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Received 15 November 2005
Revised 18 October 2006
Accepted 1 November 2006

Abstract

Purpose – The purpose of this paper is to provide a survey piece on the concept of privacy and the justification of privacy rights.

Design/methodology/approach – This article reviews each of the following areas: a brief history of privacy; philosophical definitions of privacy along with specific critiques; legal conceptions of privacy, including the history of privacy protections granted in constitutional and tort law; and general critiques of privacy protections both moral and legal.

Findings – A primary goal of this article has been to provide an overview of the most important philosophical and legal issues related to privacy. While privacy is difficult to define and has been challenged on legal and moral grounds, it is a cultural universal and has played an important role in the formation of Western liberal democracies.

Originality/value – The paper provides a general overview of the issues and debates that frame this lively area of scholarly inquiry. By facilitating a wider engagement and input from numerous communities and disciplines, it is the authors' hope to advance scholarly debate in this important area.

Keywords Privacy, Human rights

Paper type Conceptual paper

Privacy is a difficult notion to define. Part of the problem is that privacy has been used to denote a wide number of interests 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.

In any case, privacy, as noted in the brief historical sketch that follows, 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, and more generally public/private distinctions, have been found in every culture systematically studied. Based on the human relations area files at Yale University, Alan Westin (1968) has argued that there are aspects of privacy found in every society – privacy is a cultural universal. This view is supported by John Roberts and Thomas Gregor:

> 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 (Roberts and Gregor, 1971, p. 200).

Library Hi Tech
Vol. 25 No. 1, 2007
pp. 58-78

0737-8831
DOI 10.1108/07378830710735867

In the USA 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 women'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 we will review each of these areas including:

- a brief history of privacy;
- philosophical definitions of privacy along with specific critiques;
- legal conceptions of privacy, including the history of privacy protections granted in constitutional and tort law; and
- general critiques of privacy protections both moral and legal.

Our hope is to provide a general overview of the issues and debates that frame this lively area of scholarly inquiry.

A brief history of privacy: Athens and China, Locke and Mill

It is difficult to write about the history of privacy because of an overabundance of subject matter. In this section we will focus on privacy as developed in two distinct cultures and within two different moral traditions (Moore, 2005). The legal history of privacy will be covered in a later section.

Classical Athens and China

The distinction between public and private activity was entrenched in Greek society by the time of Socrates (470-399 BC), Plato (427-347 BC), and Aristotle (384-322 BC). Typically the distinction was cast in terms of political activity compared to isolated intellectual pursuits (Moore, 1984). At his defense for corrupting the youth, making the worse case appear the better, and not believing in the State gods, Socrates writes:

> Someone may wonder why I go about in private, giving advice and busying myself with the concerns of others, but do not venture to come forward in public and advise the state .... For I am certain, O men of Athens, that if I had engaged in politics, I should have perished long ago and done no good either to you or to myself. And don't be offended at my telling you the truth: for the truth is that no man who goes to war with you or any other multitude, honestly struggling against the commission of unrighteousness and wrong in the state, will save his life; he who will really fight for the right, if he would live even for a little while, must have a private station and not a public one (Plato, *Apology*, 31c-32a).

As an early social critic, Socrates plays two roles. First he does not hold public office and seeks his own personal ends. Yet at the same time Socrates publicly challenges many of the customs, institutions, and well-established philosophical theories of his day. In a very public way Socrates voiced the opinion that "The unexamined life is not worth living" which requires individuals to examine their own personal views and beliefs. Socrates then publicly challenged, and in many cases humiliated, those who had not examined their own beliefs.

Plato was openly hostile to privacy – deeming it unnecessary and counterproductive in relation to the ideal state. In The Republic Plato writes:

> And so, Glaucon, we have arrived at the conclusion that in the perfect State wives and children are to be in common; and that all education and the pursuits of war and peace are also to be common, and the best philosophers and the bravest warriors are to be their kings?
>
> That, replied Glaucon, has been acknowledged. Yes, I said; and we have further acknowledged that the governors, when appointed themselves, will take their soldiers and place them in houses such as we were describing, which are common to all, and contain nothing private, or individual … (Plato, *Republic*, Cha VIII).

In *The Laws* Plato advocates the elimination of private spheres of activity.

> The first and highest form of the state and of the government and of the law is that in which there prevails most widely the ancient saying, that "Friends have all things in common." Whether there is anywhere now, or will ever be, this communion of women and children and of property, in which the private and individual is altogether banished from life, and things which are by nature private, such as eyes and ears and hands, have become common, and in some way see and hear and act in common, and all men express praise and blame and feel joy and sorrow on the same occasions, and whatever laws there are unite the city to the utmost-whether all this is possible or not, I say that no man, acting upon any other principle, will ever constitute a state which will be truer or better or more exalted in virtue (Plato, *The Laws*, Chapter 5, 738d-e).

Plato views privacy as something that is inherently disvaluable in relation to the perfect state. Moreover he recognizes no psychological, sociological, or political needs for individuals to be able to control patterns of association and disassociation with their fellows.

Aristotle, on the other hand, makes use of a public/private distinction in at least two ways. First, he recognizes a boundary between affairs of the state or polis and household affairs. Jürgen Habermas noted:

> In the fully developed Greek city-state the sphere of the polis, which was common to the free citizens, was strictly separated from the sphere of the *oikos*; in the sphere of the *oikos*, each individual is in his own realm (Habermas, 1962, p. 10).

Second, contemplative activity – which for Aristotle was necessary for human flourishing – required distance, space, and solitude from public life.

The public/private distinction was also well understood by the Warring States period – 403 BC to 221 BC – in China (see Moore, 1984). Like Aristotle, Confucius (551-479 BC) distinguished between the public activity of government and the private affairs of family life. Confucius also contends that "a private obligation of a son to care for his father overrides the public obligation to obey the law against theft" and that "a timid man who is pretending to be fierce is like a man who is so 'dishonest as to sneak into places where one has no right to be, by boring a hole or climbing through a gap'"(Moore, 1984, p. 223). Han Fei Tzu (280-233 BC) writes:

> When T s'ang Chieh [a mythic cultural hero] created the system of writing, he used the character for "private" to express the idea of self-centeredness, and combined the elements for "private" and "opposed to" to form the character for "public." The fact that public and private are mutually opposed was already well understood at the time of T s'ang Chieh. To regard the two as being identical in interest is a disaster which comes from lack of consideration (Tzu, 1964, p.106).

While not sophisticated and clearly contentious, the public/private distinction arose and was a matter of philosophical debate in two distinct cultural traditions. In both of the cultures privacy was a commodity purchased with power, money, and privilege. Barriers such as walls, fences, and even servants secured areas of isolation and seclusion for the upper class. To a lesser degree, privacy was also secured by those with more modest means.

John Locke and John Stuart Mill

John Locke (1632-1704) and John Stuart Mill (1806-1873) defended similar accounts of privacy from different moral perspectives. For Locke the public/private distinction falls out of his conception of the state of nature, the legitimate function of government, and property rights. The state of nature was a pre-governmental state where individuals had perfect freedom bounded by the law of nature (Locke, 1690, Ch. 2). As sovereign and moral equals, individuals in the state of nature had rights to life, liberty, and property. Unlike Thomas Hobbes, who viewed the state of nature as hypothetical rather than actual and conceived of it as a place where life was "solitary, poor, nasty, brutish, and short" (Hobbes, 1962, Ch. 13), Locke thought of it as peaceful place governed by morality (Locke, 1690, Ch. 2). Where Hobbes envisioned a "war of all against all" Locke saw mere inconveniences related to individual prejudices and competing interpretations of the law of nature. The sole reason for uniting into a commonwealth, for Locke, was to remedy these inconveniences – the function of government was to secure the rights of life, liberty, and property.

As it has often been noted, property rights were central to Locke's conception of just government. In the state of nature individuals could unilaterally take part of the commons – what was available for public consumption – and obtain private property rights (Locke, 1690, Ch. 5). These property rights allowed individuals the moral space to order their lives as they saw fit. On estates and behind fences, walls, and doors Lockean individuals secured a domain of private action free from public pressures. Public incursions into private domains required weighty justification.

John Stuart Mill offers the following account. His liberty principle states:

> The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of any of their number, is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant (Mill, 1859, Ch. 1).

When an individual is harming no one or only himself government agents or other citizens cannot justifiably interfere. Mill recognized that harm could occur through action and inaction and noted that:

> A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury. The latter case, it is true, requires a much more cautious exercise of compulsion than the former. To make anyone answerable for doing evil to others is the rule; to make him answerable for not preventing evil is, comparatively speaking, the exception (Mill, 1859, Ch. 1).

Here Mill accepts a version of the doing/allowing distinction – actions that cause harm are different than failings to prevent harm. In anticipation of the question "won't any action someone performs affect others in some way?" Mill adds:

> But there is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest: comprehending all that portion of a person's life and conduct which affects only himself or, if it also affects others, only with their free, voluntary, and undeceived consent and participation. When I say only himself, I mean directly and in the first instance; for whatever affects himself may affect others through himself (Mill, 1859, Ch. 1).

Here we get Mill's doctrine of "self-regarding" and "other-regarding" acts and the problem of when an action can be considered to be "purely" self-regarding. Mill promises to take this issue up in another work.

In part he addresses this worry in chapter five of *Utilitarianism* (Mill, 1863, Ch. 5). To be brief, rights provide the standard of harm and the boundary between self-regarding and other-regarding acts. A right is a valid claim on society to protect us in a certain way (Mill, 1863, Ch. 5). When an action violates the rights of another moral harm has occurred and appropriate action or interference is warranted by citizens or government agents. Liberty, property, and life rights appear to be the kinds of rights that Mill endorses. If so, then like Locke, Mill uses rights to secure individuals the moral space to order their lives independent of social pressures. Isaiah Berlin puts the point the following way.

> . . . it is assumed, especially by such libertarians as Locke and Mill in England, and Constant and Tocqueville in France, that there ought to exist a certain minimum area of personal freedom which must on no account be violated; for if it is overstepped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred (Berlin, 2002, p.171).

Philosophical definitions of privacy

Privacy has been defined in many ways over the last century (see DeCew, 1997). Warren and Brandeis following Judge Thomas Cooley called it "the right to be let alone" (Cooley, 1880). Pound (1915) and Freund (1971) have defined privacy in terms of an extension of personality or personhood. Alan Westin and others have described privacy in terms of information control (Westin, 1968; Moore, 2001; see also Allen, 2003; Gavison, 1983). Still others have insisted that privacy consists of a form of autonomy over personal matters (*Eisenstadt* v. *Baird* (1972) 405 U.S. 438; Henkin, 1974; Feinberg, 1983; Ortiz, 1989; Englehardt, 2000). William Parent (1983, p. 269) argued that "[p]rivacy is the condition of not having undocumented personal knowledge about one possessed by others" while Julie Inness (1992, p. 140) defined privacy as "the state of possessing control over a realm of intimate decisions, which include decisions about intimate access, intimate information, and intimate actions." More recently, Judith Wagner DeCew (1997, p. 62) has proposed that the "realm of the private to be whatever is not, according to a reasonable person in normal circumstances, the legitimate concern of others". This brief summary indicates the variety and breadth of the definitions that have been offered.

While admittedly imprecise, different conceptions of privacy typically fall into one of six categories or combinations of the six. Following Daniel Solove's analysis, "1) the right to be let alone; 2) limited access to the self; 3) secrecy; 4) control of personal information; 5) personhood; 6) intimacy" (Solove, 2002, p. 1094); and 7) privacy as a cluster concept. Moreover, each conception has been criticized. We will take them up in turn.

The right to be let alone

In 1890 Warren and 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" (Warren and Brandeis, 1890, p. 194). They note how technology, media interests, and big business have "invaded the sacred precincts of private and domestic life" and ensured that "what is whispered in the closet shall be proclaimed from the house-tops" (Warren and Brandeis, 1890, p. 195). While acknowledged as starting the modern debate, the conception of privacy proposed by Warren and Brandeis has been widely criticized as too vague (see Gavison, 1980; O'Brien, 1979; Allen, 1988; Schoeman, 1984; Bloustein, 1964; Solove, 2002). 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.

Limited access to the self

Privacy defined as "limited access to the self" has been defended by numerous authors including Sissela Bok (1983), Anita Allen (1988), and Ruth Gavison (1980; see also Moore, 2003; Gross, 1967).Van Den Haag, 1971). Bok writes, "privacy is the condition of being protected from unwanted access by others – either physical access, personal information, or attention" (Bok, 1983, p. 10). The worry here is that if no protection is available or the condition does not obtain it would be odd to conclude that privacy interests were not relevant. Gaviston offers a different account of limited access. On her view limited access consists of "secrecy, anonymity, and solitude" (Gavison, 1980, p. 433). Solove (2002, p. 1105) notes "Although Gaviston contends that 'the collection, storage, and computerization of information' falls within her conception, these activities often do not reveal secrets, destroy anonymity, or thwart solitude." If so, such conceptions of privacy would be too narrow.

Privacy as secrecy

Judge Richard Posner (1998, p. 46: see also Jourard, 1966) has defined privacy as the "right to conceal discreditable facts about oneself" – a right to secrecy. Amitai Etzioni (1999, p. 12 cited in Solove (2002)) seems to concur writing "the realm in which an actor … can legitimately act without disclosure and accountability to others". DeCew and others have criticized this conception of privacy noting "secret information is often not private (for example, secret military plans) and private matters are not always secret (for example, one's debts)" (DeCew, 1997, p. 48; see also Inness, 1992; Benn, 1971). Moreover it seems that privacy-as-secrecy accounts cannot accommodate what has come to be called "decisional privacy" – for example, the right between consenting adults to use contraceptive devices in private places.

Control of personal information

"Control over personal information" has also been offered as a definition of privacy. Alan Westin writes:

> . . . [p]rivacy 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 (Westin, 1968, p.7; see also Moore, 2003; Moore, 2001; Miller, 1971; Parker, 1974).

Charles Fried (1968, p. 475, cited in Solove (2002)) claims:

> . . . [p]rivacy 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.

Critics have attacked this conception on grounds that it, like the secrecy view, cannot account for "decisional privacy." It also fails to acknowledge a physical aspect to privacy – control over access to locations and bodies (see also Schoeman, 1984; O'Brien, 1979; Inness, 1992; Parent, 1983; Thomson, 1975; Solove, 2002). Moreover, expanding the definition to include control over bodies and locations leads to the following worry offered by Judith Wagner DeCew.

> If a police officer pushes one out of the way of an ambulance, one has lost control of what is done to one, but we would not say that privacy has been invaded. Not just any touching is a privacy intrusion (DeCew, 1997, p. 53).

Personality

Paul Freund (1971), Jeffrey Reiman (1976), Stanley Benn (1971), and others (see Bloustein, 1964) have defended a personality-based conception of privacy. According to this view privacy protects personhood and autonomous action. 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 (Benn, 1971, p. 26).

Critics of this view have countered noting that, rather than defining privacy, personality-based conceptions of privacy simply indicate why privacy is important or valuable – privacy protects personal development and autonomous choice (see Rubenfeld, 1989; Gavison, 1980; Solove, 2002).

Privacy as intimacy

Several authors have defended the view that privacy is a form of intimacy (Fried, 1968; Rachels, 1975; Gerety, 1977). Jeffrey Rosen (2000, p. 8) writes:

> 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.

Julie Inness (1992, p. 91) maintains 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.

In critique Solove (2002), citing DeCew and Farber, notes that financial information may be private but not intimate. Moreover, it is possible to have private relationships without intimacy and to perform private acts that are not intimate.

Privacy as a cluster concept

Finally, many view privacy as a cluster concept that contains several of the dimensions noted above. Judith Wagner DeCew (1997) has proposed that privacy is concept ranging over information, access, and expressions. Adam Moore (2003) has defended a "control over access" view arguing that privacy is a culturally and species relative right to a level of control over access to bodies, locations, and information. Daniel Solove (2002) has offered a contextualized dependent approach for defining privacy – for example, in the context of information we may focus on certain dimensions of privacy that will not be as important in different contexts like spatial control.

Descriptive, normative, reductionists, and non-reductionists

In addition to the different conceptions already presented there are two distinctions that have been widely discussed related to defining privacy. The first is the distinction between descriptive and normative conceptions of privacy. A descriptive or non-normative account describes a state or condition where privacy obtains. An example would be Parent's (1983, p. 269) definition, "[p]rivacy is the condition of not having undocumented personal knowledge about one possessed by others". A normative account, on the other hand, makes references to moral obligations or claims. For example when DeCew talks about what is of "legitimate concern of others" she includes ethical considerations.

Reductionist and non-reductionist accounts of privacy have also been offered (see Peikoff, 2004). The non-reductionist views privacy as related to, but distinct from, other rights or concepts. Reductivists argue that privacy is derived from other rights such as life, liberty, and property rights – there is no overarching concept of privacy but rather several distinct core notions that have been lumped together. Viewing privacy in this fashion might mean jettisoning the idea altogether and focusing on more fundamental concepts. For example, Frederick Davis (1959, p. 20) has argued that:

> ... [i]f truly fundamental interests are accorded the protection they deserve, no need to champion a right to privacy arises. Invasion of privacy is, in reality, a complex of more fundamental wrongs. Similarly, the individual's interest in privacy itself, however real, is derivative and a state better vouchsafed by protecting more immediate rights.

Judith Jarvis Thomson (1975, p. 306) agreed claiming that:

> ... the right to privacy is itself a cluster of rights, and that it is not a distinct cluster of rights but itself intersects with ... the cluster of rights which owning property consists in.

The cluster of rights to property and over the person does not need the new framework of privacy in order to describe rights violations. The simpler avenue, according to Thomson, is to focus on these cluster of rights which are more basic or fundamental than the "derivative" right of privacy.

It is our view that these distinctions – descriptive/normative and non-reductive/reductive – are not as important as some have thought. First, it is possible and proper to define privacy along normative and descriptive dimensions.

Intellectual property is also defined descriptively and normatively. We may, for example, define intellectual property without making any essential references to normative claims. We can even give a description of the conditions that surround an intellectual property right. Moreover, we can define intellectual property in normative terms by indicating the moral claims that surround persons and their property. The same is true of privacy.

Second, without considering the justification of the rights involved, it is unclear if privacy is reducible to other rights or the other way around. This point has been made by Parent and others (see DeCew, 1997 citing Scanlon, 1975; Reiman, 1976). And even if the reductionist is correct it does not follow that we should do away with the category of privacy rights. The cluster of rights that comprise privacy may find their roots in property or liberty yet still mark out a distinct kind. Finally, if all rights are nothing more than complex sets of obligations, powers, duties, and immunities it would not automatically follow that we should dispense with talk of rights and frame our moral discourse in these more basic terms.

Legal conceptions of privacy

While imprecise, legal protections for privacy are typically classified into four categories:

(1) decisional privacy;

(2) First Amendment privacy;

(3) Fourth Amendment privacy; and

(4) privacy torts.

Numerous state and federal protections for privacy will not be presented.

Decisional privacy

In *Griswold* v. *Connecticut* (1965) 381 U.S. 479, a statute prohibiting the dissemination of contraceptive devices and information to married couples, was struck down because it would, in part, allow the police to violate the "the sacred precincts of marital bedrooms". Justice 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 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".

A number of judicial decisions solidified the Douglas and Goldberg line of argumentation. In *Loving* v. *Virginia* (1967) 388 U.S. 1, *Stanley* v. *Georgia* (1969) 394 U.S. 577, *Eisenstadt* v. *Baird* (1972) 405 U.S. 438, and *Carey* v. *Population Services*

(1977) 431 U.S. 678, 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* (1973) 410 U.S. 153. Justice Blackmun argued:

> . . . [t]he 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.

While left relatively untouched by subsequent decisions the right to choose enshrined in *Roe* is narrow in scope and only protects, however important, the privacy interests of a segment of the population.

Conversely as of 1960, every State had some sort of anti-sodomy law prohibiting anal or oral sex between consenting adults in private places. In 1986 the Supreme Court decided *Bowers* v. *Hardwick* (1986) 478 U.S. 186, and upheld as constitutional, a Georgia anti-sodomy statute. Seventeen years later the *Bowers* decision was overturned in *Lawrence et al.* v. *Texas* (2003) 538 U.S. 918. Justice Kennedy wrote:

> The petitioners are entitled to respect for their private lives . . . The state cannot demean their existence or control their destiny by making their private sexual conduct a crime.

Griswold, Roe, Lawrence, as well as the other cases mentioned ground what some legal scholars have called "decisional privacy" – that is a right, in private places and between consenting adults, to decide what happens to and in our own bodies.

While acknowledging the privacy protection afforded by *Griswold, Roe, and Lawrence*, a broader view of the cases and laws that surround "decisional privacy" indicates just how narrow these decisions were and are. Writing a dissent opinion in the Lawrence case Supreme Court Justice Antonin Scalia claimed:

> [T]he Court leaves strangely untouched its central legal conclusion: "[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do . . . Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is "immoral and unacceptable" constitutes a rational basis for regulation. See, e.g. *Williams* v. *Pryor* (2001), 240 F. 3d 944, 949 (CA11) (citing *Bowers* in upholding Alabama's prohibition on the sale of sex toys on the ground that "[t]he crafting and safeguarding of public morality . . . indisputably is a legitimate government interest under rational basis scrutiny"); *Milner* v. *Apfel*, 148 F. 3d 812, 814 (CA7 1998) (citing *Bowers* for the proposition that "[l]egislatures are permitted to legislate with regard to morality . . . rather than confined to preventing demonstrable harms"); *Holmes* v. *California Army National Guard* 124 F. 3d 1126, 1136 (CA9 1997) (relying on *Bowers* in upholding the federal statute and regulations banning from military service those who engage in homosexual conduct); *Owens* v. *State*, 352 Md. 663, 683, 724 A. 2d 43, 53 (1999) (relying on *Bowers* in holding that "a person has no constitutional right to engage in sexual intercourse, at least outside of marriage"); *Sherman* v. *Henry*, 928 S. W. 2d 464, 469-473 (Tex. 1996) (relying on *Bowers* in rejecting a claimed constitutional right to commit adultery).

In light of the *Lawrence* decision, and the overturning of *Bowers*, Scalia maintains that laws against same-sex marriage, prostitution, masturbation, and fornication will not be sustainable. Coming from a conservative justice, these sentiments are hardly

surprising – allow acts of sodomy to occur and the floodgates of immorality and vice will be opened. Many of us would like to see Scalia's prognostication come true although he would not. It is also not true to claim that *Roe* has not been undermined in recent years. Mississippi, for example, has implemented numerous restrictions on the ability of women to obtain an abortion like mandatory waiting periods and counseling.

In addition we cannot use certain kinds of drugs, euthanize ourselves, or engage in certain sorts of athletic events, such as extreme fighting. All 50 states have laws prohibiting the use of certain types of drugs. For example, in the state of Washington possession of less than 40 grams of marijuana is punishable by up to 90 days in jail and a fine up to $1,000. For amounts of 40 grams or more the penalties increase to up to five years in prison and a fine up to $10,000. In *Washington et al.* v. *Glucksberg et al.* (1997) 522 U.S. 702 the Supreme Court upheld a state ban on physician assisted euthanasia. Missouri and numerous other states have banned "extreme fighting" contests (Missouri Revised Statute, 1996, 317.018).

There are also laws against, viewing obscene material, adultery, and gambling. In Alabama and Georgia it is illegal to stimulate the wrong organs with self-pleasuring devices (see Ala. Code. § 13A-12-200.1). Fornication, or sex between unmarried people, is legally prohibited in Washington, DC, Virginia, West Virginia, Minnesota, Utah, Massachusetts, and Idaho (see *Owens* v. *State* (1999) 352 Md. 663). Even when these activities are done in private places between consenting adults, our government, federal, state, and local, has decided that we cannot make these decisions for ourselves.

First Amendment privacy

Surprisingly, privacy is also protected by the First Amendment (see Strossen, 2001). Sometimes the ability to speak freely is based 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 (see *Dendrite Int'l* v. *Doe No. 3* (2001) 342 N.J. Super. 134; *Buckley* v. *American Constitutional Law Foundation* (1999) 525 U.S. 182; *ACLU* v. *Miller* (1997) 977 F. Supp. 1228, N.D. Ga; *Bates* v. *City of Little Rock* (1960) 361 U.S. 516; *NAACP* v. *Alabama* (1958) 357 U.S. 449; and *McIntyre* v. *Ohio Elections Comm'n* (1995) 514 U.S. 334).

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. [citing *Talley* v. *California*,[17]] Great works of literature have frequently been produced by authors writing under assumed names. Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, 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, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment (*Dendrite*, 2001, p. 149).

Moreover, as noted by Douglas in *Griswold*, the First Amendment protects the privacy of associations and groups to peaceably assemble (see also *NAACP* v. *Alabama*).

Privacy may be important in relation to information access as well. For example, suppose someone, living prior to the civil war in the American south, wanted to explore the idea that blacks and women were the moral equals of white men. Having private access to theories and views related to this matter would be important. In some instances, anonymous access and authorship are necessary for freedom of thought and expression. As with decisional privacy, however, this area of privacy protection is fairly narrow.

Fourth Amendment privacy

With a long history of cases and judicial decisions, this area of law protects 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.

In *Boyd* v. *United States* (1886) 116 U.S. 616, the Supreme Court enshrined the notion of "every man's house is his castle" and established close connections between privacy and property interests.

In *Olmstead* v. *United States* (1928) 227 U.S. 438 the court ruled that the Fourth Amendment against unreasonable searches and seizures applied to physical things like 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* (1967) 389 U.S. 347 (see also *Berger* v. *New York* (1967) 388 U.S. 41.), 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 repudiated and it was generally acknowledged that a "search" could include both physical and electronic or technological invasion.

Nevertheless the *Katz* decision has fallen on hard times. The "plain view" doctrine established in *Coolidge* v. *New Hampshire* (1971) 403 U.S. 443 permitted police observations conducted during a warranted intrusion. The "open view" doctrine, on the other hand, allowed for observations because no search was being conducted. Tom Bush (1987, p. 1776) writes:

> According to this approach "the sky, like a road, is a highway over which those licensed to do so may pass . . . " aerial views, like views from the road, do not implicate fourth amendment interests.

In "One hundred years of privacy" Ken Gormley (1992, p. 1369) notes:

> A reasonable expectation of privacy has been found, sufficient to ward off governmental intrusion, with respect to the use of . . . bugging devices; administrative searches of homes and businesses; searches of closed luggage and footlockers; sealed packages; . . . random spot checks for automobiles to inspect drivers' licenses and vehicle registrations.

On the negative side:

> . . . [t]he court had found no reasonable expectation of privacy in an individual's bank records; in voice or writing exemplars; in phone numbers recorded by pen registers; in conversations recorded by wired informants; and a growing list of cases involving automobiles, trunks, glove compartments and closed containers therein (Gormley, 1992, p. 1369).

More recently, and especially after the terrorist attacks of September 11, 2001, Fourth Amendment privacy has been further eroded. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act made numerous changes to existing law. Below is a list of some of the changes. The Patriot Act:

- Expands the government's ability to conduct covert "sneak and peak" searches. Government agents may take photographs, seize property, and not notify the target until a later time (Patriot Act, sec. 213).
- Expands the breadth of "trap-and-trace" and "pen register" surveillance by allowing content to be monitored (Patriot Act, sec. 214). "Not requiring probable cause for these devices rested on judicial reasoning that neither the 'trap and trace' nor the pen register devices could, prior to the USA Patriot Act, capture the substantive material of the communication in question" (Lilly, 2003, p. 460).
- Allows the inclusion of DNA information into databases of individuals convicted of "any crime of violence" (Patriot Act, sec. 503).
- 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 (Patriot Act, sec. 217).
- Authorizes the Attorney General to circumvent probable cause restrictions through the use of national security letters (NSL's) or administrative subpoenas (Patriot Act, sec. 505).
- Increases the government's ability to access records held by third parties (Patriot Act, sec. 215). By expanding the use of FISA, targets "whose records are sought need not be an agent of a foreign power. United States citizens could be . . . investigated on account of activities connecting them to an investigation of international terrorism" (Lee, 2003, p. 381). In addition, FISC judges must issue a warrant if the application the requirements of Section 215.

Privacy torts

In 1890, Samuel D. Warren and Louis D. Brandeis issued a call to arms in their celebrated paper "The right to privacy". Hinting at times to come, Warren and Brandeis noted:

> Recent inventions and methods call attention to the next step business 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" (Warren and Brandeis, 1890, p. 194).

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.

> *Private facts*: Publicizing highly offensive private information about someone which is not of legitimate concern to the public. For example, photographs of an undistinguished and wholly private hardware merchant carrying on an adulterous affair in a hotel room are published in a magazine.
>
> *False light*: Publicizing a highly offensive and false impression of another. For example, a taxi driver's photograph is used to illustrate a newspaper article on cabdrivers who cheat the public when the driver in the photo is not, in fact, a cheat.
>
> *Appropriation*: Using another's name or likeness for some advantage without the other's consent. For example, a photograph of a famous actress is used without her consent to advertise a product.
>
> *Intrusion*: Intruding (physically or otherwise) upon the solitude of another in a highly offensive manner. For example, a woman sick in the hospital with a rare disease refuses a reporter's request for a photograph and interview. The reporter photographs her anyway, over her objection (Prosser, 1960, taken from Alderman and Kennedy, 1995, p. 155).

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 (Prosser, 1960) and Prosser's four torts were incorporated into the second Restatement of Torts in 1977. Andrew McClurg (1995, p. 989) notes:

> Courts in at least twenty states have explicitly or implicitly accepted each of the four torts . . . several other states have adopted the . . . torts of intrusion, public disclosure of private facts, and appropriation . . . virtually all states have recognized a tort cause for invasion of privacy in some form.

Nevertheless, each of Prosser's torts has been sacrificed for other social values such as free speech.

Melvin v. *Reid* (1931) 112 Cal. App. 285, set the stage for undermining privacy rights in public places. In this case, Gabrielle Darley a former prostitute who was also tried and acquitted of murder, married Benard Melvin in 1919, left her old life behind, and began a respectable life with new friends. In 1925 the defendants, without permission produced a movie entitled *The Red Kimono* based on the life of Gabrielle Darley. Moreover, the principle character was named Gabrielle Darley. Upon release of the film, Gabrielle's friends scorned and ridiculed her. She brought suit for the sum of 50,000 dollars. The case was decided in favor of the defendants. Judge J. Marks writes:

> From the foregoing it follows as a natural consequence that the use of the incidents from the life of appellant in the moving picture is in itself not actionable. These incidents appeared in the records of her trial for murder which is a public record open to the perusal of all. The very fact that they were contained in a public record is sufficient to negative the idea that their publication was a violation of a right of privacy. When the incidents of a life are so public as to be spread upon a public record they come within the knowledge and into the possession of the public and cease to be private (*Melvin* v. *Reid* (1931), p. 290).

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) 40 Cal. 2d 224 decided seven years before Prosser's four torts were explicated. In *Gill* a photograph was taken and published of the plaintiffs embracing and used to illustrate

an article entitled "And so the world goes round". Citing *Melvin*, Judge J. Spence reaffirmed the view that privacy rights generally lapse in public places.

> By their own voluntary action plaintiffs waived their right of privacy so far as this particular public pose was assumed, for "there can be no privacy in that which is already public." (*Melvin* v. *Reid*) The photograph of plaintiffs merely permitted other members of the public, who were not at plaintiffs' place of business at the time it was taken, to see them as they had voluntarily exhibited themselves. Consistent with their own voluntary assumption of this particular pose in a public place, plaintiffs' right to privacy as to this photographed incident ceased and it in effect became a part of the public domain (*Gill* v. *Hearst Publishing Co.*).

The death knell for private fact torts came in *Florida Star* v. *B.J.F.* (1989) 491 U.S. 524. 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, on appeal, decided in favor of the defendant citing:

> . . . it was held that the imposition of civil damages on the newspaper, pursuant to the Florida statute, 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 or encouraging such victims to report the offenses, since (a) the government itself failed to abide by the policy against disclosure . . . (*Florida Star* v. *B.J.F.*).

Thus, in *Melvin, Gill*, and *Florida Star* we see a heavy judicial bias against informational privacy in public places (see also *Cox Broadcasting Corp.* v. *Cohn* (1975) 420 U.S. 469, and *Jones* v. *Herald Post Co.* (1929) 230 Ky. 227).

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 (see *Machleder* v. *Diaz* (1986) 801 F.2d 46; U.S. App.). Andrew McClurg notes:

> False light, a sickly stepchild of defamation, has been rejected by several states and even where accepted, "the chances of a plaintiff ultimately prevailing . . . are slim" (McClurg, 1995, p. 366).

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 like names, likeness, and vocal quality (see *Matthews* v. *Wozencraft* (1994) 15 F.3d 432, 438, 5th Cir.). Thus when a television commercial includes a song sung "in the voice" of a famous singer the actual owner of said voice might sue for misappropriation (see *Young & Rebicam, Inc.* v. *Midler* (1992) 112 S. Ct. 1513).

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 (Restatement of Torts 652B, 1977). Here again the cases pile up against privacy. *Melvin, Gill*, and *Florida Star* each rule out the possibility of an

invasion tort because the private information disclosed in these cases was, in some sense, publicly available.

General critiques of privacy

The discussion of privacy, including the definitions and history presented above, must also include views which challenge the authenticity, legitimacy, and necessity of privacy (see DeCew, 2006). While not exhaustive, presented below are some of the most forceful critiques of privacy that dominate the literature.

The feminist critique

A number feminist scholars have critiqued privacy, noting that it often shields domination, abuse, and violation – privacy protects the hierarchical power relationships that subject women to subordination by men. Behind the walls of privacy these power relationships remain hidden and thus perpetuate inequality. Catharine MacKinnon (2002, p. 191) 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.

Other feminists such as Anita Allen (1988) and Jean Bethke Elshtain (1981) argue that rejecting privacy rights, and more generally the private/public distinction, may afford those in dominate positions more power over women.

Bork's critique

In the area of legal privacy, the Supreme Court, particularly Justice Douglas, found evidence of privacy rights in the Constitution and Bill of Rights. Robert Bork (1990) argued that these claims do not stand up under scrutiny. The mere existence of opinions by Douglas and others do not warrant the level of privacy articulated by the Court. In short, this view argues that privacy rights do not exist in the Constitution or the Bill of Rights – such rights are the result of judicial activism and have been invented by Justices to support a specific moral bias.

Posner's critique

The value of privacy, in an economic sense, determines how privacy ought to be applied in specific instances, and in some cases privacy should be passed over in favor of economic gains to society. Richard Posner (1981) favors an approach which protects privacy when the economic gain will suffer otherwise. His stance places a high value on privacy in business dealings since this privacy has potential for greater impact on the economy. Personal information, on the other hand, does not deserve the same privacy protection because persons, as opposed to businesses, will tend to increase personal wealth over the growth of societal wealth.

The communitarian critique

Amitai Etzioni (1999 cited in Solove (2002)) has argued that in our society privacy has been treated as the highest privileged value to the detriment of other commons goods such as public safety and public health. Etzioni views privacy as a "societal license"

that exempts certain conduct from public scrutiny. Helena Gail Rubinstein (1999, p. 228) writes:

> Communitarians reject the primacy of the individual, and invite members of the community to move beyond self-interest in favor of a vision of society defined by community ties and a search for the communal good … individuals should not assert their "right to be let alone" when it is time to contribute to the collective good.

Communitarians like Etzioni and Rubinstein seek to find a balance between individual rights and social responsibilities.

Transparency – privacy is dead

In contrast to the communitarian claim that privacy interests have become too prominent, numerous scholars have announced the death of privacy. The critique offered is not so much a normative one but rather descriptive – privacy is no longer relevant in the age of transparency. The "stark reality", Richard Spinello (1997, p. 9) writes is "that our personal privacy may gradually be coming to an end". David Brin (1998), Charles Sykes (1999), Jeffrey Rosen (2000), and others have proclaimed that privacy is under siege. Implicated in the assault is the growth of information technology and ubiquitous computing.

Conclusion

A primary goal of this article has been to provide an overview of the most important philosophical and legal issues related to privacy. While privacy is difficult to define and has been challenged on legal and moral grounds, it is a cultural universal and has played an important role in the formation of Western liberal democracies. By facilitating a wider engagement and input from numerous communities and disciplines, it is our hope to advance scholarly debate in this important area.

References

ACLU v. *Miller* (1997), 977 F. Supp. 1228, N.D. Ga.

Alderman, E. and Kennedy, C. (1995), *The Right to Privacy*, Knopf, New York, NY.

Allen, A.L. (1988), *Uneasy Access: Privacy for Women in a Free Society*, Rowman & Littlefield, Totowa, NJ.

Allen, A.L. (2003), *Why Privacy Isn't Everything: Feminist Reflections on Personal Accountability*, Rowman & Littlefield, Lanham, MD.

Bates v. *City of Little Rock* (1960), 361 U.S. 516.

Benn, S.I. (1971), "Privacy, freedom, and respect for persons", in Pennock, R. and Chapman, J. (Eds), *Privacy Nomos XIII*, Atherton, New York, NY.

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

Berlin, I. (2002), "Two concepts of liberty", in Hardy, H. (Ed.), *Isaiah Berlin: Liberty*, Oxford University Press, Oxford, p. 171.

Bloustein, E. (1964), "Privacy and an aspect of human dignity: an answer to Dean Prosser", *New York University Law Review*, Vol. 39.

Bok, S. (1983), *Secrets: On the Ethics of Concealment and Revelation*, Pantheon Books, New York, NY.

Bork, R. (1990), *The Tempting of America: The Political Seduction of the Law*, Free Press, New York, NY.

Bowers v. *Hardwick* (1986), 478 U.S. 186.

Boyd v. *United States* (1886), 116 U.S. 616.

Brin, D. (1998), *The Transparent Society: Will Technology Force Us To Choose Between Privacy And Freedom?*, Addison-Wesley, Reading, MA.

Buckley v. *American Constitutional Law Found* (1999), 525 U.S. 182, 197-90.

Bush, T. (1987), "Comment: a privacy-based analysis for warrantless aerial surveillance cases", *California Law Review*, Vol. 75.

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

Cooley, T. (1880), *A Treatise on the Law of Torts*, Callaghan and Co, Chicago, IL.

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

Cox Broadcasting Corp. v. *Cohn* (1975), 420 U.S. 469.

Davis, F. (1959), "What do we mean by 'right to privacy'?", *South Dakota Law Review*.

DeCew, J.W. (1997), *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology*, Cornell University Press, Ithaca, NY.

DeCew, J.W. (2006), *Privacy, in Stanford Encyclopedia of Philosophy*, available at: http://plato.stanford.edu/entries/privacy/ (accessed November 1, 2006).

Dendrite Int'l v. *Doe No. 3* (2001), 342 N.J. Super. 134.

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

Elshtain, J.B. (1981), *Public Man, Private Woman: Women in Social and Political Thought*, Princeton University Press, Princeton, NJ.

Englehardt, H.T. Jr (2000), "Privacy and limited democracy", *Social Philosophy and Policy*, Vol. 17, pp. 120-40.

Etzioni, A. (1999), *The Limits of Privacy*, Basic Books, New York, NY.

Feinberg, J. (1983), "Autonomy, sovereignty, and privacy: moral ideas in the constitution?", *Norte Dame Law Review*, Vol. 58.

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

Freund, P.A. (1971), "Privacy: one concept or many?", in Pennock, R. and Chapman, J. (Eds), *Privacy Nomos XIII*, Atherton, New York, NY.

Fried, C. (1968), "Privacy", *Yale Law Journal*, Vol. 77.

Gavison, R. (1980), "Privacy and the limits of law", *Yale Law Journal*, Vol. 89.

Gavison, R. (1983), "Information control: availability and control", in Benn, S. and Gaus, G. (Eds), *Public and Private in Social Life*, St Martin's Press, New York, NY.

Gerety, T. (1977), "Redefining privacy", *Harvard Civil Rights and Civil Liberties Law Review*, Vol. 12.

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

Gormley, K. (1992), "One hundred years of privacy", *Wisconsin Law Review*.

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

Gross, H. (1967), "The concept of privacy", *New York University Law Review*, Vol. 42.

Habermas, J. (1962), *The Structural Transformation of the Public Sphere*, MIT Press, Cambridge, translated by Burger, T.and Lawrence, F.

Henkin, L. (1974), "Privacy and autonomy", *Columbia Law Review*, Vol. 74, pp. 1410-25.

Hobbes, T. (1962) in Oakeshott, M. (Ed.), *Leviathan*, Collier Books, New York, NY (original published 1660).

Holmes v. *California Army National Guard* (1997), CA 124 F. 3d. 1126.

Inness, J. (1992), *Privacy, Intimacy, and Isolation*, Oxford University Press, New York, NY.

Jones v. *Herald Post Co.* (1929), 230 Ky. 227, 229.

Jourard, S.M. (1966), "Some psychological aspects of privacy", *Law and Contemporary Problems*, Vol. 31.

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

Lawrence et al. v. *Texas* (2003), 538 U.S. 918.

Lee, L.T. (2003), "The USA Patriot Act and Telecommunications: privacy under attack", *Rutgers Computer & Technology Law Journal*, Vol. 29.

Lilly, J.R. (2003), "National security at what price?: A look into civil liberty concerns in the information age under the USA Patriot Act of 2001 and a proposed constitutional test for future legislation", *Cornell Law Journal*, Vol. 12.

Locke, J. (1690) in Macpherson, C.B. (Ed.), *The Second Treatise of Government*, Hackett Pub. Co., Indianapolis, IN.

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

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

McClurg, A. (1995), "Bringing privacy law out of the closet: a tort theory of liability for intrusions in public places", *North Carolina Law Review*, Vol. 73.

McIntyre v. *Ohio Elections Comm'n* (1995), 514 U.S. 334.

MacKinnon, C. (2002), *Toward a Feminist Theory of the State*, Harvard University Press, Cambridge, MA.

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

Melvin v. *Reid* (1931), 112 Cal. App. 285, 290.

Mill, J.S. (1859), *On Liberty*, Penguin, Harmondsworth.

Mill, J.S. (1863), *Utilitarianism*, available at: http://etext.library.adelaide.edu.au/m/mill/john_stuart/m645/utilos.html

Miller, A.R. (1971), *The Assault on Privacy: Computers, Data Banks, and Dossiers*, Univ. of Michigan Press, Ann Arbor, MI.

Milner v. *Apfel* (1998), CA 148 F. 3d 814.

Missouri Revised Statute (1996), 317.018.

Moore, A.D. (2001), *Intellectual Property and Information Control: Philosophic Foundations and Contemporary Issues*, Transaction Publishing, New Brunswick, NJ.

Moore, A.D. (2003), "Privacy: its meaning and value", *American Philosophical Quarterly*, Vol. 40.

Moore, A.D. (Ed.) (2005), *Information Ethics: Privacy, Property, and Power*, University of Washington Press, Seattle, WA.

Moore, B. Jr (1984), *Privacy: Studies in Social and Cultural History*, M.E. Sharpe, New York, NY.

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

O'Brien, D.M. (1979), *Privacy, Law, and Public Policy*, Praeger, New York, NY.

Olmstead v. *United States* (1928), 227 U.S. 438.

Ortiz, D.R. (1989), "Privacy, autonomy, and consent", *Harvard Journal of Law and Public Policy*, Vol. 12.

Owens v. *State* (1999), 352 Md. 663, 683, 724 A. 2d 43, 53.

Parent, W.A. (1983), "Privacy, morality, and the law", *Philosophy and Public Affairs*, Vol. 12.

Parker, R.B. (1974), "A definition of privacy", *Rutgers Law Review*, Vol. 27.

Peikoff, A. (2004), "No corn on this cob: why reductionists should be all ears for Pavesich", *Brandeis Law Journal*, Vol. 42, p. 751.

Posner, R.A. (1981), *The Economics of Justice*, Harvard University Press, Cambridge, MA.

Posner, R.A. (1998), *Economic Analysis of Law*, Little, Brown, Boston, MA.

Pound, R. (1915), "Interests in personality", *Harvard Law Review*, Vol. 28, p. 343.

Prosser, D.W. (1960), "Privacy", *California Law Review*, Vol. 48.

Rachels, J. (1975), "Why privacy is important", *Philosophy and Public Affairs*, Vol. 4.

Reiman, J. (1976), "Privacy, intimacy, and personhood", *Philosophy and Public Affairs*, Vol. 6, pp. 26-44.

Restatement of Torts (1977), 652B.

Roberts, J. and Gregor, T. (1971), "Privacy: a cultural view", in Pennock, R. and Chapman, J. (Eds), *Privacy Nomos XIII*, Atherton, New York, NY, pp. 199-225.

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

Rosen, J. (2000), *The Unwanted Gaze: The Destruction of Privacy in America*, Random House, New York, NY.

Rubenfeld, J. (1989), "The right of privacy", *Harvard Law Review*, Vol. 102.

Rubinstein, H.G. (1999), "If I am only for myself, what am I? A communitarian look at the privacy stalemate", *American Journal of Law & Medicine*, Vol. 25, Summer-Fall.

Scanlon, T. (1975), "Thomson on privacy", *Philosophy and Public Affairs*, Vol. 4, pp. 315-22.

Schoeman, F. (1984), "Privacy: philosophical dimensions in the literature", in Schoeman, F. (Ed.), *Philosophical Dimensions of Privacy*, Cambridge University Press, Cambridge.

Sherman v. *Henry* (1996), Texas, 928 S.W. 2d 464, 469-473.

Solove, D.J. (2002), "Conceptualizing privacy", *California Law Review*, Vol. 90.

Spinello, R. (1997), "The end of privacy", *America*, Vol. 176.

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

Strossen, N. (2001), "Protecting privacy and free speech in cyberspace", *Georgetown Law Journal*, Vol. 89.

Sykes, C. (1999), *The End of Privacy*, St. Martin's Press, New York, NY.

Thomson, J.J. (1975), "The right to privacy", *Philosophy and Public Affairs*, Vol. 4.

Tzu, H.F. (1964), *Han Fei Tzu: Basic Writings "The Five Vermin,"*, Columbia University Press, New York, NY, p. 106, translated by Burton Watson, Section 49.

Van Den Haag, E. (1971), "On privacy", in Pennock, R. and Chapman, J. (Eds), *Privacy Nomos XIII*, Atherton, New York, NY.

Warren, S. and Brandeis, L. (1890), "The right to privacy", *Harvard Law Review*, Vol. 4, pp. 193-220.

Washington et al. v. *Glucksberg et al.* (1997), 522 U.S. 702.

Westin, A. (1968), *Privacy and Freedom*, Atheneum, New York, NY.

Williams v. *Pryor* (2001), 240 F.3d 944, 949 (CA11).

Young & Rebicam, Inc. v. *Midler* (1992), 112 S. Ct. 1513.

Further reading

Arkansas v. *Sanders* (1979), 442 U.S. 753.

Beauchamp, T. (2000), "The right to privacy and the right to die", in Paul, E.F., Miller, F.D. Jr and Paul, J. (Eds), *The Right to Privacy*, Cambridge University Press, Boston, MA.

Delaware v. *Prouse* (1979), 440 U.S. 648.

Dionisio v. *United States* (1973), 410 U.S. 1.

Moore, A.D. (2004), *Intellectual Property and Information Control: Philosophic Foundations and Contemporary Issues*, Transaction Publishing, New Brunswick, NJ.

Plato (n.d.), *Collected Works of Plato*, Greystone Press, New York, NY, translated by Jowett, B.

Quindlen, A. (2005), "Connecting up the dots", *Newsweek*, January.

Solove, D.J. (2004), *The Digital Person: Technology and Privacy in the Information Age*, New York University Press, New York, NY.

United States v. *United States Dist. Court* (1972), 407 U.S. 297.

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1. Bidyut B Hazarika, James Gerlach, Lawrence Cunningham. 2018. The Role of Service Recovery in Online Privacy Violation. *International Journal of E-Business Research* **14**:4, 1-27. [Crossref]
2. Da VeigaAdéle, Adéle Da Veiga. 2018. An information privacy culture instrument to measure consumer privacy expectations and confidence. *Information and Computer Security* **26**:3, 338-364. [Abstract] [Full Text] [PDF]
3. Farad Rafique Jusob, Carlisle George, Glenford Mapp. 2017. Exploring the need for a suitable privacy framework for mHealth when managing chronic diseases. *Journal of Reliable Intelligent Environments* **3**:4, 243-256. [Crossref]
4. Ulrike Hugl. 2011. Reviewing person's value of privacy of online social networking. *Internet Research* **21**:4, 384-407. [Abstract] [Full Text] [PDF]
5. William H. Ross, Christopher J. Meyer, Jeng-Chung V. Chen, Paul Keaton. 2009. Information Protection at Telecommunications Firms: Human Resource Management Strategies and their Impact on Organizational Justice. *Journal of Information Privacy and Security* **5**:1, 49-77. [Crossref]
6. Jengchung V. Chen, William Ross, Shaoyu F. Huang. 2008. Privacy, trust, and justice considerations for location-based mobile telecommunication services. *info* **10**:4, 30-45. [Abstract] [Full Text] [PDF]