitutional prerogatives of the school's private clients, the children. Although children do not shed their constitutional rights at the "schoolhouse gate," a student's interest in privacy may be compromised in the public school environment for health and safety concerns. Indeed, some surveillance is necessary because of the age and status of children, as schools act in loco parentis. But sometimes children's constitutional rights are treated rather cavalierly for no other reason than there is no legal tradition instructing otherwise.

Although the public nature of instruction makes children's privacy hard to maintain, untoward incursions into that instruction are touching children daily. Today, a public school involves both federal and state governments and has become highly regulated. It is an all-encompassing environment with its own rules and regulations designed to fulfill its pedagogical mission for a vulnerable class of individuals and to fulfill its obligations as a government agency. The crucial point is whether schools have practices and regulations—that interfere with students' constitutional liberty of privacy.

Both missions affect two distinct contours of student privacy: the classroom itself and the fruits of the classroom, student records. Privacy in the classroom-workplace is harder to control by its very nature. More noticeable—because of its tangible quality—are children's losses of privacy as to their records-work product. Under either, children should not be asked to shed so much of their constitutional rights nor allow so much governmental interference that the assumption of privacy is forsaken. Thus, schools should not be considered the source of privacy protections; instead their interference in the liberty assumption should be limited by a legitimate state interest in that interference. Students do have to compromise some of their liberty interest because of the public and participatory nature of education. However, the

392. See, e.g., Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 830–31 (2002). One problem in dealing with the health and safety protection of students is the diminution of, if not the erasure of, the lines between school as educational function, school as governmental agency function, and school as police function. The blurring of those lines is most insidiously accomplished in the random drug-testing cases where the "guardianship" aspect of the school is rendered indistinguishable from the pedagogical mission. See, e.g., id. Suffice it to say that the blurring of the line is a slippery slope in otherwise justifying or preventing governmental intrusion under other government caretaker operations. The war on drugs has addled many an otherwise cogent mind.
contours of governmental interference in schools must be adjusted to recognize the assumption of liberty as a guiding principle and not the presumption of government regulation. 393

A. The Workplace: All the World's a Stage

The circumstance most constraining the protection of students' privacy is that education occurs in a public setting. 394 This is the workplace, and three important behaviors must be considered in establishing constitutional privacy in the classroom: first is receipt of knowledge; second is classroom governance; and last is fear of public exposure, the outgrowth of childhood secrecy and fear of stigma.

Obviously, the receipt of knowledge occurs in a "public" forum. Cognition is the ultimate existential condition; however, it is not necessarily a private condition. Cognition is recognized in relationship to the experience of others; knowledge is shared. 395 Thus, the outer borders of education privacy must account for the learning process itself. Jefferson and Franklin did not necessarily account for such publicity when they envisioned universal education: The wealthy were privately tutored so only the poor attended "formal" schools. In both systems, children scribed their lessons on individual slates or tablets, thus maintaining a modicum of privacy in learning. As prosaic an instrument as the blackboard—first used in American schools between 1860 to 1869—had a profoundly erosive effect on the privacy of instruction and began to tip the balance into the public sphere of the classroom. These instruments of publicity made it easier for teachers to supervise the instruction of a large number of pupils and contributed in no small part to the uniformity, rather than individuality, of instruction. 396

Today, the situation may be even worse: Computer-assisted testing and instruction may well lower a child's feeling of privacy, if not actually be an

393. The actual implementation of these contours of privacy is beyond the scope of this Article. A companion Article will address specific regulatory regimes, their effectiveness, and suggestions for the limits on government interference in this liberty interest.


396. VAN MANEN & LEVERING, supra note 4, at 160. Uniformity of instruction is also blamed on the rising tensions between the pluralistic temperaments brought to the table by parents and by the schools' efforts to accomplish as much academic progress in the shortest possible time. See, e.g., Project: Education and the Law: State Interests and Individual Rights, 74 MICH. L. REV. 1373, 1384–85 (1976).
invasion of that privacy.\textsuperscript{397}

Second, classroom governance entails group instruction, which challenges the individual autonomy and therefore respect for student privacy. Education is essentially "a social process that cannot occur except through structured interpersonal interaction within a classroom."\textsuperscript{398} Thus, the success of a classroom requires that children learn to live as miniature adults within a miniature government. One of the functions of that miniature society is the delineation of what is public for group consumption and what is private and thus shared with the group only at the individual’s discretion.\textsuperscript{399} That too, of course, is a function of a democratic education. Indeed, "[b]oth the individual and society benefit when each individual achieves the academic competence needed for political literacy and economic self-sufficiency and acquires sufficient social awareness to assure his adherence to fundamental societal norms."\textsuperscript{400}

The last feature of the public nature of schools that is intimately related to education privacy are children’s desires to avoid stigma and the related accommodation—if any—for the privacy interests of children in evaluation and discipline. Locke’s educational philosophy advocated private shame and public acclaim,\textsuperscript{401} a fortunate victim of American child-centered education. However, to some children, any public recognition—even positive—is deleterious because “public” competition necessarily devalues those who are not as successful as their fellows.\textsuperscript{402} Although achievement is a critical

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397. Charles R. Tremper & Mark A. Small, \textit{Privacy Regulation of Computer-Assisted Testing and Instruction}, 63 \textit{WASH. L. REV.} 841, 842 (1988). Weighed against the potential for increasing individualization in instruction, CATI threatens privacy by problems in information-gathering, information-maintenance, and information-interpretation. First, information registered on computer screens loses more privacy by its greater exposure to others than do pen and paper responses. Second, computer records themselves are at greater risk for improper disclosure. Third, the likelihood of erroneous interpretation of results is increased because the “graders”—both the computers and their “trainers”—are looking for more quantitative rather than qualitative information. \textit{Id.} at 844–57.


399. The “socio-group” in the classroom is the “legislative” network for creating the classroom’s social order. THELEN, \textit{supra} note 394, at 108.


401. LOCKE, \textit{supra} note 365, at 119.

402. Ames, \textit{supra} note 383, at 337, 340. As one commentator has noted,
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component of the education process, the public nature of that creative force—a competition of sorts—has serious ramifications. As testing of children becomes the accepted manner of publicly marking a successful school—as opposed, perhaps, to a successful education—not only is there pressure placed on a child to achieve for himself, but there is pressure placed on the child to achieve for others.\textsuperscript{403} These problems in balancing the private yet public aspect of achievement also may deleteriously affect a child’s self-esteem and thus the worth of his own autonomy.\textsuperscript{404}

Schools should mirror the larger American society for which the children are being educated and into which it is hoped they will mature.\textsuperscript{405} However, in the realities of these three public faces of education, they are often criticized that they do not stress autonomy enough, that the organization of the institution in general—and the classroom instruction in particular—teaches children to become academically submissive and therefore submissive in their recognition is made public. Bulletin boards and charts, for example, that display children’s accomplishments, work, or progress toward goals invite social comparisons. Even when the progress is toward an individual goal (e.g., a certain number of books to be read), the public forum guarantees that many children will feel a negative form of recognition. Similarly, emphasizing and rewarding perfection (e.g., charting 100\% in spelling, redoing work to attain 100\%, posting of perfect papers or papers with A’s) especially in public makes ability a highly salient dimension of the classroom learning environment. When recognition for accomplishments or progress is private, between the teacher and the child, feelings of personal pride and satisfaction do not derive from doing better than others.

\textit{Id.} at 337–38.

\textsuperscript{403} Donald J. Rogers, \textit{How to Teach Fear}, in \textit{FOUR PSYCHOLOGIES APPLIED TO EDUCATION: FREUDIAN, BEHAVIORAL, HUMANISTIC, TRANSPERSONAL} 27, 27–28 (Thomas B. Roberts ed., 1975). Resolution of this problem may require teaching children to face those fears so they can fight their own battles. \textit{Id.} at 30. Available data suggest that students who feel personally responsible for their academic success are more likely to achieve such success. ROSS D. PARKE, \textit{READINGS IN SOCIAL DEVELOPMENT} 306 (Ross D. Parke ed., 1969). Conscious, social peer pressure aside, the fear of straying from the group also affects the child. Just as significant is the impact of the family group on the child’s autonomy, that the child’s achievement is not her own but the responsibility of the family. Samuel Tenebaum, \textit{School Grades and Group Therapy}, in \textit{FOUR PSYCHOLOGIES APPLIED TO EDUCATION: FREUDIAN, BEHAVIORAL, HUMANISTIC, TRANSPERSONAL} 39, 39–41 (Thomas B. Roberts ed., 1975). Nonetheless, school is, to a certain extent, the conduit through which children learn to act independently of the family unit in preparation for adulthood. Thus, a democratically run school has a better chance of giving children the opportunity to model their roles for participation in the larger society. DAVID CARR, \textit{PROFESSIONALISM AND ETHICS IN TEACHING} 234–38 (2000).

\textsuperscript{404} Self-esteem has been postulated as a combination of two universal concepts: agency and evaluation. Agency is one’s creation of a record of experiences, or agentive encounters. Schools and learning are early agentive encounters. On the other hand, evaluation is an “adjudication” of one’s goals and aspirations. As an early evaluator, schools also have a critical role in forming a child’s self-esteem. JEROME BRUNER, \textit{THE CULTURE OF EDUCATION} 35, 37–38 (1996).

\textsuperscript{405} THALEN, \textit{supra} note 394, at 69, 100. Thelen has found three “growth” themes in the classroom: (1) adaptation, (2) participation, and (3) transcendence. \textit{Id.} at 66, 69, 73.
social and moral lives. Indeed, recent political developments encouraging more "standardization" of instruction and testing are likely to lead to a loss of young Americans' autonomy necessary for critical thinking and will instead lead to conformity. If education's role is to teach autonomous individuals, an integral construct of a democratic developmental autonomy is children's privacy. Of particular consequence is that:

[parents and teachers who understand the significance and possible consequences of secrecy and privacy realize that each child is unique, and so each child has different tolerances and makes different room for the place and nature of secrecy and privacy. But this pedagogical relativism does not contradict the argument that both privacy and secrecy are positive factors in children's development and, indeed, throughout adult life.

The recognition of education privacy for schoolchildren would serve three purposes in the face of these public realities, all more practical than legal. First, children's privacy would be an assumption rather than an afterthought in designing, advocating, and legislating educational policy, especially policy that seems more designed for political rather than pedagogical gain. Second, such an assumption would have an existential impact on the civic mission of the schools to re-emphasize the instruction of and deference to American autonomy as a national value. Last, it would necessarily focus on students as unique individuals with rights of autonomy that include certain considerations of privacy. But this constitutional right faces different challenges in a school's pedagogical mission and in a school's agency mission.

For the most part, observing children's privacy is already an integral part of the pedagogical mission. Most American teachers are sensitive to these privacy issues, in no small part because of the emphasis on child-centered education in professional schools of education. Despite their best efforts, some public acclaim and derision exists from both classmates and educators. Some instances are avoidable; others are not by the nature of the clientele. However, it is the rare instance when the classroom experience itself is legally challenged as being insensitive to a child's privacy. The most notable incident was in Owasso Independent School District No. I-011 v. Falvo. That case involved a school district's practice of peer grading, by which

407. Id. at 387–88.
408. VAN MANEN & LEVERING, supra note 4, at 160.
students exchange papers and classmates grade those papers. Although the plaintiffs children felt stigmatized by the public nature of the evaluation process. Although the school district ultimately prevailed, Falvo demonstrated that the public nature of the forum could better serve the privacy interests of children. Indeed, the evaluation system of children and the unrelenting need of parents to know how their children are doing in school have been particularly savaged as failing to protect children’s right to privacy. Although children’s privacy cannot be wholly protected from public exposure in schools, certain limits on pedagogical and disciplinary practices should be—and usually are—observed in the classroom in the education function.

The bigger problem with privacy in the public forum is the agency, or “government,” function of schools, when the school acts as an agent of the state or in some capacity other than its educational mission. Schools are considered acting in loco parentis, not only to educate, but also to “govern” children so the educational function can take place. Because of the number of participants in the function, the nature of the function, and the immaturity of the customers, students do not have the full range of behavioral rights that they might otherwise exercise vis à vis the state in other venues. Some privacy must be abandoned by children to guard the health and safety of other inhabitants as well as themselves. The compromise of their Fourth Amendment rights is the most noticeable. Although distinct from the Fourteenth Amendment liberty interest espoused here, the high-profile erosion of privacy under the Fourth Amendment has served to inure the public to other legislative and judicial inroads on student privacy. Especially

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410. Id. at 429.
411. Id. at 429–30.
412. Id. at 436.
413. HOLT, supra note 379, at 246–48. Holt was a proponent of children’s right to learn, that children should decide what should go into their minds. Id. at 242–43. He was also convinced that the educational evaluation system, rather than protecting children, breeds “envy, fear, greed, and obsessive competitiveness.” Id. at 246. At least there has been some improvement since the Puritan schools where one form of discipline for unruly children was the whipping post while another was the death penalty! KARIER, supra note 366, at 14–15.
415. Generally, formulations of privacy theory exclude from protection those whose activities will harm another. See, e.g., Buchanan, supra note 299, at 495–96.
417. A small body of law exists that treats the protection of student’s bodily integrity as a right to privacy outside the Fourth Amendment. For example, female students had a substantive due process claim against their soccer coach for a pattern of physical and mental abuse, official acts that
insidious is the nascent movement to provide video surveillance in classrooms, in the name of security.\textsuperscript{418} An assumption of children's privacy would clearly affect the practices in many schools as they act as government agents.

Therefore, in contouring the constitutional assumption of educational privacy, its limits to government interference can be hewn from two different although not necessarily incompatible standards: The "regulatory" framework of the educational—or pedagogical—function must be governed by legitimate pedagogical concerns, and intrusions on students' privacy interests must be reasonably related to those concerns.\textsuperscript{419} The framework of privacy for this function does not differ significantly from current educational practices. Privacy decisions are made daily on an ad hoc basis in every classroom, in every school across the country. Those decisions tend to be more reactive than proactive and do not have many characteristics of governmental interference with the liberty. On the other hand, the "regulatory" framework of the governmental function should be circumscribed by a "legitimate state interest."\textsuperscript{420} As legislatures and schools take more deliberate steps to interfere with student privacy, they should have the burden of presenting a more cogent rationale than "because we can." As we diminish students with less respect for their belongings and bodies, we tend to diminish their privacy interests as a whole and their ability to act as autonomous individuals. That is certainly not the civics lesson we should be teaching.

\textbf{B. The Work-Product}

The more abused aspect of educational privacy and the only aspect that has any legal tradition is the treatment of student records. This aspect encompasses the collection of, access to, and dissemination of student information. Because schools are a government function, they have to keep

\textsuperscript{"shocked the conscience" of the court. Lillard v. Shelby Co. Bd. of Educ., 76 F.3d 716, 725 (6th Cir. 1996). Other cases deal with corporal punishment and bodily integrity. See, e.g., Garcia v. Miera, 817 F.2d 650, 655 (10th Cir. 1987) (holding a student has a Fourteenth Amendment right to be free from state intrusion into personal privacy and bodily security). Another court held that a gym teacher's forcing a special education student to strip off his torn swim trunks and to stand nude in front of his classmates for a quarter of an hour was an unreasonable seizure under the Fourth Amendment. Daniel S. v. Bd. of Educ., 152 F. Supp. 2d 949, 953 (N.D. Ill. 2001). And in a rather unusual ruling, a former student stated a Fourteenth Amendment claim for invasion of privacy when a picture of his genitalia was published in his high school yearbook. Granger v. Klein, 197 F. Supp. 2d 851, 871 (E.D. Mich. 2002).


\textsuperscript{420} Lawrence v. Texas, 539 U.S. 558, 578 (2003).
records, but transparency of government institutions is required to avoid secrecy in government actions and to hold those institutions accountable to the public. But what records do schools hold that can and should be made public or otherwise accessible in order to fulfill their governmental function? School records can include students’ permanent grade records, disciplinary records, psychological testing records, any retained copies of actual school work, and standardized test scores, as well as the more mundane personal information necessary to keep track of attendees. Unregulated access to and disclosure of this information is highly invasive of a child’s privacy, but there is little regulation to protect those records and even less penalty if they are not protected. Thus, the governmental function of schools can create a nearly irreconcilable conflict between the transparency required of public institutions and the privacy of children. And there are few legislative regimes that protect children’s records, thus accentuating the need to endow their privacy interests with a constitutional force.

As a general principle, public recordkeeping is an important function of local, state, and federal governments. Public records include the recordation of vital information (birth, death, marriage) and the recordation of an individual’s contact with the government itself (driver’s license, social security, voter’s registration, professional licensing).421 The kinds and categories of information held by the government are simply overwhelming, but most adults would deem it personal, indeed private, information. The anticipation of privacy may be greater in some instances than others. A particular individual’s desire for privacy may be greater in some instances than others. And the desire for privacy of particular information may be greater in some information rather than in other. For instance, most individuals would prefer that their tax records remain private. Some individuals might feel more protective of privacy in their drivers’ license information than would others. And most individuals with criminal records would prefer privacy over that information over and above any other type of information.

In contrast to these privacy concerns is the reality of government transparency—that records must be accessible to the public to hold the government accountable for its actions. A government that is free and open to

the populace is essential to the functioning of the republic.\textsuperscript{422} In addition, the First Amendment mandates that certain government activities must be open to the public.\textsuperscript{423} The public, however, is not so fulsome in embracing government transparency when it becomes personal and the spectrum of information moves from matters that necessarily take place in the public arena to those matters that are more or less "involuntarily" gathered by the government.\textsuperscript{424} In addition, some citizens clearly suspect that government databases are not secure.\textsuperscript{425} As a result of adults' concerns about making publicly gathered, "private" information publicly available, legislatures achieved some regulation over the collection of and access to this information.

These regulatory regimes make a distinction between two types of public records. Some records are simply open and accessible as a matter of government transparency. The others consist of private information that just happens to be collected by the government. A matter of public record is a record that has been made "public," and one generally has no "expectation of

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  \item \textsuperscript{422} Martin E. Halstuk, \textit{Shielding Private Lives from Prying Eyes: The Escalating Conflict Between Constitutional Privacy & the Accountability Principle of Democracy}, 11 \textit{COMMLAW CONSPECTUS} 71, 80-82 (2003); Solove, \textit{Access and Aggregation}, supra note 421, at 1173–76.
  \item \textsuperscript{423} E.g., Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559–60 (1976) (court proceedings); Solove, \textit{Access and Aggregation}, supra note 421, at 1201–03. The First Amendment is the progenitor of access to and use of public information under the freedom of speech and freedom of the press. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975); Solove, \textit{Access and Aggregation}, supra note 421, at 1206. The First Amendment right to know is also touted as a bar to privacy concerns in data regulation, or the information exchange in the private sector. See, e.g., Fred H. Cate & Robert Litan, \textit{Constitutional Issues in Information Privacy}, 9 \textit{MIC. TELECOMM. & TECH. L. REV.} 35, 49–57 (2002); Singleton, supra note 249, at 94, 152; Eugene Volokh, \textit{Freedom of Speech & Information Privacy: The Troubling Implications of A Right to Stop People from Speaking About You}, 52 \textit{STAN. L. REV.} 1049, 1053 (2000); but see Los Angeles Police Dept. v. United Reporting Publg. Corp., 528 U.S. 32, 36–37 (1999) (A private investigator could not bring a First Amendment facial attack on a state statute requiring that a requester of arrestees' addresses declare the information will not be used for marketing, scholarly, journalistic, or political purposes). However, the Fourth Amendment privacy right trumped the press's First Amendment right when reporters recorded events for purely private purposes during the execution of a warrant. Wilson v. Layne, 526 U.S. 603, 612–13 (1999). And the First Amendment is no shield to charges of distribution of child pornography. See, e.g., New York v. Ferber, 458 U.S. 747, 759 (1982).
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privacy" in such information. The line is sometimes blurred between the two, but both can be subject to unwanted disclosure and access. After nearly 200 years of data collection, Congress finally enacted a regulatory regime over personal information collected by the federal government with the Privacy Act of 1974, which limits a federal agency to collecting only as much information as it needs to accomplish its purpose. However, the Privacy Act does not apply to public schools. Neither do the restrictions under the Freedom of Information Act ("FOIA"), which has regularized access to government records while promoting transparency of the government function. Thus, children's privacy has not been embraced with as much enthusiasm by legislatures as adults' privacy interests in controlling the permeability of the government system of collecting and disclosing private information.

Some general and some explicit privacy protections to student records have been afforded by states with similar open-record laws. These open-
record laws govern the disclosure of and access to state-collected information, just as FOIA does for the federal government. For example, Illinois's Freedom of Information Act exempts "files and personal information maintained with respect to... students." Wisconsin's exempts "pupil records" from disclosure. Others would probably be interpreted to protect student information from public disclosure simply because "personal information" is protected by the statute. However, the reality is that children's privacy—for the most part—is not given the same legislative regulation and respect as adult privacy interests.

What meager legal tradition does exist specifically for children's privacy is of very recent vintage. Congress made an attempt to regularize some privacy practices in the collection and dissemination of student information with the 1974 passage of FERPA. With FERPA, sometimes called "the Buckley Amendment," most schools and administrators—and perhaps parents—had taken some comfort in the privacy protections ostensibly offered by this statute. FERPA is a mechanism for penalizing education institutions that receive federal funds if they violate certain standards for the disclosure of and access to student information. The statute and its detailed regulations set out a list of circumstances under which a school may lose its federal funding for having a "policy or practice of permitting the release of education records." Pursuant to these guidelines, most school districts and their administrators established procedures to protect education records from disclosure. Although there were a few disputes over the actual nature of the protected education records, most people assumed that FERPA granted some sort of wide-ranging and generalized privacy protection to schoolchildren over certain information generated by the children and by the schools themselves.

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434. Goldstein, supra note 430, at 1217-80 (appendices).


436. Id. § 1232g(b)(1).
That notion evaporated in *Gonzaga University v. Doe*,\(^ {437}\) when the Court determined that FERPA does not unambiguously confer a privacy right to a person whose education records have been "wrongfully" disclosed.\(^ {438}\) Without such statutory right, that person has no cause of action for a violation of his civil rights under § 1983,\(^ {439}\) much less an independent right of action under the language of the statute itself.\(^ {440}\) FERPA has no specific "rights-creating" language, and thus evinces insufficient congressional intent to create such right.\(^ {441}\) There still remain the financial penalties assessed by the U.S. Department of Education against a school that has a policy or practice of disclosing records, but that is small comfort for the individual student whose records are disclosed without permission. As a result, what little legislative protection existed has pretty much evaporated for children's education privacy in their records.

Furthermore, FERPA's limits to collection and access do not really solve the government's transparency responsibilities under competing statutes that mandate disclosure of student information in a way that makes that information more vulnerable than adult information. For instance, certain information—defined as "directory information"—is deemed disclosable per se by FERPA itself and not a legislative violation of children's privacy.\(^ {442}\) Other recent legislative changes have made it easier for non-school agencies to access student records without the same safeguards afforded adult information: under the IDEA, student records can be turned over to law enforcement without a warrant,\(^ {443}\) and the military has virtually unlimited access to certain personal information of all students over the age of fifteen.\(^ {444}\) In addition, as part of government reporting, all sorts of student records—usually statistical although not personally identifiable—must be available for public inspection and consumption. And those concerns do not even begin to address the abuses in disclosure and dissemination.

An education privacy of constitutional dimensions would certainly help rein in the cavalier treatment of schools with regard to student records and the


\(^{438}\) Id. at 286.


\(^{440}\) *Doe*, 536 U.S. at 282–83.

\(^{441}\) Id. at 286–87. Legislative history, of course, tells a slightly different story. *See, e.g.*, 120 Cong. Rec. 14549, 14581, 14583 (May 14, 1974); 121 Cong. Rec. 13990 (May 13, 1975); PERSONAL PRIVACY IN AN INFORMATION SOCIETY: THE REPORT OF THE PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 412 (1977).


\(^{444}\) Id. § 7908.
governmental function. The assumption of constitutional privacy in student information, and particularly in student records, would govern the legislative mandates for disclosure. All legislative interference—collection, dissemination, and access—would be first measured against a legitimate state interest in the interference that reins in the agency function of schools, not against some vague pedagogical concern that constrains the educational function. As a measure of that legitimate state interest, violations of such legislation would carry civil rights penalties or injunctive relief, not just some ephemeral and ineffectual threat to penalize a school that has a pattern or practice of disclosure. The onus would be on the offender, not on the offended.

The bedrock of that constitutional privacy for student records is the principle that the vast majority of information concerning children that is collected by schools—in whatever form—is not only not a public record but also not a government record. Everything that a child does in school is, or could be, a school record. This workplace is the site of all the child's work-product. But that work-product is not like the work-product of the adult government employee who generates product for the employer and thus belongs to the government. The child, instead, generates this information for herself. Therefore, except for very limited information—such as vital information for accounting for daily attendance and contacting parents and information created by a teacher as part of her teaching function—these records belong to the child, not the government. Schools are only the curators for most of this information. Schools are not the owners; the children are. Consequently, general principles that legislatures usually consider concerning the collection, disclosure, and access to that information have no corollary in adult privacy protections.

For example, one type of a public record presupposes an adult's volition in her participation in the government function. Mortgaging a house as well as involvement in a public court proceeding requires recognition of the public function of the recordkeeping process or that the process necessarily takes place in a public arena. Another type of public record presupposes slightly less volition, like employment records of government employees, financial information given to the Internal Revenue Service, and the like. But these adult record issues really do not fit the problem of children's education records. To the extent that students attend school "involuntarily" by reason of compulsory attendance statutes, the collection of their information by the government is by no means a voluntary "transaction" between the individual and the government—either state or federal—thereby necessitating considerations different than those applied to adults. In addition, work-product can be more a source of embarrassment, stigma, and other unwanted
attention for children than adult work-product would be to their parents.

Thus, schoolchildren’s privacy concerns are not the same as adult privacy concerns and should be treated differently. The best form of recognition is the assumption of constitutional liberty upon which government regulation can be shaped rather than vice versa. The dichotomy of the government function of the school as government probably has not entered the minds of most parents and students because, to the extent they have delegated the educational function to schools, they have also delegated the responsibility to respect their children’s privacy. In the embrace of the government, students’ privacy interests can best be protected by constitutional recognition. Within this public setting must still remain a private domain, not only for the creation of the autonomous individual, but also for the memorialization of those matters that mark the achievements, discipline, and other indices that set out not just educational progress, but indicia of the individual herself. Schools are collection machines and that must continue for the pedagogical function. However, that does not make this information disclosable or accessible as government records. Information of this nature is kept for a variety of reasons, by a variety of people, in a variety of places, and for a variety of periods. Permanent academic records of achievement and test scores are the ones most easily identifiable by the public. But such information will also include family histories, medical histories and information, disciplinary reports, periodic academic reports, and the like. Much of this information is extremely personal to students, and perhaps to their families. The fact that this information is held by the government does not, ipso facto, make it a government record, much less a public record. Instead, it is a private record, held in trust, and the governments should be limited in their interference with their privacy as a constitutional liberty under the Fifth and Fourteenth Amendments.

VI. CONCLUSION: “THE CHILD IS FATHER TO THE MAN”

With the death of FERPA and until a better recognition of children’s privacy interests with effective legislative prohibition, only “historical” tradition—observed perhaps more by teachers in the education function rather than administrators in the government function—is the bulwark between children’s privacy and public disclosure. Indeed, since 1929, the Code of

446. Unfortunately, the guidance provided to teachers on the handling of this information is limited. See, e.g., ROBERT W. RICHEY, PLANNING FOR TEACHING: AN INTRODUCTION TO EDUCATION 168–69 (6th ed. 1979); but see JOHN SALVIA & JAMES E. YSSELDYKE, ASSESSMENT IN SPECIAL AND REMEDIAL EDUCATION 433–42 (1978).
Ethics espoused by the National Education Association has included a right of confidentiality.\textsuperscript{447}

To teachers, this charge was—and is—the equivalent of a privilege.\textsuperscript{448} However, little else stands between children in their private state and children as a public customer in the absence of constitutional recognition of their liberty interest in education privacy.

Measuring the current governmental intrusions against this assumption of education privacy indicates how little recognition has been given to that assumption.\textsuperscript{449} And with so little recognition comes little motivation to protect it. Constitutional recognition would obviously motivate more schools and regulatory agencies to get a better grasp on the problem through the worst of all mechanisms, litigation. At best, litigation would result in minimal damages and attorney fees. Because the most effective remedy is prohibitory or mandatory injunctive relief, the education system would be better served to simply rethink its own, even local, initiatives. More effective, more respectful regulatory regimes from both legislatures and local school boards would be neither difficult nor onerous. Most educators understand the need for privacy and respect that privacy as part of the pedagogical function. The government itself seems less attuned to children’s privacy than it does to privacy in general. If the child is the father to the man, a renewed interest in children’s privacy may change government’s interference in privacy in general. And King Tantalus’s travails may be over.

\textsuperscript{447} First Principle: The primary obligation of the teaching profession is to guide children, youth and adults in the pursuit of knowledge and skills, to prepare them in the ways of democracy, and to help them to become happy, useful, self-supporting citizens. The ultimate strength of the nation lies in the social responsibility, economic competence, and moral strength of the individual American.

In fulfilling the obligations of this first principle the teacher will –

\begin{quote}
5. Respect the right of every student to have confidential information about himself withheld except when its release is to authorized agencies or is required by law.
\end{quote}

\textsuperscript{448} The only exception to that privilege is to consult with colleagues and authorized agencies to deal with the educational problems of the individual child. HUGGETT & STINNETT, supra note 447, at 261.

\textsuperscript{449} Those specific measures are better developed in a companion piece along with suggestions for creating local privacy regimes.