University of Queensland

Research Summary

Queensland Council for Civil Liberties

Proposed Statutory Tort of Privacy:

An Annotated Bibliography

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RESEARCH QUESTION ONE (Joanna Lane)

"On a philosophical level, the relationship between privacy and freedom of speech."

Summary

Overall, the justifications for the right of privacy seem to be a more recent construct than that behind the philosophy of free speech. In articles comparing the two rights, generally it is accepted that the effect of introducing privacy rules of too robust a nature would have an egregious effect upon free speech. Balance is therefore the key philosophical as well as legal concern. It is observed that the values are sometimes but by no means always opposed.

Generally, the main arguments identified behind the idea of a right of 'freedom of speech' are based in its *political* necessity for the sustainment of self-government, though there are other arguments from the discovery of *truth* and the importance of free speech to *personal development*. A good general text for examining the variety of arguments behind freedom of speech is *Barendt*. See also *Kleinberg*. The collection of free speech essays edited by *Waluchow*, in which David Richard's essay is found may also be useful. The primary arguments behind the right to privacy are based in the concepts of autonomy or dignity. The majority of the texts regarding the right to privacy explore both arguments, with *Johnstone* preferring the basis of the right in personal autonomy. The text provided by *Doyle* prefers the autonomy-based approach.

For articles dealing with the relationship between Article 8 and Article 10 of the European Convention on Human Rights (which replicates legally the potential philosophical tension between the values referred to) the text prepared by *Clayton and Hugh* provides a detailed exploration on how the articles have affected the case law and the concepts of privacy and freedom of expression. Also, the collection of papers from Third International Colloquy about the European Convention on Human Rights, Brussels in which Velu's article is found provides other papers on Article 8 and Article 10.

Other potentially useful sources in regards to the philosophical basis of privacy, which are not more fully annotated below (for lack of time), are:

- Solove, Daniel J. 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania Law Review* 477.
- Fried, Charles, 'Privacy' (1967) 77 *Yale Law Journal* 475.
- Winfield, Percy H. 'Privacy' (1931) 47 *The Law Quarterly Review* 23.

- Prosser, William L., 'Privacy' (1960) 48 *California Law Review* 383.
- O'Callaghan, Patrick, 'Privacy in Pursuit of a Purpose' (2009) 17 *Tort Law Review* 100.
- Richards, Neil M. 'The Puzzle of Brandeis, Privacy and Speech' (2010) 63 *Vanderbilt Law Review* 1295.
- Warren, Samuel D. and Louis D. Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.
- Posner, Richard A. 'The Right of Privacy' (1978) 12 *Georgia Law Review* 393.
- Post, Robert C. 'Three Concepts of Privacy' (2000) 89 *The Georgetown Law Journal* 2087.

Other sources in relation to the philosophical basis of freedom of speech are:

- Gerber, Scott D. 'The Politics of Free Speech' (2004) 21 *Social Philosophy and Policy* 23.
- Peonidis, Filimon, 'A Note on Mill's Early Theory of Free Speech' (2008) 33 *Australian Journal of Legal Philosophy* 60.
- Boehringer, Kathe, 'Freedom of Speech: Jurisprudence' in Philip Bell and Roger Bell (eds) *Americanization and Australia* (University of NSW Press, 1998).
- Schauer, Frederick, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982).

Links to further sources of relevance on the Social Sciences Research Network can be accessed via the following:

- http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1889243 – 'The Concept of a Right to Privacy', Eoin Carolan
- http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1862264 – 'The Limits of Tort Privacy', Neil M. Richards
- http://papers.ssrn.com/sol3/papers.cfm?abstract_id=440985 – 'Speech and Strife', Robert L. Tsai
- http://papers.ssrn.com/sol3/papers.cfm?abstract_id=368961 – 'Acknowledging the Conflict Between Copyright Law and Freedom of Expression Under the Human Rights Act', Michael Birnhack
- http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1481478 – 'First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech', Lawrence Rosenthal

Books:

1. Barendt, Eric, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007).

This book discusses the legal protection of free speech in countries such as England, United States, Canada and under the European Human Rights Convention. Chapter 1 discusses the nature of a principle of free speech and explores four justifications for that principle: arguments concerned with the importance of discovering truth; free speech as an aspect of self-fulfilment; the argument from citizen participation in a democracy; and suspicion of government. Each of these arguments emphasises the interests of either the speaker or the audience, or perhaps that of the public in an open tolerant society. Therefore, the free speech interests of speakers, recipients (listeners, readers, and viewers), and the general public in the unimpeded communication of information and ideas are considered. The author is fairly critical of the theories listed behind the freedom of speech, and presents a detailed account of the arguments both for and against the particular theories.

Chapter 6 also contains an analysis of the legal principles for balancing the two rights; it will be seen that there are a variety of solutions, some of them more solicitous of free speech concerns than others. The legal problems posed by non-defamatory insults and political satire are also explored, along with the issue of whether the law should adopt similar rules to those appropriate for defamation or should give stronger protection to privacy rights. The writer comes to the conclusion that free speech and reputation rights may be balanced on the basis of rules to be applied in a fairly mechanistic way or on the basis of a detailed weighing of the particular facts. He argues that an ad hoc balancing approach is preferable, if only because it is the better way to resolve conflicts between two competing rights.

2. Clayton, Richard, and Hugh Tomlinson (eds) *Privacy and Freedom of Expression* (Oxford University Press, 2nd ed, 2010).

This book provides an analysis of human rights law and practice in the UK in relation to the areas of privacy and freedom of expression. It contains an analysis of each right under the Human Rights Act 1998 and also under the European Convention on Human Rights. In regards to privacy, the main justifications behind the concept are notions of personal liberty and autonomy and separates issues arising from privacy into four categories. In regards to freedom of expression, it gives a number of justifications, arguing that the most persuasive of which is the ability of the right of the citizen to participate in the democratic process. It then goes on to discuss restrictions on freedom of speech as necessary to the interests of privacy

such as in the context of government secrets and in relation to regulation of the media. The book provides a detailed examination of the interaction between Article 8 and Article 10 of the European Convention on Human Rights.

3. Doyle, Carolyn and Mirko Bagaric, *Privacy Law in Australia* (The Federation Press, 2005).

Chapter 2 contains a brief review of the definitions and justifications behind the concept of the 'right to privacy'. It critically analyses definitions of privacy from the Victorian Law Reform Commission and the United States Congress Office of Technology among others. The writers are critical of definitions presented by the Victorian Law Reform Commission and instead favour the definition presented by Gavison. This is important when constructing their approach to the justifications for the right.

The chapter also provides a brief analysis of justifications for the basis of privacy. These are identified as the justifications being self-evident, based in dignity, and based in autonomy. The chapter also analyses the basis of privacy from a utilitarian approach. The writers are critical of the justifications for the right to privacy as being self-evident, or that the basis is in dignity and instead favours the argument that the right is based in autonomy and is also supported by utilitarian arguments. The remainder of the book focuses on existing legal protections through both common law and statute as at the time of publication.

4. Glenn, Richard A. *The Right to Privacy: Rights and Liberties Under the Law* (ABC-CLIO, 2003).

This book sets out the origin, development, meaning and future of the 'right to privacy'. Its analysis of the philosophy behind privacy includes the right's constitutional and common law foundations in American law. It examines the theoretical basis of the right to privacy as developed by seventeenth and eighteenth century political philosophers Thomas Hobbes and John Locke. It then goes on to analyse the article written by Warren and Brandeis and the implications of their article on the right to privacy. Generally it presents the concept of the right to privacy from an autonomy based approach. The book also contains references to a number of texts for further reading, and excerpts from a number of sources that have been influential to the development of the 'right of privacy' such as Warren and Brandeis' "The Right to Privacy" and the case of Griswold v Connecticut (1965).

5. Wacks, Raymond, *Privacy and Press Freedom* (Bell and Bain Ltd, 1995).

This book contains an analysis of the extent to which the law in England affords protection against invasions by the press. It contains an analysis of privacy and the balance against 'free speech' primarily in the context of press freedom. Chapter 2 contains a summary of justifications for free speech, which fall into consequentialist or rights-based arguments. The chapter then further discusses these as compared to arguments for the 'right of privacy'. It then goes on to discuss how the two concepts are weighed against each other in different contexts such as in cases of sexual offences and in the concept of self-government. The remainder of the book discusses the idea of privacy in the common law in relation to matters of public interest and in relation to media intrusion both in the United States and in England.

Articles and Commentary:

1. Canavan, Francis 'Freedom of Speech and Press: For What Purpose?' (1971) 16 *American Journal of Jurisprudence* 95.

This article explores the philosophy behind the idea of 'freedom of speech' and analyses American case law and commentary regarding the basis for freedom of speech, presenting an alternate view to that of previous commentators. It provides a detailed discussion of the various purposes for establishing the right, beginning with the right being essential to the basic conceptions of government and then going on to analyse the ends the right serves. He argues that the conditions of a marketplace of ideas, which is his preferred justification for the idea of freedom of speech, do not always exist. Thus when considering whether a public interest justifies restriction of freedom of speech and press, there is a scale of public interests that justify, in proportion to their importance, limitations of that freedom.

2. Emerson, Thomas I., 'The Right of Privacy and Freedom of the Press' (1979) 14 *Harvard Civil Rights-Civil Liberties Law Review* 329.

This article is an argument by the author that there is an urgent need for a right of privacy with the increasing scope of governmental intercession and the development of modern technology in America. The author argues that the theoretical foundations of the right of privacy are relatively unformed as compared to the well-established history of free speech in the case of freedom of the press. The author acknowledges that there are only limited circumstances where there is a conflict between the right of privacy and the freedom of the speech.

He goes on to discuss the following issues in regards to theories behind the right to privacy as well as the formation of the legal doctrine: the issue arising when there is a right to publish and the existence of a privacy tort; and the issues arising out of a right to privacy and a right to obtain information. In his definition of privacy, he prefers Gerety's formulation of privacy as necessary to protect autonomy, identity and intimacy. He argues that, in terms of the press at least, that when balancing the right to privacy and the right to free expression, the focus should be on the public's "need to know" as this would give weight to major social interests and the search for truth. Alternatively, he favours the idea of developing privacy as a tort in relation to three factors which it would attempt to perform: intimacy, disclosures incidental to formal proceedings, and the extent to which a person has waived their claims to privacy.

3. Frey, R. G., 'Privacy, Control, and Talk of Rights' in Ellen Frankel, Fred D. Miller Jr and Jeffrey Paul (eds), *The Right to Privacy* (Press Syndicate of the University of Cambridge, 2000), 45.

This article examines the philosophical basis of privacy in terms of negative rights. The author construes negative rights as a rebuttable presumption against interference by others. The article provides a discussion of the difficulties in using the base of privacy in the theory of 'negative rights' and argues that it is not clear on what grounds prevention of invasions to privacy should be based upon. The author concludes with a brief discussion of utilitarian arguments in relation to privacy and proposes that this is a more substantial approach to the basis of privacy. He also provides discussion on natural rights as opposed to conventional rights, preferring the latter construction of privacy out of the two.

4. Gavison, Ruth 'Privacy and the Limits of Law' (1980) 89 *The Yale Law Journal* 42.

This article examines the notion of privacy in three contexts: firstly, it defines a neutral concept of privacy that in order to identify when a loss of privacy has occurred; secondly, it argues that privacy must have coherence as a value in order to establish whether losses of privacy are undesirable; and thirdly, it argues that privacy must be a concept useful in legal contexts as the law does not interfere to protect against every undesirable event. Its main arguments for the establishment of a right of privacy are based in notions of promotion of liberty, autonomy, selfhood, and human relations, and furthering the existence of a free society.

The author begins by defining a neutral concept of privacy which she uses to determine whether or not particular actions constitute an invasion of privacy. She argues that the core

concept of privacy is limiting access to oneself. Her initial definition of 'perfect' privacy is where one is completely secluded from the rest of the world. She then moves on to examine invasions of privacy as being either information accessed about the individual, physical access to the individual or attention paid to an individual.

In examining the justifications for privacy, she discusses autonomy arguments, promotion of human liberty and limiting exposure to others. She seems to favour arguments of privacy being based in privacy, but concedes that the existence of autonomy may continue without the notion of privacy.

5. Johnstone, Brian V., 'The Right to Freedom: the Ethical Perspective' (1984) 29 *American Journal of Jurisprudence* 73

This article provides an ethical analysis of the right to privacy. It provides a brief history of the legal developments. The various philosophical bases for the right are then examined, including the basis of the right in dignity and from a negative rights perspective and also positive rights perspective. The basis of the right is then critically examined and compared with the relevant elements of the Christian and particularly the Roman Catholic social ethical traditions. As a result the author concludes that the right to privacy is best understood as being founded on the value of human dignity. He argues that social ethical theories which stress the community and the common good need to be complemented by the respect for the individual person which is affirmed in the contemporary development of law on privacy.

6. Kleinberg, Stanley, 'How sacred is Free Speech?' (Paper presented at the Twelfth Annual Conference of the Association for Legal and Social Philosophy, University of Glasgow, 29-31 March 1985).

This paper examines the meaning of free speech and categorises it into three parts consisting of: the expression of opinions regarding government; the expression of opinions regarding the actions of individuals to oppose the government; the ability to take part in peaceful gatherings to discuss these matters. It then goes on to discuss the basis of freedom of speech which it splits into two categories: fundamental and pragmatic. These are then further analysed from the arguments that free speech stems from the aspiration to attain truth, is required for self-government and the ideal of community. The author concludes that the latter two categories of free speech are generally more problematic than the former. He does however, argue that attempts to suppress freedom of speech are always likely to do more harm than good, even in cases where they do achieve their aim.

7. Lindsay, David, 'An Exploration of the Conceptual Basis of Privacy and the Implications for the Future of Australian Privacy Law', (2005) 29 *Melbourne University Law Review* 131.

This article contains an analysis of the philosophical literature regarding the right to privacy since the 1960s. It contends that the basis of privacy centres upon two approaches: the European 'rights-based' approach and the American 'market-based' approach. The article begins by exploring the definition of privacy and the difficulties in trying to define the concept. It then moves on to examine the various justifications for protecting privacy from a reductionist standpoint, deontological standpoint and consequentialist standpoint. It then goes on to examine justifications for the existence of information privacy/data protection laws from four different theoretical positions. It concludes with a brief analysis of the American and European approaches to the protection of privacy and how these have become divergent.

The author acknowledges that a rights-based approach is likely to encounter more difficulties but that it should be considered as a means of promoting more pluralistic approaches to identity, and of resisting global nonnalisation and homogenisation. He does, however, emphasise that the justification behind the developing a right of privacy will have a significant impact on the relevant law.

8. Maher, Gregory, 'Freedom of Speech as a Problem in Legal and Social Philosophy' (Paper presented at the the Twelfth Annual Conference of the Association for Legal and Social Philosophy, University of Glasgow, 29-31 March 1985).

This paper contains a brief summary of the arguments behind free speech encompassing commentary from John Mill to Frederick Schauer. It examines the idea of speech as an idea itself and argues that for the concept of 'freedom of speech' to be justifiable, the scope of 'speech' needs to be set within a particular range. It examines the basis of free speech as being a fundamental requirement in a democratic society. The author does not provide a critical analysis of the arguments, and instead more so just briefly summarises the different positions.

9. Posner, Richard, 'Privacy, Secrecy and Reputation' (1979) 28 *Buffalo Law Review* 1.

Following on from his article regarding an economic analysis of privacy in 1978, the author considers other aspects of privacy not covered in his previous article. He also attempts to explain the status of statutes regarding privacy as at the time of publication along with the role of the government as being both a possessor of privacy and an invader of privacy. He continues with his economic justifications for a right to privacy as well as expanding his previous definition of the right. He continues on to provide an economic justification for defamation whereby he argues that reputation has an economic important function in a market system and therefore falsification of reputation can have detrimental consequences to the "marriage market", market in friends as well as the market system.

10. Richards, David A. J., 'Free Speech as Toleration' in Waluchow, W.J. (ed) *Free Expression: Essays in Law and Philosophy* (Calrendon Press, 1994).

This article provides an examines the justifications for free speech from three perspectives: utilitarianism, argument from democracy and free speech as toleration. The author primarily focuses on approaching free speech from a toleration model and argues that the approach is based on the notion that the State may have no power over a particular subject because enforceable State judgements about the worth or value of a particular subject fails to respect the right of persons reasonably able to make such judgments for themselves. The author centres his argument around the United States' tolerance for religion and the principle of free speech.

11. Velu, Jacques, 'The European Convention on Human Rights and the Right to Respect for Private Life, the Home and Communications (Paper presented at the Third International Colloquy about the European Convention on Human Rights, Brussels, 30 September - 3 October 1970).

This paper begins as an analysis of Article 8 of the European Convention on Human Rights where it discusses the origins of the article and those affected by its implementation. It then goes on to discuss the notion and definitions of privacy, where it divides the justifications for protection of privacy into two parts: protection of private life; and protection of the home. These are both discussed in detail, with the limitation on each part and the implications of the European Convention on Human Rights also discussed.

12. Volokh, Eugene, 'Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You' (2000) 52 Stanford Law Review 1049.

In this article the author argues against information privacy restrictions by highlighting how the restrictions could affect other kinds of speech, specifically in the US jurisdiction. He highlights how the justifications for information privacy may have unintended consequences for speech. In doing so he examines five justifications for the imposition of privacy restrictions: matters which fall under contract, personal information as intellectual property, matters considered "commercial speech", matters of private concern and matters of compelling interest.

Overall the author does not consider any of the justifications behind the right to privacy as particularly compelling and argues that the problems associated with its implementation outweigh the benefits to be gained from its introduction. He argues that the justifications for information privacy are insubstantial, and that the run on consequences of constructing information privacy in such a way. He makes three main points: firstly, that restrictions on speech that reveal personal information are constitutional under current doctrine only if they are imposed by contract, are express or implied; secondly, that expanding the doctrine to create a new exception may result in the development of expanded speech restrictions, a result which he considers quite likely; and thirdly that there are three ways in which the issue of free speech restrictions can be approached whereby people can either completely ignore free speech consequences, attempt to define privacy restrictions in a specific and narrow manner, or determine that the imposition onto free speech is too great to allow development of privacy restrictions.

RESEARCH QUESTION TWO (Breeanna Jeffs)

"***An analysis both for and against the Australian Law Reform Commission's proposal for a statutory tort of privacy."***

Summary

Most of the judicial and legislative sources detailed below evince a consensus in favour of the introduction of a statutory tort of privacy, but detailed consideration of the specific features of the proposed ALRC action is less easy to find. A useful overview of the various options for reform and a preliminary critical appraisal of the form and features of the ALRC proposal can be found in source 4 below (Barker, Cane, Lunney, Trindade *The Law Of Torts in Australia* 5th ed 2012 pp 390-416 –forthcoming- extract supplied).

We include as a starting point the Australian, New South Wales and Victorian Law Reform Commission Reports for your reference. These will provide a comparison between the different proposals ongoing throughout Australia.

A recurring argument for the introduction of a statutory action is that this would avoid straining existing actions (such as the action for breach of confidence) to fit the privacy mould that were never intended to do so. Another often-cited reason for introducing an action is that other leading jurisdictions (eg the United States, the United Kingdom and New Zealand) all provide some form of action for the invasion of privacy, whether via a common law tort (or torts) or otherwise via an adapted law of breach of confidence.

Several of the articles suggest that the privacy protection currently in place in Australia is inadequate and that the introduction of a statutory tort is necessary to unify the protection of privacy laws and to provide a firm foundation for subsequent judicial developments.

Some articles contend that privacy would be better developed by the judiciary (either via a common law tort or via the law of confidence) than via a statutory action, but there are keen differences in view on this point. The pieces published by Applegarth SC, for example,

recommend statutory reform on the basis of the uncertainty that has been displayed to date in Australian case law.

Some of the articles included below advocate the adaptation of the breach of confidence doctrine as opposed to statutory reform, which is the approach adopted in the United Kingdom. They contend that the action for breach of confidence can operate as a "stand in" in cases involving the wrongful disclosure of private information, thus raising the question whether a statutory tort is in fact necessary for cases of this type. This type of approach would allow existing causes of action to take up much if not all of the work that needs to be done by an action for the invasion of privacy. A potential problem with this approach is that common law development is always incremental, which is likely to be seen as a disadvantage in the current political climate.

A number of criticisms have been made of the ALRC proposal. Some express the view that another level of complexity will be introduced into our legal system, which will provide a fecund ground for dispute. Others express concerns that a statutory cause of action for invasion of privacy might unduly inhibit freedom of speech. The current ALRC proposals obviously seek to address this concerns in some measure in the way in which the thresholds are set for the action. One key question and further source of concern is whether the threshold stipulated by the ALRC is currently set in the right place - whether a standard of 'high offence' (drawn from the US case-law) is appropriate in actions for the wrongful disclosure of private information, or whether a lower threshold standard of 'reasonable expectation of privacy' reflects a better balance between the different interest at stake (this is the approach under the UK action). The reference to high offence is also reflected in the New Zealand common law action, but has been questioned in lower Australian courts and does not feature in the NSWLRC proposal. Finally, the ALRC proposal effectively sets out to provide a single cause of action for both cases of wrongful disclosure of private information and wrongful intrusion upon a person's privacy. This is contrary to the way in which actions appear to have developed elsewhere- where discrete actions are used in the different types of case. This feature has also come in for some criticism on the basis that it will muddy the two case type, in only one of which (disclosure) is freedom of speech directly implicated.

A point to note is that some of the sources that are included pre-date the release of the ALRC Report. These articles may still be helpful in examining the concept of privacy, defences and

remedies in a general way. It also seems that most of these writers were accurate in their speculations on what form they assumed the statutory form would take.

The sources below therefore represent a range of different views about the way in which privacy reform should be effected. The overall consensus appears to be in favour of a statutory cause of action, but there remain difficult questions relating to the precise form of the action.

Law Reform Reports:

1. Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008). Accessed via http://www.austlii.edu.au/au/other/alrc/publications/reports/108/74.html.

The above resource is fundamental to the analysis of the Australian Law Reform Commissions' proposal **("ALRC")** as it is important to understand the law reform the Government is proposing to implement. Considering the sheer volume of the report, Part 74 *Protecting Your Right to Personal Privacy* is attached as it is most relevant to this research topic. The ALRC ultimately recommend a statutory cause of action for a serious invasion of privacy of a natural person. However, they acknowledge the hardship in defining what constitutes "privacy".

The ALRC also make several other recommendations including that bringing an action should not depend on proof of damage, the action should be restricted to intentional or reckless acts on the part of the defendant and any action at common law for invasion of a person's privacy should be abolished. Moreover, they also state that an exhaustive range of defences should be provided and that the court should be able to choose the remedy that is most appropriate in the circumstances.

2. New South Wales Law Reform Commission, *Invasion of Privacy,* Report 120 (2009). Accessed via http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/R120.pdf/$file/R120.pdf.

The New South Wales Law Reform Commission ("**NSWLRC**") recommended in their final report that New South Wales should amend the *Civil Liability Act 2002* (NSW) to provide a cause of action for invasion of privacy. This resource is helpful to use as a comparison to the ALRC's report and their final recommendations on privacy.

The NSWLRC, like the ALRC, recognise the difficulty in defining a satisfactory definition of "privacy", but envisage that the amended statute would contain a non-exhaustive list of the types of invasion that fall within this category.

The writers of the report conclude that if a privacy invasion does not fall within the statute, this would empower the courts to grant plaintiffs the remedy that was appropriate in the circumstances.

In conclusion, both the ALRC and the NSWLRC recommend that legislation should provide for a statutory cause of action for privacy invasion. The NSWLRC ultimately agreed with the ALRC's view that national consistency should be one of the goals of privacy regulation as it would effectively regulate privacy invasion of trans-jurisdictional technologies.

3. Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010). Accessed via http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/resources/3/6/36418680438a4b4eacc0fd34222e6833/Surveillance_final_report.pdf.

The Report from the Victorian Law Reform Commission ("**VLRC**") involves a discussion of both the ALRC and NSWLRC reports as well as commentary considering the Victorian context. What distinguishes this report from the ALRC and the NSWLRC is that Victoria is required to consider the implications of section 13 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

In summary, the VLRC concluded that two statutory causes of action would be appropriate and recommend that a specific defence of public interest be established. In contrast, the Australian and New South Wales Commissions take the view that the public interest in the defendant's actions can be accommodated in the general standards.

Books, Articles and Commentary:

1. Barker, Kit, Cane, Peter, Lunney, Mark, Trindade, Francis, *The Law of Torts in Australia*, pp 390-414(Oxford University Press, 5th edition, 2012).
   ***Note – not for wider distribution.**

This yet to be published resource provides a helpful overview of the invasion of privacy. The authors acknowledge that until recently protection for invasion of privacy was provided, albeit indirectly, under other causes of action such as trespass, nuisance and defamation. The authors state that this creates causes of action meeting purposes for which they were not designed, which can result in their distortion to the detriment of the law's transparency. The reference to *Kaye v Robertson* [1991] FSR 62 is helpful to demonstrate this.

The authors of the book acknowledge the different manners in which privacy rights can be protected in Australia, one of which being a statutory cause of action. The article mentions the recent ALRC and NSWLRC proposals for a statutory cause of action for the invasion of privacy, which prevailed over the alternative options for breach of confidence or the common law tort.

This resource is particularly of assistance in that it makes reference to the advantages the statutory route would provide such as avoiding straining on existing causes of action, that it would sidestep problems for precedent and it would also allow for a more flexible approach towards remedies. The resource is also helpful as it discusses the elements of the proposed tort in detail as well as the potential defences and remedies. It makes some criticisms of the proposed form and elements of the ALRC proposals, favouring instead the NSWLRC draft legislation instead.

2. Applegarth, PDT, The Tort of Privacy Invasion in Australia after Jane Doe, (2008) March *Gazette of Law and Journalism.* Accessed via http://archive.sclqld.org.au/judgepub/2008/The%20tort%20of%20privacy%20invasion%20in%20Australia%20after%20Jane%20Doe.pdf.

This article demonstrates the uncertainty that appears to surround the tort of privacy. Applegarth highlights the confusion that is apparent amongst the courts by focussing on the case of *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281.
It was here that Hampel SC unnecessarily held a tort of invasion of privacy existed in Australian law but did not consider it appropriate to define the elements of the tort. Applegarth also refers to other cases such as *ABC v Lenah Game Meats* [2001] HCA 63 that have left the tort of privacy open for interpretation, accordingly Applegarth suggests that if the tort is to be developed, it needs to be done by the legislature. Applegarth raises a series of important and interesting questions that need to be answered if a tort of privacy is in fact developed. A few of these include what is classified as "private facts", when will privacy trump other interests and what defences would be available if there was an action for a tort of privacy.

In summary, this article provides a helpful insight from a Supreme Court Judge into the confusion currently being felt by the courts. Although the writer acknowledges there is uncertainty surrounding the tort, it is in his opinion that this is not a sufficient reason to not enact a statutory tort of privacy.

3. Witzleb, Normann, Giller v Procopets: Australia's Privacy Protection Shows Signs of Improvement, (2009) 17 *Torts Law Journal*, 121-129.

The writer focuses on the case of *Giller v Procopets* [2008] VSCA 236, which involved the respondent showing recorded sexual encounters to the appellant's family and friends appeal, the appellant was successful in her plea for breach of an equitable duty of confidence therefore the judges did not consider it necessary to decide on her plea for breach of privacy. Considering the law reforms, the judges left the decision of whether a separate common law right to privacy should be recognised for another case.

The importance of this case is that the court recognised that a plaintiff can recover from mental distress under the action for breach of confidence. This raises the question if there is in fact a need for the invasion of privacy doctrine if an award for mental distress is available under the action of breach of confidence. Moreover, quoting the writer, "the refusal to decide on Ms Giller's privacy claim further suggests that the court did not think that the remedial

consequences of a breach of confidence action and a possible future privacy tort would significantly differ."

The writer uses this case to convey that courts are likely to defer a decision on a privacy tort as long as plaintiffs can be protected through other causes of action, like breach of confidence.

In conclusion, the fact that mental distress damages are now available for breach of confidence allows this action to be a "stand in" for the wrongful disclosure of private information, which allows the question to be raised if the tort is necessary at all.

4. Polden, Mark, Privacy sounds good, but…. (2008) 58 *Law Society Journal*, 60-62.

In this article, although Polden acknowledges the advantages as argued by others for the statutory privacy reform, the paper is predominantly casting the reform in a negative light. Quoting the author, the proposal "would simply introduce another level of complexity…It is a blunt instrument for reform, likely to provide fecund ground for dispute."

Polden also refers to a previous report from the ALRC, *Privacy*, which recommended against enacting a tort of invasion of privacy on the grounds it would be "too vague and nebulous" thus painting the ALRC in a somewhat hypocritical light.

There is also an argument in the article that introducing a right to privacy through statute without a fellow right to freedom of expression will create an incorrect balance. However, the writer does raise the counterargument that, according to the ALRC, public interest considerations will be taken into account to determine if a serious privacy invasion is present, meaning that neither privacy nor free speech would be privileged.

5. Pelletier, Robert, A new tort of privacy: we should be able to sue, (2008) 58 *Law Society Journal,* 60-62.

The article by Pelletier mainly demonstrates positive aspects regarding the tort of privacy. Pelletier recognises how the freedom of the press and the right of privacy are in tension, but

acknowledges the effort by the ALRC to seek to strike the right balance by introducing safeguards with the cause of action.

The author does acknowledge it would be possible to have a right to privacy developed by the common law but states without statutory reform we will be left with piecemeal rights that are of uncertain scope and dubious enforceability.
Moreover, he argues that the uncertainty will lead to expensive test cases which will inevitably be commenced only by persons with the financial means to do so. Pelletier summarises that if the law reform requires that the press and others justify an invasion of people's private lives in court, it seems like a small price to pay.

6. Caldwell, Jillian, Protecting Privacy Post Lenah: Should the Courts Establish a New Tort or Develop Breach of Confidence, (2003) 26(1) *University of New South Wales Law Journal*, 90. Accessed via http://www.austlii.edu.au/au/journals/UNSWLJ/2003/4.html.

Caldwell provides a helpful comparative analysis of the position of privacy law in Australia with other jurisdictions such as the United States, New Zealand and the United Kingdom. She also refers to the *Lenah* case as she believes lawmakers should use this decision as leverage to develop the laws on privacy.

Although the journal article pre-dates the ALRC report, Caldwell recognised the need for reform, claiming the *Privacy Act 1988* (Cth) insufficient due to rapidly advancing technologies and an investigative media industry. Therefore, she turns to other jurisdictions for prospective models for the Australian system.

Caldwell summarises by labelling the privacy protection offered in Australia inadequate. She recommends that due to the similarities of legal and social contexts between Australia and New Zealand, Australia should follow the approach taken by New Zealand courts. She also concludes that like in art 17 of the *International Covenant on Civil and Political Rights*, which Australia is a signatory, the tort should be based on personal autonomy and human dignity.

7. Watson, Penelope, Remedies for Novel Torts: Invasion of Privacy, (2008) 1 (1&2) *Journal of the Australasian Law Teachers Association*, 391- 402. Accessed via http://www.austlii.edu.au/au/journals/JlALawTA/2008/35.pdf.

The focus of this article is on what remedies would potentially be available for an action of invasion of privacy, which often causes intangible, non-physical or non-economic loss.

The writer concludes that the creation of a separate tort of invasion of privacy would avoid many problems that flow from distorting remedies to fit existing causes of action like the breach of confidence.

It is Watson's opinion that there is ample power in the law of remedies to respond to new developments in the tort of privacy based on the suggested reforms from the NSWLRC. Their recommendation primarily includes injunctions and remedies, as well as proposing orders requiring apologies, orders for delivery up and destruction of material.

She also believes that the law of remedies will be able to sufficiently address the wrongs suffered by plaintiffs as demonstrated by the Court in the *Jane Doe* case where sizable sums for invasion of privacy were awarded.

8. Butler, Des, A Tort of Invasion of Privacy in Australia?, (2005) 29 *Melbourne University Law Review,* 339- 389. Available via http://www.austlii.edu.au/au/journals/MULR/2005/11.html.

The article above addresses the potential forms that the development of the tort of privacy could take in Australia. The article is useful as the writer acknowledges that before implementing s a tort, issues need to be taken into account such as our existing laws, as well as the constitutional freedom of communication concerning government or political matters.

Butler, like other privacy writers, refer to other jurisdictions who have protection against invasion of personal privacy but states that this comparison is merely persuasive and not conclusive as to whether Australia should adopt the same.

The writer is against adopting a breach of confidence approach as in the UK, as Australia does not have human rights legislation which is said to have been the catalyst for the UK reform.

Butler concludes by highly recommending Australia follow the US model which he believes is a beacon for balancing competing rights. He also refers to defences which he believes to be appropriate, which operate as a guide for potential reform in Australia.

9. Meagher, Dan, Freedom of Political Communication, Public Officials and the Emerging Right to Personal Privacy in Australia, (2008) 29 *Adelaide Law Review*, 175-204.

The writer of this article focuses on whether it is possible for public officials in Australia to enjoy a right to personal privacy under the Constitution. He concludes that elected public officials also deserve their privacy rights protected but their rights are not absolute.

It is Meagher's opinion that there is no principle that demands that people who seek public office must completely surrender their privacy. However, he recognises that protection cannot be unlimited for public officials as at times they must yield to circumstances. A useful example he gives is when private facts are necessary to provide citizens with information to make accurate voting choices thus reflecting the implied freedom of political communication under the Constitution. In conclusion, the writer believes that it is important for an individual to lead a secluded and private life but must at times conform to the Constitution.

10. Witzleb, Normann, Privacy. Exposure Draft of the New Australian Privacy Principles – The First Stage of Reforms to the Privacy Act 1988 (Cth), (2011) 39 *Australian Business Law Review*, 58.

This article provides an overview of the important aspects of the ALRC's review. Overall, the writer's opinion is that the ALRC should be commended on its exhaustive analysis of current issues in privacy law as well as recognising key stakeholder concerns.
Although Witzleb writes with a focus on how the law will affect businesses, he recognises the proposed reforms would be a win for all.

11. Lindsay, David, Playing Posum? Privacy, Freedom of Speech and the Media Following ABC v Lenah Game Meats Pty Ltd. Part II: The Future of Australian Privacy and Free Speech Law, and Implications for the Media, (2002) 7 *Media & Arts Law Review*, 161. Accessed via http://www.law.unimelb.edu.au/CMCL/malr/7-3-1%20Lenah%20II%20Revised%20Formatted%20for%20web.pdf.

This article was chosen for its particular focus around the impact of the *Lenah* case on media organisations. The writer refers to the role of the media, stating that obtaining information from a variety of sources is in their normal course of operations thus problems will be encountered that fall within privacy rights and the right to free speech.

Lindsay explains that the recent *Lenah* case illustrates how a search for a remedy may inhibit the development of consistent rules for resolving tensions between fundamental rights and values, as well as distorting the doctrinal basis of technical causes of action. He concludes by acknowledging the uncertainty that lies in the area of privacy after the *Lenah* case which he finds detrimental.

12. Paul Telford, *Gross v Purvis*: its place in the common law of privacy, (2003) 36 *Privacy Law and Policy Reporter*. Accessed online via http://www.austlii.edu.au/au/journals/PLPR/2003/36.html

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The purpose for including this article is that focus is placed on the influential case of *Grosse v Purvis* [2003] QDC 151. It is influential as subsequent to the *Lenah* case, this is the only other time an Australian court has recognised some form of invasion of privacy. It was in this case a Queensland District Court provided aggravated and exemplary damages for a breach of the plaintiff's privacy. Moreover, Skoien SDCJ structured the essential elements of the cause of action but interestingly ignored the inclusion of a public interest element.

13. Power, Charles, Eye on the spy – Privacy laws, (2008) 63 *Monash Business Review*. Accessed online via http://www.austlii.edu.au/au/journals/MonashBusRw/2008/63.html.

The reason for the inclusion of this article is to display another area that privacy laws will impact on if they are introduced. It is the author's belief that privacy laws need to catch up with technology in the workplace. Power highlights the many ways that an employer can intrude on the privacy of their employees, for example by reading their emails and retaining data.

It is his belief that the laws in place that regulate privacy in Australia are far from comprehensive and lack mechanisms for enforcement. Power concludes by hoping the *Privacy Act 1988* (Cth) will be amended to remove small business exemptions, which then would require all Australian employers to observe the same privacy rules.

14. Taseff, Rebecca, The Protection of Personal Privacy: The Differences Between a Privacy Tort and the Action for Breach of Confidence, (2005) 10 *Media & Arts Law Review,* 208. Accessed via http://www.law.unimelb.edu.au/cmcl/malr/10-3-2%20Taseff%20formatted%20for%20web.pdf.

This paper outlines the two models available for the protection of personal privacy, which are the privacy tort and the extended action for breach of confidence. The paper addresses the main differences between the two causes of action with respect to standing, defences and remedies. The writer also discusses if there is any substantial difference between a public interest defence as developed in the cause of action for breach of confidence, and the defence of legitimate 'public concern' as formulated by the New Zealand Court of Appeal. In summary, the writer states that whichever avenue will safeguard one's autonomy and improve the existing laws on privacy.

15. Watson, Penelope, A man without privacy is a man without dignity: it's time for a tort of invasion of privacy, (2007) 78 *Precedent*, 4-10.

The focus of this article is that Australia should recognise a tort if privacy considering the United Kingdom, New Zealand and the United States have all arrived at similar conclusions. She acknowledges the concern that is often expressed over non-elected judicial officers undertaking major law reform without direct accountability to the people. Moreover, she recommends that a creation of a statutory tort would speed up and unify the protection of privacy and provide a firm foundation for subsequent judicial development. Although common law development has been suggested by some academics, Watson believes that recommendations by law reform bodies seem to be the most fruitful and likely way forward for the tort to be developed.

16. Applegarth, PDT, Is Nothing Private? Privacy and the Need for Legislative Intervention, (Speech delivered to the Australian Legal Philosophy Students' Association, 18 March 2008). Accessed via http://www.qccl.org.au/documents/Speech_PA_18Mar08_Is_Nothing_Private.pdf.

Applegarth's speech, although similar to his previous publications, focuses on the philosophical nature behind privacy rights. Applegarth commences by quoting fellow academic Raymond Wacks who supports the difficulty in what is classified as private. In the words of Wacks, "in this attenuated, confused and overworked condition 'privacy' seems beyond redemption….Except as a general abstraction of an underlying value, it should not be used as a means to describe a legal right or cause of action."

Although Applegarth acknowledges that the concept of privacy is overworked, it remains to wield a powerful influence. His speech is also helpful as he makes reference to how privacy is situated amongst the advances of modern technology.

17. Curtis, Karen, *Privacy and Law Reform*, (Speech delivered to The University of Melbourne Law School, 2009).

This speech was included as it demonstrates the views of an expert in the privacy field on the proposed ALRC reforms. This speech was undertaken by the Privacy Commissioner regarding her stance on the proposed privacy reforms. It is her opinion that the reform is greatly needed as the law should evolve to meet expectations of society.

Curtis refers to the need for a cause of action as technology has allowed individuals to significantly impinge on the rights of others. Moreover, she believes that if statutory reform is implemented, this would remove the patchwork of common law measures to provide privacy protection such as defamation and nuisance.

18. Curtis, Karen, *Meeting Privacy Challenges – the ALRC and NSWLRC Privacy Reviews*, (Presentation to Symposium, University of New South Wales, 2008).

This source was included as it provides a helpful analysis of the ALRC proposal. Although the layout of the presentation does not adhere to the usual format, it can be helpful in setting out the issues which are of considerable importance.

It is in Curtis' opinion that the ALRC proposal has the potential to be leading edge privacy legislation. The speaker has a primary focus on the how technology can impact on privacy and commends the ALRC for making reference to these. In summary, she believes that Australia is positioned will to get leading edge privacy protection for our nation based on the ALRC proposal.

19. Richardson, Megan, Whither Breach of Confidence: A Right of Privacy for Australia, (2002) 20 *Melbourne University Law Review*. Accessed via http://kirra.austlii.edu.au/au/journals/MULR/2002/20.html

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The writer in this article expresses that the equitable doctrine of breach of confidence is an effective measure that can be used to protect privacy rights, without statutory intervention.

Richardson argues that while a sui generis privacy doctrine might have advantages in terms of greater transparency, the breach of confidence doctrine has already proved to offer appropriate protection of private information. Moreover, she argues that the doctrine's treatment of commercial privacy interests and freedom of speech is consistent with the foundation of privacy rights theory.

RESEARCH QUESTION 3 (Paris Astill-Torcher)

Privacy Acts in British Columbia, Manitobia, Saskatchewin And Newfoundland and their relationship with freedom of speech issues.

Summary

This annotated bibliography below seeks to identify sources which deal with the relationship between the Privacy Acts in all or any of the four Canadian provinces and the issue of freedom of speech. These articles are those listed from 1 through to 7 in Part II below. A selection of articles which address the impact of the Privacy Acts on other areas of social and commercial life have also been included. These are namely the relationship between privacy legislation and issues concerning technology, the status and powers of private investigators or individuals carrying out surveillance on others and the notion of privacy extending into the public space. These are listed from 8 through to 10.

Case law is presented in a similar structure, dealing first with cases that make specific comment on the intersection of the Privacy Acts and issue of freedom of speech or concern the direct impact of privacy legislation on the right of the media to publish certain information (from 11 through to 15). Cases addressing issues of Privacy legislation and surveillance, reasonable expectations of privacy held by individuals and the notion of public privacy are listed from 16 through to 19.

Research was conducted using the *WestLaw*, *LexisNexis* and *HeinOnline* databases. Google also provided a good starting point to identify the scope of sources and their citations which could then be located in the academic databases. *WestLaw* was the database used primarily for locating case law while *HeinOnline* provided an extensive list of materials analysing the Privacy Acts and their impacts/ effectiveness. Given the time constraints on this research, resources contained in databases such as *SSRN* and *LexisNexis* could be examined more thoroughly to locate further sources in this area. General Torts law sources also provided a helpful starting point. These included Lewis N Klar, *Tort Law* (Carswell, 4th ed, 2008) (see pages 84-87) and Linda D Rainaldi, *Remedies in Tort: Volume Three* (Carswell, 1987).

Legislation:

The four relevant pieces of legislation and their citations are as follows:

- British Columbia: *Privacy Act*, RSBC 1996, c C-373.
- Manitobia: *Privacy* Act, CCSM, c P-125.
- Saskatchewin: *Privacy Act*, RSS 1978, c P-24.

- Newfoundland: *Privacy Act*, RSNL 1990, c P-22.

Books

1. Dale Gibson (ed), *Aspects of Privacy Law: Essays in Honour of John M Sharp* (Butterworths, 1981).

This book contains a collection of essays covering the topic of privacy law. There are two essays within the book which address legislative protection of Privacy Laws. The essay authored by Philip Osbourne ('The privacy Acts of British Columbia, Manitobia and Saskatchewan') commencing at page 73 provides a brief historical analysis of privacy legal history and then embarks on an analysis of the privacy statutes existing in British Columbia, Saskatchewan and Manitobia.

2. Colin H H McNairn and Alexander K Scott, *Privacy Law in Canada* (Buttersworth, 2001).

The book offers an outline of the current law and analyses the Canadian Charter of Rights and Freedoms, common-law and statutory developments in the courts and legislatures. Chapter 1 summarises approaches for protecting privacy and addresses the leading definitions of privacy.

Chapter 3 examines the tort of invasion of privacy both at common law and in the provinces where Privacy Statutes exist. Here the authors observe the relatively law value of the awards which have resulting from claims under these statutes and contend that this signals the tenuous position of the tort of invasion of privacy. Chapter 3 also discusses privacy in the context of the competing interest of freedom of expression— although the focus here is narrowed to the concern of preserving the public's access to the courts and avoiding a chilling effect on the press.

3. Robert Martin and G Stuart Adam, *A Sourcebook of Canadian Media Law* (Carleton University Press, 2nd ed, 1994).

Chapter 1 of this book deals generally with freedom of expression in the Canadian constitutional context. This is followed by an examination of the various societal, competing interests which may limit this freedom. One of these competing interests is identified as the laws of defamation and privacy and this is dealt with in Chapter 5. Here the authors provide a

detailed (over 300 pages) legal guide to the basic concepts necessary to form plaintiff and defendant cases in these areas of law.

Articles/Commentary/Reports

4. Sandra Lawson, 'Privacy v Freedom of the Press' 1 *Appeal: Review of Current Law and Law Reform* (1995) 46.

This article considers the connection between the British Columbia *Privacy Act* and the Canadian Charter of Rights and Freedoms (particularly the right to freedom of the press contained within the Charter).

Lawson notes that the rights guaranteed by the Charter are not absolute but rather must be balanced to ensure that limitations imposed on those rights are 'justifiable in a free and democratic society.' Lawson also notes that where a Charter right is violated, the onus of proof shifts to the party seeking to uphold the impugned provision. This is said to be inappropriate in the context of the power imbalance between private individuals and the media which is increasingly controlled by large and wealthy corporate entities.

The article concludes that the review and confirmation of the boundaries of freedom of the press, in the context of individual privacy, must be a role undertaken by the government as it is a burden too complex, important and expensive to be left to the private individual.

5. British Columbia Law Institute, *Report on the Privacy Act of British Columbia*, February 2008, Report No 49 <http://www.bcli.org/sites/default/files/Privacy_3Act_Report_Website.pdf>.

This Report provides generally a defence of the British Columbian *Privacy Act* and its continued relevance and importance in modern society. And overview of the Act and its provisions are discussed and analysed in part II.

Part III contains the Report's recommendations. Part III (A) speaks to the continued relevance of the Act, Recommendation 1concerns the need to retain the *Privacy Act* particularly in the context of the highly invasive capacities of modern technology and the current political atmosphere which places an increasingly high value on privacy (see page 21 especially).

In part III (E) it is noted that if corporations were afforded the same protection as individuals under the Privacy Act, it would become a means of discouraging internal and external scrutiny of a corporation's activities. Further fear of being subject to a tortious claim may prevent whistleblowers from bringing improprieties to light. Recommendation 6

consequently suggests clarification of the scope of the Act to cover individuals and not corporations.

6. Simon Chester, Jason Murphy and Eric Robb, 'Zapping the Paparazzi: Is the Tort of Privacy Alive and Well?' (2003) 27 *Advocates Quarterly* 357.

This article surveys Canadian tort litigation of claims alleging breaches of privacy. The article comments that while the Privacy statues in British Columbia, Manitobia, Saskatchewanand Newfoundland are promising in theory, case law reveals that in the majority of cases damages have been nominal and the costs of litigation exorbitant. This article also examines the conception of privacy as a fundamental human right and the attempt by some Canadian courts to anchor constitutional values in the concept of Privacy (see especially pages 385-391).

Appendix A summarises the similarities and differences between the Privacy Acts.

7. David Vaver, 'What's Mine is Not Yours: Commercial Appropriation of Personality under the Privacy Acts of British Columbia, Manitoba and Saskatchewan' (1981) 15 *University of British Columbia Law Review* 241.

This article provides an overview and key provisions of the Privacy Acts existing in British Columbia, Manitobia and Saskatchewan (see part II).

The article then engages in a detailed consideration of the Privacy Acts (part IV) including the treatment/ exclusion of corporations under the Acts (part IV (A)(ii)). However, discussion is limited by the article's primary focus on the commercial appropriation of personality under the Acts in the three jurisdictions.

Relevant to the relationship between the Acts and the issue of freedom of speech, the 'in the public interest' defence (*Privacy Act* section 2(3)(a)) is considered in part IV(G). This part discusses the actions and circumstances of publication which may fall under it the protection of the defence.

8. David H Flaherty, 'Some Reflections on Privacy and Technology' (1998-1999) 26 Manitobia Law Journal 219.

David Flaherty served as the Privacy Commissioner in British Columbia from 1993-1999. This article, which is a revised version of a presentation given by Mr Flaherty, focuses on the relationship between privacy and technology, particularly in regards to electronic databases and other technologies which store and allow searchable access to personal

information. One example provided is the storage and use of personal information provided in applications for supermarket rewards programs.

The author argues that the Privacy Acts which exist in the Western Canadian provinces do not really address the four privacy torts identified in the seminal article by Dean William Prosser ('Privacy' (1968) 48 *California Law Review* 383) namely the intrusion on solitude, public disclosure of private facts, placing people in a false light in an offensive fashion and the unauthorised commercial use of a person's identity. The author further notes that the claims filed under these Acts have been infrequent.

9. Elaine F Geddes, 'The Private Investigator and the Right to Privacy' (1988-1989) 27(2) *Alberta Law Review* 256.

This article examines the relationship between privacy law and the status and powers of private investigators. The relationship is examined in the specific context of the Canadian Privacy Acts in part VII of the article.

The author notes that cases decided under the various Privacy Acts have been rare however some observations are made in regards to the relationship between the acts and private investigators and the conduct which will constitute an invasion of privacy.

10. Elizabeth Paton-Simpson, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' (Summer 2000) 50(3) *University of Toronto Law Journal* 305.

This article deals with the limits of the protection of privacy in public spaces in both American and Canadian law. The extent of protection in public places offered by the Privacy Acts of the Canadian Provinces is addressed from page 314. The Canadian approach appears to be varied however the author notes that in contrast to American courts, Canadian court may be more open to the concept of public privacy.

Cases

11. *Pierre v. Pacific Press Ltd.* 1994 CarswellBC 237 British Columbia Court of Appeal, 1994.

The facts of this case concerned the publication of the identity of a witness (Mrs Pierre) to a public crime after she was voluntarily interviewed and photographed by two of Vancouver's daily newspapers. Mrs Pierre sought, among other things, compensatory and exemplary damages for breach of privacy under section 1 of the *Privacy Act*. The Defendants

had applied to strike out the jury notice given by the Plaintiff on the ground that the issues raised were of a complex and intricate character and thus unsuitable for a jury trial. This was dismissed and this case is the appeal brought by the defendants.

In deciding whether the case should be heard before a jury, Taylor JA noted the historical importance of trial by jury and the role it has played in establishing freedoms of speech and of the press.

It was argued by the Defendants that Canadian courts must give effect to the Charter of Rights and Freedoms in the application of common law principles which affect the entrenched rights of the media, namely the right to freedom of expression contained in section 2(b) of the Charter. In consideration of this, Goldie JA makes reference to the America Authority *The Florida Star v. B.J.F.* (1989) 491 U.S. 524 and the relationship between the First Amendment and statue/common law, reiterating the comments of Marshall J in *Florida Star* that each case must be decided by balancing the interests involved [52-54]. Goldie JA goes on to hold that this balancing can also be performed by a Jury.

It was ordered that this case would proceed to trial by jury.

12. *Edmonton Journal v Alberta* [1989] 2 SCR 1326.

Supreme Court of Canada determined that the protection of privacy was a pressing and substantial concern which could in particular circumstances over-ride the right to freedom of the press.

13. *Hollingsworth v BCTV* (1998) 113 BCAC 304.

The plaintiff's hair replacement treatment was recorded on video and released to the media. The video was then played on air without the consent of the plaintiff. This satisfied the requirements of the tort of invasion of privacy under the British Columbian Privacy Act. The facts did not amount to defamation as the fact that the plaintiff had a baldness treatment was true. The court awarded $15, 000 in general damages.

14. *B (A) v D (C)* [2011] BCWLD 2578.

The case concerned the application by a teacher and school board for publication ban covering information ban covering information that would tend to identify them. The plaintiff had previously been involved in criminal proceedings against the teacher.

Noting the limits to freedom of speech, the court noted that neither the right to privacy not the freedom of speech is absolute. Further, publication ban to protect identification of a person of entity should be ordered where such an order is necessary to prevent serious

invasion of privacy and where the salutary effects of the ban outweigh the deleterious effects on rights of others and the public including the right to free expression [63].

15. *F (JM) v Chappell* (1998) 158 DLR (4^{th}) 430.

The case concerned the publication of the plaintiff's name by the Nelson Daily News in its report of a criminal case. Prior to the criminal trial proceeding, a publication ban had been on the proceedings had been ordered by the court. The effect of the ban was, for publication purposes, as if the plaintiff's name had never been mentioned.

The plaintiff's appeal for variation of damages was upheld and the plaintiff was awarded the $19,000 of damages for invasion of privacy initially awarded by the jury at civil trial.

16. *Davis v. McArthur* (1969), 10 D.L.R. (3d) 250 (B.C.S.C.).

The facts of this case concerned the hiring of an investigator by the plaintiff's wife following a marriage breakdown. A tracking device was attached to the plaintiff's car.

The Court of Appeal suggested that the concept of privacy under the Act aligns with the concept of privacy under legislation in the United States. Here privacy is characterised not as an absolute right but rather one which is exercisable only to the extent consistent with law and public policy.

Section 2(1)(c) of the British Columbian Privacy Act provides that an act is not a violation of privacy if done under authorisation of law (constituting a 'claim of right'). Tysoe JA agreed with the trial judge and held that the role of a private investigator does not give a claim of right nor authorisation so as to afford a complete defence [146]. Tysoe JA further noted that this is not mean that a person's position as a private investigator is not relevant and there is an acceptance that such a person may have a legitimate interest recognised by law in carrying out an investigation [147].

17. *Milner v Manufacturers Life Insurance Co* (2005) 36 CCLT (3d) 232 (BCSC), additional reasons at (2006), 2006 CarswellBC 2615 (SC).

In this case, the defendant insurer carried out surveillance on the plaintiff who they believed to have been untruthful in her application for disability benefits from the defendant insurer as a result of chronic fatigue syndrome. The surveillance was carried out on the plaintiff and incidentally on members of her family.

Court held that the plaintiff was not entitled to an expectation of privacy in the circumstances and that the defendant had a lawful interest in conducting surveillance of the

plaintiff given the nature of her claim and the credibility issues it raised. Further, videotaping of plaintiff's sons playing soccer did not constitute a violation of their privacy as they were in a public space.

18. *Nesbitt v Neufeld* (2010) BCSC 1605

The facts of this case concerned an action for defamation and breach of privacy brought by Ms Wendy Lee Neufeld against Dr Partick Michael Nebitt after Dr Nesbitt accessed some of the personal correspondence of Ms Neufeld which remained on an old computer lent by her to Dr Nesbitt. This correspondence was then released to a number of third parties and some to the public.

In relation to the action brought under the British Columbian *Privacy Act*, the court held that the actions of Dr Nesbitt constituted a deliberate act that violated Ms Neufeld's privacy [91] and that the fact that the correspondence was in a computer given to him by Ms Neufeld was of little relevance as a quick scan of the documents would have revealed their highly personal nature [92]. Reference was also made by the court to the reasonable expectation of privacy which existed by virtue of the personal and private nature of the documents and the fact that Ms Neufeld did not consent to the use of the documents [94].

For breach of privacy and defamation (this part of the whole amount was limited) the court awarded $40, 000 in damages.

19. *Silber and Value Industries Ltd v BCTV* (1986) 69 BCLR 34.

This case concerned an action brought against BCTV for publishing photographs and films of the plaintiffs and their property. This action failed. Lysyk J expressed approval of the notion that the recording of public activities may not be an actionable invasion of privacy. Further, public activities not only include activities carried out on public property but also activities carried out on private property in the full view of the public at all times.

RESEARCH QUESTION FOUR (Jessica Thrower)

"*How the issue of the relationship between privacy and the First Amendment is dealt with in the United States.*"

Summary:

The concept of a right to privacy in the United States was first introduced by Warren and Brandeis in their vision of a general tortious action based on a 'right to be let alone'. Since then, the law has followed a different path, with William Prosser's 'multiple interest' model of privacy adopted in the *United Stated Restatement of Torts* (Second) ss652B-E. This model contends that the invasion of 'privacy' is composed of four separate torts:

1. Intrusion into the plaintiff's seclusion or solitude, or into his/her private affairs ('Wrongful Intrusion')
2. Public disclosure of private facts about the plaintiff ('Wrongful Disclosure')
3. Publicity which places the plaintiff in a false light in the eyes of the public ('Casting in a False Light')
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness ('Appropriation of Personality')

For a comprehensive overview of the development of privacy actions in the United States and suggested developments to the doctrine, see Article no. 18.

An examination into the jurisprudence surrounding privacy and the First Amendment demonstrates an overwhelming triumph for free speech, as First Amendment values remain victorious in most conflicts. In reaching this conclusion, two key themes resonate through the case law. Firstly, a tendency to narrowly decide each case on its facts, and secondly, a tendency to sidestep the actual free expression/privacy conflict by concentrating on the source of the published information. Several of the articles note that there is very little discussion of the plaintiff's privacy interests at all, but rather the bulk of the Court's discussions tend to focus on the manner in which the press obtained the plaintiffs' names-for example, whether it was obtained from the government or from a public record, or whether it was obtained lawfully. In considering the Court's treatment of the Wiretapping Act in the

seminal case of *Bartnicki v Vopper*, it is noted that the decision rendered the First Amendment privacy doctrine narrow and evasive, and worse, actually made the doctrine less clear and analytically sound than it was before (see Articles no. 8 and 12).

It is argued that due to a lack of consistent and systematic theory surrounding the constitutional protection of expression and privacy, the Courts have resorted to a 'weighing process.' Consequently, rather than constitutional theory of free expression, we find in the Supreme Court First Amendment cases "a set of sometimes overlapping, sometimes independent, sometimes contrary, ad hoc decisions applicable to discrete fact situations in which freedom of expression is at issue." (Article no. 2)

It is noted that the future of First Amendment privacy cases appears to hinge on whether or not information has been "lawfully obtained". Much of the commentary in this area has focussed on the "troublesome" concept of "unlawfully obtained" information, arguing that it has become far more important to First Amendment privacy than it logically should be. "It has nothing to do with expression, and the First Amendment can largely do without it under any circumstance." (Article no. 12) The 'newsworthiness' defence (articulated in cases such as *Shulman; Howard; Branzburg; Virgil; Sipple*) is warned to possibly be "so overpowering as to virtually swallow [the mass publication] tort [of privacy]." (Article no. 9). Further, a new model is proposed where the onus is shifted from the Plaintiff to the Defendant. (Article no. 18)

Additionally, the commentary warns of the dangers of 'First Amendment exceptionalism' by which courts take it upon themselves to set out novel rules for the protection of speech that deviate sharply and consciously from common law rules, and do so to the detriment of us all. (Article no. 5)

While some commentators support the strength of the First Amendment priority in the jurisprudence (see Articles no. 3, 10, 16 and 20), the majority of articles focus on the negative implications of the low success rate of privacy cases. Abhorring the fact that Brandeis and Warren's privacy right has been rendered almost non-existent (Article no. 12) it is argued that there must be a point where humanity and sensitivity overcome the media's First Amendment right (Article no. 6)

Books:

1. Barker, Kit; Cane, Peter; Lunney, Mark and Trindade, Francis, *Law of Torts in Australia* (5th ed, 2011) 390

This chapter outlines the law of privacy in Australia and provides an overview of the 'multi interest' model of privacy adopted in the United States. The *"shockingly low success rate for actions for wrongful intrusion or disclosure"* in the United States due to the priority of the First Amendment is highlighted. [396].

2. Lewis, Anthony, *Freedom for the Thought That We Hate: A Biography of the First Amendment.* (Basic Books, 2007)

This book examines the case of *Time, Inc. v Hill* 385 U.S. 374 (1967) and notes, *"Using someone's likeness without permission has developed as one of the four branches of privacy law. A second is false light privacy, exemplified by the Hill case: putting someone in a false light by, for example, fictionalizing a story about him or her."*

3. Lidsky, Lyrissa Barnett; R. George Wright, *Freedom of the Press: A Reference Guide to the United States Constitution.* (Praeger, 2004)

"... the Supreme Court requires proof of falsity and fault in all defamation cases involving matters of public concern, although the requisite fault depends on the status of the plaintiff. If plaintiffs were able to avoid these requirements simply by choosing to sue for false light rather than defamation, it would encourage an 'end run' around the First Amendment. The United States Supreme Court foresaw and partially prevented this problem in its first false light case, Time, Inc. v. Hill."

Regarding the rationale of the decision by the Supreme Court in the case, the authors note, *"The Court's reasoning was parallel to the reasoning being developed in defamation cases: Errors are inevitable in free debate on matters of public interest, and the press must have breathing space to protect it from liability for such 'inevitable' errors."*

4. Prosser, William, *Law of Torts 117* (4th ed, 1971)

Governmental power to protect the privacy interests of its citizens by penalizing publication or authorising causes of action for publication implicates directly First Amendment rights.

Privacy is a concept composed of several aspects. As a tort concept, it embraces at least four branches of protected interests: protection from unreasonable intrusion upon one's seclusion, from appropriation of one's name or likeness, from unreasonable publicity given to one's private life, and from publicity which unreasonably places one in a false light before the public per *The Restatement (Second) of Torts* ss652B-E.

Articles/Commentary:

1. Blasi, Vincent, 'The Checking Value in First Amendment Theory' (1977) *American Bar Foundation Research Journal* 521

This article proposes that the courts should consider the press's role as a watchdog in analysing First Amendment freedom of the press issues. It is argued that the "checking value" espouses the role of the press as a watchdog against government malfeasance. The free press is said to "serve in checking the abuse of power by public officials." [527] The watchdog role raises the press's value to a democratic society, and should be considered a supplement to, rather than a substitute for, the values that, prior to 1977, had been central to First Amendment analysis.

2. Bloustein, E. J., 'First Amendment and Privacy: The Supreme Court Justice and The Philosopher' (1975) 28 *Rutgers Law Review* 41

In this article, it is argued that due to a lack of consistent and systematic theory surrounding the constitutional protection of expression and privacy, the Courts have resorted to a 'weighing process.' Consequently, rather than constitutional theory of free expression, we find in the Supreme Court First Amendment cases "a set of sometimes overlapping, sometimes independent, sometimes contrary, ad hoc decisions applicable to discrete fact situations in which freedom of expression is at issue."

This article is divided into several sections:

- The Philosopher's Theory of Free Expression- Drawing primarily on the work of Meiklejohn, this first section provides an overview of the philosophical grounding of the First Amendment, namely, that the First Amendment provides the social interest in 'hearing' or 'being informed' as opposed to protecting the individuals' right to speak.
- The Philosopher's Theory and the Right to Privacy- This section includes a discussion of issues such as the mass publication right to privacy, the newsworthiness defence, the Meiklejohn analysis and newsworthiness, and the use of name and likeness in the news. This section concludes by applying a Meiklejohn analysis to the Sidis case. Throughout these analyses, a threefold distinction is drawn between the public right to be informed, the public yearning for gossip about private lives, and the publisher's right to publish.

In conclusion, the article argues that through the use of Meiklejohn's theory allows for the exposure of the private and public uses of speech, enabling us to assure the robust exposition of public issues without inviting the lurid exploitation of private lives.

3. Calvert, C. and Torres, M., 'Putting the Shock Value in the First Amendment Jurisprudence: When Freedom for the Citizen-Journalist Watchdog Trumps the Right of Informational Privacy on the Internet' (2011) 13 *Vanderbilt Journal of Entertainment and Technology Law* 323

This Article, which takes the July 2010 ruling by the Fourth Circuit in Ostergren v. Cuccinelli as a point of departure, explores the growing tension between the First Amendment right of Free Speech and the nascent right to online informational privacy. The Article addresses the "shock value" in First Amendment jurisprudence, stretching from Cohen v. California and Texas v. Johnson through the recent ruling in Ostergren.

The Article also examines the traditional watchdog function of the press increasingly performed on the Internet by so-called citizen-journalists akin to Betty Ostergren.

The Article concludes that while the Fourth Circuit's decision in Ostergren is a victory both for the shock value in First Amendment jurisprudence and for the watchdog role played by citizen-journalists, the appellate court failed to adequately explore and distinguish between

two strands within shock value cases. In particular, the Fourth Circuit failed to distinguish between speech that shocks because it violates norms of civil discourse-causing anger and emotional outrage (Cohen and Johnson)-and speech that shocks because it intrudes on financial security (Ostergren).

4. Emerson, Thomas, 'Toward a General Theory of the First Amendment' (1963) 72 *Yale Law Journal* 881

This article sets forth the factors upon which any non-verbal interpretation of the first amendment must rest. Two major conclusions are reached:

One is that the essence of a system of freedom of expression lies in the distinction between expression and action. The other conclusion is that conditions in a modern democratic society demand that a deliberate, affirmative, and even aggressive effort be made to support the system of free expression. It is argued that only through a positive approach, in which law and judicial institutions play a leading role, can an effective system be maintained.

It is argued that in considering First Amendment: "The issue before the court cannot be a de novo balancing of different social values and objectives involved in each case. Rather the issue must be framed in terms of ascertaining the area of expression which it is the purpose of the first amendment to protect, the kind of governmental action which constitutes an infringement of that area, and the nature of ostensibly private action which nevertheless carries the imprint of government authority to such an extent that it, too, should be considered an exercise of state power." [956]

5. Epstein, Richard, 'Privacy, Publication and the First Amendment: The Dangers of First Amendment Exceptionalism' (2000) 52 *Stanford Law Review* 1003

This article argues that it is possible to discern two sharply inconsistent attitudes toward co-ordination of privacy and freedom of speech. One view holds that the First Amendment simply prevents any legislative backsliding from the common law rules that protect freedom of speech and of the press. On the alternative view of what is termed First Amendment exceptionalism, the First Amendment protection is read more broadly to afford speech greater protection than the common law rules that insulate the publication of stolen information from judicial sanction by either damages or injunction.

The article then argues that the common law approach affords a better balance between privacy and disclosure with respect to a wide range of confidential information, including the protection of trade secrets. In so doing, it criticises the results reached in a number of important recent cases including Desnick v. American Broadcasting Co.; Food Lion v. Capital Cities/ABC, and Ford Motor Co. v. Lane.

The article begins with a discussion of cyberspace and argues that cyberspace exacerbates the tension between privacy and freedom of speech. In regarding the case law surrounding the issue, it is noted:

The point here is not that constitutional law rules, especially insofar as they relate to the articulation and defence of individual rights, bear a closer resemblance to common law rules than to the legislation that often supplants them; both are judge-made rules that necessarily lack the administrative backbone and dense texture that only legislation, whether for wise or for ill, can provide. Rather, the nub of the problem is that the two bodies of judge-made law start from different substantive visions about their common subject matter.

The article is divided into several parts:

- Part I explores the relationship between the torts of defamation and invasion of privacy, and explains the critical role that the issue of truth has played in developing the basic rules for publication damages in the two torts.
- Part II explains what corrections should be made to the laws governing defamation and invasion of privacy, by insulating false statements from liability and by imposing liability for certain true statements.
- Part III examines cases that allow the publication of true information that has been wrongfully obtained.
- Part IV looks at First Amendment exceptionalism in action, by examining the distinctive constitutional justifications for denying legal redress for publication damages particularly focussing on the case of Cohen v Cowles.
- Part V examines the tension between the common law practice of affording injunctive relief and the First Amendment prohibition against prior restraints.
- Part VI extends the analysis to trade secrets, focussing on modern Internet communications in Ford and noting that the political climate is far more favourable to the protection of trade secrets than it is toward the suppression of unfavourable stories

published about firms through unlawful methods as the gains of the appropriator of the trade secret are similar to the gains of the thief of ordinary property.

In conclusion, the article warns of the dangers of 'First Amendment exceptionalism' by which courts take it upon themselves to set out novel rules for the protection of speech that deviate sharply and consciously from common law rules, and do so to the detriment of us all.

6. Fialkow, David, 'The Media's First Amendment Rights and the Rape Victim's Right to Privacy: Where Does One Right End and the Other Begin?' (2006) 39 *Suffolk University Law Review* 745

This note examines First Amendment jurisprudence in the context of prior restraints on free speech and the press and the evolution of the right to privacy. It is noted that a balancing test must be undertaken in weighing up three interests: the media's right to free speech, a rape victim's right to privacy, and the state's interest in protecting rape victims. Analysing cases such as Cox, Florida Star and Bryant, it is demonstrated that the balancing test alters between cases involving a rape victim's name and a rape victim's sexual history due to the differing consequences of these scenarios.

Recent trends in First Amendment jurisprudence in relation to the right to privacy are analysed, particularly in relation to rape victims. It is argued that there must be a point where humanity and sensitivity overcome the media's First Amendment right and the Colorado Supreme Court is applauded for recognising this. The note concludes by offering guidance on how courts should deal with future problems arising when sensitive, confidential information is inadvertently disclosed to the media or general public.

7. Glendon, William, 'The Pentagon Papers- Victory for a Free Press' (1998) 19 *Cardozo Law Review*, 1225

A discussion of the case of New York Times v United States in relation to free speech under the First Amendment versus privacy.

8. Hilmert, James, 'The Supreme Court Takes on the First Amendment Privacy Conflict and Stumbles: Bartnicki v. Vopper, the Wiretapping Act, and the Notion of Unlawfully Obtained Information' (2002) 77 *Indiana Law Journal* 639

This Note analyses the Court's treatment of the Wiretapping Act's constitutionality under Bartnicki. The ultimate concern of the Note regards Court's curious treatment of the conflict between free expression and privacy as a whole. The Note examines Bartnicki as the most recent extension of the Court's First Amendment privacy doctrine, and in the end finds it to be a poorly reasoned decision that adds little to and even obfuscates the state of the law.

This Note suggests that the inquiry about unlawfully obtained information-one that has become central to First Amendment privacy cases-is misplaced. In particular, this note argues that the "lawfully obtained" requirement has little to do with expression; that it is actually dangerous to free expression values; that it relies on circular reasoning; and that focusing on it tends to overshadow the actual conflict between free expression and privacy.

This note provides an overview of the history of the case law regarding Court's First Amendment privacy doctrine, considers Bartnicki in light of this doctrine and offers possible explanations for the notion of unlawfully obtained information in the Court's First Amendment privacy cases. It concludes that the notion that information must be obtained lawfully to receive constitutional protection is a red herring of a free expression principle that is largely irrelevant to meaningful First Amendment analysis and dangerous to First Amendment values.

9. Kalven, H., 'Privacy in Tort Law: Were Warren and Brandeis Wrong?' (1966) 31 Law and Commentary Problems 326

This article highlights the confusion between the public's constitutional right to be informed about the lives of public figures, the publisher's constitutional right to publish private gossip, and the public's thirst for lurid details of any private life. Kalven expresses the view that the 'newsworthiness' defence might be "so overpowering as to virtually swallow [the mass publication] tort [of privacy]." [336]

10. Locke, Christina, 'Does Anti-Paparazzi mean Anti-Press?: First Amendment Implications of Privacy Legislation for the Newsroom' (2010) 20 *Seton Hall Journal of Sports & Entertainment. Law* 227

This article examines the constitutional viability of the 2009 California Assembly Bill 524,15 amended Section 1708.8 of the California Civil Code which 1) extends liability to first

publishers of illegally obtained photos; and 2) authorises the government to pursue civil actions based on private individuals' mental distress.

Part I examines the history of the new anti-paparazzi statute, from the evolution of the common law right to privacy to the latest celebrity-versus-photographer snafus. Using case law from both the United States and California Supreme Courts, Part II analyses the new California law from a First Amendment standpoint. Finally, Part III of this Article concludes that the newest anti-paparazzi law chills speech protected by the First Amendment: traditional news publications must often include celebrity coverage to meet reader demand; also, so-called "tabloid" publications are not completely devoid of social value and still merit First Amendment protections. Further, this Article concludes that the government should not fund litigation in defence of highly-paid celebrities' privacy rights.

11. Meiklejohn, Alexander, 'The First Amendment Is an Absolute' (1961) *Supreme Court Review* 245

In this philosophical analysis of the First Amendment it is noted:

"The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.' It is concerned, not with a private right, but with a public power, a governmental responsibility."

12. O'Wallace, Kerry, 'Bartnicki v Vopper: The First Amendment versus Privacy and the Ghost of Louis Brandeis' (2002) *Mercer Law Review* 894

The article begins by outlining the case of Bartnicki v Vopper and proceeds to provide a legal background to:

- Protecting the Privacy of Oral and Wire Communications- beginning with Brandeis' article and its application to case law and providing an overview of the relevant legislation, namely, the *Communications Act* of 1934, Title III of the *Omnibus Crime Control and Safe Streets Act* of 1968 (*Wiretapping and Electronic Surveillance Act*), the *Electronic Communications Privacy Act* of 1986.
- The First Amendment Shield for Publishing True Information of Public Concern- Provides an overview of case law in this area including *Bartnicki v Vopper; Whitney v*

California; New York Times v Sullivan; New York Times v United States; Smith v Daily Mail Publishing Co.; Florida Star v B.J.F.; Boehner v McDermott.

- Rationale of the Court in *Bartnicki v Vopper*- A detailed analysis of the reasoning of the Court in this case, including the majority, concurring and dissenting judgements.
- Implications of *Bartnicki v Vopper*- Outlines the 'disastrous impact' the decision may have on the individual right to privacy, noting that the 'anonymous source' is essentially empowered to violate any law without tainting that same information beyond the point where it is publishable. Brandeis and Warren's privacy right is considered to be almost non-existent as the thresholds for determining what is "public interest" and who are "public figures" is likely to be very low.

13. Prosser, Dean, 'Privacy' (1960) 48 *California Law Review* 383

In this seminal article, Prosser contends that "privacy" is composed of four separate torts, the only unifying element of which was a "right to be left alone." These elements were:

- appropriating the plaintiff's identity for the defendant's benefit
- placing the plaintiff in a false light in the public eye
- publicly disclosing private facts about the plaintiff
- unreasonably intruding upon the seclusion or solitude of the plaintiff

14. Richards, Neil, 'Intellectual Privacy' (2009) 87 *Texas Law Review* 387

This Article is about intellectual privacy- the protection of records of our intellectual activities-and how legal protection of these records is essential to the First Amendment values of free thought and expression. The basic argument is that in order to speak, it is necessary to have something to say, and the development of ideas and beliefs often takes place best in solitary contemplation or collaboration with a few trusted confidants. To function effectively, it is argued that these processes require a measure of what is called "intellectual privacy."

The argument proceeds in three steps:

First, the notion of intellectual privacy is located within First Amendment theory, demonstrating how intellectual privacy undergirds each of the traditional understandings of

why we protect free speech as it safeguards the freedom of thought upon which all theories ultimately rest.

Second, a normative theory of intellectual privacy is offered that begins with the freedom of thought and radiates outward to justify protection for spatial privacy, the right to read, and the confidentiality of communications.

Third, four recent disputes about intellectual records are examined- government surveillance, private records of intellectual property, government access to such records, and the introduction of reading habits in criminal trials. These cases are used to demonstrate how a greater appreciation for intellectual privacy can illuminate the latent First Amendment issues in these disputes and can suggest different solutions to them that better respect our tradition of cognitive and intellectual freedom.

15. Richards, Neil, 'Reconciling Data Privacy and the First Amendment' (2005) 52 *UCLA Law Review* 1149

This Article challenges the First Amendment critique of data privacy regulation the claim that data privacy rules restrict the dissemination of truthful information and thus violate the First Amendment. It is argued that The First Amendment critique should be rejected for three reasons.

First, it mistakenly equates privacy regulation with speech regulation. Building on scholarship examining the boundaries of First Amendment protection, this Article suggests that "speech restrictions" in a wide variety of commercial contexts have never triggered heightened First Amendment scrutiny, refuting the claim that all information flow regulations fall within the First Amendment:

"I argue that the relationship between privacy and the First Amendment is complex, but that it is not irreconcilable. Much of the perceived conflict results from an under-appreciation of the definitional murkiness that suffuses existing legal conceptions of "privacy" and "speech." Such murkiness has allowed what are essentially consumer protection issues in the economic rights context to be transformed into civil rights issues of the highest magnitude, as opponents of data privacy regulation have seized upon the First Amendment as a handy means of derailing proposals to deal with the database problem." [1151]

Second, this article contends that the critique inaccurately describes current First Amendment doctrine. To demonstrate this point, this Article divides regulations of information flows into four analytic categories and demonstrates how, in each category, ordinary doctrinal tools can be used to uphold the constitutionality of consumer privacy rules.

Third, it is argued that the critique is normatively unpersuasive. Relying on recent intellectual histories of American constitutional law, this Article argues that fundamental jurisprudential reasons counsel against acceptance of the First Amendment critique.

In conclusion, this article argues that rejecting the First Amendment critique has real advantages. At the level of policy, it preserves the ability of legislatures to develop information policy in a nuanced way. And at the level of theory, it preserves the basic dualism upon which the modern edifice of rights jurisprudence is built.

16. Volokh, Eugene, 'Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You' (2000) 52 *Stanford Law Review* 1049

Volokh is regarded by many as the most prominent advocates of First Amendment rights in relation to privacy. This article starts from the proposition that although data privacy sounds unthreatening in the abstract, *"the difficulty is that the right to information privacy-my right to control your communication of personally identifiable information about me-is a right to have the government stop you from speaking about me."* [1051] Accordingly, while private agreements to restrict speech are enforceable under express and implied contract principles, any broader, government-imposed code of fair information practices that restricts the ability of speakers to communicate truthful data about other people is inconsistent with the most basic principles of the First Amendment.

Volokh goes so far as to conclude that *"despite their intuitive appeal, restrictions on speech that reveals personal information are constitutional under current doctrine only if they are imposed by contract, express or implied."* [1122]

Volokh's argument can be boiled down to two basic elements: First, data privacy regulation that restricts the communication of information and that is not grounded in contract violates

the First Amendment; and second, the changes to existing doctrine necessary to permit data privacy rules could be used to justify other, more sinister exceptions to free speech doctrine.

This article examines case law, doctrine, and theory to reach the conclusion that *"information privacy rules are not easily defensible under existing free speech law."*

17. Schwartz, Paul, 'Free Speech vs. Information Privacy: Eugene Volokh's First Amendment Jurisprudence' (2000) 52 *Stanford Law Review* 1559

This article provides an overview and critique of the work of Eugene Volokh in the area of the privacy law and the First Amendment. It is proposed that no less than public discourse, a democratic society depends on other realms for communication. Drawing on examples from health care law, this article questions the usefulness of Volokh's contract exception for privacy and the likelihood of a slippery slope, nuanced or otherwise, if the law acts to protect information privacy. It is argued that Volokh's approach shifts power to private commercial entities and limits some legislative limits on privacy-robbing contracts.

While arguing that Information privacy law has an important role to play in structuring communicative discourse in a deliberative democracy, it is noted that Volokh raises a significant gauntlet to information privacy jurisprudence and that judges, policymakers, and legal scholars will have much work to do in response. The challenge will be to demonstrate that information privacy law is an integral element of the mission of free speech and not its enemy.

18. Scott, Sean, 'The Hidden First Amendment Values of Privacy' (1996) 71 *Washington Law Review* 683

This article challenges the argument that punishing a media defendant for publishing untruthful information will unduly threaten First Amendment values. The article argues instead that the private facts tort promotes, not undermines, First Amendment values and suggests a reallocation of the burdens of proof in private fact tort cases, demonstrating that this reallocation will revitalise the tort while not threatening First Amendment interests.

The article proposes a model in which the burden of proving newsworthiness in an action based on the private facts tort would shift from the plaintiff to the defendant. Additionally, a

nexus requirement would be added to the newsworthiness test. This requirement would demand that the defendant establish that the information disclosed substantially related to a matter of public interest and also that it was obtained lawfully. Finally, the Plaintiff could rebut the showing of newsworthiness by establishing that the restriction on publicising the information was necessary to further a compelling state interest.

Part II of the article reviews existing methods used by courts to balance the protection of private information against the freedom of the press.

Part III investigates the impact the proposed approach would have on First Amendment values and applies the model to a scenario.

The article provides a comprehensive overview of the development of the privacy tort in the United States of America.

19. Simitis, Spiros, 'Reviewing Privacy in an Information Society' (1987) 135 *University of Pennsylvania Law Review* 707

This article examines the relationship between information processing and democracy, and the importance of privacy protection in securing individuals' ability to communicate and participate in democratic society.

20. Singleton, S. 'Privacy Versus the First Amendment: A Skeptical Approach' (2000) 11 *Fordham Intellectual Property Media & Entertainment Law Journal* 97

This article argues that the tension between privacy and the First Amendment reflects a serious conflict between free speech and privacy outside of cases involving media defendants and privacy torts. It is argued that *"the courts should think twice before sacrificing the mature law of free speech to the less coherent concerns about privacy."* [97]

It is argued that the primary issues that arise in any First Amendment challenge to privacy regulation are whether the speech in question in classified as commercial or non-commercial, the strength of the government's interest in regulating the speech and whether the proposed legislation is narrowly tailored to suit its purpose.

Part I of this article explores the foundations of the law of privacy in the United States, laying the groundwork for understanding how concepts of privacy relate to each other. It is argued that the 'reasonable expectation of privacy' theory gives the courts little guidance when genuinely new methods of surveillance arise.

Part II explores the philosophical conflict between free speech and privacy through various different models- The "I Own Information About Myself" argument and the concept that databases 'cross an invisible line'.

Part III examines the commercial speech doctrine and outlines the broader implications of the use of data in the private sector for Constitution and human rights.

Problems in the current speech doctrine are identified [152]:

a) Placing a higher value on certain types of truthful speech than other speech, particularly the idea that commercial speech is low value;
b) The treatment of outright bans on commercial speech under a higher standard of scrutiny than partial bans;
c) The view that commercial speech is easily chilled because it is for profit

"Throughout history, people have generally been free to learn about one another in the course of business transactions and other day-today contacts. Restrictions that alter this default rule sweep a potentially enormous pool of facts and ideas out of the shared domain." [152]

21. Zimmerman, D., 'Requiem to a Heavyweight: Farewell to Warren and Brandeis's Privacy Tort' (1983) 68 *Cornell Law Review* 291

In this article it is argued that the Warren and Brandeis contribution has actually had a pernicious influence on modern tort law because it created a cause of action that, however formulated, cannot coexist with constitutional protections for freedom of speech and press.

It is noted that from the outset, advocates of privacy have faced a dual, and sometimes internally inconsistent, task. On the one hand, they needed to develop a philosophical basis to support the right through an exploration of why a civilised and humane society should recognise and protect an interest in controlling public discussion of personal information. On the other hand, they had to protect free speech by creating numerous defenses and narrowing

the scope of the privacy tort, so that much personal information could circulate without penalty.

This article seeks not to restate what has already been argued so well in favour of the private-facts tort, but, by presenting the opposite view, to encourage a re-evaluation of the prevailing doctrine.

Case Law (in chronological order)

1. *Whitney v California*, 274 US 357 (1927)

This case represents a strong defence of free speech.

Charlotte Whitney was convicted under California's Criminal Syndicalism Act and appealed on the grounds inter alia that the statute was an unconstitutional restraint on free speech, assembly and association. The majority affirmed Whitney's conviction.

Though Brandeis agreed with the majority's affirmation of conviction, his concurrence called for strenuous protection of First Amendment free speech rights [373-378]. Brandeis differed from the majority in his belief that *"fear of serious injury cannot alone justify suppression of free speech and assembly"* [373]. Brandeis's concurrence in this case set the stage for subsequent case law that refined the line that separates the privacy of public figures from the free speech rights of the first amendment.

2. *Olmstead v The United States* 227 US 438 (1928)

This case demonstrated the application of the principles articulated in Brandeis' 'The Right to Privacy.' The court affirmed the conviction of three defendants based upon conversations obtained by federal officers employing wiretaps.

3. *Melvin v. Reid*, 297 P. 91 (Cal. Dist. Ct. App. 1931)

Held that the plaintiff had cause of action for invasion of privacy when defendant filmmakers made a movie about her past as a prostitute and a murder defendant.

4. *Chaplinsky v New Hampshire*, 315 US 568 (1942)

"The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people . . . . All ideas having even the slightest redeeming social importance-unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion-have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

5. *Winters v New York*, 333 US 507, 510 (1948)

"We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right."

6. *Beauharnais v. Illinois*, 343 U.S. 250 (1952)

"Libelous utterances are not within the area of constitutionally protected speech," and obscenity, too, was outside the protection intended for speech and press.

7. *Roth v United State*, 354 U.S. 476 (1957)

Related to the constitutional law of obscenity. Court in an opinion by Brennan J settled in the negative the "dispositive question" "whether obscenity is utterance within the area of protected speech and press." The Court then undertook a brief historical survey to demonstrate that *"the unconditional phrasing of the First Amendment was not intended to protect every utterance."*

Brennan J later changed his mind on this score, arguing that, because the Court had failed to develop a workable standard for distinguishing the obscene from the non-obscene, regulation should be confined to the protection of children and non-consenting adults. See *Paris Adult*

Theatre I v Slaton, 413 U.S. 49, 73 (1973)

8. *Konigsberg v State Bar of Cal*., 366 U.S. 36 (1961)

In considering the issue of privacy in relation to the First Amendment it was noted:

"General regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests...." [50]

9. *New York Times v Sullivan*, 376 US 254 (1964)

In this case, the Supreme Court held that a state law allowing a public official to recover for a defamatory statement relating to his official conduct violated the free speech guarantees of the First Amendment, absent a requirement that the statement was made with knowledge or reckless disregard that it was false.

This case stands for the proposition that public figures acting in their official capacity are afforded less protection against public criticism, even when the same criticism would rise to a level of defamation against a private citizen [279]. Brennan J reasoned that the fear of unlimited civil liability, should criticism of a public official acting in his public capacity prove unintentionally false, would result in "self-censorship" and lead to a chilling of important public speech.

10. *Griswold v Connecticut*, 381 US 479 (1965)

In this case, Justice Douglas found the fundamental right to privacy in the shadows of the Bill of Rights. Here, a jury convicted two physicians of assisting a married couple with the use of contraceptives. Reversing the trial court's decision, the majority found penumbras within the Bill of Rights, and a zone of privacy embedded within those penumbras. The Supreme Court invalidated the Connecticut statutes on the grounds that people enjoy a right of privacy in their homes.

11. *Time, Inc. v Hill*, 385 US 374 (1967)

This case involved James Hill, his wife and five children who were held hostage in their own house. A best-selling novel influenced by the ordeal was published in 1953 titled 'The Desperate Hours' and in 1954, the Broadway Theatre production of the same titled play debuted. The scenario in the play was a fictional portrayal of a family victimized by threats of sexual abuse and other violent acts. Life magazine published an article on the debut of The Desperate Hours on Broadway, characterising it as a "re-enactment" of the ordeal experienced by the Hill family.

The question in this case was whether appellant, publisher of Life Magazine, was denied constitutional protections of speech and press by the application by the New York courts of 50-51 (Right of Privacy) of the New York Civil Rights Law to award appellee damages on allegations that Life falsely reported that a new play portrayed an experience suffered by appellee and his family.

Brennan J wrote about the balance between freedom of speech and exposure to public view: *"The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press."*

The majority opinion held that states cannot judge in favour of plaintiffs *"to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or reckless disregard of the truth."* This decision had the impact of elaborating on the "actual malice" standard of the Court's prior holding in *New York Times Co. v. Sullivan*, to also include cases involving false light.

"Erroneous statements about a matter of public interest ... are inevitable, and, if innocent or merely negligent, must be protected if 'freedoms of expression are to have the breathing space' that they 'need to survive.'"

12. *Pearson v Dodd*, 410 F.2.d 701 (D.C. Cir. 1969)

In this case, the D.C. Circuit held that the two defendant columnists were entitled to publish information that they knew had been improperly leaked to them by members of Senator Dodd's staff. The defendants had not procured the copying of the documents, but had only received the information with the knowledge that it was stolen-a point that impressed itself on the court.

13. *Stanley v. Georgia*, 394 US 557 (1969)

Here, the Supreme Court held that a prosecution for the possession of obscenity in a home violated the First Amendment because of the fundamental need for privacy surrounding an individual's intellectual explorations. The Court explained that the First Amendment protected a *"right to receive information and ideas, regardless of their social worth"* that was *"fundamental to our free society."* [564] Although the Court agreed that the possession of obscene books and films could be criminalized, the First Amendment had special application to the circumstances of the case.

In a famous passage overtly linking the freedom of thought, spatial privacy, and the right to autonomous intellectual exploration, the Court concluded:

"Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." [565]

Thus, this case protects intellectual privacy and the right to read in the home, recognizing the close relationship between privacy and the intellectual activities.

14. *Rowan v. United States Post Office Dep't*, 397 US 728 (1970)

This case related to residential privacy. Here, the Court assessed a First Amendment challenge to the constitutionality of a federal law allowing homeowners to prevent companies from sending them sexually explicit junk mail and to have their names removed from the

mailing lists, it upheld the law on residential privacy grounds.

15. *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971)

In this case, the defendants were two reporters who, in conjunction with the district attorney, hatched a scheme whereby they would go to the plaintiff's home office, armed with secret cameras and microphones, to pose as patients seeking the plaintiff's odd treatments. When the pictures and verbal accounts were published in Lie magazine, plaintiff recovered $1,000 in damages. The Court's decision was brief and to the point:

"The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office." [249]

16. *New York Times v United States*, 403 US 713 (1971)

Here, the Supreme Court refused to enjoin the New York Times from publishing the contents of a classified government report ("the Pentagon Papers"), despite the fact that the report had been stolen by a third party and given to the newspaper in violation of federal espionage laws. In his concurrence to the per curiam opinion, Justice Black stated that *"both the history and language of the First Amendment" required that the press be left free to publish news, "whatever the source, without censorship, injunctions, or prior restraint"* [717].

Among the concurring opinions, Justices Douglas, White, and Marshall all placed great emphasis on the fact that while the government was seeking to prevent the publication of the classified report, it had not charge the New York Times under any of the various federal laws prohibiting possession and therefore, granting the injunction would result in the imposition of a prior restraint on lawful speech of the public interest [733].

17. *Branzburg v Hayes*, 408 US 665 (1972)

This case is a good example of how the Supreme Court's First Amendment jurisprudence makes clear that even media defendants collecting newsworthy information enjoy no privilege against the application of ordinary private law, noting:

It would be frivolous to assert... that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. [691]

18. *Gertz v Robert Welch, Inc.* 418 U.S. 323 (1974)

This case established the standard of First Amendment protection against defamation claims brought by private individuals. The Court held that, so long as they do not impose liability without fault, states are free to establish their own standards of liability for defamatory statements made about private individuals. However, the Court also ruled that if the state standard is lower than actual malice, the standard applying to public figures, then only actual damages may be awarded.

The consequence is that strict liability for defamation is unconstitutional in the United States; the plaintiff must be able to show that the defendant acted negligently or with an even higher level of mens rea.

Most importantly, this case left unresolved the issue "whether the State may ever define and protect an area of privacy free from unwanted publicity in the press."

19. *Cox Broadcasting Corp. v Cohn*, 420 US 469, 491 (1975).

This case involved a constitutional challenge to a Georgia statute that made it a misdemeanour to publish or broadcast the names or identity of any rape victim. A television reporter obtained the name of a rape and murder victim from official court records open to the public. The reporter identified the deceased by name while reporting on the trial of the accused rapists. When the father of the deceased sued for violation of the Georgia statute, the defendants raised the First and Fourth Amendments as their defence.

The Supreme Court found that *"once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it."* [496] The Court thus held that the First and Fourth Amendments barred the State of Georgia from penalising the defendants for the broadcast.

White J noted that the defence of truth is constitutionally required in suits by public officials or public figures. But *"[t]he Court has nevertheless carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defence in a defamatory action brought by a private person as distinguished from a public official or public figure."* [490] If truth is not a constitutionally required defence, then it would be possible for the States to make truthful defamation of private individuals actionable and, more important, truthful reporting of matters that constitute invasions of privacy actionable. (*Brasco v. Reader's Digest*, 4 Cal. 3d 520, 483 P. 2d 34, 93 Cal. Rptr. 866 (1971); *Commonwealth v. Wiseman*, 356 Mass. 251, 249 N.E. 2d 610 (1969), cert. den., 398 U.S. 960 (1970)).

However, the Court declined to resolve in sweeping terms the conflict between free expression and privacy, and it specifically limited its holding to the particular facts before it. It left the broad question of *"whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments"* open for future cases.

20. *Virgil v. Time, Inc.,* 527 F.2d 1122 (9th Cir. 1975)

In this case, the privilege to publicise newsworthy matters was held to be included in the definition of the tort set out in Restatement (Second) of Torts § 652D (Tentative Draft No. 21, 1975). Liability may be imposed for an invasion of privacy only if *"the matter publicised is of a kind which ... is not of legitimate concern to the public."* While the Restatement does not so emphasise, the was satisfied that this provision is one of constitutional dimension delimiting the scope of the tort and that the extent of the privilege thus is controlled by federal rather than state law.

21. *Zacchini v Scripps- Howard Broadcasting Co*., 433 US 562 (1977)

Here, the Court held unprotected by the First Amendment a broadcast of a video tape of the "entire act" of a "human cannonball" in the context of the performer's suit for damages against the company for having "appropriated" his act, thereby injuring his right to the publicity value of his performance.

The Court emphasized two differences between the legal action permitted here and the legal actions found unprotected or not fully protected in defamation and other privacy-type suits. First, the interest sought to be protected was, rather than a party's right to his reputation and freedom from mental distress, the right of the performer to remuneration for putting on his act. Second, the other torts if permitted decreased the information which would be made available to the public, whereas permitting this tort action would have an impact only on "who gets to do the publishing." In both respects, the tort action was analogous to patent and copyright laws in that both provide an economic incentive to persons to make the investment required to produce a performance of interest to the public.

The "right of publicity" tort is conceptually related to one of the privacy strands, "appropriation" of one's name or likeness for commercial purposes. [569-72]

22. *Landmark Communications v Virginia*, 435 US 829 (1978)

This case arose in the context of the investigation of a state judge by an official disciplinary body; both by state constitutional provision and by statute, the body's proceedings were required to be confidential and the statute made the divulging of information about the proceeding a misdemeanor. For publishing an accurate report about an investigation of a sitting judge, the newspaper was indicted and convicted of violating the statute, which the state courts construed to apply to nonparticipant divulging.

Although the Court recognised the importance of confidentiality to the effectiveness of such a proceeding, it held that the publication here "lies near the core of the First Amendment" because the free discussion of public affairs, including the operation of the judicial system, is primary and the State's interests were simply insufficient to justify the encroachment on freedom of speech and of the press.

The scope of the privilege conferred by this decision on the press and on individuals is, however, somewhat unclear, because the Court appeared to reserve consideration of broader

questions than those presented by the facts of the case. It does appear, however, that government would find it difficult to punish the publication of almost any information by a non-participant to the process in which the information was developed to the same degree as it would be foreclosed from obtaining prior restraint of such publication (See *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539 (1976))

The decision by Chief Justice Burger was unanimous, Justices Brennan and Powell not participating, but Justice Stewart would have limited the holding to freedom of the press to publish [848].

23. *Oklahoma Publishing Co. v District Court*, 31.430 US 308 (1979)

This case considered the issue of whether the government may restrict the truthful publication of information obtained from court proceedings. This case involved an eleven-year-old boy charged with second-degree murder after he allegedly shot a railroad switchman. At a detention hearing, a reporter and photographer employed by Oklahoma Publishing Company learned the boy's name and took his picture, which were thereafter published in local newspapers and other media. Subsequently, the local judge issued an injunction prohibiting the further dissemination of personal information about the boy, including his name and picture.

Oklahoma Publishing Company challenged the judge's order as an unconstitutional prior restraint on speech. On appeal to the Supreme Court, the state argued that the court proceeding was a private matter because a state statute provided for closed juvenile hearings unless the judge ordered otherwise, and the judge had not specifically declared the proceeding to be public The Court rejected this argument.

In a brief opinion, it found that when the judge initially allowed the boy's name and photograph to be taken, they became, under Cox, public information "revealed in connection with the prosecution of [a] crime; thereafter, the trial judge could not enjoin their publication" [311]

By holding that the publication of a juvenile's name obtained from court proceedings could not be punished, this case reaffirmed Cox but went little further than its predecessor, though

the privacy interests of the juvenile were not mentioned.

24. *Smith v Daily Mail Publishing Co*., 443 US 97 (1979)

Here, the Supreme Court held that a West Virginia statute that punished newspapers for publishing the name of a juvenile defendant without the approval of the juvenile court was an unconstitutional restraint on free speech *"absent a need to further a state interest of the highest order"* [103]. The newspaper defendant in this case published the name of a juvenile murder suspect that it had lawfully obtained from monitoring police radio frequencies and interviewing eyewitnesses. Justice Berger's opinion made clear that the issue being addressed was very narrow and specific, but the Court's reasoning was actually very expansive and articulated what has become known as the "Daily Mail Principle". Namely [103]:

"If a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."

The state interest in this case, protecting the anonymity of the juvenile offender, was found to be insufficient in comparison to the suspension of the newspaper's free speech rights, noting the *"state action to punish the publication of truthful information is seldom can satisfy the constitutional standards"* [102].

Significantly, the Court did not view the governmental interest in this case as an interest in privacy per se. Instead, it was characterised as simply the need to protect the juvenile's "anonymity." [104] Thus, this case did not resolve whether a governmental interest in "privacy" could satisfy the Court's "highest order" standard. Moreover, since the case involved information that was lawfully obtained, the Court did not determine whether the press may be constitutionally punished for publishing unlawfully obtained information.

25. *Central Hudson Gas & Electricity Corp. v Public Service Comm'n of New York*, 447 U.S. 557 (1980)

Established the following inquiry to test the constitutionality of a restriction on commercial speech [564]:

a) Does the speech accurately promote a legal product or activity?
b) Is the government's interest in regulating the speech substantial?
c) Does the regulation directly advance the government interest at issue?
d) Is there a reasonable fit between the regulation and the interest it is intended to further?

26. *Capital Cities Media, Inc. v Toole* 463 U.S. 1303 (1983)

This case regarded the constitutionality of courtroom prior restraints, with the Supreme Court holding that a prior restraint preventing the release of juror names in a criminal trial was unconstitutional.

27. *Sipple v. Chronicle Publishing Co.*, 201 Cal. Rptr. 665 (Cal. Ct. App. 1984)

This case held that there was no cause of action for invasion of privacy when a newspaper revealed the sexual orientation of the plaintiff who thwarted an assassination attempt on President Ford, due to the newsworthiness of the item.

28. *Seattle Times Co. v. Rhinehart* 467 U.S. 20 (1984)

Here, the Supreme Court held that the petitioner newspaper could not publish information that it had received in discovery which had been made subject to a protective order, with an exception for information that was otherwise obtainable.

29. *Hustler Magazine, Inc. v Falwell*, 485 US 46 (1988)

In this case, the Court applied the New York Times v. Sullivan standard to recovery of damages by public officials and public figures for the tort of intentional infliction of emotional distress.

The case involved an advertisement "parody" portraying the plaintiff, described by the Court as a "nationally known minister active as a commentator on politics and public affairs," as

engaged in "a drunken incestuous rendezvous with his mother in an outhouse." The court believed that affirming liability in this case would subject "political cartoonists and satirists…to damage awards without any showing that their work falsely defamed its subject."

It was held that proof of intent to cause injury, "the gravamen of the tort," is insufficient "in the area of public debate about public figures." Additional proof that the publication contained a false statement of fact made with actual malice was necessary, the Court concluded, in order "to give adequate 'breathing space' to the freedoms protected by the First Amendment." [52-53]

30. *Shulman v Group W Productions Inc*., 955 P 2d 469 (Cal. 1988)

This case involved pictures of the immediate aftermath of a serious road accident. In relation to the burden of proof, it was held that the onus is on the Plaintiff to demonstrate that a private matter which has been published is not 'of public concern' is he or she is to succeed. The concept of 'public concern' has been so widely defined as to include virtually anything 'newsworthy'.

31. *Howard v. Des Moines Register* & *Tribune* Company, *283 NW 2d 289* (Iowa 1989)

In relation to the burden of proof, the Court clearly stated that *"it is necessary for the plaintiff to prove the lack of newsworthiness of the disclosure as well as its invasiveness. Newsworthiness is thus not an issue of privilege which must be urged defensively but an element which must be negated by the plaintiff in meeting her burden of proof."* [300]

32. *Times Mirror Co. v Superior Court,* 244 Cal. Rptr. 556 (Ct. App. 1988), cert. dismissed, 489 U.S. 1094 (1989)

In this case, it was held that the nondisclosure of the plaintiff's name served a compelling state interest when a crime had been committed and the search for the perpetrator was ongoing.

The plaintiff's roommate had been murdered and the plaintiff had discovered the body and seen the murderer. The newspaper published an account of the murder and identified the

plaintiff by name. The plaintiff then sued for invasion of privacy. In denying the defendant's motion for summary judgement, the court held where there is a witness to a crime and the criminal has not yet been apprehended, *"the individual's safety and the state's interest in conducting a criminal investigation may take precedence over the public's right to know the name of the individual."* [560]

Thus, this case indicated that the state's interest in an individual's safety and the resolution of crimes are compelling state interests when the assailant is still at large.

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

In this case, the Court extended the Daily Mail principle to protect a newspaper from liability for publishing information that had been lawfully obtained through a third-party's violation of a state statute. The newspaper and the sheriff's department were both sued by a rape victim whose name was published, first in a negligently prepared, publicly-accessible sheriff's report and subsequently by the newspaper, based on the sheriff's report. The Court applied the Daily Mail principles to these facts and determined that the Florida statute prohibiting publication was unconstitutional under the First Amendment. The majority found that three considerations underlay the "highest order" standard, each of which focused on how the information was obtained or from what sources the information was obtained.

Because the newspaper had furnished the information, the newspaper was liable for neither the initial "publication" of the victims name nor for the other lawfully obtained information that it eventually published. Further, the information related to a crime and its investigation and was therefore a matter of "paramount public import" [536].

Despite this expansion of the Daily Mail principle to include information that was not lawfully acquired from a third party who had illegally acquired or published it, the Court in this case carefully reserved ruling on anything more than necessary under the facts. The Court articulated that *"the Daily Mail principle does not settle the issue whether, in cases where the information has been acquired unlawfully by the newspaper….government may ever punish not only the acquisition, but the ensuing publication as well"* [535]. The holding was further limited by stating *"we do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State*

may protect the individual from intrusion by the press" [541].

34. *Butterworth v. Smith*, 494 U.S. 624 (1990)

This case demonstrated that there are limits on the extent to which government may punish disclosures by participants in the criminal process, the Court having invalidated a restriction on a grand jury witness's disclosure of his own testimony after the grand jury had been discharged.

35. *Re Lifetime Cable No. 90-7046*, 1990 WL 71961 (D.C. Cir. 1990)

This case demonstrated the Court's unwillingness to issue prior restraints on the sole basis of protecting individual privacy. Here, the D.C. Circuit Court refused to issue a prior restraint on a movie describing the alleged sexual abuse of a minor.

36. *Macon Telegraph Pub. Co. v Tatum*, 436 S.E.2d 655 (Ga. 1993)

In this case, the Georgia Supreme Court held that the plaintiff was not entitled to recover damages from a newspaper for an invasion of privacy based on its publication of her name in connection with a sexual assault. The Plaintiff based her claim against the newspaper on violation of the private facts tort. The Plaintiff had shot and killed an attacker as he attempted to rape her. The police who investigated the shooting disclosed the Plaintiff's name to reporters for the Defendants newspaper, but admonished them not to publish it. The Defendant published her name and the street where she lived despite the admonition.

The Plaintiff did not base her cause of action on the common law tort and the state had imposed liability on the media defendant based on a negligence per se standard. The Court construed the holding in Florida Star narrowly: *"The U.S. Supreme Court has held that the First Amendment prohibits imposing damages on a newspaper that publishes the name of a rape victim obtained from a police report."* [657]. Though not finding the decision controlling, the Court adopted the lawfully obtained test applied in Florida Star and disallowed the Plaintiff's recovery.

37. *Desnick v. American Broadcasting Cos., Inc*. 44 F.3d 1345, 1352 (7th Cir. 1995).

This case involved an expose' by ABC's PrimeTime Live covering the shoddy medical practices of the plaintiff's eye clinics. "There was no invasion in the present case of any of the specific interests that the tort of trespass seeks to protect. The test patients entered offices that were open to anyone expressing a desire for ophthalmic services and videotaped physicians engaged in professional, not personal, communications with strangers (the testers themselves)." The offices were not open to anyone expressing a desire for ophthalmic services while concealing their intention to broadcast scandal if they could find it.

Desnick has been attacked for taking the uncompromising (and untenable) line that holds that the common law of trespass is not meant to offer any protection against invasions of privacy, as these invasions are commonly understood.

38. *Sanders v. American Broadcasting Co., Inc*, 978 P.2d 67 (Cal. 1999)

This case involved another PrimeTime Live Broadcast in which an ABC employee used false pretense to obtain work as an employee of a telepsychic company, allowing her to secretly videotape her conversations with plaintiff, a co-employee also working as a telepsychic.

Justice Werdegar was prepared to protect the privacy interest by drawing a line on how plaintiff's behaviour was covered. Justice Werdegar explicitly rejected the notion that privacy had a binary, all-or-nothing characteristic, and concluded that *"in the workplace, as elsewhere, the reasonableness of a person's expectation of visual and aural privacy depends not only on who might have been able to observe the subject interaction, but on the identity of the claimed intruder and the means of intrusion."* Accordingly, *"a person who lacks a reasonable expectation of complete privacy in a conversation, because it could be seen and overheard by coworkers (but not the general public), may nevertheless have a claim for invasion of privacy by intrusion based on a television reporter's covert videotaping of that conversation."* [77]

Desnick was distinguished on the ground that Sanders was concerned "with interactions between co-workers rather than between a proprietor and a customer."

39. *Food Lion, Inc. v. Capital Cities/ABC, Inc.,* 194 F.3d 505 (4th Cir. 1999).

In this case, the Fourth Circuit held that investigative journalists who obtained jobs at a grocery store under false pretences in order to videotape and publish suspected sanitary abuses trespassed and violated the duty of loyalty under state law. Although the court divided on whether the elements of the various state law torts had been met, [519-20] and [524], they were unanimous in rejecting the media defendants' argument that the First Amendment created a press privilege to commit torts in the process of newsgathering [520-22] and [524].

40. *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999)

In this case, the Tenth Circuit struck down as an unconstitutional burden on commercial speech a rule imposing a duty of confidentiality upon telephone companies with respect to customer data collected in the course of providing telephone service.

41. *Boehner v McDermott*, 191 F.3d 463 (D.C. Cir. 1999)

Here, the District Court of Columbia Circuit Court of Appeals upheld the constitutionality of the Electronic Communications Privacy Act and the corresponding Florida statute, holding that the statute served a substantial governmental interest and only incidentally restricted speech. The statute therefore satisfied the intermediate level of scrutiny for speech regulations that are content-neutral and of general applicability.

The plaintiff, a Republican member of the House of Representatives, sued his Democratic colleague under 18 U.S.C. §2511(1)(c) for disclosing to newspapers an audio tape recording containing an illegally intercepted cellular telephone conversation between the Republican congressman and members of his party's political leadership. The defendant had no involvement with acquiring the recording but knew that it had been illegally intercepted when he provided it to several newspapers for publication. The court of appeals rejected the defendants argument that §2511(1)(c) was an overly broad restriction on free speech, reasoning that what the statute restricted was not "pure speech", but primarily conduct [466].

The Court's decision in this case was essentially contemporaneous with the contrary decision of the Third Circuit in *Bartnick v Vopper*, and certiorari was granted to resolve the conflict.

42. *Bartnicki v Vopper*, 532 U.S. 514 (2001)

In this seminal case, the United States Supreme Court held six three that there could be no liability under Federal of Pennsylvanian Wiretap Acts for a person who receives an illegally intercepted electronic communications from an unknown third party and publishes the communication when it contains information of public importance. Further, to the extent that the Electronic Communication Privacy Act prohibits persons from publishing true information that is legally obtained by the publisher (regardless of the legality of the original source), it violates the First Amendment and is unconstitutional. In deciding this case, the Court explicitly reserved the question of "whether truthful publication may ever be punished consistent with the First Amendment."

In this case, an unknown person intercepted a telephone conversation between Bartnicki and Kane, prominent participants in a contentious public dispute with the local school district. The interceptor taped their conversation in violation of the Wiretapping Act and put the tape in the mailbox of Yocum, the leader of a taxpayer's union formed to oppose Bartuicki and Kane in the dispute Yocum identified the voices, and gave a copy of the tape to local radio personalities, who repeatedly broadcast it to the chagrin of Bartnicki and Kane. Bartnicki and Kane then sued both Yocum and the radio stations under the Wiretapping Act.

The end result of Bartnicki is that the "highest order" standard is gone for the time being or at least in the context of the Wiretapping Act. In its place is the standard of scrutiny articulated by Justice Breyer-one ideally suited for ad hoc decision making. Under the standard, the government will generally have the constitutional power to punish free expression to promote an interest in individual privacy, except in certain, largely undefined circumstances where the Justices decide that the balance tips in favour of the First Amendment instead.

After Bartnicki, some of these factors to be considered involve instances when the information is unlawfully obtained, when the information concerns public figures, and when there is a "legitimate" privacy interest in the information. But other than listing these three factors, the Court left the lower federal courts no reasonably applicable standard and consequently left the First Amendment privacy doctrine in disarray.

Many commentators (see 'articles and commentary' notes) believe that the implications of this decision could have, as Justice Rehnquist's dissent cautioned, a disastrous impact on the

individual right of privacy as it relates to media publication. This decision requires that the media only lack actual malice to avoid liability for publishing information of "public concern"- regardless of the privacy interests of the subjects or the legality of the source.

43. *People v Bryant*, 94 P.3d 624 (Colo. 2004)

This case demonstrates a privacy limitation on First Amendment in relation to rape victims. Here, Colorado charged Bryant, a well-known NBA all-star, with sexual assault. When Bryant sought to admit evidence of the victim's prior sexual conduct, the trial court held 'in camera' hearings pursuant to Colorado's rape shield statute, to determine the "relevancy and materiality" of the victim's past sexual encounters. On June 24, 2004, the court clerk accidentally emailed the transcripts of the proceedings to seven media entities. After realising the mistake the same day, the court ordered the recipients to destroy or delete the transcripts and prohibited the release of any of its contents. The recipients challenged the order, claiming it was an unconstitutional prior restraint against publication inapposite to the First Amendment jurisprudence.

In hearing the media's appeal, the Supreme Court of Colorado applied the narrowly tailored analysis from Florida Star, but came out on the other side of the issue- recognising the rape victim's right to privacy. The Court first identified the state's interest was greater in this case than Florida Star because of the content of the information- explicit details of the victim's sexual past, the extraordinary media attention and the nature of the order. It was also found that the potential harm to the victim was more significant due to this content. It was noted that if the 'in camera' hearing determined that the testimony was not admissible, but the media had already provided it to the world, then the additional harm to the victim would be greater as it would be as if it was actually admitted into evidence. [636]

The trial court's order was modified to solidify compliance with the narrowly tailored standard, removing the section of the order mandating destruction of the copies, explaining that restricting dissemination adequately protected state interests. The Court held that the modified order was a valid prior restraint. [638]

44. *Mainstream Mktg. Servs. Inc. v. FTC,* 283 F. Supp. 2d 1151, 1167-68 (D. Colo. 2003), rev'd, 358 F.3d 1228, 1241 (10th Cir. 2004).

This case related to the FCC's "Do-Not-Call" Registry, which allows consumers who do not wish to receive commercial telemarketing calls to place their telephone numbers on a list of numbers that telemarketers are forbidden from calling. At the original trial, the Federal District court invalidated the Registry as an unconstitutional infringement on commercial speech. This decision was subsequently reversed by the Tenth Circuit.

This case demonstrates the confusion surrounding the First Amendment Privacy Doctrine.

45. *United States v. Curtin*, 489 F.3d 935 (9th Cir. 2007)

This case relates to the introduction of reading materials as evidence to prove intent in criminal trials. Here, a male federal agent posing as a 14-year-old girl engaged in a lengthy instant-messenger chat with Curtin, and arranged to meet him in Las Vegas for a sexual encounter. When the defendant arrived at the meeting point, he was arrested and charged with interstate travel with intent to engage in a sexual act with a minor and using an interstate facility to attempt to persuade a minor to engage in a sexual act. At trial, over Curtin's objection, the government successfully introduced a number of text files from his PDA containing pornographic stories of incest. Curtin was convicted, and on appeal, the Ninth Circuit rejected his argument that his First Amendment rights had been violated by the introduction of the stories into evidence. As long as the evidence was relevant, the Court reasoned, nothing in the First Amendment prohibited its introduction into evidence.

46. *Ostergren v. Cuccinelli* 615 F.3d 263 (4th Cir. 2010)

This case involved the online posting and disclosure of Social Security numbers (SSNs) by a Virginia privacy rights activist named Betty Ostergren. Ostergren found the SSNs in Virginia land records she lawfully obtained online after county clerks uploaded them to a public network. Ostergren posted the land records with unredacted SSNs on her own website "to publicize her message that governments are mishandling SSNs and generate pressure for reform." [269] She primarily posted the SSNs of Virginia political figures.

A statute that made it a crime for a person to "intentionally communicate another individual's social security number to the general public" was challenged. In ruling that a statute did not apply to Ostergren, the Fourth Circuit rejected Virginia's argument that requiring her to fractionally redact the SSNs before she posted the land records would strike an appropriate balance between free speech and informational privacy concerns. [272] The appellate court reasoned that "partial redaction would diminish the documents' shock value and make Ostergren less credible because people could not tell whether she or Virginia did the partial redaction." It added that "the unredacted SSNs on Virginia land records that Ostergren has posted online are integral to her message. Indeed, they are her message. Displaying them proves Virginia's failure to safeguard private information and powerfully demonstrates why Virginia citizens should be concerned." [272]

Significantly, the Fourth Circuit opined that "Ostergren's advocacy website cannot be distinguished from a television station or newspaper." [267] The appellate court thus applied the same test that federal courts use for traditional news media outlets when they disclose lawfully obtained information of public concern that allegedly violates privacy interests, namely, the Daily Mail test which states: "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."

47. *Citizens United v. Federal Election Commission* 130 S. Ct. 876 (2010)

This case emphasised the notion that political speech merits the highest level of protection in noting: *"political speech must prevail against laws that would suppress it, whether by design or inadvertence."* [898]