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The Literary Language of Privacy—How Judges' Use of Literature Reveals Images of Privacy in the Law

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THE LITERARY LANGUAGE OF PRIVACY—HOW JUDGES' USE OF LITERATURE REVEALS IMAGES OF PRIVACY IN THE LAW

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ABSTRACT

George Orwell's Nineteen Eighty-Four. *When we think of literary works and privacy, that is the first book that comes to mind, and the same is true for judges penning privacy law opinions too. Although the novel is notable for expressing fears of authoritarian overreach, other literary works offer judges a tool for describing the plights of parties before them—parties who seek to vindicate breaches of privacy in many different forms.* Nineteen Eighty-Four *particularly suits cases that challenge government surveillance or non-governmental wiretapping. References to Franz Kafka and Joseph Heller illuminate other privacy harms, such as unease with governmental collection, manipulation, and release of data. Nathaniel Hawthorne's* The Scarlet Letter *comments on punishment via exposure of stigmatizing information. William Shakespeare, centuries ago, spoke knowingly of the peculiar pain arising from injury to one's reputation.*

Judges have referenced all these works in majority and dissenting opinions to help make concrete the often amorphous, but still very real, damage that privacy breaches can cause. This Article organizes many of these opinions according to the type of privacy invasion and provides examples of how judges' language can help us show why the

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law provides remedies, however imperfect and unevenly provided, for privacy harms.

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INTRODUCTION

Literary works sometimes appear in opinions related to privacy cases; judges use them to help portray the nature of the privacy interest involved or the harm someone may have suffered from a breach of privacy.[1] George Orwell's *Nineteen Eighty-Four* is most popular among these works.[2] It is a suitable resource with its vivid and hair-raising imagery of "Big Brother" looking over everyone's shoulder and reading everyone's thoughts.[3] But privacy cases, dealing as they do with the abstract world of personhood, broken boundaries, and betrayal, have drawn on other works of literature too, and these—along with *Nineteen Eighty-Four*—are the focus of this Article. Works cited by judges include those by Franz Kafka, William Shakespeare, Nathaniel Hawthorne, and others.[4]

A wide variety of privacy actions have pulled judges toward their bookcases. Some of the most common privacy actions involve searches under the Fourth Amendment;[5] defamation;[6] intrusion upon seclusion;[7] information privacy protected by the Fourteenth Amendment;[8] and state constitutional actions.[9] Examining the cases in which judges turn to literature to explain and illuminate their reasoning reveals the sorts of images that engage judges, which in turn can aid in thinking about and successfully advocating for privacy.

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1. *See, e.g.*, United States v. Steinger, 626 F. Supp. 2d 1231, 1235–36 (S.D. Fla. 2009); Creamer v. Raffety, 699 P.2d 908, 920–21, 921 n.3 (Ariz. Ct. App. 1984); A.A. v. State, 895 A.2d 453, 468 (N.J. Super. Ct. App. Div. 2006) (Fisher, J., concurring); Woznicki v. Erickson, 549 N.W.2d 699, 707–08 (Wis. 1996) (Bablitch, J., concurring), *superseded by statute*, 2003 Wis. Act 47, *as recognized in* Wis. Mfrs. & Com. v. Evers, 977 N.W.2d 374 (2022); McChrystal v. Fairfax Cnty. Bd. of Supervisors, 67 Va. Cir. 171, 176 n.3 (Va. Cir. Ct. 2005).

2. GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949).

3. *See id.* at 3–4.

4. *See Creamer*, 699 P.2d at 920–21, 921 n.3; *A.A.*, 895 A.2d at 468 (Fisher, J., concurring); *Woznicki*, 549 N.W.2d at 707–08 (Bablitch, J., concurring); *McChrystal*, 67 Va. Cir. at 176 n.3.

5. *See* Florida v. Riley, 488 U.S. 445, 447–48 (1989).

6. *See Woznicki*, 549 N.W.2d at 701.

7. *See* Cramer v. Consol. Freightways, Inc., 209 F.3d 1122, 1126 (9th Cir. 2000).

8. *See* Peninsula Counseling Ctr. v. Rahm, 719 P.2d 926, 928 (Wash. 1986) (en banc).

9. *See* State v. Williams, No. 97-L-191, 1999 WL 76633, at *1 (Ohio Ct. App. Jan. 29, 1999), *rev'd*, 728 N.E.2d (Ohio 2000).

This Article loosely groups privacy cases that cite common works of literature according to the type of privacy invasion at issue: government surveillance and searches; government collection and disclosure of personal data; intrusions on autonomy and liberty; invasions of intellectual privacy; public punishment; and tortious interferences with privacy. Finally, the Article summarizes some possible conclusions about how courts visualize the privacy interests involved.

I. SEARCHES AND SURVEILLANCE

Government surveillance, including by wiretap or camera, can inflict distressing feelings of nakedness, of loss of boundaries around oneself, and of being watched by those unseen.[10] It can also inflict overwhelming fear—fear of imprisonment, punishment, or loss of all autonomy.[11] Orwell aptly portrays this fear through Big Brother, so references to *Nineteen Eighty-Four* occur most commonly in opinions related to these sorts of incursions on privacy. The gloomy world of Kafka's *The Trial* runs a close second, followed by Hawthorne's *The Scarlet Letter*.

A. Orwell's Nineteen Eighty-Four*: "BIG BROTHER IS WATCHING YOU"—Big Brother and Winston Smith*

Orwell's *Nineteen Eighty-Four* is the marquee literary work in privacy law analysis, especially in cases assessing government surveillance or searches. The novel is one of the English language's best known examples of the dystopian genre.[12] The story takes place

10. *See* Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 492–93, 495 (2006).

11. *See id.*

12. *See* Robert Paul Resch, *Utopia, Dystopia, and the Middle Class in George Orwell's* Nineteen Eighty-Four, BOUNDARY 2, Spring 1997, at 137, 137 (describing the work as a "famous dystopian novel"). In a dystopian novel, the characters reside in some kind of hell. *See* CHRIS BALDICK, THE OXFORD DICTIONARY OF LITERARY TERMS 108 (4th ed. 2015) (mentioning "George Orwell's *Nineteen Eighty-Four* (1949)" in defining dystopia as "[a] modern term invented as the opposite of *utopia, and applied to any alarmingly unpleasant imaginary world, usually of the projected future").

in fictional Oceania, where the Party, led by Big Brother, rules.[13] The Party observes citizens through ever-present telescreens and monitors citizens' thoughts for "thoughtcrime."[14] The main character, Winston Smith, is a disillusioned Party member who joins what he believes to be a rebel group seeking to overthrow the Party.[15] Alas, poor Winston trusts unwisely and learns that the fellow rebel he confided in was actually a Party member who later tortures him with rats as punishment.[16] In the end, the Party breaks Winston's spirit and will to rebel, and he becomes a faithful Party member.[17]

Orwell presents Big Brother as omniscient, seeing everything and everyone, including their thoughts—a terrifying world.[18] The omnipresent telescreens have the text "BIG BROTHER IS WATCHING YOU,"[19] an image that judges often mention when referring to the novel, especially in cases examining government surveillance.[20]

The Party has the power to use surveillance to read people's hopes and desires and sends troops into their homes to arrest them for "thoughtcrime."[21] In addition to the telescreens, the Party exerts control over its citizens' thoughts by using spies to constantly monitor citizens, including using children to tattle on their parents.[22] The novel depicts the complete erasure of human feelings and individual personhood.[23] Orwell identifies the "place where there is no darkness,"[24] but this place with no darkness of which Winston dreams turns out to be a bare, brightly lit cell where there is no place to hide and darkness never falls rather than a utopian escape.[25]

13. *See* ORWELL, *supra* note 2, at 3–5.
14. *Id.* at 3–4, 20, 68.
15. *See id.* at 170–71, 172–73.
16. *See id.* at 287–89.
17. *See id.* at 297–300.
18. *See id.* at 28.
19. ORWELL, *supra* note 2, at 3, 4.
20. *See infra* notes 26–45 and accompanying text.
21. ORWELL, *supra* note 2, at 20.
22. *Id.* at 24–25, 134–35.
23. *See, e.g.*, *id.* at 68 ("Desire was thoughtcrime.").
24. *Id.* at 26.
25. *See id.* at 229.

In a typical legal opinion citing *Nineteen Eighty-Four*, a person has accused the government of some type of surveillance. Video surveillance, in particular, inspires references. For instance, in dissenting from the majority opinion in *Florida v. Riley*, Justice Brennan drew upon the novel to warn of the dangers of government surveillance from the skies.[26] In *Riley*, a homeowner challenged surveillance by a helicopter that flew over his home, and the Supreme Court held that such surveillance was not a Fourth Amendment search.[27] In dissent, Justice Brennan emphasized the resemblance to Big Brother's all-seeing presence:

> The Fourth Amendment demands that we temper our efforts to apprehend criminals with a concern for the impact on our fundamental liberties of the methods we use. I hope it will be a matter of concern to my colleagues that the police surveillance methods they would sanction were among those described 40 years ago in George Orwell's dread vision of life in the 1980's:
>
> "The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said. . . . In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows."
>
> Who can read this passage without a shudder, and without the instinctive reaction that it depicts life in some country other than ours? I respectfully dissent.[28]

Riley and a previous case that approved of similar flyover surveillance, *California v. Ciraolo*, both involved momentary

26. *See* Florida v. Riley, 488 U.S. 445, 456, 466–67 (1989) (Brennan, J., dissenting).

27. *Id.* at 450, 452 (majority opinion).

28. *Id.* at 466–67 (Brennan, J., dissenting) (citation omitted) (quoting GEORGE ORWELL, NINETEEN EIGHTY-FOUR 4 (1949)).

glimpses of citizens and their property.[29] But the surveillance in *Nineteen Eighty-Four* was far more pervasive, emanating "from every commanding corner."[30] The Fifth Circuit seized upon that distinction in striking down the video surveillance of a defendant's backyard, finding that the added feature of recording was a material distinction and stating that "[t]his type of surveillance provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the spectre of the Orwellian state."[31]

In another case involving continuous video surveillance, *State v. Costin*, the Vermont Supreme Court approved of police using video surveillance after police received an informant's tip of the defendant's cultivation of marijuana plants.[32] One justice described the following in dissent:

> George Orwell's bleak and chilling vision of post-modern civilization has not come to pass, at least not in this country.

29. *See id.* at 445 (majority opinion); California v. Ciraolo, 476 U.S. 207, 213–15 (1986) (ruling, in a 5-4 decision, that warrantless surveillance of a home's backyard from an airplane 1,000 feet overhead did not violate the Fourth Amendment).

30. ORWELL, *supra* note 2, at 4.

31. United States v. Cuevas-Sanchez, 821 F.2d 248, 251 (5th Cir. 1987). The court quoted specific passages from the novel to support its reasoning:

> The telescreen received and transmitted simultaneously. Any sound that Winston made, above the level of a very low whisper, would be picked up by it; moreover, so long as he remained within the field of vision which the metal plaque commanded, he could be seen as well as heard. There was of course no way of knowing whether you were being watched at any given moment.

Id. at 251 n.3 (quoting GEORGE ORWELL, NINETEEN EIGHTY-FOUR 4 (1949)). Other courts have also conjured notions of Orwellian oversight. *See* United States v. Torres, 751 F.2d 875, 877 (7th Cir. 1984) (rejecting a Fourth Amendment challenge to the FBI's silent video surveillance of a terrorist group's "safe house" but noting that "television surveillance in criminal investigations" was "reminiscent of the 'telescreens' by which 'Big Brother' in George Orwell's *1984* maintained visual surveillance of the entire population of 'Oceania,' the miserable country depicted in that anti-utopian novel"); Cowles v. State, 23 P.3d 1168, 1175, 1182 n.53 (Alaska 2001) (Fabe, J., dissenting) (condemning the majority's upholding of the warrantless use of a videorecorder monitoring employees by quoting the same language from *Nineteen Eighty-Four* as *Cuevas-Sanchez*); State v. Thomas, 642 N.E.2d 240, 241, 245 (Ind. Ct. App. 1994) (affirming the granting of a motion to suppress and quoting the references to *Nineteen Eighty-Four* in *Cuevas-Sanchez*); State v. Bonnell, 856 P.2d 1265, 1270, 1277 (Haw. 1993) (granting a motion to suppress recordings from covert video surveillance of the break room of a post office whose employees were suspected of gambling, stating that "indiscriminate video surveillance raises the spectre of the Orwellian state" (quoting *Cuevas-Sanchez*, 821 F.2d at 251)).

32. State v. Costin, 720 A.2d 866, 867, 871 (Vt. 1998).

> But allowing police agents to set up surreptitious, twenty-four-hour video surveillance of landowners on their own property without judicial oversight raises the specter of such a society.
> . . . Few Vermonters would think that, merely by leaving their land unposted, they have left it open it to the Orwellian intrusions permitted under today's holding.[33]

Audio surveillance, even without video, has also drawn references to *Nineteen Eighty-Four*. The Supreme Court of Maryland examined the state police's interception of telephone calls based on an order that did not follow Title III of the Omnibus Crime Control and Safe Streets Act of 1968's strict procedural protections.[34] The court cited *Nineteen Eighty-Four* in affirming the dismissal of an indictment based on wiretap evidence that had not met Title III's strict procedures:

> Under the Constitution there is no place in this country for an unfettered police force such as terrorized Germany and Italy during the 1930's and 1940's and which runs rampant today in many other parts of the world. It would be intolerable for the spectre of recrimination to silence the dialogue and dissent which is so necessary to the lifeblood of our society. In these scientifically sophisticated times the distinct possibility of Big Brotherism is apparent.[35]

33. *Id.* at 871 (Johnson, J., dissenting).

34. State v. Siegel, 292 A.2d 86, 87, 95 (Md. 1972). A similar focus on procedural protections arose in a New York District Court case that denied a motion for summary judgment in a Fourth Amendment case. Suss v. Am. Soc'y for the Prevention of Cruelty to Animals, 823 F. Supp. 181 (S.D.N.Y. 1993). The plaintiff alleged that firefighters had broken through a wall of his business and argued for greater protection of dwellings "in order to minimize the risks foreseen in George Orwell's *1984*." *Id.* at 184, 186 n.10.

35. *Id.* at 88–89 (footnotes omitted) (internal quotation marks omitted). Aside from surveillance, a significant group of cases where references to *1984* arise are those brought by sex offenders who challenge Megan's Law-type registration programs. Generally, such challenges have not succeeded, leaving

Not just the act of monitoring but the necessary set-up for that monitoring inspires comparisons to Orwell. In *United States v. Finazzo*, a decision later vacated by the Supreme Court, the Sixth Circuit referenced *Nineteen Eighty-Four* in upholding the suppression of evidence from a wiretap that federal agents broke into an office to install:

> Orwell's image of *1984* is no longer fiction if we should hold that hundreds of police officers across the country in every town and village have the power to break into homes and offices to plant electronic monitoring devices if they can obtain permission from a local magistrate in a secret hearing.[36]

* * *

"Privacy is destroyed when monitored. Friendship is frustrated, intimacy is undermined[,] and mutual trust may become dangerous *when our confidences are permanently recorded or publicly disclosed*."[37] But surveillance using technological devices is not the only type that draws a reference to Orwell's Big Brother; (relatively) old-fashioned urine drug testing also invites them. One court, in striking down such testing, stressed it as a form of surveillance:

> We would be appalled at the spectre of the police spying on employees during their free time and then reporting their activities to their employers. Drug testing is a form of

dissenting judges to call upon Orwell to make their point of the impending all-seeing surveillance society. For instance, in an unsuccessful Fourteenth Amendment challenge to a South Carolina law that allowed the state to continuously track the plaintiff, a sex offender, a dissenting judge quoted from *Nineteen Eighty-Four* as follows: "There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time." State v. Dykes, 744 S.E.2d 505, 516 & n.14 (S.C. 2013) (Hearn, J., dissenting) (quoting GEORGE ORWELL, NINETEEN EIGHTY-FOUR 6 (1949)).

36. United States v. Finazzo, 583 F.2d 837, 838, 842 (6th Cir. 1978), *vacated*, 421 U.S. 929 (1979).

37. *Id.* at 841 (emphasis added).

> surveillance, albeit a technological one. Nonetheless, it reports on a person's off-duty activities just as surely as someone had been present and watching. It is George Orwell's Big Brother Society come to life.[38]

In *Nineteen Eighty-Four*, the government used citizen spies—neighbors who might just rat each other out.[39] Some judges have noted the systematic use of spies, including children, to police society and the effect such use might have on the perception of police and its similarities to *Nineteen Eighty-Four*. For instance, in *Diehl v. State*, a Texas appellate court upheld a search warrant based on information provided by an eleven-year-old informant, the daughter of one defendant and the stepdaughter of the other.[40] A dissenting judge decried the police's use of a child informant:

> Should such a practice be allowed and then encouraged or abused by the State, a monumental violation of individual rights, as well as a destructive impact on the family unit in society, could result. It is inconsistent with the way of life we cherish, and raises the specter of a totalitarian regime, as created by Adolf Hitler and imagined by George Orwell, where systematic government programs attempt to persuade young children to inform against their parents.[41]

Technological advances have allowed machines to take the place of old-fashioned citizen spies (family or otherwise) in some instances. A

38. Capua v. City of Plainfield, 643 F. Supp. 1507, 1511, 1522 (D.N.J. 1986) (internal quotation marks omitted).

39. *See* ORWELL, *supra* note 2, at 23–25, 62.

40. Diehl v. State, 698 S.W.2d 712, 713–14 (Tex. App. 1985).

41. *Id.* at 720 (Levy, J., dissenting) (internal quotation marks omitted). The Ninth Circuit, however, rejected such allusions to *Nineteen Eighty-Four* in concluding that a police offering the defendant's five-year-old son $5 if he would show them where his mother kept her heroin on the premises did not violate the Fourth Amendment, insisting that the ruling would not "lead to systematic government programs to 'persuade' young children to inform against their parents, as in the societies created by George Orwell and Adolf Hitler." United States v. Penn, 647 F.2d 876, 879, 882 (9th Cir. 1980) (en banc). Four judges dissented on the grounds that the intrusion onto the family relationship rendered the search unreasonable under the Fourth Amendment. *See id.* at 888 (Goodwin, J., dissenting).

single GPS device can replace a legion of citizen spies. In *United States v. Cuevas-Perez*, the Seventh Circuit upheld the placement of a GPS tracking device on a suspect's car against a Fourth Amendment challenge.[42] In dissent, Judge Wood cited *Nineteen Eighty-Four*: "The technological devices available for . . . monitoring have rapidly attained a degree of accuracy that would have been unimaginable to an earlier generation. They make the system that Orwell depicted in his famous novel, *1984*, seem clumsy and easily avoidable by comparison."[43] In the Ninth Circuit case of *United States v. Kyllo*, which held that police use of a thermal imager did not violate the Fourth Amendment[44]—a result later overturned by the Supreme Court—a dissent condemned the holding by citing *Nineteen Eighty-Four*: "The first reaction when one hears of [the thermal imager] is to think of George Orwell's *1984*. Although the dread date has passed, no one wants to live in a world of Orwellian surveillance" that "could 'detect sexual activity in the bedroom.'"[45]

These references together illustrate the power of Orwell's imagery; even when rejecting similarities between present day and novel-based societies, judges are clearly affected by the novel's dystopian vision. The novel has motivated those opposed to surveillance to eagerly liken those situations to *Nineteen Eighty-Four*'s Oceania. Whether cited for similarities or cited for distinctions, judges seem wary of an all-seeing surveillance society.

B. Kafka's The Trial*: Josef K. and Bewilderment*

Government surveillance and searches evoke the privacy fear of being trapped behind a one-way mirror, constantly on display and constantly being judged by immensely powerful but unseen

42. United States v. Cuevas-Perez, 640 F.3d 272, 272–73 (7th Cir. 2011), *vacated*, 565 U.S. 1189 (2012).

43. *Id.* at 286 (Wood, J., dissenting).

44. United States v. Kyllo, 190 F.3d 1041, 1047 (9th Cir. 1999), *rev'd*, 533 U.S. 27 (2001).

45. *Id.* at 1050 (Noonan, J., dissenting) (quoting United States v. Kyllo, 37 F.3d 526, 530 (9th Cir. 1994)).

evaluators.[46] In Kafka's *The Trial*, the protagonist, Josef K., starts a mystifying, nonsensical, year-long journey through a diabolical maze of a court system after he is arrested for an unknown offense that is never revealed to him or the reader.[47] His bewildered questions are never answered by the mysterious officials; at one point he describes the system as follows:

> There is no doubt . . . that there is some enormous organisation determining what is said by this court. In my case this includes my arrest and the examination taking place here today, an organisation that employs policemen who can be bribed, oafish supervisors and judges of whom nothing better can be said than that they are not as arrogant as some others. . . . Its purpose is to arrest innocent people and wage pointless prosecutions against them which, as in my case, lead to no result.[48]

In the end, two functionaries kill Josef K.[49] Lawyers come off particularly badly in the novel—lazy, corrupt, and unhelpful.[50] Kafka's story illustrates arbitrary abuses of government power by denying information, ignoring desperate questions, and withholding answers. This befuddling and opaque obstruction for no apparent purpose distinguishes this sort of privacy harm from that in *Nineteen Eighty-Four*: The government's purposes in Orwell's novel are entirely clear—total domination of citizens' thoughts. In Kafka's work, though, the ultimate endgame of the government is much more mysterious, leading to a different sort of privacy harm.

46. *See* Solove, *supra* note 10.

47. FRANZ KAFKA, THE TRIAL (David Wyllie trans., Dover Thrift ed., Dover Publ'ns 2009) (1925); Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1419–21 (2001) (describing the novel and identifying the main character's "frustrating quest to discover why he has been arrested and how his case will be resolved").

48. KAFKA, *supra* note 47, at 33 (internal quotation marks omitted).

49. *See id.* at 164–65.

50. *See, e.g.*, *id.* at 90–91.

Capricious government policies that needlessly impose indignities can invite a court to reference Kafka. For instance, a strip search by police entails a brutal and visceral assault on privacy and should be used only when circumstances justify it.[51] The victims of unjust strip searches usually assert Fourth Amendment claims, and the Fourteenth Amendment provides additional protection against arbitrary and intrusive government actions.[52] In *Creamer v. Raffety*, the plaintiff, an arrestee, alleged that the defendants violated his right to privacy by subjecting him to a strip search and body cavity inspection pursuant to the city's standard procedure for anyone incarcerated.[53] In concluding that he stated a viable § 1983 claim, the court cited *The Trial*, describing it as denoting "the archetypal encounter of the ordinary mortal with the capriciousness and irrationality of modern bureaucracies."[54]

While the *Creamer* court specifically identified *The Trial*, some judges have simply used the adjective "Kafkaesque" or referred to the author himself to describe rogue government actions.[55] While a strip search clearly violates most people's notions of privacy, is one's covered torso private? In *United States v. Hanson*, a defendant moved to suppress a handgun discovered after the arresting officers raised his shirt to look for tattoos to confirm his identity, only to learn that the arrestee's tattoos did not match those of the target they sought to

51. *See* Solove, *supra* note 10, at 537 & n.327.

52. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979) (inmate raising a Fourth Amendment challenge to a strip search following a contact visit); Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (student raising a Fourth Amendment challenge to a strip search occurring at school); *see also* U.S. CONST. amends. IV, XIV. First described by the Supreme Court in *Whalen v. Roe*, Fourteenth Amendment due process privacy generally protects at least two interests: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599–600 (1977) (footnote omitted) (concluding that the state's interests in regulating certain prescription drug medications outweighed the plaintiffs' privacy interests).

53. Creamer v. Raffety, 699 P.2d 908, 911, 913 (Ariz. Ct. App. 1984).

54. *Id.* at 920–21, 921 n.3; Parker B. Potter, Jr., *Ordeal by Trial: Judicial References to the Nightmare World of Franz Kafka*, 3 PIERCE L. REV. 195, 248–49 (2005).

55. *See generally* Potter, Jr., *supra* note 54 (quoting multiple cases that refer to Franz Kafka or use the adjective "Kafkaesque").

arrest.[56] The magistrate characterized the police's actions as a "quasi-strip search" and emphasized the character of the intrusion: "Hanson was subjected to the additional humiliation and helplessness attendant to having his shirt pulled up and his chest exposed for inspection by a half-dozen police while sitting handcuffed in a squad car . . . ."[57] The court continued, stating that if this search was "a constitutionally reasonable investigative detention, then Franz Kafka might be proud but the Founding Fathers are spinning in their graves like pinwheels."[58]

Just as *Nineteen Eighty-Four* involved citizen spies, *The Trial* involved accusers who apparently spied on their hapless neighbors and told on them to faceless bureaucrats; but in *The Trial*, the accusers were hidden.[59] When legal life imitates this sort of art, judges can highlight the parallel. In *People v. Hobbs*, the Supreme Court of California took up the question of a criminal defendant's right to challenge the validity of a search warrant of her home based on a confidential informant's information.[60] The court concluded that the defendant was not entitled to learn the informant's identity or the contents of the informant's communication.[61] However, a dissenting justice vigorously asserted the defendant's right to challenge the search warrant, which contained only the address of the home without any information of what was sought to be searched and seized: "Did this scenario occur in a communist dictatorship? Under a military junta? Or perhaps in a Kafka novel? No, this is grim reality in California in the final decade of the 20th century."[62]

56. United States v. Hanson, No. 05-CR-106-C, 2005 WL 2716506, at *1, *3, *9 (W.D. Wis. Oct. 20, 2005).

57. *Id.* at *1, *8.

58. *Id.* at *8. Kafka and his visions of a menacing, chaotic government randomly embroiling itself every day in the lives of its citizens appears in other Fourth Amendment cases as well. One district court judge struck down part of a United States Department of the Interior program that subjected employees that were not in "sensitive positions" to random drug testing. Bangert v. Hodel, 705 F. Supp. 643, 645 (D.D.C. 1989). Concluding that the urinalysis did not pass Fourth Amendment scrutiny, the judge took care to imagine the drug testing process in detail and remarked caustically that "[o]nly a Kafka, an Orwell, or a Gogol could do true justice to such a scene, or perhaps, in keeping with the farcical aspects of this tragedy, those modern masters of the absurd, Samuel Beckett or Eugene Ionesco." *Id.* at 655–56.

59. *See* ORWELL, *supra* note 2, at 23–25, 62; KAFKA, *supra* note 47, at 1, 33, 84.

60. People v. Hobbs, 873 P.2d 1246, 1249–50 (Cal. 1994).

61. *See id.* at 1262–63.

62. *Id.* at 1263 (Mosk, J., dissenting).

Thus, when the particular privacy injury lies in helplessness and powerlessness against an all-seeing, unseeable government power, judges may find Kafka and *The Trial* apt, especially his vision of a society hamstrung by legal issues yet uncoupled from any discernable principles.

In sum, judges have used *Nineteen Eighty-Four* and *The Trial* to create imagery of a specter of capricious use of power to surveil and control.

II. GOVERNMENT COLLECTION, MANIPULATION, AND RELEASE OF DATA

The power to surveil carries with it the power to collect data, and governments have many tools with which they can surveil citizens and collect substantial data.[63] With that data, the government can grant, use, or withhold access to sensitive and powerful information according to its preferences.[64] Two major sets of tools regulate this government conduct: the Fourteenth Amendment's privacy protections and statutory enactments, such as the Freedom of Information Act's (FOIA) exceptions to compelled government disclosure and the Privacy Act of 1974's (Privacy Act) control of the release of government data by federal agencies.[65]

The Fourteenth Amendment prevents a government agency from releasing information when the privacy interest in the information outweighs the public interest in allowing access to that information while also protecting the privacy interest that allows individuals to make certain decisions autonomously and without government interference.[66] Kafka's, Orwell's, Hawthorne's, Shakespeare's, and

63. *See* JULIA ANGWIN, DRAGNET NATION: A QUEST FOR PRIVACY, SECURITY, AND FREEDOM IN A WORLD OF RELENTLESS SURVEILLANCE 3–5 (1st ed. 2014).

64. *See id.* at 4, 5.

65. *See* Neil M. Richards, *The Information Privacy Law Project*, 94 GEO. L.J. 1087, 1105 (2006) (reviewing DANIEL J. SOLOVE, THE DIGITAL PERSON: PRIVACY AND TECHNOLOGY IN THE INFORMATION AGE (2004)); Solove, *supra* note 10, at 509, 518.

66. *See* cases cited *infra* note 67; U.S. CONST. amend. XIV; *see also* Richards, *supra* note 65, at 1105–12 (noting problems with this perceived dichotomy); Solove, *supra* note 10, at 557–62 (describing "decisional interference" and its relation to information privacy).

Joseph Heller's works are all cited in cases evaluating that balancing test and together reveal how courts may view the immense power the government has over individuals' autonomy and liberty thanks to the information it collects and discloses.[67]

Open records laws, such as FOIA,[68] present a quandary for privacy law. On one hand, such laws allow individuals to access the data that a government entity might collect about them, revealing powerful knowledge and perhaps allowing them to correct the information that the entity maintains.[69] On the other hand, though, these laws can expose sensitive information that a government has collected about specific individuals to anyone who asks for it.[70] Often, the government entity has gathered that information for some other purpose entirely.[71] For example, in completing paperwork for the prosaic task of acquiring a driver's or occupational license, a citizen might provide requested demographic data with no idea that he or she might be releasing the information to the world at large. The volume of government-collected data has exploded in the age of surveillance, and the state and federal legislators who originally adopted such freedom of information acts never foresaw the petabytes of data recorded from street cameras, police officer button cameras, or private data miners.[72]

To curb wholesale release of data to the public, freedom of information acts have exceptions to protect privacy. For instance, FOIA exempts from disclosure "personnel and medical files and similar files[,] the disclosure of which would constitute a clearly

67. *E.g.*, Dowd v. Calabrese, 101 F.R.D. 427, 437 n.32 (D.D.C. 1984); Pilon v. U.S. Dep't of Just., 796 F. Supp. 7, 9 (D.D.C. 1992); A.A. v. State, 895 A.2d 453, 468 (N.J. Super. Court. App. Div. 2006) (Fisher, J., concurring); Fredenburg v. City of Fremont, 14 Cal. Rptr. 3d 437, 446 (Ca. Ct. App. 2004); Post-Newsweek Stations, Fla. Inc. v. Doe, 612 So. 2d 549, 554 (Fla. 1992) (Kogan, J., dissenting); United States v. Sczubelek, 402 F.3d 175, 203 (3d Cir. 2005) (McKee, J., dissenting); Woznicki v. Erickson, 549 N.W.2d 699, 707–08 (Wis. 1996) (Bablitch, J., concurring), *superseded by statute*, 2003 Wis. Act 47, *as recognized in* Wis. Mfrs. & Com. v. Evers, 977 N.W.2d 374 (2022); United States v. Steinger, 626 F. Supp. 2d 1231, 1235–36 (S.D. Fla. 2009); McChrystal v. Fairfax Cnty. Bd. of Supervisors, 67 Va. Cir. 171, 176 n.3 (Va. Cir. Ct. 2005).

68. *See generally* 5 U.S.C. § 552.

69. *See id.*; Solove, *supra* note 10, at 509, 522–23.

70. *See* 5 U.S.C. § 552; *see also* Solove, *supra* note 10, at 508, 535.

71. *See* ANGWIN, *supra* note 63, at 5, 33.

72. *See id.* at 3–4, 32–33; Corey A. Ciocchetti, *The Eavesdropping Employer: A Twenty-First Century Framework for Employee Monitoring*, 48 AM. BUS. L.J. 285, 292 & n.20, 312 & n.109 (2011).

unwarranted invasion of personal privacy,"[73] along with those "records . . . compiled for law enforcement purposes, but only to the extent that" the release of the information could, among other things, "reasonably be expected to constitute an unwarranted invasion of privacy."[74] But individuals must depend upon the agencies themselves to assert the exceptions and, failing a successful assertion, may find hurtful information released to the world at large.[75]

Discussed below are cases that consider government disclosure of collected data and cite works of Kafka, Orwell, Hawthorne, Shakespeare, and Heller to envision the resulting effects on those whose information has been revealed.

A. Kafka's The Trial *and Other Works—Josef K., Informants, and Bewilderment*

The Fourteenth Amendment protects two slightly different privacy interests: the interest in maintaining the secrecy of collected information and the interest in making autonomous decisions about oneself, free from interference.[76] It is the former interest—maintaining nondisclosure—that is the focus here.

The government can wreak havoc on an individual's life while never revealing its goals, fracturing one's peace of mind, dignity, and understanding of reality along with his or her own role in it. Sometimes a government must necessarily rely on informants to achieve justice, but that reliance can become twisted and abusive.[77] Unchecked, a government might even feel the need to use information known to be false to seek what it might well believe is a worthwhile end.

For instance, a government agency may use information collected from one citizen in a way that impacts the life of another, then decline

73. 5 U.S.C. § 552(b)(6).

74. § 552(b)(7).

75. *See* § 552(c); Daniel J. Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution*, 86 MINN. L. REV. 1137, 1162 (2002).

76. *See supra* note 66 and accompanying text.

77. *See* People v. Hobbs, 873 P.2d 1246, 1249–50, 1253 (Cal. 1994) (noting the "sanctioned" practice of withholding a full search warrant affidavit from the defense to protect an informant's identity).

to reveal the information to the affected party. An informant's privilege allows the government to maintain the anonymity of those who provide information to law enforcement about the commission of crimes,[78] however much that may mystify the informed-upon party. In *Dowd v. Calabrese*, former United States Department of Justice (DOJ) "strike force attorneys" brought a libel action against the *Wall Street Journal* and an author who wrote that the agents improperly pressured an organized crime member, Calabrese, to testify for the government.[79] The defendants moved to compel the production of documents and testimony related to people the government claimed to be informants;[80] the government asserted the informant's privilege against the request, even though one requestor, the article's author, was *himself* someone the government alleged to be an informant whom it needed to protect.[81] In addressing the motion to compel, the court recognized that, clearly, the informant, who was a defendant and counter-plaintiff in the suit, knew his own identity and so did his fellow defendants.[82] The court scoffed at the government's assertion of the informant's privilege in this context, citing *The Trial*: "Difficult as that may be to believe, the [DOJ] seeks to withhold from [the informant] and the other defendants documents identifying [the informant] as an individual who provided the [DOJ] with information."[83] The court ordered the DOJ to turn over the documents.[84]

Governments in possession of sensitive information can not only selectively blockade the information but can willfully misuse false or unreliable information in the quest for some government goal. The *Dowd* judge, Harold H. Greene, referenced Kafka's work again in a

78. *See* Westinghouse Elec. Corp. v. City of Burlington, 351 F.2d 762, 768 (D.C.C. 1965). The privilege is not absolute; rather, where a party seeks the identity of an informant, the court should "balanc[e] the public interest in protecting the flow of information against the individual's right to prepare his defense." *Id.* (quoting Roviaro v. United States, 353 U.S. 53, 62 (1957)).

79. Dowd v. Calabrese, 101 F.R.D. 427, 430 (D.D.C. 1984).

80. *Id.*

81. *See id.* at 430, 436–37, 437 n.32.

82. *See id.* at 436–37. The defendant–informant was the author of a piece in the *Wall Street Journal* that the plaintiffs asserted had libeled them. *Id.* at 430.

83. *Id.* at 437 n.32.

84. *Id.* at 437.

subsequent opinion, *Pilon v. United States Department of Justice*.[85] That case involved what the court described as "one of the more disturbing phenomena of the Washington scene—the leaking of false information to damage the reputation or livelihood of an official."[86] The leaking at issue was "particularly egregious": "[I]n actions reminiscent of Franz Kafka's novel *The Trial*, [DOJ] officials leaked confidential information concerning [the] plaintiff with considerable abandon, while at the same time [the] plaintiff was told that he could not be allowed access to the facts underlying the investigation the government had conducted of him."[87] These leaks led the plaintiff, a former DOJ employee, to sue agency officials for violating the Privacy Act.[88] The court denied the DOJ's motion for summary judgment on the Privacy Act claim, concluding that the plaintiff properly alleged that the DOJ acted willfully or intentionally.[89]

When a government uses informants or disperses false information about a target, it uses its considerable power to manipulate sensitive information that has either been conveyed by an informant the target may have trusted or created falsely by the government to manipulate public opinion. The target does not know what the government knows and cannot know if it is true or outrageously false. Thus, courts can refer to *The Trial* to illuminate the particular feeling of powerlessness that Kafka so aptly portrays through Josef K., the hapless citizen who journeys blindly through the maze laid out by his government persecutors.[90]

85. Pilon v. U.S. Dep't of Just., 796 F. Supp. 7, 9 (D.D.C. 1992).

86. *Id.* at 8 (footnote omitted).

87. *Id.* at 9 (footnotes omitted) (citations omitted).

88. *Id.* at 9–10. FBI agents had originally accused the plaintiff of providing "a classified State Department document" to his wife, who then allegedly gave it to South African officials. *Id.* at 9. The plaintiff brought suit after DOJ personnel continued to leak information that was damaging to the plaintiff's reputation even *after* reaching a settlement with him that entailed paying him damages and issuing a public letter of apology. *Id.* at 9–10. The DOJ had already cleared the plaintiff of wrongdoing. *Id.* at 9.

89. *Id.* at 12–13.

90. *See supra* notes 47–51 and accompanying text.

B. Orwell's Nineteen Eighty-Four*: Winston, Big Brother, and the Vulnerability of the Surveilled*

While courts refer to Kafka when they want to emphasize bewilderment and powerlessness, they may draw on Orwell to emphasize the feeling of nakedness that government surveillance can foment, discussed above, and to describe the sort of injury that government abuse of collected information can cause. Collection and disclosure of medical information can render one particularly vulnerable, implicating a privacy interest protected by the Fourteenth Amendment—the right to keep certain sensitive information confidential.[91]

One fear about the government collecting data is that the whole may exceed the sum of its parts—while no one single unit of data might be particularly revealing, when amassed together, the units can reveal the target. In *Peninsula Counseling Center v. Rahm*, a group of mental health care providers and patients sued to enjoin Washington State from carrying out a tracking system that would have required mental health centers to identify certain mentally ill patients and provide details about their care.[92] The plaintiffs asserted the program would violate patients' constitutional right to privacy, stressing the need for confidentiality in the therapist–patient relationship.[93] The majority

91. *See* Solove, *supra* note 10, at 527, 530–31; Peninsula Counseling Ctr. v. Rahm, 719 P.2d 926, 929, 933 (Wash. 1986) (en banc) ("[Plaintiffs] asserted that they have a constitutional right to privacy which would preclude the county health authorities from giving patients' names and diagnoses to [the [Department of Social and Health Services].."). For a discussion on how the Fourteenth Amendment implicates privacy concerns, see *supra* notes 65–66 and accompanying text.

92. *Rahm*,719 P.2d at 927–28.

93. *Id.* at 928. The plaintiffs also alleged the regulations violated the Washington State constitution. *Id.*

upheld the regulations,[94] but in a forceful dissent, Justice Pearson drew from Orwell's *Nineteen Eighty-Four*:

> So what is objectionable about permitting the government to collect and store, in dossier form, information on each and every individual in this country?
> . . . [E]ach additional thread that attaches to an individual lessens his own psychological security and invites governmental abuse. Viewed this way, the [tracking system] is not as benign as the majority would like to believe. . . .
> If this society is to avoid Orwell's frightening forecast, and retain any modicum of personal privacy, infringements upon privacy cannot be accepted as an inevitable outgrowth of technological advancement.[95]

Such distinctions themselves, however, serve to illuminate the courts' understanding of the nature and definition of the privacy interest involved.

C. Hawthorne's The Scarlet Letter*: Hester Prynne and Community Shaming*

When the collected and disclosed cache of information pertains to criminal acts, courts may draw upon Hawthorne's novel of sin in Puritan New England, *The Scarlet Letter*.[96] There, he describes the hardships of Hester Prynne, a resident of seventeenth-century Salem, Massachusetts, then a Puritan settlement, who gave birth to a daughter

94. *Id.* at 930. The majority balanced the patients' privacy interests against governmental concerns and concluded that the regulations implementing the new tracking system were valid, reasoning that the regulations did not require more disclosure than it "reasonably needed in order to maintain an efficient auditing and tracking system." *Id.* at 929.

95. *Id.* at 930–31 (Pearson, J., dissenting) (internal quotation marks omitted). Judge Pearson also drew upon Aleksandr Solzhenitsyn's book *Cancer Ward*, which characterized the forms that we fill out as we go through life as creating "hundreds of little threads radiating from every man . . . . Each man, permanently aware of his own invisible threads, naturally develops a respect for the people who manipulate the threads." *Id.* at 930 (quoting ALEKSANDR SOLZHENITSYN, CANCER WARD 189 (1968)).

96. NATHANIEL HAWTHORNE, THE SCARLET LETTER (Stanley Appelbaum ed., Dover Thrift ed., Dover Publ'ns 1994) (1850); *see infra* text accompanying notes 109–12.

despite her absent husband.[97] The father of her child is the town's minister, although she keeps that secret.[98] To punish her for her apparent adultery, the town elders condemn her to wear a scarlet letter "A" on her chest.[99] The novel depicts a curious combination of governmental authority and sin and raises questions about the role of shame in criminal punishment.

Sex offender registry laws are an example of government collection—and more to the point, disclosure—of sensitive information. New Jersey adopted a sex offender registry law in 1994, following the murder of Megan Kanka.[100] By 1996, every state had adopted a "Megan's Law" requiring convicted sex offenders to register with a government agency.[101] The state agency then either alerted the offender's neighbors to the offender's presence or made the registration information publicly available.[102] These pieces of legislation were immediately challenged on several grounds, including the Fourteenth Amendment's guarantee of due process, which entails rights of personal autonomy, information privacy, and equal protection under the law.[103]

While initial registries were not publicly available, the spread of the internet allowed many states to broaden the accessibility of sex offenders' registration information by posting it on a publicly accessible website.[104] Thus, the analogy to *The Scarlet Letter*, where

97. *See* HAWTHORNE, *supra* note 96, at 36, 41 43.

98. *See id.* at 175–76.

99. *See id.* at 41, 43.

100. N.J. STAT. ANN. §§ 2C:7-1 to -10 (West 2023); A.A. v. State, 895 A.2d 453, 455–56, 455 n.5 (N.J. Super. Ct. App. Div. 2006).

101. H.R. REP. NO. 105-256, at 6, 8 (1997). In 1996, Congress passed Megan's Law, which penalized states by withholding anti-crime funds from a state unless it took steps to "release relevant information that is necessary to protect the public" from released sex offenders. 42 U.S.C. § 14071(d), (e)(2) , *repealed by* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 129(a), 120 Stat. 587, 600 (2006). In 2006, Congress enacted the Adam Walsh Child Protection and Safety Act, establishing a new registry requirement. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 112, 120 Stat. 587, 593 (2006) (codified at 34 U.S.C. § 20912).

102. H.R. REP. NO. 105-256, at 6, 8, 32 (1997).

103. Such sex offender registry statutes could also be challenged as violating the Eighth Amendment's prohibition against "cruel and unusual punishment." State v. Schad, 206 P.3d 22, 39 (Kan. Ct. App. 2009). These challenges are discussed in more detail below. *See infra* Part IV.

104. *See, e.g.*, N.J. STAT. ANN. § 2C:7-13 (West 2023).

Hester Prynne has to wear her letter for all to see, became even more apt. Unsurprisingly, references to *The Scarlet Letter* appear in cases that take up challenges to these broader, modernized laws. For instance, in one New Jersey case, *A.A. v. State*, a group of individuals covered by the state's revised law argued that it violated the federal Equal Protection Clause.[105] The court relied on the earlier decision of *Doe v. Poritz*, along with the Supreme Court's decision in *Smith v. Doe*,[106] to briskly sweep away the challenges.[107] Nonetheless, in a concurring opinion, one judge explicitly invoked Hawthorne's novel, describing the law as "requir[ing] that they wear an electronic scarlet letter, expressive of their past crimes and visible to anyone in the world with internet access and the desire to look."[108] That judge understood the revised law's impact and emphasized its parallelism to the novel's scarlet letter, helping to illuminate the deep shame that society had chosen to heap upon the designated offenders.

The internet boom also allowed for Megan's Laws to give rise to "pin maps," whereby offenders' addresses could be individually mapped onto their communities in a visceral and visible way.[109] A California resident unsuccessfully challenged such maps as violating his right to privacy in *Fredenburg v. City of Fremont*.[110] There, the California appellate court not only rejected his legal claim but also distinguished the device from Hawthorne's New England: "Megan's Law is not a scarlet letter of derision but a red flag of warning."[111] The

105. *A.A.*, 895 A.2d at 455. The plaintiffs also asserted that the law violated the Ex Post Facto Clause, the Double Jeopardy Clause, and the state constitution's guaranty of a right to privacy. *Id.*

106. Smith v. Doe, 538 U.S. 84, 105–06 (2003) (holding that the retroactive application of the Alaska Sex Offender Registration Act does not violate the Ex Post Facto Clause); Doe v. Poritz, 662 A.2d 367, 413–15 (N.J. 1995) (holding that the notification and registration requirements of the New Jersey statute do not violate the Equal Protection Clause).

107. *A.A.*, 895 A.2d at 456–58.

108. *Id.* at 468 (Fisher, J., concurring).

109. Fredenburg v. City of Fremont, 14 Cal. Rptr. 3d 437, 442–43 (Ca. Ct. App. 2004).

110. *Id.* at 446–47.

111. *Id.* at 446. The court relied on *Smith v. Doe*, in which the Supreme Court upheld Alaska's Megan's Law and discussed "early forms of colonial punishment meant to inflict disgrace, such as public whipping or branding with a letter of the alphabet signifying one's crime." *Id.* (citing *Smith*, 538 U.S. at 97–98).

law did not violate the California constitution's right to privacy because, the court reasoned, people do not have privacy interests in the location of a residence.[112] Such reasoning ignores the significance of the flagging of an offender's location. In *The Scarlet Letter*, it was not Hester's apparel in and of itself that revealed her private life but the significance that the community placed on the letter that she wore and its signal to the community. Similarly, it is the exposure of the residence's location in the particular database (and subsequent pinning onto the designated map) that gives rise to the reaction.

However, the sex offender registry law cases are not the only claims that cause judges to turn to *The Scarlet Letter*. The processes of administering criminal justice and adjudicating civil disputes can result in a glut of personal—and often sensitive—data.[113] Those whose names are linked to such judicial actions may find themselves judged if the government discloses, or allows access to, their link to a crime. State freedom of information statutes may require the government agent to reveal the data.[114]

For instance, the person linked to a crime may not be the actual perpetrator but some hapless third party whose name was necessarily caught up in a criminal investigation. Can that person use privacy laws to shield the person's identity from release? In *Post-Newsweek Stations, Florida Inc. v. Doe*, individuals named on a "client list" of someone charged with prostitution sued to have the State withhold from the press the defendant's client list, which the government collected in searching her, even though the state's open records law

The court characterized "[t]he stigma of Alaska's Megan's Law [as] result[ing] not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public." *Id.* (quoting *Smith*, 538 U.S. at 98). In contrast, "[t]he purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender." *Id.* (quoting *Smith*, 538 U.S. at 99). *Smith*, however, involved an Ex Post Facto Clause claim and not a privacy claim. *Smith*, 538 U.S. at 89. *See also* Roe v. Farwell, 999 F. Supp. 174, 189–90 (D. Mass. 1998) (rejecting the plaintiff's argument that disclosure of his sex offenses was like forcing him to wear a "Scarlet Letter," reasoning that "historical shaming punishments are not identical to notification or public disclosure . . . [that] entailed more than the dissemination of information").

112. *Fredenburg*, 14 Cal. Rptr. at 446.

113. Solove, *supra* note 75, at 1145–49.

114. *See id.* at 1160–61, 1163–64.

ordinarily required the disclosure of such discovery.[115] The plaintiffs' action invoked both the state's discovery rules and the Florida constitution's right to privacy provision.[116] A majority of the Florida Supreme Court concluded that the prosecution's witness list should be disclosed pursuant to the state's open records law, reasoning that the plaintiffs' privacy rights did not outweigh the public's interest in accessing a witness list in a criminal prosecution.[117]

However, a dissenting justice recognized the harms that can arise from the release of such data and cited *The Scarlet Letter*:

> [P]rivate individuals have a right to require the State at least to commence a criminal prosecution against them before it can release scandalous material the State itself has collected alleging criminal wrongdoing. . . . *This is a process more reminiscent of Nathaniel Hawthorne's scarlet letter than modern constitutional law*.[118]

Here, the justice seemed to rely on the scarlet letter imagery to highlight the damage that can be done by publicly labeling an individual without a full and fair trial.[119] Since the persons named on the client list were not actually charged, they had no chance to clear their names from the implications of being linked with the crimes with which the accused was charged.[120]

115. Post-Newsweek Stations, Fla. Inc. v. Doe, 612 So. 2d 549, 550, 551 (Fla. 1992).

116. *Id.* at 551, 552.

117. *Id.* at 553. The court concluded that the trial judge adequately protected the plaintiffs' privacy rights with an in-camera inspection of the information, and, accordingly, the judge had not abused his discretion in ruling against the plaintiffs on their privacy claim. *Id.*

118. *Id.* at 554 (Kogan, J., dissenting) (emphasis added).

119. *See id.* In *The Scarlet Letter*, Hester Prynne does receive a trial before magistrates; however, the trial was arguably not a full and fair one but rather one where the outcome was pre-determined. *See* HAWTHORNE, *supra* note 97, at 36, 44, 47.

120. *See Post-Newsweek Stations*, 612 So. 2d at 551 (majority opinion). In contrast, Hester Prynne herself did receive a trial, however specious. *See* HAWTHORNE, *supra* note 97, at 36, 44, 47. The majority itself seems to assume that the John Does were guilty of something, essentially sewing on the scarlet letters: "Because the Does' privacy rights are not implicated *when they participate in a crime*, we find that closure is not justified . . . ." *Post-Newsweek Stations*, 612 So. 2d at 552–53 (emphasis added).

Can DNA be a scarlet letter? One judge portrayed DNA collected and maintained by government hands as a sort of scarlet letter. In *United States v. Sczubelek*, a convicted bank robber on supervised release refused his probation officer's demand that he give a sample of his DNA to comply with a federal law.[121] The majority upheld the DNA collection against the plaintiff's Fourth Amendment challenge.[122] A dissenting judge, however, cited *The Scarlet Letter*:

> Thus, if we are to accept the majority's emphasis on rehabilitation, then the seizure of Sczubelek's DNA is certainly unreasonable. He has all but completed his rehabilitation. Yet, *the scarlet letters of his DNA remain embroidered into the government's database* long after he finishes his court supervision and ages out of any statistically significant chance of recidivism.[123]

Essentially, the dissenting judge compared the government's retention of the defendant's DNA to a continuing, endless revelation of unique and personal data. The judge appeared to view one's DNA as very private information[124]—similar to one's sex life, as depicted in the novel—that the government should not be able to continue to use to mark one for this sort of public treatment. The punishment, in this case, is the surveillance.

The vivid image of the scarlet letter "A," so engrained in American literature, is particularly apt for instances where the government, whether intentionally or incidentally, shames someone or exposes someone's secret. In the modern information age, shame can be ever more intense and widely revealed, making the novel ever more relevant.

121. United States v. Sczubelek, 402 F.3d 175, 176 (3d Cir. 2005).
122. *Id.* at 177.
123. *Id.* at 203 (McKee, J., dissenting) (emphasis added) (internal quotation marks omitted).
124. *See id.* at 190 (arguing that "we may be just beginning to appreciate the wealth of personal information that may be encoded inside our blood").

D. Shakespeare

A government's power to disclose information is the power to alter—positively or negatively—the reputation of someone to whom the information pertains. Shakespeare wrote powerfully on the topic of reputation, and accordingly, judges cite to his works when discussing actions that impact someone's reputation.[125] Two of Shakespeare's plays, *Othello* and *Richard II*, vividly depict the importance of reputation, which courts have invoked in ruling on privacy issues.

1. Othello*: Iago and Reputation's Value*

In *Othello*, Shakespeare writes of the Moorish king who murders his wife because of overwhelming jealousy based on the false witness of his friend and confidant, Iago.[126] At one point, Iago pursues a plan to disrupt the royal household by manipulating King Othello, Desdemona, and one of Othello's lieutenants, Cassio.[127] Iago slyly indicates to Othello that he has suspicions of Cassio, but when Othello presses him, he coyly claims a right to keep his thoughts private and to avoid unjustifiably besmirching the name of another:

> Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls:
> Who steals my purse steals trash—'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him
> And makes me poor indeed.[128]

125. *See, e.g.*, Woznicki v. Erickson, 549 N.W.2d 699, 707–08 (Wis. 1996) (Bablitch, J., concurring), *superseded by statute*, 2003 Wis. Act 47, *as recognized in* Wis. Mfrs. & Com. v. Evers, 977 N.W.2d 374 (2022); United States v. Steinger, 626 F. Supp. 2d 1231, 1235–36 (S.D. Fla. 2009).

126. *See* WILLIAM SHAKESPEARE, OTHELLO act 5, sc. 1, ll. 1–22, sc. 2, ll. 51–87.

127. *Id.* at act 3, sc. 3, ll. 95–156.

128. *Id.* at act 3, sc. 3, ll. 158–64 (Alice Walker & John Dover Wilson eds., Cambridge Univ. Press 1969) (1622).

Here, Shakespeare places immense value on the nature of a reputation, whereby its worth is characterized by its innate intimacy with the person to whom it pertains.[129] In the privacy law context, this quote most commonly appears in defamation opinions,[130] but it can also help express the risks to one's good name that can rise precipitously once an individual has fallen under the spotlight of a government investigation. As discussed above, records amassed during an investigation may become available to the public under a freedom of information statute even though those same records might have been obscured beforehand.[131] For instance, in *Woznicki v. Erickson*, a school employee was charged with having sex with a minor and, in investigating the case, the county district attorney's office subpoenaed not only his complete personnel file from his employer but also his personal telephone records.[132] After investigating, the district attorney dismissed the case, and the employee sought an order prohibiting the district attorney from releasing the subpoenaed records for which two requests were made.[133] The Wisconsin Supreme Court concluded that the state records were not exempt from disclosure; in essence, by coming within the district attorney's possession through a subpoena, the records became available to the public at large.[134] However, in a victory for individual privacy, the court also ruled that the open records law did implicitly permit a target whose records are subject to the law to seek nondisclosure.[135] In reasoning that such a right to a remedy exists, a concurring justice stated as follows:

129. *See id.*
130. *See infra* Section V.B.1.i.
131. *See supra* note 114 and accompanying text.
132. Woznicki v. Erickson, 549 N.W.2d 699, 701 (Wis. 1996), *superseded by statute*, 2003 Wis. Act 47, *as recognized in* Wis. Mfrs. & Com. v. Evers, 977 N.W.2d 374 (2022).
133. *Id.*
134. *See id.* at 702.
135. *See id.* at 706.

> We are talking about a private citizen's concern that his reputation and privacy will be damaged, perhaps irreparably, by the release of his personnel and private telephone records. . . . [T]hose records[] may contain uncorroborated or untrue hearsay, raw personal data, or a myriad of accusations, vendettas, or gossip. Much if not all of this data may serve only to titillate rather than inform.
>
> Once released, this data can be quoted with impunity. A titillated society quickly moves on to the next headline; the revealed person carries the consequences forever.
>
> . . . The damage, once done, cannot be undone. And the damage can be monumental. Shakespeare had it right: "[] who steals my purse steals trash; . . . But he that filches from me my good name . . . makes me poor indeed."[136]

In other words, the information gathered by and held by an agency may be nothing more than irrelevant trivia or even mean-spirited gossip. However, the imprimatur of a government seal can give the information credibility it never would have had otherwise, and once a law compels disclosure, it can acquire power that it never would have had otherwise: the power to "filch[] . . . [a] good name."[137]

2. Richard II*: Thomas Mowbray's Defense of Reputation*

By merely possessing a piece of information, a government entity puts it at risk of widespread disclosure and consequent damage to individuals' public personas. Shakespeare refers vividly to the delicacy and importance of reputation again in *Richard II*, his chronology of the last two years of the British King's life, including Richard's fall from the throne because of his considerable character flaws.[138] At one point early in the play, Richard listens to a heated

136. *Id.* at 707–08 (Bablitch, J., concurring) (footnote omitted) (quoting SHAKESPEARE, *supra* note 126, at act 3, sc. 3, ll. 160–62).

137. *See* SHAKESPEARE, *supra* note 126, at act 3, sc. 3, l. 162 (Alice Walker & John Dover Wilson eds., Cambridge Univ. Press 1969) (1622).

138. *See generally* WILLIAM SHAKESPEARE, RICHARD II.

dispute between his cousin, Henry Bolingbroke, and the Duke of Norfolk, Thomas Mowbray, where Bolingbroke accuses Mowbray of treason.[139] Protesting the accusation as slander, Mowbray asserts that "[t]he purest treasure mortal times afford [i]s spotless reputation: that away, [m]en are but gilded loam, or painted clay."[140]

A court can use Shakespeare's characterization to justify keeping public records secret. In *United States v. Steinger*, newspapers sought access to sealed documents pertaining to a grand jury's indictment of four individuals for committing various federal crimes arising from a Ponzi scheme.[141] The sought documents concerned the portion of another grand jury's corruption investigation that exonerated six public officials.[142] In denying the newspapers' request for access to the information on the exonerated individuals, the court noted that the sought documents identified several of them by name and reasoned as follows:

> Disclosure of those names, and the matters being investigated, could have devastating consequences for those persons who have been cleared of any misconduct, as well as for those still under investigation. As William Shakespeare put it centuries ago, "[t]he purest treasure mortal times afford is spotless reputation; that away, men are but gilded loam, or painted clay." And if it is true that "[a]t every [w]ord a [r]eputation dies," then public access to the sealed documents and transcripts here could easily kill many reputations.[143]

139. *See id.* at act 1, sc. 1, ll. 30–83.

140. *Id.* at act 1, sc. 1, ll. 171, 177–179 (Funk & Wagnalls 1967) (1597).

141. United States v. Steinger, 626 F. Supp. 2d 1231, 1233 (S.D. Fla. 2009).

142. *Id.* at 1234–35. The investigating agency asserted that the sought documents "would necessarily reveal matters associated with the ongoing portion of [a separate and ongoing] investigation." *Id.* at 1235.

143. *Id.* at 1235–36 (alteration in original) (citations omitted) (first quoting WILLIAM SHAKESPEARE, RICHARD II act 1, sc. 1, ll. 177–78 (1597); then quoting ALEXANDER POPE, THE RAPE OF THE LOCK, Canto III, l. 16) (1712)). The court reasoned that unsealing the documents could unfairly impugn the names of certain public officials who appeared in the documents but who had been cleared of wrongdoing in a parallel investigation by the DOJ's Public Integrity Section. *Id.* at 1234–35.

The language the court used indicates the fragility of reputation—its delicacy and brittleness—and also alludes to the power of one particular piece of information to drown out other aspects of a person's reputation.

E. Heller's Catch-22*: Yossarian's Frustration*

Oddly enough, government agencies that collect personal data can exert power not just by *releasing* it to others, but also by *withholding* it from the very person to whom the data pertains. Secreting crucial information from a hapless target is a theme of Kafka's *The Trial*, discussed above, and also of Heller's *Catch-22*, which follows a United States Army bombardier and his squadron during World War II as they try to survive military life.[144] The title of Heller's novel has become shorthand for the damned-if-you-do-damned-if-you-don't dilemma.[145] Courts have used the novel to capture the frustrating conundrum arising when someone needs information that a government agency is both withholding from and using against that target.[146]

These situations sometimes arise when a court is faced with competing privacy interests. In *McChrystal v. Fairfax County Board of Supervisors*, the plaintiff, a county employee who received a reprimand for workplace discrimination, sought the investigating agency's report and supporting materials.[147] The agency resisted the request, explaining that it had a policy of promising confidentiality to those who had complained.[148] It cited the state's freedom of

144. *See supra* notes 46–48 and accompanying text. *See generally* JOSEPH HELLER, CATCH-22 (Dell Publ'g Co., New Dell ed. 1977) (1961).

145. The reference first arose in reference to the paradoxical rule of the authorities in the book that bombardiers needn't fly if they were insane, but to ask to not fly showed rational concern for one's well-being that indicated sanity. HELLER, *supra* note 144, at 46–47. The phrase is often used to refer to irrational (or impossible) restrictions. Adam Winkler, Heller's *Catch-22*, 56 UCLA L. REV. 1551, 1552 (2009) (recognizing the term catch-22 as a well-known "idiom representing a no-win situation" or a "double bind").

146. *See, e.g.*, McChrystal v. Fairfax Cnty. Bd. of Supervisors, 67 Va. Cir. 171, 172, 176 n.3 (Va. Cir. Ct. 2005).

147. *Id.* at 171–72.

148. *Id.* at 172.

information law's exemption from disclosure for "information furnished in confidence with respect to an active investigation of individual employment discrimination complaints."[149] The *McChrystal* court summed up the relevant material from the novel as follows:

> The County's argument . . . resembles the "catch-22" suffused Joseph Heller's novel about airmen fighting both World War II and military regulations. The following dialogue between flight surgeon, Dr. Daneeka, and airman, Yossarian, who desperately seeks to learn what it takes to escape European combat and return to the States, exemplifies the theme.
>
> [Yossarian]: "Is [Airman] Orr crazy?"
> [Dr. Daneeka]: He sure is. . . . "
> [Yosarrian]: "Can you ground him?"
> [Dr. Daneeka]: "I sure can. But he has to ask me to. That is part of the rule."
> [Yossarin]: "Then why doesn't he ask you to?"
> [Dr. Daneeka]: "Because he's crazy. . . . "
> [Yossarin]: That's all he has to do to be grounded?"
> [Dr. Daneeka]: "That's all. Let him ask me."
> [Yossarian]: "And then you could ground him?"
> [Dr. Daneeka]: "No, then I can't ground him."
> [Yossarian]: "You mean there's a catch?"
> [Dr. Daneeka]: "Sure there's a catch. . . . Catch-22. Anyone who wants to get out of combat duty isn't really crazy."[150]

The court concluded that the plaintiff was entitled to learn the identity of those who had complained about him.[151] *McChrystal* embodied something of a clash of privacy interests: To fully

149. *Id.* at 175 (quoting VA. CODE ANN. § 2.2-3705.3(3) (2005)).
150. *Id.* at 176 n.3 (alterations in original) (quoting JOSEPH HELLER, CATCH 22 45–46 (2004)).
151. *Id.* at 187.

understand the actions against him, the plaintiff needed to know the identities of those coworkers who had said things against him, even though they may have revealed their concerns only with the promise that their identities would *not* be revealed. By citing Heller's novel, the court shows that it understands the plaintiff's dilemma perfectly.

III. INTELLECTUAL PRIVACY AND FORCED SPEECH—ORWELL'S *NINETEEN EIGHTY-FOUR*: WINSTON, OCEANIA AND "THOUGHTCRIME"

One of the next frontiers for privacy law and technology is the protection of one's internal thoughts and emotions. Data miners collect information about our web searches, which can, particularly when strung together, trace a path of one's thoughts as they occur.[152] For instance, key-logging devices can capture all of the information transmitted through a keyboard, even the words of a deleted email or text—thoughts unthought.[153] Certainly advertisers are anxious to capitalize on this information that so closely expresses our thoughts and desires, but government entities may also be interested in learning just exactly what their citizens are thinking.[154] Themes of this sort of intimate surveillance appear in both Orwell's *Nineteen Eighty-Four* and in Kafka's *The Trial*.

One of *Nineteen Eighty-Four*'s features that draws the most judicial attention is that of the "thoughtcrime," an offense policed by Oceania's Ministry of Truth.[155] The image of "thoughtcrime" chased down by the "Thought Police" is powerful, and Orwell's images can help a court explain the resulting damage to privacy.[156] For instance, a Texas criminal provision prohibited communicating online with a minor "if the person has the intent to arouse and gratify anyone's sexual

152. *See* Ciocchetti, *supra* note 72, at 312 & n.109.
153. *See id.* at 315.
154. Maurice E. Stucke & Ariel Ezrachi, *When Competition Fails to Optimize Quality: A Look at Search Engines*, 18 YALE J.L. & TECH. 70, 77–78 (2016); *see* Ciocchetti, *supra* note 72, at 351 (describing the FBI's installation of a key-logging device on a suspect's computer).
155. *See* ORWELL, *supra* note 2, at 20, 23, 68.
156. *See id.* at 56, 68, 1134–35.

desire."[157] A Texas court of appeals struck down the provision as violating the First Amendment, referring to Orwell: "A man's thoughts are his own; he may sit in his armchair and think salacious thoughts, murderous thoughts, discriminatory thoughts, whatever thoughts he chooses, free from the 'thought police.'"[158]

IV. PUNISHMENT AND THE FIFTH AND EIGHTH AMENDMENTS—HAWTHORNE'S *THE SCARLET LETTER*: HESTER PRYNNE AND EXTREME PUNISHMENTS

Privacy and punishment are an awkward pair. Public shame is a traditional punitive measure.[159] Requiring a defendant to participate in his own public shaming can particularly injure privacy. Court references to Hawthorne's best-known work soared between the early 1990s and early 2000s as many states adopted Megan's Laws to require convicted sex offenders to register with a government agency that either notified the offenders' neighbors of the offenders' presence or made the registration information publicly available.[160] As discussed above, these pieces of legislation were immediately challenged on several grounds, specifically as violating the Eighth Amendment's prohibition against "cruel and unusual punishment" and the Fourteenth Amendment's due process protections, which safeguard rights of personal autonomy and information privacy.[161]

Most of these challenges were unsuccessful, but a particularly vivid reference to the novel came in a successful challenge to a court's order that required a convicted sex offender to, among other strictures, "post a prominent sign at every entrance of his residence stating,

157. *Ex parte* Lo, 424 S.W.3d 10, 17 (Tex. Crim. App. 2013) (discussing the constitutionality of TEX. PENAL CODE ANN. § 33.021(b) (West 2013)).

158. *Id.* at 26, 27 (quoting ORWELL, *supra* note 2, at 20).

159. *See* Aaron S. Book, *Shame on You: An Analysis of Modern Shame Punishment as an Alternative to Incarceration*, 40 WM. & MARY L. REV. 653, 659–60 (1999).

160. *See* H.R. REP. NO. 105-256, at 8 (1997); *e.g.*, State v. Muhammad, 43 P.3d 318, 319, 324–25 (Mont. 2002); State v. Schad, 206 P.3d 22, 33–34 (Kan. Ct. App. 2009);

161. U.S. CONST. amends. VIII, XIV; *see supra* notes 100–24 and accompanying text. The previous discussion focuses on the government's actions of collecting and releasing data about sex offenders, while this one focuses on the punitive dimension of those practices.

'CHILDREN UNDER THE AGE OF 18 ARE NOT ALLOWED BY COURT ORDER.'"[162] The defendant pleaded guilty to having nonconsensual sexual intercourse with a fourteen-year-old girl.[163] The defendant asserted that the sign requirement both unconstitutionally interfered with his right to privacy and "exceed[ed] statutory parameters regarding the dissemination of information concerning sexual offenders."[164] The Montana Supreme Court agreed that the punishment exceeded what was allowed under the statute, as it was "unduly severe and punitive to the point of being unrelated to rehabilitation."[165] Furthermore, "the effect of such a scarlet letter condition tends to over-shadow any possible rehabilitative potential that it may generate."[166]

Later, a Kansas appellate court relied heavily on the Montana Supreme Court's characterization of such a shaming sign.[167] The trial court had required a defendant who pleaded no contest to aggravated indecent solicitation of a child to "post signs around his house and on his car declaring his sex offender status"; however, in citing the Montana Supreme Court case, the Kansas appellate court held that the signs were outside the "bounds of rehabilitating [the defendant]" and were instead "a badge of shame for all to see."[168]

Megan's Laws have also been challenged under state constitutional provisions. In *State v. Williams*, a decision later overturned by the Supreme Court of Ohio, a convicted sex offender asserted that Ohio's version of Megan's Law violated the state constitution's guarantee of "certain inalienable rights."[169] In assessing the law's notification provisions, the court noted that "[l]ike Hester Prynne in Hawthorne's

162. *Muhammad*, 43 P.3d at 319 (quoting the sign's language).
163. *Id.* at 320.
164. *Id.* at 324.
165. *Id.* at 325.
166. *Id.*
167. *See* State v. Schad, 206 P.3d 22, 31–32, 34 (Kan. Ct. App. 2009).
168. *Id.* at 26, 33–34. The court also quoted the theme song of a sixties television western series, *Branded*, that concerned "a United States Army captain who had been court-martialed for cowardice and forced to leave the Army." *Id.* at 34.
169. State v. Williams, No. 97-L-191, 1999 WL 76633, at *1, *3 (Ohio Ct. App. Jan. 29, 1999) (quoting OHIO CONST. art. 1, § 1), *rev'd*, 728 N.E.2d 342 (Ohio 2000)).

The Scarlet Letter (1850), [the defendant] and his family are exposed to shame, humiliation, and 'the sting of public censure.'"[170]

Megan's Laws have continued to keep up with technology and now may require an offender to wear a GPS device for continuous monitoring, even after the offender's sentence is completed; such a device may serve as its own "scarlet letter."[171] In finding that the retroactive application of the monitoring statute violated the Ex Post Facto clauses of both the federal and state constitutions, the Supreme Court of New Jersey focused on the physical nature and visibility of the GPS device that the defendant would have to wear, even in public:

> Even though [the GPS device's] purpose is not to shame Riley, the effects of the scheme will have that result. If Riley were to wear shorts in a mall or a bathing suit on the beach, or change clothes in a public locker or dressing room, or pass through an airport, the presence of the device would become apparent to members of the public. The tracking device attached to Riley's ankle identifies Riley as a sex offender no less clearly than if he wore a scarlet letter.[172]

References to *The Scarlet Letter*'s shaming punishment are not limited to cases involving sexual offenses. In a case hewing closely to the novel's facts, a judge ordered a defendant to "affix to the license plates of any vehicle he drives a fluorescent sign stating *'convicted dwi*'" as a condition of his probation.[173] In ruling that the trial judge exceeded his authority in imposing the condition, New York's highest court stated that "[t]he punitive and deterrent nature of the disputed scarlet letter component of the probationary conditions here overshadow[ed] any possible rehabilitative potential that it may generate."[174]

170. *Id.* at *10 (quoting State v. Cook, 700 N.E.2d 570 (1998)).

171. *See, e.g.*, N.J. STAT. ANN. §§ 30:4-123.90, 4-123.92 (West 2007), *unconstitutional as applied by* Riley v. N.J. State Parole Bd., 98 A.3d 544 (N.J. 2014).

172. *Riley*, 98 A.3d at 559–60 (internal quotation marks omitted).

173. People v. Letterlough, 655 N.E.2d 146, 147 (N.Y. 1995) (quoting the sign's language).

174. *Id.* at 150, 151 (footnote omitted) (internal quotation marks omitted).

In Florida, however, a DUI defendant failed in a similar challenge to a requirement that the defendant place a DUI news ad in a local paper as a condition of probation.[175] The court quoted another Florida decision that quoted approvingly of "scarlet letter" punishments:

> The deterrent, and thus the rehabilitative, effect of punishment may be heighted if it inflicts disgrace and contumely in a dramatic and spectacular manner. . . . Measures are effective which have the impact of the scarlet letter described by Nathaniel Hawthorne or the English equivalent of wearing papers in the vicinity of Westminster Hall like a sandwich-man's sign describing the culprit's transgressions.[176]

The court was unpersuaded by the defendant's argument that "this condition invade[d] his privacy by making him a reluctant public figure and then exposing him to ridicule and humiliation."[177]

The Scarlet Letter's vivid imagery and appealing protagonist seem particularly effective in helping courts express the effect of a publicly visible punishment on privacy. Whether a sign that has to be displayed or a GPS device that has to be worn, the nature of these punishments differs significantly from more ordinary measures.

V. TORTS AND WIRETAPPING

The term "privacy torts" usually refers to the four privacy torts consolidated by William Prosser:[178] (1) intrusion upon seclusion;[179] (2) public disclosure of private facts;[180] (3) appropriation;[181] and (4) false

175. Lindsay v. State, 606 So. 2d 652, 653 (Fla. Dist. Ct. App. 1992). The court was answering a certified question issued by the trial court. *Id.*

176. *Id.* at 656 (citation omitted) (internal quotation marks omitted) (quoting Goldschmitt v. State, 490 So. 2d 123 (Fla. Dist. Ct. App.), *rev. denied*, 496 So. 2d 142 (Fla. 1986)).

177. *Id.* at 657.

178. *See* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

179. *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977).

180. Prosser, *supra* note 178; *see also* RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977).

181. Prosser, *supra* note 178; *see also* RESTATEMENT (SECOND) OF TORTS § 652C (AM. L. INST. 1977).

light in the public eye.[182] The various wiretap laws can be thought of protecting the same sort of interests as the intrusion and public disclosure torts; for example, the prohibition of surreptitious recording of others' conversations not only protects the speakers' seclusion but also helps to prevent a subsequent disclosure of the speakers' private conversations.[183] In terms of relying on literature, cases tend to examine the impact of invasion and surveillance or reputation and appropriation, discussed further below.

A. Invasion and Surveillance

The above Section addresses government surveillance, privacy, and literary references. Private surveillance entails similar, but slightly different, fears. While government surveillance inspires fears of imprisonment, private surveillance stokes fears of ostracism.[184]

1. Orwell's Nineteen Eighty-Four*: The Omniscient Big Brother*

Private surveillance, like government surveillance, raises comparisons to life in *Nineteen Eighty-Four*'s Oceania. In a private employer context, a judge quoted Orwell in condemning a trucking company that videotaped employees in restrooms through two-way mirrors.[185] Though the majority concluded that federal labor laws preempted the invasion of privacy claim,[186] a dissenting judge believed that the surveillance was criminal and quoted Orwell's *Nineteen Eighty-Four*: "There was . . . no way of knowing whether you were being watched at any given moment. . . . It was even conceivable that they watched everybody all the time . . . ."[187] Here, the idea of relentless surveillance strikes a particularly twitchy nerve.

182. Prosser, *supra* note 178; *see also* RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977).
183. *See* Solove, *supra* note 10, at 492–93.
184. *Id.* at 493, 495.
185. Cramer v. Consol. Freightways, Inc., 209 F.3d 1122, 1135–36 (9th Cir. 2000) (Fisher, J., dissenting in part).
186. *Id.* at 1128–33 (majority opinion).
187. *Id.* at 1135–36 (Fisher, J., dissenting in part) (quoting George ORWELL, 1984, at 6–7 (Signet Classic 1992) (1949)).

However, while concluding that testing employees' urine did implicate public policy protecting privacy, the Alaska Supreme Court nonetheless held that "public policy supporting . . . health and safety" outweighed such concerns.[188] The court recognized, however, that other courts have quoted Orwell in concluding that such testing is an unjustified intrusion.[189]

A court can use vivid language from *Nineteen Eighty-Four* to present a theatrical introduction rather than a real, substantive comparison to the facts at hand. In rejecting an intrusion claim of an animal trainer who was filmed backstage brutalizing his orangutans, the Supreme Court of Nevada concluded that the trainer could not have reasonably expected that he was in a place of seclusion.[190] The court introduces the discussion with the following quote from Orwell's *Nineteen Eighty-Four*: "*You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard and, except in darkness, every movement scrutinized*."[191]

2. Shakespeare's Hamlet*: Polonius's Eavesdropping*

Intruding on another's privacy by eavesdropping evokes fears of shame and exposure and can lead to unhappy endings for eavesdroppers. Shakespeare wrote knowingly of the consequences of intruding on another's privacy by eavesdropping, and his observations prove useful in court opinions.[192] For instance, in *Cady v. IMC Mortgage Co.*, the Rhode Island Supreme Court affirmed an award of damages in a case involving an employer wiretapping an employee's private telephone calls; the defendant's president "surreptitiously

188. Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1136–38 (Alaska 1989).

189. *Id.* at 1134 ("Drug testing is a form of surveillance, albeit a technological one. Nonetheless, it reports on a person's off-duty activities just as surely as someone had been present and watching. It is George Orwell's 'Big Brother' Society come to life." (quoting Capua v. City of Plainfield, 643 F. Supp. 1507, 1511 (D.N.J. 1986))).

190. PETA v. Bobby Berosini, Ltd., 895 P.2d 1269, 1280–83 (Nev. 1995), *overruled on other grounds by* City of Las Vegas Downtown Redev. Agency v. Hecht, 940 P.2d 134 (Nev. 1997).

191. *Id.* at 1278 (quoting ORWELL, *supra* note 2, at 4).

192. *See* WILLIAM SHAKESPEARE, HAMLET act 3, sc. 4, ll. 22–34; *e.g.*, Cady v. IMC Mortg. Co., 862 A.2d 202, 207 (R.I. 2004).

listen[ed] in on the telephone conversations of certain employees" and heard himself described in "salty language."[193] When the employer fired the plaintiff for the language used in the telephone calls, he successfully sued the president and the employer's parent company for, among other claims, violating the state and federal wiretap statutes and invasion of privacy.[194] The court began its opinion with a reference to *Hamlet*: "As Polonius learned in Shakespeare's [*Hamlet*], eavesdropping on one's enemy often can lead to disastrous results."[195] The court also noted that "Hamlet suspects his late father's brother—who also happens to be his mother's new husband—is hiding behind a tapestry, listening to their conversation. Hamlet acts upon his suspicions by stabbing blindly through the curtains and killing the courtier, Polonius."[196]

Of course, none of these monetary awards rival the fate of Polonius, whom Hamlet stabbed to death through the tapestry behind which he hid.[197] Nonetheless, *Hamlet* made the point that eavesdropping does not end well when caught.

B. Reputation and Appropriation

Two common injuries to privacy are misrepresentation of one's personhood and misuse of one's personhood.[198] The tort of false light in the public eye protects the former, whereas the tort of appropriation protects the latter.[199]

193. *Cady*, 862 A.2d at 207, 224.

194. *Id.* at 209–10. The jury awarded him $50,000 in actual damages on the wiretapping claim. *Id.* at 210. In addition, the jury awarded $25,000 on the plaintiff's invasion of privacy claim. *Id.* The jury also awarded damages on the plaintiff's breach of contract claim and a state damages statute and awarded punitive damages. *Id.*

195. *Id.* at 207.

196. *Id.* at 207 n.1.

197. SHAKESPEARE, *supra* note 192, at act 3, sc. 4, ll. 22–29. *Hamlet* is the most frequently cited of Shakespeare's plays in American cases. Steven M. Oxenhandler, *The Lady Doth Protest Too Much Methinks: The Use of Figurative Language from Shakespeare's Hamlet in American Case Law*, 23 HAMLINE L. REV. 370, 371 (2000) ("Although Hamlet represents only three percent (3%) of the total number of Shakespeare's plays, an astounding twenty-one percent (21%) of the total number of Shakespearean quotations used in judicial opinions stem from Hamlet.").

198. *See* RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (AM. L. INST. 1977); *id.* § 652E cmt b.

199. *See id.* § 652E; *id.* § 652C.

1. Shakespeare

Any number of courts evaluating civil violations of privacy claims reference Shakespeare's many lines that implicate the concerns that privacy laws protect.[200]

i. Othello*: Iago's Reputation*

Othello contains one of Shakespeare's most well-known quotes. In it, Iago states that he "[w]ho steals my purse steals trash . . . But he that filches from me my good name . . . makes me poor indeed."[201] This is a go-to quote for a judge wrestling with a reputational attack.[202] The use of this language is instructive: It demonstrates that courts believe that the tort of defamation primarily exists to remedy the injury to the target's outward image to the world rather than the injury to the target's feelings. For instance, the Rhode Island Supreme Court, in evaluating a defamation claim, described the changes to the perception of the tort of defamation as follows:

> But now we conceive of defamation as a tort that "tends to injure 'reputation'"—an intangible but much-prized piece of personalty that Shakespeare dubbed "the immortal part" of each person:
>
> > "The purest treasure mortal times afford Is spotless reputation: take that away, Men are but gilded loam or painted clay."
>
> Injury to reputation "involves the idea of disgrace;" yet "[d]efamation is not concerned with the plaintiff's own

200. *E.g.*, Nassa v. Hook-SupeRx, Inc., 790 A.2d 368, 372 (R.I. 2002); Rafferty v. Hartford Courant Co., 416 A.2d 1215, 1218–19 (Conn. Super. Ct. 1980); Zinda v. La.-Pac. Corp., 409 N.W.2d 436, 444 (Wis. Ct. App. 1987), *aff'd in part, rev'd in part*, 440 N.W.2d 548 (Wis. 1989); Yelp, Inc. v. Hadeed Carpet Cleaning, Inc., 752 S.E.2d 554, 561 (Va. Ct. App. 2014), *vacated*, 770 S.E.2d 440 (Va. 2015); Onassis v. Christian Dior-N.Y., Inc., 472 N.Y.S.2d 254, 260 (Sup. Ct. 1984); Schlessman v. Schlessman, 361 N.E.2d 1347, 1348 n.2 (Ohio Ct. App. 1975); Levine v. Walterboro City Police Dep't, No. 05-2906-18, 2006 WL 2228993, at *2 n.3 (D.S.C. Aug. 3, 2006).

201. SHAKESPEARE, *supra* note 126, at act 3, sc. 3, ll. 160–64 (Alice Walker & John Dover Wilson eds., Cambridge Univ. Press 1969) (1622).

202. *See* John M. DeStefano III, *On Literature as Legal Authority*, 49 ARIZ. L. REV. 521, 529 (2007).

> humiliation, wrath or sorrow." Rather, defamation is based on "conduct which injuriously affects a [person's] reputation, or which tends to degrade him [or her] in society or bring him [or her] into public hatred and contempt . . . ."[203]

A court can cite to *Othello* to emphasize the fragility and the brittleness of the "house" of privacy rights that gathers in the four Prosser privacy torts and their cousins, defamation and intentional infliction of emotional distress.[204] The house of privacy rights may be collectively vulnerable when any single right within it weakens. The newly divorced plaintiffs in *Rafferty v. Hartford Courant Co.* asserted intrusion and false light claims against a newspaper and its personnel who attended their "unwedding" ceremony, took pictures of them, and published a story about it.[205] The plaintiffs asserted these acts caused them "extreme mental anguish"—even forcing the former husband to leave his job—and brought claims for intrusion, public disclosure of private facts, and false light in the public eye.[206] In denying summary judgment to the defendant that claimed a First Amendment privilege, the court stated:

> Shakespeare probably said it best: "Good name in man and woman, dear my lord is the immediate jewel of their souls: Who steals my purse steals trash; 'tis something, nothing 'twas mine, 'tis his and has been slave to thousands: But he

203. *Nassa*, 790 A.2d at 369, 371–72 (alterations in original) (footnotes omitted) (citation omitted) (first quoting W. PAGE KEETON & WILLIAM L. PROSSER, PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 773 (5th ed. 1984); then quoting WILLIAM SHAKESPEARE, OTHELLO act 2, sc. 3; then quoting WILLIAM SHAKESPEARE, RICHARD II act 1, sc. 1; then quoting KEETON & PROSSER, *supra*, § 111, at 771, 773; and then quoting Swerdlick v. Koch, 721 A.3d 849, 860 (R.I. 1998)). The court then went on to determine that this type of injury differed from that that workers compensation law is intended to remedy, and therefore the workers compensation law did not bar a defamation action. *Id.* at 375.

204. *See* Prosser, *supra* note 178; Ciocchetti, *supra* note 72, at 323; *e.g.*, *Rafferty*, 416 A.2d at 1218–20.

205. *Rafferty*, 416 A.2d at 1216.

206. *Id.*

> that filches from me my good name robs me of that which not enriches him and makes me poor indeed."[207]

The court continued: "Once the wall of privacy is breached one's whole house of rights can crumble including most particularly the freedom to associate with others and to organize to promote one's own ideas."[208] Noting the plaintiffs' "peculiar garb" and that "some of the guests dressed a bit oddly," the court reasoned:

> Although one who acts the fool before others cannot complain if they laught; it is one thing to perform for friends and quite another for the public. The plaintiffs' affidavits make it clear that they thought their behavior was to be viewed privately. It is well known that acts which are privately funny may in public appear bizarre and weird because they are not viewed through a warming lens of friendship.[209]

Judges also use the *Othello* quote to explain the difficulty of assessing damages: Just how "poor indeed" does an item of defamatory material make one? A Wisconsin court ruled that a $50,000 jury award was excessive for an employee defamed by an employer in a company newsletter.[210] The majority reasoned that the plaintiff "presented no evidence that his reputation had suffered."[211] While quoting *Othello*, a dissenting judge, however, argued that the majority failed to afford the jury's judgment sufficient deference because "[t]he value of a person's reputation is difficult to determine."[212] The injury's amorphous nature, the judge seemed to

207. *Id.* at 1218–19, 1221 (quoting SHAKESPEARE, *supra* note 126, at act. 3, sc. 3, ll. 158–64).
208. *Id.* at 1220.
209. *Id.* at 1216 (internal quotation marks omitted).
210. Zinda v. La.-Pac. Corp., 409 N.W.2d 436, 438, 441 (Wis. Ct. App. 1987), *aff'd in part, rev'd in part*, 440 N.W.2d 548 (Wis. 1989). The jury had also awarded $50,000 for the plaintiff's invasion of privacy claim for a total damage award of $100,000. *Id.* at 441.
211. *Id.* at 442.
212. *Id.* at 443–44 (Myse, J., dissenting).

say, justified deference to the finder of fact rather than second-guessing.[213]

Anonymous reviews are more prevalent in the digital age. In *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, privacy interests directly conflicted when the owner of a business reviewed disparagingly by an anonymous poster to Yelp sought to force Yelp to reveal the poster's identity.[214] In upholding the subpoena (a decision reversed on appeal), the Virginia appellate court sided with the disparaged plaintiff:

> Perhaps, Shakespeare said it best:
>
> "Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls.
> Who steals my purse steals trash;
> 'Tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed."[215]

This quote from *Othello* is particularly well-suited to construing the claim of appropriation, which provides relief when someone exploits another's identity for that person's own use or benefit.[216] In the appropriation/right of publicity context, the quote from *Othello* stresses ownership of reputation rather than quality. For instance, in *Onassis v. Christian Dior-New York, Inc.*, the former First Lady, Jacqueline Kennedy Onassis, sought to restrain the defendant from using an ad featuring a photograph of her look-alike.[217] The court enjoined Dior from using the ad, concluding that the New York statute

213. *Id.* at 444 ("Although under the majority's value system a lesser amount may properly reflect the value of this very intangible asset, the majority is not privileged to superimpose its value system on the jury.").

214. Yelp, Inc. v. Hadeed Carpet Cleaning, Inc., 752 S.E.2d 554, 558 (Va. Ct. App. 2014), *vacated*, 770 S.E.2d 440 (Va. 2015).

215. *Id.* at 561, 569 (quoting SHAKESPEARE, *supra* note 126, at act. 3, sc. 3, ll. 158–64).

216. *See* RESTATEMENT (SECOND) OF TORTS § 652C (AM. L. INST. 1977).

217. Onassis v. Christian Dior-N.Y., Inc., 472 N.Y.S.2d 254, 256 (Sup. Ct. 1984).

"intended to protect the essence of the person, his or her identity or *persona*," and quoted *Othello* as "right on target."[218]

Similarly, in *Schlessman v. Schlessman*, an Ohio court of appeals reversed a lower court's grant of summary judgment in favor of the plaintiff's mother-in-law, whom the plaintiff alleged forged the plaintiff's name on the joint income tax return of the defendant's son, the plaintiff's husband.[219] In recognizing that the facts stated a claim for appropriation, the court drew upon other states' cases and characterized the claim as for "the use of the plaintiff's name as a symbol of his identity," quoting *Othello*.[220]

Civil rights hero Rosa Parks took action against members of the group OutKast and their record producer after they used her name as the title of a song.[221] The Sixth Circuit reversed the district court's grant of summary judgment in the artists' favor, rejecting their First Amendment argument: "[T]he fact that Defendants cry artist and symbol as reasons for appropriating Rosa Parks' name for a song title does not absolve them from potential liability for, in the words of Shakespeare, filching Rosa Parks' good name."[222]

ii. Richard II*: Thomas Mowbray's Defense of Reputation*

Shakespeare also raised the theme of reputation in *Richard II*.[223] In the first scene, King Richard arrives to mediate a dispute between two nobleman, his cousin (and eventual successor to the throne), Henry Bolingbroke, and Thomas Mowbray.[224] Bolingbroke accuses Mowbray of conspiring to murder one of the King's uncles, and the

218. *Id.* at 260, 263.
219. Schlessman v. Schlessman, 361 N.E.2d 1347, 1348–49 (Ohio Ct. App. 1975).
220. *Id.* at 1348–49, 1348 n.2.
221. Parks v. LaFace Records, 329 F.3d 437, 441 (6th Cir. 2003).
222. *Id.* at 463 (internal quotation marks omitted). However, the Sixth Circuit did affirm summary judgment for the defendants on Parks' defamation claim, reasoning that the song did not "make any factual statements about her." *Id.* at 462, 463.
223. *See* SHAKESPEARE, *supra* note 138, at act 1, sc. 1, ll. 166–71, 177–79.
224. *See id.* at act 1, sc. 1.

two swap insults and threats and challenge each other to a duel.[225] Mowbray, in outrage at the accusation of conspiracy, states:

> The purest treasure mortal times afford
> Is spotless reputation: that away,
> Men are but gilded loam or painted clay.
> A jewel in a ten-times-barr'd-up chest
> Is a bold spirit in a loyal breast.
> Mine honor is my life; both grow in one;
> Take honor from me, and my life is done . . . .[226]

The recognition of a fifteen-year-old's reputation also drew a reference to this quote. In *Levine v. Walterboro City Police Department*, the defendant newspaper published a photograph of a teen in a police car, allegedly "falsely indicating that [she] was charged with public disorderly conduct, assault, battery and malicious damage."[227] The teen sued for invasion of privacy and for intentional infliction of emotional distress, but the court dismissed the claims, reasoning that the "tort of intentional infliction of emotional distress requires an unusually high degree of damning evidence [that is] all the more exacting in the First Amendment context."[228] Nonetheless, the court recognized the teen's interest in her reputation, providing in a footnote that "[t]he purest treasure mortal times afford is a spotless reputation."[229] Shakespeare's words illustrate the outrage of the falsely accused and the wrongfully portrayed that the laws of defamation, false light in the public eye, and intentional infliction of emotional distress all seek, in one way or another, to remedy.

225. *Id.* at act 1, sc. 1, ll. 86–100, 124–73.
226. *Id.* at act 1, sc. 1, ll. 177–84.
227. Levine v. Walterboro City Police Dep't, No. 05-2906-18, 2006 WL 2228993, at *1 (D.S.C. Aug. 3, 2006).
228. *Id.* at *1–2.
229. *Id.* at *2 n.3 (quoting WILLIAM SHAKESPEARE, RICHARD II act 1, sc. 1).

2. *Hawthorne's* The Scarlet Letter*: Hester's Shame*

One theme of *The Scarlet Letter* is the constant reliving of one's worst moment. In *Briscoe v. Reader's Digest Association*, the Supreme Court of California examined whether the truthful reporting of a shameful act from a person's past stated a sufficient cause of action for the tort of public disclosure of private facts.[230] Although later overturned on First Amendment grounds, *Briscoe* considered an article published by the defendant called "The Big Business of Hijacking" that referred to the plaintiff, revealing that he hijacked a truck eleven years prior.[231] Though the plaintiff was convicted of the crime years before, he moved beyond it; neither his daughter nor his new friends knew about it, and upon learning of it, "[t]hey thereafter scorned and abandoned him."[232] The plaintiff alleged that regardless of whether the information was true, the story did not need to use his true name to achieve any newsworthy purpose, and the court agreed.[233] The court noted that it "ha[s] no doubt that reports of the facts of past crimes are newsworthy," but "identification of the *actor* in reports of long past crimes usually serves little independent public purpose."[234] In stating that a publisher should know "that identification of a man as a former criminal will be highly offensive to the individual involved. It does not require close reading of 'Les Miserables' or 'The Scarlet Letter' to know that men are haunted by the fear of disclosure of their past and destroyed by the exposure itself."[235] Years later, however, the Supreme Court of California overruled *Briscoe* "insofar as [the] holding applies to facts obtained from public official court records," reasoning that the First Amendment does not permit liability for the publication of facts obtained from official public records.[236]

230. Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 35–36 (Cal. 1971), *overruled in part by* Gates v. Discovery Commc'ns, Inc., 101 P.3d 552 (Cal. 2004).
231. *Id.* at 36.
232. *Id.*
233. *Id.* at 36, 40.
234. *Id.* at 39–40.
235. *Id.* at 43 n.18.
236. Gates v. Discovery Commc'ns, Inc., 101 P.3d 552, 555, 559–60 (Cal. 2004).

CONCLUSION

Literature offers a way to learn more about ourselves and to see the struggles and joys of others. References to literary works in case law demonstrate how a judge sees a privacy struggle and can illuminate the values of privacy in particular contexts. Though Orwell's *Nineteen Eighty-Four* is the marquee work among privacy cases that cite literature, it is far from the only novel that reveals the discomfort of those who suffer the breach of boundaries.

Nineteen Eighty-Four is particularly suitable for scenarios involving government surveillance and collection of citizens' data. But other works also contribute to a deeper understanding of the somewhat amorphous, yet certainly perceptible, feelings from invasions of privacy. Kafka, Hawthorne, Shakespeare, and Heller have all created characters and situations that speak to the fears that our privacy laws seek to allay, at least in part.