A Definition of Physical Privacy: Reviving Constitutional Privacy

Richard Barron Parker

Abstract

I define physical privacy as control over who can sense us and control over when we can sense others. By sense I means simply the five senses of seeing, hearing, touching, smelling, and tasting. I exclude from my definition control over anything that can be stored on a computer. Distinguishing physical sensual privacy from other sorts of privacy is useful for reviving the constitutional right of privacy. The line of cases of *Griswold, Roe, Lawrence,* and *Obergefell* can be seen as protecting physical sensual privacy rather than protecting a vague Fourteenth Amendment liberty interest. The Fourth Amendment's formula of "reasonable expectations of privacy," which has not worked well to protect general informational privacy, can be used to protect physical sensual privacy, which, as I define it, is the foundation for human autonomy and for trust, friendship, and love.

Part I

Forty years ago, in an essay entitled, "A Definition of Privacy," I defined privacy as "control over who can sense us."1 By "sensed" I meant simply seen, heard, touched, smelled, or tasted. I had hoped that privacy thus defined could encompass most of what we meant by privacy.

In the last forty years, new technologies have created the possibility of huge amounts of digitized information about each and every one of us being collected, stored, and accessed by almost anyone. Rather than wrestle with the problems of defining privacy in a way that covers all sorts of informational privacy, I will confine myself to defining physical privacy. I will use the same definition as I did in the earlier essay with the addition of the adjective "physical."

I will also add to my definition of physical privacy: "control over how and when we sense other people." The addition to our definition of control over what we sense about others makes clearer the close connection of "physical privacy" to "autonomy" and "liberty." Controlling when and how we sense others on a daily basis is tantamount to controlling our path through life. Physical privacy can thus be seen as a necessary condition for personal autonomy and personal freedom.

I wish my definition to be as true and as useful as possible. By “true” I mean that it fits the actual use in ordinary language of the words “physical privacy.” As much as possible my definition should not be overly inclusive and include things that we would not normally use “physical privacy” to describe, and it should not be under-inclusive and fail to include things we would normally use “physical privacy” to describe.

By “useful” I mean my definition needs to be short and simple enough to be usable in the legal process. Inevitably, the goals of truth and usefulness will conflict. As Wittgenstein’s example of the word “game” shows, the actual meaning of any general term such as “physical privacy” cannot be stated in a simple short univocal definition. Yet the legal process requires short univocal definitions of important terms. Some stipulation is required even if that stipulation makes the definition less reflective of the actual use of the term in ordinary language. For example, terms such as “ordinary income” or “negligence” or “reliance” are useful in the legal process only when they are given short simple stipulative definitions that do not exactly capture their actual use in ordinary language.

In sum, I wish to define physical privacy as control over how and by whom we are sensed by others and control over how and when we sense other people. By "sense" I mean simply the five senses of seeing, hearing, touching, smelling, and tasting. Control over anything that can be stored on a computer is not part of my definition. We will see that this distinction allows (physical) privacy to be revived as a useful term in constitutional adjudication.

---

1. Parker, Richard B., "A Definition of Privacy," *Rutgers Law Review* (1974) pp. 275-296. Reprinted in Leiser (1981) pp. 277-296, and Barendt (2001) pp. 83-104.

Part II

One of my intentions in this essay is to define (or describe) what physical privacy is. The most useful definition will be non-normative. I aim to describe physical privacy independently of any judgement of its value or use. Such a definition of physical privacy can be used by either side in any dispute over how much physical privacy we should have in any given situation. We can agree with any disputant about how much physical privacy was gained or lost in a given situation and then argue about whether it should have been gained or lost.

An adequate non-normative definition of physical privacy must allow us to ask separately these five questions: (1) whether a person has lost or gained physical privacy, (2) whether that person should lose or gain physical privacy, (3) whether that person knows that he or she has lost or gained physical privacy, (4) whether that person approves or disapproves of the loss or gain, and (5) how that person experiences that loss or gain.

This requirement rules out defining physical privacy as a psychological state, for example, the experience of being apart from others. The first and third and fifth questions could not be asked separately. Physical privacy cannot be defined as a right or a claim since that would not allow the first and second questions to be asked separately. Definitions of privacy in the large literature on privacy which do allow these five questions to be asked separately are those which define privacy as control over something that can be lost or gained, but control over what? 2

Here are some examples that illustrate my definition of physical privacy as control over how and by whom we are sensed by others and control over how and when we sense others.

When we step out of our apartment building onto a street in Manhattan's Upper West Side, we voluntarily surrender some of our physical privacy. We lose some control over who can see us. When we step back into our apartment building, we gain back some control. When our neighbors in the apartment above ours continually clump around in heavy shoes on bare floors, we lose some control over what we hear of others; we lose physical privacy. Even though we keep the same control over who can sense us, we lose some control over whom we sense, in this case, our neighbors walking about. If our neighbors decide to voluntarily take off their shoes when at home, we regain some control over what we hear. We regain some physical privacy. Our gain depends on the voluntary cooperation of our neighbors. The amount of physical privacy we all enjoy depends on cooperation among people. Physical privacy is not a zero-sum situation. When people cooperate, everyone can enjoy more physical privacy, more control over how and by whom they are sensed and whom and how they sense.

Being imprisoned is a drastic loss of physical privacy. We lose control over who can see, hear, touch, smell, and taste us and we lose control over whom we can see, hear, touch, smell, and taste.

When we make the decision to have sexual intercourse, we decide to allow our partner to see, hear, touch, smell, and taste us. And we decide to see, hear, touch, smell, and taste our partner. Voluntary sexual intercourse is a mutual exercise of physical privacy, an exercise of our mutual control over who senses us and whom we sense.

---

2. For more discussion of the value of defining privacy as some kind of control see Parker (1974) pp. 278-284, and DeCew (1997) pp. 46-60. Others have defined privacy as "the control we have over information about ourselves." Fried (1970) p. 140, or "the individual's ability to control the circulation of information relating to him." Miller (1971) p. 25. Adam Moore defines privacy as "a right to control access to and uses of bodies and information." Moore (2010) p. 115. Moore admits that his definition is normative. See his discussion of "control-based" definitions of privacy, and normative versus non-normative definitions at Moore (2010), pp. 16-22.

Rape is a drastic loss of physical privacy by the victim, a drastic loss of control over who the victim senses and how the victim is sensed. For the rapist, rape is an exercise of physical privacy, an exercise of the control the rapist has over whom and what he senses. If the rapist is interrupted in the act of rape and chased away he suffers a loss of physical privacy, a loss of the control he had over whom he was sensing. Recall that our definition is descriptive and non-normative. The interrupted rapist has suffered a loss of physical privacy even though we may approve of his loss.

Voluntary pregnancy and voluntarily giving birth are exercises of physical privacy, exercises of the mother's control over who senses her and how and whom she senses. She chooses a set of sensations, often painful, lasting over months. An unwanted pregnancy and an unwanted birth are a drastic loss of physical privacy, a drastic loss of control over what the mother senses and who senses her, also lasting for months.

Voluntarily raising a child is an exercise of physical privacy lasting years. In making the commitment to raise a child, we chose to be constantly sensed by that child and to constantly sense that child to the exclusion of many other possibilities for sensual experience. Involuntarily raising a child is a drastic loss of physical privacy; we are continually sensing and being sensed by that child against our will.

A voluntary marriage is an even greater commitment than raising a child. Choosing to be continually sensed and be sensed by a spouse is an exercise of physical privacy. An involuntary marriage is a drastic loss of physical privacy that can last a lifetime.

It is useful to draw a distinction between physical privacy, the control we have over what we sense and who senses us, and the privacy that involves the loss of control over digitized information about us and yet is described using the ordinary verbs of sensing.

If our picture and movements are captured by a surveillance camera, we may suffer a loss of privacy but have we lost physical privacy? Normal verbs of sensing are used. We are "seen" by someone watching the screen. When our movements are being seen at the same time that we are moving, we are being seen "live." We are also "seen" by someone watching the video of our movements at a later time, although here the sense of "seen" is more metaphorical. We can be "seen" by millions of viewers again and again at any future time.

There is an important difference between seeing someone through a video camera and seeing that person with our own eyes. Imagine seeing Taylor Swift or Tom Brady at a concert or a football game. If we see the concert or football game on television, we can "see" these people, often in closeup. But we don't "see them with our own eyes." If we are actually at the concert or football game, we may not be able to see them nearly as well as on television but we can actually see them "in person." That small figure on the stage or the field actually is Taylor or Tom. A common reason people go to concerts and football games is to see with their own eyes the actual human being, the actual star, even if only from afar.

A major reason to restrict our definition of physical privacy to control over who actually sees us in person without the aid of digitized information of one kind or another is that physical privacy in the sense of control over being touched, or seen, or heard, or smelled or tasted by another human being with their own sense organs is a precious kind of privacy that can be preserved in the future, despite huge losses of informational privacy due to the wide circulation of digitized information.

By the same token, control over who we sense in digitalized form can be excluded from our definition of physical privacy. It may be possible in the not too distant future to replicate some intense experience (making love to a celebrity) in virtual reality. We put on goggles and are totally wired up so that we can have the simulated experience of making love to Taylor Swift or Tom Brady. Control over whether or not we have these experiences is not an exercise of our physical privacy. From the point of view of our definition of physical privacy as control over whom we actually sense, we are sensing no one. And in the same way, the real Tom Brady or Taylor Swift loses no control over who can sense them. They suffer no loss of physical privacy when we enjoy them in virtual reality.

Tom or Taylor may have a cause of action in copyright or misappropriation of their likeness but there is no loss of physical privacy (although there may be a loss of various sorts of informational privacy).

There are of course links between physical privacy as we have defined it and the spread of digitized information. For example, our smart phones continually notify the world of our physical location, making it easier for people to intercept us and actually see us. Carrying a smart phone thus results in a loss of a degree of control over who can sense us. (On the other hand, by using our smart phone to notify friends of where we will be at a certain time we gain control over who we will sense in the future, a gain of physical privacy.)

Still, a sharp distinction can be made between (1) privacy defined as control over digitized information such as pictures, videos, and recordings as well as data stored on computers, and (2) physical privacy as control over who senses us and whom we sense.

Charles Fried in a famous article entitled "Privacy [a moral analysis]" defined all of privacy as "control over knowledge about oneself." (Fried 1968, 483; reprinted in Schoeman 1984, 210). A major objection to his definition was that it was too broad. Surely not all knowledge about oneself is a matter of privacy. We have the advantage that our task is only to define physical privacy, not all of privacy. Fried's main concern in the article was to show the importance of privacy to trust, friendship, and love. One can argue that physical privacy as defined here is the sort of privacy most essential for trust, friendship, and love.

Part III

The definition of privacy is important in American constitutional law in two main areas: (A) the constitutional "decisional" privacy of *Griswold v Connecticut*, 381 U.S. 479 (1965) (contraception) *Roe v. Wade,* 410 U.S. 113, (1973) (abortion), *Lawrence v. Texas*, 539 U.S. 558 (2003) (sodomy) and *Obergefell v. Hodges*, 576 U.S. ____ (2015) (gay marriage) and (B) the "reasonable expectations of privacy" protected by the Fourth Amendment to the Constitution. Does our definition of physical privacy help clarify any of the problems that the concept of privacy has caused s in these two areas?

IIIA

A novel basis for a constitutional right of privacy sprang full-blown from the head of Justice Douglas in the Court's opinion in *Griswold v. Connecticut* (1965). The case was decided by a vote of seven to two. Douglas found a constitutional right of privacy in the "penumbras" of more specific constitutional provisions. All the other justices in the majority, except Justice Clark, endorsed different theories for a constitutional right of privacy. Justice Douglas wrote:

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See Poe v. Ullman, 367 U.S. 497, 516-522 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourth and Fifth Amendments were described in Boyd v. United States, 116 U.S. 616, 630, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." [*] We recently

referred [p485] in Mapp v. Ohio, 367 U.S. 643, 656, to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people." See Beaney, The Constitutional Right to Privacy, 1962 Sup.Ct.Rev. 212; Griswold, The Right to be Let Alone, 55 Nw.U.L.Rev. 216 (1960).

We have had many controversies over these penumbral rights of "privacy and repose."[Citations to cases.] These cases bear witness that the right of privacy which presses for recognition here is a legitimate one. The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives, rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms….Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

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

It is fair to say that the idea of an independent right of privacy founded on the penumbras of the various rights in the Bill of Rights did not find favor in subsequent cases. Even in *Griswold*, although four justices joined in the court's opinion, three of those wrote a separate concurrence grounding a right of privacy not in penumbras but in the Ninth Amendment. Justice Goldberg in his concurring opinion (joined by Chief Justice Warren and Justice Brennan) wrote:

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution [p496] explicitly forbids the State from disrupting the traditional relation of the family -- a relation as old and as fundamental as our entire civilization -- surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government, though not specifically mentioned in the Constitution. (Goldberg, joined by Warren and Brennan, concurring)

Justice Harlan in his separate concurring opinion eschews the idea of a right of privacy and relies on the conception of ordered liberty he finds in the Due Process Clause of the Fourteenth Amendment.

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325. For reasons stated at length in my dissenting opinion in Poe v. Ullman, supra, I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom. (Harlan concurring)

Justice White also bases his concurrence on the concept of liberty in the Fourteenth Amendment. He never uses the world "privacy" in his opinion.

Justice Stewart and Justice Black dissented in *Griswold*, both attacking the notion of a constitutional right of privacy. Justice Stewart said:

But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to

hold that it violates the United States Constitution. And that I cannot do.
In the course of its opinion, the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. [p528] But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.
We are told that the Due Process Clause of the Fourteenth Amendment is not, as such, the "guide" in this case. With that much, I agree. There is no claim that this law, duly enacted by the Connecticut Legislature, is unconstitutionally vague. There is no claim that the appellants were denied any of the elements of procedural due process at their trial, so as to make their convictions constitutionally invalid. And, as the Court says, the day has long passed since the Due Process Clause was regarded as a proper instrument for determining "the wisdom, need, and propriety" of state laws. Compare Lochner v. New York, 198 U.S. 45, with Ferguson v. Skrupa, 372 U.S. 726. My Brothers HARLAN and WHITE to the contrary, [w]e have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. Ferguson v. Skrupa, supra, at 730…..What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees." With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.
At the oral argument in this case, we were told that the Connecticut law does not "conform to current community standards." But it is not the function of this Court to decide cases on the basis of community standards. We are here to decide cases "agreeably to the Constitution and laws of the United States." It is the essence of judicial [p531] duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.
(Stewart dissenting*)*

Justices Black also dissents and also attacks the very use of the word "privacy."

I agree with my Brother STEWART's dissenting opinion. And, like him, I do not to any extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise, or that its policy is a good one. In order that there may be no room at all to doubt why I vote as I do, I feel constrained to add that the law is every bit as offensive to me as it is to my Brethren of the majority and my Brothers HARLAN, WHITE and GOLDBERG, who, reciting reasons why it is offensive to them, hold it unconstitutional. There is no single one of the graphic and eloquent strictures and criticisms fired at the policy of this Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe -- except their conclusion that the evil qualities they see in the law make it unconstitutional….
The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth [p509] Amendment's guarantee against "unreasonable searches and seizures." But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy." To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given. The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. He simply wants his property left alone. And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures." "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. I have expressed the view many times that First Amendment freedoms, for example, have suffered

from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 293 (concurring opinion); cases collected in City of El Paso v. Simmons, 379 U.S. 497, 517, n. 1 (dissenting opinion); Black, The Bill of Rights, 35 N.Y.U.L.Rev. 865. For these reasons, I get nowhere in this case by talk about a constitutional "right of privacy" as an emanation from [p510] one or more constitutional provisions. [n1] I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons, I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional. (Black dissenting)

Since *Griswold*, the court has increasingly distanced itself from the idea of a free standing right of privacy. *Roe v Wade* makes use of the term "privacy" but grounds a right to privacy in the Fourteenth Amendment. In *Lawrence*, and in *Obergefell*, privacy drops out and these cases are based on Fourteenth Amendment liberty plus, in *Obergefell*, the Equal Protection Clause of the Fourteenth Amendment. In *Obergefell*, *Griswold* is cited by Justice Kennedy writing for the Court with no reference to the word "privacy."

To simply invoke Fourteenth Amendment liberty without more leads to justified accusations that the Court is simply legislating with no unifying theory. But there is a possible theory. The exercise of physical privacy as we have defined it (as control over who can sense us and whom we sense) is a specific kind of liberty. The immediate sensual character of physical privacy (undiluted by digitized information) unites the contraceptive cases, the abortion cases, the sodomy cases, and the gay marriage cases. It is a particular liberty involving control over physical intimacy with others.

What if Justice Douglas had actually defined "physical privacy" as we do and then found a right to physical privacy in *Griswold*. The constitutional right to physical privacy would then be a right to control our most sensual interactions with other people. This is a much tighter and more coherent view of what is actually being protected in *Griswold, Roe, Lawrence, and Obergefell*. And the emphasis on our control of what we sense, a constitutional right to physical privacy, would have allowed extension of that right to physical privacy to include the right to die, the right to physician assistance when committing suicide, and perhaps the use of recreational drugs.

IIIB

The 4th Amendment reads as follows: *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

In his opinion in *Griswold*, Black predicted what might have happened if "privacy" was thought to be the main thing protected by the Fourth Amendment In fact, his prediction came true. The lead case was *Katz v. United States,* 389 U.S. 347 (1967), decided two years after *Griswold*. In that case, the Fourth Amendment was extended to cover electronic eavesdropping. The FBI had listened to incriminating conversations (illegal gambling wagers) by the defendant Katz through an electronic device attached to the outside of the telephone booth that Katz was using. Katz protested that because the FBI agents had no warrant, the device constituted an illegal search contrary to the Fourth Amendment. The lower court rejected Katz's claim on the ground that there was no physical intrusion into the booth itself. The Supreme Court reversed and found that Katz was protected by the Fourth Amendment. (Only Justice Black dissented.)

Unfortunately, in this extension of Fourth Amendment protection to cover electronic eavesdropping, the Court found that the FBI had violated the privacy upon which Katz justifiably relied while using the telephone booth. He reasonably expected his telephone conversations to be private. In later cases "reasonable expectations of privacy" became the main thing protected by the Fourth Amendment. Defining the Fourth Amendment as protecting our

reasonable expectations of privacy (with no clear idea of what privacy was) set in motion a vicious downward spiral. As the government invaded our privacy more and more, our reasonable expectations of privacy were progressively lowered. We reasonably expected less and less privacy and thus the Fourth Amendment offered progressively less real protection against a loss of privacy.

When the 4th Amendment was written, the protection of physical persons and personal places and papers was enough to protect our privacy generally. Now, without our physical privacy being invaded at all, others can know more about us than we know about ourselves. Our preferences, tastes, lifestyle, friendships, family, finances, and the entire network of our lives can be known by people who never sense us directly.

There is wide spread agreement that, as regards digitized information, the horse has left the barn. We can reasonably expect that anything we put into any device connected to the Internet can be accessed by any determined government and by many private parties. When we update an app on our smart phone or computer, everything on that device is accessible to any determined party. Our reasonable expectations are that we cannot control digitized information.

To revive some reasonable Fourth Amendment protection against the spread of digitized information, we probably should develop other ways to talk about these problems that do not use the word "privacy." Perhaps we should simply talk about the digitized information itself. We can pass statutes regulating what kinds of information can be collected, stored, or accessed and what kinds cannot. For example, distinctions can be made between the government just collecting the telephone numbers called as opposed to actually recording conversations. Rules can be promulgated requiring the disposal of all street surveillance camera videos after a certain period of time. To help reduce the gap between what citizens know and the government knows, all surveillance cameras viewing public places could be accessible by anyone on the Internet. The use of the concept of privacy does not help us in dealing with these problems of digitized information.

A government which collects all telephone conversations is not invading our physical privacy as I have defined it because all of the information thus gained by the government is digitized. The main reason that we object to the collection of all telephone conversations is not because of some privacy interest but because it gives the government too much power relative to the citizenry. We forbid recording and storing every telephone conversation of every citizen for the same reason that we limit the President to two terms of office. We need to check the power of government. The Fourth Amendment need not be invoked at all to control the use of digitized information.

The Fourth Amendment may still play an important role in protecting our physical privacy as I have defined it here, control over whom we sense and who senses us. Thus we could give up "privacy" as a legal term of art when trying to control the spread of digitized information; but we could keep "privacy" when defending against actual physical intrusion or preserving the freedom to control who senses us and whom we sense.

The use of the "privacy" when using the Fourth Amendment to protect us from the government should be reserved for physical privacy as I have defined it here. The sharp demarcation possible between physical privacy and the rest of privacy allows us to protect physical privacy with a distinct body of law involving control of what and by whom we are sensed and whom and how we sense others. With all digitized information it may be best just to regulate the flow of information or the use of the actual devices.

In sum, general privacy has failed as a term of art in American constitutional law. However, physical privacy, defined as control over who can sense us and whom we sense, succeeds in expressing the heart of what we want to protect in the constitutional cases from *Griswold* to *Obergefell* and also revives the Fourth Amendment as a protector of perhaps the most important sort of privacy--physical privacy. As Fried and many others would argue, physical privacy is the foundation of personal freedom and our major means of achieving trust, friendship, and love.

References

Barendt, Eric, editor (2001) *Privacy*. Aldershot UK: Dartmouth Publishing.

DeCew, Judith Wagner (1997). *In Pursuit of Privacy.* Ithaca: Cornell University Press.

Fried, Charles, (1970). *An Anatomy of Values*. Cambridge MA: Harvard University Press.

Fried, Charles, "Privacy [a moral analysis]," *Yale Law Journal*, Vol. 77 (January, 1968) pp. 475-493.

Griswold v Connecticut, 381 U.S. 479 (1965) (contraception).

Katz v. United States, 389 U.S. 347 (1967) (electronic surveillance).

Lawrence v. Texas, 539 U.S. 558 (2003) (sodomy).

Leiser, Burton M., editor (1981) *Values in Conflict: Life, Liberty and the Rule of Law*, New York: Macmillan 1981.

Miller, Arthur, 1971 *The Assault on Privacy: Computers, Data Banks, and Dossiers,* Ann Arbor: Univ of Michigan Press.

Moore, Adam D. 2016. *Privacy, Security, and Accountability.* London: Rowman & Littlefield.

Moore, Adam D. 2010. *Privacy Rights: Moral and Legal Foundations.* University Park: Pennsylvania State University Press.

Obergefell v. Hodges, 576 U.S. ____ (2015) (gay marriage).

Parker, Richard B., "A Definition of Privacy," *Rutgers Law Review*, Vol. 27 (Winter, 1974) pp. 275-296.

Roe v. Wade, 410 U.S. 113, (1973) (abortion).

Schoeman, Ferdinand David 1992. *Privacy and Social Freedom.* New York: Cambridge University Press.

Schoeman, Ferdinand David 1984. *Philosophical Dimensions of Privacy.* New York: Cambridge University Press.