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RECONSIDERING THE LEGAL DEFINITION OF PRIVACY

*Michael Morgan*¹

I. THE NEED FOR A NEW DEFINITION

On June 2, 2015, Congress passed the Freedom Act,² which curtails many of the controversial surveillance programs employed by the National Security Agency (NSA). Although this law satisfies many of the critics of the surveillance practices, Congress passed the Freedom Act not because the courts agreed that the surveillance programs were unconstitutional, but rather to appease an outraged public. This raises the following question: if another terrorist attack were to occur, would a public scare motivate these programs' reimplementaion?³ Because the current legal definition of privacy is both too narrow and too vague, the courts' ability to check the legislative and the executive branches from re-implementing these programs and abusing this right is severely limited.

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2 Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping, Dragnet-collection and Online Monitoring Act of 2015, 2048 H.R. §§ 1-812 (2015).

3 See *Klayman v. Obama*, 14-5004. 1, 4-5 (D.C. Cir. 2015); see also *Larsen v. U.S. Navy*, 02-2005. 1. 6 (D.C. Circ. 2012). That this is a pertinent question is apparent in the D.C. Court of Appeals' ruling on *Klayman v. Obama*, a case involving the bulk pone collection. The Court decided that the issue is not moot. Citing *Larson v. U.S. Navy*, the D.C. court explained that "[c]essation of a challenged practice moots a case only if 'there is no reasonable expectation ... that the alleged violation will recur.'"

Privacy, as currently defined in United States law, is both personal decision-making without unwanted interference and control over information.⁴ However, this definition confuses the right to privacy with related but distinct rights such as the right to autonomy. The distinction between the right to privacy and other rights is important, since it is possible to invade people's privacy without infringing upon these other rights. This confusion between the concept of privacy and autonomy has left the right to privacy vulnerable to abuse.

To remedy this issue, alternative definitions of privacy have been proposed. Besides privacy as protection of autonomy,⁵ the most popular definitions of privacy are: privacy as information protection⁶ (and not protection of autonomy as upheld by the court system); privacy as a cluster of other rights;⁷ and finally, privacy as restricted access.⁸ Except for privacy as restricted access, all rival accounts of privacy fail to protect our privacy the way that it ought to be protected.

In defining the theory of privacy as restricted access, Ruth Gavison, in her article *Privacy and the Limits of the Law*, states that "losses of privacy may be identified by reference to the central notion of accessibility."⁹ Thus an invasion of privacy occurs when a privacy invader accesses an aspect of the victim's life that the victim means to restrict to either the invader or to society as a whole.

Privacy as restricted access is robust, aligns with our intuitions of privacy, and would prove to be the most useful legal definition of this constitutional right. The basis of this definition's strength is that, whereas other definitions view privacy invasion as a *content* issue,

4 John T. Soma & Stephen D. Rynerson, *PRIVACY LAW IN A NUTSHELL* 64 (2008).

5 Judith Wagner DeCew, *IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY* 78 (1997).

6 Charles Fried, *AN ANATOMY OF VALUES*, 140 (1970).

7 Judith Jarvis Thomson, *The Right to Privacy*, 4.4 *PHILOSOPHY AND PUBLIC AFFAIRS* 295, 310 (1975).

8 Ruth Gavison, *Privacy and the Limits of Law*, 89 *YALE L.J.* 421, 423 (1980).

9 *See* Gavison, *supra* note 7, at 459.

privacy as restricted access recognizes privacy invasion as a *context* issue. Therefore, it is not limited by the content of the privacy invasion. Regardless of the nature of the intrusion, one can appeal to the right to privacy (where privacy is defined as restricted access) in legally defending a victim of an infringement of privacy. For these reasons, the court system should abandon the current definition of privacy and adopt the definition of privacy as restricted access.

Although this definition of privacy would be beneficial to understanding commonly occurring infringements on privacy, the importance of correctly defining this right becomes crucial when the United States is faced with a national security crisis. As history suggests, placing the protection of constitutional rights into the more reactive executive and legislative branches can lead to regrettable consequences that occur under the pretext of safety: the Japanese internment camps of World War II, the Red Scare, the wiretapping of the home of Martin Luther King, Jr., and most recently, the post-9/11 NSA surveillance programs.

A more specific and robust legal definition of privacy would help avoid similar future consequences. Although national security issues at times require a restriction of even fundamental rights, without a proper definition of this right, the government may use new technological advances to unnecessarily invade our privacy. Clearly defining privacy will give this right greater protection when the United States is confronted with a security crisis.

In this paper, I will demonstrate both that the courts' current definition of privacy is too narrow and vague by exploring the various definitions of privacy and that the definition of privacy as restricted access will protect our rights during a national security crisis.

II. PRIVACY AS AUTONOMY

Because privacy is not explicitly listed among the constitutional rights, the United States' legal concept of privacy has a history with many roots in both the court system and academia. Even though it is widely considered as a constitutional right, it was not until the year 1890 that Samuel Warren and Louis Brandeis presented privacy as a legal right in their article, "The Right to Privacy." Warren

and Brandeis argued that “political, social and economic changes entail the recognition of new rights,” and, according to Warren and Brandeis, this includes the right to privacy.¹⁰ Seventy years later, the Supreme Court first officially recognized the right to privacy in *Griswold v Connecticut*. Estelle Griswold, the executive director of the Planned Parenthood League of Connecticut, was fined for opening a clinic that sold contraceptives, which were illegal in Connecticut at the time. When appealed, the Supreme Court overturned the law, stating that the law violated the privacy of married couples. Justice William Douglas wrote the majority opinion, saying, “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”¹¹ In *Griswold*, the Supreme Court first introduced the right to privacy as a right to make decisions involving marriage and sexuality. Subsequent court decisions have expanded this definition to involve the right to make personal decisions, or the right to autonomy.¹²

The theory of privacy as protection of autonomy has been defended by Judith DeCew, who argued that it allows people, without interference, to explore, to realize their true identity, and to experiment with life.¹³ Although personal decision-making is important for personal growth, what DeCew is defending is not privacy, but autonomy.

The exercise of autonomy happens at times in private, but autonomy, not privacy, is the freedom to personal decision-making. Granted, the two rights are related, as a violation of autonomy is often accompanied by an invasion of privacy. For example, suppose Congress passes a law that requires everybody to exercise thirty minutes a day. In order to enforce this law, a representative from the National Institute of Health may need to visit each home to record

10 Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 1 HARV. L. REV. 4, 5 (1890).

11 *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965).

12 *See Stanley v. Georgia*, 394 U.S. 557 (1969) and *Roe v. Wade*, 410 U.S. 113 (1973).

13 *See DeCew supra note 4*, 78.

who exercises and who does not. Under this paradigm, an inspector recording how many bicep-curls we did would be an invasion of privacy, and the law requiring us to exercise would be an invasion of our autonomy. If the government did not invade our privacy by sending an inspector, our actions could never have been controlled. Thus, privacy invasion is often a prerequisite to coercive government policies. For this reason, Justice Douglas wrote in his majority opinion of *Griswold*, “The First Amendment[, which protects autonomy,] has a penumbra [implication] where privacy is protected from governmental intrusion.”¹⁴

Even though Douglas is correct to say that privacy and the First Amendment freedoms are interconnected, the right to privacy still remains distinct from decision-making, for it is possible to invade privacy without violating autonomy. For example, suppose the U.S. government, out of sheer curiosity, desires to know how often we look in the mirror. Unbeknownst to us, the CIA puts tiny cameras in our bathrooms to monitor our behavior. The CIA does not force us to look in the mirror; it simply observes. In this case, the United States is not violating our autonomy, since the CIA neither coerced us to nor precluded us from acting a certain way. However, the government is spying on our lives without permission and is therefore violating our privacy. Privacy and autonomy are distinct concepts. For this reason, the current legal understanding of privacy (that the concept of privacy includes the ability to make personal decisions without interference) is flawed.

III. INFORMATIONAL PRIVACY

A popular proposal to fix this flaw came from Professor Charles Fried, who, in 1970, suggested that privacy be viewed not as protection of autonomy, but as control over information.¹⁵ This concept became part of legal history in 1977, when a group of physicians and patients in New York sued the New York Department of State for requiring physicians to report personal information concerning

14 *Griswold*, 381 at 479, 483.

15 *See Fried supra* note 5, at 140.

certain drug prescriptions to the Department of State. In this case, *Whalen v. Roe*, the Supreme Court ultimately ruled in favor of the Department of State, but it also allowed for the interpretation of privacy as control over information as well as control over personal decisions. As Judge Stevens wrote, “We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information. . . . much of which is personal in character and potentially embarrassing or harmful if disclosed.”¹⁶ Although previous Supreme Court cases involved privacy where information was concerned,¹⁷ *Whalen v. Roe* was the first case where the Supreme Court officially acknowledged the right to privacy as a right to information control.¹⁸ Subsequent cases recognized privacy as control over information, but these cases also granted private entities (such as corporations) the right to use disclosed customer information for its own benefits.¹⁹

Even though the Supreme Court first recognized the concept of privacy as information control in *Whalen*, it had already been passing judgment on privacy cases that did not reflect the definition of privacy implied in either *Griswold v Connecticut* or *Roe v Wade*. Ten years before *Whalen*, the Supreme Court laid a criteria for judging whether a specific scenario is an invasion of privacy or not in *Katz v United States*. Charles Katz used a telephone booth to illegally transmit gambling wagers. The FBI had bugged the telephone line, and subsequently arrested Katz. Katz sued, arguing that the police had, without a warrant, violated his right to privacy. The Supreme Court ruled in his favor, and Judge Harlan wrote a concurring opinion, outlining the following criteria for determining whether or not a situation where privacy is involved calls for a warrant: “first that a person have exhibited an actual . . . expectation of privacy and, second, that the expectation be one that society is prepared to recognize as

16 *Whalen v. Roe*, 429 U.S. 589, 605 (1977).

17 *White v. United States*, 401 U.S. 745 (1971) and *Katz v. United States*, 389 U.S. (1967).

18 *See Soma supra* note 3, 64.

19 *Miller v United States*, 425 U.S. 435 (1976).

‘reasonable.’”²⁰ Judge Harlan’s criteria continue to provide the courts with a useful methodology of determining whether or not someone’s claim to a right to privacy is legitimate. Later in my argument, I will demonstrate that Harlan’s criteria fits naturally with the theory of privacy as restricted access.

Although the courts have commonly adhered to the idea that privacy is information control, this definition fails to conform to our intuitions of privacy.²¹ Take the following scenario for example: Jim, a high school teacher, finds a hole in the outside of the girls’ locker room. Each day, at 9:00am, he, without being able to hear them, looks through the hole and watches the same girls go through the same daily routine as they get ready for gym class.²² Even though Jim is not learning any new information about the girls each new day that he watches them, surely the majority of people would agree that Jim continues to invade these girls’ privacy day after day. Nevertheless, because Jim has not learned any new information, the girls have not lost any more control of their personal information with Jim’s subsequent invasions of privacy than what they lost during the first time that he observed them. Thus privacy as information control proves problematic in that it does not account for cases where the majority of people would agree that information is not the defining aspect of the privacy invasion.

20 See Katz *supra* note 14, 347 (Harlan, J., concurring).

21 See William A. Parent, *Privacy, Morality, and the Law*. 12.4 PHILOSOPHY AND PUBLIC AFFAIRS 268 (1983). Not all scholars who believe that privacy should be defined in terms of information would agree with Fried that it should be seen as a “control” over information. William Parent, for example, believes that privacy loss happens when knowledge about an individual is made available to the public. Nevertheless, any definition of privacy that pertains solely to information/knowledge is susceptible to the criticism that I offer in this paper.

22 See Gavison, *supra* note 7, 435. Ruth Gavison mentions other examples where information is not gained despite the loss of privacy. For example, a mother may follow her child to school, or someone may enter a room where another person is present and, without looking at that person, cause a loss of privacy.

IV. PRIVACY: JUST A CLUSTER OF RIGHTS

Problems with the current legal understanding of privacy (that privacy protects both personal decision-making and information) has led some to believe that privacy should not be regarded as a legal concept in itself, and that it should remain a purely psychological phenomenon. As Judith Jarvis Thomson argued, “the right to privacy is everywhere overlapped by other rights.” According to Thomson, any sense of the word ‘privacy’ either can be or already is legally protected under the names of other rights such as the right to bodily protection, ownership rights, rights against slander and libel, and so on. Nevertheless, many legal scholars find this view problematic, since it does not guarantee protection to privacy for privacy’s sake. Thus, hypothetically, if the interest for privacy could be separated from the interests for other rights, privacy would have no legal protection.²³ Thomas Scanlon gives an example of how an invasion of privacy that would usually be associated with ownership can occur without infringing on ownership rights. Suppose person *A* owns a safe. Person *A* lends it to person *B*, and while person *B* has it, person *C* tries to spy on what is inside of the safe.²⁴ In this example, person *B* would be justified in accusing person *C* of acting wrongly. However, person *B* could not accuse person *C* of infringing upon his or her ownership rights, for person *B* does not own the safe. The only grounds on which person *B* could accuse person *C* would be on invading his or her privacy.

V. PRIVACY IN TORT LAW

Even before the Supreme Court formally recognized the right to privacy, some state and local courts began to implement it as a

23 See Thomson *supra* note 6 at 310.

24 See Thomas Scanlon, *Thomson on Privacy*, 4.4 Philosophy & Public Affairs. 315, 318 (1975) for some details omitted in my summary that may be necessary to respond to some questions and objections, such as how person *C* was able to spy on the safe in the first place.

right.²⁵ Influential in this process was an article written by William Prosser, who found overarching definitions of privacy insufficient for its legal application. Instead, Prosser outlined four torts that he claimed would protect this right: first, “intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs. [Second,] public disclosure of embarrassing private facts about the plaintiff. [Third,] publicity which places the plaintiff in a false light in the public eye. [Fourth,] appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.”²⁶ Although one could synthesize Prosser’s torts with a theoretical definition of privacy, some (including Prosser himself) find his torts to stand independent of any overarching theory.²⁷ These torts are currently widely accepted and applied in privacy protection today.

Thus the legal history of privacy is based in various traditions and theories. With this confusion of what privacy is, and without a single tradition of the concept of privacy, courts are left to their own discretion as to which theory to implement. This proves problematic when courts are receiving pressure from either the public or other branches of government. The courts may choose the most popular option, justifying it with the interpretation of privacy that pleases those pressuring them. An overarching theory that the courts adhere to is needed to protect people’s privacy in the instance of a public scare or an overreaching executive (or legislative) branch. As I will now explain, the theory of privacy as restricted access both adheres to our intuitions of privacy and protects the country from future abuses of privacy.

VI. PRIVACY AS RESTRICTED ACCESS

Why is this definition of privacy better than other current definitions? First, privacy as restricted access explains how, even when the content of the invasions differs, two situations can both be an

25 Roberson v. Rochester Folding Box Co., 64 N.E. 442 (1902), and Cason v. Baskin, 20 So.2d 243 (1943).

26 William L. Prosser, *Privacy*, 48 CAL. L. REV. 389 (1960).

27 David M. O’Brien, *PRIVACY, LAW, AND PUBLIC POLICY* (1979).

invasion of privacy; second, the definition of privacy as restricted access can be applied to a diverse society where standards of privacy differ; third, privacy as restricted access can be molded into already existing legal applications of privacy such as Judge Harlan's criteria as outlined in *Katz v. United States*;²⁸ fourth and finally, privacy as restricted access will better protect the citizenry from future abuses of privacy.

If privacy is understood as a "reference to the central notion of accessibility,"²⁹ it becomes clear why the previously mentioned cases are all considered invasions of privacy—even though the contents of the invasions differ. In *Griswold*, the state of Connecticut intervened in decisions important to marital sex, decisions that the defendants (and ultimately the Supreme Court) believed that the state should not be given the right to access. In the example in which the government wants to monitor how long we exercise, it is an invasion of privacy because our physique is an aspect of our lives in which we usually feel the government has no business. Finally, in the case of Jim consistently spying on his female students, Jim is ignoring obvious social rules and cues that adult men are restricted from accessing the girls' locker room.

In each of these cases, the contents of the privacy invasion differ (the first involves personal decision making; the second, information; and the third, the respect of the physical body), but each example involves both a party that expects others to respect social cues that hint at a restriction of access and another party that fails to respect these social cues. Therefore, it is the context—not the

28 See Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 96 CAL. L. REV. 1887 (2010). I will not attempt to synthesize the theory of privacy as restricted access with William Prosser's four privacy torts, for the third and fourth torts do not truly apply to privacy. Other definitions of privacy have similar problems when synthesized with Prosser's torts. I am not the only one who finds Prosser's torts problematic. This article provides a more thorough critique of Prosser's torts.

29 See Gavison, *supra* note 7, at 459.

content—that determines whether or not a certain situation is an invasion of privacy.³⁰

One issue that haunts other definitions of privacy (but not that of privacy as restricted access) is the issue of varied expectations of privacy. Such expectations change from culture to culture, era to era, and person to person; thus some may wonder if it is possible for a legal system to determine what is and is not an invasion of privacy. For example, if privacy is understood by information alone, how do we determine what information is private and what is not? Some may believe that certain information about themselves is private (sexual orientation, religious beliefs, etc.), yet others may find no harm in revealing this same information. Similarly, Sarah Conly points out in her defense of paternalism, in some cultures the attempt to view one's ankles is an invasion of privacy, but in other cultures, bare ankles are common.³¹ With so many different expectations of privacy, creating privacy laws that appeal only to the content of the privacy invasion would result in “laundry-list” laws that do not align with everyone's intuitions. For example, should the legal system make the attempt to view another's ankles an invasion of privacy? Such a practice would seem absurd, and yet a small minority may feel such a protection necessary. The theory of privacy as restricted access solves this issue by examining the context in which the privacy invasion occurred. Such examination can be made by asking the following questions: did the victim desire to restrict a certain aspect of his or her own life to the invader, and was that restriction obvious to either the invader or to society in general?

These questions are, in essence, the same criteria used in determining an invasion of privacy that Judge Harlan enumerated in *Katz v. United States*: “first that a person have exhibited an actual . . .

30 It is possible, even likely, that, in a society as complex and multivalued as the one we live in today, people may feel that this definition does not encompass every aspect of privacy they wish to protect. Instead of arguing that this definition of privacy is perfect, I argue instead that it is more robust and applicable than the competing notions of privacy, such as privacy as autonomy, privacy as information control, privacy as a cluster of rights, or any of the other current definitions of privacy.

31 Sarah Conly, *AGAINST AUTONOMY*, 2013 140-141.

expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”³² Although he may not have had any specific theory of privacy in mind when writing his criteria, Harlan recognized that legal discussions of privacy need to focus on the situation rather than the content of the invasion.

Understanding how one “exhibits an actual expectation of privacy” demonstrates an even stronger connection between Harlan’s criteria and the theory of restricted access. Many aspects of our lives that we may deem private (sexual intimacy, marital problems, journals, etc.) are also seen as private by the majority of other members of society. Thus, other than bidding by normal social rules, we often do not need to give any extra social cues to “exhibit an actual expectation of privacy.”³³ Nevertheless, if we desire to have privacy with regards to an aspect of our lives that society would not recognize as normally private (for example, the contents of our front yards), we would have to take extra action to exhibit an expectation of privacy (such as growing a thick hedge around our yards). The vocabulary of the restricted access theory can be used to explain the same concept. In order to restrict one’s access to the public, someone needs only to follow social norms for the majority of the things that he or she wishes to keep private. Nevertheless, if that same person desires to restrict another aspect of his or her life that society does not recognize as necessarily private, he or she needs to communicate this desired restriction of access to the public. As long as the person’s privacy does not either cause third party harm or break any standing laws, it is society’s obligation to respect that restriction of access.

The definition of privacy as restricted access can also give the courts more power to protect privacy in the case of abuse from other branches of government. Recently, the NSA’s surveillance practices consisted of collecting data that included, among other information, the phone number of the person calling and the call’s duration of

32 *Katz* 389 at 347 (Harlan J., concurring).

33 By the same token, if members of society do not follow these cues, they cannot reasonably expect others to respect their privacy. For example, if someone revealed to a large and random audience that he or she were HIV positive, that person could not expect others to respect his or her plea for privacy and confidentiality on the matter.

time. In *Klayman v. Obama*, the plaintiffs challenged the constitutionality of such practices. However, in the D.C. Circuit Court of Appeal's review, Judge Sentelle questioned whether "mere collection" of data (without actually using the data), is an invasion of privacy.³⁴ The rationale for not considering this an invasion of privacy is based on an informational understanding of privacy. An invasion of privacy only happens if information is used and considered. Nevertheless, as Professor James Moor illustrates in the following example, information does not have to be considered for an action to be considered an invasion of privacy: "Suppose while [person] B is away from her personal computer, [person] A uses it to call up B's personal diary and lists the contents of the diary on the screen. Also suppose A is distracted so A does not read the screen..."³⁵ The majority of people would see person A's actions as an invasion of privacy even though person A neither saw nor considered any information.

Some may argue that even if the courts adopt the definition of privacy as restricted access, the Supreme Court case *Smith v. Maryland* (1979) justifies the NSA metadata collection. In *Smith*, the Supreme Court ruled that only the content of telephone conversations can be considered private, not the specific phone numbers dialed.³⁶ Nevertheless, in *Kyllo v. United States* (2001), the Supreme Court adopted a more cautious view of the government's ability to interfere in private lives. In *Kyllo*, police used thermal imaging technology to determine if Danny Kyllo was growing marijuana in his home. Using the information they gained from the thermal images, the police obtained a warrant for Kyllo's arrest. Kyllo sued, arguing that the use of thermal imaging technology violated the Fourth Amendment. The Court ruled in Kyllo's favor. According to Justice Scalia, who wrote the majority opinion,

34 Pete Yost, *Federal Appeal Court Struggles on NSA Surveillance Case*, PBS (Nov. 4, 2014), <http://www.pbs.org/newshour/rundown/federal-appeals-court-struggles-nsa-surveillance-case/>.

35 James H. Moor, *The Ethics of Privacy Protection*, LIBRARY TRENDS, 69, 76 (1990).

36 *Smith v. Maryland*, 429 U.S. 735, 741 (1979).

Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a “search” and is presumptively unreasonable without a warrant.³⁷

This ruling shifted the Court’s interpretation of the government’s ability to obtain citizens’ personal information. Martin Kuhn, a legal scholar who focuses on mass media law, tells the importance of *Kyllo* in regards to how surveillance practices should be viewed:

...the Court explicitly recognized a heightened privacy interest in private homes and in situations wherein the government uses surveillance technology that is generally unfamiliar to the public. . . . Thus, the advent of new surveillance technologies has caused the Court to conceptualize privacy as an individual’s right to control access to information in Fourth Amendment privacy jurisprudence.³⁸

The definition of privacy as restricted access explains rather simply why the government invades its citizens’ privacy when it collects citizens’ details about their phone calls: for decades, people have viewed details about phone calls as an aspect of their lives that are personal and out of governmental reach. If the definition of privacy as restricted access would be adopted, it would be obvious that these practices would be illegal. No laws existed banning the government from mass surveillance practices because the technology necessary for such surveillance is fairly new. As established by *Kyllo*, the use of this new technology without a warrant is unreasonable.

VII. CONCLUSION

With the recent terrorist attacks in Paris and San Bernardino, more and more Americans are viewing terrorism as the most prominent

37 *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

38 Martin Kuhn, *FEDERAL DATAVEILLANCE: IMPLICATIONS FOR CONSTITUTIONAL PRIVACY PROTECTIONS* 113 (2007).

issue in the 2016 presidential election.³⁹ A number of prominent politicians have started to voice support for once again implementing the NSA bulk metadata collection practices.⁴⁰ Although there may be times when national security issues require temporarily limiting the right to privacy, it is too difficult for the court system to appreciate the true value and scope of privacy without a clear and distinct definition of this important right. Adopting the definition of privacy as restricted access will allow the Judicial Branch to give the right to privacy the constitutional protection it needs.

Unless there is a clear and imminent national security threat, the federal court system should deem the NSA bulk metadata collection as unconstitutional. Such practices are an invasion of Americans' privacy.

39 Rebecca Rifkin, *Americans Name Terrorism as No. 1 U.S. Problem*. Gallup (Dec. 14, 2015), <http://www.gallup.com/poll/187655/americans-name-terrorism-no-problem.aspx>.

40 Foxnews.com, *Paris attacks re-ignite debate over NSA tactics, metadata program*. Fox News, Inc. (Nov 18, 2015), <http://www.foxnews.com/politics/2015/11/18/paris-attacks-re-ignite-debates-over-encryption-expiring-nsa-metadata-program.html>.

