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Claremont McKenna College

Behind Locke and Key: A Philosophical Reorientation of Privacy as
Property in Oneself and its Applications to Personal Consumer Data

Submitted to
Professor Paul Hurley

By
Tara Mehra

For
Senior Thesis
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Abstract

The U.S. law has a weak conception of the right to privacy— one that fails to adequately protect consumers in the technological age. This project draws primarily upon Locke, Kant, and Ripstein to articulate and apply a reorientation of the right to privacy and defend that reorientation as constitutionally sound. Specifically, Locke's property theory and Kant's innate right suggest that the right to privacy is derived from an exclusive right to control one's person, which is one's most fundamental property. In applying this understanding of privacy, there is a case for a robust protection of consumer data. Further, Ripstein's analysis of public provisions highlights that the state has a positive duty to secure the conditions for the effective exercise of the right to privacy. Doing so entails state regulation of what I argue are illegitimate business-to-consumer consent agreements. In short, this reorientation provides grounds for a protection and maintenance of a morally robust right to privacy in the technological age that can pass constitutional muster.

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Introduction | The Death of Privacy

In 1997, plastered across the nation's newsstands in bright yellow letters, *TIME* Magazine announced "The Death of Privacy." A face—close-up, blurry, and cast in ominous red shadows—stared through a keyhole, watching newsstand passerbyers as they carelessly went about their day. "You have no secrets," the cover warned.¹ "At the ATM, on the Internet, even walking down the street, people are watching your every move. What can you do about it?"²

The article's answer: not much. According to American journalist Josh Quittner, the absence of federal privacy regulations and a constitutionally-bound right to privacy gave people a weak defense against invasions of their private space. Quittner suggested that because the law provided little protection, the best way for people to protect their privacy was to alter their behavior. Instead of using an E-Z Pass and an ATM, which traced one's location, Quittner argued that people could opt to "use quarters at tolls" and "pay cash for everything."³ But, as he subsequently acknowledged, such an evasion of everything "wired" comes with a cost— isolation from modern technology. Despite his tone of urgency and his discontent with the nascent invasions of privacy, Quittner ultimately settled that he didn't "want to be cut off from the world."⁴

25 years later, not only is Quittner's call for federal action left unanswered, but the inability to avoid constant intrusions on private space is significantly more pronounced. Quittner was primarily concerned with daily, but momentary, instances of data collection, like when one's location is recorded by use of an ATM. Not only were these kinds of intrusions limited, but

¹ Quittner, Josh. "Invasion of Privacy: Our Right to Be Left Alone Has Disappeared, Bit by Bit, in Little Brotherly Steps. Still, We've Got Something in Return-- And It's Not All Bad." *TIME*, August 25, 1997.

² Quittner, "Invasion of Privacy."

³ Quittner, "Invasion of Privacy," 4.

⁴ Quittner, "Invasion of Privacy," 6.

avoidance was somewhat plausible. Now, the circumstances have changed— data is *constantly* collected from consumers through a wide range of technologies, including cell phones, computers, mobile applications, smart TVs, fitness trackers, voice recognition technology, and facial recognition technology. Put bluntly, avoidance of engagement with the technology that eviscerates privacy has become impossible.

The data that is constantly extorted from consumers is robust in size and personal in nature. For every consumer, there is a dossier of data. As Amy Gajda explains in *Seek and Hide: The Tangled History of the Right to Privacy*, these dossiers contain data on, quite literally, everything: geolocation data, biometric data, personal addresses, previous purchases, photographs, one's social security number, social media posts, voter registration, credit card activity, bank account activity.⁵ Businesses collect, retain, and refine even more granular data on their consumers. Gajda obtained available data on her user profile from Amazon, which consisted of “approximately 80 folders, each with its own subfolders.”⁶ TIME Magazine's haunting warning— “You have no secrets—” rings more true than ever before.

And, our “secrets” are being used against us— sometimes without our knowledge. Not only is privacy increasingly insecure, but consumer data helps further advantage already powerful companies like Facebook, Amazon, and Google. Companies use consumer data to target specific consumer groups through advertisements, inform their product development, and determine their pricing strategy. They are willing to pay a pretty penny for it, too. The IAB Data Center found that in 2017, U.S. firms spent over \$19 Billion on third-party audience data.⁷ While companies enjoy maximizing their profits, consumers are often left in the dark about what data is

⁵ Gajda, Amy. *Seek and Hide: The Tangled History of the Right to Privacy*. New York: Viking, 2022., 232-233

⁶ Gajda, *Seek and Hide*, 234

⁷ “U.S. Firms to Spend Nearly \$19.2 Billion on Third-Party Audience Data & Data-Use Solutions in 2018, up 17.5% from 2017,” December 5, 2018.
<https://www.businesswire.com/news/home/20181205005139/en/U.S.-Firms-to-Spend-Nearly-19.2-Billion-on-Third-Party-Audience-Data-Data-Use-Solutions-in-2018-up-17.5-from-2017>.

being collected. In 2020, the FTC found that the Amazon Alexa and Apple App Store both collected and used the personal data of users without their knowledge in order to better target users with advertisements.⁸

Why can third parties collect and use such exhaustive data on consumers in the U.S.? Ultimately, privacy is “dead” because the law allows it to be. Consumer privacy is weak because the law does not demand that it be strong. In American law, the right to privacy rests on an unprincipled, weak grounding that stems from Samuel Warren and Louis Brandeis’ Harvard Law Review article, “The Right to Privacy.” As a result of a weak right to privacy, consumers lack control of their data. Consequently, they face harms ranging from exploitative advertising to identity theft. Change is imperative. The advances of technology demand that the U.S. reframe its approach to privacy in the law.

This project aims to do just that. By appealing to political and moral philosophy, this project proposes a legal reorientation of the right to privacy that can withstand constitutional muster and protect citizens in the technological age. Chapter 1 outlines a new approach to privacy and argues for its fundamentality within the U.S. constitutional scheme. The approach uses Lockean and Kantian theory to locate the right to privacy in a more fundamental right to property in oneself. Works by Locke and Kant suggest that to have a property in oneself means that one has an exclusive right to control one’s person and the tangible and intangible things necessary to pursue one’s ends independently. Accordingly, property in oneself creates a realm of “personal space” in which a person has absolute control. Because under Lockean theory, the state

⁸ Feiner, Lauren. “FTC orders Amazon, Facebook, and others to explain how they collect and use personal data.” CNBC, December 4, 2020, <https://www.cnbc.com/2020/12/14/ftc-orders-amazon-facebook-and-others-to-explain-how-they-use-personal-data.html>

comes about to better protect property, and one's most fundamental property is property in themselves, the state has a foremost obligation to protect the right to property in oneself.

Having proposed a reorientation for the right to privacy and defended that reorientation in the context of the U.S. constitutional scheme, I turn to applications of the theory in Chapter 2. Specifically, I illustrate why the objects of greatest interest in privacy discussion today— personal data— must be protected under my understanding of privacy. Finally, I use frameworks from Arthur Ripstein and John Rawls in Chapter 3 to explain that merely *recognizing* a formal right to privacy, even a robust one, is not sufficient. The state must take positive action to *secure the conditions* for the effective exercise of the right. In this case, that entails regulating business in relation to their standards of consent. I argue that while it appears that consumers consent to entry into their “personal space” by companies, such consent is illegitimate. Accordingly, the state must take positive steps in order to structure conditions of rightful interaction and prevent third parties from violating one's right to property in themselves.

Together, these chapters put forth a framework for defining, applying, and securing the right to privacy that would better safeguard consumers and their rights. Our secrets deserve protection— for better or for worse.

1 | Reviving the Right: A New Approach to Privacy

“‘And it’s eliminated my ability to just talk to you.’ He was still talking. ‘I mean, I can’t send you emails, because you immediately forward them to someone else. I can’t send you a photo, because you post it on your own profile. And meanwhile, your company is scanning all of our messages for information they can monetize. Don’t you think this is insane?’”

- Dave Eggers, *The Circle*⁹

In this chapter, I use work in legal, political, and moral philosophy to articulate my theory of the right to privacy— an approach that deviates from current legal understandings. I begin by analyzing Samuel Warren and Louis Brandeis’ “The Right to Privacy” (1890), which generated an approach that has dominated the philosophy of privacy law in the last century. I suggest that the right to privacy identified by Warren and Brandeis lacks strength and caused privacy law to have an unprincipled grounding, as evinced in major Supreme Court decisions. I specifically identify three issues with Warren and Brandeis’ framework: 1) their right to privacy entails rights only in the negative sense, 2) they misunderstand the relationship between privacy and property, and 3) they do not seem to think that there is a right to privacy in the Constitution. In what follows, I propose a reorientation of the right to privacy. Along the way, I address the three issues that I identify in Warren and Brandeis’ framework. Specifically, I use John Locke’s property theory and Immanuel Kant’s discussion of the innate right to articulate that everyone’s first and most fundamental right is exclusive property in their own person. Using Locke’s understanding of liberty and Kant’s analysis of private rights, I further explain that to have a property in something is to have a right to control that thing, in both the positive and negative senses. Accordingly, I derive the right to privacy from one’s exclusive power to control their person and the property (or “means,” in Kant’s terms) that is necessary to pursue one’s ends independent

⁹ Eggers, Dave. *The Circle*. New York: Random House LLC, 2013.

from the arbitrary will of others. I suggest one is entitled to a right to privacy within the “personal space” where such exclusive control must be protected. Finally, I consider the role of the state in protecting a right to privacy as I understand it. Because, under Locke’s account, people consent to the state in order to more effectively secure property rights, and one’s right to oneself is the most fundamental property right, I argue that the state has a foremost responsibility to secure the right to privacy. Further, the centrality of the right to self-ownership makes the right to privacy core to the U.S. constitution, providing a strong legal argument for its protection.

Enduring Understandings: Warren, Brandeis, and the Right to be Let Alone

In their famous *Harvard Law Review* article entitled “The Right to Privacy,” to-be Supreme Court justices Samuel Warren and Louis Brandeis (hereafter: W&B) were the first to articulate a categorical right to privacy.¹⁰ The article was influential because W&B advocated for the understanding of privacy as a stand-alone right, which deviated from enduring approaches that loosely found privacy rights based on other independent legal concepts, like copyright. While influential, I will suggest that their approach is fundamentally flawed. In particular, W&B’s article both overlooks and misinterprets property rights and, accordingly, lands on a weak constitutional grounding and a limited principle.

Written after the emergence of the instant photograph, audio recording, and the salacious press, W&B were fundamentally concerned with anything of an inherently personal nature—domestic occurrences, personal letters, and sacred personal effects—being reported to the public and discussed by them in light of this new technology. In their words, “The intensity and

¹⁰ Brandeis, Louis, and Warren, Samuel. “The Right to Privacy.” *Harvard Law Review* IV, no. No. 5 (December 15, 1890). https://h2o.law.harvard.edu/text_blocks/5660.

complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world . . . so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress.”¹¹ W&B thus aimed to identify a legal principle that would restrict the press, and other entities, from describing things that are deeply personal to an individual and often harmful to have discussed.

In elucidating this principle, W&B drew from established areas of the common law, including property law, copyright law, and contract law. Ultimately, they suggested that while none of these legal arenas gave a substantial grounding for privacy individually, such a right had been implicit in the common law and should stand alone going forward. Because it is important for the context of my approach, I will focus on W&B’s rejection of using property law to find a right to privacy. W&B suggested that the private property approach was insufficient both legally and in principle. They first acknowledge that private property alone could easily be protected from interference— when someone owns a house, they have the right to exclude someone from their property. However, they articulate that despite a physical protection of property, it is challenging to make successful claims about the *reproduction* of such property under private property law. The pair illustrate this argument through several examples. Suppose that a man keeps a highly valuable collection of gems hidden in his home.¹² Idiosyncratically, he does not want anyone else to see this gem collection. Now, suppose that a “friend” of the man were to snoop around the house, find the hidden gem collection, and create and share a detailed description of the gems. The “friend” was allowed into the home, and as such, no physical trespass occurs. The friend also does not take or damage the gems, meaning that the private

¹¹ Brandeis and Warren, 196.

¹² Brandeis and Warren, 203.

property remains intact. So, W&B argue that under private property law, the gem owner would have no standing for a legal claim. Nonetheless, W&B contend that the gem owner has been wronged by the distribution of the written reproduction of his property— they just do not have a principle with which to identify that wrong in the common law as it stood at the time. W&B also put forth the example of replicating the contents of a private letter. Suppose that two people exchange a private letter, and a third person intercepts the letter and replicates its contents. Are there legal grounds to punish the interceptor? W&B contend that there are no grounds on which to punish the interceptor in the common law unless the contents of the letter has pecuniary literary value.¹³ In both the case of the gem collection and the case of the letter, W&B identify wrongs that they find troubling. They view the respective reproductions as not just injuries on property, but as “spiritual” injuries that offend the “honor” of the victimized man.¹⁴ People want to have agency and control over their property, and even if that property is not taken or trespassed upon in the legal sense, one is still wronged when it is nonconsensually shared or described.

Along these lines, W&B put forth their conclusion “that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in prevent publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beat and the right not to be imprisoned.”¹⁵ W&B want to recenter the injury from private property, a contract, or copyright to the *person*, on the basis of their *right against interference*, or *privacy*, understood as a “right to be let alone.”

¹³ Brandeis and Warren, “The Right to Privacy.”

¹⁴ Brandeis and Warren, “The Right to Privacy.”

¹⁵ Brandeis and Warren, 207.

While the “right to be let alone” defines what grounds the right, W&B also make a claim regarding the nature of the right, or the principle from which the right stems. They write that “The principle which protects personal writings and all other personal productions . . . is in reality not the principle of private property, but that of an inviolate personality.”¹⁶ They also describe this concept as “part of the more general right to the immunity of the person” and “the right to one’s personality.”¹⁷ The concept of the “inviolable personality” ties “the right to be let alone” to an injury that the pair view as broader than just an injury to property, described by W&B as an injury to the independence and dignity of a person.

Although W&B offer a more robust and principled conception of privacy than existed prior to the article’s publication, there are two clear challenges with their framework. First, it is not clear that the right to privacy entails anything beyond the sphere of negative rights, or freedom *from*. Being “let alone” suggests a freedom from intrusion. It thus protects people and their things by imposing a negative duty upon others to not interfere. But being “let alone” does not necessarily grant individuals full agency over their things, which limits the positive duty imposed upon the state. The lack of a broader right to control, facilitated by the state, means that the right to privacy is fairly limited. Thus, the law being defined only in the negative sense of rights is problematic because it limits how secure the right will be.

Second, W&B do not seem to think that there is a right to privacy in the Constitution. Despite promoting its recognition and protection, they do not offer any defense of the grounds on which privacy should be protected in forthcoming case law. Consequently, Supreme Court cases that have directly taken up questions of privacy in recent history have had weak and unprincipled outcomes. In 1967, Justice Harlan asserted that every American has a “reasonable expectation of

¹⁶ Brandeis and Warren, 205.

¹⁷ Brandeis and Warren, 207, 213.

privacy” in ruling on *Katz v. United States*, which found that the warrantless placement of a listening device outside a phone booth was unconstitutional.¹⁸ Subsequent rulings, however, weakened this finding considerably. In 1986, the Court found no constitutional issue with flying a plane over a house to see marijuana growing in the backyard (*California v. Ciraolo*).¹⁹ Three years later in *Florida v. Riley* (1989), the Court similarly established that flying a helicopter over a greenhouse was constitutionally sound.²⁰ The Court enabled similar restrictions to the exclusionary rule throughout the second half of the 20th century. The exclusionary rule, established in *Mapp v. Ohio* (1961), invalidated evidence obtained without a warrant under the general principle that people should have privacy and security in their homes.²¹ However, *Hudson v. Michigan* (2006) ruled that evidence procured without a warrant is admissible in Court even when law enforcement violates the “knock and announce” protocols.²² Other exceptions, like good faith, inevitable discovery, and independent source tear apart the essence of the exclusionary rule and what it is meant to protect.²³ The exceptions to *Katz* and *Mapp*— both of which protect an individual’s personal space— highlight the weakness in the constitutional approach that is meant to protect privacy in the 4th Amendment scope.

In what follows, I will suggest that the major misstep that W&B make in their argument is a misinterpretation of property rights. Though they understood property as a right that had “grown to comprise every form of possession— intangible, as well as tangible,” they still fundamentally understand property as merely a right to *things*.²⁴ I argue that in doing so, W&B

¹⁸ *Katz v. United States*, 389 U.S. 347 (1967).

¹⁹ *California v. Ciraolo*, 476 U.S. 207 (1986).

²⁰ *Florida v. Riley*, 488 U.S. 445 (1989).

²¹ *Mapp v. Ohio*, 367 U.S. 643 (1961).

²² *Hudson v. Michigan*, 547 U.S. 586 (2006).

²³ LII / Legal Information Institute. “Exclusionary Rule.” Accessed December 1, 2022.

https://www.law.cornell.edu/wex/exclusionary_rule.

²⁴ Brandeis and Warren, “The Right to Privacy.”

overlook the most fundamental property that individuals have— property in themselves. Thus, although much of W&B’s approach aligns with a more powerful conception of privacy that had been embraced by US judges, the article lacks a powerful grounding as it has a limited understanding of privacy as existing only in the negative dimension.

In this paper, I use the flaws in W&B’s account, along with philosophical consensus, to propose a reorientation of how we think about privacy rights. To summarize, W&B’s account is problematic because it only recognizes the right to privacy in the negative sense of rights, misinterprets property rights, and is not explicitly constitutionally grounded. The reorientation that I propose is grounded in property rights in oneself, which I view as the power to positively control one’s person and the things integral to that person’s ends. The most fundamental property is a property in one’s person, and privacy is a manifestation of a right to control property in one’s person. Because the role of the state is to enforce property, and privacy is a precondition to the property rights of one’s person, privacy is a core right that is foundational to the constitutional grounding and must be protected by the state.

John Locke and the Right to Property

Overlapping consensus between Locke, Kant, and Madison provides a rich rationale for a necessary protected realm of personal space, which is both required by and secures property in oneself. I begin with an exploration of Lockean property theory. In Chapter V of the *Second Treatise of Government*, John Locke puts forth his conception of property rights— an account largely embraced in early American constitutional thought. Locke first emphasizes that the most fundamental property that one possesses is property in himself. He writes in Section 27 of the *Second Treatise* that “Though the earth, and all inferior creatures, be common to all men, yet

every man has a *property* in his own *person*: this no body has any right to but himself.”²⁵ Central to Locke’s account of property is the necessity of exclusive self-ownership. He makes clear that man is entitled to nothing at birth— all else is common— but the one thing that man has is ownership of himself. Further, that ownership is the one property that no other man can have any claim over. It is fundamental.

Next, Locke provides an account for how men acquire additional property in the state of nature, given that they come into the world empty-handed. Although Locke believes that one can *acquire* property in the state of nature, he contends property can only be *secured* through the state. Nonetheless, Locke’s account for the acquisition of property is helpful in emphasizing the fundamentality of property in oneself. Locke suggests that “The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*.”²⁶ Locke’s “mixing” argument reaffirms the ownership of man in himself and his actions. Additionally, Locke suggests that our ownership of things *external* to oneself comes from our ownership *of* oneself. Therefore, property in things, which Locke sees as fundamental to freedom, presupposes property in one’s person. The necessity of self-ownership to secure additional rights further emphasizes how integral full self-ownership is within the Lockean scheme, which was highly influential to the US founding.

Property is a strong starting point for an account of privacy. In Chapter IX, Locke clarifies that the foremost role of the state is to secure one’s property, while expanding the definition of the term in a way that is notable from the perspective of privacy. In Section 123,

²⁵ Locke, John. *Second Treatise of Government*. Enhanced Media, 2014, Chapter 5, Section 27.

²⁶ Locke, Chapter 5, Section 27.

Locke questions why, if man is so free in the state of nature, he would part with such freedom and the absolute control it entails in order to join the state. He concludes that man willingly parts from the state of nature because he “is willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties, and estates, which [is] call[ed] by the general name, property.”²⁷ Locke understands the “end” of joining the commonwealth as the preservation and protection of property. Thus, the foremost role of the established state is to protect property.

What kind of property is most important for the state to protect? Locke understands property rights not just as applying to physical things, like a house or a gem collection. In Section 123, it becomes evident that self-ownership does not merely entail property in one’s physical person, but more robustly includes property in one’s *lives* and *liberties*. And to Locke, property in oneself, one’s lives, and one’s liberty are the *most important* property— he lists “life” and “liberty” before estates when defining what property entails in Section 123. To Locke, legitimate property in one’s estates presupposes property in their life and liberty. Thus, the role of the state is to protect property, where property in life and liberty is more fundamental than property in physical things.

What does it mean to have a property right in one’s life and liberties? To Locke, our property in our lives and liberties requires a robust protection of negative rights, as evidenced through the fence metaphor in Section 17. Locke posits that an individual who attempts to get another man under his power and impose his will enters into a state of war with that man. The perpetrator imposes a “force” which eliminates the victim’s security, Locke reasons. Specifically, Locke writes that “To be free from such force is the only security of my preservation; and reason bids me to look on him, as an enemy to my preservation, who would take away that freedom

²⁷ Locke, Chapter 9, Section 123.

which is the fence to it.”²⁸ With his articulations about self-ownership and his robust understanding of property in mind, Locke’s description of our freedom forming a “fence” and protecting our preservation suggests that there is some outside boundary, composed of our rights and our person, within which others are not entitled to enter or interfere with.

Finally, it is worth questioning what, according to Locke, our liberty guarantees from the perspective of a more positive sense of control. Locke’s understanding of exclusive property in our person and depiction of a fence surrounding our freedom provides strong grounds for enforcing a right against intrusion or interference with a person and their freedoms. These are negative rights. Imposing a negative duty upon others to not interfere with property or liberties within a boundary does not necessarily grant one a robust sense of control over those things, which is often facilitated by the state. An additional Lockean work— *An Essay Concerning Human Understanding*— reveals that to Locke, liberty entails not merely freedom from intrusion or security in one’s person within a particular boundary, but a more positive sense of control of all that lies within that boundary. He writes in Book II, Chapter XXI that “liberty is not an idea belong to volition, or preferring; but to the person having *the power of doing, or forbearing to do*, according as the mind shall choose or direct” (emphasis added).²⁹ Lockean liberty involves self-control. Self-control requires imposing a negative duty upon others, but also often requires imposing a positive duty to enable such control— an idea I expand upon later. Thus, the Lockean account of exclusive self-ownership suggests that part of the state’s foremost role— protecting property— requires the state to protect individuals’ ability to control their lives in a positive sense as well as a negative sense.

²⁸ Locke, Chapter 3, Section 17.

²⁹ Locke, John. *An Essay Concerning Human Understanding*. Edited by Winkler, Kenneth. Indianapolis: Hackett Publishing Company, Inc., 1996.

The Lockean account is helpful when considering a reorientation of privacy rights because it grounds tangible property and liberties in the more fundamental property in one's person. Because property in one's person is prior to property in other things and other liberties, and the role of the state is to effectively secure property rights, it follows that the state's foremost obligation is to protect property in, and control over, oneself. Furthermore, this robust understanding of property provides a principled basis for beginning to understand the right to privacy. The notions of exclusivity and control are important from the lens of privacy. Property in our person is a constraint on the system; it is a place where other individuals, on Locke's account, cannot legitimately encroach. Exclusiveness, central to Locke's account, entails a guarantee of personal security and promise against interference, which is part of the essence of privacy. The right to control is critical to the essence of privacy. Its importance with respect to privacy is even clearer in the Kantian account, to which I now turn.

Ripstein and Kant: Innate Rights and Private Rights

Arthur Ripstein's interpretation of Kantian theory provides a complementary view that adds consensus to Lockean exclusive self-ownership and our right to control property external to ourselves. Further, the Kantian account more robustly details why a positive right to control entails an absolute right to privacy. The Kantian account begins with the idea of the "innate right."³⁰ Innate rights are the only rights that man has naturally, without any action on behalf of the state. Kant names our innate right as freedom, writing in *The Metaphysics of Morals* that "freedom . . . is the only original right belonging to every man by virtue of his humanity."³¹

³⁰ Ripstein, Arthur. *Force and Freedom: Kant's Legal and Political Philosophy*. Cambridge, Massachusetts: Harvard University Press, 2009.

³¹ Kant, Immanuel. *The Metaphysics of Morals*. Edited by Denis, Lara. Cambridge, United Kingdom: Cambridge University Press, 2017, 30.

Ripstein's account of Kant puts the innate right in terms important for this paper. Ripstein explains that Kant's "Innate right . . . [entails] a person's entitlement to her own person and reputation."³² Like Locke, Kant is thus clear that we have a fundamental property in our own person.

Ripstein further explains that Kant's conception of freedom is defined by independence such that man's foremost right is to possess and control his "means" in order to independently define and pursue his "ends." I will begin by explaining what it means for one to independently pursue their "ends." Kantian independence requires a freedom from being constrained by another's choice in the pursuit of one's ends. In Ripstein's words, Kant suggests that "Each person is entitled to be his or her own master, not in the sense of enjoying some form of special self relation, but in the contrastive sense of not being subordinated by the choice of any other particular person" (10). Thus, Kantian freedom as independence, or man's innate right, embraces rights in both the positive and negative senses: being enabled to actively control one's own destiny (positive) without interference or coercion from others (negative).

The idea of freedom as independence helps us understand why W&B were flawed in seeing property external to ourselves as merely "things." Instead, property is a "means" to pursuing our "ends." In analyzing Kant, Ripstein writes "The core idea of independence is an articulation of the distinction between persons and things. A person is a being capable of setting his or her own purposes, while a thing is something that can be used in pursuit of those purposes."³³ People are independent if they are the ones deciding which purposes to pursue, and we use "things," including "bodily powers," as "means" to achieve our purposes.³⁴ Having

³² Ripstein, *Force and Freedom*, 19.

³³ Ripstein, *Force and Freedom*, 14.

³⁴ Ripstein, *Force and Freedom*, 14.

“means” is essential to achieving our purposes. Thus, it is not just “ends” that are important for Kant. Having possession and control of one’s “means” is critical for freedom as independence.

One’s innate right, or freedom as independence, is violated when individuals lose control of the ability to decide what purposes they will pursue or to pursue those purposes using their means. Ripstein writes that “The person who uses your body or a part of it for a purpose you have not authorized makes you dependent on his or her choice; your person, in the form of your body, is used to accomplish somebody else’s purpose, and so your independence is violated.”³⁵ In asserting that people should not be used as a “mere means,” Ripstein outlines two ways that this can occur. The first entails “drawing that person into purposes that she has not chosen;” the second entails “depriving her of her means” and using her means to advance ends other than hers.³⁶ For example, if I were to loop you into a pyramid scheme that is fraudulent, I am violating your power to choose your own ends. If I were to take the property that you required in order to support your family, I would deprive you of the means required to pursue your ends and use them instead to pursue my own ends. Thus, for Kant, freedom entails not only the ability to set and pursue one’s own ends independent from arbitrary will of others, but also having a robust means to do so, un-usurped by others.

Kant’s framework of innate rights supports a conception of property over which individuals must have robust control. And similar to Locke’s assertion that property in other things presupposes property in oneself, Kant views the innate right as a precondition to private rights. Private rights encompass all rights beyond the innate right, like the right to own property. They arise out of necessity. Innate rights only entitle people to their person and reputation. There are other “means” by which people might need to pursue their purposes, which are contained

³⁵ Ripstein, *Force and Freedom*, 15.

³⁶ Ripstein, *Force and Freedom*, 15.

within the realm of private rights. Private rights differ from the innate right because in the latter, everyone is equal; each person has an equal protection and entitlement to themselves and their independence. While people remain subject to equal individual freedom no matter what, they have asymmetric claims to different things within the sphere of private rights.

As previously mentioned, one such private right is the right to property. Importantly, and distinct from W&B, Kant's understanding of property does not merely involve property as governing *things*. Ripstein, in explaining Kant, writes that "property is a relation between persons [with respect to things], not a relation between a person and a thing."³⁷ We have an innate right to control our person, and because property in things is a "means" by which we exercise that control, we have an exclusive right to control our property. Another person interfering with that property, or interfering with the owner's ability to control that property and use it to pursue their ends, would in turn be a violation of the innate right. Violating someone's control of their property violates their ability to control themselves, and therefore their independence, which is paramount. Put in Kant's language, property dictates relations between persons because property "comprises the external means that you use in setting and pursuing purposes; if someone interferes with your property, he thereby interferes with your purposiveness."³⁸ In sum, Ripstein's interpretation of the Kantian account explains the extension of an innate right to control one's person to a right to control things, with the defining aspect of control being the regulation of interactions between people.

There are two important implications that emerge from the Kantian account. First, Kant's innate right helps build consensus with the Lockean ideal of property in one's person. Accordingly, the idea of having a property in oneself is a viable starting point for this account.

³⁷ Ripstein, *Force and Freedom*, 22.

³⁸ Ripstein, *Force and Freedom*, 91.

Second, Kant makes clearer the idea of control that is present in the Lockean account, which has clear applications to the right to privacy. Individuals have the exclusive authority to possess and control their means in order to set and pursue their ends. Oftentimes, the means they use include property. Hence, it follows that if one has a *property* in something, it means that they have a *right to control* that thing. This right to control entails rights in both the positive and negative sense by nature. Ripstein illustrates the right to control in a negative sense by writing that “the reason harmless trespasses are prohibited is that they violate the owner’s right to determine how his or her property will be used.”³⁹ From this example, we can see that the right of control entails associated “negative” rights, with one such right being the right to exclude. I cannot fully control my property if I cannot exclude people from it and bar people from interfering with it. That is why even seemingly “harmless” trespasses, like you coming into my house without my consent and giving it a deep clean, would be a violation of my rights under the Kantian and Ripsteinian view. You violated my right to control my property, which includes my being able to exclude people from use of my property. Further, the right to control for Kant must also mean that we have the *ability* to control, which brings about rights in the positive sense. If one lacks the ability to control their means due to various circumstances, independence is threatened. The state must help establish the circumstances to enable people to control their means— an idea that imposes a positive duty which I further explore in Chapter 3. Thus, understanding property and other “means” to our purposes through the lens of the right to control is critical for Kant and Ripstein.

Ripstein, Roads, and the Role of the State

What is the role of the state in securing our innate rights? The Lockean account makes clear that people consent to the state apparatus in order to more effectively secure their property,

³⁹ Ripstein, *Force and Freedom*, 92.

of which the most important property is property in oneself. Chapter 8 of Ripstein's *Force and Freedom* adds an additional perspective that can be seen as reinforcing this view. In Chapter 8, Ripstein takes up traditional libertarian arguments, like those from Charles Taylor and Ronald Dworkin. The libertarian arguments, in short, suggest that public provisions threaten individual liberty and libertarian principles of freedom. By contrast, Ripstein contends that such a libertarian ideal can actually *limit* freedom. He draws upon the example of public roads.⁴⁰ Suppose that there are 100 plots of land adjacent to one another, in numerical order. Now suppose that the individual who owns and resides in Plot 1 wants to travel to Plot 100. Ripstein argues that the individual who owns and resides in Plot 1 is not really free, because he or she depends upon the private choices of those in Plot 2 through Plot 99 in order to achieve his or her goal of movement. As Ripstein writes, "every person is systematically subject to the choice of others," and accordingly, he suggests that the libertarian ideal does not secure freedom, properly understood.⁴¹ Ripstein asserts that instead, the state itself should make it possible for the individual residing in Plot 1 to reach Plot 100. Along these lines, he ultimately concludes that public roads are a precondition for the freedom of movement.

Conditions of equal public freedom and what Ripstein calls the rightful condition thus require public space for the exercise of certain critical constitutional rights. In what follows, I will argue that there is an important parallel to this argument. Just as the state has a fundamental obligation to secure public provisions and space as a condition of legitimate authority, it has a fundamental obligation to guarantee some realm of personal space for each individual in order to secure their innate rights, or freedom.

⁴⁰ Ripstein, *Force and Freedom*, 246.

⁴¹ Ripstein, *Force and Freedom*, 247.

James Madison on Property

Finally, the Madisonian account of property adds further consensus to the idea of property in one's person and a robust understanding of what that property entails. In his essay "Property," Madison makes clear that we have a property not only in ourselves and the things that we own, but also less tangible things that are somehow extensions of ourselves. He writes that property "embraces every thing to which a man may attach a value and have a right, and *which leaves to everyone else the like advantage* . . . He has a property very near to him in the safety and liberty of his person . . . In a word, as a man is said to have a right in his property, he may equally be said to have a property in his rights."⁴²

Madison's assertion that one has a property "in the safety and liberty of his person" and "in his rights" reinforce the Lockean and Kantian understandings of property in oneself and exclusive right to control one's life. The ideas are mutually reinforcing. Also, Madison provides a clear account for property intangible things—something present in both Locke and Kant, but most explicit here. Again, the common thread is property in oneself. For example, Madison expounds that "a man has a property in his opinions and the free communication of them."⁴³ Our absolute, fundamental right to control our person includes a right to control our thoughts and opinions, including how, and if, those thoughts are communicated. This reinforces the idea that we are entitled to exclusivity and control not only in ourselves, but in the intangible things that occur within a realm of personal space.

⁴² Madison, James. *The Founders' Constitution*. Vol. Volume 1, Chapter 16, Document 23. The University of Chicago Press, 1792.

⁴³ Madison, *The Founders' Constitution*.

From Property to Privacy

I believe that the Lockean, Kantian, Ripsteinian, and Madisonian accounts provide the grounds for a reorientation of the right to privacy. There are two major parts to this argument. The first part regards what gives rise to the right to privacy and the nature of the right. All are clear that you have an innate right, a property in your own person— this is what Locke calls self-ownership, and what Kant calls freedom as independence. On these accounts, having property in your own person is to have the exclusive power to *control* your person and capacities, or “means,” to pursue certain ends. Part of the right to control our property, which stems from our right to control our person, includes the absolute right to exclude others from our property. The right to privacy, therefore, is one such right that is required for us to claim our self-ownership and our innate rights. But the right to privacy does not merely mean a right to exclude others. It stems from a positive right to control our person, which generates a right to control our property and our “means” more generally. So, just as I can exclude people from myself and my “means,” I can control myself and my “means” in a way that protects how they are used by others, and the state should enable this control. Accordingly, I suggest that there is a realm of personal space, composed of ourselves, our thoughts, and those things most central to our purposiveness that are entitled to this absolute privacy. If this personal space is violated, one’s right to control their property is violated, and more fundamentally, their right to control themselves is threatened.

The second part of this argument regards the role of the state. I contend that the state has a positive duty to protect people’s property in their person, which includes the right to privacy. Though I explore what this positive duty entails further in Chapter 3, I discuss why the state has any such obligation here. The role of the state, on the Lockean account, is to more effectively

secure our property rights. For Locke, our first and most fundamental property is in our person. Similarly, for Kant, our innate rights are a precondition of private rights, and securing such innate rights are required for equal individual freedom. It thus follows that the most important role of the state is to secure our right to our own person (our self-ownership, our innate rights). So, the state has an obligation to recognize a right to privacy in this robust sense.

This requirement entails enforcing a boundary of personal space. As I outlined earlier, Ripstein suggests that we must enforce public provisions— like public roads— to secure some of the freedoms— like the freedom of movement— critical to establishing conditions of equal freedom. In parallel, I build upon this argument to suggest that the state must protect a right to privacy in a person and the tangible and intangible things integral to that person’s purposiveness. As roads are required for freedom of movement, a realm of protected “personal space” is necessary for full control of our lives and liberties, fundamental to our self-ownership and innate rights. In order to affirm equal individual freedom, the state therefore must enforce personal space, which includes privacy, to secure rights in one’s person.

In sum, the right to privacy is derived from one’s right to control their property and “means,” more generally, which is required for self-ownership and innate rights. Because the state’s role is to more effectively secure individuals’ property, and a property in one’s own person is the most fundamental property they have, the state’s foremost obligation is to protect one’s right to control their person. This requires that the state enforce and positively protect a realm of personal space.

The critical distinction between this approach and other approaches is the notion that property is about what we have the exclusive right to control and the constraint that is imposed upon others, not just the things that we have possession of. I contend that when something is

your property, in the most fundamental sense, it is something that you have the right to control, including by excluding others. It exists within a personal space that is critical for equal individual freedom. Other approaches, like that of W&B, misinterpret what a right to property really is. It is evidenced, however, that understanding property as a right to control allows us to reach the conclusions that W&B want to reach with ease.

In fact, W&B seem to *want* to reach the more expansive understanding of property that I do, or at least *gesture* towards it, but fail to do so because they get tripped up by the notion of property being control of other “stuff.” The right to privacy that they come to— “the right to be let alone—” is negative in nature, and therefore narrow and constrained. Yet, they also reference the principle of an “inviolable personality,” where privacy is “part of the more general . . . right to one’s personality.” While certainly not as robust, the references to control of one’s personality are somewhat similar to the Lockean and Kantian ideals that people, to be free, require a positive sense of control over their lives. But in their article, W&B fail to reach a standard that allows for, and requires the state to secure, this positive sense of control. Their failure lies in their dismissal of property as existing in things, even if those things are as expansive as “the products and processes of the mind, as words of literature and art, goodwill, trade secrets, and trademarks.”⁴⁴ If property is merely a “thing,” it is harder to form a principled argument for why prying eyes have no right to enter replications of it that I did not create.

Take the aforementioned example of a private letter between two individuals that a third individual replicates and shares. This example illustrates the logical nature of my approach, and its ability to reach sound moral conclusions using the property approach. W&B contend that no property law covers this replicated letter, because the initial two individuals have no claim of ownership over the letter. Thus, W&B dismiss property as a means to understand why that letter

⁴⁴ Brandeis and Warren, “The Right to Privacy.”

would be entitled to a privacy right. Instead, they suggest that it is covered under the vague and constitutionally ungrounded “right to be let alone,” which sets up the right to be broken down.

Under my framework, the wrong is clear, and protection is necessary. I have a property in my thoughts and the expressions of those thoughts on paper derived from my property in myself. This means that I have an exclusive right to control my thoughts and the expressions of those thoughts. By replicating and sharing the letter, the third individual is nonconsensually entering my private space and dominating my right to exclusively control how my thoughts are shared. In doing so, they are wronging me because they are ultimately subverting my exclusive control of myself.

We can see a similar outcome from the gem example that was previously explored. An account that understands property as merely ownership of things would fail to identify why it is wrong for a houseguest to make and distribute a detailed description of the homeowner’s hidden gem collection. After all, no physical trespass occurred, and no gems were stolen. On my view, the sentimentally valuable gems are something that the homeowner has control over. In making and sharing a description of those gems, the houseguest is usurping the homeowner’s right to control his or her property. In doing so, the houseguest is violating the homeowner’s exclusive right to control his or herself.

My understanding of property, which embraces property in both the negative and positive senses of liberty, thus enables a privacy protection over both tangible and intangible things, including reproductions of my speech or property. Importantly, however, not all things which I have a property claim to are necessarily subject to the right to privacy. This is because not all of my property is necessarily part of my protected personal space, which is integral to my self-ownership and innate rights. In other words, although I contend that all *personal* property is

subject to the right to privacy through an exclusive right to control, it is not necessarily true that all *private* property is subject to such a right to privacy. Even Karl Marx and Frederick Engels, thinkers taken as eschewing the liberal tradition, recognize a distinctive claim to personal property. In *The Communist Manifesto*, they help illustrate a distinction between personal property and private property. Marx and Engels argue only for the “abolition of private property.”⁴⁵ They clarify that by private property, they do not mean all objects. The duo write “Do you mean the property of petty artisan and of the small peasant, a form of property that preceded the bourgeois form? There is no need to abolish that.”⁴⁶ Instead, it is only “the kind of property which exploits wage labor” which needs to be abolished.⁴⁷ For Marx and Engels, the distinction lies in the *use* of the property because according to them, “To be a capitalist, is to have not only a purely personal, but a social *status* in the production.”⁴⁸ There is a distinction between property that is private property and personal property, and property that is private property. Marx and Engels were not interested in abolishing ownership of one’s bed or one’s toothbrush (personal and private property), they were interested in abolishing ownership of one’s factory or commercial entity (private property). This distinction thus helps explain why not all private property is entitled to the owner’s full control, and illuminates a path forward to determining a distinction for what counts as property that exists within one’s personal space.

Constitutional Grounding and Defense

So far, my account has addressed, at length, one of the problems that I identified with W&B’s approach: the misinterpretation of property rights. It has begun to explore the second

⁴⁵ Marx, Karl, and Engels, Friedrich. *The Communist Manifesto*. 1888 Translated Edition. Booklover’s Library Classics, 1848, 72.

⁴⁶ Marx and Engels, 72.

⁴⁷ Marx and Engels, 72.

⁴⁸ Marx and Engels, 72.

problem— a lack of positive control related to the right to privacy— which will be further expounded upon in Chapter 3. I now turn to the third contention which I took up with W&B— the lack of a constitutional grounding for their account. I argue that under my framework, the right to privacy is not merely penumbral. It is core. Not only can it be grounded constitutionally, unlike the murkily grounded right to an “inviolate personality” articulated by W&B, but it is foundational to the overall constitutional grounding.

Before unpacking why the notion of personal space is core to the Constitution, it is fruitful to understand where the Court has found the right historically. Importantly, the Court has not understood the right to privacy as core, but rather, as penumbral. It was not even until 1965, in *Griswold v. Connecticut*, that the right to privacy was formally recognized by the Court.⁴⁹ *Griswold* concerned a married couple’s ability to purchase and use contraceptives, free from state interference. The Court held that state law could not prohibit the sale and use of contraceptives to a married couple because the marital relationship falls under a “zone of privacy” secured in the “penumbras” of other Amendments, like the First, Fourth, and Ninth amendments. As Justice Douglas explains in his majority opinion, penumbras are “formed by emanations from those guarantees that help to give them life and substance.”⁵⁰ Thus, the Court suggests that penumbras from the Bill of Rights create “zones of privacy” upon which the state cannot infringe. In subsequent cases like *Roe v. Wade* (1973), a right to privacy was reaffirmed through the idea of penumbral rights and what the Court calls “substantive due process.”⁵¹ Ultimately, however, the Court overturned *Roe*, leaving many to question the security of the right to privacy as it affects personal relationships moving forward.

⁴⁹ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁵⁰ *Griswold v. Connecticut*.

⁵¹ *Roe v. Wade*, 410 U.S. 113 (1973).

Notably, while the right to privacy expounded in *Griswold* and subsequent cases is constitutionally grounded, it is not core. It is a mere “emanation” that serves to “strengthen” certain Amendments in the Bill of Rights, but it is not necessarily required for it. Consequently, the right to privacy does not stand on a clear principle and cannot be applied consistently across cases. Additionally, the right to privacy is weak. If the Court decides that one does not have an absolutely protected “zone of privacy” that allows them to make decisions about their reproductive health, then the right to privacy is simply not guaranteed there. My approach avoids a weak and unprincipled application of the right to privacy by emphasizing that it is foundational to the constitutional grounding. From a philosophical perspective, it is clear that a right to exclusive self-ownership is an integral right, if not the most important right, for the state to secure. Through Locke, I have already emphasized that the right to property in one's person is central, and thus states must protect privacy. But my understanding is also reflected in a plausible reading of the text of the Constitution. I will highlight the foundational nature of personal space in the constitutional scheme in two ways: through the preamble and through the Bill of Rights.

First, the preamble states that the Constitution is ordained and established in part to “secure the blessings of Liberty to ourselves and our posterity.”⁵² The whole intention of the Constitution is to guarantee enduring freedom. The language of liberty, as well as much of the Constitution’s aspirations, can be traced to the Declaration of Independence, which asserts that all men are entitled to the “unalienable Rights,” including “Life, Liberty, and the pursuit of Happiness.”⁵³ Numerous accounts have pointed to the significance of Locke’s influence on the

⁵² “U.S. Constitution | Constitution Annotated | Congress.Gov | Library of Congress.” Accessed December 4, 2022.
<https://constitution.congress.gov/constitution/?adlt=strict&toWww=1&redig=81A155A0016047FEB8A94195FB5D0667>.

⁵³ National Archives. “Declaration of Independence: A Transcription,” November 1, 2015.
<https://www.archives.gov/founding-docs/declaration-transcript>.

authors of the Declaration of Independence. This means that Locke's understanding of liberty, and its requisite of self-ownership, was likely recognized by the founders of the American constitutional scheme. Privacy as I characterize it can thus be seen as foundational to the constitutional scheme because it is one requirement of property in oneself, which is at the core of liberty.

Second, rather than seeing privacy as "formed by emanations" of the Bill of Rights, I see the Bill of Rights as being an articulation of specific aspects of a right to personal space. Also, and separately, personal space is a precondition for the meaningful exercise of these rights. Take the right to free speech in the First Amendment, for example. The First Amendment right to free speech makes explicit one application of the right to personal space. Within our personal space, we have a right to control our thoughts and opinions, including the choice whether or not to express those opinions. As such, choosing to express those opinions through free speech applies the right to personal space. Likewise, having personal space can be seen as a requirement for the authentic formation of thoughts and opinions.

Consider also the Third Amendment, which prohibits the nonconsensual quartering of soldiers in individuals' homes. It is not that this right gives rise to a "zone of privacy" within the home, but rather, the Amendment is making explicit one application of the fundamental right to property in ourselves, which extends to control of our homes. It is *because* we have an exclusive right to control our person and our property that we have the Third Amendment. These arguments can be replicated for much of the Bill of Rights, including the 4th Amendment (right to be secure in our persons and affects) and the 5th Amendment (due process, takings clause, and self-incrimination).

The examples of the preamble and the Bill of Rights suggest that the guarantee of personal space is evident in both the *philosophy* of the Constitution and the *text* of the Constitution. As such, guaranteeing personal space is core to the constitutional scheme, and judges must uphold it in order to properly protect freedom.

Kantian Property and Supreme Court Precedent

Now, the argument for why the state and Constitution secure property in oneself is clear. But how novel would it be for the state to take a more expanded approach to property rights? The strength of understanding privacy through the lens of property in oneself, where property means a right to control, stems from more than just a plausible constitutional grounding. Although in a limited way, the philosophy of the Court's prior rulings has gestured towards a more Kantian understanding of property. Though evident in many areas of property law, I focus on the Court's 5th Amendment jurisprudence— the area of jurisprudence that deals most directly with property. The Court acknowledges that to own property is not just to have mere *possession* of that property, but to have *use* of that property, and a right to control it. Cases on the 5th Amendment's Takings Clause are cases that debate the extent of people's right to control their property. In part, the 5th Amendment promises "nor shall private property be taken for public use, without just compensation."⁵⁴ This recognition of eminent domain is called the "Takings Clause." It is one of four instances in which property is mentioned within the Constitution.⁵⁵ Initially, the Takings Clause was thought to only be applied with reference to a "direct appropriation" of property, like in instances where the government forces someone off their land in order to use it for a different purpose.⁵⁶ However, the application of the Takings Clause evolved as Justices recognized that

⁵⁴ "U.S. Constitution | Constitution Annotated | Congress.Gov | Library of Congress."

⁵⁵ "U.S. Constitution | Constitution Annotated | Congress.Gov | Library of Congress."

⁵⁶ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

there is more than just losing *physical* possession of something that deprives someone of their property rights, properly understood. I use two cases regarding per-se takings— *Loretto v. Teleprompter Manhattan CATV Corp* (1982) and *Lucas v. South Carolina Coastal Council* (1992) to highlight the expanded understanding of property rights that the Court undertook.

Loretto questioned whether a physical occupation of private property, even if small in scale, would constitute a taking under the 5th Amendment. Specifically, at issue was a New York statute which required that landlords allow a cable television provider to install its equipment on their property. Further, the statute barred the landlord from requesting payment from the company at any amount greater than what was determined to be a reasonable payment by the State Commission. In the case of the cable television equipment, that amount was established to be one dollar. A landlord who had recently purchased a five-story apartment building in New York City learned that equipment had been installed by the cable television provider without his consent. In response, he sued under the claim that the statute constituted a “taking” under the meaning of the 5th Amendment.

In delivering the opinion of the Court, Justice Marshall employs a philosophy of property that gestures towards a more Kantian understanding. His opinion emphasizes that ownership is not about possession, but about use rights, and demonstrates that property relates to rights to control. He ultimately finds that the New York statute is unconstitutional, holding that a physical invasion of someone’s property backed by the state, no matter how minor, constitutes a taking under the 5th Amendment and thus requires just compensation. Throughout the opinion, Marshall maintains an emphasis on the idea of control. For example, he writes that “the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the

property.”⁵⁷ Marshall stresses that having a right to property in something means that we should, ideally, have exclusive control over that thing and how we use it. Property to him, like to me, is not just a physical thing or space that someone has possession of. It is something that they have the active power to use and control.

Although not as directly, the Court also articulates an openness to this expanded understanding of property in the *Lucas* decision. At issue in *Lucas* was the alleged “taking” of Lucas’s land through regulation. Lucas had purchased two adjacent lots upon which he intended to build single-family homes. Subsequently, the Southern Carolina legislature enacted the Beachfront Management Act, which barred Lucas from building such homes in the interest of protecting environmental destruction and preserving tourism. Lucas sued, claiming that the limitations imposed by the regulation in effect constituted a “taking” under the 5th Amendment, despite no physical intrusion or physical seizure of his land. Lucas maintained possession of his property, but his control over its economically viable use was stifled.⁵⁸

The majority opinion, authored by Justice Scalia, affirmed a taking despite the lack of physical trespass or seizure. In doing so, it expanded the enduring test for required compensation, which at the time assessed “whether the legislature has recited a harm-preventing justification for its action.”⁵⁹ Scalia insisted that the harm-prevention justification test essentially allowed legislatures to be “artful” in order to avoid providing just compensation for land that they had regulated.⁶⁰ Instead, he suggested that when “a regulation that declares ‘off-limits’ all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.”⁶¹ Although the decision is

⁵⁷ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

⁵⁸ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

⁵⁹ *Lucas v. South Carolina Coastal Council*.

⁶⁰ *Lucas v. South Carolina Coastal Council*.

⁶¹ *Lucas v. South Carolina Coastal Council*.

made in terms of economic productivity, the principle underlying it is similar to that in *Loretto*. Scalia, a constitutional originalist notorious for sticking strictly to the text, decides that just compensation must be given even when land isn't actually, physically taken. To Scalia, we are deprived of our property rights when state action profoundly affects the viability of the property, which is one specific use of property.

The reasoning from the majority in both *Loretto* and *Lucas* thus reflect, to some extent, the idea that property ownership is about something more than just possession of something physical. The Court recognizes that ownership is about use rights, and in much of the Takings Clause jurisprudence, weighs and debates the extent of those use rights. Property, to some extent, entails a right to control something. This line of reasoning from the Court, which is duplicated in many other areas of property law, is significant for my account. It shows that my Kantian proposition of property rights, which hinges on ownership as use rights, is not entirely off-base from current legal understandings of property. In fact, the Court might even be gesturing towards it. Not only is my theory consistent with the constitutional scheme, but there is evidence that it is a plausible legal theory.

2 | Applying the Approach

“The Party seeks power entirely for its own sake. We are not interested in the good of others; we are interested solely in power— pure power.”

- George Orwell, 1984⁶²

Privacy Through Property in Oneself: What is Protected Today?

I have now established that the Courts have been thinking about privacy in a fundamentally wrong way, and I have proposed a reorientation about how we think about privacy in the legal sense. This reorientation entails deriving a right to privacy from an exclusive property in one’s person, which includes a right to control one’s person. Having established the theory, it is beneficial to apply it in order to unpack how such a reorientation would change current legal protections. In this chapter, I apply my theory to the most pressing topic of privacy today: data. I argue that while the current U.S. law fails to provide clear grounds for data ownership and consequently lacks national data privacy legislation, my theory would require that individuals have exclusive control over their personal data, which includes a privacy right. I support this claim by using the example of advertising technology (AdTech) to illustrate the wrong associated with commercialized use of our aggregated personal data.

According to American legal scholar and professor Aziz Z. Huq in an article for the *Boston Review*, there is currently no clear answer in the U.S. law about whether people have ownership of their personal data.⁶³ Huq highlights how pundits have been quick to name personal

⁶² Orwell, George. 1984. Penguin Clothbound Classics. London, England: Penguin Classics, 1949.

⁶³ Huq, Aziz Z. “Who Owns Our Data?” *Boston Review*, 2021. Accessed December 4, 2022. <https://www.bostonreview.net/articles/who-owns-our-data/>.

data the “new oil” because commercial entities are realizing, and rapidly taking advantage of, a rich asset that was previously unknown and underutilized.⁶⁴ However, Huq notes that the process of extracting data is unlike the labor-intensive process of extracting oil. Almost effortlessly for commercial entities, individuals’ personal data is produced “through [people’s] daily jaunts across social networks such as Facebook and TikTok. [They] exude it when [they] browse the Internet, triggering electronic tracking ‘cookies’ that advertisers have cunningly strewn across the web. It is pumped forth from [one’s] muscles as soon as [they] strap on a Fitbit or turn on a directional service while walking or driving to school.”⁶⁵ Personal data, therefore, captures and aggregates individuals’ information, behavior, movement, and more in such a way that makes it an enormously valuable commercialized asset. Commercial entities benefit from consumer data without the massive undertaking of extracting oil, and often extract it from consumers “unwittingly.”⁶⁶

While it is easy for commercial entities to extract and utilize personal data from consumers, consumers do not have equal ease in control of their data— in fact, consumers aren’t even considered to have ownership rights in their data. And Huq is pessimistic about the prospect of the U.S. law recognizing individual ownership of their data in the technological context. He cites the Supreme Court’s holding in *International News Service v. Associated Press* (1918) that the U.S. law does not recognize a property interest in facts. Because property is the primary way to legally establish protections under U.S. law, and there is no clear property right to one’s data, it unfortunately makes sense that under current law people are lacking a robust right to privacy over their data. In my terms, since the Court doesn’t recognize people as having a property in

⁶⁴ Huq.

⁶⁵ Huq.

⁶⁶ Huq.

their data, people do not have a clear right to control their data. The lack of control that Americans have over their data is reflected in the absence of comprehensive national data privacy legislation.

Under my proposed reorientation of privacy, however, it would not just be *plausible* for people to have control over their personal data in the technological context—it would be *required*. There are two reasons why, under my account, individuals must have exclusive control over their personal data. First, and most critically, personal data is directly derived from one's person, and thus having property in oneself necessitates having property in one's data. Second, and more narrowly, the nonconsensual use of individuals' personal data violates Kant's innate right. The first point is straightforward. Our right to control our data, which includes the right to exclude others from that data, is derived from our property in ourselves. Our personal data is an extension of ourselves, and would not exist without us. As such, it resides within what I call our personal space. Because it exists within our personal space, and is an integral part of ourselves, we have a claim to have exclusive control over it.

To further illustrate, consider a parallel to the Madisonian argument about thoughts. For Madison, an absolute right to control our person includes a right to control those intangible effects that are derived from our person, like our thoughts and opinions. Individuals have the exclusive authority to determine if, and when, to share their thoughts and opinions. Even when individuals do share an opinion in something like a personal letter, the recipient of the letter does not have the authority to further share that person's thoughts. Personal data is similar to one's thoughts in that they are an intangible personal effect that would not exist without that person's formation of them. Individuals similarly have the exclusive authority to determine when to share

those pieces of personal information about themselves, and sharing them does not entail a license on the recipient to further share that data.

Second, the use of individuals' personal data often violates their ability to set and pursue their own ends through a usurpation of their means. Without having robust protection of our personal data, our innate right, or self-ownership, is violated. Recall that to Kant, as explained by Ripstein, "You are independent if you are the one who decides which purposes you will pursue."⁶⁷ One such way that people pursue their purposes is through the use of their property, where property rights must "constrain others even when the owner is not in physical possession of an object."⁶⁸ In terms of property, one's innate right is violated when individuals lose control of the ability to decide what purposes they will pursue or to pursue those purposes using their property.

The non-consensual use of personal data violates the innate right because the data is used in a way that limits individuals' capacity to pursue their own ends, free from constraint, by depriving them of full control of their means. AdTech usurps consumers' personal data to advance goals of profit maximization, using consumers as a "mere means" to those goals. In the online world, consumers are subject to exploitative algorithms that are designed to manipulate and alter their choices. In Data&Society's "Weaponizing the Digital Influence Machine: The Political Perils of Online Ad Tech," Anthony Nadler, Matthew Crain, and Joan Donovan explain the extent to which aggregated personal information data alters consumer choices, from choices that seem unimportant (where should I buy my coffee?) to choices that are significant (for whom should I cast my vote for President?) Nadler et. al. characterize the scheme of AdTech as the

⁶⁷ Ripstein, *Force and Freedom*, 14.

⁶⁸ Ripstein, *Force and Freedom*, 91.

“Digital Influence Machine,” named as such because it entails “a system that’s been constructed to allow its operators (advertisers) to act upon objects (targets of influence) with amplified technological force.”⁶⁹ Nadler et. al. explain how extensive tracking efforts, across platforms and grounded in surveillance, create comprehensive “profiles” of users. These profiles help advertisers tailor their approaches to specific individuals in order to achieve their ultimate goal—manipulation.

These manipulation tactics use information about the consumer against themselves in order to alter their behavior. For example, Nadler et. al. point to how “In 2015, anti-abortion groups employed a digital ad agency to use mobile geo-fencing targeting to send ads to women who visited Planned Parenthood and other reproductive health clinics across the US.”⁷⁰ The targeted women received anti-abortion ads across platforms for a month after leaving the clinic, and only received such advertisements because their locations had been tracked and vulnerabilities identified. The anti-abortion, geolocation-based advertising is a prime example of how the use of persona data creates an informational asymmetry which allows third parties to exploit consumers and alter their decision making.

The “Digital Influence Machine” is problematic from a Kantian perspective because it threatens freedom as independence by usurping individuals’ property in themselves. Under my account, such a scheme would not be possible because the use of personal data to manipulate the consumer would be seen as a violation of the innate right, or in my terms, the right to exclusive property in oneself. When third parties access personal consumer data and use that data to

⁶⁹ Nadler, Anthony, Matthew Crain, and Joan Donovan. “The Political Perils of Online Ad Tech,” Data & Society Research Institute, 2018, https://www.datasociety.net/wp-content/uploads/2018/10/DS_Digital_Influence_Machine.pdf

⁷⁰ Nadler et. al. 15

influence consumer choices, they are usurping that consumer's property in themselves and consequently undermining their ability to set and pursue their own ends. Instead, because consumers would have an exclusive right to control their data, they would have a secure and robust right to exclude others from their data. In other words, they would have a privacy right to their data. As such, no "Digital Influence Machine" could exist if the law approaches privacy as I propose it does.

Skeptics of my approach might question whether any advertising scheme that could be seen as threatening an individual's independence would be impermissible under my principle. That is not the case. There is a meaningful difference between an advertisement that airs on television and an online ad targeted to a specific consumer based on the use of their personal data. The difference lies in the use of personal data— something that individuals are entitled to exclusive control over, unless explicitly consented to give away for other's use. Advertisements in magazines or on television do not deprive individuals of their "means," like personal data, and use that individuals' means to advance their *own* ends. It is that deprivation that makes the specific complex of AdTech so problematic.

Benefits of AdTech: Ripstein on Wrongs and Harms

Some might claim that while potentially manipulative, such targeted advertising practices should not be seen as problematic because the practices might not harm consumers— they might even benefit them. In fact, at an initial Congressional hearing on internet privacy, a Direct Marketing Association representative argued that harms associated with consumer data collection for advertising would be "minimal, and outweighed by the beneficial uses of the

information, such as improving the visitor's experience through personalization.”⁷¹ Survey data also shows evidence that at large, people appreciate more personalized advertisements. For example, a survey run by advertising personalization specialist A Million Ads found that in the UK, 61% of consumers were happy for their personal data to be used by third parties to personalize ads.⁷² Nadler et. al. note in their report that this argument, which centers data collection around consumer benefit, is a large part of what has kept excessive outcry and regulation at bay.

What those who emphasize the benefits of AdTech misunderstand, however, is the distinction between a wrong and a harm. Even if such a scheme of targeted advertising does not harm someone, and even *benefits* someone on balance, that does not mean that it does not *wrong* that person. The meaningful distinction between a wrong and a harm, and its application to the Kantian argument, is best put forth by Arthur Ripstein in “Beyond the Harm Principle.” In the article, Ripstein responds to a dominant perspective that legal coercion is only justified when the action of one individual in effect harms another individual. Ripstein takes issue with this understanding, known as the “harm principle,” in part because there are instances when no *harm* occurs, but there is an obvious *wrong* to someone's rights. He illustrates this example through the idea of a harmless trespass. He asks us to suppose that an individual enters another person's home, takes a nap there, and leaves. In doing so, that individual leaves no physical trace of having entered, or napped in, the home. Ripstein contends that most everyone can identify that

⁷¹ Cerasale, Jerry. Direct Marketing Association, Inc. July 13, 1999. Electronic Commerce: The Current Status of Privacy Protections for Online Consumers. House Commerce Comm. Subcomm. Telecom, Trade, Consumer Protection. Serial No. 106-39.

⁷² MacRae, Duncan. “Consumers Happy for Advertisers to Use Personal Data to Personalise Ads.” Marketing Tech News, June 18, 2021.
<https://www.marketingtechnews.net/news/2021/jun/18/most-consumers-are-happy-for-advertisers-to-use-personal-data-to-personalise-adverts/>.

there is something seriously wrong with the napper's actions. But he points out that ordinary understandings of the harm principle would not take issue with the harmless trespass because the wrongdoing amounts to no effect.⁷³

Instead, Ripstein suggests that we can identify wrongdoing on behalf of the napper by assessing whether, in Kantian terms, mutual independence was violated. Independence requires the ability for people to set and pursue their own ends, and in doing so, for each person to use what Ripstein calls their "powers" as they see fit. These "powers" are analogous to Kant's "means." Along these lines, Ripstein articulates that in the napping example "I wrong you by using the powers that are external to your person— your property— without your permission."⁷⁴

The napper using an individual's bed is analogous to the case of a company using a consumer's data. Just as the napper does not harm the owner of the house, the company does not necessarily harm the consumer— they might even benefit them by pointing them in a favorable direction. But the core issue is that in both cases, the napper and the company did not have the authority to usurp the homeowner's and consumer's property, respectively, and use it for their own ends. So, regardless of whether the victim was harmed or benefited, they were undoubtedly wronged in a way recognizable by the law.

In conclusion, the most significant consequence of my approach to privacy is that it provides a strong, principled legal grounds for individuals to have control over their data— something they are lacking under current law. It is almost self-evident that having property in ourselves requires having property in our data, which means we have an exclusive right to

⁷³ Ripstein, Arthur. "Beyond the Harm Principle." *Philosophy & Public Affairs* Vol. 34, no. No. 3 (May 28, 2008): 216–46, 218–221.

⁷⁴ Ripstein, "Beyond the Harm Principle," 240.

control our data. On a more granular level, an insecure ability to own and control our data is problematic in a Kantian sense because it violates one's exclusive ability to use their means in order to pursue their ends, independent from the arbitrary will of others.

Debates about the benefits of AdTech can loom, but there is no question under this account that there is a distinct wrong when a third-party usurps one's personal data without consent. But it is that last part—“without consent”—that might raise eyebrows for some people. Surely, people are given a choice with regards to their personal data every day, and they choose to give it up. I think it is not so black and white. It is to the “consent exception” that I now turn.

3 | Securing the Right: the Consent Exception

Personal Space and Positive Rights

At this point, I have proposed a reorientation for the right to privacy and defended that reorientation in the context of the constitutional scheme. I have also illustrated why the objects of greatest interest in privacy discussions today— personal data— must be protected under my understanding of privacy. In other words, I have made the case for a *formal* protection of a robust privacy right— one that includes a privacy right to one’s personal consumer data. But there is a final part of my approach to the right to privacy: securing the right.

The final aspect of the approach is grounded in Ripstein. There is another important implication from Ripstein’s road analogy that is helpful when thinking about the right to privacy in the positive sense. His analysis highlights an important distinction between recognizing a right to privacy in the formal sense and safeguarding the exercise of that right. Earlier, Ripstein’s *Force and Freedom* illuminated the state’s obligation to establish public provisions in order to secure conditions of equal freedom. In parallel, this paper argues that the state has a positive obligation to protect a realm of “personal space” necessary for full control of one’s lives and liberties, which is integral to securing conditions of equal freedom. The control of personal space includes a right to privacy, and so the state has an obligation to protect a right to privacy.

Ripstein’s example of public roads is further helpful to explore the distinction between recognizing a right and securing that right in a meaningful way. His example highlights that recognizing a formal right is not sufficient; the state must act positively to effectively secure the right. Recall that a right to association is necessary for securing a rightful condition. Ripstein argues that recognizing a formal right to association, as is the case in the libertarian society, is not sufficient. Public roads are necessary in order to secure the effective exercise of the right to

association; to make the right meaningful. Thus, the state must take positive action to secure the right to association by creating, funding, and maintaining roads.

The principle that the state must actively secure the conditions for the effective exercise of formally protected rights extends to personal space. Currently, these conditions are not secured. People rely on third parties in order to access the modern technologies, like cell phones and the internet, that are critical to functioning in today's society. Third parties— typically businesses— are thus in a power position. Businesses can coerce consumers into relinquishing their formally recognized rights, like the right to privacy, because businesses know that consumers depend upon the services they offer. When such ethically troubling coercion occurs, one's personal space is not effectively enforced, even if formally promised. Accordingly, the state must take positive steps in order to secure the conditions for the effective exercise of the right.

Specifically, the exploitation of business power and consequent undermining of privacy protections is evident when consumers consent to expansive use and sale of their personal data. Under this account, and also under current understandings, the primary way in which someone can enter another person's personal space is through consent. By voluntarily opening my door to you and inviting you inside my home, I have consented to your entry into part of my personal space.

That example— physical entrance into one's home— does not align with the settings in which people most often give consent in the modern world. Instead, consent to enter into one's personal space occurs most frequently in cyberspace, despite no *physical entrance* being required. Take the following examples. Under this paper's approach, people are entitled to a right to privacy with respect to computed information like geolocation data or aggregated personal

characteristic data. It thus follows that use of this data by third parties would require consent—and, though current law does not necessarily recognize consumer ownership over data, it still often requires consent for use of the data.

Today, people consent to major invasions of their personal space on a daily basis. In signing a smartphone contract with a service provider like AT&T or Verizon, people “consent” to having their incoming and outgoing calls, incoming and outgoing text messages, frequency of internet access, and cell tower geolocation data collected, retained, and even shared by the service provider.⁷⁵ A 2015 Pew Research Center report found that most Americans use cell-phones like “body appendages,” with a whopping 90% of surveyed cell phone users saying that they “frequently” carry their phone with them.⁷⁶ Hence, cell-phone service providers retain, and often share, logs of most Americans every movement. Importantly, they are able to do this because people “consented” to it in their phone contracts.

There is a similar story with the various applications and websites people use. People inevitably leave a data trail wherever they go in cyberspace. The primary way that free-to-use applications and websites make their money is by making the consumer the product.⁷⁷ The data that users generate is not limited to use by that application, but is collected, aggregated, and sold to third parties—that is how the free services make their money.⁷⁸ According to an Apple report from 2021, iOS and Android apps have, on average, six trackers.⁷⁹ Throughout the day, much

⁷⁵ “Smartphone Privacy | PrivacyRights.Org.” Accessed December 4, 2022.

<https://privacyrights.org/consumer-guides/smartphone-privacy>.

⁷⁶ Rainie, Lee. “Chapter 1: Always on Connectivity.” *Pew Research Center: Internet, Science & Tech* (blog), August 26, 2015.

<https://www.pewresearch.org/internet/2015/08/26/chapter-1-always-on-connectivity/>.

⁷⁷ “Here’s Exactly What You Agree to When Accepting Terms and Conditions.” Accessed December 4, 2022.

<https://www.cbs58.com/news/what-exactly-are-you-agreeing-to-when-accepting-terms-and-conditions>.

⁷⁸ “Here’s Exactly What You Agree to When Accepting Terms and Conditions.”

⁷⁹ “A Day in the Life of Your Data,” Apple, April

2021. https://www.apple.com/privacy/docs/A_Day_in_the_Life_of_Your_Data.pdf

information is collected, including but not limited to location, online behavior, demographic information, purchasing habits, photos, and contact information.⁸⁰ These trackers allow third-parties “to collect and link data [an individual has] shared with them across different apps and with other data that has been collected about [that individual].”⁸¹ This data is most often aggregated and sold by data brokers to third-party companies who never had a direct relationship with the consumer.⁸² And, as is the case with cell-phone service contracts, people “consent” to the collection and sale of this information— this time, though lengthy, convoluted “Terms and Conditions” agreements.

The consequences of technological invasion in one’s personal space is, as I have established, problematic from the Kantian perspective. When we lose control of our data, we lose control of ourselves. The right to privacy, even if formally established, is constantly resigned in the schemes described above. So, why are people so willing to consent to such an intense invasion of their privacy? I contend that in actuality, they are not. In what follows, I will argue that in relation to privacy and technology, the law understands consent in systematically distorted ways. Agreeing to cell-phone contracts and terms and conditions agreements is not meaningful from a rights-based perspective when such agreement is necessary for participation in modern society. Consent to such agreements is coerced, and therefore, should be viewed as illegitimate. Even if the law embraces the more robust understanding of privacy that this paper proposes, the right is not effectively secured if third parties can exploit their asymmetric power and extort personal data from individuals. Thus, it is critical that the state take positive steps to regulate third parties in relation to their definitions of legitimating consent in order to create the conditions that effectively secure the right to privacy.

⁸⁰ “A Day in the Life of your Data.”

⁸¹ “A Day in the Life of your Data.”

⁸² “A Day in the Life of your Data.”

Understanding Illegitimate Consent

Why should one be concerned with the way that businesses establish user consent to access their services? Consent that hinges on an illegitimate, practically involuntary choice cannot constitute legitimating consent. If someone is able to put another individual in a situation where there is no legitimate choice, or if one is part of a social structure where there is no legitimate choice, ethically concerning coercion occurs. I illustrate my definition of illegitimate consent using Supreme Court precedent. The 2019 case *Mitchell v. Wisconsin* offers a portrait of how consent is often understood in systematically distorted ways when it relates to “choice” situations influenced by social structures. *Mitchell* highlights the issue of consent because it was decided wrongly in that respect; even the dissenting opinion fails to grasp the full significance of the underlying consent problem. The petitioner in the case, Gerald Mitchell, was found stumbling along the side of the road close to his parked van.⁸³ After a preliminary blood alcohol content (BAC) test showed that Mitchell was over the legal driving limit, he was arrested. The police officers took Mitchell to the station for a follow-up test with superior equipment. Upon arriving at the station, Mitchell was too lethargic for a breath test, and was then transported to the hospital for a blood test. However, once they reached the hospital, Mitchell was unconscious. Given the direction of the officers, the hospital proceeded to draw his blood. The state contends that doing so was in accordance with a Wisconsin “implied consent” law that assumes that a person who is not capable of withdrawing implied consent has not done so. Mitchell was then convicted because his BAC exceeded the legal limit in Wisconsin. Mitchell contended that the blood test violated his Fourth Amendment right against “unreasonable searches” since the

⁸³ *Mitchell v. Wisconsin*, 588 U.S. ____ (2019).

officers did not obtain a warrant to test his blood, and challenged the blood test along these lines.⁸⁴

The majority opinion, authored by Justice Alito, affirmed the constitutionality of the state's actions.⁸⁵ Alito framed the case narrowly, writing that the primary issue under consideration was the circumstances in which an officer can issue a BAC test without a warrant. He thus positioned the case within existing Fourth Amendment case law relating to warrantless BAC searches, drawing heavily upon two points: the time-sensitive issue of BAC and the exigent circumstances doctrine. Ultimately, he found that the case of a warrantless blood draw for a potentially drunk driver satisfied the requirements for exigent circumstances under the Fourth Amendment, which entail a “compelling need for official action” and “no time to secure a warrant.”⁸⁶ As such, the action of the state was upheld.⁸⁷

In my view, the holding is flawed because the majority does not critically address the aspect of the case which is most troubling from a constitutional perspective: the Wisconsin “implied consent” statute. The statute, Wis. Stat. 343.305(2), reads that “Any person who . . . drives or operates a motor vehicle upon the public highways of [Wisconsin] is deemed to have given consent to one or more tests of his or her breath, blood, or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol . . . a person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent.”⁸⁸ What is critical to notice in this statute is that giving consent to such blood draws is a

⁸⁴ Mitchell v. Wisconsin.

⁸⁵ Mitchell v. Wisconsin.

⁸⁶ Mitchell v. Wisconsin.

⁸⁷ Mitchell v. Wisconsin.

⁸⁸ “Unconscious Mistake: Wisconsin Implied Consent Statute Upheld for Wrong Reasons – Marquette University Law School Faculty Blog.” Accessed December 4, 2022. <https://law.marquette.edu/facultyblog/2019/07/unconscious-mistake-wisconsin-implied-consent-statute-upheld-for-wrong-reasons/>.

condition of operating a motor vehicle in Wisconsin— anyone who drives, by virtue of that action, gives consent to a blood test.

Although Justice Sotomayor’s dissenting opinion takes up the issue of the Wisconsin law more directly than the majority, it still fails to grasp the full significance of the problem. Sotomayor frames her dissent around the necessity of a warrant for alcohol-related blood draws, insisting that the majority overstates the time-sensitivity issue and that Fourth Amendment precedent is at odds with the majority’s decision.⁸⁹ In her words, “The state of Wisconsin conceded in the state courts that it had time to get a warrant to draw Gerald Mitchell’s blood, and that should be the end of the matter.”⁹⁰ Midway through the opinion, Sotomayor includes a short section on consent as it relates to the Wisconsin law. She emphasizes the intimate nature of blood, writing that a blood draw “‘places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading,’ . . . such as whether a person is pregnant, is taking certain medications, or suffers from an illness. That ‘invasion of bodily integrity’ disturbs an individual’s ‘most personal and deep-rooted expectations of privacy.’”⁹¹ Blood, by its nature, is a powerful and revealing entity that is most close to one’s person. It is critical that people have the right to control it— and that right to control is stripped away by the Wisconsin statute.

On the issue of the statute, Sotomayor states that the one aspect of the majority opinion that she agrees with is the lack of a reliance on the consent exception. She goes further, though, than simply not using the statute as grounds for constitutionality in the case. Sotomayor claims that “the state statute, however phrased, cannot itself create the actual and informed consent that

⁸⁹ Mitchell v. Wisconsin, 588 U.S. ____ (2019), Sotomayor Dissent.

⁹⁰ Mitchell v. Wisconsin, Dissent 1.

⁹¹ Mitchell v. Wisconsin, Dissent 5.

the Fourth Amendment requires.”⁹² She does not expand her commentary beyond citing several cases that offer definitions of consent under the Fourth Amendment, such as the requirement from *Bumper v. North Carolina* (1968) that consent must be “freely and voluntarily given.”⁹³

Although it is beneficial that Sotomayor highlights the issue of consent, neither her dissent nor the majority take a clear challenge on the constitutionality of the Wisconsin statute with respect to its depiction of consent. In my view, what is *most* problematic about the case at issue is the Wisconsin statute’s depiction of legitimating consent. In Wisconsin, if someone drives a car, they are consenting to blood draws and various other intrusion to their personal space by virtue of that action. But driving is an everyday activity. 89% of adults in the US have a drivers’ license.⁹⁴ Not only is driving an everyday activity, but it is also a *necessary* activity. People rely on driving in order to exercise their freedom of movement and carry out their daily responsibilities. Thus, if given a choice between driving or not being subject to a blood test under certain circumstances, nobody will realistically choose the latter option. In this situation, there is no *choice* to be made, properly understood. Wisconsin drivers are put into a choice situation that, because of the structure of society, is coercive in a way that is ethically concerning.

While I do not provide a robust account of consent, I do make an argument for what consent requires to be legitimating. When people do not have what I call a “legitimate” choice to make—like the choice between being licensed to drive or not consenting to a blood test—the consent they give is coerced. It is important to note, though, that not all choices that have only one obvious answer are ethically concerning. For a choice situation to be ethically concerning, one must be put in that choice situation because of social structures or other people. If the system

⁹² Mitchell v. Wisconsin, Dissent 7.

⁹³ Mitchell v. Wisconsin, Dissent 7.

⁹⁴ admin. “Number of Licensed Drivers in US in 2023.” Hedges & Company, October 17, 2018. <https://hedgescompany.com/blog/2018/10/number-of-licensed-drivers-usa/>.

is structured to not secure one's equal individual freedom, and consequently that individual is in an illegitimate "choice" situation, ethically concerning coercion occurs. Suppose that an individual freely chooses to go ice climbing for sport. During the climb, suppose that this individual gets her arm lodged in a crack. Due to the cold temperatures, if she does not cut off her arm and free herself, she will die. In this way, she is coerced by the circumstances, but the coercion is not ethically concerning. Now, take the example in *Mitchell*. The social structure demands that people drive in the state of Wisconsin. Because of the social structure, people are put in a situation where they have no legitimate choice but to consent to blood draws and other bodily intrusions. Because the individual is placed into an illegitimate choice situation by the structure of society, the coercion that occurs is ethically concerning.

When a choice is coerced in an ethically concerning way, any "consent" given is illegitimate. This notion of illegitimate choice reflects that of "sleep with me or you're fired" or "your money or your life." In all instances, people technically *choose* to drive, sleep with their boss, or hand over money, but in all scenarios there was no other *legitimate choice* to be made because of societal structures or the will of others.

What constitutes legitimating consent? Put briefly, if consent given when there is no other legitimate choice is coerced and thus illegitimate, then a legitimate choice is required in order to give legitimating, uncoerced consent. When someone has a legitimate choice, it means that they are not unethically coerced by some force or individual— the necessity of functioning in society, of keeping their job, of saving their life— into making a particular decision. If the state has secured conditions of equal freedom, someone signing an offer for a new job would constitute legitimating consent to the contents of that offer because that person had a free choice whether to remain at their current job or pursue a new one.

According to this understanding of consent and choice, individuals are not able to give legitimating consent online. The reason that consent is troubling in the statute governing *Mitchell v. Wisconsin* (2019) is the same reason that it is troubling in the formerly mentioned technology-based examples of cell-phone service contracts and terms and conditions agreements. The argument that we cannot see signing a cell-phone contract as meaningful acceptance of contractual conditions of use is best outlined by Justice Roberts in *Carpenter v. United States* (2018). *Carpenter* builds on the *Riley v. California* (2014) decision, holding that the warrantless search and seizure of mobile phone records from a third party service is unconstitutional.⁹⁵ In the majority opinion, Chief Justice Roberts reasons that “cell phones and the services they provide are ‘such a pervasive and insistent part of daily life’ that carrying one is indispensable to participation in modern society.”⁹⁶ Because people’s cell phones are almost an extension of themselves, one’s location is most always tracked, collected, and retained. But does that constitute legitimating consent? Not under my account, and this reasoning is supported by Roberts. Given the necessity of cell phones, he concludes that “in no meaningful sense does the user voluntarily ‘assume the risk’ of turning over a comprehensive dossier of his physical movements” by use of a cell phone.⁹⁷ His reasoning parallels the example of driving a vehicle. Just as one has no other legitimate choice than to drive, owning a cell phone is a necessary condition of modern existence. People access necessary technologies through third parties. Third parties, because of this power, are able to put people into unethical choice situations that render the right to privacy insecure. We can not be understood as freely consenting to things that are contractual conditions of owning a cell-phone when such ownership is not optional based on the

⁹⁵ *Carpenter v. United States*, 588 U.S. ____ (2018), *Riley v. California*, 573 U.S. 373 (2014).

⁹⁶ *Carpenter v. United States*.

⁹⁷ *Carpenter v. United States*.

social structure. Because of the social structure, third parties can put people into choice situations where signing the contract is coerced in an ethically concerning way.

The story is the same for terms and conditions agreements. Much like driving a car, or carrying a phone, using the internet is an integral part of existence in modern society. People cannot function without accessing information on the internet, which they depend on third parties to do. They have *no choice* but to accept the “terms and conditions” to proceed to various websites. Third parties put people into unfair choice situations. Hence, private companies are constantly taking and using, without legitimate consent, large amounts of personal data from consumers.

Creating the Conditions for the Right to Privacy

If third parties have the power to put people in ethically concerning choice situations that amount to illegitimate consent, then even if the law embraces a robust right to privacy like this paper proposes, the right is effectively insecure. Without roads, the right to free movement and association is not effectively secured. People might by the letter of the law have an unqualified right to free movement, but because people depend on private choice to exercise that right, the right cannot be effectively exercised. Similarly, without some government regulation of third party companies and their consent doctrines, the right to privacy cannot be effectively secured. People might have a formal right to privacy, but because they depend on third parties for access to that technology, they are subject to the will of the third party, even if that effectively strips away their right to privacy.

If the right to privacy or personal space is not secure in a meaningful sense, then the state has not secured conditions of equal freedom and has not secured people’s most fundamental

property: themselves. As such, the state must take positive action to secure the right to privacy by creating the conditions for its effective exercise. Given the above example, this paper suggests that creating these conditions entail regulating the coercive structure of business-to-consumer contracts and agreements.

Fighting Illegitimate Consent in the Court: *Lee v. Weisman* (1992)

As I do in previous chapters, I turn to the question of whether my theory can survive constitutional muster. Is there a plausible case for a legal notion of consent that hinges on legitimate choice? Although *Mitchell* is an problematic example, there are instances when the Court has enforced restrictions on institutional action due to what it calls “subtle coercion.” *Lee v. Weisman*, an Establishment Clause cause, provides a parallel to the case of personal data because both issues concern a nonconsensual coercion of one’s conscience. Important to my account, the Court in *Lee* both recognizes an instance of subtle coercion as constitutionally problematic and puts forth an argument for why we must evaluate freedom of conscience issues at the highest level of scrutiny when they relate to core constitutional promises.⁹⁸ Thus, if we accept my argument that the right to privacy through property in oneself is core to the constitution, there is a strong case for positive government action as it relates to protecting privacy through altering its standards of consent.

At issue in *Lee v. Weisman* was the constitutionality of a nonsectarian invocation and benediction delivered by a Rabbi at a Rhode Island lower school graduation. During the invocation and benediction, students were requested to stand respectfully and silently. Weisman, whose daughter was a graduate being recognized, filed for an injunction to ban public school officials from inviting members of any clergy to deliver such invocations and benedictions at the

⁹⁸ *Lee v. Weisman*, 505 U.S. 577 (1992).

graduation ceremonies. He claimed that despite its nonsectarian nature, the prayer violated the Establishment Clause.

In writing for the majority, Justice Kennedy agreed, holding that the nonsectarian invocation and benediction at public schools constituted a state-directed religious exercise. His reasoning hinged on the idea of legitimate choice, paralleling my argument with respect to *Mitchell*, phone contracts, and online terms and conditions agreements. As Kennedy writes, “The undeniable fact is that the school district’s supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.”⁹⁹ Due to this pressure, Kennedy concludes that “to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme.”¹⁰⁰ The reasoning employed by Kennedy—that the choice of attendance was not a legitimate one, and cannot withhold constitutional muster—gives strength to my view that our consent to allow entry into our personal space is often illegitimate in the technological sphere.

What is more significant, and furthers the parallel to violations of privacy and demand for state action, is the principle that Kennedy views as being abridged in the case of coercive participation in religion. In *Lee*, the First Amendment is the *text* that is violated. But Kennedy articulates a deeper *principle* from which the text stems that is violated when people are coerced to participate in religion. He emphasizes that we place such high scrutiny on religion because of this deeper principle—complete freedom of conscience, specifically as it relates to our decision-making—such that even subtle coercion must be barred. Specifically, he writes that

⁹⁹ *Lee v. Weisman*.

¹⁰⁰ *Lee v. Weisman*.

“One timeless lesson is that if citizens are subject to state sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.”¹⁰¹ It is constitutionally unsound for any state institution to be even mildly coercive with regards to religion because that violates a more fundamental, timeless duty of a state to protect one’s freedom of conscience and belief within a personal sphere.

These various parallels are significant for this paper’s argument from a legal perspective. The majority’s argument in *Lee v. Weisman* is closely related to what currently occurs with regards to personal data and a right to privacy. Just as people have no legitimate choice besides attending their graduation ceremony despite relinquishing their religious freedom, in today’s technological environment, people have no legitimate choice but to relinquish their right to privacy in order to participate in the modern world. Both instances boil down to a violation of the same principle: freedom of conscience and belief. In my terms, both instances violate our right to property in ourselves because we lose the right to exclusive self-control through coercion of the mind. Further, in both instances, there is a clear violation of the Constitution. In *Lee*, the First Amendment is violated coercively. In the case of data privacy, the core, foundational element of the Constitution is violated coercively– the right to exclusive property in oneself.

Additionally, Kennedy’s referral to a state’s duty supports the idea that the state has a responsibility to secure the conditions for the effective exercise of rights. The violation of free exercise is not explicit. Instead, in this paper’s language, Kennedy highlights that the secular prayer at the graduation ceremony fails to secure the *conditions* for the effective free exercise of religion. Just as roads are necessary for the effective exercise of the freedom of movement, the absence of public prayer, even secular prayer, is necessary for the effective free exercise of religion.

¹⁰¹ *Lee v. Weisman*.

These parallels offer a strong argument for why, based on Supreme Court precedent, the government must, and constitutionally can, take positive action to reframe standards of consent with respect to privacy in order to guarantee the effective exercise of the right. In *Lee*, Kennedy insists that the government cannot permit such coercion, and rules that even nonsectarian invocations and benedictions cannot occur at public school graduation ceremonies. Accordingly, if one is to accept the parallel between the violation in *Lee* and that with regards to data privacy, it is clear that the government must take action to address the violation of property in oneself that is occurring through coerced consent.

Building Consensus: Rawls, the Worth of Liberty, and Examples of State Action

Finally, having established the lack of legitimate consent given online and having highlighted the plausibility of the legal path forward, it is worth building consensus on the necessity of positive state action. John Rawls, a dominant modern liberal thinker, offers another way to think about the important distinction between recognizing a right in the formal sense and securing the effective exercise of that right. For Rawls, the entry into one's personal space without legitimate consent is concerning from a rights-based perspective because it denies individuals what he calls the "worth" of their liberty. Like Ripstein, Rawls emphasizes that the government must compensate for a lacking worth of liberty. Accordingly, an exploration of Rawls' argument strengthens the imperative nature of positive state action with regards to privacy and third party consent practices.

In *A Theory of Justice*, Rawls provides a comprehensive concept of liberty. He writes that "Persons are at liberty to do something when they are free from certain constraints either to do it or not to do it and when their doing it or not doing it is protected from interference by other

persons.”¹⁰² Rawls puts liberty in terms of not just constraint, but the more nuanced measure of worth. He rejects the idea that “the inability to take advantage of one’s rights and opportunities” due to “a lack of means” is a constraint against liberty.¹⁰³ Instead, he views such conditions as “affecting the worth of liberty, the value to individuals of the right that the first principle defines.”¹⁰⁴ While liberty encompasses the system of rights to which people are entitled, “the worth of liberty to persons and groups depends upon their capacity to advance their ends within the framework the system defines.”¹⁰⁵ In other words, the more authority a person has, the greater the worth of their liberty.

When the worth of liberty is diminished, and the basic value of liberty does not exist, positive action is required by the state. Rawls draws upon the example of political participation to illustrate this point. He argues that “The liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate.”¹⁰⁶ An imbalance of power in the public debate arena, perhaps with certain groups dominating political advertisements, diminishes the worth of liberty for the everyday participants. Similar to how the freedom of movement is not effectively secured without public roads, the right to political participation has less value when participation is manipulated by private external influences. According to Rawls, the state has a positive obligation to secure the basic worth of liberty. In Rawls’ words, “Compensating steps must . . . be taken to preserve the fair value for all of the equal political liberties.”¹⁰⁷

¹⁰² Rawls, John. *A Theory of Justice*. 2nd Edition. Cambridge, Massachusetts: Belknap Press: An Imprint of Harvard University Press, 1971.

¹⁰³ Rawls, 179.

¹⁰⁴ Rawls, 179.

¹⁰⁵ Rawls, 179.

¹⁰⁶ Rawls, 198.

¹⁰⁷ Rawls, 199.

When applying Rawls' framework for the worth of liberty to the conditions of consent outlined above, it becomes evident that the choice situations which people are put in with regards to relinquishing their personal data diminish the worth of liberty. The basic worth of liberty is not secure when people are constantly put in choice situations that essentially require them to give up their liberties, like the right to privacy and the right to control their data. Like political participation is not meaningful when it is manipulated by powerful actors who control public debate, the right to privacy is not meaningful when ultra-large companies manipulate our choice to consent to our data being used.

Like Ripstein's, Rawls' account suggests the imperative of positive government action. Because the basic worth of the right to privacy is threatened, Rawls would suggest that the government must "compensate" by taking positive action to regulate the powerful private companies that are manipulating choice situations in their favor. The necessity of such compensating steps is especially pronounced when considering how fundamental the right to property in oneself is under this paper's philosophical framework.

Further, to address skeptics of regulations, the call for positive government action when the worth of liberty is diminished is not at all novel. It should not be legally contentious. We can see such "compensating steps" taken in U.S. law. For example, in the U.S., the state plays an active role in securing the worth of liberty given by the 6th Amendment right to a fair trial through its requirement to provide for a competent public defender. One's 6th Amendment rights are given *value* by a competent defense. These "compensating steps" often extend to regulating private commercial entities. As an example, various states have laws on the books that require

companies to give time off for voting.¹⁰⁸ The importance of securing the full worth of the right to political participation supercedes skepticism about regulating private commercial entities.

Thus, Rawls' argument for securing the worth of liberty builds consensus for the necessity of positive state action to effectively secure the right to personal space, even if the right is formally recognized. When powerful private companies manipulate choice situations, the "means" of the consumers to protect their right to privacy is diminished. The worth of people's most fundamental liberty— exclusive property in themselves— is threatened. A lacking value of liberty is so concerning that for Rawls, it requires the state to step in and compensate for the lack of worth. Therefore, not only is the state justified in interfering with private companies, but it is *required* to do so in order to secure the basic worth of liberty.

Final Remarks

The Ripsteinian analysis, supported by Rawls, highlights the imperative of positive state action to protect the right to privacy. Recognizing a formal right, even a robust one, in the letter of the law is not enough. The state has a responsibility to secure the conditions for the effective exercise of that right. Under this paper's analysis, the fact that individuals depend upon third parties to access necessary technologies creates an asymmetric power situation that third parties can exploit. Third parties exploit this power by asking consumers to waive their privacy rights in order to access necessary technologies. That "consent" hinges on an illegitimate choice and produces ethically concerning coercion. Thus, it should not be seen as legally binding, and in order to meaningfully secure the right to privacy, the state must address this kind of exploitative consent by imposing greater regulations on third parties.

¹⁰⁸ "Voting Rights During Working Hours." Accessed December 4, 2022.
<https://www.laurawongpanlaw.com/post/voting-rights-reminder-for-employees>.

Such regulation by the state is not novel, nor is it out of line with the Constitution. *Lee v. Weisman* shows not only that the Court has previously recognized indirect coercion as suspicious, but it has also recognized a general commitment to securing conditions necessary the effective exercise of freedoms. In the case of privacy, unlike that in *Lee*, securing these conditions entails regulating private, third party companies. Although this kind of regulation raises eyebrows for some, it is not at all novel. Although the Court generally limits its reach from private entities, in instances where liberty core to the constitutional scheme is at risk, the liberty issue supersedes the hesitancy to regulate private entities. For example, in *Heart of Atlanta Motel, Inc v. United States* (1964), the Court held that private businesses that function as places of public accommodation cannot deny service on the basis of various protected classes.¹⁰⁹ At this point, segregation was understood to be repugnant to constitutional ideals, and as such, private third parties could be regulated accordingly. This paper shows that property in oneself is core to the constitutional scheme. Therefore, based on precedent, the Court has reason to regulate private third parties that violate this most fundamental right.

¹⁰⁹ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

Conclusion

It was 25 years ago that TIME Magazine announced the death of privacy. Since then, technological advances have led to more intrusive, more constant invasions of privacy. In particular, the constant monitoring, aggregation, and sale of personal consumer data creates a scheme in which all-powerful corporations know all, and tell all, about their consumers. They use their all-knowing power to exercise a form of control over consumers, depriving them of independence while maximizing company profit and power. As a consequence, modern U.S. society is inching closer to the dystopias depicted in novels like Dave Eggers' *The Circle* and George Orwell's *1984*.

But to TIME's question, "What can you do about it?" I have a stronger answer than that of Quittner. Quittner suggested that the best way for people to evade invasions of their privacy would be for people to avoid the kinds of technologies that threatened privacy. Today, such avoidance is impossible. Instead, to answer the question, this paper suggests a new legal approach to the right to privacy— one equipped to protect consumers in the modern age.

Chapter 1 outlines this approach, and argues that privacy, properly understood, is core to the U.S. constitutional scheme. The chapter first takes up the enduring understanding of privacy derived from "The Right to Privacy" by Warren and Brandeis, arguing that their framework is flawed. As a consequence of its limited principle and lack of a constitutional grounding, privacy law has been weak and unprincipled. Then, this paper draws on Locke and Kant to suggest that privacy is derived from a larger principle: exclusive property in oneself. When one has property in something, it means that they have an exclusive right to control that thing in order to advance their ends. People are entitled to privacy within a "personal space" where the exclusive right to control themselves and those tangible and intangible things integral to pursuing their ends must

be protected. Because the state's foremost role, according to Locke, is to secure property rights, and oneself is the most fundamental property that one has, the state must protect property in oneself, which includes a right to privacy. Further, this paper suggests that the idea of property in oneself is core to the Constitution, and should be treated as such.

Chapter 2 applies this paper's approach to privacy to personal data— one of the most contested privacy issues today. Under this paper's approach, it is evident that consumers must have control over their personal data. Personal data is derived from oneself, and lacking control of it threatens freedom as independence due to corporate manipulation, in the Kantian sense. Regardless of what the potential benefits of use of consumer data might be, its nonconsensual use is wrong under this paper's approach.

Finally, Chapter 3 shifts the conversation from forming the right to privacy and arguing for its recognition to an analysis of what it takes to effectively secure the right and the positive role of the state under my approach. The chapter suggests that in order to meaningfully secure the right to privacy, the state must take positive action to create the conditions for its effective exercise. In this case, that requires regulating third parties with respect to their standards of consumer consent, which this paper suggests is coerced.

Beyond providing a framework, this paper hopes to initiate a Gestalt shift in the way that people understand their right to privacy, particularly with relation to personal data. Too often, people believe that privacy is a necessary sacrifice of existing in today's age. But one's personal information is sacred; it is not something that third parties should be entitled to due to consumer technology dependence. The reason that personal data is so powerful, so valued, is because it is so close to one's *own person*. By understanding the closeness of personal data to one's person,

and its role in securing independence, people should become increasingly aware of the magnitude of the wrong occurring.

A world that secures personal space looks different. It is a world where people have a newfound agency in themselves and their things, protected by the state. Where powerful companies that extort consumer data and use it for de-facto mind control are guilty of theft. Where interactions are constrained to respect one's personhood. But there is one implication that is most significant. A world that secures personal space can help reinvigorate trust— in the state, in other people, in enterprises. Trust— at a historical low today— is critical for a functioning democratic society. Personal space secures not only one's most critical rights, but helps move achieve harmony in democracy.

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