UNPOPULAR PRIVACY: THE CASE FOR GOVERNMENT MANDATES

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I. INTRODUCTION

What is privacy? People, including lawyers and judges, refer to a diverse range of phenomena when they speak of “privacy.” In everyday parlance, invasions of “privacy” include five sorts of things: (1) physical intrusions, such as creeping onto someone’s property, peeping into their bedroom window, and taking photographs of them having sex;1 (2) informational intrusions, such as private investigators “pretexting” to obtain social security numbers for their clients;2 (3) decisional intrusions,

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1. See, e.g., Plaxico v. Michael, 735 So. 2d 1036, 1037 (Miss. 1999).

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such as states banning assisted suicide or gay marriages;³ (4) proprietary intrusions, such as a publisher using a family’s group portrait without permission or compensation;⁴ and, finally, (5) associational intrusions, such as an unwelcome person demanding membership into an exclusive club or the Boy Scouts.⁵

What is privacy law? To start, privacy law includes the four common law invasion of privacy torts recognized in most states and by the American Law Institute's Restatement of (Second) of Torts: intrusion upon seclusion, publication given to private facts, false light publicity and misappropriation of identity. I would include in my definition of privacy law the closely affiliated state common law of publicity and confidentiality. Next, privacy law includes provisions and interpretations of the Federal Constitution. The word "privacy" does not appear in the U.S. Constitution. Nevertheless, the Bill of Rights has spawned a mountain of privacy jurisprudence. The First and Fourth Amendments' jurisprudence of associational, physical, and informational privacy must be noted in this regard.⁶ The controversial Fourteenth Amendment equal protection and substantive due process decisional privacy jurisprudence is part of privacy law, too.⁷ The Third, Fifth, Eighth and Ninth Amendments have been held to protect privacy interests.⁸ And to complete the picture, one should not omit inclusion of state constitutions. State courts have repeatedly held that state constitutions significantly expand privacy protection beyond federal limits.⁹ The final dimension of privacy law consists of federal and state statutes that protect privacy interests. Dozens of federal privacy statutes and regulations cover government record management; health, education, and financial data;

⁹. See, e.g., In re T.W., 551 So. 2d 1186, 1191 (Fla. 1989); Commonwealth v. Sell, 470 A.2d 457, 467 (Pa. 1983).
video rentals; communications; the Internet; and surveillance. Some of them are known by their nicknames: HIPAA, FERPA, COPPA, Gramm-Leach-Bliley, and Title III. The states have privacy protection statutes of their own, governing everything from medical records and library records to adoption records and state tax returns.

Typical discussions of privacy law focus on measures to advance or cut back on popular forms of privacy. By “popular” forms of privacy, I mean the physical, informational, proprietary, decisional or associational privacy that people in liberal nations tend to want, believe they have a right to, and expect government to secure. The confidentiality laws governing telephone calls, e-mail, and April 15th tax filings are popular forms of privacy and so are the confidentiality laws governing health information, bank accounts, and academic records. The government tells citizens, residents and consumers that we cannot have all the privacy we want. Law enforcement, the war on terror, and public health research are just a few of the reasons lawmakers and the courts give us for letting us down. Privacy isn’t everything—sometimes it is a tough nut to swallow.

But popular privacy is not the focus of this lecture. My focus is unpopular privacy. Unpopular privacy is any sort of privacy that is disliked by the people subjected to it. If you think that privacy laws only regulate popular privacy, think again. Unpopular privacy is pervasively promoted, required, and enforced by government mandate. There are, as one scholar recently put it, “duties” of privacy as well as rights of privacy. Take for example the federal government’s “don’t ask, don’t tell” policy. This regulation requires that homosexuals keep their

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12. The “don’t ask, don’t tell” policy of the U.S. military is codified in 10 U.S.C. § 654(b). It provides

Policy. A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:
sexual orientation private. This is a government privacy mandate that is wildly unpopular with homosexuals who want careers in the military but reject the closet. There are other ready examples of unpopular privacy. The Children's Online Privacy Protection Act of 1998 is unpopular with children under thirteen who would like to make purchases and win prizes on the Internet without their parents lording over them. Another example of unpopular privacy: state and local anti-nudity laws upheld by the U.S Supreme Court impose pasties and g-string modesty gear on otherwise nude dancers. These laws are unpopular with club owners and dancers who believe wearing pasties and g-strings impairs their ability to earn maximal profits.

II. JUSTIFYING MANDATES

How does our government justify mandating privacy that people don't like and don't want? Isn't privacy an aspect of freedom and moral autonomy? In 1906, the first state court to recognize the right to privacy likened invasions of privacy to slavery. The state in question was Georgia, where the memory of human chattel slavery was still alive. If invasions of privacy are like slavery, could impositions of privacy be like slavery, too? The purpose of this lecture is to call attention to the need for critical examination of the justifications for coercing privacy offered in the United States.

I first began thinking about this subject, unpopular, mandated

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts
(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.
(3) That the member has married or attempted to marry a person known to be of the same biological sex.

privacy, more than a decade ago. I wrote an essay\textsuperscript{15} and planned to write a book. My book was going to use examples, chiefly from contemporary U.S. privacy law, to raise philosophical questions about legal coercion under liberalism. But at about that time, novel Internet, financial and medical privacy laws were on the horizon: COPPA, HIPAA, Gramm-Leach Bliley. In the United States and internationally, privacy law was entering a rapid-growth phase. I decided to set my manuscript aside and wait for the dust to settle.

I decided to await the passage of time for another reason as well: dramatic changes in privacy norms were afoot. The United States seemed to be in the midst of a revolution in the nature of the public's attachment to privacy. For example, opinion polls indicated that most Americans highly valued informational privacy and welcomed laws protecting it. Yet emergent lifestyles told another story: a general relaxation of informational privacy concerns. In everyday life, people were becoming open about intimate matters. Americans freely disclosed intimacies on the Internet, in print media and as guests on television and radio. Market incentives for voluntary intimate disclosure and self-disclosure multiplied; fleeting fame and fast money proved effective lures. But ideals of convenience, accountability, and the common good seemed to be equally effective lures. Although U.S. privacy advocates and civil libertarians decried invasions of privacy, the general public seemed to tolerate requests from businesses and government for personal information about family, health, and finances.

The terrorist attacks of September 11, 2001 kicked up more legal dust. The feeling in the United States was that the world had been remade and needed a reinvigorated regime of security and law enforcement. Hastily enacted and reauthorized a few years later, the USA PATRIOT Act permitted new levels of government surveillance.\textsuperscript{16} Now government was expressly asking the public, when they traveled, placed phone calls, or used the library or Internet, to give up previously fostered expectations of privacy. Since the late 19th century, fears of invasive technology from camera to computers had been major factors prompting growth in privacy law. Now a worried, patriotic public mainly accepted technology as an appropriate tool of government and its

private sector partners, together waging an international “war against terrorism.”

As the first decade of the second millennium draws to a close, enough of the jurisprudential dust has finally settled to allow me to move forward, confident of the terrain on which I tread. This is not to say that the social and political contexts of privacy or privacy law have become either static or unambiguous. But the moment will never come for a study of unwanted privacy mandates if either policymaking or culture must stand utterly still for a snapshot. And, perhaps I need not have delayed at all, since it was always the case that my ultimate concern is an enduring one of inherent and practical value, namely the limits of choice and coercion.

Scholars need to expand the privacy debates in a significant way. The “right to privacy” has enjoyed wide popularity for several decades now. Legions of philosophers, lawyers, judges, policymakers and journalists have made the compelling case for privacy rights protecting personal information and personal choices. It is generally agreed that privacy rights, are not absolute even if fundamental rights and human rights are. Accordingly, the case for limiting the right to privacy for the greater good has also been heard.

Robust privacy rights can slow down the efficient flow of data and data access preferred by many businesses and officials charged with responsibility for law enforcement, public health and national security. Beefy privacy rights tolerating diverse lifestyle and intimate choices negates a common, shared morality. The question of how to reconcile the ideal of privacy rights with the need for information, surveillance and social cohesion is an important one, the subject of frequent debate in democratic societies.

Yet debates over balancing “privacy and data accessibility,” “privacy and security” or “privacy and moral community” are not the only ones that deserve a forum. We need also to engage in debates, as this lecture suggests, about balancing freedom from privacy, on the one hand, and government imposed privacy on the other.

Privacy is often coupled with the concept of “individual right.” It is easy to overlook the fact that many individuals do not value certain privacies. They are not attached to them as the basis of actual or potential “rights.” Right to it or not, many people wish to be free of the burden of one form of privacy or another. Although privacy is often depicted as a basic good that rational people naturally want and demand
of good government, some people, young and old, will give up seemingly beneficial privacy if they are allowed to. Should they be allowed to? Should they be allowed to if only coercion can stop them?

Scholars must explore in practical context the extent to which varied forms of privacy should be mandated. How do we balance the interest in freedom from privacy with the interest in mandating it? My question should be of interest to anyone gripped by the larger, classic inquiries within social and political philosophy into the just bounds of individual freedom and coercion.

If privacy were just a routine good, the case for coercing it would not have particular weight. But philosophers continue to maintain that the experience of privacy is of great value to individual dignity, psychological well-being, and limited government. If privacy is as important as liberal philosophers have claimed it is, should we not do something to cultivate a taste for privacy? Perhaps parents, teachers and clergy should teach and preach the value of privacy with new zeal. But what about the public sector? Shouldn’t officials act to shore up the preference for privacy? Yet how can government action in this domain be justified and constrained?

A central question for privacy scholars then is this: when is coercing privacy required by western liberal democratic ideals and when does coercing privacy contradict them? I believe privacy is more than a routine good and a sometimes popular preference. I believe it is a foundational good to which liberal societies must have a substantive commitment, as they do to freedom and equality. The importance of privacy cannot be reduced to the importance of the legal “right to privacy,” with its built-in assumptions of at-will alienability.

People should be taught to value and respect others’ privacy and their own. Government will sometimes be entitled or even required to reinforce or coerce privacy practices. Liberal democracies must not only champion certain privacy rights as protected options, they must also treat some privacy as vital enough to be imposed on the uncaring. Returning to an earlier example, the U.S. Congress did exactly that when it enacted the Children’s Online Privacy Protection Act. Unites States children under thirteen no longer have a right to share personal data with Internet operators.

Government must have the power to coerce privacy. Yet this power,
like all state power, is subject to abuse. Government can turn privacy into a weapon against its own citizens. Government can coerce privacy to reduce the transparency of its operations and the accountability of officials. Governments may coerce privacy as a tool of social control, depriving individuals of identity, sexuality, or freedoms of expression and association, some of which are critical to the realization of democratic ideals.

Thus, while coercing privacy is highly desirable from a liberal democratic point of view, it is also potentially dangerous from a liberal democratic point of view. Ultimately society must constrain the power to mandate privacy, not only to promote ideals of responsible freedom, but also to promote ideals of open government.

III. THE LIMITS OF COERCION

Liberalism proceeds from a utilitarian or deontic bias against government coercion. I defend some coercion aimed at privacy promotion, but I think we can readily see that the coercion at society’s disposal will not always be effective. An example from Germany illustrates the point.

In early 2000, German regulators considered forcing the nightly television program Big Brother off the air. The purpose would have been to mandate privacy. Modeled after a Dutch predecessor, contestants on the show agreed to live in isolation on a television set designed to look like a house. Contestants were not allowed televisions, phone calls or newspapers. Every aspect of their lives on the set was recorded on camera, including trips to the toilet, hygiene and intimacy. Each week the viewing public voted a contestant off the show, until a final contestant was declared winner and handed a large check.

Interior Minister Otto Schilly raised the possibility that the television program violated the German constitution, which provides for an inalienable right to human dignity. A fan from Berlin urged fellow Germans to “just have fun and relax, and not [to] spend all their time worrying and discussing everything.”18 Under the pressure of opposition from prominent officials and public figures, some changes were made in the show’s format voluntarily to address concerns about inhumanity, including creating a camera-free room to which contestants could retreat.

for one hour of privacy a day. In a free society moral suasion, or the mere threat of legal action, can sometimes achieve goals otherwise sought through coercion.

To mandate privacy more forcibly by taking the show off the air would have required lawmakers to confront disapproving public opinion. Moreover there was a certain futility for television regulators to implement a ban. The television show was actually a compilation of highlights from *Big Brother*, the twenty-four hour, seven days a week web cast. Had the forty-five minute nightly television show been cancelled by a privacy mandating government, *Big Brother* would still have continued on the Internet. Pragmatically speaking, banning the television show would have been a symbolic expression of privacy values rather than a way to insure any individual’s privacy.¹⁹

Privacy is important and some legal privacy mandates are worthwhile. But the law is full of tradeoffs. United States law often places property and freedom of speech above privacy. The J.D. Salinger letters case makes for an apt illustration. Joyce Maynard had a brief affair with writer J.D. Salinger when he was fifty-three and she eighteen. Decades later she decided to sell the fourteen unpublished letters that the reclusive author wrote to her from his New Hampshire cottage between April 25, 1972 and August 17, 1973. Sotheby’s agreed to manage the sale at auction. Maynard knew how greatly Salinger valued his privacy, but she rebuffed critics of the auction, saying she needed the money to send her children to college and could not be deterred.²⁰ Like it or not, the rules of privacy and property law assigned Maynard the right to waive her own privacy interests in not having the letters made public, and to profit handsomely from ownership. Interestingly, in an earlier episode, U.S. copyright law was successfully marshaled by J.D. Salinger to prevent the use of his private correspondence in an unauthorized biography.

I believe coercing privacy can be justified but not that coercing privacy is always the best or only option. Sometimes policymakers bent on promoting privacy have a plausible choice between mandating privacy through coercive laws and establishing greater privacy by increasing options for choice. In a society with liberal aspirations,

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choice concerning personal matters should be preferred to coercion. Liberalism commends a principled bias against coercion.

United States policymakers commonly seek to avoid and minimize coercion. The Federal Trade Commission ("FTC") took a non-coercive approach to addressing the problem of annoying telemarketing calls. The FTC identified telemarketing calls as a major source of unwanted invasions of privacy and sought to do something about it. In 2002 a typical residential home owner might receive dozens of telemarketing calls a week. These calls disturbed the solitude and intimacy of home life. They frequently came in the early evenings when callers were likely to interrupt rest, meals, bathing, sex, bill-paying, housework or child and elder care. Annoying calls came during homework and religious observances.

The telemarketing industry tried to minimize the disturbance caused by their calls, observing that people did not have to answer the phone, could turn their phones off or use caller ID. Call recipients could also request that individual callers not call back and report those who did to authorities for prosecution. The FTC argued that the self-help remedies were inadequate. The number of calls was overwhelming, the procedures for blocking and screening calls inconvenient, impractical and expensive. No one had the time to keep track of the names of the telemarketer who made repeat calls and pursue legal action against them.

The FTC could have moved to ban all telemarketing calls for all residential phone customers. This would have mandated privacy even for home dwellers who did not want it. Instead it decided to give individuals the ability to opt out of accessibility to telemarketers by notifying the FTC that they wanted their phone numbers to be included on a National Do Not Call ("NDNC") list. People who valued their privacy and knew of the registry could opt in, while people who did not particularly value their privacy could live with the status quo. But the status quo could be expected to change if enough people opted out of calls. The telemarketing industry might be forced to scale back its

business if its target population were significantly reduced in size, resulting in the placement of fewer calls.

In 2003 the FTC established the National Do Not Call Registry program. Under the program, most commercial telemarketers were prohibited from calling phone numbers on a government managed list. Politicians seeking votes, researchers, and charities were permitted to call numbers on the list, but only businesses with a prior relationship with the call recipient could call a residential phone customer.

The NDNC registry was a popular success. Even before the program officially took effect, people signed up in the millions. Naturally, the telemarketing industry was unhappy. A successful suit was filed in Oklahoma district court by the Direct Marketing Association and three others claiming that the FTC lacked the legal authority from Congress to regulate access to phone customers. The FCC, plaintiffs argued, has responsibility for phone matters. The FTC believed it was acting pursuant to its authority to fight unethical and deceptive trade practices, of which it believed the telemarketing industry was often guilty. Moreover, Congress had already appropriated funding for the FTC to implement the program, implicitly granting it authority. Congress quickly responded with legislation promptly signed by the President to make the FTC’s uncertain authority certain.

A second lawsuit filed in federal court in Colorado by Mainstream Marketing Services Inc. and two other firms attacked the NDNC on constitutional grounds. The claim was that the right to commercial free speech was violated by the program. The FTC was guilty of “content discrimination” because it singled out commercial telemarketers, permitting calls by politicians and charities. If the ballet and the Republican Party can disturb diaper changing with a cold call to a household, why can’t a commercial telemarketer, the plaintiffs asked?

The federal appeals court in Colorado sided with the FTC, emphasizing the constitutional importance of the privacy of the home. The First Amendment does not give commercial entities the right to impose their messages on a captive audience of unwilling listeners, and thus the opt-in Do Not Call Registry is constitutional. As for banning some unwanted calls but not others, government is free to fix part of a problem by singling out what it reasonably believes are the worst offenders.

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23. Id. at 1238.
Why did the FTC not take a more coercive approach to resolving the telemarketing problem? The more coercive approach would have been for the FTC to categorically ban most telemarketing calls. This would have been to deny freedom of choice to both telemarketers and residential phone owners. Less coercively, the FTC might also have developed a policy that required phone owners wishing to receive telemarketing calls to opt into a National Calls-Permitted Registry. The approach the FTC took recognizes the significance of freedom of choice, leaving the option of receiving calls and placing calls open. The severity of the problem of interrupted lives was sufficiently great in my view to warrant the more coercive, categorical ban on telemarketing calls or an opt-in plan. The case for coercing privacy in this context was paternalistic: some people may not realize the importance of the privacy they are missing because they are constantly batting away telemarketing calls.

A U.S./European comparison helps to focus on the virtues of paternalism. The European Union ("EU") is governed by a 1998 data directive that imposes fair information practices on those who collect and transmit personal information. Fair information practices require notice of data practices, review, consent, security and legal enforcement of privacy rights. Strikingly, the EU directive holds that some types of information are so sensitive that member states cannot collect it even with the consent of the individuals from whom it would be gathered. Now that's mandatory privacy, pure and simple. One can admire the "inalienability" rule in EU information law, because it reflects appreciation of the dangers of data flow, and the reality that it may be hard for individuals to comprehend or protect against those dangers.

Privacy right inalienability is not an absolute good and would be an undesirable feature of the law of professional confidentiality. Compelled professional silence is an important category of mandatory privacy. The laws that require confidentiality and secrecy of lawyers, physicians, therapists and clergy are sound public policy-coercion without unwarranted subordination, paternalism or injustice that liberal

24. The European Union (EU) Data Protection Directive went into effect in October 1998. The purpose of the Directive was to mandate minimum privacy standards to safeguard the informational privacy of persons residing in EU member states. The Directive regulates the types of personal information that can be sought, collected and shared without the consent of the individual. The Directive applies to all sectors of industry and to nearly all personal data. Broad exceptions are made for law enforcement, national security and routine government administration.
democracy must condemn. It is important though, that the law not regard professional silence as an inalienable privacy right. Voluntary waiver can put an end to dysfunctional seccrues. To be able to tell the public what one is expected only to share with mental health professionals can have important therapeutic and educative advantages. *When Rabbit Howls* is the autobiography of Truddi Chase, a psychotherapy patient who had been subjected to incest and bestiality as a child, by an uncommonly cruel father. She was ultimately diagnosed with Multiple Personality Disorder (Dissociative Identity Disorder). Traditionally, the sessions of a psychotherapist and patient are not recorded or shared. Chase asked her therapist to tape all of their sessions so that other victims of incest and the people who treat them could benefit. I was initially alarmed to read that the therapist agreed, but by the end of Chase’s book, I could see the value of the taping. The tapes helped substantiate Chase’s unusual diagnosis of having more than ninety distinct identities, helped train student-therapists, and helped Chase write what proved to be a best-selling book accurately documenting her successful treatment.

IV. WEAK AND STRONG COERCION

Government privacy mandates include some that are weakly coercive and others that are strongly coercive. In practice, both weakly and strongly coercive privacy mandates spawn normative controversy.

Weak mandates mildly constrain freedom to speak, act or choose. Weak mandates may include mechanisms for opting out of otherwise required privacy protections. I would offer the aforementioned Children’s Online Privacy Protection Act as a weak mandate. It frustrates the desire of precocious preteen children for independent access to websites that collect personal data. Yet with parental approval, a child may disclose personal data to site operators. I characterize the COPPA privacy mandate as “weak” because it is limited in application to childhood and leaves the door open for children to share personal data

25. TRUDDI CHASE, WHEN RABBIT HOWLS (Jove 1990).

26. Id. at 7 (“Her condition for taking on her treatment was that he would talk about it to everyone, to anyone, and that the sessions were to be filmed for the eventual training of mental health professionals . . . . She explained her desire to break most victims’ rule of privacy.”).

with website operators if their parents opt out of protection.

Strong privacy mandates extensively constrain freedom and do not provide mechanisms of circumvention. Some familiar laws exemplify strong privacy mandates. U.S. indecency laws, for example, couple prohibitions against sought-after nudism and nude entertainment with criminal penalties for their violation. In another vein, rules of professional silence also exemplify fairly strong privacy mandates. Lawyers cannot freely publicize their conversations with interested clients, even if there are profits to be earned by doing so. Disclosing client confidences without the fully informed consent of their clients subjects lawyers to ethical discipline from their professional peers as well as legal prosecution. A similar fate awaits physicians and accountants who do not keep mum. Corporate executives are silenced by U.S. securities laws that compel insiders privy to undisclosed corporate information to refrain from trading that might give them an unfair advantage or tip a company's secret hand. I mentioned earlier that homosexuals can serve in the U.S. armed forces so long as they do not reveal their homosexuality to others through word or deed. Requiring unwanted silence under threat of serious sanction, the "don't ask, don't tell" requirements facing gays and lesbians in the U.S. military are an example of strongly coercive mandatory privacy laws.

The strongest of the strong category of privacy mandates are legal measures that steeply curtail freedom of movement and association, authorizing enforcement via forcible physical coercion. Mandatory public health quarantines and forcible confinement in mental hospitals are good examples. Another apt example would be the long-term solitary confinement of aggressive felons in the U.S. penal systems' isolated "supermax" prison cells. Women were once subject to strong privacy mandates of seclusion. Political philosophers have often explained that legal rules governing marriage, contract and property once helped to restrict women to the private sphere of home and family as subordinated caretakers. To an extent, women have always capitalized on private lifestyles by developing meaningful capacities for nurture, intimacy and creative artistry. But the problem of state mandated privacy and the problem of coercion remained.

V. BENEFICIARIES

Who benefits from mandated privacy? In practice, the designated beneficiaries of mandatory privacy— the categories of people expressly
named by state lawmakers, regulators and law enforcers—include individuals, families, and the general public. In the case of Internet data protection beneficiaries are supposed to be the children forced into anonymity; their families, whose informational privacy they might compromise along with their own; or the society whose children and families could be harmed by unscrupulous website operators. The intended beneficiaries of mandated professional silence are the consumers of professional services. Consumers' willingness to make important disclosures depends upon trust and confidentiality. But public health is also a beneficiary of medical professionals' silence, much as the ideal of an adversarial legal system is a beneficiary of lawyers' professional silence. When it comes to "don't ask, don't tell policies," the immediate beneficiary is supposed to be the armed forces, whose \textit{esprit de corps} and effectiveness is said to depend upon the absence of the social and sexual tensions among the troops.

At times the intended beneficiary of government mandated privacy is government itself. It is not in principle out of order for government to mandate privacy for the sake of good government or to protect the interests of officials. However, a problem arises when government enforcement of citizens' privacy rights comes across as a mere pretext for self-serving state secrecy.

Consider U.S. efforts to keep secret the names of post 9/11 detainees. After September 2001 terrorist attacks in the United States, the federal government detained hundreds of individuals believed to have a connection to terrorism. Media and civil liberties groups attempted to use the Federal Freedom of Information Act to get the names and other information about the detainees, suspecting that a number were being held on shoddy grounds. However, the government asserted that the Freedom of Information Act open record law contained exceptions for personal and other sensitive information whose disclosure might jeopardize law enforcement or national security.\footnote{Electronic Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(9)(2000) (omitting matters to which the section does not apply).} Ironically, many of the detainees would have preferred ready disclosure to bureaucratically vaunted privacy in this instance. The privacy "protection" the government asserted on their behalf was received as an unwanted mandate. Critics of the government claimed that in essentially coercing privacy, the government was really trying to protect state secrecy and avoid accountability for overly broad national origin, religion and
ethnicity-based round-ups. The Court of Appeals for the District of Columbia sided with the government in a 2003 decision, *Center for National Security Studies v. U.S. Department of Justice.* In 2006, over privacy and security objections raised by government, the Pentagon was forced to release to the Associated Press documents that included the names of terrorism-related captives imprisoned at the U.S. naval base at Guantanamo, Cuba.

The intended beneficiaries of a regime of mandated privacy may perpetually reject it as coercive, unjustifiably paternalistic, discriminatory or cruel; or they may come to accept it as legitimate. Judgments within a group of stated beneficiaries may be uniform or discordant. Judgments may have merit or lack merit. We need to step back and assess the merits of recurrent arguments put forth in the United States and other liberal democracies for and against officially mandating various forms of unwanted privacy.

VI. CONCLUSION

I do not for a moment think it is a small or easy task to persuasively deliver the central argument of this lecture. But let me summarize it. Privacy is important, a human good. It is not merely an optional good, waivable by the unwanting without cause for concern or public interference. Individuals do not always care or recognize that their privacy is important; privacy is so valuable that individuals must sometimes be forced to accept it for the good it does them or others. While liberal societies properly constrain government coercion, they also properly constrain individual choice when necessary to preserve foundational goods, including inalienable rights and compelling needs. For this reason, government, even a liberal one, may justifiably mandate privacy.