

**SYMPOSIUM: PRIVACY JURISPRUDENCE AS AN
INSTRUMENT OF SOCIAL CHANGE**

**FIRST AMENDMENT PRIVACY AND THE BATTLE FOR
PROGRESSIVELY LIBERAL SOCIAL CHANGE**

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I. INTRODUCTION

Privacy law has been an instrument of social change. Privacy-based legal arguments have been used to support progressive claims that government must cease to criminalize morally controversial personal choices.¹ But privacy law has also been an effective instrument

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¹ See, e.g., *Roe v. Wade*, 410 U.S. 113, 160–63 (1973) (holding that the fundamental right to privacy demands abolishing state laws that categorically criminalize abortion practices which were rejected by some but not all ethicists and religious groups). But see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 110 (1990)

of social stasis. Privacy-based legal arguments have been used to support conservative claims that neither government nor fellow citizens can interfere with traditional practices merely for the sake of progressive ideas about marriage, family, social life, or citizenship.² To illustrate these points, I explore themes of social progress and social stasis through an examination of First Amendment³ privacy doctrines. The Supreme Court has identified associational privacy, informational privacy, anonymity, and privacies of religion, thought, and intellect as requirements of the First Amendment, giving rise to a robust First Amendment jurisprudence of privacy and private choice.⁴

The concept of privacy plays a major role in the jurisprudence of the First but also the Third, Fourth, Fifth, and Fourteenth Amendments. Here, I focus on the First Amendment. First Amendment privacy law is an especially rich context for freshly assessing the past

(suggesting that the “right of privacy” invented by the Warren Court matured into a judicial power to dictate moral codes).

- 2 *See, e.g.*, *State v. Rhodes*, 61 N.C. 453, 459 (1868) (“We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence.”).
- 3 The Amendment provides that: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. The Amendment applies to Congress, but also to state lawmakers. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“[W]e . . . assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”). Courts and parties before them have introduced the First Amendment guarantees of religion, free expression, and peaceable assembly on behalf of interests in spiritual life, private thought, anonymity, and exclusive group association. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 209–10 (1972) (upholding the ability of the Amish religion to reject competitive, material life in favor of simple, spiritual existence lived in harmony with nature), *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (upholding petitioners assertion of a “right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home”), *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462–63 (1958) (requiring NAACP to produce membership list to state is a substantial restraint on freedom of association and would adversely affect members’ ability to foster their beliefs due to fear of exposure and consequent reprisal); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 580–81 (1995) (excluding those whose views are at odds with parade organizers is a permissible expressive freedom of speech).
- 4 *See, e.g.*, *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (holding that a state may not ban anonymous political literature opposing taxes); *Yoder*, 406 U.S. at 234 (holding that a state may not require members of the Amish faith to send children to school pursuant to compulsory schooling laws that violated their religious beliefs); *Stanley*, 394 U.S. at 568 (holding that criminalizing the mere possession of obscene material in the home is prohibited by the First and Fourteenth Amendment); *Patterson*, 357 U.S. at 466 (holding that a state may not require organization to reveal names of its rank-and-file members).

success and future potential of privacy concept-based jurisprudence as an instrument of progressive social change for African Americans, women, and gay, lesbian, and bisexual Americans. In First Amendment cases, judicial application of concepts of associational privacy, informational privacy, Internet anonymity, and intellectual privacy have often furthered the ends of tolerance, respect for individuals, and equality.⁵ But those same concepts of privacy have been applied in First Amendment cases to, in effect, preserve the status quo of intolerance, disrespect, and inequality. Indeed, in the First Amendment arena, historically subordinated groups and those hostile to the equality and dignity of historically subordinated groups have likewise claimed privacies of free association, exclusive association, and anonymous speech to further their ends. As a legal tool, First Amendment privacy jurisprudence is aptly likened to the proverbial double-edged sword, an attractive but perilous weapon when deployed either by socially liberal or socially conservative idealists. Privacy law must be understood both as an instrument of progress and change for the better and as an instrument of stasis and change for the worse.

II. PRIVACY AND THE CONSTITUTION

The word “privacy” does not appear in the original eighteenth-century U.S. Constitution or in any of its twenty-seven eighteenth, nineteenth, or twentieth century Amendments.⁶ Little can be made of its absence.⁷ That is because, although the Founders and Framers did not include the word “privacy” in the text of the written constitution, rich *conceptions* of privacy are implicit in any plausible renderings of the text. That privacy and private property are implicit constitutional values is strongly reflected in the Third Amendment’s limit on government access to private houses: “No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in

⁵ Examples of such cases are focal points of this Article and will include *Patterson*, 357 U.S. at 466 (holding that a state may not demand membership list of civil rights group dedicated to African American equality) and *Wallace v. Brewer*, 315 F. Supp. 431 (M.D. Ala. 1970) (finding that a state may not demand names and registration of members of a Nation of Islam group that purchased land in state).

⁶ See generally Anita L. Allen, *Constitutional Law and Privacy*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 145 (Dennis Patterson ed., 2d ed. 2010) (advancing argument repeated here that protection for privacy is implicit in explicit in nation's founding principles and Bill of Rights).

⁷ Cf. Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 69 (2011) (“The text of the Constitution may say a lot, but it does not say everything one needs to know to resolve all possible cases and controversies.”).

time of war, but in a manner to be prescribed by law.”⁸ That privacy is a constitutional value is also strongly reflected in the Fourth Amendment.⁹ Recognizing a proper sphere of household, social, and work product privacy, the Fourth Amendment asserts that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁰

The Fifth Amendment shelters private thoughts and belief by limiting the government’s power to compel persons to provide evidence against themselves that would lead to their prosecution in a criminal proceeding: “[N]or shall any person . . . be compelled in any criminal case to be a witness against himself.”¹¹ The Ninth Amendment guarantee of unenumerated rights acknowledges deeply rooted traditions of non-interference with decision making about personal life: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹²

In the eighteenth century, as now, normative ideals of privacy and private choice in everyday life subsisted in common understandings of the proper means and ends of constitutional law, including the protection of houses, intimacy, conscience, business, and personal communications, and through limits on state intrusion, surveillance,

8 U.S. CONST. amend. III; *see also* *Engblom v. Carey*, 677 F.2d 957, 962 (2d Cir. 1982) (“The Third Amendment was designed to assure a fundamental right to privacy.”); Robert A. Gross, *Public and Private in the Third Amendment*, 26 VAL. U. L. REV. 215, 221 (1991) (noting that the Third Amendment provides a “foundation for a right of privacy guaranteed by the Constitution”).

9 U.S. CONST. amend. IV. *But see* Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1515 (2010) (suggesting that the Fourth Amendment reasonable expectation of privacy test should be abandoned).

10 U.S. CONST. amend. IV; *see also* *Katz v. United States*, 389 U.S. 347, 350 (1967) (conceding that the Fourth Amendment “protects individual privacy against certain kinds of governmental intrusion”).

11 U.S. CONST. amend. V. *Cf.* *Tehan v. United States*, 382 U.S. 406, 414 n.12 (1966) (noting that the Fifth Amendment reflects “our respect for the inviolability of the human personality and the right of each individuals ‘to a private enclave where he may lead a private life’”).

12 U.S. CONST. amend. IX; *cf.* *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (striking down laws criminalizing the use of contraception by married couples); *id.* at 490, 493 (Goldberg, J., concurring) (“[T]he Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement.”).

and interference with individual and collective liberty.¹³ Though conceptions of privacy—associational,¹⁴ informational,¹⁵ physical,¹⁶ decisional,¹⁷ proprietary,¹⁸ and intellectual¹⁹ conceptions—played, as it were, “behind-the-scenes” and “supporting actor” roles in the theory and practice of American constitutionalism at the beginning, they came to play “starring” roles in the centuries ahead.²⁰ The Bill of Rights was fully ratified in 1791.²¹ By the time the bicentennial of the

¹³ See Allen, *supra* note 6, at 147 (citing evidence from the Federalist Papers of relevant public-private distinctions embedded in the Founders’ and Framers’ constitutional thinking).

¹⁴ By “associational privacy,” I mean freedom to form and maintain exclusive social and political groups.

¹⁵ By “informational privacy,” I mean limited access to personal or sensitive data, confidentiality and anonymity. I will sometimes include the federal courts’ First Amendment “anonymity” jurisprudence in what I refer to here as “informational privacy” jurisprudence. Anonymity is an aspect of informational privacy in the straightforward sense of limited access to information about persons (namely, information concerning their identities) or control over information about persons (again, information concerning their identities). Anonymity jurisprudence is also included in what has been referred to as the “intellectual” privacy, since anonymity is one of the means by which individuals enjoy their intellectual privacy to, for example, express, and explore unpopular ideas. See *infra* note 19.

¹⁶ By “physical privacy,” I mean limited spatial and sensory accessibility to others, such as when one is secluded alone at home behind closed doors and when one is free from non-consensual touching.

¹⁷ By “decisional privacy,” I mean non-interference with certain intimate choices such as birth control, abortion, marriage, medical care, and consensual adult sexual partners.

¹⁸ By “proprietary privacy,” I mean ownership and control of the use of attributes of personal identity, such as voice, name, and photographic likeness.

¹⁹ By “intellectual privacy,” I mean the freedom to think about, read about and discuss ideas. See Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 389 (2008) (“Intellectual privacy is the ability, whether protected by law or social circumstances, to develop ideas and beliefs away from the unwanted gaze or interference of others. Surveillance or interference can warp the integrity of our freedom of thought and can skew the way we think, with clear repercussions for the content of our subsequent speech or writing. The ability to freely make up our minds and to develop new ideas thus depends upon a substantial measure of intellectual privacy. In this way, intellectual privacy is a cornerstone of meaningful First Amendment liberties.”).

²⁰ Constitutional uses of “privacy” have expanded to include those identified *supra* in notes 14–19. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 34–35 (2001) (protecting the physical privacy of a home occupied by drug dealers); *Whalen v. Roe*, 429 U.S. 589, 600 (1977) (establishing informational privacy of confidential prescription data reported to states); *Roe v. Wade*, 410 U.S. 113, 163 (1973) (protecting decisional privacy of woman’s abortion choices); *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (finding intellectual privacy of pornography possession in a man’s home); *Katz v. United States*, 389 U.S. 347, 359 (1967) (protecting informational privacy of man using a phone in a public booth); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958) (establishing associational privacy and informational privacy of civil rights group). See generally ANITA L. ALLEN, *PRIVACY LAW AND SOCIETY* 4–7 (2d Ed. 2011) (discussing legal definitions of privacy).

²¹ See *Bill of Rights (1791)*, OUR DOCUMENTS (Jan. 1, 2012, 12:24 AM), <http://www.ourdocuments.gov/doc.php?flash=true&doc=13> (providing background information on the Bill of Rights, which went into effect on December 15, 1791).

Bill of Rights was being celebrated in 1991,²² the Supreme Court had repeatedly and expressly held in landmark cases that the first ten amendments and the Fourteenth Amendment protect privacy interests relating to a host of core concerns.²³

The terms “privacy,” “right to privacy,” and “expectations of privacy” featured prominently in landmark U.S. Supreme Court cases, starting with *Katz v. United States*²⁴ and *Griswold v. Connecticut*.²⁵ These cases and those for which they became precedents tested the notion that government must be tolerant and constrained.²⁶ Many scholars now agree that human beings have dignity, autonomy, and needs by virtue of which they merit lives and relationships of their own.²⁷ When it comes to homes, conversations, social groups, political affiliations, medical care, sexuality, marriage, and families, people should be largely let alone. Even in areas of constitutional law where privacy protection is not and cannot be the core concern, one finds federal

22 Cf. Warren E. Burger, *Bicentennial Considerations on America's Bill of Rights*, 22 PRESIDENTIAL STUD. Q. 663, 664–65 (1992) (providing an essay based on former Chief Justice Burger's keynote address when he chaired the Commission on the Bicentennial of the United States Constitution).

23 See *supra* note 20; see also *Thornburgh v. Am. Coll. of Obstetricians & Gynecology*, 476 U.S. 747, 772 (1986) (reaffirming *Roe v. Wade*, 410 U.S. 113 (1973), and holding that the right to privacy compels striking down state laws impeding ready, affordable, and anonymous access to medical abortions), *overruled in part* by *Planned Parenthood v. Casey*, 505 U.S. 833, 870 (1992) (O'Connor, Kennedy & Souter, JJ.). Cf. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278–79 (1990) (holding that individuals have a strong liberty interest in private, autonomous medical decisionmaking). *But see Bowers v. Hardwick*, 478 U.S. 186, 195–96 (1986) (holding that the fundamental right to privacy does not extend to homosexual sodomy), *overruled by Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

24 389 U.S. 347, 359 (1967) (overturning a criminal conviction based on the warrantless interception of a phone call). The word “privacy” appeared in an exalted role in the early wiretapping case, *Olmstead v. United States*, 277 U.S. 438, 471, 473 (1928), in a famous dissent by Justice Louis Brandeis. See *infra* note 41.

25 381 U.S. 479 (1965) (striking down state laws criminalizing the prescription and use of contraception).

26 The precedents include, of course, *Roe v. Wade*, 410 U.S. 113 (1973).

27 See generally ANITA L. ALLEN, UNPOPULAR PRIVACY: WHAT MUST WE HIDE (2011) (arguing for ethical and legal duties to protect physical and informational privacies threatened by contemporary practices of exposure and self-revelation); HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE (2009) (outlining conception of privacy as contextual integrity to be applied to contemporary information privacy problems); DANIEL J. SOLOVE, NOTHING TO HIDE: THE FALSE TRADEOFF BETWEEN PRIVACY AND SECURITY (2011) (arguing that greater national and local security does not require abrogation of strong privacy protection); DANIEL J. SOLOVE, UNDERSTANDING PRIVACY (2008) (arguing that public policy and law should reflect an understanding that there are a number of different varieties of privacy each with its own requirements and justifications); Judith DeCew, *Privacy*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/privacy/> (last updated Sept. 18, 2006) (making a strong normative case for physical and informational privacies).

judges marking out a terrain of legally protectable privacy-related interests. U.S. approaches to criminal punishment are premised on coercive isolation and surveillance.²⁸ Yet Eighth Amendment jurisprudence incorporates ideals of privacy as legal constraints on penological practices.²⁹ The Second Amendment would appear to have little to do with privacy.³⁰ But the jurisprudence of the Second Amendment has come to incorporate ideals of the places we live as protective sanctums wherein privileges of self-defense and ownership are inconsistent with gun control laws that rule out the private decision to possess readily operable handguns in private homes. For example, the Court recently struck down a local Washington D.C. law prohibiting possession of unlicensed firearm possession, including in private homes, on the grounds that the Second Amendment confers on individuals an individual right to protect themselves and their families.³¹

28 See *Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (holding that a prisoner has no reasonable expectation of privacy in his prison cell); *Bell v. Wolfish*, 441 U.S. 520, 535, 559–60 (1979) (holding that Fourth Amendment and Eighth Amendment-based privacy claims fail in light of legitimate goals and methods of criminal detention). Cf. *Wilkinson v. Austin*, 545 U.S. 209, 225 (2005) (holding that prisoners' liberty interests and prisons' needs and objectives must be balanced).

29 The Eighth Amendment provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The ban on cruel and unusual punishment bears on how extensively prisons can withhold from inmates desired conditions of solitude, modesty, private communication, and confidentiality. See *Merriwether v. Faulkner*, 821 F.2d 408, 418 (7th Cir. 1987) ("[A] prisoner's expectation of privacy is extremely limited in light of the overriding need to maintain institutional order and security The Eighth Amendment's prohibition against cruel and unusual punishment stands as a protection from bodily searches which are maliciously motivated, [and] unrelated to institutional security" (citations omitted)); see also *Johnson v. Phelan*, 69 F.3d 144, 152 (7th Cir. 1995) (Posner, J., concurring in part and dissenting in part) (noting that cultural nudity taboo warrants respect for prisoners modesty and privacy).

30 It reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

31 *District of Columbia v. Heller*, 554 U.S. 570, 635–36 (2008) ("[W]e hold that the District's ban on handgun possession *in the home* violates the Second Amendment, as does its prohibition against rendering any lawful firearm *in the home* operable for the purpose of immediate self-defense. . . . [T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct." (emphasis added)). In *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010) (Alito, J.), the Supreme Court held that the Fourteenth Amendment makes the Second Amendment right to bear arms as articulated in *Heller* fully applicable to the States.

III. CONSTITUTIONAL PRIVACY LAW AND SOCIAL CHANGE

Notwithstanding its nontextual, implicit, judge-made origins, constitutional privacy law has served as an important instrument of social change. Indeed, the adoption by the Supreme Court of doctrinal discourses of privacy has helped to bring about significant changes in key societal sectors. A notable instance in the health-care arena, the Supreme Court's decision in *Cruzan v. Missouri*,³² led to routine execution of "living wills" and "advanced directives."³³ Nancy Cruzan was an adult state hospital patient in a persistent vegetative coma.³⁴ Unable to eat and drink on her own, she received food and water for many years through tubes inserted into her body to keep her alive.³⁵ Missouri state hospital authorities refused a request by Cruzan's parents to cease artificial nutrition and hydration of their daughter who had no hope of recovery.³⁶ The Supreme Court of Missouri recognized a right to refuse treatment, grounded in the doctrine of informed consent, but refused to authorize Cruzan's parents to choose death over life on her behalf in the absence of clear and convincing evidence of her own wishes.³⁷ The Supreme Court emphasized that medical decision making should be in the hands of private individuals, not the state; but upheld the state of Missouri's "clear and convincing evidence" standard as protective of individual liberty.³⁸ The *Cruzan* decision was interpreted to mean that the Fourteenth Amendment privacy interest of autonomous individuals in making their own life and death medical decisions could be protected by documenting their wishes in advance of coma or other cognitive inca-

32 497 U.S. 261 (1990). Widely discussed as a privacy case, the role of privacy is muted in the opinion that speaks of private individuals' "liberty interest" in medical decision-making rather than a fundamental right to privacy. See *id.* at 278 ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.").

33 Cf. Robert N. Swidler, *Take Your Own Advice—Please: Advance Planning for Healthcare Decisions*, 83 N.Y. ST. B.A. J. 20, 21 (Jul./Aug. 2011) ("When living wills first appeared in the 1960s, the legality of the documents was uncertain, and the people who completed them were considered a bit idiosyncratic. To be sure, our culture has changed dramatically since then, and such documents are now familiar and legally accepted.").

34 *Cruzan*, 497 U.S. 261, 266–267.

35 *Id.* at 266 ("[S]urgeons implanted a gastrostomy feeding and hydration tube in Cruzan with the consent of her then husband").

36 *Id.* at 267.

37 See *Cruzan v. Harmon*, 760 S.W. 2d 408, 425 (Mo. 1988) ("[N]o person can assume that choice for an incompetent in the absence of the formalities required under Missouri's Living Will statutes or the clear and convincing, inherently reliable evidence absent here.").

38 *Cruzan*, 497 U.S. at 261.

capacity.³⁹ Following the *Cruzan* decision, patients and the elderly have been encouraged not only to discuss their end of life wishes with family and friends but also to execute “living wills” or other advance directives stating the types of medical interventions they would wish in the event of incapacity.⁴⁰

The Court’s constitutional privacy law has facilitated even more sweeping and dramatic movement in new directions than that represented by the advance medical directive. For example, the development of the “reasonable expectations of privacy”⁴¹ analysis in Fourth Amendment cases following *Katz v. United States*⁴² recalibrated the balance of power between citizens and law enforcement for a generation. Dissenting in an early wiretapping case, Justice Brandeis had urged such a recalibration.⁴³ In *Olmstead v. United States*, the ma-

39 Since the 1980s the question of whether patient “autonomy” should alone dictate end of life option has become a matter of intense policy debate. Compare Robert H. Blank, *End-of-Life Decision Making Across Cultures* 39 J.L. MED. & ETHICS 201, 201–02 (2011) (contrasting the importance that Western medicine places on patient autonomy with other world cultures that do not share such an emphasis), with Angela Fagerlin & Carl E. Schneider, *Enough: The Failure of the Living Will*, 34 HASTINGS CENTER REP. 30, 30–31 (2004) (arguing that it is against public policy to allow an individual to bind his or her future self through living wills).

40 Patsy K. Keyser, *After Cruzan: The “Values Base” to Advance Directives*, 11 ORTHOPAEDIC NURS. 37, 37–40 (1992) (noting that, in light of *Cruzan*, decisions surrounding life-sustaining treatment refocused on advance directives, such as living will and durable power of attorney for health care decisions and additional “clear and convincing” evidence of the patient’s wishes, may be beneficial); see also James F. Childress, *Dying Patients: Who’s in Control?*, 17 J. L. MED. & HEALTH CARE 227, 228 (1989) (noting that meaningful autonomy remains elusive despite advance directives developed in response to legal requirements of informed consent applied to incompetent and comatose patients kept alive by new health care technologies).

41 *Katz v. United States*, 389 U.S. 347, 361–62 (1967) (Harlan, J., concurring) (“My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’ . . . reasonable expectations of privacy may be defeated by electronic as well as physical invasion.”).

42 *Id.* at 359 (“Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored ‘the procedure of antecedent justification . . . that is central to the Fourth Amendment,’ a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner’s conviction, the judgment must be reversed.” (alteration in original) (footnote omitted)).

43 *Olmstead v. United States*, 277 U.S. 438, 472, 478 (1928) (Brandeis, J., dissenting) (“We have likewise held that general limitations on the powers of Government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the states from meeting modern conditions by regulations which a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. . . . The makers of our Constitution undertook to secure conditions fa-

jority on the Court agreed with the government that wiretapping accomplished without entering a private home or office did not require a search warrant.⁴⁴ Concerned about the implication of technology for the privacy of new and old modes of communication, a forward-looking Brandeis urged his brethren on the Court to understand privacy as an imperative of enlightened civilization.⁴⁵ The jurisprudence spawned by *Katz* has had its critics,⁴⁶ especially in light of problems associated with government use of and access to recent surveillance and communication technologies.⁴⁷ Yet, after the *Katz* decision, it was impossible to design a law enforcement or surveillance practice without attention to whether privacy interests required a search warrant, court order, or procedural showing. Privacy jurisprudence is not necessarily pro-privacy; and some would argue that current Fourth Amendment interpretations reveal a lawmaking designed less to shield individuals than to make “dark corners” of the modern capitalist administrative state visible to the maximally tolerable degree.⁴⁸ Judicial interpretations of search and seizure law after the tragic events of September 11, 2001, have upheld privacy diminishing legislation relating to law enforcement and intelligence gathering, such as

avorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights, and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.” (internal quotation marks omitted)).

44 *Id.* at 466 (“[T]he wire tapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment.”).

45 *Id.* at 478.

46 Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511 (2010) (arguing that the reasonable expectation of privacy test should be abandoned); Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083 (2002).

47 See Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503 (2007) (criticizing the Supreme Court for failing to provide a consistent explanation for what makes an expectation of privacy “reasonable”); see also *United States v. Jones*, 132 S. Ct. 945 (2012) (denying petitioner’s motion for a rehearing on the issue of whether evidence of illegal drug trade can be used to convict where police and the FBI secretly attached a GPS device to suspected drug dealer Antoine Jones’ car without a search warrant and monitored the car’s movement for twenty-eight days).

48 Ken I. Kersch, *The Reconstruction of Constitutional Privacy Rights and the New American State*, 16 STUD. AM. POL. DEV. 61, 61 (2002).

the “roving” surveillance warrants⁴⁹ and agency data-sharing⁵⁰ authorized by the PATRIOT Act.⁵¹

Consider, too, by way of example, the infamous penumbral privacy doctrine set forth in *Griswold v. Connecticut*.⁵² It was transformative and it changed American women’s lives forever.⁵³ Prior to *Griswold*, the prescription, sale, and use of birth control was restricted by law in Connecticut and several other states.⁵⁴ The innovative privacy doctrine embraced by the Court’s majority, according to which a right to privacy is entailed by the First, Third, Fourth, Fifth, and Ninth Amendments, cleared the way for American women to use medical contraception, including “the pill.”⁵⁵ In *Griswold*, the Supreme Court

49 Uniting and Strengthening America Providing Appropriate Tools Required to Intercept and Obstruct Terrorism of 2001, Pub. L. No. 107–56, § 206, 115 Stat. 272 (2001) (as amended).

50 Cf. *In re Sealed Case*, 310 F.3d 717 (Foreign Int. Sur. Ct. Rev. 2002) (holding that the PATRIOT Act allows government agencies to share information received through surveillance of agents of foreign powers).

51 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (amending numerous federal law enforcement, financial, and communications laws).

52 381 U.S. 479 (1965).

53 Of course, the majority opinion of Justice Douglas in *Griswold* also transformed constitutional jurisprudence itself. Cf. Risa Goluboff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1365–66 (2010) (highlighting where Ninth Amendment rights are concerned, strict scrutiny applies).

54 For example, Massachusetts law criminalized birth control. Indeed, even today, that state’s largely ignored archaic law only approves administering or prescribing birth control to “married” persons. See *Washington Legislature Debates Archaic Law Banning Birth Control For Unmarried Women*, WASH. INDEP., Oct. 5, 2011, <http://washingtonindependent.com/113063/massachusetts-legislature-debates-archaic-law-banning-birth-control-for-unmarried-women>, a seeming limitation invalidated by the Supreme Court in *Eisenstadt v. Baird*. See Mass. Gen. Laws ch. 272 § 21A (1966) (“A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.”). See also *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding constitutional any statute whereby single persons may not obtain contraceptives from anyone to prevent pregnancy). See generally Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court before Griswold v Connecticut*, 75 IOWA L. REV. 915, 918–20 (1990) (describing federal and state restrictions on birth control prior to *Griswold*, and noting that Connecticut and Massachusetts “lagged behind” most other states due to influence of Catholic Church); see also C. Thomas Dienes, *The Progeny of Comstockery—Birth Control Laws Return to Court*, 21 AM. U. L. REV. 1 (1972) (detailing a history and analysis of Massachusetts and other states’ moralistic laws restricting access to birth control).

55 See generally NANCY GIBBS, *LOVE, SEX, FREEDOM AND THE PARADOX OF THE PILL: A BRIEF HISTORY OF BIRTH CONTROL* (2010) (noting *Griswold* ruled that the Bill of Rights implicitly included a right of privacy and overturned bans on contraception by married couples);

struck down Connecticut's law criminalizing married couples' use of medically prescribed contraception, relying on a newly identified "right to privacy" grounded in what it termed the "penumbra" of the Bill of Rights.⁵⁶ The new jurisprudence of privacy unleashed an independent brand of American woman greatly in control of her reproductive capacities,⁵⁷ for whom fears about pregnancy no longer needed to govern decisions about sex, marriage, education, and employment. *Griswold* launched "sexual" and "cultural" revolutions, continued by two later cases, *Eisenstadt v. Baird*,⁵⁸ which extended the holding of *Griswold* to unmarried men and women, and *Roe v. Wade*,⁵⁹ which decriminalized medical abortions.⁶⁰

Roe v. Wade and more than two dozen subsequent abortion cases, embodied a jurisprudence of constitutional privacy for which *Griswold* was a crucial precedent, but premised on a more straightforward Fourteenth Amendment privacy doctrine.⁶¹ For a time a majority on the Court embraced *Roe's* doctrine that a "fundamental" right to privacy is entailed by the individual liberty and due process guarantees of the Fourteenth Amendment. In *Roe* the strict scrutiny required by a fundamental right was applied to criminal abortion statutes.⁶² Such statutes categorically criminalizing most abortions were held to be unconstitutional. Case law relying on this idea of a fundamental right

ELAINE TYLER MAY, *AMERICA AND THE PILL: A HISTORY OF PROMISE, PERIL, AND LIBERATION* 118–19 (2011) (articulating the *Griswold* holding and its impact on women).

56 *Griswold*, 381 U.S. at 485.

57 *But see* CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 100–102 (1987) (arguing that privacy rights help preserve male control over the private sphere unless women are freed from coercive relationships and subordination).

58 405 U.S. 438 (1972).

59 410 U.S. 113 (1973).

60 *Id.*; *see also* DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (rev. ed. 1998) (noting that the quest for decriminalizing medical abortions came from *Roe v. Wade*).

61 The Supreme Court applied a "compelling interest" standard in cases scrutinizing the regulation of abortion, beginning with *Roe v. Wade*. *Roe*, 410 U.S. at 155; *id.* at 170 (Stewart, J., concurring). Under this highest of standard of review, a governmental regulation that interferes with the decision to abort is presumed invalid; to overcome the presumption, the government must show that its regulation constraining personal choice is narrowly drawn to further a legitimate and compelling state interest. *Id.* at 165. The Court no longer applies the compelling state interest requirement of *Roe* in all abortion cases. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court required only that the government establish that challenged abortion restrictions did not impose unduly burdensome interference on the important constitutional right to choose. *Casey*, 505 U.S. at 874–77.

62 *Roe*, 410 U.S. 113.

to abortion privacy had a profound effect on women's health.⁶³ It led to fewer deaths from illegal and non-medical abortions, and increased availability and usage of affordable medical abortions.⁶⁴ It spawned moderate state laws regulating but permitting most first and second trimester abortions. It helped to shape the manner in which women's reproductive health services would be delivered—namely, in specialized, segregated clinics. *Roe v. Wade* effected another social change that pleases no one: the polarization of national politics and the creation of a pro-life/pro-choice “litmus test” of political viability.⁶⁵

Constitutional privacy doctrines played a role in *Loving v. Virginia*,⁶⁶ the Supreme Court decision striking down state interracial marriage bans. The end of these bans has brought demographic and other social changes. Such bans were among the last strongholds of state-imposed segregation and ideologies of white supremacy. *Loving* maintained that the privacy of spousal choice is both a matter of equal protection and substantive liberty. After *Loving*, different-race couples no longer faced criminal penalties; the number of marriages

63 See LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES 1867–1973 1–6 (1997) (“The stunning transformation in law and public policy regarding abortion and women’s rights was rooted in the declining conditions of abortion under the criminal law and built on generations of women demanding abortions—and getting them.”).

64 It is widely recognized that the legalization of abortion decreased illegal abortion-related mortality and morbidity. See Willard Cates, Jr., David A. Grimes & Kenneth F. Schulz, *The Public Health Impact of Legal Abortion: 30 Years Later, Perspectives on Sexual and Reproductive Health*, 35 GUTTMACHER INST. 1 (2003), available at <http://www.guttmacher.org/pubs/journals/3502503.html>.

65 See KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984) (describing how abortion was thought to have been treated as murder, both popularly and legally); EILEEN L. MCDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT (1996); Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of a Woman-Protective Abortion*, 2007 U. ILL. L. REV. 991, 1030–31 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=958254 (providing an example of a South Dakotan abortion statute that captured national political attention due to its restrictiveness); Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and The Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L. J. 1641, 1669 (2008) (“WPAA [woman protective antiabortion argument] took shape in political relationships in which the abortion-hurts-women argument had important strategic functions.”); see also Linda Greenhouse & Reva B. Siegel, *Before Roe v. Wade*, BRENNAN CENTER FOR JUST. (June 2, 2010), http://www.brennancenter.org/blog/archives/Greenhouse_and_Reva_B_Siegel (stressing that abortion rights symbolized “the new morality—a problematic ‘permissiveness’ that afflicted the nation”).

66 388 U.S. 1, 2 (1967); see also *Loving Decision: 40 Years of Legal Interracial Unions*, NAT’L PUB. RADIO (June 11, 2007), <http://www.npr.org/templates/story/story.php?storyId=10889047> (chronicling the Loving couple and state of interracial marriage after the landmark decision). But see *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding ban on polygamy).

between African Americans and whites has significantly increased, along with the population of mixed race American families.⁶⁷

A mixture of equality and liberty-based constitutional privacy doctrines would reemerge in *Lawrence v. Texas*, the historic decision overturning *Bowers v. Texas* and establishing that consenting adults are entitled to make their own decisions about the sex of their intimate partners.⁶⁸ Both *Loving* and *Lawrence* would have a role in the gradual case for gay partnership equality and gay marriage fought in the states, and already won in more than half a dozen states, including New York.⁶⁹ While the path is less direct, constitutional understandings of privacy articulated in *Lawrence* played a role in undermining the compromise implicit in the well-intended but misguided “Don’t Ask, Don’t Tell” policy introduced during the presidency of Bill Clinton. Under the law, gays and lesbians could serve in the military if they kept their sexual orientations a strict secret.⁷⁰ The policy compromised the integrity and well-being of thousands of gay and lesbian service members, their families, friends, and allies. The rule was abolished in September 2011, following a careful, step-wise congressional and military review overseen by President Barack Obama.⁷¹

67 Zhenchao Qian and Daniel T. Lichter, *Changing Patterns of Interracial Marriage in a Multiracial Society*, 73 J. MARRIAGE & FAMILY 1065, 1065–84 (2011) (stating that the number of marriages between blacks and whites is increasing—for example, in 1980, only 5% of black men married white women; in 2008 the number rose to 14%). Cf. RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE* 37 (2011) (noting that in 2000 more than ten times as many African American men intermarried as in 1960); Meredith Melnick, *Study: Blacks and Whites Intermarrying More in the U.S.*, TIME (Sept. 19, 2011), <http://healthland.time.com/2011/09/19/study-blacks-and-whites-are-marrying-more-in-the-u-s/#ixzz1aF0hZOgB> (noting that the rate of interracial marriages between blacks and whites increased rapidly between 1980 and 2008, outpacing marriages between whites and other ethnic groups).

68 *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) *overturning* *Bowers v. Hardwick*, 478 U.S. 186 (1986) (articulating that the liberty protected by the Constitution allows homosexual people the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity and freedom).

69 New York’s Marriage Equality Act went into effect June 24, 2011. See Marriage Equality Act, N.Y. DOM. REL. LAW § 10-a et seq. (McKinney 2011); see also *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, N.Y. TIMES, Feb. 28, 2012, http://topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html (detailing the recent gay marriage legislation and litigation in New York, Connecticut, Iowa, New Hampshire, Vermont, Washington, and Washington, D.C.).

70 10 U.S.C. § 654 (1994), *repealed by* Don’t Ask, Don’t Tell Repeal Act of 2010, Pub.L. 111–321, § 2(f)(1)(A), 124 Stat. 3516.

71 Sheryl Gay Stolberg, *Obama Signs Away “Don’t Ask, Don’t Tell,”* N.Y. TIMES, Dec. 22, 2010, <http://www.nytimes.com/2010/12/23/us/politics/23military.html>.

IV. FIRST AMENDMENT PRIVACY

The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁷² The Amendment restricts government from interfering with religious freedom and free press, of course. But it also restricts government from interfering with rights of assembly and grievance. From these express freedoms, the Supreme Court has abstracted what is often termed a right of free association, meaning a right to form and belong to groups with social, political, or religious purposes, including groups that may be critical of government.⁷³ The Supreme Court has held that the freedom of association includes, *inter alia*, the freedoms (1) to keep membership and membership lists a secret,⁷⁴ and (2) to exclude unwanted others from membership or participation in one’s exclusive groups and group activities.⁷⁵ The Court has also abstracted a right of anonymous speech from the First Amendment.⁷⁶ Privacies, both physical and informational, are requirements of thoroughgoing freedom of association and anonymous free speech. Seclusion and concealment, along with informational privacies such as confidentiality, secrecy, and anonymity have been used as specific modes of restricting access to people and information.

⁷² U.S. CONST. amend. I.

⁷³ For cases holding that the right to associate is protected under the First Amendment, see *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982); *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

⁷⁴ See *Patterson*, 357 U.S. at 466 (finding that compelled disclosure of petitioner’s membership lists was likely to constitute an effective restraint on its members’ freedom of association). But see *Church of the Am. Knights of the Ku Klux Klan v. Keri*, 356 F.3d 197 (2d Cir. 2004) (declining to hold that freedom of association or the right to engage in anonymous speech entails a right to conceal one’s appearance in a public demonstration).

⁷⁵ See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (upholding the right of each group to deny membership to homosexual participants under the First Amendment); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557 (1995). But see *N.Y. State Club Ass’n v. New York City*, 487 U.S. 1 (1988) (upholding the constitutionality of New York City’s Human Rights law forbidding discrimination based on race, creed, sex, and other grounds by any “place of public accommodation, resort or amusement”); *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (denying that each group’s First Amendment rights were violated when they were required to extend membership to women); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (denying right of Jaycees, a large, non-selective civic organization, to exclude women from membership and upholding application of Minnesota Human Rights Act).

⁷⁶ See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) (invalidating an Ohio statute that prohibited the distribution of anonymous campaign literature).

With the examples of the Supreme Court's sex, marriage, and reproductive rights jurisprudence in mind, constitutional privacy law might appear to be an instrument of progressively liberal social change. Traditions of racial privilege, heterosexual domination, and sexism have been weakened in the United States with the help of judicial interpretations of the Constitution that require protection for privacy interests and fundamental individual privacy rights. But, viewed overall, constitutional privacy doctrines have not been entirely and exclusively servants of liberal social change. The adoption of privacy-based doctrines has also been a challenge and impediment to liberal change. This point is supported by a close look at the dynamics of privacy jurisprudence under the First Amendment. I consider three contexts: race, sexual orientation, and gender.

A. *Race and Social Change*

NAACP v. Alabama ex rel. Patterson shows the ideal of freedom of association and related associational privacy put to liberal progressive uses.⁷⁷ The National Association for the Advancement of Colored People ("NAACP") is a national, multi-racial civil rights membership organization organized under the laws of New York more than a hundred years ago.⁷⁸ In the early twentieth century, the leaders and members of the NAACP devised and executed strategies designed to force an end to state-enforced, race-based discrimination against African Americans. The NAACP was active in Alabama in the 1950s, where segregation on the basis of race entailed unequal political and economic opportunity for African Americans of every educational attainment and character.⁷⁹ The Alabama NAACP regional offices and affiliates recruited members and solicited contributions. Among the goals of the Alabama NAACP was to push for desegregation of Alabama's universities and places of public accommodations, such as retail stores, municipal buses, and hotels.

77 *Patterson*, 357 U.S. 449 (1958); see also Anita L. Allen, *Associational Privacy and the First Amendment: NAACP v. Alabama, Privacy and Data Protection*, 1 ALA. C.R. & C.L. L. REV. 1 (2011).

78 See NAACP, *Our Mission*, NAACP, <http://www.naacp.org/pages/our-mission> (last visited Feb. 19, 2012).

79 See Allen, *supra* note 77, at 4–6 (describing the NAACP's efforts in Alabama from 1918 on and the hostilities between the organization and the state throughout the 1950s).

1. NAACP

The story begins in the 1950s. Alabama had enacted a state statute which required a foreign corporation to qualify before doing business in the state by filing its corporate charter with the Secretary of State and designating a place of business and an agent to receive service of process.⁸⁰ Seeking to expel the NAACP from the state for its unwelcome civil rights activism, in 1956 the Alabama Attorney General charged the NAACP with violating the foreign corporations law.⁸¹ Indeed the NAACP technically had skirted the law, but only because (as a non-commercial entity) it considered itself exempt.⁸² In furtherance of its bid to expel, Alabama ordered the NAACP to produce its membership list and the names of its officers and directors.⁸³ The NAACP tendered the required registration papers and the names of its principal officers and directors; but Alabama was not satisfied. Fearing for the safety, jobs, and businesses of its members, the NAACP refused to produce membership lists.⁸⁴ In appealing a \$100,000 civil contempt penalty Alabama imposed as a consequence of the refusal to disclose the names of its membership, the NAACP argued that compelled disclosure of the membership lists would “abridge the rights of its rank-and-file members to engage in lawful association in support of their common beliefs.”⁸⁵

The Supreme Court agreed: “Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”⁸⁶ A lack of informational privacy could “induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.”⁸⁷ The Court held that

80 *Patterson*, 357 U.S. at 452.

81 *Id.*

82 *Id.* (“The Association had never complied with the qualification statute, from which it considered itself exempt.”).

83 *Id.* at 453. (“[T]he State moved for the production of a large number of the Association’s records and papers, including bank statements, leases, deeds, and records containing the names and addresses of all Alabama ‘members’ and ‘agents’ of the Association.”).

84 *Id.* at 462 (“Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”).

85 *Id.* at 460.

86 *Id.* at 462.

87 *Id.* at 463.

immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment.⁸⁸

The court concluded that “Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have.”⁸⁹

The Supreme Court’s associational and informational privacy-based decision in *NAACP* was instrumental in furthering the immediate goals of an important player in the civil rights movement. The decision rendered more difficult future uses of similar strategies by officials seeking to hijack civil rights to preserve traditions of segregation based on myths of white superiority and privilege. *NAACP* was an important precedent available to other African Americans stymied by threats, intimidation, and opportunistic applications of state law.⁹⁰

2. *Nation of Islam*

NAACP served as a controlling precedent for a far less well-known, but significant lower court case brought on behalf of the Nation of Islam, *Wallace v. Brewer*.⁹¹

In this extraordinary case, Alabama segregationists and allied state officials sought to use a peculiar state registration law to expel Nation of Islam Black Muslims, not for desegregation efforts but for purchases of land intended to make segregated African Americans self-sufficient. Under a corporate pseudonym “Progressive Land Developers, Inc.” and with the help of two white Alabamans, the Nation of Islam purchased land in Alabama on which they hoped to set up an

⁸⁸ *Id.* at 466.

⁸⁹ *Id.*

⁹⁰ *See, e.g.*, *NAACP v. Button*, 371 U.S. 415, 430 (1963) (“We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record . . . subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity. . . . [including] the right ‘to engage in association for the advancement of beliefs and ideas.’” (citing *Patterson*, 357 U.S. at 460)).

⁹¹ 315 F. Supp. 431 (M.D. Ala. 1970) (declaring a law requiring Muslims to register in Alabama unconstitutional).

agri-business enterprise designed to employ black workers and produce wholesome, affordable food for urban markets.⁹²

In November 1969, residents of St. Clair County, Alabama learned that an entity known as Progressive Land Developers, Inc. (“PLD”) had quietly purchased two farms in the county totaling more than 900 acres from two white businessmen, former state senator Ray Wyatt and dentist Dr. Robert McClung.⁹³ PLD was owned by African American “Black Muslims” affiliated with Elijah Muhammad’s Chicago-based Nation of Islam.⁹⁴ The Nation of Islam had previously purchased farmland near Dawson and Sasser, Georgia and set up a successful farm, dairy, and cannery.⁹⁵ Muhammad reported that he hoped to purchase farmland throughout the south, and that the objective of his group’s farming enterprises was “to produce beef, dairy products and vegetables, providing jobs for black people and lower prices on goods shipped to Muslim stores in big cities.”⁹⁶

Not wishing to have Black Muslims operating in northern Alabama, riled residents organized a “Stop the Muslims” campaign. Their goal was to invalidate the contracts of sale to PLD and to thereby oust the Muslims. The “Stop the Muslims” campaign attracted the support of law enforcement⁹⁷ and drew some two thousand local resi-

⁹² Interestingly, *Wallace* omits any details about the rich factual context of the litigation, which were widely reported in southern newspapers and nationally circulated magazines of the day all over the United States. See, e.g., *infra* notes 94–107.

⁹³ *Wallace*, 315 F. Supp. at 436.

⁹⁴ *Northern Alabamans Resent Muslim Move*, SARASOTA JOURNAL, Dec. 9, 1969, at 12 (describing the plight of the Progressive Land Developers), available at <http://news.google.com/newspapers?nid=1798&dat=19691208&id=YPYeAAAIBAJ&sjid=YwEAAAIBAJ&pg=7183,2032374>.

⁹⁵ Don McKee, *Black Muslims Buying Big Acreages*, CORPUS CHRISTI TIMES (Texas), Nov. 20, 1969, at 3–E (describing a 1743 acre operation managed by a northern Muslim transplant David Spencer and employing local non-Muslim blacks as labor), available at <http://www.newspaperarchive.com/SiteMap/FreePdfPreview.aspx?img=100524307>.

⁹⁶ *Id.*; see also Joseph M. Chapman, *Black Muslims . . . Mercenary or Missionary?*, THE DISPATCH, (Lexington, N.C.), Dec. 8, 1969, at 8 (describing the plight of the Progressive Land Developers), available at <http://news.google.com/newspapers?nid=1734&dat=19691208&id=y3kcAAAIBAJ&sjid=fFEAAAIBAJ&pg=6885,3100860>.

⁹⁷ *Wallace*, 315 F. Supp. at 453 n.42 (“After defendants Wyatt and Bishop discovered that Progressive Land Developers, Incorporated (PLD), a Black Muslim corporation, had purchased land in St. Clair County, they met with defendant District Attorney Waid for the purpose of ascertaining how the Black Muslims could be kept out of St. Clair County. Defendant Hodges, from the Attorney General’s office, a native of St. Clair County, was appointed to assist Waid in his investigation. Waid or Hodges informed defendants Wyatt and Bishop of the criminal penalties and laws concerning acting as an agent for an unqualified foreign corporation and the muslim registration statute. Both Waid and Hodges disapproved of the Black Muslims owning land in St. Clair County.” (footnote omitted)).

dents to a public meeting in a Pell City high school gymnasium.⁹⁸ Opponents of the PLD purchases warned that Muslims “don’t respect our flag and they support communist positions in many ways while they regard Christianity as the enemy” and that the farms PLD had purchased “can easily be used for storage of weapons and training in guerrilla warfare.”⁹⁹

Wyatt and McClung realized a \$20,000 profit on land they sold to the Muslims.¹⁰⁰ Wyatt attempted to persuade St. Clair whites that PLD had benign intentions.¹⁰¹ Indeed, PLD did have demonstrably benign intentions. The Muslims planned to use the land purchase to bring a \$2.5 million vertically integrated food business to Alabama, creating jobs that would also “supply their ghetto stores and restaurants.”¹⁰² Wyatt, who called himself a “strict segregationist, just like the Muslims,” sold the Muslims pickup trucks and helped them secure local workers.¹⁰³ Wyatt paid a price for economic dealings with blacks: His cows were shot, twelve of his cars were splashed with acid, and his auto dealership burned.¹⁰⁴ Wyatt’s own brother, Wallace Wyatt, joined forces against him, forming an organization called “Restore Integrity to Development” to derail the Muslim venture.¹⁰⁵ An ex-con and Ku Klux Klan Grand Wizard, Robert Shelton entered the fray against an undeterred Ray Wyatt,¹⁰⁶ as did a Baptist preacher, Reverend James H.

98 See Cordell S. Thompson, *Black Muslims Fight to Keep Alabama Farm*, JET MAGAZINE, Jan. 1, 1970, at 16–22 (explaining the goals of Wyatt and his organization), available at <http://books.google.com/books?id=JjkDAAAAMBAAJ&pg=PA22&lpg=PA22&dq=st+clair+alabama+elijah+muhammad+nation+of+Islam+and+ray+wyatt&source=bl&ots=MJg-MgVr03&sig=jMbkpsBn6q7avKYL-8W44M61PD0&hl=en#v=onepage&q=st%20clair%20alabama%20elijah%20muhammad%20nation%20of%20Islam%20and%20ray%20wyatt&f=false>.

99 *Wallace*, 315 F. Supp. at 436. See *Northern Alabamans Resent Muslim Move*, SARASOTA J., Dec. 9, 1969, at 12 (describing the conflict between Wyatt and the local white residents), available at <http://news.google.com/newspapers?nid=1798&dat=19691208&id=YPYeAAAAIBAJ&sjid=YwEAAAIBAJ&pg=7183,2032374>; see also William Jones, *Muslims Buy Farmland in South; Feud Stirred*, CHICAGO TRIBUNE, Dec. 8, 1969 (describing the Alabama land feud), available at <http://pqasb.pqarchiver.com/chicagotribune/access/577668392.html?dids=577668392:577668392&FMT=ABS&FMTS=ABS:AI&type=his toric&date=Dec+08%2C+1969&author=&pub=Chicago+Tribune>.

100 Thompson, *supra* note 98, at 17.

101 Chapman, *supra* note 96, at 8 (quoting Wyatt as saying “All they have in mind is farming and employing local people to do the work at a reasonable rate”).

102 *Northern Alabamans Resent Muslim Move*, *supra* note 99, at 12.

103 Thompson, *supra* note 98.

104 *Northern Alabamans Resent Muslim Move*, *supra* note 99.

105 *Id.*

106 *Id.* (“Robert Shelton, the Ku Klux Klan imperial wizard, left a federal prison last month just in time to get into the fray.”); *Muslims Give up Farm*, PALM BEACH POST, Mar. 18, 1970, at A9 (reporting that Klan spokesman Robert Shelton said Klan leased land adjacent Muslims’ land to observe them and Elijah Muhammed announced plan to move farm to

Bishop.¹⁰⁷ Dr. McClung also paid a price for working on behalf of the Muslims. He lost most of his dental practice and was forced to resign as president of the John Birch Society.¹⁰⁸

Like Ray Wyatt and Dr. McClung, the Muslims and their attorney were targeted with harassment. John Henry Davis was arrested in connection with writing a five-dollar check for the purchase of gasoline.¹⁰⁹ Jimmy Holmes, hired by Wyatt after working in the Muslim plant in Georgia,¹¹⁰ was prosecuted on what appeared to be trumped up charges of trespass and allowing his livestock to run at large.¹¹¹ Holmes was also prosecuted for violations of a curious state law¹¹² criminalizing remaining in Alabama for more than one day as an unregistered “communist, muslim or nazi.”¹¹³ An arrest warrant was

Greene County in Western Alabama due to rifle fire and cattle poisonings), *available at* <http://news.google.com/newspapers?nid=1964&dat=19700318&id=mbwiAAAAIABJ&sjid=CrYFAAAAIABJ&pg=1757,544361>.

107 See Martin Waldron, *Muslims Buying Land to Farm in Alabama*, ST. PETERSBURG TIMES (Florida), Nov. 24, 1969, at 15-A (quoting Bishop as saying “I for one am willing to lay down my life for the cause [of ousting the Muslims] if necessary”), *available at* <http://news.google.com/newspapers?nid=888&dat=19691124&id=QUxSAAAIAIBJ&sjid=XsDAAAIAIBJ&pg=6958,3241637>.

108 Thompson, *supra* note 98, at 18.

109 *Wallace v. Brewer*, 315 F. Supp. 431, 437 (M.D. Ala. 1970) (“On December 4, 1969, plaintiff Davis was arrested on a warrant sworn to by defendant Bishop on a charge of violating Code of Alabama, Title 10, § 21 (94). This charge developed when defendant Wyatt purchased a five-dollar check from a local service station where Davis had purchased gasoline with the check.”).

110 See Chapman, *supra* note 96, at 8 (Holmes hired by Wyatt after working on Muslim farm); see also *Northern Alabamans Resent Muslim Move*, *supra* note 99.

111 Cf. *Wallace*, 315 F. Supp. at 435 (“On January 28, 1970, from the bench, this Court further enjoined these defendants from prosecuting plaintiff Holmes under a warrant (issued on January 7, 1970) charging him with permitting livestock to run at large.”).

112 ALA. CODE, tit. 14, § 97(1)–(8) (1940), *invalidated by Wallace*, 315 F. Supp. at 443–46.

113 ALA. CODE, tit. 14, § 97(1)–(8), 97(4a) (1940), *invalidated by Wallace*, 315 F. Supp. at 443–46 (“Registration of communists, nazis, muslims, officers of communist party and officers and members of communist front organizations. 1. Each person remaining in this state for as long as one day who is a communist, nazi or muslim or is knowingly a member of a communist front organization, shall register with the department of public safety on or before the fifth consecutive day that such person remains in this state, and at such intervals thereafter as may be directed by the department of public safety. 2. Such registration shall be under oath and shall set forth the name (including any assumed name used or in use), address, business occupation, purpose of presence in the state of Alabama, sources of income, place of birth, places of former residence, and features of identification, including fingerprints, of the registrant; organizations of which registrant is a member; names of persons known by registrant to be communists, nazis or muslims or members of any communist front organization as the case may be; and any other information requested by the department of public safety which is relevant to the purposes of this section. 3. Each and every officer of the communist party and each and every officer of communist front organizations, knowing said organizations to be communist front organizations, and each and every member of nazi or muslim organizations, knowing said or-

sworn out for Orzell Billingsley, Jr., who had assisted with the real estate sale to PLD.¹¹⁴ Billingsley, a prominent African American attorney who had served as a lawyer for both Dr. Martin Luther King and Rosa Parks during the Montgomery Bus Boycott,¹¹⁵ was charged with being an agent of a foreign corporation (presumably PLD) not licensed to do business in the state.¹¹⁶ (Ray Wyatt and Dr. McClung also faced these charges.)¹¹⁷ A civil suit was brought by Pine Forest Missionary Baptist Church against Holmes, Billingsley, and PLD, seeking \$500,000.¹¹⁸ Located near one of the farms, the church alleged trespass and interference with land use.

ganizations to be nazi or muslim organizations, shall register or cause to be registered said party or organizations with the department of public safety, if said party or organizations have any members who reside, permanently or for a period of more than thirty days, in the state of Alabama. Such registration shall be under oath and shall include the name of the organization, the location of its principal office and of its offices and meeting places in the state of Alabama; the names, real and assumed, of its officers; the names, real and assumed, of its members in the state of Alabama and of any person who has attended its meetings in the state of Alabama; a financial statement reflecting receipts and disbursements and by whom and to whom paid; and any other information requested by the department of public safety which is relevant to the purposes of this statute. Such registrations shall be made within thirty days after the effective date of this section, and thereafter at such intervals as are directed by the department of public safety. 4. Failure to register as herein required, or the making of any registration which contains any false statement or any omission, shall constitute a felony and shall be punishable by a fine of not less than \$1,000 or more than \$10,000, or by imprisonment in the penitentiary for not less than two or more than ten years, or by both. 5. The registration records shall be open to inspection by all law enforcement officers of the United States, of this state or of any other state or territory of the United States. Such records may also, in the discretion of the department of public safety, be open for inspection by the general public.”).

114 Orzell Billingsley, Jr. (1924–2001) was a prominent civil rights lawyer and municipal judge, one of the first African Americans to be admitted to the Alabama State Bar. He represented ordinary and high profile African Americans including Dr. Martin Luther King, Jr. and Rosa Parks. Billingsley is said to have taken “a strong interest in the economic development of black communities.” *Billingsley, Orzel Jr. (1924–2002)*, BIRMINGHAM PUB. LIBR., <http://www.bplonline.org/resources/BlackBirmingham.aspx> (last visited Jan. 23, 2012).

115 *Id.*

116 *Wallace*, 315 F. Supp at 453 (“Thereafter, defendant Bishop swore out a warrant against plaintiff Billingsley, a Negro attorney, for acting as an agent for a foreign corporation not authorized to do business in Alabama, Sections 21 (93)–(94), Title 10, Code of Alabama. Billingsley allegedly violated the statute for engaging in one specific act: filing for record the deed for land purchased in St. Clair County by PLD. Billingsley did not draft or execute the deed but only filed it for record.”).

117 *Id.* at 436.

118 *Id.* at 454 (“Defendants Palmer, Hare and Cash, as Trustees of the Pine Forest Missionary Baptist Church, brought a civil action in the Circuit Court of St. Clair County for trespass against the plaintiffs and others. The complaint seeks compensatory damages for the trespass and punitive damages in the amount of \$250,000.00 for aggravating the trespass and \$250,000.00 damages for denying and infringing upon the church’s use of its land.”).

In response to these suits and arrests, five of the individuals targeted by the “Stop the Muslims” campaign filed an action in federal court, seeking injunctive and declaratory relief on behalf of themselves and all “(1) Negro citizens of Alabama and their attorneys and (2) members, friends and associates of the Lost Found Nation of Islam.”¹¹⁹ The plaintiffs sought relief including relief “from conduct harassing, threatening and interfering with plaintiffs in exercising their first amendment rights to express themselves and associate and to exercise their chosen religion, and their statutory rights to hold and own property and to make contracts.”¹²⁰ The defendants argued that the plaintiffs were not entitled to relief because “the Black Muslim organization is not a religion but a political organization whose sole advocacy is violence and black racism and whose purpose in St. Clair County is to establish, by means of force if necessary, a separate nation of its own.”¹²¹ The Muslims were denied class action status but successfully challenged the constitutionality of the Muslim registration law at the heart of efforts to intimidate them.¹²²

The Court found that the registration law was vague and overbroad.¹²³ There was, for example, no definition of “muslim” in the law, which required that “muslims,” “communists,” and “nazis” who remained in Alabama for one day must register with the department of public safety and supply a host of information about themselves and their groups. Citing *NAACP*, the Court held that the registration law was an unconstitutional abridgement of the First Amendment right of freedom of association. The law violated notions of associa-

119 *Id.* at 435 (“Plaintiffs premise their request for declaratory and injunctive relief upon the first, fifth, sixth, eighth, ninth, thirteenth, fourteenth and fifteenth amendments to the U.S. Constitution and also upon 42 U.S.C. §§ 1981, 1982, 1983, 1985 and 1988.”). The court declined to certify a class consisting of all Negro Alabamans and their lawyers, but the suit went forward on behalf of the individually named plaintiffs. *Id.* at 437–38.

120 *Id.* at 435.

121 *Id.* at 449–50 (“[Defendants argue that] Black Muslims are members of a foreign nation or political organization, not a religion, which seeks to establish a foreign nation within the United States, and in particular in St. Clair County. They further argue that Black Muslims, as members of a foreign nation, are not citizens of the United States and thus not entitled to first or fourteenth amendment rights or equitable relief; that a state government has inherent governmental authority to protect itself against insurrection and overthrow by violence; and that the statutes attacked by plaintiffs are designed to protect the State’s right to a republican form of government, guaranteed by Article 4, Section 4 of the United States Constitution.”).

122 *Id.* at 443 (“For the above reasons, we conclude that section 97(4a) is an unconstitutional abridgment upon the first amendment right of freedom of association.”). The plaintiffs sought to represent the “class of all ‘Negro citizens of Alabama and their attorneys.’” *Id.* at 438.

123 *Id.* at 440.

tional privacy by requiring individual “muslims” to identify themselves, and provide detailed personal information about themselves and their associates.¹²⁴ The Court found that the “first amendment reasoning of the Supreme Court in the production of membership list cases [best exemplified by *NAACP*] is equally applicable where the statute requires registration of individual members.”¹²⁵ The Court cited and quoted *NAACP*, as well other free expression cases: “This Court has recognized the vital relationship between freedom to associate and privacy in one’s associations.”¹²⁶

3. *Cork Club*

It is not only groups seeking progressive advancement of African Americans who have the First Amendment right of associational privacy.¹²⁷ The right would belong equally to a group with the polar opposite goal of seeking to maintain the African American community as a lowly, economically, socially, and politically inferior caste.¹²⁸ Such a group would have prima facie entitlement to keep its membership secret from the state, no less than the NAACP or Nation of Islam. The federal courts’ “truly private” club cases reveal limitations, though, on private groups’ ability to use the First Amendment doctrine of associational privacy as a sword against efforts by African Americans to break down traditional barriers to full citizenship with the help of the nation’s civil rights statutes. *Wright v. Cork Club* was a telling instance.¹²⁹

124 *Id.* at 442.

125 *Id.* at 443.

126 *Id.* (quoting *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 462 (1958)).

127 *See* *Watchtower Bible & Tract Soc’y of New York v. Vill. of Stratton*, 536 U.S. 150 (2002) (applying the First Amendment right of associational privacy to the preaching activities of Jehovah’s Witnesses); *MacIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) (applying the First Amendment right of associational privacy to the distribution of anonymous leaflets opposing a proposed school tax levy); *Talley v. California*, 362 U.S. 60 (1960) (applying the First Amendment right of associational privacy to the distribution of handbills in Los Angeles). *But see* *John Doe No. 1 v. Reed*, 130 S. Ct. 2811 (2010) (holding that with respect to referendum petitions, the disclosure requirements were sufficiently related to significant state interests so as to satisfy the scrutiny standard applicable to First Amendment challenges).

128 *Cf.* *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 207–08 (2d Cir. 2004) (stating that hooded masks worn by KKK members did not constitute expressive conduct entitled to First Amendment protection, and that New York’s anti-mask statute prohibiting the wearing of masks or disguises in public, other than for entertainment purposes, was not facially unconstitutional).

129 315 F. Supp. 1143 (S.D. Tex. 1970).

In May 1967 a woman representing a social sorority contacted the Cork Club of Houston, Texas about holding a luncheon and fashion show on its premises. Ethel Banks spoke by telephone to Al Uhlenhoff, auditor of the Club.¹³⁰ Uhlenhoff informed Banks that membership was not necessary for use of the Cork Club's facilities and that sorority members would be welcomed as guests of the club's president.¹³¹ However, Uhlenhoff sent Banks application forms inviting sorority members to join the Club.¹³² Mrs. Noah Wright, an African American, filled out an application and returned it with a dues check for \$18.00, payable to the Cork Club. She soon received a membership card in the mail.¹³³ Except for Mrs. Wright, no African American had ever been issued a membership card by the Cork Club.¹³⁴

In June 1967 Wright twice visited the club for drinks, and from the visits the Cork Club management learned that they had conferred membership on a black person. That same month Uhlenhoff wrote to Wright that

“the matter of integration has never come before the membership of the Cork Club;” that the question of integration would be brought up at the next stated meeting in January, 1968; and that her membership card would not be active until the question was settled; Mr. Uhlenhoff also advised Mrs. Banks that the sorority's plans for a luncheon and style show at the Cork Club were cancelled.¹³⁵

Wright brought a lawsuit alleging violations of the Civil Rights Act.¹³⁶ She maintained that the Cork Club was private in name only and was in fact a place of public accommodations subject to the provisions of Title II of the Civil Rights Act of 1964.¹³⁷

The court stated as background for its decision that “governmental regulation of the membership of private clubs is beyond the pale of governmental authority.”¹³⁸ Indeed, “[i]f the government were allowed to regulate the membership of truly private clubs, private organizations, or private associations, then it could determine for each citizen who would be his personal friends and what would be his private associations, and the Bill of Rights would be for naught.”¹³⁹ Yet Wright prevailed. The Cork Club was found to be a place of “public

130 *Id.* at 1146.

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 Civil Rights Act of 1964, 42 U.S.C. § 2000a *et seq.* (2006).

138 *Cork Club*, 315 F. Supp. at 1157.

139 *Id.*

accommodation” with the shell of a “private club” status maintained primarily for purposes of complying with Texas liquor control laws limiting alcohol service to private clubs.¹⁴⁰ The court found that, other than for race, the Cork Club did not carefully screen applications for membership, did not limit the use of its facilities or services strictly to members, and advertised its facilities to the general public.¹⁴¹ The club had lax membership policies, and was open to white people with little regard for their “good credit and good character.”¹⁴² For these reasons, the court concluded that the Cork Club did not qualify for the private club exemption provided for in 42 U.S.C. § 2000a(e) and required by constitutional ideals of free association.¹⁴³

B. *Sexual Orientation and Social Change*

Two well-known First Amendment cases blended expressive freedom of association doctrines and privacy concepts in service of heterosexual groups’ efforts to exclude homosexuals from organizations and activities otherwise widely open to all. As it was used (unsuccessfully) in the Cork Club case, the First Amendment private association doctrine was used (successfully) in the gay rights cases to sustain a status quo of majority group privilege.

1. *Boston Parade*

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*¹⁴⁴ the Supreme Court considered whether consistent with the First Amendment “Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey.”¹⁴⁵ In the succinct words of Justice Souter who wrote for the majority, such a mandate

140 See 42 U.S.C. § 2000a(b)(2)–(3) (2006) (stating that all persons shall be entitled to equal access at establishments “affecting interstate commerce or supported in their activities by State action as places of public accommodation . . . [including] any restaurant, cafeteria . . . or other facility principally engaged in selling food for consumption on premises, including but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station”).

141 *Cork Club*, 315 F. Supp. at 1154.

142 *Id.* But see *Solomon v. Miami Woman’s Club*, 359 F. Supp. 41, 45 (S.D. Fla. 1973) (holding that a woman’s club with whites-only admissions policy was not formed as a sham simply to evade civil rights law).

143 *Cork Club*, 315 F. Supp. at 1156.

144 515 U.S. 557 (1995).

145 *Id.* at 559.

violates the First Amendment.¹⁴⁶ For two years running, in 1992 and 1993, the South Boston Allied War Veterans Council had refused to allow the gay pride group Irish-American Gay, Lesbian and Bisexual Group of Boston (“GLIB”) march in an annual St. Patrick’s Day parade through the public streets of Boston.¹⁴⁷ State officials and courts had found that the exclusion of GLIB from the forty-seven-year-old institution violated “the State and Federal Constitutions and of the state public accommodations law, which prohibits ‘any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement.’”¹⁴⁸ The state trial court found, and the Massachusetts Supreme Judicial Court agreed, that the parade fell within the statutory definition of a public accommodation, which was defined as any place “which is open to and accepts or solicits the patronage of the general public.”¹⁴⁹

The United States Supreme Court found, however, that parade organizers could not be required to include GLIB, a gay, lesbian, and bisexual pride group, in their parade.¹⁵⁰ GLIB’s participation could be perceived as support for gay and lesbian equality, especially since there was no traditional way for the organizers to disavow “any identity of viewpoint” between themselves and any group selected for participation.¹⁵¹ In order to protect the expressive freedom of the parade organizers, the Court, in effect, endorsed a physical segregation of GLIB from the parade. The Court seemed to over-estimate the likelihood that admitting GLIB would have been forcing a message of endorsement as opposed to mere toleration. Permitting the parade organizers to segregate themselves from unwelcome gays and lesbians might be compared to permitting Alabamans the segregated distance they sought from Muslims whose viewpoints they reject. Ironically, one of south Boston’s communities most associated with the St. Patrick’s Day parade is now a hub of Boston’s gay community life.¹⁵²

146 *Id.* at 566 (“We granted certiorari to determine whether the requirement to admit a parade contingent expressing a message not of the private organizers’ own choosing violates the First Amendment. We hold that it does and reverse.” (citation omitted)).

147 *Id.* at 561–62.

148 *Id.* at 561 (alteration in original) (quoting MASS. ANN. LAW ch. 272, § 98 (LexisNexis 1992)).

149 *Hurley*, 515 U.S. at 561–63.

150 *Id.*

151 *Id.*

152 See Erica Corsano, *How Gay Is Southie?*, BOSTON PHOENIX (Oct. 19, 2009), <http://thephoenix.com/boston/life/91293-how-gay-is-southie> (“Once unthinkable, Boston’s most notorious neighborhood now sports a welcoming face.”); see also Cara Bayles, *Gay Community Gains a Larger Voice in South Boston*, BOSTON.COM (Mar. 18, 2011),

2. *Boy Scouts*

The Boy Scouts of America is an iconic institution.¹⁵³ Millions of boys and men join to partake of opportunities for friendship, mentoring, and personal growth. The Boy Scouts is, formally speaking, a private, not-for-profit organization.¹⁵⁴ James Dale was an Eagle Scout whose adult membership in the Boy Scouts of America was revoked when the organization learned that he was gay.¹⁵⁵ The New Jersey Supreme Court held that state public accommodations laws prohibited excluding Dale on the basis of sexual orientation.¹⁵⁶ *Boy Scouts of America v. Dale* asked the United States Supreme Court to decide, as Justice Rehnquist framed the question, whether “applying New Jersey’s public accommodations law [construed to require admission of a gay man to membership] violate[d] the Boy Scouts’ First Amendment right of expressive association.”¹⁵⁷ The Court, in an opinion by Justice Rehnquist, held that the decision of the state supreme court must be reversed on First Amendment grounds.¹⁵⁸ The majority reasoned that: “The forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”¹⁵⁹

Although this freedom of expressive association was not absolute and can be overridden “by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms,”¹⁶⁰ it was not overridden here. The Boy Scouts organization believed that homosexuality was inconsistent with the “morally straight” values it sought to instill in youth and declined to endorse

http://www.boston.com/yourtown/news/south_boston/2011/03/bar_by_bar_southie_g ets_more_g.html (demonstrating South Boston’s acceptance of the gay community).

153 See generally BOY SCOUTS OF AMERICA, <http://www.scouting.org> (last visited Feb. 20, 2012).

154 See *Unit Gifts and Tax Exempt Status*, CAPITALSCOUTING.ORG, http://www.capitalscouting.org/capital_docs/bsa_unit_policy_update_2006.pdf (stating that Boy Scouts of America is a 501(c)3 charity but individual chapters are not). See generally *The Boy Scouts of America Annual Report, Continuing the Journey*, BOY SCOUTS OF AMERICA (2010), available at <http://www.scouting.org/About/AnnualReports.aspx>.

155 *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

156 *Id.* (holding that New Jersey’s public accommodations law requiring that the Boy Scouts admit Dale, an avowed homosexual, violates the Boy Scouts’ First Amendment right of expressive association).

157 *Id.* at 644.

158 *Id.* at 648.

159 *Id.*

160 *Id.* (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)).

homosexual conduct as legitimate behavior.¹⁶¹ As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view (we endorse/tolerate homosexuality?), the presence of Dale as an assistant scoutmaster would interfere with the Boy Scout's choice not to propound a point of view (we endorse/tolerate homosexuality?) contrary to its beliefs.

Private associations are entitled by the First Amendment to segregate themselves in exclusive physical domains, hold secrets, confidences, and embrace viewpoints and messages that may be offensive to others. Government cannot tell us whom or what to like. First Amendment associational privacy cases, like Fourteenth Amendment decisional privacy cases, trade, for better and for worse, on the notion that privacy "amounts to the state of the agent having control over decisions concerning matters that draw their meaning and value from the agent's love, caring, or liking."¹⁶²

C. Gender, Technology and Social Change

I will now consider the extent to which the First Amendment's privacy jurisprudence of anonymous Internet speech contributes to progressively liberal social change in the area of gender relations. I will consider, inter alia, the AutoAdmit case,¹⁶³ an infamous example of anonymous Internet speech, which demeaned female law students with sex and sexuality-related insults, false statements, and privacy invasions.

Legal scholars now recognize "the offensive Internet" as a major problem, worthy of ethical, market, and even legal reforms.¹⁶⁴ The Internet has brought about social change, described by Saul Levmore as "succeeding in remaking us as inhabitants of a small village."¹⁶⁵

161 *Boy Scouts*, 530 U.S. at 650 ("The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms 'morally straight' and 'clean.'").

162 See JULIE C. INNESS, *PRIVACY, INTIMACY, AND ISOLATION* 91 (1992) (discussing the connection between the nature of intimacy and Inness's account of privacy).

163 See *Doe I v. Individuals*, 561 F. Supp. 2d 249, 256–57 (D. Conn. 2008) (holding that a student was entitled to disclosure of an anonymous Internet poster's identity if she could make a concrete showing as to the elements of a prima facie case against the anonymous speaker to outweigh First Amendment protection of anonymous speech). See generally Ellen Nakashima, *Harsh Words Die Hard on the Web; Law Students Feel Lasting Effects of Anonymous Attacks*, WASH. POST, Mar. 7, 2007, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/Article/2007/03/06/AR2007030602705.html>.

164 Saul Levmore & Martha C. Nussbaum, *Introduction*, in *THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION* 1, 1–5 (Saul Levmore & Martha C. Nussbaum eds., 2010).

165 *Id.* at 1.

Communication is easy, and information spreads quickly. We know and are known by people like us, notwithstanding geographical distances. But, in the case of the Internet, the descriptive term “village” does not denote a place of kinship and solidarity. To be sure, the Internet can be such a place. An online patient forum might turn strangers with nothing in common but their gender and a breast cancer diagnosis into quasi-sisters.¹⁶⁶ Yet viewed from the vantage points of many online sites, the Internet “village” feels more like the vicious pre-civil society imagined in Hobbes’s *Leviathan*, than the ambivalent but peaceful community of hut dwellers imagined in Rousseau’s *Discourse on the Origin of Inequality*.¹⁶⁷

The current era—I call it the Era of Revelation—is characterized by the wide availability of multiple modes of communication, easily and frequently accessed, capable of disclosing breadths and depths of personal, personally-identifiable and sensitive information to a universe of people rapidly. Many Internet users are fond of broadcasting what they think and feel, motivated by business and pleasure, and because they care about friendship, kinship, health, education, politics, justice and culture. Many people think of the Internet as the most attractive and appropriate place to go to share, vent, discover, and be silly. Yet there is no absolute right to say what is true, whether offline or online, when doing so would tortiously invade privacy in a manner that is highly offensive to a reasonable person.¹⁶⁸ Nor is there any exemption of anonymous Internet speech from the law of defamation, infliction of emotional distress, interference with contract, or other familiar torts.¹⁶⁹

166 See, e.g., usafmom, *Breast Cancer Topic: My Sister—the Idiot!!*, BREASTCANCER.ORG (Dec. 16, 2011, 1:34 A.M.), <http://community.breastcancer.org/468 U.S. 609forum/8/topic/779614> (recording a colloquy among women with stage IV metastatic breast cancer begun by a woman complaining about her biological sister’s lack of interest in her cancer, leading another to reply: “But you have all your sisters here that care so much! So vent away and we will laugh and cry with you!”).

167 See Anita L. Allen, *Driven into Society: Philosophies of Surveillance Take to the Streets of New York*, 1 AMSTERDAM L.F. 35, 35–36, Aug. 2009, available at <http://ojs.uvu.vu.nl/468 U.S. 609alf/Article/view/92/157> (comparing Locke and Rousseau’s social contract origin myths).

168 Public disclosure of true but private facts is a tort recognized by the Restatement of Torts (Second) and many state courts. See RESTATEMENT (SECOND) OF TORTS § 652A (1977) (stating that the right of privacy is invaded by the “unreasonable intrusion upon the seclusion of another,” the appropriation of the other’s name or likeness,” “unreasonable publicity given to the other’s private life,” and “publicity that unreasonably places the other in a false light before the public”); see also, e.g., CAL. CONST. art. I, § 1 (stating that each citizen has an “inalienable right” to pursue and obtain “privacy”).

169 See Matthew Mazzotta, Comment, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 B.C. L. REV. 833, 845 n.88 (2010) (citing cases that

American Internet users may face civil liability, but we are essentially unmuzzled in practice. Some of us are often intentionally disrespectful and abusive. Some in the United States exploit the privacy we call anonymity to say and do things through the Internet that they would not otherwise dare to say or do. Online and offline anonymity allows the dark sides of ourselves to vent and prey with reduced accountability. Recording in private diaries would be better for some of the harsh discourse posted online, but publication on the Internet would appear to be the preference of many. The pairing of privacy-as-anonymity and freedom of speech contribute to what Brian Leiter refers to as “cyber-cesspools.”¹⁷⁰ These are “those places in cyberspace—chat rooms, websites, blogs and often the comment sections of blogs—that are devoted in whole or in part to demeaning, harassing and humiliating individuals.”¹⁷¹ Cyber cesspools not only cause dignitarian, emotional, and reputational harms but they also surely threaten what Robert George terms the “moral ecology” of society.¹⁷²

1. *Boyer, Clementi, and Deputy Jane Doe*

Martha Nussbaum warns of “objectification” and a “culture of cruelty” that infects online communications and harms women.¹⁷³ Ann Bartow has raised special concerns about the impact of Internet culture on women’s emotional, dignitarian, and economic interests.¹⁷⁴ In addition to women, young gay men have also raised special concerns about bullying and victimization online. The murder of Amy Boyer in 1999¹⁷⁵ and the suicide of Tyler Clementi in 2010¹⁷⁶ stand as

hold that requests to unmask anonymous Internet speakers require a balancing of defendants’ rights to speak anonymously against plaintiffs’ rights to seek redress for harmful speech).

170 Brian Leiter, *Cleaning Cyber-Cesspools: Google and Free Speech*, in *THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION*, *supra* note 164, at 155.

171 *Id.*

172 ROBERT P. GEORGE, *THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS* 94 (2001); ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 43 (1993).

173 Martha C. Nussbaum, *Objectification and Internet Misogyny*, in *THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION*, *supra* note 164, at 79–80, 83. *See generally* Ann Bartow, *A Portrait of the Internet as a Young Man*, 108 *MICH. L. REV.* 1079 (2010) (noting the poor treatment of women because of the “commoditized” sexual nature of the Internet).

174 Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 *HARV. J.L. & GENDER* 383, 384–92 (2009) (noting the emotional harms that women experience because of the Internet and the available legal and economic remedies for harms committed on the Internet).

175 *See* *Remsberg v. Docusearch, Inc.*, 816 A.2d 1001, 1005–06 (N.H. 2003) (describing how the murderer of Amy Boyer used Docusearch to discover Boyer’s birthdate, social security number, and employment information before killing her).

sad symbols of the destructive potential of personal and commercial free speech online.

Amy Boyer was murdered by a former high school classmate Liam Youens, who obtained information about her work address, a dentist's office, from an online firm, Docusearch, and then stalked and assassinated her as she left her workplace.¹⁷⁷ Youens stored guns and ammunition in his bedroom and warned of violence against Amy and her family.¹⁷⁸ In 2010 a talented young musician named Tyler Clementi was a freshman at Rutgers, the State University of New Jersey. He asked his roommate Dharun Ravi to let him have their room for the night for a date. Ravi consented, but pulled a prank. He remotely activated the webcam on a computer in their dorm room, webcasting Clementi's same-sex intimacies all over the Internet, and letting everyone know about it on Twitter. When Clementi learned what had been done to him, the distraught gay youth bid farewell to his friends online and then committed suicide. On September 22, 2010, the teenager apparently leapt to his death off of the George Washington Bridge.¹⁷⁹ Ravi's thoughtless advantage-taking was unethical, and as moral (bad) luck would have it,¹⁸⁰ it also had a devastating out-

176 See Lisa Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 30, 2010, at A1 ("It started with a Twitter message on Sept. 19: 'Roommate asked for the room till midnight. I went into molly's room and turned on my webcam. I saw him making out with a dude. Yay.'").

177 See Patrick Meighan & Joseph G. Cote, *Nashua Man Charged in Bludgeoning Murder; City Man, 20, Held Without Bail over Body in Street*, TELEGRAPH (Nashua, N.H.), June 1, 2011, <http://www.nashuatelegraph.com/news/921206-196/charges-in-bludgeoning.html> ("In October 1999, Amy Boyer, 20, was ambushed by a gunman outside the dentist's office where she worked as she got in her car. The killer, Liam Youens, who then committed suicide, was a former high school classmate who stalked her online. The case was often cited nationally in efforts to pass cyberstalking laws.").

178 See Andrew Wolfe, *School Pauses to Remember Stalking Victim: IF YOU GO; New Hampshire Technical Institute Hoping Memorial for Boyer Will Raise Awareness*, TELEGRAPH (Nashua, N.H.), Apr. 29, 2009, at 1 ("Boyer was slain by a former Nashua High School classmate, Liam Youens, 21, who had secretly stalked her for years and wrote of his obsessions in a journal he published online, though his Web site remained tragically obscure until after her murder and his suicide."); see also *Dental School to Honor Alum, Slain Nashua Woman*, TELEGRAPH (Nashua, N.H.), Apr. 28, 2008, available at 2008 WLNR 27989183 ("A subsequent police investigation revealed that Liam Youens kept firearms and ammunition in his bedroom, and maintained a website containing references to stalking and killing Amy, as well as detailing plans to murder her entire family, according to news accounts."). Cf. *Liam Youens*, http://www.netcrimes.net/Amy%20Lynn%20Boyer_files/liamsite.htm (last visited Jan. 21, 2012) (creative fiction purporting to be an actual reproduction of the site that Liam Youens ran on the Internet, depicting his thoughts and actions).

179 See Foderaro, *supra* note 176.

180 Clementi's act of suicide was beyond Ravi's control, yet we judge the severity of Ravi's misconduct by reference to its unlucky fatal consequence. See THOMAS NAGEL, *MORTAL QUESTIONS* (1979) (cited as sources of the problematic concept of moral luck); see also

come, compounding the sense of its wrongfulness. Although Ravi was not charged for Clementi's suicide, he was prosecuted and, in March 2012, convicted of bias intimidation and invasion of privacy.¹⁸¹

Cass Sunstein has argued that something should be done to protect men and women “against negligence, cruelty, and unjustified damage to their reputations—[and] also to ensure the proper functioning of democracy itself.”¹⁸² That said, to be held accountable, some individuals arguably deserve to have their conduct exposed on the Internet, even anonymously. Whether dead-beat dads, unfaithful wives, bad dates, and stubborn ex-husbands should be exposed online is an open question. A grossly negligent physician—who allegedly hired a consultant to manipulate her Google rankings and fabricate “five star” rave customer satisfaction reviews—caused the vegetative coma and premature death of a young patient who went to her for a minor cosmetic procedure; this physician arguably deserved to have individuals identifying themselves only as her former patients describing online the poor quality of care they believe they, too, had received.¹⁸³

The “cruelty, and unjustified damage to their reputations” Sunstein refers to is a genuine problem.¹⁸⁴ No one knows the precise extent of the problem, but many examples of people who wrongfully invade privacy and publish through the Internet have found their way

Moral Luck, STAN. ENCYCLOPEDIA OF PHIL. (FALL 2008 ED.), available at <http://plato.stanford.edu/archives/fall2008/entries/moral-luck>. Cf. Ian Parker, *The Story of a Suicide*, NEW YORKER, Feb. 6, 2012, available at http://www.newyorker.com/reporting/2012/02/06/120206fa_fact_parker.

181 Kate Zernike, *Jury Finds Spying in Rutgers Dorm Was a Hate Crime*, N.Y. TIMES, Mar. 17, 2012, at A1. See also N.J. STAT. ANN. § 2C:16-1 (West 2008) (criminalizing bias intimidation based upon a person's sexual orientation); N.J. STAT. ANN. §§ 2C:14-9(c), 2C:51 (criminalizing invasion of privacy).

182 Cass R. Sunstein, *Believing False Rumors*, in THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION, *supra* note 164, at 106.

183 Cf. Complaint, *Rajagopal v. Does*, No. CL10-3014 (Va. Cir. Ct. Oct. 22, 2010), available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2010-10-22-Rajagopal's%20Complaint.pdf> (describing circumstances wherein a plastic surgeon on probation for alleged gross negligence, stemming from a cosmetic procedure which left her patient permanently comatose, was accused of having hired a consultant to boost her standing in the community with manufactured patient views and a priority browser ranking on Google). In *Rajagopal*, the doctor sought to unmask the identities of five persons who submitted negative comments about her practice on maps.google.com in 2009. *Id.* at 2-3. She accused them of defamation, tortious interference with her contracts with existing patients, tortious interference with her potential contracts with future patients and conspiracy to injure in trade, business, and reputation. *Id.* at 3-5.

184 Sunstein, *supra* note 182, at 106.

into the courts. In the recent case of *Doe v. Luzerne County*,¹⁸⁵ a deputy chief of a sheriff's department used his office computer to post and share video taken of a subordinate female Deputy Sheriff in states of undress.

Deputy Chief Ryan Foy accompanied Deputy Sheriff Jane Doe and another officer to the decontamination area of the local hospital where they had been ordered to report for treatment of an infestation of biting fleas picked up while attempting to serve a bench warrant.¹⁸⁶ Foy admitted filming Sheriff Jane Doe's ordeal of flea bites and decontamination. However, he denied stating, as Foy alleged, that he made his video "for training purposes."¹⁸⁷ The images, which Foy posted on the web via his office computer and showed to other officers, allegedly depicted Doe partly and fully unclothed, revealing a tattoo drawn on her back. The tattoo was the initials of another woman to whom Doe had a romantic attachment.¹⁸⁸

Sherriff Jane Doe filed a lawsuit for invasion of privacy in violation of the Fourth and Fourteenth Amendments.¹⁸⁹ The district court granted the defendants' summary judgment motion on the grounds that Doe had failed to state a valid constitutional claim.¹⁹⁰ The Third Circuit found that Doe had a reasonable expectation of privacy while she was in the decontamination area of a hospital¹⁹¹ but sustained summary judgment with respect to the Fourth Amendment claim on

185 660 F.3d 169 (3d Cir. 2011) (holding that a female deputy sheriff had a reasonable expectation of privacy while undergoing a decontamination procedure).

186 Initially Doe and the other affected officers were ordered to "a nearby Emergency Management Building ('EMA') [to] await construction of a temporary decontamination shower." *Id.* at 171–72. Foy began filming Doe there. Doe claimed she requested that Foy stop filming her; but Foy denied that she made such a request. *Id.* at 172.

187 *Id.* at 172 (internal quotation marks omitted).

188 *See id.* at 177 n.6 (expressing doubt about the claim that Does's sexual orientation was revealed for the first time to anyone as a result of Foy's video). The court stated:

In addition to the exposure of Doe's body in the Decontamination Area, Doe also asserts that Foy's filming of the tattoo of someone's initials on her back led to the discovery of the private and intimate fact that she is in a lesbianic relationship. We note that initials of a person generally are not indicative of a person's gender. Furthermore, such an assertion is belied by the record, which contains no evidence that, as a result of the September 27 events, anyone learned for the first time that Doe had a girlfriend.

Id.

189 *Id.* at 171. She also alleged, unsuccessfully, a failure to train claim. *See id.* (reversing the district court's grant of summary judgment to the county on Doe's constitutional right to privacy claim under the Fourteenth Amendment and affirming the district court's order dismissing all other claims).

190 *Id.* at 174.

191 *Id.* at 177 ("We conclude that Doe had a reasonable expectation of privacy while in the Decontamination Area, particularly while in the presence of members of the opposite sex.").

the ground that the act of recording and sharing video of Officer Doe was not a search or seizure within the meaning of the Fourth Amendment.¹⁹² Moreover, the court found that Deputy Chief Foy was not acting in the scope of his official duties when he shot, viewed, or posted the video on official department computers.¹⁹³ The Third Circuit reversed the district court with respect to Jane Doe's Fourteenth Amendment invasion of privacy claim.¹⁹⁴

At least two kinds of privacy are protected by the Fourteenth Amendment: decisional privacy, as in *Roe v. Wade*¹⁹⁵ and *Lawrence v. Texas*,¹⁹⁶ and informational privacy, as in *Whalen v. Roe*.¹⁹⁷ Jane Doe is not straightforwardly arguing that a right of hers to be free from government interference with personal choices regarding intimate matters was infringed. Hence she did not appear to be relying on the reproductive rights or sexual privacy line of cases. Her case before the Third Circuit was argued by a lawyer for the Electronic Privacy Information Center,¹⁹⁸ a clue that her Fourteenth Amendment claim, despite its sexual overtones, is not based on a decisional privacy argument but rather on a bold informational privacy argument that has begun to evolve in other jurisdictions.¹⁹⁹

192 *Id.* at 179.

193 *Id.* The court concluded:

Foy's conduct of recording and disseminating the video and images of Doe was not a search or seizure under the Fourth Amendment. At oral argument, Doe's counsel conceded that Foy filmed Doe for personal interest, and that Foy did not film Doe in furtherance of any governmental investigation. Because Foy acted for personal reasons and outside the scope of a governmental investigation, his actions do not implicate the Fourth Amendment. Accordingly, we will affirm the District Court's dismissal of Doe's Fourth Amendment claim.

Id. (citation omitted).

194 *Id.* at 179.

195 *See* *Roe v. Wade*, 410 U.S. 113, 153–54 (1973) (finding a constitutional right to privacy, which encompasses a woman's qualified right to terminate her own pregnancy).

196 *See* *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (holding that the Due Process Clause of the Fourteenth Amendment provides a right to engage in consensual, homosexual relations without governmental interference).

197 *See* *Whalen v. Roe*, 429 U.S. 589 (1977) (recognizing an individual's interest in avoiding disclosure of personal information, such as prescription drug usage, but upholding the constitutionality of the New York statute at issue).

198 For an electronic version of this case, including the names of counsel, see *Doe v. Luzerne Cnty.*, 660 F.3d 169, 171 (3d Cir. 2011), available at <http://www.ca3.uscourts.gov/opinarch/103921p.pdf>.

199 *Id.* at 176 (“Although the issue of whether one may have a constitutionally protected privacy interest in his or her partially clothed body is a matter of first impression in this circuit, other circuits—including the Second, Sixth, and Ninth Circuits—have held that such a right exists.” (citing *Poe v. Leonard*, 282 F.3d 123, 136–39 (2d Cir. 2002) (finding that plaintiff, a female civilian who was participating in a police training video, alleged sufficient facts to raise a triable issue of whether her constitutional right to privacy was violated where the male police officer surreptitiously filmed her in the dressing room while

Whalen v. Roe concerned whether, consistent with the Fourteenth Amendment interest in informational privacy, the state of New York could enact a law requiring pharmacists to report the names of patients receiving certain prescription drugs.²⁰⁰ Jane Doe's claim could be construed as a claim that state employees under color of office collected intimate, sensitive information and failed to protect it as required by the holding and dicta of *Whalen*. In this regard, nude photography and video precedent from other jurisdictions provided critical support for Jane Doe's argument.²⁰¹

2. *Rotten Candy*

The cases referred to in the last section reflect a low regard for privacy and for the dignity of women and homosexuals of both genders. As we will see, in the online context, one set of privacy interests clashes with another. The speakers' informational privacy interests in anonymous speech generally protected by the First Amendment, clash with others' informational and proprietary privacy interests protected by the common law. The common law²⁰² and related state sta-

topless and without a bra)); *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 497–98 (6th Cir. 2008) (finding a privacy violation where a middle school's surveillance cameras recorded the plaintiff students in their undergarments while in the school locker room); *York v. Story*, 324 F.2d 450, 454–56 (9th Cir. 1963) (finding that the plaintiff properly stated a claim for a violation of her constitutional right to privacy where she alleged that, while reporting a sexual assault, a male police officer deceived her into permitting him to photograph her genitals and exposed breasts under the pretext of an investigation), *cert. denied*, 376 U.S. 939 (1964).

200 *See Whalen*, 429 U.S. at 591 (“The constitutional question presented is whether the State of New York may record, in a centralized computer file, the names and addresses of all persons who have obtained, pursuant to a doctor’s prescription, certain drugs for which there is both a lawful and an unlawful market.”).

201 The Third Circuit had not yet extended the Fourteenth Amendment privacy doctrine to nudity cases. *See Luzerne Cnty.*, 660 F.3d at 176 (“We have found the following types of information to be protected: a private employee’s medical information that was sought by the government; medical, financial and behavioral information relevant to a police investigator; a public employee’s prescription record; a minor student’s pregnancy status; sexual orientation; and an inmate’s HIV-positive status.” (citing *Malleus v. George*, 641 F.3d 560, 565 (3d Cir. 2011) (dividing these types of privacy interests into three categories: sexual information, medical information, and some financial information))).

202 The Second Restatement of Torts states the following:

652A. General Principle

(1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.

(2) The right of privacy is invaded by:

(a) unreasonable intrusion upon the seclusion of another, as stated in 652B; or

(b) appropriation of the other’s name or likeness, as stated in 652C; or

(c) unreasonable publicity given to the other’s private life, as stated in 652D; or

(d) publicity that unreasonably places the other in a false light before the public, as stated in 652E.

tutes²⁰³ create civil liability for highly offensive publications of true but private facts, for highly offensive publications that depict others in a false light, and for appropriation of names, likenesses, and identities for commercial purposes. If the tort law of privacy potentially changes gender relations for the better by deterring and redressing gratuitously offensive speech aimed at women, the constitutional law of privacy, with its generous protection of demeaning, anonymous speech targeting women, is a potential barrier to change. Indeed, First Amendment privacy-as-anonymity jurisprudence potentially functions as an instrument of social stasis in a world marked by traditions of gender subordination. The common law of defamation, infliction of emotional distress, and invasion of privacy potentially functions as instruments of progressive social change.

Male Internet users exploit their power and online anonymity and harm or offend women. But women can and do exploit privileges and anonymity, for harmful, privacy-invading purposes, too. The *Yath* case is illustrative.²⁰⁴

Candace Yath was a patient at Fairview Clinics in Minnesota. She revealed to her physicians at the clinic that she was having an extramarital affair. She was tested and treated for sexually transmitted in-

652B. Intrusion upon Seclusion

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

652C. Appropriation of Name or Likeness

One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.

652D. Publicity Given to Private Life

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.

652E. Publicity Placing Person in False Light

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

- (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
- (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

RESTATEMENT (SECOND) OF TORTS, §§ 652A–E (1997).

²⁰³ For the first and best known of such statutes, *see, e.g.*, N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2012).

²⁰⁴ *See Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 37 (Minn. Ct. App. 2009) (describing a dispute where a woman's private sexual history was wrongly accessed and used to harm and offend her online).

fections.²⁰⁵ One of Candace's husband's relatives, Navy Tek, saw Candace at the clinic and was curious about why she was there.²⁰⁶ Tek worked at the clinic as a medical assistant with access to electronic records of patient health information. Tek decided to have a look at Candace's health record.²⁰⁷ When she learned about the STD and affair, two days later she e-mailed and then phoned Candace's sister-in-law, Net Phat, also a medical worker, and shared what she had learned.²⁰⁸ A short time later, Phat told her brother what she had learned about his wife. He filed for a divorce.²⁰⁹ About the same time a MySpace.com page appeared bearing a photograph of Candace, labeled "Rotten Candy."²¹⁰ The page stated that Candace Yath had had a sexually transmitted disease, that she had cheated on her husband and that she was addicted to plastic surgery.²¹¹ The MySpace page was traced to a computer having an Internet protocol address assigned to a business at which Navy Tek's sister, Molyka Mao, worked.²¹²

Candace filed a lawsuit against Tek, Phat, Mao, and Fairview Clinics. She alleged that all defendants invaded her privacy, that all but Mao had breached a confidentiality in violation of common law and state statutes,²¹³ and that all the defendants intentionally or negligently inflicted emotional distress. There were a number of issues in the case, but the most important is whether information posted on MySpace for several days constituted "publicity" sufficient to meet the prima facie case requirements of the "publication of private fact" invasion of privacy tort.²¹⁴ In the many states that recognize the invasion of privacy tort, the requirement of "publication" generally requires dissemination to more than one or two people.²¹⁵ The appeals court in *Yath* importantly concluded that the publicity requirement

205 *Id.* at 38.

206 *Id.*

207 *Id.* at 39 ("Fairview investigated and learned that Tek had accessed Yath's medical file five times between March 21 and May 4, 2006. Fairview determined that Tek had no legitimate business reason to do so and that, therefore, her access was unauthorized by Fairview policy and prohibited by HIPAA.").

208 *Id.* at 38 ("Tek called and told Phat that she saw Yath's record and that Yath had another sex partner.").

209 *Id.*

210 *Id.* at 39.

211 *Id.*

212 *Id.*

213 There is no private right of action under the federal health privacy statute, HIPAA. *Acara v. Banks*, 470 F.3d 569, 572 (5th Cir. 2006).

214 *Yath*, 767 N.W.2d at 44 ("We hold that the publicity element of an invasion-of-privacy claim is satisfied when private information is posted on a publicly accessible Internet website.").

215 RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

had been met: “information was posted on a public MySpace.com page for anyone to view. This Internet communication is materially similar in nature to a newspaper publication or a radio broadcast. . . available to the public large.”²¹⁶

3. *AutoAdmit*

Anonymity is a dimension of informational privacy—limited access to information about personal identity. The First Amendment extends to the protection of interests in anonymity on and off line.²¹⁷ Anonymity can be important because it furthers associational privacy interests relating to undisclosed participation in a formal group, as in the *NAACP* case;²¹⁸ but anonymity can be important because it furthers the interest individuals have in freedoms of speech, expression, and participation unrelated to organizational or group membership. This latter sort of anonymity interest was asserted in the *AutoAdmit* case, *Doe I and Doe II v. Individuals, Whose True Names Are Unknown*, by anonymous Internet users who posted highly offensive comments about two Yale law students on a chat-room site.²¹⁹

In February 2008, two Jane Doe plaintiffs who were Yale Law students issued a subpoena to AT&T Internet services for information relating to the identity of the person assigned to the Internet protocol address from which someone using the pseudonym “AK-47” posted disturbing comments about them on the *AutoAdmit* website.²²⁰ *AutoAdmit* is a discussion forum popular with persons seeking, inter alia, admission to law school, advice about how to navigate law school, and advice and information about legal clerkships and employment.²²¹ An anonymous poster posted a message on *AutoAdmit* in January 2007 in which he encouraged others to “rate this HUGE breasted cheerful big tit girl from Yale law school” and provided a link to an actual photograph of Jane Doe II. The synonymously designated AK-47 joined the thread that included posts asserting that plaintiff Jane Doe II

²¹⁶ *Yath*, 767 N.W.2d at 43.

²¹⁷ *See* *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 199–200 (1999) (holding a badge requirement removing anonymity unconstitutional); *Dendrite Int’l Inc. v. Doe No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001) (holding defamation suits may be filed against anonymous Internet speakers as “John Doe” defendants whose identities may be discovered where certain conditions are met including allegations sufficient to survive a motion to dismiss).

²¹⁸ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

²¹⁹ 561 F. Supp.2d 249, 251 (D. Conn. 2008).

²²⁰ *Id.* at 250.

²²¹ *Id.* at 251.

fantasized about being raped by her father, that she enjoyed having sex while family members watched, that she encouraged others to punch her in the stomach while seven months pregnant, that she had a sexually transmitted disease, and that she had abused heroin, and a poster “hope[s] she gets raped and dies.”²²²

AK-47 posted that he or she, Jane Doe II, and two men (Alex Atkind and Stephen Reynolds) were gay lovers.²²³ This case eventually settled out of court,²²⁴ but the women plaintiffs won important victories on two points of law. First, the court held that while anonymity online is a constitutionally protected interest, plaintiffs who assert a plausible case of defamation may employ subpoenas to learn the identities of the individuals they seek to sue.²²⁵ Defendants’ motion to quash was rejected. In another victory, the court held that Internet users sued on account on anonymous online posts are not automatically entitled to proceed anonymously into litigation.²²⁶ The court found insufficient grounds for changing the default rule of identification and permitting the defendants to proceed anonymously.²²⁷

Some people think of the Internet as an exceptional domain in which verbally and pictorially offensive speech should be given a wide berth.²²⁸ Faced with the problem of the “offensive internet,” courts

²²² *Doe I*, 561 F. Supp.2d at 251.

²²³ *Id.*

²²⁴ *Yale Online Slur Lawsuit Settled*, ASSOCIATED PRESS, Oct. 22, 2009, <http://www.newstimes.com/news/article/Yale-online-slur-lawsuit-settled-185825.php> (“A lawyer for two former Yale University law students says they have settled their lawsuit against several people they accused of posting sexually harassing and threatening messages about them on an Internet site. San Francisco attorney Ashok Ramani told the Hartford Courant on Wednesday that the two women settled with ‘a handful of folks’ out of the more than 30 anonymous authors they sued and the case is over. Terms of the deal were not disclosed. Heide Iravani and Brittan Heller, who have since graduated, sued the message writers in U.S. District Court in Hartford, seeking at least \$245,000 in punitive damages as well as legal expenses. The lawsuit was over crude comments about them posted on AutoAdmit, a Web message board site frequented by college students.”).

²²⁵ *Doe I*, 561 F. Supp.2d at 254–55 (citing *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756, 771 (N.J. Super. Ct. App. Div. 1991) (balancing the First Amendment right to autonomous speech against the necessity of discovery, the court weighed factors including whether the plaintiff gave notice to possible defendants, the plaintiff’s specificity concerning the offending statements, the specificity of the discovery request, the necessity of the information to advance the plaintiff’s case, the party’s expectation of privacy at the time of posting and the adequacy of the claims against the defendants)).

²²⁶ *Doe I*, 561 F. Supp.2d at 254–55.

²²⁷ *Dendrite Int’l, Inc.*, 775 A.2d at 771.

²²⁸ An example is Adam Thierer, a research fellow at the Mercatus Center at George Mason University who writes about the importance of minimizing government regulation of the Internet and warns against panicked reactions to new trends and technologies. Cf. Adam Thierer, *Cyber-Libertarianism: The Case for Real Internet Freedom*, THE TECHNOLOGY LIBERATION FRONT (Aug. 12, 2009), <http://techliberation.com/2009/08/12/cyber-libertarianism-the-case-for-real-internet-freedom/> (providing an overview and history of

have not embraced Internet exceptionalism. Instead, they have tended to view speech that would be tortious off line as tortious on-line.²²⁹ They have, however, embraced the notion that anonymous speech is a compelling, protected First Amendment interest.²³⁰ Those who would sue to unmask anonymous speakers must make certain legal and evidentiary showings in advance.²³¹ People have a right to anonymous speech and that right should not be rendered meaningless by the subpoena power.²³² Here is an important respect in which

“cyber-libertarianism” and its “cousin” the philosophy known as “internet exceptionalism”).

229 For a recent example, see, e.g., *Deer Consumer Products, Inc. v. Little*, 650823/2011, 2012 WL 280698 (N.Y. Sup. Ct. Jan. 27, 2012) (“Included within the panoply of protections provided by the First Amendment is the right of an individual to speak anonymously. The anonymity of speech, however, is not absolute and may be limited by defamation considerations.” (citations omitted)).

230 See, e.g., *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 717 (Ariz. Ct. App. 2007) (observing that First Amendment concerns are raised when the government seeks identities of anonymous Internet users); *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005) (“It is clear that speech over the internet is entitled to First Amendment protection. This protection extends to anonymous internet speech.” (footnotes omitted)); *Indep. Newspapers v. Brodie*, 966 A.2d 432, 438–41 (Md. 2009) (“Included within the panoply of protections that the First Amendment provides is the right of an individual to speak anonymously.”); *Dendrite Int’l, Inc.*, 775 A.2d at 760, 765 (recognizing the “well-established First Amendment right to speak anonymously”); *In re Does 1–10*, 242 S.W.3d 805, 819–20 (Tex. App. 2007) (“[A]n author’s decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment.” (citation omitted)).

231 See *Façonnable USA Corp. v. Doe*, No. 11–cv–00941–CMA–BNB, 2011 WL 2173736, at *1 (D. Colo. June 2, 2011) (“The Court finds that Skybeam has demonstrated that the balance of hardships tips decidedly in its favor. If a stay is denied in error, Skybeam will be required to disclose the Does’ identities, which could harm the Does’ First Amendment right to speak anonymously.” (citing *Elrod v. Burns*, 427 U.S. 347, 373, (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”))); see also *Mem. Supp. SkyBeam Inc.’s Emergency Mot. For Stay Pending Determination of Skybeam’s Objections to Mag. J. Boland’s Order Compelling Skybeam to Identify Defs.* at 4, *Façonnable USA Corp. v. Doe*, No. 11–cv–00941–CMA–BNB, 2011 WL 2173736 (D. Colo. June 2, 2011), available at <http://www.citizen.org/documents/Façonnable-v-Doe-Memo-Supporting-Stay.pdf> (“[T]here is a consistent line of precedent in many different state and federal courts over the past ten years holding that the First Amendment requires actual notice to the anonymous Internet speaker and an evidentiary showing of merit before the right to remain anonymous may be taken away These cases represent a careful balancing of the rights of both plaintiffs and anonymous defendants, trying to make it neither too easy to compel identification, which could create a chilling effect on protected speech, nor too hard for plaintiffs to pursue meritorious claims.”).

232 See *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) (“If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights.”); see also *Columbia Ins. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (“People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one’s mind without the burden of the other party

privacy law has been simultaneously an instrument of social change and stasis. The courts' informational privacy-as-anonymity holdings have enabled the new Internet-based technologies of social and commercial communication to flourish. The habit of globally networked free expression represents a cultural transformation. Unfortunately, the content of the free expression this transformation has enabled is "business and usual" when it comes to gender relations: Leiter's cesspool.²³³

But, as the balancing of interests in anonymous speech and civil prosecution found in the AutoAdmit case shows,²³⁴ American courts have been careful not to allow claims of mere offense and bad taste to, as it were, drain the cesspool. But they have facilitated civil actions, by, for example, denying that Internet subscribers have a reasonable expectation of privacy in their subscriber information—name, address, phone number, and e-mail address—conveyed to their Internet service providers.²³⁵ Torts committed online do not get a free pass on account of respect for anonymity.²³⁶ First Amendment privacy law has potential as an instrument of social change and social stasis.

V. CONCLUSION

One might wish to live in a progressively changed world in which, first, African Americans were not burdened by legacies of legally enforced slavery and segregation; second, gays, lesbians, and bisexuals were welcome in all corners of social, community, economic, and po-

knowing all the facts about one's identity can foster open communication and robust debate People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity.").

²³³ Leiter, *supra* note 170, at 155.

²³⁴ *Cf. In re Anonymous Online Speakers*, 611 F.3d 653 (9th Cir. 2010) (identifying standards guiding recent courts in balancing discovery and the right to anonymous speech in commercial speech and other cases).

²³⁵ *First Time Videos, LLC v. Does 1–500*, 276 F.R.D. 241, 247 (N.D. Ill. 2011) (“[C]ourts have consistently held that Internet subscribers do not have a reasonable expectation of privacy in their subscriber information—including name, address, phone number, and e-mail address—as they have already conveyed such information to their ISPs.” (citation omitted)).

²³⁶ Several categories of speech fall outside the protection of the first Amendment whether they are online or offline, namely “obscenity, fraud, defamation, true threats, incitement or speech integral to criminal conduct.” *United States v. Cassidy*, CRIM. RWT 11-091, 2011 WL 6260872, at *6 (D.Md. Dec. 15, 2011) (citations omitted) (finding that defendant’s blog and twitter activities caused severe emotional distress could be protected speech).

litical life; and, third, in which women were not so routinely assaulted on the basis of their gender and sexuality to the detriment of their privacy, reputations, and security. This imagined world has yet to come fully into existence.

As this essay observes, privacy jurisprudence grounded in the First, Fourth, and Fourteenth Amendments has played a singular role in the struggle for equal rights and citizenship for African Americans, women of all races, and gay, lesbian, and bisexual Americans. First Amendment privacy jurisprudence has played an especially historic role, starting with *NAACP*.²³⁷ But neither the associational privacy nor the privacy-as-anonymity legacy of *NAACP*²³⁸ exclusively serves liberal causes. Women, minorities, and gays may be excluded from truly private clubs, parades, or the Boy Scouts; and most online anonymous speech viciously targeting blacks, women, and gays may have to be tolerated.

Like the 1950's hate-mongering segregationist, venomous online speakers today can use anonymity to shield racist, sexist, and homophobic speech. Fortunately, a number of courts have opened their doors to lawsuits when anonymous speech crosses traditional lines of tort and copyright liability, allowing plaintiffs to unmask offenders and bring them to civil justice.²³⁹ Measures limiting anonymity are privacy jurisprudence too, and can contribute to an understanding of privacy law as an instrument, not of harmful, hidebound tradition or new technology-assisted freedom to hurt and offend, but of progressively liberal social change.

237 *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

238 *Id.*

239 Some courts permit unmasking anonymous Internet posters when the tough *Dendrite* and *Cahill* standards are met. An Illinois appeals court has rejected *Dendrite* and *Cahill* in favor of a more generous standard in a case alleging online defamation. *See Maxon v. Ottawa Publ'g Co.*, 929 N.E.2d 666, 674–75 (Ill. App. Ct. 2010) (“There is no question that certain types of anonymous speech are constitutionally protected. However, it is overly broad to assert that anonymous speech, in and of itself, warrants constitutional protection We find nothing in these cases to support the proposition that anonymous Internet speakers enjoy a higher degree of protection from claims of defamation than the private individual who has a cause of action against him for defamation.” (citing *Watchtower Bible & Tract Soc’y of N.Y. v. Vill. of Stratton*, 536 U.S. 150 (2002); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Talley v. California*, 362 U.S. 60 (1960)).