Informational and Decisional Privacy
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Madeleine Schachter
for David Stagliano,
Mark and Emily
# Contents

Preface xvii

## Part I  Fundamental Principles of Privacy Law  3

**Conceptualizing Privacy**  3

- Defining “Privacy”  3
- The Etiology of Privacy Rights  6
  - “The Right to Privacy”  9
- The Impact of the Article by Warren and Brandeis  15
- Notes and Questions  20

**De May v. Roberts**  21

**Rationales for Privacy Protections**  23

- Concerns about Privacy Invasions in On-Line Communications  29
- Aggregation of Data  31

**Analytical Constructs for Privacy Law**  33

- Introduction  33
- A Categorical Approach to the Study of Privacy Interests  34
  - Zones of Privacy  35
    - Notes and Questions  39
  - The Status of the Individual  40
    - Employees’ Status  41
    - *Smyth v. Pillsbury Co.*  44
  - Family Status  46
  - Minors’ Status  48
  - Victims’ Status  49
  - Notes and Questions  50

- The Nature of the Subject Matter  51
  - *Bowers v. Hardwick*  52
  - Judicial Application of Normative Values  55

**Empirical Amalgam of Rights: Prosser’s Approach**  58

- Intrusion on Seclusion  59
  - *Nader v. General Motors Corp.*  59
  - *Le Mistral, Inc. v. Columbia Broadcasting Sys.*  63
- Notes and Questions  64
CONTENTS

Privacy as an Analogue and Facilitator of Autonomy 175
Malleability of Analytical Constructs 179
  \textit{Kyllo v. United States} 180
  Application of \textit{Stare Decisis} Principles to Cases Involving
  Changing Norms 185
    \textit{Planned Parenthood of Southeastern Pa. v. Casey} 186
  Application of Analytical Constructs to New Technologies
  and Circumstances 194

Part II  Access to Information 199
  Introduction 199
    Interests in Transparency and Open Access 201
    Analytical Constructs for Access to Information 203
      Regulatory Approaches to Access 203
        “E-Commerce and Trans-Atlantic Privacy” 205
        Self-Regulatory Approaches to Access 214
        The European Union Approach and the American Response 216
      Notes and Questions 221
    Legislative Approaches 222
      The Privacy Act 222
        \textit{Pippinger v. Rubin} 223
        \textit{Tripp v. Executive Office of the President} 230
      The Computer Fraud and Abuse Act 235
        \textit{Chance v. Avenue A, Inc.} 239
      The Electronic Communications Privacy Act 243
        \textit{In re DoubleClick, Inc. Privacy Litig.} 245
      Notes and Questions 256
    Sherman & Co. v. Salton Maxim Housewares, Inc. 257
      Law Enforcement Investigations 259
        \textit{McVeigh v. Cohen} 260
        Notes and Questions 266
    Allegedly Unauthorized Interceptions 268
      \textit{Chance v. Avenue A, Inc.} 268
      Notes and Questions 271
    Anti-Terrorism Legislation 273
      “Could the WTC Attack Have Happened
      Without the Internet?” 274
    Collection of Electronic Data by the Government 276
    The Children’s Online Privacy Protection Act 278
    Legislation Relating to Financial Information 280
    Legislative Themes 281
Constitutional Implications of Access to Information 283

Whalen v. Roe 283

The Informational Privacy Right 288

Access to Particular Types of Information 290

Access to Information Pertaining to Identity 290

Anonymous and Pseudonymous Speech 290

American Civil Liberties Union of Georgia v. Miller 295

Allegedly False Anonymous Speech 300

Immunomedics, Inc. v. Doe 304

Notes and Questions 307

Anonymous Plaintiffs 310

Access to Personal Identification Data 313

Dwyer v. American Express Co. 315

Notes and Questions 317

Los Angeles Police Dep’t v. United Reporting Publ’g Corp. 318

Use of Personal Identification Data by the Government 320

Privacy Claims Relating to Social Security Numbers 321

County Security Agency v. Ohio Dep’t of Commerce v. Michael J. Betzold, Intervenor-Appellant 325

Access to Patient Healthcare Records 329

The Nature of the Interests 329

Knight v. Penobscot Bay Medical Center 334

United States v. Westinghouse Electric Corp. 337

Lampshire v. Procter & Gamble Co. 344

Tracking and Computerizing Healthcare Data 345

Peninsula Counseling Center v. Rahm 347

The Health Insurance Portability and Accountability Act 357

Notes and Questions 359

Medical Peer Review Proceedings 360

Access through Aural and Visual Surveillance 362

Access by the Press 362

Bartnicki v. Vopper 362

Recordation by Medical Practitioners 376

Estate of Henry Berthiaume v. Pratt 376

Recordation by Members of the Public 379

Flanagan v. Flanagan 379

Recordation and Repetition 383

Access to Communicative Attributes 386

Tattered Cover, Inc. v. City of Thornton 389

Access to Computerized Digital Information 399

Notes and Questions 401

In re Intuit Privacy Litig. 402
CONTENTS  

Access to Information about Convicted Sex Offenders 408  
  *Doe v. Dep’t of Public Safety* 410  
  Notes and Questions 418  
Unsolicited or Unwanted Access to Information 419  
  Subliminal Messages 420  
  Unsolicited Bulk E-Mail Messages 424  
  *Intel Corp. v. Hamidi* 425  
  The Constitutionality of Anti-Spam Statutes 434  
  *Washington v. Heckel* 434  
  Ferguso. v. Friendfinders, Inc. 440  
Use of Filtering Devices 447  
  The Children’s Internet Protection Act 448  
  *American Library Association, Inc. v. United States* 449  
  Notes and Questions 476  
Access to Government Records and Data 477  
  The Freedom of Information Act 477  
  Exemption 1 478  
  Exemption 2 479  
  Exemption 3 479  
  *Central Intelligence Agency v. Sims* 479  
  Exemption 4 489  
  *Chicago Tribune Co. v. Federal Admin.* 489  
  *Public Citizen Health Research Group v. Food & Drug Admin.* 492  
  Exemption 5 496  
  *United States v. Nixon* 497  
  Notes and Questions 501  
Exemption 6 502  
  Notes and Questions 509  
Exemption 7 510  
  *United States Dep’t of Justice v. Reporters Committee for Freedom of the Press* 510  
  Exemption 8 517  
  Exemption 9 517  
  Notes and Questions 517  
The Electronic Freedom of Information Improvement Act 518  

Part III  Disclosure of Information 519  
  Introduction 519  
  False Publication 519
## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canterbury v. Spence</td>
<td>631</td>
</tr>
<tr>
<td>Thornburgh v. American Coll. of Obstetricians and Gynecologists</td>
<td>639</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>643</td>
</tr>
<tr>
<td>Moore v. Regents of Univ. of Cal.</td>
<td>643</td>
</tr>
<tr>
<td>Arato v. Avedon</td>
<td>652</td>
</tr>
<tr>
<td>Disclosure Pursuant to a Duty to Warn</td>
<td>658</td>
</tr>
<tr>
<td>Tarasoff v. Regents of Univ. of Cal.</td>
<td>658</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>669</td>
</tr>
<tr>
<td>Stevens v. Parke, Davis &amp; Co.</td>
<td>670</td>
</tr>
<tr>
<td>Physicians’ Duty to Warn Persons Whose Identity Is Not Known</td>
<td>674</td>
</tr>
<tr>
<td>Gammill v. United States</td>
<td>676</td>
</tr>
<tr>
<td>Disclosure in the Course of Reassuring Others</td>
<td>678</td>
</tr>
<tr>
<td>Proprietary Interests and Privacy</td>
<td>681</td>
</tr>
<tr>
<td>Copyright Interests in Expressive Content</td>
<td>681</td>
</tr>
<tr>
<td>Salinger v. Random House, Inc.</td>
<td>691</td>
</tr>
<tr>
<td>Lish v. Harper’s Magazine Foundation</td>
<td>698</td>
</tr>
<tr>
<td>Copyright Law and Privacy Interests</td>
<td>708</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>709</td>
</tr>
<tr>
<td>Misappropriation and the Right of Publicity:</td>
<td>709</td>
</tr>
<tr>
<td>The “Privatization” of Personality</td>
<td>714</td>
</tr>
<tr>
<td>Time, Inc. v. Hill</td>
<td>720</td>
</tr>
<tr>
<td>Negri v. Schering Corp.</td>
<td>724</td>
</tr>
<tr>
<td>New York Magazine v. Metropolitan Transp. Auth.</td>
<td>728</td>
</tr>
<tr>
<td>Perfect 10, Inc. v. Cybernet Ventures, Inc.</td>
<td>733</td>
</tr>
<tr>
<td>Defenses to Right of Publicity and Misappropriation Claims</td>
<td>734</td>
</tr>
<tr>
<td>Artistic Uses of Names and Likenesses</td>
<td>735</td>
</tr>
<tr>
<td>Parks v. LaFace Records</td>
<td>739</td>
</tr>
<tr>
<td>Proprietary Interests in Somatic Matter</td>
<td>739</td>
</tr>
<tr>
<td>Moore v. Regents of Univ. of Cal.</td>
<td>758</td>
</tr>
<tr>
<td>“Patently Controversial: Markets, Morals, and the President’s Proposal for Embryonic Stem Cell Research”</td>
<td>760</td>
</tr>
</tbody>
</table>

### Part IV Autonomous Decision-Making

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>771</td>
</tr>
<tr>
<td>Schloendorff v. Society of the New York Hosp.</td>
<td>774</td>
</tr>
<tr>
<td>Concepts of “Personhood”</td>
<td>777</td>
</tr>
<tr>
<td>“The Right of Privacy”</td>
<td>778</td>
</tr>
<tr>
<td>Reproductive and Procreative Decisional Privacy Issues</td>
<td>796</td>
</tr>
</tbody>
</table>
CONTENTS

Compulsory Sterilization 797
  *Skinner v. Oklahoma ex rel. Williamson* 797
Distribution and Use of Contraceptives 802
  *Poe v. Ullman* 802
  Notes and Questions 809
  *Griswold v. Connecticut* 810
Use of Contraceptives by Non-Married Persons and Minors 814
Termination of Pregnancy 821
  *United States v. Vuitch* 825
  *Roe v. Wade* 831
  *Doe v. Bolton* 848
The Scope of the Abortion Right and State Regulation 851
  *Webster v. Reproductive Health Servs.* 854
  Notification and Consent Requirements 858
    *Planned Parenthood of Central Mo. v. Danforth* 860
    *Planned Parenthood of Southeastern Pa. v. Casey* 864
Informed Consent and Waiting Requirements 871
  *Planned Parenthood of Southeastern Pa. v. Casey* 873
  Notes and Questions 884
Regulation of the Abortion Procedure 886
Autonomy Over End of Life Decisions 889
  Refusing Life-Sustaining Treatment 890
    *Suenram v. Society of the Valley Hosp.* 894
    Notes and Questions 895
    Refusal by Inmates of Life-Sustaining Treatment 896
      *Thor v. Superior Court of Solano Cty.* 897
      *Polk Cty. Sheriff v. Iowa Dist. Court for Polk County* 906
Physician-Assisted Suicide 914
  *Washington v. Glucksberg* 918
  *Vacco v. Quill* 934
  Notes and Questions 938
  “The Right to Die and the Ninth Amendment: Compassion and Dying After Glucksberg and Vacco” 940
    *People v. Kevorkian* 949
    Notes and Questions 954
Decisions by Proxies to Withdraw or Forego Life-Sustaining Measures 955
  *In the Matter of Quinlan* 956
Analytical Constructs for Decisions by Persons Other Than the Patient 973
  *Cruzan v. Director, Mo. Dep’t of Health* 977
CONTENTS  xv

*Conservatorship of the Person of Robert Wendland v.*
*Florence Wendland*  984

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acknowledgments</td>
<td>995</td>
</tr>
<tr>
<td>Table of Cases</td>
<td>997</td>
</tr>
<tr>
<td>Index</td>
<td>1013</td>
</tr>
</tbody>
</table>
Preface

Justice Douglas asked rhetorically, “If a man’s privacy can be invaded at will, who can say he is free?” Osborn v. United States, 385 U.S. 323, 354 (1966) (Douglas, J., dissenting). What constitutes legitimate spheres of “privacy,” what comprises an “invasion,” and which countervailing interests may supercede privacy interests have generated a considerable body of caselaw, legislation, and scholarly commentary. Issues relating to the law of privacy call into question the degree to which one may control access by others to information about him, and whether, once acquired, legal constraints operate to prevent indiscriminate or other disclosure. Also at issue is the scope of an individual’s capacity to make decisions, the degree to which such decisions are adequately informed, and the ability to restrict others from interfering with decisions. Privacy essentially serves as a shield against unwanted interference from others. As well, privacy fosters independent decision-making. Autonomy, which is animated and facilitated by privacy, fosters self-determination to shape one’s identity and distinguishes one person from another.

This book is designed to explore constitutional tenets and their inferences, judicial constructs, and legislative precepts, in order to consider such quintessentially metaphysical questions as the definition of personhood. The approach of the book is to require the student to take initial, intuitive reactions, and traverse through doctrinal rationales and analytical prisms, reflecting on whether reaction and reason are coincident. At the outset, fundamental principles of privacy are explored as a means of laying a foundation for doctrinal approaches to the consideration of privacy problems. Access to information is then discussed in order to evaluate the degree to which the individual has, and should have, control over access to personal information. Legal constraints on the dissemination of such information once access is achieved are then reviewed. Finally, autonomous decision-making, an analogue and facilitator of informational privacy, is illustrated through a discussion of reproductive freedoms and end of life decisions.

Privacy law is an inherently capacious topic, ill-suited to any reasonable aspiration to comprehensively cover all facets of the law. Further, in light of the extraordinary fluidity of privacy law, the inter-disciplinary nature of the field, dynamic technological developments in surveillance and tracking methods, and continuing advancements in biomedical research and clinical practice, the materials included in this work no doubt will deserve updating even before the book goes to press in mid-2002.

The book includes materials that are noteworthy for their analyses, because courts have distinguished or relied on them, or in light of the media attention they have garnered, notwithstanding that they may have been modified by subsequent developments, technological advances, or other proceedings. While caselaw in this area tends to consist

Footnotes, headings, and citations to case records have been selectively omitted, and other stylistic modifications have been made to court decisions, statutes, and secondary sources, in order
of quite lengthy court decisions, concurring and dissenting opinions often have been in-
cluded nonetheless in order to promote a more comprehensive understanding of alterna-
tive and countervailing rationales. The factual basis for the claim asserted frequently is
set forth as well, lest one lose sight of the fact that legal analyses are expounded about
personal sensibilities.

The selected case excerpts and commentary are not designed to summarize the cur-
rent state of the law; rather, they survey in didactic fashion the efficacy and utility of the
analyses utilized to reach particular conclusions. Exhaustive review of all aspects of the
law of privacy law simply is not feasible. This book omits, for instance, extensive discus-
sion of comparative international and state privacy law, proposed legislation, and re-
view of criminal law issues. Nor does the book deal with a wide range of privacy issues
attendant to medical care, such as consent to biomedical investigation, treatment op-
tions, and genetic counseling.

This book expands on, and is compatible with, Law of Internet Speech. Not surpris-
ingly, there is some overlapping discussion and case excerpts with that book, particu-
larly with respect to privacy issues that have arisen in the Internet context. This book is
designed to be used independently of Law of Internet Speech, as a companion to it, or
for either a prerequisite or advanced course on the subject matter.

There is no question that privacy matters are inherently controversial and highly
emotional, engendering passionate views. Amongst the insights that may be gleaned
from court decisions and scholarly commentary is a pronounced effort to respect op-
posing views while zealously advocating a particular position. The author is an in-house
attorney at AOL Time Warner Book Group Inc., which is part of AOL Time Warner
Inc., and an Adjunct Associate Professor at the Fordham University School of Law. The
materials included in this book, which contain divergent viewpoints, are intended to
serve as an intellectual catalyst to provoke discussion and thought; but where there are
vestiges of viewpoints or if views are inferred, nothing herein should be construed as
necessarily expressing the views of anyone other than the author or as constituting legal
advice.