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PRIVACY RIGHTS IN MODERN AMERICA

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IN THE US LIBERAL TRADITION, the public–private distinction has been used to mark the boundary of when individuals should be left alone. Building on such thinkers as John Locke and John Stuart Mill, the writers of the US Constitution, federal and state legislation, and subsequent case law placed individual liberty and freedom at the heart of American political thought.

For Locke (1632–1704), the public–private distinction fell out of his conception of a pre-political state of nature, the legitimate function of government, and property rights. The sole reason for uniting into a commonwealth, according to Locke, was to remedy the inconveniencies of the state of nature. The primary function of government was to secure the rights of life, liberty, and property.[1] On estates and behind fences, walls, and doors, individuals secured a domain of private action, free from public pressures or interference.

John Stuart Mill (1806–73) also sought to limit societal or public incursions into private domains. He argued, "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[2] When an action violates the rights of another, moral harm has occurred and appropriate action or interference is warranted by citizens or government agents. Short of this sort of violation, compulsion or interference is unjustified. A central and guiding principle of Western liberal democracies is that individuals, within certain limits, may set and pursue their own life goals and projects. Rights to privacy erect a boundary that allows individuals the moral space to order their lives as they see fit.

The individualism of Locke and Mill and the liberal, political, and economic experiments that followed the Enlightenment stand in stark contrast to what came before. In prior centuries, individuals were born into various hierarchical

social orders that largely determined the arc of their lives. For example, slaves, serfs, peasants, clergy, feudal lords, and monarchs each had various attached duties and obligations. Loyalty to a tribe, obedience to the queen, and submission to religious authorities, along with the surveillance necessary to determine compliance, was the norm. The ascendency of individual rights, as opposed to communal or societal obligations, became the backdrop for the liberal democracies in Western Europe and the United States.

At their core, disputes about the strength and scope of privacy center on the question of what we owe each other as citizens, colleagues, or friends. Imagine that we simply don't owe each other much—that aside from respecting the basic rights of life, liberty, property, and contract, we are each free to order our lives as we see fit and pursue our own values. In the absence of more robust obligations to citizens, colleagues, or friends, privacy may flourish. Imagine a different extreme. Consider that we are "our brother's keeper" and owe a great deal to others in our society. Aside from the basic rights of life, liberty, and property, we add rights to health care, jobs, food, education, income, retirement, respect, security, social justice, and so on. In this society, the moral and legal landscape would be thick with obligations and duties. In the face of these duties and the accompanying demands of moral and legal accountability, the domain of privacy would shrink.

Complicating the tensions between privacy, obligations to others, and accountability is that privacy is difficult to define. Privacy has been used to denote a wide variety of interests or rights, including personal information control, reproductive autonomy, access to places and bodies, secrecy, and personal development. Privacy interests also appear to be culturally relative—for example, opening a door without knocking might be considered a serious privacy violation in one culture and yet permitted in another.

Privacy has always been a commodity secured, more or less, on the basis of wealth, power, and privilege. While recent advances in information technology have highlighted privacy interests and concerns, privacy norms have been found in every culture systematically studied. Alan Westin, former professor of public law and government, argued that aspects of privacy are found in every society.[3] This view is supported by anthropology professors John Roberts and Thomas Gregor, who write, "Societies stemming from quite different cultural traditions such as the Mehinacu and the Zuni do not lack rules and barriers restricting the flow of information within the community, but the management and the functions of privacy may be quite different."[4] For example, in Mehinacu society, where gossip and the lack of physical barriers encourage openness and transparency, many individuals engage in obfuscation by spreading false or misleading rumors, thus attempting to conceal and control private information.

In the United States, legal protections for privacy have been found to exist in the penumbras of certain amendments to the Constitution and as part of

common law. Local, state, and federal statutes also protect various dimensions of privacy. From these sources, privacy law has grown to protect the sanctity of the home and bedroom, a woman's right to obtain an abortion, the right to secure publications with anonymity, and rights against intrusions by government officials or other citizens.

In this article I review each of these areas, including (1) philosophical definitions of privacy along with specific critiques; (2) legal conceptions of privacy, including the history of privacy protections granted in constitutional and tort law and various federal and state statutes; and (3) general critiques of privacy protections both moral and legal. My hope is to provide a general overview of the issues and debates that frame this lively area of scholarly inquiry.

PHILOSOPHICAL DIMENSIONS OF PRIVACY

Different conceptions of privacy typically fall into one of six categories or combinations of the six.[5] In 1890, legal theorists Samuel Warren and Louis Brandeis argued that "recent inventions and business methods call attention . . . for the protection of the person, and for securing to the individual . . . the right to be let alone."[6] While credited with starting the modern debate, the conception of privacy proposed by Warren and Brandeis has been widely criticized as both too broad and too narrow. For example, on this definition any offensive or hurtful conduct would violate a "right to be let alone," yet we may not want to conclude that such conduct is a violation of privacy. Moreover, unobtrusive National Security Agency surveillance may leave someone alone but still violate privacy.[7]

Privacy defined as "limited access to the self" has been defended by numerous authors.[8] Philosopher Sissela Bok writes, "Privacy is the condition of being protected from unwanted access by others—either physical access, personal information, or attention."[9] Ruth Gavison argues that privacy consists of "secrecy, anonymity, and solitude."[10] These conceptions of privacy also seem too broad and too narrow. For example, while I may not want others to notice the color of my eyes as I walk through a public park or when I have friends over for dinner, it would seem overbroad to claim that privacy has been violated if others take note of my eye color in these contexts. Additionally, the undiscovered Peeping Tom may not know who you are or impact your solitude and yet this seems to be a paradigm case of a privacy violation.

Judge Richard Posner has defined privacy as a kind of secrecy. Privacy is the right to conceal discreditable facts about oneself.[11] Judith Wagner DeCew and others have criticized this conception of privacy, noting that "secret information is often not private (for example, secret military plans) and private matters are not always secret (for example, one's debts)."[12] Moreover, it seems that privacy defined as informational secrecy cannot accommodate the areas of locational privacy and decisional privacy. For example, I might wander into your house

and not take any information with me, or we might consider the right between consenting adults to use contraceptive devices.

Control over information has also been offered as a definition of privacy. Alan Westin writes, "Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[13] Charles Fried claims, "Privacy is not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves."[14] Aside from omitting bodily or locational privacy and decisional privacy, this conception is also too broad. Imagine that you share intimate information with a lover. While you may no longer control this information, it may yet still be private, and sharing this information to a wider group may be a privacy violation. We might also wonder about the normative status of this control. For example, a new technology might be invented that limits my abilities to control personal information. Critics of nonnormative accounts of privacy note that we do not actually care whether a condition or state of privacy obtains; what we care about is the normative status—*Should* the condition obtain? For example, your purchase of an X-ray device may cause me to lose control over private information. But the question is not whether you can look; the question is whether you are morally justified in looking.

According to personality-based conceptions, privacy protects personhood and autonomous action.[15] Philosopher Stanley Benn writes, "Respect for someone as a person, as a chooser, implies respect for him as one engaged on a kind of self-creative enterprise, which could be disrupted, distorted, or frustrated even by so limited an intrusion as watching."[16] Zones of privacy protect us from the unwanted gaze of governments, corporations, and neighbors. In private areas, self-examination and critical reflection can occur free from the judgment of others. But rather than offering a definition, critics note that personality-based conceptions explain why privacy is valuable and why we should care about protecting privacy. Additionally, bodily or locational privacy, personal information, and private decisions are clearly connected to personhood, reputation, and self-creation, but so are a host of other values, such as liberty and property.[17]

Privacy has also been viewed as a form of intimacy.[18] Law professor Jeffrey Rosen argues that "in order to flourish, the intimate relationships on which true knowledge of another person depends need space as well as time: sanctuaries from the gaze of the crowd in which slow mutual self-disclosure is possible."[19] Julie Inness notes that privacy is "the state of the agent having control over decisions concerning matters that draw their meaning and value from the agent's love, caring, or liking. These decisions cover choices on the agent's part about access to herself, the dissemination of information about herself, and her actions."[20] Critics counter, arguing that financial information may be private but not intimate, whereas it is

also possible to have private relationships without intimacy and to perform private acts that are not intimate.[21] Moreover, data mining and predictive analytics may pose a threat to individual privacy without affecting intimate relationships.

The final area may be viewed as a catchall or hybrid area that joins together different aspects of the privacy definitions already discussed. Philosophers Judith Wagner DeCew and Adam Moore offer normative definitions of privacy. DeCew has proposed the "realm of the private to be whatever types of information and activities are not, according to a reasonable person in normal circumstances, the legitimate concern of others."[22] Moore argues that "privacy is a right to control access to, and uses of, places, bodies, and personal information."[23] Helen Nissenbaum has advanced the view that privacy is a matter of contextual integrity. Nissenbaum writes: "Contextual integrity ties adequate protection for privacy to norms of specific contexts, demanding that information gathering and dissemination be appropriate to that context and obey the governing norms of distribution within it."[24] Each of these hybrid accounts of privacy has strengths and weaknesses, and this brief summary indicates the variety and breadth of definitions of privacy.

LEGAL CONCEPTIONS OF PRIVACY

Legal privacy protections in the United States can be divided into three categories. Common-law torts protect privacy by allowing individuals to sue others in civil court. Constitutional privacy, including decisional privacy, First Amendment privacy, and Fourth Amendment privacy, protects US citizens from unjustified governmental intrusions into private domains. Finally, various statutory regulations at local, state, and federal levels protect privacy. We will take them up in turn.

Privacy Torts

While privacy protections were implicated in the common-law doctrines of nuisance, trespass, and restrictions on eavesdropping, one of the first discussions of privacy occurred in Judge Thomas Cooley's treatise on torts in 1880.[25] In *De May v. Roberts* (1881),[26] the Michigan Supreme Court echoed Cooley's view acknowledging an individual's right to be let alone. "The plaintiff had a legal right to the privacy of her apartment . . . and the law secures to her this right by requiring others to observe it, and to abstain from its violation."[27] In 1890, Samuel D. Warren and Louis D. Brandeis issued a call to arms in their article titled "The Right to Privacy."[28] Hinting at times to come, Warren and Brandeis noted: "Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right 'to be let alone.' Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous

mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"[29]

The remedy for such invasions was to create a new tort. Torts are, in general, a negligent or intentional civil wrong that injures someone and for which the injured person may sue for damages. In 1960, in an effort to clarify matters, legal scholar Dean William Prosser separated privacy cases into four distinct but related torts: *intrusion*—intruding (physically or otherwise) on the solitude of another in a highly offensive manner; *appropriation*—using another's name or likeness for some advantage without the other's consent; *private facts*—publicizing highly offensive private information about someone that is not of legitimate concern to the public; and *false light*—publicizing a highly offensive and false impression of another.[30]

Following Warren and Brandeis, Prosser offered a common-law foundation for these privacy torts. The first Restatement of Torts in 1939 recognized this common-law right,[31] and Prosser's four torts were incorporated into the second Restatement of Torts in 1977.[32] Thus, by the mid-1970s, common-law protections of privacy were widespread in the US legal landscape.

Nevertheless, each of Prosser's torts has been limited by other social values such as free speech. *Melvin v. Reid* (1931) set the stage for undermining privacy rights in publicly available information.[33] The *Melvin* case involved Gabrielle Darley, a former prostitute who was tried and acquitted of murder as depicted in the movie *The Red Kimono*. Darley brought suit and lost, although the court also held that the use of the plaintiff's name was actionable. The view that in entering the public domain individuals voluntarily relinquish privacy claims was further solidified as a principle of law in *Gill v. Hearst Publishing Co.* (1953).[34] In *Gill*, a photograph of the plaintiffs embracing was used to illustrate an article titled "And So the World Goes Round." While in public, the plaintiffs argued that the embrace was a private moment not meant to be broadcast to the world as part of an article. Ruling against the plaintiffs and citing *Melvin*, Judge J. Spence reaffirmed the view that privacy rights generally lapse in public places.

Along with *Melvin* and other cases, the death knell for private fact torts came in *Florida Star v. B.J.F.* (1989).[35] In this case, a news agency published the name of a sexual assault victim after obtaining the name from a police report. The Supreme Court decided in favor of the defendant, stating: "The imposition of civil damages on the newspaper . . . violated the First Amendment, because (1) the news article contained lawfully obtained, truthful information about a matter of public significance, and (2) imposing liability under the circumstances was not a narrowly tailored means of furthering state interests in maintaining the privacy and safety of sexual assault victims."[36] Dissenting in *Florida Star*, Justice Byron White argued that "at issue in this case is whether there is any information about

people, which—though true—may not be published in the press. By holding that only 'a state interest of the highest order' permits the State to penalize the publication of truthful information, and by holding that protecting a rape victim's right to privacy is not among those state interests of the highest order, the Court accepts appellant's invitation . . . to obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts."[37]

The common-law tort of false light has seemingly transformed into defamation and has little to do with privacy and more to do with a property claim in one's reputation. As with defamation, truth is seen as a defense against a false light charge.[38] The tort of appropriation, which prohibits the commercial use of someone's name or likeness without consent, has also broken free from protecting privacy interests. Typically, it is used by celebrities and public figures to protect commercial value in intangible property such as names, likenesses, and vocal qualities.[39] The scope and power of the intrusion tort has also been severely limited. Some jurisdictions require physical trespass, and virtually no violation can occur in public places. The invasion must be intentional, it must physically intrude, the plaintiff must have a reasonable expectation of privacy, and it must be highly offensive to a reasonable person.[40] Here again, the cases pile up against privacy. *Melvin*, *Gill*, and *Florida Star* each rule out the possibility of an intrusion tort, because the private information disclosed in these cases was, in some sense, publicly available.[41]

Constitutional Privacy Protections

Constitutional-based protections of privacy can be broken into three areas: decisional privacy, First Amendment privacy, and Fourth Amendment privacy. Privacy related to the Third and Fifth Amendments will not be considered.[42] Due to issues related to constitutional interpretation, this area of privacy is fairly complex and controversial. Many scholars deny that the constitution protects privacy except in a very narrow range of cases—for example, the Fourth Amendment's prohibition against "unreasonable searches and seizures" of "houses, papers, and effects."[43] In any case, the goal in this section is to describe the current state of privacy protections in US constitutional law.

Decisional Privacy

In *Griswold v. Connecticut*,[44] a statute prohibiting the dissemination of contraceptive devices and information, even to married couples, was struck down because it would, in part, allow the police to violate "the sacred precincts of marital bedrooms."[45] Justice William Douglas, writing the majority opinion in *Griswold*, claimed that a legal right to privacy could be found in the shadows or penumbras of the First, Third, Fourth, and Fifth Amendments to the Constitution.

Douglas argued that by protecting the rights of parents to send their children to private schools and for associations to assemble and restrict access to membership lists, the First Amendment hints at a legal protection for privacy. Combined with the Third and Fourth Amendments, which protect against invasions into one's home, and the Fifth Amendment, which affords individuals the right not to disclose information about themselves, Douglas thought the sum was a legal right to privacy. Also in *Griswold*, Justice Arthur Goldberg invoked the Ninth and Fourteenth Amendments in support of privacy. Goldberg claimed that privacy was one of the rights retained by the people and that the due process clause of the Fourteenth Amendment protects privacy as a value "implicit in the concept of ordered liberty."[46]

Several judicial decisions solidified the Douglas and Goldberg line of argumentation. In *Loving v. Virginia*,[47] *Stanley v. Georgia*,[48] *Eisenstadt v. Baird*,[49] and *Carey v. Population Services*,[50] the Court struck down laws that prohibited interracial marriage, possession of pornographic materials in one's own home, and distribution of contraceptives to unmarried persons. One of the most important and controversial applications of this line of reasoning came in 1973 with *Roe v. Wade*.[51] Justice Harry Blackmun argued, "The right to privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon the state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[52] Thus, in general terms, the court recognized that individuals have privacy rights to be free from governmental interference related to certain sorts of decisions.

First Amendment Privacy

Privacy is also safeguarded by protecting the right to speak anonymously and the confidentiality of one's associations.[53] Sometimes the ability to speak freely relies heavily on anonymity. For example, the Supreme Court of New Jersey has held that an anonymous online speaker has a First Amendment right to remain unidentified.[54] "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Great works of literature have frequently been produced by authors writing under assumed names . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment."[55]

Many individuals would not speak their minds, engage in whistleblowing, challenge popular views, or denounce those in power without the ability to remain anonymous. Much of the discourse in online environments would not occur

without anonymity and encryption. Just as an example, consider the many anonymous philosophical works or works published under a pseudonym that have challenged religious orthodoxy. Saying something unpopular or anti-religious could, and did, get people killed; anonymity thus played a key role in preserving human life while allowing new ideas to emerge.

As noted by Douglas in *Griswold*, the First Amendment also protects the privacy of associations and groups to peaceably assemble. In *NAACP v. Alabama* (1958), the state of Alabama required the National Association for the Advancement of Colored People to submit the names and address of all members in the state.[56] The US Supreme Court held that compelled disclosure of the NAACP membership lists would have the effect of undermining the association, noting that the "petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[57]

Privacy has a role in protecting information access as well. Imagine someone visiting a library to learn about alternative lifestyles not accepted by the majority. Remaining anonymous or hiding one's curiosity about, for example, a gay lifestyle may be important in certain contexts. This is true of all sorts of personal information, such as religious preference or political party affiliation. Not having authorities looking over one's shoulder might also be important for conducting research. In *Urofsky v. Gilmore* (2000), six professors employed by several public universities in Virginia challenged "the constitutionality of a Virginia law restricting state employees from accessing sexually explicit material on computers that are owned or leased by the state."[58] Denial of access and requiring permission, they argued, would have the effect of suppressing research and constituted an assault on academic freedom. Ultimately, the Virginia law was upheld and the US Supreme Court refused to hear the case.

Fourth Amendment Privacy

In a long series of cases and judicial decisions, known as "Fourth Amendment Privacy," the court has protected citizens from unreasonable searches and seizures. The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[59] This amendment grew out of opposition to writs of assistance, which were general warrants utilized by the English Crown authorizing government agents to enter any house or other establishment and seize contraband. Writs of this sort, often used against political or business rivals, were

generally detested by American colonists as "fishing expeditions." In 1760 James Otis attacked such writs, citing the long English tradition that "a man's house is his castle."[60] Addressing the English Parliament in 1763, William Pitt wrote, "The poorest man may in his cottage bid defiance to all the force of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement."[61]

Although many cases and developments in Fourth Amendment jurisprudence took place during the 1800s and early 1900s, our modern view began to take shape with *Olmstead v. United States* (1928).[62] In *Olmstead*, the court ruled that the Fourth Amendment protection against unreasonable searches and seizures applied to physical things such as houses, notebooks, and receipts but not to electronic communications. To violate the prohibition against unwarranted searches and seizures, an officer would have to physically trespass on the property of the defendant. Since electronic eavesdropping did not constitute trespass, such surveillance did not violate the Fourth Amendment. Thirty-nine years later, the Supreme Court, in *Katz v. United States*,[63] overturned the *Olmstead* decision, affirming that privacy interests may be found in personal communications as well as "persons, houses, papers, and effects." In *Katz*, the physical trespass doctrine of *Olmstead* was seemingly repudiated, and it was generally acknowledged that a search could include both physical and electronic or technological invasion.[64]

In place of the physical trespass doctrine of earlier times, the *Katz* court offered a "reasonable expectation of privacy" test. If an individual has a reasonable expectation of privacy, then a warrant must be obtained. Justice John Harlan, in his concurring opinion, offered two requirements for determining whether a search has occurred. "These requirements were, first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'"[65] Also in 1967, the Supreme Court struck down specific sections of a New York eavesdropping statute in *Berger v. New York*, noting that the probable cause requirement of the Fourth Amendment applied to electronic surveillance.[66] Thus, in *Berger* and *Katz*, the Supreme Court sought to extend Fourth Amendment protections to electronic communications. Physical trespass was not necessary, probable cause applied, and the "particularization" requirement—detailing the communications to be seized and the allowable duration of the surveillance—applied as well. These changes in Fourth Amendment jurisprudence affected several statutes, including the Omnibus Crime Control and Safe Street Act of 1968.[67]

The plain view doctrine established in *Coolidge v. New Hampshire*[68] permitted police observations conducted during a warranted intrusion. Thus, a police officer who has a warrant to search for documents and who inadvertently notices,

for example, a marijuana plant growing in a planter, would be allowed to use this evidence even though the warrant did not specify a drug search. The open view doctrine, on the other hand, allowed for observations made when no search was being conducted. If a police officer, while walking down the street, noticed a marijuana plant growing in a backyard, the officer could use this information without a warrant because no search was conducted.[69] Unaided observations from a nonintrusive altitude do not run afoul of Fourth Amendment protection. What is observed is also important in that the courts have drawn a distinction between open fields and private dwellings, attaching more protection to the latter than to the former.[70]

In "One Hundred Years of Privacy,"[71] law professor Ken Gormley notes, "A reasonable expectation of privacy has been found, sufficient to ward off governmental intrusion, with respect to the use of . . . bugging devices;[72] administrative searches of homes and businesses;[73] searches of closed luggage and footlockers;[74] sealed packages;[75] . . . random spot checks for automobiles to inspect drivers' licenses and vehicle registrations."[76] On the negative side, "The court had found no reasonable expectation of privacy in an individual's bank records;[77] in voice or writing exemplars;[78] in phone numbers recorded by pen registers;[79] in conversations recorded by wired informants;[80] and a growing list of cases involving automobiles, trunks, glove compartments and closed containers therein."[81]

More recently, and especially after the terrorist attacks of September 11, 2001, Fourth Amendment privacy has been limited further by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act.[82] The Patriot Act expands the government's ability to conduct covert "sneak and peak" searches; expands the breadth of "trap-and-trace" and "pen register" surveillance by allowing content to be monitored; allows the inclusion of DNA information into databases of individuals convicted of "any crime of violence"; increases government surveillance abilities of suspected computer trespassers (any target suspected of violating the Computer Fraud and Abuse Act may be monitored without a court order); authorizes the attorney general to circumvent probable cause restrictions through the use of national security letters or administrative subpoenas; and increases the government's ability to access records held by third parties.[83]

This last limit on Fourth Amendment privacy protections is now called the third-party doctrine, holding that when citizens voluntarily give personal information to others, they forfeit reasonable expectations of privacy related to government surveillance.[84] The third-party doctrine is the US government's primary defense for the National Security Agency's and FBI's bulk data collection programs (PRISM, IREACH, Stellar Wind, etc.), and it is also why applications for warrants have decreased in favor of using administrative subpoenas.[85] Recently,

however, several legal challenges have sought to limit the scope of these surveillance programs.[86]

Statutory Privacy

Statutory privacy protections exist at the local, state, and federal levels. While a comprehensive overview of each level is beyond the scope of this chapter, I will mention several of the most important federal statutes and a few of the more interesting state statutes.[87]

- The Omnibus Crime Control and Safe Street Act of 1968 regulated electronic surveillance and wiretaps.[88]
- The Fair Credit Reporting Act of 1970 regulated the accuracy and use of personal information held by credit agencies.[89]
- The Family Educational Rights and Privacy Act of 1974 regulated access to educational records.[90]
- The Privacy Act of 1974 was enacted to promote fair information practices between citizens and the government.[91]
- The Right to Financial Privacy Act of 1978 regulated access to personal financial records in reaction to the Supreme Court's ruling in *United States v. Miller*.[92]
- The Electronic Communications Privacy Act of 1986 expanded the scope of federal wiretap laws to cover electronic communications and stored electronic communications.[93]
- The Computer Matching and Privacy Protection Act of 1988 amended the Privacy Protection Act related to computer matching and information sharing across different federal agencies.[94]
- Title V of the Gramm-Leach-Bliley Financial Modernization Act of 2000 regulated the sharing of personal information by giving data subjects the ability to opt out of certain sharing practices used by financial institutions.[95]
- The Health Insurance Portability and Accountability Act of 1996 protects the security, confidentiality, and accessibility of health information.[96]
- The Video Voyeurism Prevention Act of 2004 protects individuals from intrusions via the use of miniature cameras, camera phones, and video recorders in public places.[97]

States have also passed legislation designed to protect privacy.[98] For example, Washington State's voyeurism statute prohibits the photographing of a person without that person's knowledge and consent in a "place where he or she would have a reasonable expectation of privacy."[99] The California Consumer Privacy Act (CCPA) of 2018, which echoes the European Union's General Data Protection

Regulation, gives California residents the right to access their personal information, to know if their personal information is sold or disclosed and to whom, and to reject the further sale of their personal information to others.[100] Those who fail to comply with the CCPA are subject to fines and penalties. Space does not permit a full accounting of the many statutory privacy protections found at the state and local level in the United States.

GENERAL CRITIQUES OF PRIVACY

Many scholars and legal theorists view privacy with concern or suspicion. This section describes a few of the more forceful criticisms that dominate the literature.

Judith Jarvis Thomson has argued that privacy is reducible to the more basic rights of property and what she calls "rights over the person."[101] Privacy is not unique, and we may well do better considering these other rights rather than attending to an ambiguous concept. Defenders of privacy have countered, noting that Thomson has not shown which set of rights is more basic. Perhaps property and rights over the person are reducible to privacy and not the other way around. Additionally, many contested concepts such as liberty and autonomy are difficult to define, but this does not mean that they should be jettisoned from meaningful discourse.[102]

Feminists have also been suspicious of privacy. Catharine MacKinnon writes, "For women the measure of the intimacy has been the measure of the oppression. . . . This is why feminism has seen the personal as the political. The private is public for those for whom the personal is political. In this sense, for women there is no private, either normatively or empirically. Feminism confronts the fact that women have no privacy to lose or to guarantee."[103] Other feminists note that rejecting privacy, especially decisional privacy, would have profound negative effects on the power, standing, and life prospects for women.[104]

In the area of legal privacy, many scholars have complained that the word *privacy* does not appear in the Constitution or the Bill of Rights and thus view the creation of this area of law as a form of judicial activism.[105] Focusing on decisional privacy, Louis Henkin writes, "To date, at least, the right has brought little new protection for what most of us think of as 'privacy'—freedom from official intrusion. What the Supreme Court has given us, rather, is something essentially different and farther-reaching additional zone of autonomy."[106] Defenders of decisional privacy note that privacy rights are a subset of liberty claims centering on consenting adults in private places. Thus, like any right, there is nothing odd about the connection between privacy and autonomy. DeCew expresses this point as follows: "A subset of autonomy cases . . . can plausibly be said to involve privacy interests. . . . They should be viewed as liberty cases in virtue of their concern over decision-making power, whereas privacy is at stake because of

the nature of the decision."[107] More generally, when looking at the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments, it would seem that privacy is implicated along with *liberty*—another word that does not appear in the Constitution or Bill of Rights.

FINAL REMARKS

In *FTC v Wyndham Corp.*,[108] the court held that keeping personal information about patrons on an insecure system and not correcting the security flaws after the first intrusion was deemed to be actionable behavior. Due to defective security practices, Wyndham was hacked on three separate occasions with the result of over $10 million in losses due to identity theft. Section 5 of the Federal Trade Commission Act defines an unfair and actionable behavior as one that "causes or is likely to cause substantial injury to consumers; cannot be reasonably avoided by consumers; and is not outweighed by countervailing benefits to consumers or to competition."[109] This line of thought could be used in a more robust way. Imagine that companies or states that warehouse sensitive personal information about individuals—information not central to the enterprise or business concern—could be held partially liable if this information were stolen, misplaced, or accessed by outsiders. If so, at a minimum, corporations and states would be incentivized to maintain secure systems that hold private information, and at best, this nonessential data would simply be deleted.

Cases such as *FTC v. Wyndham Inc.* and, more importantly, legislation such as the California Consumer Privacy Act and the European Union's General Data Protection Regulation may have a profound impact on how sensitive personal data are controlled, stored, and transmitted. If individuals are given rights of notice, consent, control, and deletion over their own personal information, and if violation of these rights is coupled with fines for misuse, then perhaps we will begin to move past the non sequitur that access equals abandonment—that, if someone has access to your private information, then you must have abandoned all claims to it. Note that the poet does not lose her copyright when she allows you to read her poem. Similarly, it could be argued that granting the government, corporations, or neighbors access to some private fact about yourself is not also to waive all downstream rights over this information. Needless to say, as technology expands the ways personal information may be shared, captured, warehoused, and processed, the philosophical, legal, and technical issues related to control, consent, and deletion will need to be reexamined.

NOTES

Parts of this article are drawn from previously published material. See Adam D. Moore, *Privacy Rights: Moral and Legal Foundations* (University Park: Pennsylvania

State University Press, 2010), 99–132, and "Privacy," in "Library Hi Tech: Special Issue on Information Ethics," *Library Hi Tech* 25 (2007): 58–78.

1. John Locke, *The Second Treatise of Government* (1690), ed. C. B. Macpherson (Indianapolis, IN: Hackett, 1980), 5–30.

2. John Stuart Mill, *On Liberty* (1859), ed. E. Rapaport (Indianapolis, IN: Hackett, 1978), 9.

3. Alan Westin, *Privacy and Freedom* (New York: Atheneum, 1967).

4. John Roberts and Thomas Gregor, "Privacy: A Cultural View," in *Privacy: Nomos XIII*, ed. J. Roland Pennock and John W. Chapman (New York: Atherton, 1971), 225.

5. See Daniel J. Solove, "Conceptualizing Privacy," *California Law Review* 90 (2002): 1088–155, 1094. For a more recent topology of privacy, see Bert-Jaap Koops, Bryce Newell, Timan Tjerk, et al., "A Typology of Privacy," *University of Pennsylvania Journal of International Law* 38 (2017): 483–575.

6. Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 194.

7. For example, see Ruth Gavison, "Privacy and the Limits of Law," *Yale Law Journal* 89 (1980): 421–71; Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (Ithaca, NY: Cornell University Press, 1997), 53.

8. See Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (New York: Pantheon, 1983); Gavison, "Privacy and the Limits of Law."

9. Bok, *Secrets*, 10.

10. Gavison, "Privacy and the Limits of Law," 433.

11. Richard Posner, "The Economics of Privacy," *American Economic Review Papers and Proceedings* 71 (1981): 405–9.

12. DeCew, *In Pursuit of Privacy*, 48.

13. Westin, *Privacy and Freedom*, 7.

14. Charles Fried, "Privacy: A Moral Analysis," in *Philosophical Dimensions of Privacy*, ed. Ferdinand D. Schoeman (Cambridge: Cambridge University Press, 1984), 203–21, 209.

15. See Roscoe Pound, "Interests in Personality," *Harvard Law Review* 28 (1915): 343; Paul A. Freund, "Privacy: One Concept or Many?" in *Privacy: Nomos XIII*, ed. J. Roland Pennock and John W. Chapman (New York: Atherton, 1971), 182; Jeffrey Reiman, "Privacy, Intimacy, and Personhood," *Philosophy and Public Affairs* 6 (1976): 26–44.

16. Stanley I. Benn, 1971, "Privacy, Freedom, and Respect for Persons," in *Privacy: Nomos XIII*, ed. J. Roland Pennock and John W. Chapman (New York: Atherton, 1971), 26.

17. See Gavison, "Privacy and the Limits of Law"; Jed Rubenfeld, "The Right of Privacy," *Harvard Law Review* 102 (1989): 737–807; Solove, "Conceptualizing Privacy."

18. See James Rachels, "Why Privacy Is Important," *Philosophy and Public Affairs* 4 (1975): 323–33; Julie Inness, *Privacy, Intimacy, and Isolation* (Oxford:

Oxford University Press, 1992); Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (New York: Random House, 2000).

19. Rosen, *The Unwanted Gaze*, 8.

20. Inness, *Privacy, Intimacy, and Isolation*, 91.

21. See Solove, "Conceptualizing Privacy"; DeCew, *In Pursuit of Privacy*.

22. DeCew, *In Pursuit of Privacy*, 58.

23. Adam Moore, *Privacy Rights: Moral and Legal Foundations* (University Park: Pennsylvania State University Press, 2010), 27.

24. Helen Nissenbaum, "Privacy as Contextual Integrity," *Washington Law Review* 79 (2004): 119–57.

25. Thomas Cooley, *A Treatise on the Law of Torts* (Chicago: Callaghan, 1880). See also Warren and Brandeis, "The Right to Privacy."

26. *De May v. Roberts*, 9 N.W. 146 (Mich. 1881).

27. *De May v. Roberts*, 149, cited in R. Turkington and A. Allen, *Privacy Law: Cases and Materials*, 2nd ed. (St. Paul, MN: West, 2002), 23.

28. Warren and Brandeis, "The Right to Privacy."

29. Warren and Brandeis, "Right to Privacy," 194.

30. Dean William Prosser, "Privacy," *California Law Review* 48 (1960): 383, 384. Drawn from E. Alderman and C. Kennedy's *The Right to Privacy* (New York: Knopf, 1995), 155–56.

31. Prosser, "Privacy," 386.

32. Restatement (Second) of Torts 652B-652E (1977).

33. *Melvin v. Reid* (1931) 112 Cal. App. 285.

34. *Gill v. Hearst Publishing Co.* (1953) 40 Cal. 2d 224.

35. *Florida Star v. B.J.F.* (1989), 491 U.S. 524.

36. *Florida Star v. B.J.F.* (1989), 491 U.S. 551.

37. *Florida Star v. B.J.F.*

38. *Machleder v. Diaz* (1986) 801 F.2d 46; U.S. App.

39. *Matthews v. Wozencraft* (1994) 15 F.3d 432, 438, 5th Cir.

40. Restatement of Torts 652B, 1977.

41. See also *Bartnicki v. Vopper*, 121 S. Ct. 1753 (2001). *Cape Publications, Inc. v. Bridges*, 423 So. 2d 426 (Fla. Dist. Ct. App. 1982); *DeGregorio v. CBS, Inc.*, 473 N.Y.S.2d 922 (N.Y. S. Ct. 1984); *Sipple v. Chronicle Publishing Co.*, 154 Cal. App. 3d 1040, 201 Cal. Rptr. 665 (1984).

42. The Third Amendment prohibiting the quartering of soldiers in private homes without consent and the Fifth Amendment prohibiting self-incrimination that is testimonial in nature both protect privacy interests. See, for example, *Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982), *Boyd v. United States*, 116 U.S. 616 (1886), and *Schmerber v. California*, 384 U.S. 757, 765 (1966).

43. See, for example, Robert Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon & Schuster, 1990).

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

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

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

47. *Loving v. Virginia*, 388 U.S. 1 (1967).

48. *Stanley v. Georgia*, 394 U.S. 577 (1969).

49. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

50. *Carey v. Population Services*, 431 U.S. 678 (1977).

51. *Roe v. Wade*, 410 U.S. 153 (1973).

52. *Roe v. Wade*, 164–65.

53. See, for example, Nadine Strossen, "Protecting Privacy and Free Speech in Cyberspace," *Georgetown Law Journal* 89 (2001): 2107; Susan Brenner, "The Privacy Privilege: Law Enforcement, Technology, and the Constitution," *Journal of Technology Law and Policy* 7 (December 2002): 123–94.

54. *Dendrite Int'l v. Doe No. 3*, 342 N.J. Super. 134 (App. Div. 2001). See also *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 197–90 (1999); *ACLU v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997), *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

55. *Dendrite Int'l v. Doe No. 3*, 342 N.J. Super. 134 (App. Div. 2001) at 149. See also *Talley v. California*, 362 U.S. 60 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960).

56. *NAACP v. Alabama*, 357 U.S. 449 (1958).

57. *NAACP v. Alabama* 357 U.S. 449 (1958) at 463. See also Edward Bloustein, "Group Privacy: The Right to Huddle," *Rutgers-Camden Law Journal* 8 (1977): 278, quoted in Jonathan Kahn, "Privacy as a Legal Principle of Identity Maintenance," *Seton Hall Law Review* 33 (2003): 401.

58. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000).

59. U.S. Constitution, amend 4.

60. James Otis, "In Opposition to Writs of Assistance," Delivered before the Superior Court, Boston (February 1761). See *Entick v. Carrington*, 19 Howell's State Trials 1029, 95 Eng. 807 (1705).

61. William Pitt the elder, Earl of Chatham, speech in the House of Lords, 1763, in Henry Peter Brougham, *Historical Sketches of Statesmen Who Flourished in the Time of George III*, vol. 1 (London: R. Griffin, 1839), 52.

62. *Olmstead v. United States*, 227 U.S. 438 (1928). For earlier cases, see *Boyd v. United States*, 116 U.S. 616 (1886); *Gouled v. United States*, 255 U.S. 298 (1921); *Weeks v. United States*, 232 U.S. 383, 392 (1914); *Carroll v. United States*, 267 U.S. 132, 158 (1925); *Agnello v. United States*, 269 U.S. 20, 30 (1925).

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

64. But see *United States v. Jones*, 565 U.S. 400 (2012). Justice Sonia Sotomayor wrote, "As the majority's opinion makes clear, *Katz*'s reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it." *United States v. Jones*, 565 U.S. 400 (2012) at 3.

65. Turkington and Allen, *Privacy Law*, 95. See also *Rakas v. Illinois*, 439 U.S. 128 (1978); *United States v. White*, 401 U.S. 745, 786 (1971); *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Alderman v. United States*, 394 U.S. 165 (1969); *Mincey v. Arizona*,

437 U.S. 385 (1978); *Payton v. New York*, 445 U.S. 573 (1980); *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

66. *Berger v. New York*, 388 U.S. 41 (1967).

67. Omnibus Crime Control and Safe Street Act of 1968, U.S.C. §§ 2510–2520 (1994 and Supp. V 2000). See below.

68. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

69. See Tom Bush, "Comment: A Privacy-Based Analysis for Warrantless Aerial Surveillance Cases," *California Law Review* 75 (1987): 1776.

70. See *Oliver v. United States*, 466 U.S. 170, 177 (1984); *Kyllo v. United States*, 533 U.S. 27 (2001).

71. Ken Gormley, "One Hundred Years of Privacy," *Wisconsin Law Review* (1992): 1369.

72. See *Berger v. New York*, 388 U.S. 41 (1967); *United States v. United States Dist. Court*, 407 U.S. 297 (1972). Cited in Gormley, "One Hundred Years of Privacy," n171.

73. See *Camara v. Municipal Court*, 387 U.S. 523 (1967); *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977). Cited in Gormley, "One Hundred Years of Privacy," n172.

74. See *United States v. Chadwick*, 433 U.S. 1 (1977); *Arkansas v. Sanders*, 442 U.S. 753 (1979). But see *United States v. Ross*, 456 U.S. 798 (1982). Cited in Gormley, "One Hundred Years of Privacy," n173.

75. See *Walter v. United States*, 447 U.S. 649 (1980). Cited in Gormley, "One Hundred Years of Privacy," n174.

76. See *Delaware v. Prouse*, 440 U.S. 648 (1979). Cited in Gormley, "One Hundred Years of Privacy," n178.

77. *See United States v. Miller*, 425 U.S. 435 (1976). Cited in Gormley, "One Hundred Years of Privacy," n179.

78. See *United States v. Dionisio*, 410 U.S. 1 (1973). Cited in Gormley, "One Hundred Years of Privacy," n180.

79. See *Smith v. Maryland*, 442 U.S. 735 (1979). Cited in Gormley, "One Hundred Years of Privacy," n181.

80. See *United States v. White*, 401 U.S. 745 (1971). Cited in Gormley, "One Hundred Years of Privacy," n182.

81. See *Chambers v. Maroney*, 399 U.S. 42 (1970); *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Rakas v. Illinois*, 439 U.S. 128 (1978); *California v. Carney*, 471 U.S. 386 (1985); *United States v. Ross*, 456 U.S. 798 (1982); *New York v. Belton*, 453 U.S. 454 (1981). Cited in Gormley, "One Hundred Years of Privacy," n183.

82. USA Patriot Act (U.S. H.R. 3162, Public Law 107–56), Title II.

83. USA Patriot Act, Sec. 214–17, 503, 505.

84. See *Smith v. Maryland*, 442 U.S. 735 (1979).

85. See Christopher Slobogin, "Subpoenas and Privacy," *DePaul Law Review* 54 (2005): 805–46.

86. See *Riley v. California*, 134 S. Ct. 2473, 2489 (2014); *Jewel v. National Security Agency*, accessed February 6, 2019, https://www.eff.org/files/filenode/jewel/jewel.complaint.pdf.

87. See also Cable Communications Policy Act 1984, 47 U.S.C. 521; Video Privacy Protection Act of 1988, 18 U.S.C. 2710; Telephone Consumer Protection Act of 1991, 47 U.S.C. 227; Communications Assistance for Law Enforcement Act of 1994; Telecommunications Act of 1996, 47 U.S.C. § 222; Children's On Line Privacy Protection Act of 1999, §§ 6501–6.

88. Omnibus Crime Control and Safe Street Act of 1968, U.S.C. §§ 2510–20 (1994 and Supp. V 2000).

89. Fair Credit Reporting Act of 1970, 15 U.S.C § 1681–81t (1996, 2003).

90. Family Educational Rights and Privacy Act of 1974, 20 U.S.C. §§ 1232g(a)–1232g(g).

91. Privacy Act of 1974, 5 U.S.C. § 552a(a)–552a(v).

92. Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401. *United States v. Miller*, 425 U.S. 435 (1976). In *Miller*, the court rejected the view that bank customers had legal privacy rights to financial information held by financial institutions.

93. Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510–22. See *Smith v. Maryland*, 442 U.S. 735 (1979).

94. Computer Matching and Privacy Protection Act of 1988, 5 U.S.C.A. § 552a.

95. Title V of the Gramm-Leach-Bliley Financial Modernization Act of 2000, Pub. L. No. 106–2, 113 Stat. 1338.

96. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104–91, 110 Stat. 1936.

97. Video Voyeurism Prevention Act of 2004, 18 U.S.C. 1801 (2005); Pub. L. No. 108–495.

98. For an overview of state privacy protections, see Electronic Privacy Information Center, accessed February 9, 2019, http://www.epic.org/privacy/consumer/states.html.

99. Washington State, RCW 9A.44.115. See also California's anti-voyeurism statute California Penal Code § 647(k)(1) and Federal Video Voyeurism Prevention Act of 2004, 18 U.S.C. 1801 (2005); Pub. L. No. 108–495.

100. California Consumer Privacy Act, accessed February 6, 2019, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB375. See also UN General Assembly, Universal Declaration of Human Rights, accessed February 7, 2019, http://www.un.org/en/universal-declaration-human-rights/; European Union, accessed February 7, 2019, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=EN. The General Data Protection Regulation allows fines up to 4 percent of a company's worldwide yearly revenues or twenty million euros, whichever is higher.

101. Judith Jarvis Thomson, "The Right to Privacy," *Philosophy and Public Affairs* 4 (1975): 295–314. See also William Parent, "Privacy, Morality, and the Law," *Philosophy and Public Affairs* 12 (1983): 269–88.

102. See Thomas Scanlon, "Thomson on Privacy," *Philosophy and Public Affairs* 4 (1975): 315–22; DeCew, *In Pursuit of Privacy*; Moore, *Privacy Rights*.

103. Catharine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 2002), 191. See also Carol Gilligan, *In a Different*

Voice: Psychological Theory and Women's Development (Cambridge, MA: Harvard University Press, 1982).

104. See Anita L. Allen, *Uneasy Access: Privacy for Women in a Free Society* (Lanham, MD: Rowman & Littlefield, 1988); DeCew, *In Pursuit of Privacy*.

105. See, for example, Bork, *The Tempting of America*; John Hart Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade," *Yale Law Journal* 82 (1973): 920–49; Louis Henkin, "Privacy and Autonomy," *Columbia Law Review* 74 (1974): 1410–33.

106. Henkin, 1410–11.

107. Judith Wagner DeCew, "The Scope of Privacy in Law and Ethics," *Law and Philosophy* 5 (1986): 165.

108. *FTC v. Wyndham Corp.*, 799 F.3d 236 (3d Cir. 2015).

109. Federal Trade Commission Act, Section 5: Unfair or Deceptive Acts or Practices (15 USC §45), accessed February 6, 2019, https://www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf.