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Special Project+ Privacy

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Special Project[+]
Privacy

Privacy has long been a matter of particular concern in the minds of Americans. Indeed, privacy concerns were at the crux of the American Revolution. The earliest days of colonial life saw creation of laws protecting the individual against eavesdropping, and the sanctity of one's home.[1] The Bill of Rights also reflects privacy interests.[2] As America grew, technological advances in the dissemination of information caused puhlic demands for protection of privacy rights;

[+] Each year, the *Vanderbilt Law Review* publishes one issue with notes devoted solely to a topic of current interest. These notes collectively constitute the Special Project. Past Special Projects have delved into a wide array of topics, from hankruptcy, 59 VAND. L. REV. 159 (2006), to criminal constitutional law in state courts, 47 VAND. L. REV. 795 (1994), to the Americans with Disabilities Act, 52 VAND. L. REV. 763 (1999).

1. Daniel J. Solove, *The Origins and Growth of Information Privacy Law*, 748 PLI/PAT 29, 33-34 (2003).

2. U.S. CONST. amend. IV; U.S. CONST. amend. V.

contemporary debates echo these demands.[3] For example, as early as the Civil War, telegraph-tapping technologies emerged. Soon afterward, Congress sought to obtain certain messages directly from Western Union. This resulted in debate in both public fora and the halls of Congress over the sanctity of personal communications.[4] A familiar pattern has emerged over decades. Although there have been slight variations in the privacy debate, the fundamental tension has always been among the needs of the government, the desire of the public to consume information through mass media, and the right of an individual to her private world.

In today's rapidly advancing technological age, it seems as though privacy has increasingly fallen by the wayside. From private personal information stolen by hackers, to information lost through careless transfer online (and sometimes even openly disclosed by private entities or the government), today's newspapers are full of stories about the loss of personal privacy in the Information Age.[5] The ubiquity of information today has certainly brought the privacy of individuals into the forefront of the national consciousness. Today, there exist hundreds of different laws pertaining to privacy.[6]

Against this background, policymakers, academics, and the public continue to examine these centuries-old questions regarding whether Americans have a constitutional right to privacy. If so, where in the Constitution is the specific source of that right? If not, to what extent should privacy be protected by statute or common law? These questions remain unanswered to any satisfactory degree. Looking back, however, it seems that the Framers intended some form of constitutional protection of privacy. How much protection they intended and whether their goal has been accomplished remain elusive.[7] As a result, definitions and sources of a right to privacy

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3. Solove, *supra* note 1, at 36-40 (describing the census, the mail and the telegraph as early developments that threatened privacy rights).

4. *Id.* at 31-32.

5. *Judges Grill Lawyers in FEMA Aid Privacy Cases*, NEWS-PRESS, Nov. 7, 2006, http://www.news-press.com/apps/pbcs.dll/article?AID=/20061107/NEWS01/61107043/1075 (asking whether it is an invasion of privacy for FEMA to release the names and addresses of individuals affected by Hurricane Katrina); *Loss of Data at 19 Federal Agencies Raises Privacy Concerns*, KAN. CITY STAR, Oct. 14, 2006, http://www.kansascity.com/mld/kansascitystar/news/politics/15756604.htm (reporting 788 incidents where federal employees had their personal information either lost or stolen from government computers); *Social Security Numbers Posted Online*, WSBTV, Oct. 31, 2006, http://www.wsbtv.com/news/10193623/detail.html?subid=22105243&qs=1;bp=t (revealing that a county website posting federal tax documents for the public left individual names and social security numbers on the documents).

6. Solove, *supra* note 1, at 29.

7. Stanley H. Friedelbaum, *The Quest for Privacy: State Courts and an Elusive Right*, 65 ALB. L. REV. 945, 945-47 (2002).

continue to vary widely among scholars, the judiciary, and the public in general.[8]

Louis Brandeis and Samuel Warren were the first scholars to describe privacy as a systemic legal right.[9] Their seminal article grounded a right to privacy in the Constitution.[10] As this article gained recognition, privacy rights became accepted as part of American constitutional law. At its most basic, this right was simply conceived as "the right to be left alone;" from that concept two primary branches of privacy rights developed, physical privacy and decisional privacy.[11]

The idea of a right to "informational privacy" has more recently emerged as a branch of the right to privacy[12] Constitutional doctrine and the common law have been slow to respond to claimed invasions of informational privacy—when private information that one gives out to third parties such as a health care provider, a bank, or the government is stolen, misused, or wrongfully disclosed.[13] The rapid advancements of the technological age, which add to the already unfilled holes in privacy rights law, have only resulted in more questions for the courts to answer.

This Special Topic issue of the *Vanderbilt Law Review* explores the right to privacy from several angles. The first Note examines the Health Insurance Portability and Accountability Act's ("HIPAA's") Privacy Rule, an attempt by Congress to restrict sharing of an individual's private medical records to the minimum disclosure necessary for the functioning of the health care system. HIPAA's intent to address current privacy concerns is laudable, but the author points out that the unavailability of a private right of action presents a classic enforcement problem. The victim of a HIPAA violation must content herself with reporting the incident to the Department of Health and Human Services. The Note explores other potential sources of private rights of action under HIPAA, including Section 1983, the False Claims Act, and common law tort. It concludes that the traditional confidentiality tort cause of action should be reinterpreted for use in the HIPAA context and suggests a framework for such reinterpretation.

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8. *Id.*

9. Will Thomas DeVries, *Protecting Privacy in the Digital Age*, 18 BERKELEY TECH. L.J. 283, 286 (2003).

10. *Id.* at 284, 286.

11. *Id.* at 286. The physical privacy branch protects a person's physical self and effects, while the decisional privacy branch looks to protecting a person's decisions such as the decision to marry and have a family. *Id.*

12. *Id.* at 288.

13. *Id.* at 288-89.

The second Note delves into the tension between the First Amendment and information privacy rights. The author contends that the Court has failed to articulate clearly the nature of the constitutional conflict between privacy and speech, and that this has led it to create a confused doctrinal framework that is inconsistent with the underlying purpose of the First Amendment. He argues that the Court's existing content-based/content-neutral analytical approach is perfectly capable of dealing with cases that present a conflict between these two competing interests and explains how this framework should be applied.

The final Note examines the origins of a constitutional right to privacy as it is currently understood—as a substantive due process right—and argues instead that the right to privacy should be grounded in the Fourth Amendment. After detailing the history of both the Fourth Amendment and the Fourteenth Amendment's substantive due process right to privacy, the Note examines the intense debate that the current framework has caused. It then explains why the Fourth Amendment is a preferable source of such a right, offers an interpretive framework based on it, and concludes that the Supreme Court should borrow from equal protection jurisprudence to adopt a mid-level scrutiny of the Fourth Amendment right to privacy.

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