

TORT LAW VS. PRIVACY

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[Dear readers: As you will notice, this is in many places a skeleton more than a draft. It certainly requires a great deal more work, and in particular needs to engage much more than it now does with the existing literature on negligence law (negligence law generally—I couldn’t find any literature on how negligence law affects privacy). This makes your feedback especially valuable; I would love to hear your thoughts on it.]

Through the privacy torts, tort law tries to protect privacy. But tort law, and especially negligence law, can also diminish privacy: It can create an incentive for more surveillance, more investigation of people’s lives, and more dissemination of potentially embarrassing information about people. And this tendency has gone almost unnoticed by courts and by scholars.¹

This privacy-reducing tendency is inherent in modern negligence law, including the law of product design defects.² Modern negligence law says all of us have a duty to take reasonable precautions to prevent harm caused by our actions, by our products, by our employees, or by others who are using our property.³ We also have some duties to affirmatively protect some people—our customers, our tenants, our other business visitors, and often our social guests—even in the absence of ac-

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¹ I focus here on how substantive liability rules may require gathering and revealing information. I do not discuss the important but already well-discussed debate about how discovery in civil cases may diminish the privacy of litigants, litigants’ employees, and others.

² Product design defect law is in practice largely the application of negligence principles, since it imposes liability for “unreasonable” product designs—designs that could have, reasonably and cost-effectively, been made safer. [Cite.] (In some respects, product design defect law departs from negligence principles, for instance in holding distributors liable for manufacturers’ negligent design choices, even if the distributor was not itself negligent, [cite]; but those differences are largely irrelevant for our purposes.) For purposes of this article, I will use “negligence law” to refer both to standard negligence law and product design defect law.

³ RESTATEMENT (THIRD) OF TORTS (PHYS. & ECON. HARM) §§ 3, 7 (own actions); *id.* § 41(b)(3) (actions of employees); RESTATEMENT (THIRD) OF TORTS (PROD. LIAB.) §§ 1, 2 (products); RESTATEMENT (SECOND) OF TORTS § 390 (entrustment of property).

tions on our part.⁴ And both these duties may require us to take reasonable precautions against criminal acts by others.⁵

Under Learned Hand’s famous formula for determining negligence, this requirement of “reasonable precautions” is generally understood as requiring “cost-effective precautions.”⁶ And gathering or disclosing information about people’s backgrounds and tendencies is often an inexpensive (and sometimes effective) preventive measure. Such gathering and disclosure can help potential victims avoid harm. It can deter potential wrongdoers from causing harm. And it can do so at modest financial cost, especially compared to more expensive measures such as hiring more security guards.

Negligence law, then, exerts a constant pressure: Investigate. Surveil. Disclose. Report. Nor is there counter-pressure from the privacy torts, since (for reasons described in Part I.E) such investigation, surveillance, disclosure, and reporting would generally not be tortious.

This pressure is also increasing, as surveillance technology gets better and cheaper. Background checks, whether on employees, tenants, or students, were once very expensive, time-consuming, and limited scope. This means they probably weren’t such a cost-effective precaution that they would have been required by the duty of reasonable care. Now they are much cheaper, quicker, and more comprehensive, so failing to do a background check is often seen as negligent.⁷

Hiring security guards to monitor all corners of one’s shopping mall or apartment building is expensive, and is therefore rarely required. But video surveillance cameras steadily get cheaper.⁸ What’s more, even

⁴ RESTATEMENT (THIRD) OF TORTS (PHYS. & ECON. HARM) §§ 40, 51.

⁵ “The conduct of a defendant can lack reasonable care insofar as it foreseeably . . . permits the improper conduct of . . . a third party.” *Id.* § 19. “The improper action or misconduct in question can take a variety of forms. It can be negligent, reckless, or intentional in its harm-causing quality. It can be either tortious or criminal, or both.” *Id.* § 19 cmt. a.

⁶ [Cite.]

⁷ [Cite.]

⁸ See, e.g., *Rodriguez-Quinones v. Jimenez & Ruiz*, S.E., 402 F.3d 251, 256 (1st Cir. 2005):

While the Puerto Rican courts may well pause before requiring every small business to provide a security guard, the duties sought to be imposed in this case are far more moderate. The appellants here operated a small indoor facility and could easily have improved security at modest expense—here, by installing a security camera and buzzer system and by changing some of its office practices. . . . As for negligence, the parties stipulated that the cost of an electronic lock would have been \$285; of a buzzer \$45; and of a security camera \$78, and that these devices could have been installed at Office 410. From this evidence, a jury could have rationally concluded that such relatively low-cost measures, along with changing office practice to locking the front door (and requiring patients to ring a buzzer) in the late afternoon when no one was at the front desk, were required for adequate security and that these measures would have prevented the rape.

real-time monitoring of those cameras seems likely to get cheaper. Image recognition software will likely make it easier for one guard to monitor many more video cameras. Globalization plus instant worldwide communication is making it possible to have surveillance cameras be viewed by much cheaper workers in foreign countries. And facial recognition software may make it much easier to keep track of who is present where and when.

Likewise, product manufacturers have historically been unable to monitor misuse of their products once they have been sold. But today car manufacturers can easily design cars that e-mail the police whenever the car goes over 80 miles per hour, or that check their drivers' breath alcohol level and report to the police attempts to drive drunk. And under the logic of the Hand formula, feasible monitoring may well be mandatory monitoring. The drumbeat gets louder: Investigate. Surveil. Disclose. Report. The Hand formula says that liability for failure to take a precaution is proper if $B < PL$; ⁹ and the B (burden) of investigation and surveillance is getting steadily lower.

These decisions also indirectly bear on the likely future scope of government surveillance, and not just private surveillance.

First, some government entities, such as public housing complexes and public universities, are subject to tort law rules that are similar to those imposed on private entities. And what government entities gather in their proprietary capacity, they may eventually share with other government entities in their law enforcement capacity.

Second, even private entities' surveillance files may be subpoenaed or otherwise obtained by the police, by intelligence agencies, or by regulatory agencies. No warrant and no showing of probable cause is needed for the government to get this information; a subpoena based on the possibility that the tapes contain evidence would suffice, and often the property owner might voluntarily over the material even without the subpoena. A database of video collected by a shopping center is a database of video that can be demanded by the government.

Third, what tort law legally requires of proprietors might well influence what is politically required of, or at least allowed to, law enforcement. For instance, if tort law mandates comprehensive surveillance on private property—in malls, office buildings, apartment buildings, and the like—and thus in corresponding government-owned property, people will get used to such government-mandated surveillance. And once people get used to it, they'll likely be similarly open to government surveillance on sidewalks and highways.

After all, if the legal system *requires* surveillance by private and public property owners, it becomes harder to argue that the law should *forbid* such surveillance by government. This is especially likely because

⁹ [Cite.] [Translate the formula into the standard wording.]

“we, as a society, do not have a clear definition of what privacy is To the extent that any privacy debate considers privacy issues outside the context of the particular case, all prior intrusions into privacy, which society has accepted, form a baseline for comparison to the type of intrusion.”¹⁰

And the decisions also affect more than just privacy. An employer who must warn customers about the threat posed by an employee—either because the employee has committed crimes, or because the employee is being stalked by a criminal who might injure bystanders in a future attack—will likely dismiss the employee, or not hire him in the first place. The same may be so for a landlord who must disclose this information about a tenant.

Now tort law has tools that can resist this pressure in some situations, if such resistance is called for. Indeed, this Article is largely about how courts could use such tools.

First, a judge or jury could conclude that a defendant’s refusal to surveil, disclose, report, or gather information is not unreasonable when the surveillance or similar conduct would have sufficiently burdened privacy interests. (Whether it is for the judge or jury to so decide is an important question, which Part **Error! Reference source not found.** will discuss.) In particular, when the judge or jury considers whether a proposed precaution is “cost-effective,” the cost could be seen as including the privacy cost, however that can be measured.

Second, courts could establish “no-duty” rules that specifically indicate that a defendant can’t be held negligent for protecting its own or others’ privacy in certain ways. Courts have used such rules to decide, for instance, that defendants can’t be held negligent for distributing books or movies that supposedly encourage violence, or for refusing to comply with the demands of robbers. Similar rules can be used to protect privacy.¹¹

Third, courts could defer to legislatures or administrative agencies, deferring to those institutions’ greater ability to engage in precise line-drawing, greater ability to consider the effects of decisions not just on plaintiffs and defendants but also on third party, and greater democrat-

¹⁰ Craig M. Cornish & Donald B. Louria, *Employment Drug Testing, Preventive Searches, and the Future of Privacy*, 33 WM. & MARY L. REV. 95, 114 (1991). The article goes on to add, about the way courts have dealt with privacy in Fourth Amendment cases:

Who would have ever thought that the analytic test employed in *Camara v. Municipal Court*, 387 U.S. 523 (1967), which involved searches of buildings, and *Terry v. Ohio*, [392 U.S. 1 (1968),] which involved temporary stops and pat downs, would eventually yield cases upholding the systematic blood testing of workers? Under the Court’s test, each new form of surveillance that is given a Fourth Amendment imprimatur becomes a springboard for tolerance of further incursions into individual privacy.

Id. at 118 (footnotes omitted).

¹¹ See *infra* Part IV

ic legitimacy in weighing incommensurables such as privacy and safety. Indeed, courts considering negligence claims already routinely do this in negligence cases when they are asked to weigh other incommensurables—such as cases involving calls for social host liability for serving alcohols, or for holding manufacturers liable for products that are inherently dangerous—outside the familiar efficiency vs. safety territory.¹²

But while such measures can be taken, courts have not systematically taken them. They have not developed a framework for including privacy costs in the reasonableness or cost-benefit balancing analysis—a framework that would be especially challenging to develop because privacy costs and safety benefits are not easily comparable. Nor have they expressly adopted no-duty rules or similar limitations aimed at protecting privacy. Occasionally they have indeed considered privacy issues in the negligence analysis—but they’ve done so rarely, sketchily, and generally fact-specifically.

The aim of this article is to outline some steps towards a more comprehensive framework for considering privacy in negligence cases. Part I will begin by cataloging some of the ways that tort law may require behavior that undermines privacy, or mandates surveillance. The duty of reasonable care, for instance, may mandate the disclosure of facts about one’s own life. It may mandate the disclosure of facts about others’ lives. It may require that organizations gather information about prospective and current employees, customers, tenants, students, and the like. It may require that apartment buildings, shopping centers, employers, and other property owners surveil behavior on their property. It may require that manufacturers surveil behavior by the users of their products. And it may require that these involuntary surveillers report the results of the surveillance to the government. Part II will briefly define what I mean by privacy, and why privacy may be considered valuable.

Part III will turn to how courts have considered privacy factors in the past. Most, it turns out, have not considered them in any depth. And the few that have confronted the questions more seriously have nonetheless not created a satisfactory framework for analysis.

Parts IV through VI will try to suggest how the legal system should deal with the tort law vs. privacy contest. I will not argue that privacy should always prevail, in the sense that precautions that impose privacy costs should never be required. Nor will I argue that tort law should always prevail. Instead, I will try to consider, in Parts IV and V, who is to decide which will prevail in various classes of cases—judges, juries, legislatures? And in Part VI, I will make some observations about how the value of privacy should (and shouldn’t) be evaluated, at least when judges are doing the evaluation.

¹² See *infra* Part V.

Two things will be conspicuous by their absence. First, I do not propose to embrace any particular theory of why privacy is valuable. Why we value privacy is deeply controversial, with different people valuing privacy differently and for different reasons. Courts have not shown any pattern of embracing any particular theory, and they seem to me unlikely to do so. As with free speech law, then, effective privacy arguments need to discuss all the various ways in which privacy might be useful (or harmful), rather than committing themselves to any particular vision.

Second, I do not purport to offer a categorical rule that would resolve all the questions that I've described. I'd like to be able to, and perhaps someday someone will be able to offer such a rule, but I'm just not confident of any particular approach. My main goals here are (1) to identify the problem, (2) to discuss some possible frameworks for approaching it, and (3) to discuss why some possible approaches might be unsound.

I. HOW TORT LAW IMPLICATES PRIVACY

I begin in this Part by laying out how applying normal tort law cost-benefit analysis may undermine privacy, if privacy costs are not weighed as part of that analysis.

A. *Obligations to Reveal Information About Yourself*

1. Obligation to reveal diseases and disease symptoms

The duty of reasonable care sometimes requires people to reveal private information about themselves, and about the danger they pose to others. Someone who has a casually communicable disease must warn those who come near.¹³ Someone who has a sexually transmissible disease must warn his sexual partners.¹⁴ The same is true when someone has symptoms that he should recognize as flowing from a communicable disease.¹⁵

The principle underlying such liability is simple: It is unreasonable to cause others to face serious health risks without giving them an opportunity to avoid those risks. This is just an application of the broader principle that,

A defendant whose conduct creates a risk of physical or emotional harm can fail to exercise reasonable care by failing to warn of the danger if: (1) the defendant knows or has reason to know: (a) of that risk; and (b)

¹³ [Cite.]

¹⁴ See, e.g., *Doe v. Johnson*, 817 F. Supp. 1382 (W.D. Mich. 1993) (HIV); *Berner v. Caldwell*, 543 So. 2d 686, 689 (Ala. 1989) (genital herpes), *overruled on other grounds*, *Ex parte General Motors Corp.*, 769 So. 2d 903 (Ala. 1999).

¹⁵ See, e.g., *Meany v. Meany*, 639 So. 2d 229, 235-36 (La. 1994) ([give details]).

that those encountering the risk will be unaware of it; and (2) a warning might be effective in reducing the risk of harm.¹⁶

Liability here is not for nonfeasance as such—rather, it is for misfeasance, in the sense of acting (by coming into contact with someone) without taking the proper precautions (such as a warning).

2. Obligation to reveal risk factors

But the obligation to disclose may go beyond situations where a person knows he has a disease or symptoms of a disease. Many people have no such knowledge, but do know that they have engaged in behavior that substantially increases their risk of having the disease. They might know that one of their past sexual partners has since learned that he has the disease. They might know that they have had many sexual partners recently, even if they don't know whether any of the partners have a disease. They might know that they have had sex with someone who has had very many sexual partners (such as a prostitute).

They might know that they have had sex without condoms, or have had receptive anal sex, which is unusually likely to transmit HIV.¹⁷ Or they might simply know that they (if they are men) have had sex with other men in the past, or that they have cheated on their spouses or lovers recently.

All of these factors elevate their risk of having a disease beyond the risk posed by the average person, or by the kind of person their spouse or lover may expect them to be. And these high-risk behaviors is especially relevant when testing is unlikely to produce a reliable result. HIV tests, for instance, don't reliably reveal recent infections, and asymptomatic male HPV infection also can't be reliably tested for.

One court has said there is a duty to warn of one sort of known risk factor—the fact that a past sexual partner has been found to have HIV—but no duty to warn of general “high risk” activity, such as homosexual conduct, promiscuity, or high-risk sexual practices (such as anal sex).¹⁸ Another court has generally rejected such a duty to warn.¹⁹ Another court has suggested that some such duty to warn might exist, but wasn't specific except to say that it doesn't extend when the only high-risk behavior is infidelity.²⁰

¹⁶ RESTATEMENT (THIRD) OF TORTS (PHYSICAL HARM) § 18(a).

¹⁷ [Cite.]

¹⁸ *See, e.g., Doe v. Johnson*, 817 F. Supp. at 1388, 1394.

¹⁹ Minnesota case.

²⁰ *Endres v. Endres*, 968 A.2d 336, 342 n.* (Vt. 2008) (rejecting a duty to warn one's spouse about the fact that one has been cheating, but suggesting that other high-risk behavior might suffice, and noting—apparently favorably—that “At least with respect to the transmission of HIV/AIDS, one commentator has argued that constructive knowledge should be found for defendants who engage in high risk activities, including intravenous drug use, homosexual intercourse, unprotected sex with multiple partners, and prostitu-

This rejection of a duty to warn at least as to some high-risk factors might well be correct. But if it is, it is only because privacy costs are included in the risk-benefit analysis.

Under standard tort law principles, there would be a good case for a duty to warn of all this high-risk behavior.²¹ The potential benefit in disease averted is great. The likelihood of transmission is substantial, both as to HIV and as to more common diseases such as herpes, HPV, and Hepatitis B. The financial cost of disclosure is slight. Warning of risk is thus a cost-effective precaution, which can help avoid the injury that would otherwise have been caused by the potential defendant. Tort law routinely imposes a duty to warn about more speculative risks than this.²²

3. Obligations to reveal that one may be the target of crime

One can pose a threat to others not only because of one's disease, but also because of one's enemies. Say you are a woman being pursued by an abusive ex-spouse;²³ an actress being pursued by a crazed fan; a gang member or an innocent bystander caught up in a gang feud; or an author or cartoonist being pursued by a religious fanatic who thinks that you have committed blasphemy. If your enemy comes to your property to attack you, others might be caught in the crossfire.²⁴

Again, under standard tort law principles, there would be a good case for a duty to warn others of the peril you are in, and that you are

tion. J. Turcotte, *When You Should Have Known: Rethinking Constructive Knowledge in Tort Liability for Sexual Transmission of HIV*, 52 ME. L. REV. 261, 296 (2000)."); see also *McPherson v. McPherson*, 712 A.2d 1043 (Me. 1998) (applying a "known or have reason to know" standard, but accepting the trial court's finding that defendant had no reason to know that he was infected with HPV, despite defendant's knowledge that he had indeed had an extramarital affair).

²¹ Cite.

²² There's no need here for courts to recognize a special affirmative duty to act, as in the *Tarasoff* duty of psychotherapists to warn people whom their patients express a desire to harm. The duty here is simply to help prevent the harm that one's own behavior would otherwise cause.

²³ The hypothetical is a variation on *Rojas v. Diaz*, 2002 WL 1292996 (Cal. Ct. App. June 12). Rojas worked as a gardener at Diaz's house; Diaz had provided shelter for her friends Patricia and Veronica Alvarez, who were fleeing Patricia's abusive husband David Alvarez; David Alvarez came to the house to try to forcibly take Patricia back, and in the process killed Rojas; Rojas's widow sued Diaz for, among other things, failing to warn Rojas of the danger posed by Diaz's harboring of Patricia Alvarez. The court rejected the claimed duty to warn, but on the grounds that Diaz only knew of David Alvarez's generalized threats against Patricia, so that the specific attack at the house was unforeseeable. But under other factual circumstances, the attack might well be foreseeable, especially if (as in the hypothetical in the text), the homeowner was herself the threatened party and thus new more about the details and credibility of the threat.

²⁴ See *Apolinar v. Thompson*, 844 S.W.2d 262, 263-64 (Tex. Ct. App. 1992) (holding that a homeowner could be liable to a housesitter for failing to warn the housesitter that the homeowner "had received harassing phone calls and threats").

thus placing them in.²⁵ If the other person is a new lover, who might be attacked by a jealous ex-lover, your own actions in starting a relationship with the new lover might create a duty to warn (even though there is nothing unreasonable in starting the relationship as such).²⁶ If the other person is a visitor to your property who might be mistaken for a lover, or just caught in the cross-fire, you may have a duty of reasonable care stemming from your obligations as property owner.²⁷ You might thus have to warn all repairmen or delivery people that you and therefore they are in danger.

More significantly, if you are a business owner who is targeted for violence, you might have to warn all your customers. And this might mean more than extra difficulty in hiring willing house-sitters²⁸ or gardeners;²⁹ it might mean that you will be driven out of business, as customers stay away as a result of your legally required warning.

B. *Obligations to Reveal Information About Others*

1. Obligations to reveal others' criminal propensities

You generally have a duty to protect people on your property—customers, service people, tenants, and even social visitors.³⁰ This has long been understood to include warnings about dangerous conditions that you know about but that the visitors might miss.

Under normal negligence principles, this may well include warning about the dangers posed by others who are present—guests, roommates, family members, employees—if you know they are dangerous (e.g., unreasonably jealous, occasionally belligerently drunk, or prone to criminal violence) and that an attack is thus foreseeable. So when a repairman is attacked at a home by such a person, you could be sued for fail-

²⁵ See, e.g., RESTATEMENT (THIRD) OF TORTS (PHYSICAL HARM) § 18(a) (“A defendant whose conduct creates a risk of physical or emotional harm can fail to exercise reasonable care by failing to warn of the danger if: (1) the defendant knows or has reason to know: (a) of that risk; and (b) that those encountering the risk will be unaware of it; and (2) a warning might be effective in reducing the risk of harm.”); *id.* § 19 (“The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party.”). The theory would be that even if simply interacting with others is not a breach of the duty of reasonable care—retreating to live alone in a fortified bunker is too costly—interacting with others without warning them of the danger that this interaction poses is such a breach.

²⁶ See, e.g., RESTATEMENT (THIRD) OF TORTS (PHYSICAL HARM) § ___. Cite Connecticut (??) case rejecting this duty.

²⁷ See, e.g., *id.* at __ (noting equal duties of reasonable care to one’s business visitors and social visitors); [briefly discuss older common law rule with regard to social visitors as licensees, which might have required a duty to warn as well].

²⁸ Cite Apolinar.

²⁹ Cite Rojas.

³⁰ Also your agents, employee or otherwise. RESTATEMENT (SECOND) AGENCY § 471 (duty to warn agents).

ing to warn the repairman about the person’s dangerous propensities. “We can see no reason to say that there is a duty to warn about a freshly waxed and slippery kitchen floor, but not about a homicidal maniac in the back bedroom.”³¹

Likewise, landlords may have an obligation to warn their tenants about other tenants’ criminal histories, if those histories suggest a foreseeable risk of attack on a tenant.³² The same duty extends to universities acting as landlords of dorms. Business owners presumably have an obligation to warn their business visitors, including customers, about employees’ criminal histories (if the employer is bold enough to hire an employee with a criminal history). Tenants who live with dangerous people may have an obligation to warn tenants in other apartments.³³

Nor is this limited to situations where one’s tenant, employee, or housemate has been criminally convicted in the past. The question is simply whether a reasonable person would think that an attack by such an employee or tenant is foreseeable. That the person has been indicted but is out on bail might put one on notice of this risk.³⁴ Likewise if one has just heard a plausible-sounding accusation, even if it has not turned into a legal proceeding.³⁵

In addition to a duty to affirmatively protect people on your property, you also have a duty to avoid causing harm to others—such as neighbors—even when your actions are only one step in the causal chain. Thus, if what you do may foreseeably even if indirectly assist someone in injuring someone, you might have a duty to warn people of that danger.

Say that you let a family member who has just been released from prison stay in your house, and it is foreseeable that he will commit crimes against your neighbors. If he does commit such crimes, your affirmative act of having him in your house, as well as your failure to warn the neighbors, may be both an actual cause and a proximate cause of the attack. You would have acted in a way that helped cause physical harm to another, and the question would then be whether it was rea-

³¹ *Jobe v. Smith*, 764 P.2d 771, 771 (Ariz. Ct. App. 1988); see also *Arvanitis v. Hios*, 705 A.2d 355 (N.J. Super. Ct. App. Div. 1998) (wife’s duty to warn guest about husband’s violent propensities).

³² *Kargul v. Sandpiper Dunes Ltd. Partnership*, 1991 WL 28051 (Conn. Super. Ct. Jan. 29); *Nero v. Kansas State Univ.*, 861 P.2d 768 (Kan. 1993); Tennessee case; *T.W. v. Regal Trace, Ltd.*, 908 So. 2d 499 (Fla. Ct. App. 2005).

³³ *Kargul*.

³⁴ *Nero*.

³⁵ *Lambert v. Doe*, 453 So.2d 844, 848 (Fla. Ct. App. 1984) (duty to warn when the alleged attacker-tenant had not been convicted, because the landlord “had received, several months prior to the subject incidents, reports of assaultive and bizarre conduct” by the attacker); *T.W. v. Regal Trace, Ltd.*, 908 So. 2d 499 (Fla. Ct. App. 2005).

sonable for you to allow the dangerous person to stay in your house without warning neighbors of the danger.³⁶

Psychotherapists also famously (and controversially) have a duty to warn the targets of their patients' anger or hostility, if the patients say things to the psychotherapists that reveal a serious enough danger to the target.³⁷ This is the rare duty that stems from the duty-bearer's (here, the psychiatrist's) relationship with *the dangerous person*; the rest of us generally do not have such a duty.³⁸

But we do have duties that stem from our relationship with *the possible target*, such as when the possible target is a tenant, business invitee, or social guest. So if someone tells us something that shows that he is a danger to such a tenant, invitee, or guest, we may have a duty to warn the prospective target.³⁹

2. Obligation to reveal that others may be the targets of crimes

As I discussed above, the presence of a person who is likely to be targeted for crime—whether by a stalker, a political killer, a rival gang member, or a jealous ex-lover—may also create danger to bystanders. I noted above that those innocent targets might have a duty to warn others of this danger. But of course the targets will often ignore this duty. If they are small businesspeople, they may decide to run a risk of liability for nondisclosure, when the alternative is a near certainty of losing some clients if they do disclose. They may often lack assets, and thus not much worry about liability at all. And many of them might not know about the risk of liability in the first place.

Yet the targets' employers, landlords, and others might also have a duty to warn in such situations. If you know that your tenant's jealous ex-husband has threatened to shoot her, you may have to warn other tenants or prospective tenants, since his foreseeable attack may foreseeably injure them as well. You might likewise have to warn your customers and other business visitors (delivery people, contractors who aren't covered by worker's compensation regimes that preempt tort liability, and so on) if your employee is in danger of being attacked at work.⁴⁰

³⁶ *Kargul*.

³⁷ *Tarasoff*.

³⁸ But see New Jersey case applying such a rule to spouses.

³⁹ See, e.g., *Kinsey v. Bray*, 596 N.E.2d 938 (Ind. App. 1992) (holding that a homeowner had a duty to warn his guest—his ex-wife—that another guest, his new girlfriend, had made threats against the ex-wife).

⁴⁰ Cf. *Burks v. Madyun*, 435 N.E.2d 185, 189 (Ill. App. Ct. 1982) (concluding a homeowner had no duty to warn a babysitter that the homeowner's children had merely been threatened by gang members, but suggesting the result might be different if "her children were previously assaulted by gangs on her premises").

And these duties might well be acted on. The employer or landlord has assets, and may have lawyers who give him this advice. Moreover, in some situations—for instance, a landlord’s warnings to existing tenants about the threat posed to a cotenant, in an environment where many tenants would find it costly to move—the likely financial loss from providing the warning may be fairly low.

To be sure, sometimes the risk of financial loss from providing the warning may be very high, for instance if an employer is contemplating warning customers that an employee is the prospective target of a stalker. But that just means that the duty to warn will pressure the employer to dismiss the employee. It’s not against the law for an employer to dismiss an employee who is a prospective target of violence, and thus an innocent danger to bystanders.⁴¹

Some employers may be inclined to do that in any event, to protect themselves, other employees, or customers. But employers who would normally prefer not to dismiss the employee are likely to feel pressured to do so if they know that they have a duty to warn customers about the peril that the employee poses.

C. Obligation to Gather Information about Others

Negligent hiring law effectively obligates employers to gather criminal history information about some of their employees. Likewise, liability for foreseeable crimes against tenants or customers sometimes requires property owners to install surveillance cameras.⁴² An employer might be required to monitor employees’ use of the employer’s computer, to deter or prevent criminal misuse, such as when an employee uses the computer to upload nude pictures of a child to a child pornography site.⁴³ A party host might be required to monitor his adolescent guests’ behavior, including by watching whether people are sneaking off to the bathroom to have sex.⁴⁴

Likewise, universities and trade schools could in principle be held liable for negligently failing to investigate the background of their students, or failing to report suspicious behavior to the police: Consider a lawsuit arising when a student uses his learned skills to commit a crime

⁴¹ Cite law review article on precisely this subject.

⁴² [Cite.]

⁴³ Doe v. XYZ; see also American Guarantee and Liability Ins. Co. v. 1906 Co. 273 F.3d 605

C.A.5 (Miss.),2001 (negligent entrustment case, though without duty to surveil).

⁴⁴ Doe v. Jeansonne.

(consider the al-Qaeda terrorist training in a flight school), or even simply if the student commits a crime against a classmate.⁴⁵

D. Obligation to Design Products So They Automatically Report Misuse to Government Authorities

We are likely to see similar questions with the law of product design defects. A product manufacturer is liable on a design defect theory if “the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe.”⁴⁶ This includes foreseeable risks of harm to third parties, and not just to the buyers.

Many products are usually used lawfully, but sometimes used criminally: guns, knives, cars, and more. Historically, there have been few alternative designs that could avoid the risk of criminal misuse, without dramatically diminishing the utility of the product. And if the alternative design “deprive[s] a product of important features which make it desirable and attractive to many users and consumers”⁴⁷ then manufacturers wouldn’t have to adopt that alternative. So though the risks of speeding would be reduced by blocking cars from driving faster than 75 miles per hour, that probably doesn’t make cars that can go faster than 75 “not reasonably safe.”⁴⁸ Sometimes driving over 75 may be safe and legal (for instance, if one is taking an injured person to the hospital, or on the few highways where the speed limit is 80).

But modern technology makes it possible to deter many misuses, especially of cars, simply by automatically reporting likely misuse to the police. Modern cars already have computerized control systems, and are expensive enough that the new technology would add comparatively little to the cost, without stripping the product of valuable features—at least if one counts only those features that are used legally.⁴⁹

A car could, for instance, be designed to send a cellular e-mail to the police every time the driver exceeded 75 miles per hour. Or the software could be more sophisticated still, for instance calculating the likely

⁴⁵ Cf. *J.W. ex rel. B.R.W. v. 287 Intermediate Dist.*, 761 N.W.2d 896 (Minn. Ct. App. 2009) (noting that school districts may be liable for negligently failing to prevent foreseeable attack by one student on another).

⁴⁶ RESTATEMENT (THIRD) OF TORTS (PRODUCT LIABILITY) § 2(b).

⁴⁷ *Id.* cmt. f(1).

⁴⁸ For an unsuccessful call for imposing tort liability on sellers of fast cars, see Richard A. Olsen, *Human Factors Engineering Experts and Product Design*, 4 PROD. LIAB. L.J. 23, 31-32 (1992).

⁴⁹ Cf. *Roberts v. Rich Foods, Inc.*, 654 A.2d 1365 (N.J. 1995) (concluding that the manufacturer of an on-board computer for tractor trailers could be held liable for not having a sensor that stops the computer from being used when the vehicle is moving, and where the use of the computer would thus likely distract the driver).

speed limit based on the car's GPS-calculated location, so that even driving 40 could lead to an e-mail to the police, if the speed limit is 25.⁵⁰

The police could then stop the car, or perhaps even send a ticket by mail to the owner, much as red-light camera tickets are sent to owners. This would substantially deter speeding. And if someone has to speed to get a friend to the hospital, he could still do so and either accept the ticket or raise necessity as a defense to the ticket.

Likewise, a car could have a breathalyzer ignition interlock that alerted the police when someone tried to start a car with too much alcohol on his breath. Such a feature would deter some dangerous drivers, and would help the police catch others. And one can imagine many other such reporting features.

Say, then, that you're injured by someone who is driving far above the speed limit. You sue the car manufacturer for defectively failing to include a feature that reported speeding to the police. Speeding-related injuries to third parties are certainly a "foreseeable risk[] of harm posed by the product." They could probably "have been reduced . . . by the adoption" of the speeding-reporting feature; had such a feature been present, a jury could find that the driver would probably have been deterred by the likelihood of a ticket. And because of this, you would argue, "and the omission of the alternative design renders the product not reasonably safe."⁵¹

Unlike in the other areas I describe, I know of no directly analogous cases. But the tort law logic of the argument is fairly strong, likely strong enough to send the case to the jury—unless a court concludes that drivers' interests in not being reported to the police by their own cars defeat the tort claim.

[Mention example of Taser voluntarily packing its cartridges with confetti that bears the serial number of the cartridge, so that criminals who use Tasers could be more easily tracked down. Consider hypothetical of a lawsuit requiring each Taser to have a transmitter and a GPS receiver that sends a message to a central location whenever the Taser is used.]

E. No Countervailing Pressure from the Privacy Torts

[Briefly discuss that in nearly all of the cases where negligence law pressures a defendant to diminish a third party's privacy, there is no

⁵⁰ The speed limit calculation would require a database mapping locations to speed limits; but such a database shouldn't be hard to create. And even if the database simply provides a high estimate for the speed limits—say, setting it to 35 for all places in a neighborhood, even though the limit is 25 in many of them—that would still provide some extra protection against speeding.

⁵¹ See RESTATEMENT (THIRD) OF TORTS (PRODUCT LIABILITY) § 2(b) cmt. __ (suggesting that the presence of safer designs may help satisfy the "renders the product not reasonably safe" prong).

countervailing pressure from the privacy torts. The disclosure almost never gives rise to a disclosure of private facts claim, generally because the facts would usually be seen as of legitimate concern. And the surveillance almost never gives rise to an intrusion on seclusion claim, either because the surveillance is not of particular intimate places (such as bathrooms or bedrooms) or because the defendant can insist—if negligence law pressures him to do so—that the third parties waive their rights.]

II. PRIVACY, AND THE VALUE OF PRIVACY

A. *Privacy Generally*

Privacy means many things in many contexts.⁵² Sometimes it means, for instance, the absence of other humans in close proximity, whether or not they are paying attention to you. Sometimes it means the right to do certain things to your body, such as have an abortion. But in this context I am referring to information privacy: people’s “control over the processing—i.e., the acquisition, disclosure, and use—of personal information”⁵³ about themselves and their activities.

Perfect privacy is, of course, impossible. Whenever people see or hear us, they acquire some information about us, whether we want them to or not. And broad privacy is often undesirable. For instance, I may not want the police to acquire information about a crime that I have committed. But it hardly follows that I should be able to stop them from asking people questions about me, from maintaining a file on their investigation of me, or even from searching my house or demanding a DNA sample from me. (The latter category of police behavior may require a probable cause and a warrant, but once those requirements are satisfied, the police can quite rightly undermine my privacy.)

But privacy is often considered valuable in many ways, and for many reasons (which I will touch on below). And that is also true even of imperfect privacy: privacy even as to things about you that some people know, and that most people can unearth if they try, but that are nonetheless not widely known. [Discuss more.]

Several state constitutions, including the California Constitution, expressly recognize a right to privacy.⁵⁴ The Supreme Court has also suggested that the federal Constitution secures some right to informational privacy,⁵⁵ though the contours of that right are hazy. The Califor-

⁵² See generally Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193 (1998).

⁵³ *Id.* at 1203.

⁵⁴ See ALASKA CONST. art. 1, § 22; CAL. CONST. art. 1, § 1; HAW. CONST. art. 1, § 6; LA. CONST. art. 1, § 5; MONT. CONST. art. 2, § 10.

⁵⁵ *Whalen v. Roe*. Compare *NASA v. Nelson*.

nia courts recognize the constitutional right of information privacy as a potential constraint on tort law.⁵⁶ And this must surely be right—as courts have recognized for centuries in the context of free speech rights,⁵⁷ and more recently in other contexts as well,⁵⁸ the prospect of civil liability may pose constitutional problems.

But even independently of the constitutional right of privacy, privacy costs deserve to be considered when courts are considering the costs and benefits of particular tort policies.⁵⁹ In particular, they need to be considered along financial costs in deciding which proposed precautions are so cost-effective to be required by the duty of reasonable care.

B. Privacy as Tool for Defining Yourself to Others

Possible problem: Why should we have the right to use the law to control how others see us?

C. Privacy as Tool for Maintaining Physical Security

Might be jeopardized if, for instance, landlords or employers have to reveal the threatened status of tenants or employees who are in hiding from attackers.

But normal tort rules already take care of this in some measure, since safety costs of disclosure are weighed against safety benefits.

D. Privacy as Tool for Diminishing the Coercive Power of Criminals Who Threaten Attacks

Having to reveal that one is threatened, and thus risking losing employment, customers, housing, and social acquaintances, would increase the damage to the victim caused by threats of future attacks, and would thus increase the coercive power of the threateners. Being able to keep the threats private would therefore diminish the threateners' coercive power.

E. Privacy as Tool for Rehabilitation

Benefits to ex-convicts who are trying to start afresh, and also to society, since it helps ex-convicts become productive members and to avoid future crime.

⁵⁶ [Cite.]

⁵⁷ See Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, 96 IOWA L. REV. __ (2010).

⁵⁸ *Kentucky Fried Chicken of Cal., Inc. v. Superior Court*, 927 P.2d 1260 (Cal. 1997) (state constitutional right of self-defense).

⁵⁹ [Cite examples of courts considering this in deciding whether to continue to recognize heart balm statutes.]

F. Privacy as Tool for Freedom to Experiment With Behaviors and Relationships

Pervasive surveillance can deter socially valuable experimentation, for instance if someone wants to experiment with something frowned upon in his subculture, though it can also deter criminal conduct.

G. Privacy as Tool for Developing Attitude That Authority Is Not Omnipotent

Pervasive surveillance can instill a sense that the government and other institutions are omnipotent, and that resistance to their will is futile.

H. Privacy Decreasing Risk of Blackmail

Dishonest government officials—or even private persons—could use pervasive surveillance as means to gather information about adversaries' crimes, not to enforce the law but to blackmail the targets.

I. [Many Other Arguments About Privacy]

III. HOW COURTS CONSIDER (OR DON'T CONSIDER) PRIVACY IN NEGLIGENCE CASES

As I mentioned, courts applying the Hand formula could potentially consider whether a proposed precaution would unduly intrude on privacy: Such privacy costs would be part of the burden (B) element in the B < PL analysis. Courts routinely conclude that the defendant wasn't obligated to take some precaution because the precaution would be too expensive,⁶⁰ or would intrude too much on free speech or self-defense rights.⁶¹ Likewise a court could say that the defendant had no duty to disclose information because such disclosure would be too much of a burden on the privacy of the defendant or the defendant's tenants, guests, employees, and so on.

One barrier to this approach, of course, is that it's not clear how courts are the privacy burdens and comparing them with the safety benefits. Another barrier is that courts might not focus on the privacy costs at all, not seeing that they are something that needs to be included in the B calculation. How do courts faced with such matters actually behave?

⁶⁰ [Cite.]

⁶¹ [Cite.]

A. Ignoring Privacy Costs

One possibility is for courts not to discuss privacy costs at all, which suggests that either they are not considering the costs or are leaving them entirely for jurors to consider at trial. Consider, for instance, *Kargul v. Sandpiper Realty, Inc.*⁶²

The alleged facts in *Kargul* paint a remarkable story of a defendant's unusual tendency to give people a second chance—I leave it to the reader to decide whether to commend this tendency or condemn it. Defendant Linda Scott had been the director of a sexual assault crisis service, which counseled sexual assault victims; but she also volunteered at a prison-based mental health program for sex criminals, where she met Lafate Ables. Ables had been convicted of a sexual assault when he was a teenager, and then of another sexual assault shortly after being released from his sentence for the first assault. Nonetheless, Scott and Ables became romantically involved, and when Ables was let out of prison, Scott let him live with her, in the apartment that she rented.

A few months after Ables moved in, he was arrested for a sexual assault of Scott's oldest daughter, which led to another few months in jail;⁶³ yet Scott allowed Ables to keep living with her. Finally, six months later, Ables raped and repeatedly stabbed Kargul, another tenant in the same apartment complex. Kargul sued Scott, arguing that Scott was negligent in failing to warn her fellow tenants that Scott was dangerous.

The trial court held that Kargul's claim survived summary judgment. Scott, like anyone else, had a duty "not to create an unsafe condition" for others by her "affirmative act" (here, the act of letting Ables live with her without warning the neighbors). Scott's action breached that duty, by "increas[ing] the risk of harm occurring to the plaintiff." And because a sexual assault by Ables was reasonably foreseeable—both based on his criminal history and his assault on Scott's daughter—Scott's actions could be seen as a proximate cause of Kargul's injury.

The court's analysis, however, says nothing about the possible privacy costs of applying a duty to warn in this situation. To be sure, Scott's behavior here seemed unusually culpable: She ignored not just Ables' past criminal record, but also his sexual assault on Scott's own daughter. But the rationale of the court decision does not seem to be limited to such unusual situations: The court's reasoning would likely apply equally even in the absence of the assault on the daughter, so that Scott knew only that Ables had committed sexual assaults in the past.

In a sense, then, the court's decision implements something like a "Megan's Law" by way of the tort system. Under this rule, people have a

⁶² 3 Conn. L. Rptr. 154 (Super. Ct. 1991).

⁶³ The opinion at one point says he served 90 days in jail and at another point that he served 60 days in jail.

duty to warn neighbors when they let a sex offender move in as a roommate, or likely even a houseguest. They would have a similar duty to warn neighbors if they just learned that the roommate (e.g., a prodigal son returned to the family home) had been a sex offender. The duty wouldn't be limited to renters; condominium owners and homeowners would likely have a similar duty to warn neighboring homeowners as well. And landlords would, a fortiori, have such a duty to warn tenants and possibly their neighbors if they learn that a tenant is a sex offender.

And, unlike the notification system provided by various "Megan's Laws," this duty would likely not be limited to sex offenders. There's nothing in the opinion that would keep the duty to notify from applying when a roommate has been convicted of robbery, burglary, or assault, or any other crime that shows a foreseeable propensity to act in ways that threaten one's neighbors. The duty wouldn't be as reliably enforced as Megan's Laws would be, of course, since the communications would have to come from private citizens, who may not know their duties or abide by them. But the principle would be quite like a broader version of Megan's Law: If landlords and renters act reasonably, then they would have to notify all neighbors of the violent criminal history of someone moving into the neighborhood.

Now perhaps such a duty would indeed be proper. Megan's Laws, after all, do impose such a disclosure regime as a matter of statute, albeit limited to sex offenders and administered by the police rather than by landlords or primary renters. And in my view convicted criminals have a distinctly reduced entitlement to privacy with regard to their past criminal convictions—public decisions by representatives of the public.

But Megan's Laws rightly drew a good deal of debate, in which the privacy impact was considered.⁶⁴ Similar attention to privacy should be paid when courts articulate similar tort law rules.⁶⁵

Likewise, consider the Texas Court of Appeals' terse decision in *Apolinar v. Thompson*. Charles Thompson invited Roger Apolinar to house-sit while Thompson was out of town. (The court says nothing about whether Thompson was being paid for the house-sitting.) While staying at Thompsons' house, Apolinar was attacked by some third party. Apolinar sued, claiming that "Thompson had received harassing phone calls and threats and, therefore, Thompson had a duty to warn Apolinar or make conditions reasonably safe."⁶⁶ The court concluded that Apolinar stated a negligence claim.

⁶⁴ [Cite.]

⁶⁵ *Murphy v. Eddinger*, 1999 WL 1212445, *4 n.4 (Conn. Super. Ct. Nov. 30) (dictum), suggests the opposite result: A landlord does not have the duty to warn other tenants, at least of tenant's propensity for negligence (e.g., when tenant is "a particularly inept driver" whose driving jeopardizes other cars in the parking lot).

⁶⁶ 844 S.W.2d 262 (Tex. Ct. App. 1992).

Again, though, the court's analysis says nothing about the privacy implications of imposing liability in such a case. The court's theory, after all, isn't limited to house-sitters, but extends to any "invitee or licensee,"⁶⁷ which would include social visitors and not just people who stay overnight. Nor is the court's theory limited to defendants who are in some measure culpable for being in danger of attack, such as criminal gang members who have been threatened by rival gang members. (The opinion says nothing to suggest that Thompson was so culpable.) It would equally apply to, say, women who are targeted by stalkers, or abortion providers who are targeted by anti-abortion zealots, at least if there appears to be a foreseeable risk of an attack that would also

Under the court's logic, then, a woman who is targeted by a stalker would have a similar duty to warn any party guests whom she lets into their home, or any romantic partners (or prospective partners). Likewise, someone who is credibly targeted by a politically or religiously motivated criminal—an abortion provider, an alleged blasphemer against Islam, and so on—would have to warn his friends and other guests of the danger, at least so long as an attack is foreseeable.

Now perhaps such a duty to warn is sensible, and perhaps it is not. But the analysis ought to consider more than standard duty to warn principles that were developed with regard to icy passageways or uncovered pits. Warnings are usually financially expensive, but having to warn that one is the possible target of crime can have considerable privacy costs.

Many people feel it emotionally humiliating to be seen as a victim of crime—as a vulnerable target of a powerful prospective attacker. This is especially so when the targeting stems from past crimes, such as domestic abuse (whether or not it involved sexual abuse). A woman who is fleeing an abusive ex-boyfriend might thus feel a grave privacy violation in having to tell people her story, even the parts that are the bare minimum needed to give them an adequate warning. And this is especially so since a warning given to one person is likely to spread: Tales of stalking or past abuse make for juicier gossip than stories of warnings about icy pavement.

Moreover, privacy is also a tool that people can use to minimize the social and financial impact of being a crime victim—and forced disclosure of the information can increase this impact, compounding the damage the criminal did. A person who must reveal that he or she is the target of a criminal's attention may lose prospective lovers, guests, and customers. To the damage caused by fear and risk of physical injury will be added the damage caused by social ostracism and economic loss.

Now perhaps this loss is justified, because it facilitates the prospective lovers', guests', and customers' ability to defend themselves, even if

⁶⁷ *Id.* at 264.

the self-defense takes the form of shunning the innocent crime victim. But to make such a decision, the legal system ought to consider the privacy costs, rather than just focusing solely on the safety costs. And, as I'll argue in Part IV, it should do so before the case goes to the jury.

B. *Casually Relying on Perceived Privacy Costs*

Other courts do mention privacy costs of proposed precautions, and may indeed weigh those costs heavily—but again with little substantive discussion. Consider, for instance, *Shadday v. Omni Hotels Management Corp.*⁶⁸ Like *Kargul*, *Shadday* arose out of a rape, this time in a hotel: Shadday was raped by another hotel guest (Alfredo Rodriguez Mahuad⁶⁹) in a hotel elevator, and sued the hotel, claiming that it failed to discharge its duty of reasonable care to its guests.

The Seventh Circuit expressly applied the Hand formula: “The practical question (and law should try to be practical) is whether the defendant knows or should know that the risk is great enough, in relation to the cost of averting it, to warrant the defendant's incurring the cost.”⁷⁰ It dismissed some precautions, seemingly on the grounds that they would be too expensive (“a hotel court hardly be required to have security guards watching every inch of the lobby every second of the day and night”).⁷¹ And in the process it also suggested that continuous surveillance might also be an undue intrusion on “privacy”: “The hotel cannot keep [guests] under continuous surveillance—they would be unwilling to surrender their privacy so completely.”⁷²

But while the court was obviously thinking about privacy, it didn't explain just how privacy costs are to be weighed, or are to be determined. Perhaps the court's point was simply that privacy costs are relevant insofar as they pose financial costs: If comprehensive surveillance would lead people to stay away from the hotel, then such a precaution would be highly financially burdensome to the hotel. But it's not clear that many guests would indeed stay away, especially given that a duty of surveillance imposed on this hotel would likely have equally applied to all or most hotels.

Or perhaps the court's point is that the law shouldn't strip guests of their privacy, by pressuring hotels—through risk of liability—to implement “continuous surveillance.” But why exactly? Earlier the court seems to speak favorably of some use of surveillance cameras: The court recited a hotel's “tort duty of maintaining a reasonable perimeter defense to prevent the initial intrusion, and also an inner, back-up defense

⁶⁸ 477 F. 3d 511 (7th Cir. 2007).

⁶⁹ *Shadday v. Rodriguez Mahuad*, 2006 WL 2228958 (S.D. Ind. Aug. 2, 2006).

⁷⁰ *Id.* at 513.

⁷¹ *Id.* at 1516.

⁷² *Id.* at 1517.

in case the intruder manages to get inside the hotel,” and noted that “surveillance cameras” are among the “commonly used methods of protecting the hotel's guests from criminals who try to enter the hotel to prey on them.” How is a court to tell which surveillance is required by the reasonableness standard, and which isn't?

If the concern were simple cost-effectiveness, the question could be answered by comparing the costs of cameras and of monitoring against the expected costs of the crimes that the surveillance could help interrupt or deter (the P×L). And since camera and monitoring costs are likely to decline, more and more surveillance would be cost-effective and thus reasonably required. But the court seems to suggest that the costs of cameras and monitoring aren't the whole question—guests' privacy concerns should also be considered. Yet the court doesn't tell us how this consideration is to happen.

C. *Discussing Privacy in Some Detail*

1. One's own medical history

A few courts discuss privacy in more detail—but their analysis likewise ends up being limited by the difficulty of the problem, and the lack of ready tools for analyzing it. Consider *Doe v. Johnson*,⁷³ a case in which a woman who had had sex with Magic Johnson, and allegedly contracted HIV from him. Doe claimed that Johnson should have warned her that he had contracted HIV; or, if he didn't know he had HIV, he should have warned that he had experienced symptoms indicative of HIV; or, if he didn't know of such symptoms, he should have at least warned her “that he had a high risk of becoming infected with the HIV virus because of his ‘sexually active, promiscuous lifestyle.’”⁷⁴

The court recognized the privacy implications of the woman's claim, and it discussed those implications in detail. It stated that

[R]ecognition of a duty to warn in certain contexts necessarily invades the constitutionally protected privacy rights of individuals in their sexual practices and in marriage, by requiring people to disclose prior sexual history to every potential sex partner. . . . Certainly, court supervision of the promises made by, and other activities engaged in, two consenting adults concerning the circumstances of their private sexual conduct is very close to an unwarranted intrusion into their right to privacy.

But, it went on to say,

[T]he right of privacy is not absolute, and it, “does not insulate a person from all judicial inquiry into his/her sexual relations, especially where one sexual partner, who by intentionally tortious conduct, causes physical injury to the other.”

⁷³ 817 F. Supp. 1382 (W.D. Mich. 1993).

⁷⁴ *Id.* at 1385.

And, in light of the dangerousness of HIV (a matter that, in the court's view, distinguished it "from other sexually transmitted disease, such as herpes," the court concluded that "for the most part, the burden on defendant in this case"—apparently referring to the privacy burden—"is not very high":

[I]f Mr. Johnson (1) had actual knowledge that he was HIV-positive, (2) knew he was suffering symptoms of the HIV virus, or (3) knew of a prior sex partner who was diagnosed with the HIV virus, all he needed to say to Ms. Doe was, "I have the HIV virus" or "I may have the HIV virus." In light of the risk associated with this disease, it is not much to ask a potential defendant to utter these few words. On the other hand, recognizing human nature, it is often difficult at intimate moments to bring up potentially embarrassing facts about oneself. Nonetheless, in the case of the HIV virus, it can be a matter of life and death.

But the court concluded that a person does *not* have the duty to reveal his mere "high risk" status or conduct. This partly stemmed from line-drawing concerns, but partly also from a concern about "privacy implications." This led the court to conclude that "as a matter of law it was not foreseeable that he would pass the HIV virus to Ms. Doe simply because he had unprotected sex with multiple partners prior to his encounter with Ms. Doe." And this was not, I think, just a judgment about probabilities: even fairly low risks may be foreseeable and may give rise to a duty to warn when the cost of the warning is low enough. Rather, it seems to me, that the judgment of unforeseeability "as a matter of law" stemmed from the court's conclusion that the burden imposed by such a duty to warn would be substantial, partly for privacy reasons.

The court's analysis was admirable in its detail, and its bottom line result might well be correct. People might well have a legitimate interest in not revealing some aspects of their medical status or their sexual history—even to their sexual partners, and even where the risk of disease and death is involved. This interest might well suffice to justify concealing most of one's past sex life, including high-risk elements of that sex life. And it might well not suffice to justify concealing knowledge that one of one's past sex partners has HIV, or knowledge that one has HIV or is suffering from symptoms of HIV. But how are we to know that the privacy interest has this weight, as opposed to being weighty enough to justify total concealment, or so lacking in weight that all one's possibly relevant sexual history should be disclosed? Moreover, why should this decision be made by judges, as opposed to juries or legislatures? Unsurprisingly, the *Doe* decision doesn't answer these questions. [Discuss court's reference to knowledge standard in Michigan statutes.]

2. Disclosure of private patient communications by psychotherapists

Tarasoff v. Regents famously held that, when a psychotherapist learned from a patient that the patient might pose a threat to a third

party, the psychotherapist had to warn the potential victim.⁷⁵ The court recognized that this forced disclosure of confidential conversations—indeed, conversations that many would find to be especially likely to contain private information, and especially likely to involve an expectation of confidentiality—implicated privacy.⁷⁶ “We recognize the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy, and the consequent public importance of safeguarding the confidential character of psychotherapeutic communication.”⁷⁷

But the court concluded that the interest was trumped by “the public interest in safety from violent assault.”⁷⁸ The California Legislature, the court pointed out, had carved out an exemption from the evidentiary privilege for psychotherapist-patient communications when “the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.”⁷⁹ Medical ethics rules had done the same.⁸⁰ And, because of this, “the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.”⁸¹

The California Supreme Court thus, to its credit, recognized that there were privacy concerns to be considered, and seemed to take them seriously. And, as in the cases above, it’s possible that the court reached the right result.

But the analysis seems truncated and conclusory. Why should privacy yield to safety here, especially given that the privacy interest appears to be especially strong compared to the many other relationships in which disclosure is not required? Are psychotherapists really so much

⁷⁵ 551 P.2d 334 (Cal. 1976).

⁷⁶ To be sure, under California professional conduct rules, psychotherapists were not required to keep conversations confidential when they had a reasonable concern that the patient would commit a violent crime. But the psychotherapist-patient relationship is in general one in which confidentiality is often expected, and indeed legally mandated in most respects; and the purpose of this government-fostered expectation of confidentiality is to encourage patients to speak freely, without thinking carefully about everything they say before they say it.

⁷⁷ 551 P.2d at __.

⁷⁸ *Id.* at __.

⁷⁹ *Id.* at __.

⁸⁰ *Id.* at __.

⁸¹ *Id.* at __. The dissent disagreed, stating that, “the patient’s constitutional right of privacy [under the California Constitution] is obviously encroached upon by requiring the psychotherapist to disclose confidential communications.” 551 P.2d at __ n.4 (Clark, J., dissenting).

more knowledgeable than friends or acquaintances about what constitutes a credible threat? Or is it that the psychotherapist-patient relationship should be seen as *less* deserving of privacy than relationships among friends (despite the presence of evidentiary privileges and other protections for the former and not the latter)? All we have from the court is a conclusion that the privacy interest “must yield,” and not an explanation of why it must yield.

D. Referring to the Lack of Privacy Protections Vis-à-Vis an Employer or Property or Owner

On occasion, courts conclude that a proposed precaution on defendant’s part is permissible, even though it requires surveillance of or disclosure about a third party, because the defendant has the *legal right* to engage in such surveillance or disclosure. The clearest example is *Doe v. XYZ Corp.*⁸² XYZ’s employee, the stepfather of 10-year-old Jill Doe, had secretly photographed Jill in the nude and then used his work computer to upload the photographs to a child porn site. After the employee was eventually exposed, Jill’s mother Jane Doe (the employee’s ex-wife) sued XYZ on Jill’s behalf.

The employer, Doe argued, had a “duty to exercise reasonable care so to control his [employee] while acting outside the scope of his employment as to prevent him from intentionally harming others . . . [when the employee] is using a chattel”—here, the computer—“of the [employer].”⁸³ Had the employer properly monitored the ex-husband’s computer use, Doe argued, it would have noticed that the ex-husband was accessing child pornography sites; it could then have put a stop to such access, for instance by firing the ex-husband, which would have prevented the uploading of the photos of Jill. And the employer should have realized that the ex-husband might be accessing child porn sites, because its computer logs revealed that the ex-husband was accessing “obvious porn sites (‘Big Fat Monkey Blowjobs,’ ‘Yahoo Groups-Panties R Us Messages’ and ‘Sleazy Dream Main Page’) as well as one that specifically spoke about children: ‘Teenflirts.org: The Original Non Nude Teen Index.’”⁸⁴

⁸² 887 A.2d 1156 (N.J. Super. Ct. App. Div. 2005)

⁸³ RESTATEMENT (SECOND) OF TORTS § 317.

⁸⁴ The ex-husband’s privacy was already in some measure compromised by the employer’s surveillance. But there’s a difference between someone knowing that you’re accessing porn, and their tracking closely exactly what sort of porn you’re accessing (tracking that could well have revealed tastes in lawful adult porn and not just criminal child porn). And more broadly the principle may apply even to companies that don’t actively scan computer log files: After all, the companies certainly could scan those files at low cost, which might suggest, under the court’s reasoning, that they had a duty to do so. Nor is the principle necessarily limited to employers: A similar cause of action could be brought against Internet cafes and other places that could monitor what is done on their computers.

The New Jersey court held that, if the facts were as plaintiffs alleged, the employer would indeed have a duty of reasonable care to make sure that its computers weren't used to injure Jill. And the court rejected the privacy-based objections to imposing such a duty: Because XYC had a right to monitor the use of its computers, and because "[e]mployee's office . . . did not have a door and his computer screen was visible from the hallway, unless he took affirmative action to block it," the employee "had no legitimate expectation of privacy that would prevent his employer from accessing his computer to determine if he was using it to view adult or child pornography."

I will discuss this approach further in Part VI.B, but for now let me just observe one problem with it: that A *may* gather and reveal information without violating B's legally enforceable privacy rights doesn't dispose of whether there is an excessive privacy cost to *requiring* A to do so (on pain of liability).

IV. JUDGES OR JURIES?

A. *How Leaving Such Cases to Juries Can Especially Undermine Privacy Interests*

One way of dealing with privacy costs in negligence cases is just by leaving the matter to each jury. Tort law only requires taking "reasonable precautions." Juries are often asked to decide which precautions a reasonable person has a duty to implement, and to weigh the various costs and benefits of those precautions.

Thus, in principle juries could decide whether a reasonable person would have informed a sex partner about his promiscuous or bisexual past; whether a reasonable landlord would have informed its tenants that another tenant is being stalked by a jealous and violent ex-husband; or whether a reasonable car maker would have built in features to inform the police when the car was going too fast, or was being started by someone who had a good deal of alcohol on his breath. Judges would then refuse to grant summary judgment on such matters, except in the comparatively rare cases in which they conclude that no reasonable jury would have decided, on these facts, that the defendant acted unreasonably.

But this seems to me unsound, if privacy has some value that the legal system ought to consider. This is so for three related reasons.

1. If some privacy-protecting behavior needs to be encouraged or at least tolerated, only a preannounced rule can do the job. Say your client is a landlord who would rather not tell his tenants that one of the tenants is being stalked, but who is worried about the risk of liability for preserving that tenant's privacy. "Chances are that a jury will find your concealment of the information to be reasonable" isn't much of an assurance.

You can't have much confidence that most juries will indeed say that. And even if you are right in your prediction, the overwhelming majority of civil cases don't go to juries. Your advice thus doesn't mean "expect victory," but rather "expect settlement for less than the full amount of damages, after a considerable amount of litigation expenses." Even a clear holding by a court might not give your client absolute predictability, but it will at least give considerably more than your guess about jury behavior would.

2. The role of privacy in determining people's duties is the sort of social judgment that should be made in a way that is easily subject to reasoned analysis, criticism, and revision. Judges have the opportunity to give reasons for their no-duty decisions, and to explain why they balanced privacy and safety in a particular way.

Their decisions can then easily be evaluated by several appellate judges. Courts in other states will have an opportunity to opine on the matter. Scholars can analyze the reasons, and evaluate how they were applied to the facts set forth in the opinions. Legislatures can then revise the rules.

Jury decisionmaking about whether an action was reasonable under a particular set of facts yields no written opinion. Appellate courts review it only to see if a reasonable jury could so find, a relatively deferential standard. An affirmance of the jury verdict would simply mean that liability is permissible in such a situation, not that the court concludes liability is correct.

Judicial review in free speech cases, both involving tort law and otherwise, may offer a good analogy. Many of the standards under which liability for speech can be imposed—for instance, whether a statement was made with "actual malice"—are questions of the application of law to fact. In many contexts, applications of law to fact are reviewed deferentially. But where free speech issues are involved, courts review such application-of-law-to-fact judgments *de novo*, partly to prevent erroneous denials of free speech rights but mostly to better elaborate the legal rules.⁸⁵ And this review happens not just after a verdict, on appeal, but also on pretrial motions. A court deciding whether speech is unprotected—whether against criminal punishment or tort liability—has to decide by itself whether the historical facts (seen in the light most favorable to the nonmoving party) fit within an exception to protection.

⁸⁵ See generally *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Appellate and Summary Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, pt I.B (1998). For examples of this in negligence cases involving liability for speech, see *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1021 (5th Cir. 1987); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071 (Mass. 1989).

Privacy cases likewise involve important interests that courts need to protect. In some states, the interests are of constitutional dimension, because of state constitutional guarantees protecting the right to privacy. They might also be of constitutional dimension under the federal constitution, to the extent that cases such as *Whalen v. Roe* recognize a federal constitutional interest in informational privacy.⁸⁶ Even though such rights to privacy are not absolute, neither is the right to free speech. The point of independent judicial decisionmaking about the legal rules defining the boundaries of free speech and privacy is precisely to make sure that these limited but important rights are adequately protected and defined.

3. In many tort cases, the potential privacy harm is not just to the defendant—or even people of defendant’s class—but also to third parties who aren’t directly represented in front of the court. If an employer must alert customers whenever an employee is the target of a stalker, part of the cost will be to the employer and to other employers, as frightened customers go away. But the greater cost will be to the stalker victims, whom the employer is likely to dismiss in order to avoid the loss.

Likewise, if property owners must put up cameras, coupled with facial recognition software, all over their apartment buildings or shopping centers, the property owners will have to pay a financial cost. But future customers will bear the privacy costs, as their comings and goings (and possibly embarrassing stolen kisses or associations with political radicals) will become recorded and analyzed.

To be sure, defendants who are trying to explain why their actions were reasonable will bring up these harms to third parties. But such arguments may lack vividness and credibility to jurors, precisely because they aren’t made by the people whose interests are at stake. The plaintiff is in the courtroom, arguing about the harm that was inflicted on him. The defendant is in the courtroom, arguing about the cost that taking plaintiff’s proposed precautions would have imposed on him. But the third parties aren’t there to talk about such matters.

But when judges, and especially appellate judges, decide, the third parties’ interests are more likely to be effectively represented. First, organizations representing those parties—for instance, privacy rights advocates such as the Electronic Privacy Information Center or the ACLU, or groups that represent stalker victims—could file amicus briefs. Second, judges, who see a wide range of cases, may be more likely to be able to see the implications of the proposed rule beyond this case. And third, judges, who are trained to consider indirect consequences of proposed rules (trained in law school, in law practice, and through hearing

⁸⁶ [Cite.]

such arguments on the bench) are more likely to be used to considering absent parties' interests on an equal footing.⁸⁷

B. "No-Duty Rules"

So generally leaving the weighing of privacy costs to juries under normal negligence law would likely lead to underprotection of privacy. But tort law as a device for avoiding this.

Tort law has long recognized that the duty of reasonable care—and the broad discretion that this duty leaves to jurors—is rightly modified by judges in certain classes of cases where there are other social values to be balanced beyond safety and efficiency. The Third Restatement calls such judicially imposed limitations “no-duty rules,” and in the comments to § 7 offers a helpful analysis of why many such rules exist.

As the Restatement points out, “when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.”⁸⁸ These are especially present when “negligence-based liability might interfere with important principles reflected in another area of law”⁸⁹—an area of law that deals with values other than safety and efficiency. But, more generally, they are present whenever negligence-based liability trenches on important “social norms” that courts think ought to be protected.⁹⁰

And indeed “no-duty” rules often arise in situations where judges wanted to avoid having tort law trench on other legally or socially protected values. Thus, for instance, the duty of reasonable care is limited by a property owner’s right not to worry about protecting flagrant trespassers, because of the special value recognized by property law—and by social attitudes—in “the possessor's right of exclusive control of real property and the freedom to use that property as the possessor sees fit.”⁹¹ Likewise, as the Restatement notes, under ordinary negligence principles,

A jury might plausibly find the social host negligent in providing alcohol to a guest who will depart in an automobile. Nevertheless, imposing liability is potentially problematic because of its impact on a substantial slice of social relations. Courts appropriately address whether such liability should be permitted as a matter of duty.⁹²

⁸⁷ [Cite articles discussing this phenomenon.]

⁸⁸ See, e.g., RESTATEMENT (THIRD) OF TORTS (PHYSICAL HARM) § 7(b).

⁸⁹ *Id.* cmt. d.

⁹⁰ See, e.g. *id.* cmt. c (discussing the general rule that social hosts should not be held liable for serving alcohol to their guests, even when the serving of the alcohol ends up contributing to the guest’s driving drunk and injuring someone).

⁹¹ See, e.g., RESTATEMENT (THIRD) OF TORTS (PHYSICAL HARM) § 52.

⁹² *Id.* § 7 cmt. a.

And most state courts have indeed rejected such social-host liability, partly because accepting liability would affect “social relations” by requiring social hosts to police their guests’ behavior.⁹³ Rather than leaving to each jury in each case the decision whether to so affect social relations—and thus in the process imposing the risk of liability and litigation costs even if most juries rule against liability⁹⁴—courts have made the judgments themselves, using a no-duty rule.

Tort law likewise protects the value of consumer choice in products liability cases. When plaintiff claims that defendant’s product is “so dangerous that it should not have been marked at all,” courts generally refuse to send such cases to the jury: The decision whether to effectively deny consumers access to certain products, courts conclude, ought to be made by other government actors (such as legislatures and administrative agencies).⁹⁵ The same is true when the plaintiff urges an alternative design that would eliminate the very features that consumers find most appealing, such as a convertible’s open roof,⁹⁶ or a Volkswagen van’s design that “provide[s] the owner with the maximum amount of either cargo or passenger space in a vehicle inexpensively priced and of such dimensions as to make possible easy maneuverability” (albeit with some loss of safety in a front-end collision).⁹⁷ Legislatures and administrative agencies sometimes do choose to ban products that they see as on balance more harmful than valuable—fireworks, illegal drugs, alcohol, and the like. But courts generally do not allow juries to engage in the cost-benefit balancing that involves such consumer choice questions.⁹⁸

Courts have similarly imposed no-duty rules in cases where the plaintiff claimed that the defendant was unreasonable for failing to comply with a robber’s demands,⁹⁹ for distributing books or video material that allegedly contained incorrect information that led to injury,¹⁰⁰ or for playing a contact sport in an allegedly negligent way (setting aside cases of reckless or intentional injury).¹⁰¹ Here too the decisions have been based on a reluctance to let juries weigh not just cost and safety but also other values, such as people’s right to resist crime, people’s freedom of expression, and people’s enjoyment of sports that

⁹³ *Johnston v. KFC Nat. Mgmt. Co.*, 788 P.2d 159, 163 (Haw. 1990); *Garren v. Cummings & McCrady, Inc.*, 345 S.E.2d 508, 510 (S.C. Ct. App. 1986); *Miller v. Moran*, 421 N.E.2d __, 1049 (Ill. Ct. App. __); *Burkhart v. Harrod*, 755 P.2d 759, 762 (Wash. 1988).

⁹⁴ 788 P.2d at 164.

⁹⁵ RESTATEMENT (THIRD) OF TORTS (PRODUCT LIABILITY) § 2 cmt. d.

⁹⁶ *Dyson v. General Motors Corp.*, 298 F. Supp. 1064, 1073 (E.D. Pa. 1969) (dictum).

⁹⁷ *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1073–74 (4th Cir. 1974).

⁹⁸ See RESTATEMENT (THIRD) OF TORTS (PRODUCT LIABILITY) § 2 cmt. e & reporter’s note cmt. e (discussing the very limited exceptions to this rule).

⁹⁹ *KFC etc.*

¹⁰⁰ See, e.g., RESTATEMENT (THIRD) OF TORTS (PHYSICAL HARM) § 7 cmt. d; [cases].

¹⁰¹ Cite.

necessarily involve some risk of injury. [Mention discretionary function example.]

Recognizing some such no-duty rules in privacy cases helps avoid some of the problems identified in Part IV.A. And such rules are classic situations in which “liability depends on factors applicable to categories of actors or patterns of conduct,” and in which “a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases.”¹⁰² A rule that landlords need not warn tenants that other tenants are being persecuted by criminals—even when the persecution creates a risk to everyone—can be evaluated and either adopted or rejected as a general proposition, no less than a rule that property owners are not liable to flagrant trespassers.

So it seems to me that judges should take the lead in formulating no-duty rules, under which a defendant’s decision not to gather or reveal certain information would be treated as *per se* reasonable. Perhaps the rules should be narrow and perhaps they should be broad, depending on the conclusions that the legal system reaches about the value of privacy. But they should be articulated as legal rules by courts, and not case-by-case judgments by juries.

V. JUDGES OR LEGISLATURES (OR ADMINISTRATIVE AGENCIES)?

I have argued that judges should develop “no-duty” rules under which defendants would have no duty to take certain precautions when those precautions sufficiently affect privacy. Here, I want to suggest that in many situations there are good reasons for judges to make these rules quite broad, so that—perhaps with some historical exceptions—people should be required to take privacy-impairing actions only when legislatures and administrative agencies have so decided.

There are, I think, two reasons for this.

1. To begin with, legislative actions (a term that I’ll use to also include administrative actions) are able to draw sharp lines in ways that courts have historically been reluctant to do. Legislative decisions to publicize sex offenders’ identities, for instance have generally clearly defined which crimes lead to such publicity and which do not. Judicial decisions imposing potential liability on landlords and others for failing to disclose someone’s criminal history have not drawn such lines. Instead, they have required disclosure when failure to disclose is “unreasonable.”

Likewise, a legislative decision mandating cameras on, say, ATMs would clearly define the zone of mandated surveillance. A judicial decision that required property owners to impose cameras in certain cases would generally lack any such clear boundary.

¹⁰² *See, e.g.*, RESTATEMENT (THIRD) OF TORTS (PHYSICAL HARM) § 7 cmt. a.

And such vague standards will often yield a greater interference with privacy than sharper standards would, especially when prospective defendants are asked to surveil or reveal information about third parties, rather than reveal information about themselves. The risk of litigation may pressure such defendants to disclose certain information about third parties even in cases where a jury ultimately finds that disclosure was not mandated. When erring on the side of overdisclosing or over-surveilling means alienating some customers, but erring on the side of underdisclosing or undersurveilling means vast potential costs in attorney fees and damages awards, businesses will be tempted to err on the side of greater disclosure and surveillance.

In fact, legislatures have a good deal of experience dealing with privacy linedrawing issues (though of course the results they have reached are often controversial). They routinely decide what information should be released by the government, whether through sex offender notification, rules related to expungement or sealing of criminal records, rules related to the revealing or concealing of various professional disciplinary records or government employee records, and more. And they routinely decide what disclosures various businesses and individuals have to make, both to customers and to the government. The resulting system, it seems to me, is for all its flaws better than a system that requires or allows “reasonable” disclosure, with decisionmaking to be left to judges or juries in each particular case.

2. The very fact that legislatures can draw arbitrary lines, based on their sense of public attitudes, rather than purporting to make decisions based on principle, makes them familiar and legitimate places for weighing incommensurables such as safety and privacy. That is indeed a big part of legislators’ job: drawing lines based on the felt moral and practical attitudes of the majority.

As I noted above, for instance, courts are reluctant to decide when a product’s harms outweigh its benefits to the point that it shouldn’t be sold at all. But legislators routinely make such decisions. Thus, for instance, legislatures may ban various classes of guns. (The Second Amendment and state constitutional rights to bear arms likely do not preclude such bans, so long as the bans don’t extend to all guns or to all handguns.¹⁰³) But even before Congress preempted tort lawsuits against gun manufacturers that were based on claims that certain guns failed a risk/benefit balancing,¹⁰⁴ only one court accepted such a claim.¹⁰⁵

¹⁰³ See Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1484, 1489 (2009) (discussing the likely constitutionality of bans on so-called “assault weapons”); *Robertson v. City & County of Denver*, 874 P.2d 325, 333 (Colo. 1994) (upholding such a ban under a state constitution that clearly secured an individual right to keep and bear in self-defense); *Benjamin v. Bailey*, 662 A.2d 1226, 1232–35 (Conn. 1995) (same); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993) (same).

¹⁰⁴ [Cite.]

Likewise, radar detectors might well predominantly facilitate criminal and dangerous conduct, and might fail a risk/benefit balance; this is why some state legislatures have banned them.¹⁰⁶ But given the state of the law as summarized in the *Restatement*, courts almost invariably decline to make such judgments, and leave it to voters and their elected representatives to decide which classes of products should be removed from the market.¹⁰⁷

The same is probably true—though there is less discussion about this—when a proposed rule would treat people unequally along certain dimensions. It might well be, for instance, that certain kinds of cars are unusually likely to be driven dangerously by younger drivers. Certainly younger drivers are dangerous; this is why many car rental companies don't rent to under-25-year-olds. And certainly some cars are especially appealing to people who want to drive dangerously.

Yet even if there was evidence that sports cars were unusually dangerous in the hands of under-25-year-olds, I doubt that a court would or should endorse holding car dealers liable under a negligent entrustment or negligent distribution theory for selling a sports car to someone who is too young. Legislatures may draw age classifications even among adults, and constitutional equality guarantees don't generally forbid this. But courts don't generally make these judgments, and probably shouldn't make these judgments. If the law is to divide citizens into classes based on age, that should be done by legislators elected to make such decisions.

We see the same approach in some of the social host liability cases. Thus, for instance, Illinois and South Carolina courts expressly rejected such liability largely because “[a] change in the law which has the power to so deeply affect social and business relationships should only be made after a thorough analysis of all the relevant considerations. . . . The type

¹⁰⁵ *Kelley v. R.G. Industries, Inc.*, 497 A.2d 1143, 1152-59 (Md. 1985), *rev'd by statute*, MD. CODE ANN., Crim. Law art. 27 § 36-I (Supp. 1990). *See generally* *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 207 & n.16 (Cal. Ct. App. 1999) (Haerle, J., concurring and dissenting) (“I am impressed by the many times the relevant court has declared that invitations to impose a duty not to produce or market a given gun or ammunition are properly addressed to the appropriate legislative body rather than the courts,” citing cases). The California Supreme Court ultimately agreed with Judge Haerle’s bottom-line result, though on statutory grounds. *Merrill v. Navegar, Inc.*, 28 P.3d 116 (2001).

¹⁰⁶ [Cite.]

¹⁰⁷ *See generally* RESTATEMENT (THIRD) OF TORTS (PRODUCT LIABILITY) § 2 cmt. e & Reporter’s Note to cmt. e (noting that only one jurisdiction takes the contrary view as a matter of judicial holding, and only one other takes it as a matter of statute, and even then “in a very limited manner”); *Bojorguez v. House of Toys, Inc.*, 133 Cal. Rptr. 483, 484 (Cal. Ct. App. 1976) (“Here Diane wants us to hold the retailer and distributor negligent for selling toy slingshots to the class of persons for whom they were intended—the young; in effect, she asks us to ban the sale of toy slingshots by judicial fiat. Such a limitation is within the purview of the Legislature, not the judiciary.”). For an unsuccessful call for imposing tort liability on sellers of radar detectors, see Richard A. Olsen, *Human Factors Engineering Experts and Product Design*, 4 PROD. LIAB. L.J. 23, 31-32 (1992).

of analysis required is best conducted by the legislature using all of the methods it has available to it to invite public participation.”¹⁰⁸ It is not for the judicial process, the courts concluded, to decide whether hosts should be required to police their guests’ alcohol consumption. Such balancing of host and guest autonomy vs. safety can be done, but it should be done by legislatures.

The weighing of privacy vs. safety has the same characteristics as the weighing of consumer choice vs. safety, of equality vs. safety, and of autonomy vs. safety. It involves comparing incommensurable values that are far removed from the familiar efficiency vs. safety tradeoff that courts routinely consider in negligence cases. It involves making judgments that are hard to defend as a matter of legal principle, but easy to defend as a matter of what the public, through its representatives, chooses. And it requires considering the interests of people beyond the parties to a case. As I mentioned above, judges (especially appellate judges) are better able than juries to consider such interests of third parties, but legislators are even more accustomed and equipped to do so:

[B]ecause judicial decisionmaking is limited to resolving only the issues before the court in any given case, judges are limited in their abilities to obtain the input necessary to make informed decisions on issues of broad societal impact like social host liability. . . . “[O]f the three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions based on a societal consensus.” It is for this very reason that public policy usually is declared by the Legislature, and not by the courts.¹⁰⁹

[I also need to discuss the fact that tort law decisions that interfere with privacy, like tort law decisions that constrain consumer liberty, are still revisable by legislatures. A court might conclude that a conclusion that distributing a product is unreasonable, or that not revealing one’s tenants’ criminal history is unreasonable, is just a first step in a discussion with legislators: The court can take a stab at weighing safety against privacy or liberty, but if the legislature disapproves, it can overrule the decision using its own weighing. Is that enough to lead us to be comfortable with having judges make such decisions?]

[More importantly, I need to talk about well-settled privacy restrictions, such as the duty to warn people about your communicable diseases. Do they prove that there’s no reason to be reluctant to leave courts

¹⁰⁸ *Garren v. Cummings & McCrady, Inc.*, 345 S.E.2d 508 (S.C. Ct. App. 1986) (quoting *Miller v. Moran*, 421 N.E.2d 1046, 1049 (Ill. Ct. App. 1981)); *see also* *Burkhart v. Harrod*, 755 P.2d 759, 762 (Wash. 1988) (“It is also difficult to estimate the effect that social host liability would have on personal relationships. Indeed, judicial restraint is appropriate when the proposed doctrine, as here, has implications that are ‘far beyond the perception of the court asked to declare it.’”).

¹⁰⁹ *Burkhart v. Harrod*, 755 P.2d 759, 761 (Wash. 1988) (quoting *Bankston v. Brennan*, 507 So.2d 1385, 1387 (Fla. 1987)).
Wash., 1988.

with the power to require precautions that compromise privacy? Are they different from other precautions? Or could they be acceptable precisely because they are historically well-accepted, but new privacy restrictions should be left to legislators? The *Tarasoff* duty imposed on psychiatrists might be a good test case: Should courts have left it to legislatures to decide when psychiatrists and others ought to breach patient confidences in the interests of public safety? *See, e.g., Peck v. Counseling Serv. of Addison County, Inc.*, 499 A.2d 422, 428 (Vt. 1985) (Billings, C.J., dissenting). I need to discuss further the substantial literature on this as to *Tarasoff*, though this literature doesn't discuss privacy more broadly.]

VI. HOW JUDGES SHOULD ANALYZE PRIVACY/SAFETY TRADEOFFS (IF JUDGES ARE TO ANALYZE THEM)

A. *Broad Liability as Merely Internalizing the Costs of Privacy Protection?*

Under one vision of tort law, the purpose of tort law is to require people to internalize the costs of their behavior, even if their behavior is quite morally proper.¹¹⁰ This is often used as an argument for broad liability: People still remain free to do what they like, but they just have to pay for the extra risk that this imposes on others.

In the context of privacy/safety tradeoffs, this would be an argument for having no privacy constraints on tort liability, which is to say for having both judges and juries weight privacy costs at zero. Liability would then be potentially imposed in all the cases that I describe, though privacy might still be protected for those who are willing to pay for such protection. Someone who doesn't reveal his sexual history, and then ends up transmitting a sexually transmitted disease, will simply have to pay (if he can) for the damage caused by the disease. Likewise, someone who doesn't reveal a different danger stemming from having sex with him—the risk of violent retaliation by a jealous ex-lover—would have to pay for the damage caused by his failure to disclose this.

The same would apply if the negligence claim rests on the defendant's failure to disclose, gather, or report information about someone else. If tort law imposes liability on landlords who fail to inform their tenants about other tenants' criminal history, or about other tenants' being targeted by stalkers, then in principle tenants who don't want this information disclosed could find landlords who are willing to trade off the risk of liability for a sufficient increase in rent. If car manufacturers are liable if their cars don't report speeding to the police, people who

¹¹⁰ [Cite.] *See, e.g., Bamford v. Turley*, 122 Eng. Rep. 27 (Ex. Ch. 1862) (Bramwell, B.).

want more discreet cars could buy them so long as they pay enough of a markup to compensate the manufacturer for the higher risk of liability.

But I don't think such a view of liability as mere internalization of costs is correct, at least when it comes to negligence liability and privacy. To begin with, the premise of negligence law is that it imposes liability for wrongful behavior—a breach of a duty of reasonable care. Some people might deliberately breach the duty and pay the costs, if the breach is sufficiently worthwhile for them. But the tort system still morally condemns their action. Tort aims to stigmatize the behavior as negligent and unreasonable, and not only to require payment for it. (If we were talking about a strict liability regime, the matter might be different, but rightly or wrongly our legal system deals with these problems using a negligence test.)

Relatedly, this moral stigma may well lead to the imposition of punitive damages. Punitive damages are generally unavailable for mere negligence, but they are available if the defendant is seen as having a “conscious disregard for safety.” (That is what happened, for instance, in the famous McDonald's coffee case, as well as the Ford Pinto case.) If punitive damages are available, then the efficient cost internalization story will no longer apply. But beyond this, the availability of punitive damages further reflects that negligence law involves the making and enforcement of moral judgments. A system that labels behavior as unreasonable and a punishable breach of duty can't be defended on the grounds that it merely requires people to internalize the costs of their actions.

Privacy, at least in certain situations, is also seen by many as providing social benefits that aren't entirely internalized; and privacy restrictions create corresponding social costs. Surveillance is often thought as producing citizens who are reluctant to resist even unreasonable government impositions, because they are intimidated by their habit of always thinking that the government is watching. A duty to disclose that one is a target of criminal attackers—whether ideological enemies, jealous exes, or gangsters—would add a weapon to the criminals' arsenal, and would further discourage people from resisting the criminals' coercive demands. Even if requiring people to internalize both the costs and benefits of an activity in theory provides optimal deterrence, requiring them to internalize the costs of privacy when they can't internalize the social benefits of privacy would overdeter socially useful privacy seeking.

Of course, not all privacy seeking is indeed socially beneficial; consider, for instance, the desire to conceal one's communicable disease. But that just means that no-duty rules should be limited to the socially beneficial privacy seeking behavior, rather than to all such behavior.

Finally, requiring people to pay if they are to preserve their privacy is a substantial burden—for some, an unaffordable burden—on the underlying privacy right. If one sees privacy, or certain aspects of privacy,

as something like driving, such a burden may be acceptable, just as requiring people to buy liability insurance in order to drive is seen as acceptable. But if one sees certain aspects of privacy as a deeper right, such as a right to speak or a right to sexual intimacy, such requirements should be more suspect: The poor as well as the rich should be available to enjoy the benefits of privacy, even if this may sometimes impose a cost on third parties.

B. The Limits on Borrowing from Other Privacy Contexts

It may be tempting to try to borrow rules from other privacy contexts—such as Fourth Amendment law, or the privacy torts—to determine which privacy interests should form the basis of no-duty rules. But the temptation should be resisted.

The privacy rules in those fields were developed based on concerns that are specific to those fields: limits on federal judicial authority to impose constitutional rules on state governments, the property rights of property owners, the First Amendment rights of speakers who want to disclose information about others, and the like. Judgments reached in those fields in favor of restricting privacy simply mean that privacy costs are for some reason not enough to carry the day against those rival concerns. Those judgments don't tell us much about the magnitude of those privacy costs, or how the privacy costs should be weighed against the safety benefits involved in negligence cases.

Consider, for example, employees using their employer's computer systems, or for that matter Internet café visitors using the café's computer systems.¹¹¹ Such users have very limited privacy rights vis-à-vis the computer owners, because the owners' property rights give them the right to monitor what happens on their property, especially if the owners make this clear to the users (as employers often do).

But this doesn't mean that the users' privacy has no value, and that the privacy cost of surveillance can be set at zero in balancing privacy costs and safety benefits. It just means that the privacy cost is not counted where that particular cost-benefit balance is not in play—in the user's relationship with the computer owner, which is governed by the owner's property rights and its contractual relationship with the user.

This, I think, helps show the error of the New Jersey appellate court's reasoning in *Doe v. XYZ Corp.*, discussed in Part III.D. The court held that an employer had a duty to reasonably monitor its employees' use of the employer's computers, for instance to check whether the employees were using the computers to post child pornography (a tortious injury to the children involved). And the court held—partly relying on Fourth Amendment cases holding that a government employer's search

¹¹¹ See RESTATEMENT (SECOND) OF TORTS §§ 308, 318.

of its employees' work computers was constitutional—that imposing a duty to monitor wouldn't unduly undermine employee privacy.

Yet that A *may* gather and reveal information without violating B's legally enforceable privacy rights doesn't dispose of whether there is a privacy cost to *requiring* A to do so (on pain of liability). We often have the right to gather information about people, or to reveal it. For instance, we may tell a friend about another friend's sexual history, or repeat a statement that suggests a friend may pose a danger to someone. We may even reveal such information about our friends to the world at large, "if the matter publicized is of a kind" that would not "be highly offensive to a reasonable person," or if it is "of legitimate concern to the public."¹¹²

Our right to do this may be a First Amendment right, especially if the information about the friend is a matter of public record, for instance that the friend has a criminal conviction, or has gotten a restraining order against a stalker.¹¹³ And even setting aside the First Amendment, the disclosure tort has long been crafted to protect people's ability to gossip with friends, or to publicize newsworthy information. Our right to speak has been seen as weighty enough to overcome the privacy cost of speaking. But it doesn't follow that a legal requirement that we reveal such information about our friends—even when we don't want to exercise our right to speak—poses no privacy cost.

Likewise, property owners have broad authority to observe what is happening on their property, especially if they warn people in advance that they have such authority. For instance, an apartment building owner probably may videorecord everything that happens in common spaces. Yet this doesn't stem from a judgment that such videorecording has no impact on tenant privacy. Rather, it stems from a judgment that the owner's property rights authorize him to do this notwithstanding tenant privacy interests, and perhaps that tenants implicitly accept (or even welcome) this restraint on privacy by staying in the building. So it doesn't follow that privacy concerns should be weighed at zero when the question arises whether all landlords have a duty to install such cameras.

The same goes for employer control. It is true that our employers have a great deal of access to information about us. They can perform a wide range of investigations, at least if they ask our permission as a condition of continued employment (which many employers do). They can videotape and audiorecord us at work. They can monitor our use of work computers, or even work-provided computers that we take home with us. They can to a large extent investigate our off-the-job behavior. But these powers stem from their right to control their property, and to

¹¹² See RESTATEMENT (SECOND) OF TORTS § 652D (describing these limitations on the tort of disclosure of embarrassing private facts).

¹¹³ *Florida Star v. B.J.F.*; *Gates v. Discovery Communications*.

condition access to other property (our paychecks) on our agreement to let them monitor us to some extent. It doesn't follow that our privacy at work is therefore of no weight in the tort law privacy-safety tradeoff, what they *may* do under the law of employer-employee relations is something that they *must* do under tort law.

VII. WHAT WEIGHT SHOULD BE GIVEN TO PRIVACY COSTS

- A. *Privacy and Likely Crime Targets' Duty to Warn Bystanders*
- B. *Privacy and Duty to Warn Sexual Partners of Past High-Risk Behavior*
- C. *Privacy and Duty to Disclose Employees' or Tenants' Criminal Histories*
- D. *Privacy and Property Owners' Duty to Engage in Video and Audio Surveillance of Publicly Accessible Areas*
- E. *Privacy and Computer Owners' Duty to Monitor Computer Use*
- F. *Privacy and Manufacturers' Duty to Design Products So the Products Report Likely Illegal Behavior*

VIII. CONCLUSION