

TORT LAW VS. PRIVACY

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Tort law is often seen as a tool for protecting privacy. But tort law can also diminish privacy, by pressuring defendants to gather sensitive information about people, to install comprehensive surveillance, and to disclose information. And the pressure is growing, as technology makes surveillance and other information gathering more cost effective and thus more likely to be seen as part of defendants' duty to take "reasonable care."

Moreover, these tort law rules can increase government surveillance power, and not just surveillance by private entities. Among other things, the NSA PRISM story shows how easily a surveillance database in private hands can become a surveillance database in government hands.

This Article aims to provide a legal map of how tort law can diminish privacy, and to discuss which legal institutions—juries, judges, or legislatures—should resolve the privacy-versus-safety questions that routinely arise within tort law.

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INTRODUCTION

Through the privacy torts, tort law aims to protect privacy.¹ But tort law, and especially negligence law, can also reduce privacy.

Tort law can pressure property owners, employers, and consumer product manufacturers into engaging in more surveillance.² Tort law can pressure colleges, employers, and others into more investigation of students’, employees’, or customers’ lives. Tort law can pressure landlords, employers, and others into more dissemination of potentially embarrassing information about people. Tort law can require people to reveal potentially embarrassing information about themselves. Technological change is likely to magnify this pressure still further. Yet this tendency has gone largely undiscussed.³

1. See *infra* Part II.E (discussing two of the privacy torts, intrusion upon seclusion and disclosure of private facts).

2. For convenience, this Article uses the term “privacy” to include freedom from surveillance, even in public places. This seems to be the standard definition. See, e.g., Julie E. Cohen, *What Privacy Is For*, 126 *Harv. L. Rev.* 1904, 1905–06 (2013) (arguing, in part, “freedom from surveillance, whether public or private, is foundational to the practice of informed and reflective citizenship” and “continuing vitality of the political and intellectual culture” and should thus be seen as an aspect of “privacy”); Neil M. Richards, *The Dangers of Surveillance*, 126 *Harv. L. Rev.* 1934, 1945–52 (2013) (arguing “intellectual privacy” consists of freedom to generate and develop new ideas without excessive surveillance); Daniel J. Solove, *A Taxonomy of Privacy*, 154 *U. Pa. L. Rev.* 477, 493 (2006) (treating interests in freedom from surveillance as privacy interests); Peter P. Swire, *Proportionality for High-Tech Searches*, 6 *Ohio St. J. Crim. L.* 751, 753–55 (2009) (reviewing Christopher Slobogin, *Privacy at Risk: The New Government Surveillance and the Fourth Amendment* (2007)) (same).

3. This Article focuses on how substantive liability rules may require gathering and revealing information, not on the important, but already well-discussed, debate about how discovery in civil cases may diminish the privacy of litigants, litigants’ employees, and others. See, e.g., Walter K. Olson, *The Litigation Explosion: What Happened when America Unleashed the Lawsuit* 108–27 (1991) (criticizing discovery practices that author argues unduly infringe litigants’ privacy).

Modern negligence law (including the law of product design defects⁴) obligates all of us to take reasonable precautions to prevent harm caused even in part by our actions, by our products, by our employees, or by others who are using our property.⁵ We also have duties to affirmatively protect some people—customers, tenants, other business visitors, and likely social guests—even against threats that we did not help create.⁶ Under modern proximate cause law, all these duties may require us to take reasonable precautions against foreseeable criminal acts by others.⁷

And some of those required precautions may involve disclosing personal information about ourselves or gathering and disclosing personal information about others. Under the Learned Hand formula for determining negligence, the requirement of “reasonable precautions” is often understood as requiring cost-effective precautions.⁸ Liability for failing to take a precaution is proper if $B < P \times L$ —if the burden of the precaution (B) is less than the probability that the precaution would prevent the harm (P) multiplied by the magnitude of the harm that would be prevented (L).⁹ Even those courts and commenters who reject the Hand

4. Product design defect law in practice largely applies negligence principles, since it imposes liability for “unreasonable” product designs—designs that could have been made safer through reasonable and cost-effective measures. See, e.g., Restatement (Third) of Torts: Prods. Liab. § 2 cmt. d, reporters’ note cmt. a (1998). This Article therefore uses “negligence law” to refer both to standard negligence law and product design defect law. (In some respects, product design defect law departs from negligence principles, for instance in holding distributors liable for manufacturers’ negligent design choices, even if the distributor was not itself negligent, *id.* § 2(b), but those differences are largely irrelevant for the purposes of this Article.)

5. Restatement (Third) of Torts: Liab. for Physical & Emotional Harm §§ 3, 7 (2010) (own actions); *id.* § 41(b)(3) (2012) (actions of employees); Restatement (Third) of Torts: Prods. Liab. §§ 1, 2 (products); Restatement (Second) of Torts § 390 (1965) (entrustment of property).

6. Restatement (Third) of Torts: Liab. for Physical & Emotional Harm §§ 40, 51 (2012).

7. “The conduct of a defendant can lack reasonable care insofar as it foreseeably . . . permits the improper conduct of . . . a third party.” *Id.* § 19 (2010). “The improper action or misconduct in question can take a variety of forms. It can be negligent, reckless, or intentional in its harm-causing quality. It can be either tortious or criminal, or both.” *Id.* § 19 cmt. a.

8. See, e.g., Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. Rev. 323, 326 (2012) (“The [Hand] standard is predetermined by a particular normative commitment—namely, cost efficiency . . .”).

9. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (L. Hand, J.); see, e.g., *In re City of New York*, 522 F.3d 279, 284 (2d Cir. 2008) (applying Hand formula in affirming negligence judgment); *Raab v. Utah Ry. Co.*, 221 P.3d 219, 232 (Utah 2009) (concluding negligence-like inquiry under federal liability statute requires “basic ‘Hand Formula’ negligence analysis, where the determination of duty depends on balancing the burdens associated with taking a particular preventative measure against the probability and magnitude of injury that might occur absent the measure”).

formula would usually view these three variables as relevant to deciding whether failure to take a precaution is reasonable.¹⁰

Technological advances make gathering or disclosing information about people's backgrounds, tendencies, and actions increasingly inexpensive, and potentially increasingly effective at helping avoid, interrupt, or deter harm.¹¹ The *B* (burden) of such precautions thus gets lower. The *P* (probability) that they will prevent harm gets higher. And failure to take those precautions therefore becomes negligent.

Thus, for example, when comprehensive nationwide background checks were expensive and ineffective, they were not required by the duty to exercise reasonable care.¹² Now they are cheap, quick, and more comprehensive, so failing to do a background check is often seen as negligent.¹³ And employers do indeed report that the desire to avoid legal liability is a major reason for investigating the backgrounds of job applicants.¹⁴

10. See, e.g., Stephen R. Perry, Cost-Benefit Analysis and the Negligence Standard, 54 Vand. L. Rev. 893, 895 (2001) (noting that, though juries are often not instructed to apply Hand formula, many appellate opinions hold "magnitude of the risk and the costs of preventative precautions are factors that are *relevant*" to determination of negligence).

11. Video surveillance, for example, has become much cheaper. See *infra* note 15. Such surveillance can deter crime if people know they are being watched and can help bring assistance more quickly. See, e.g., Jennifer King, Deirdre K. Mulligan & Stephen Raphael, Fighting Crime with Publicly-Financed Surveillance Cameras: The San Francisco Experience, 2009 Cal. Pol'y Options 145, 158, available at <http://harcdata.org/CAPolicyOptions2009.pdf> (on file with the *Columbia Law Review*) (reporting "statistically significant decline, with a magnitude of 23%," in property crime "in the areas within 100 feet of the new surveillance cameras"); Stephen Rushin, The Judicial Response to Mass Police Surveillance, 2011 U. Ill. J.L. Tech. & Pol'y 281, 294–99 (discussing King et al. study and others reaching similar conclusions). Likewise, criminal history records have been put online and have therefore become much easier to search. See *infra* note 13. Such searches offer the possibility of screening out potentially dangerous employees.

12. See, e.g., *Stevens v. Lankard*, 297 N.Y.S.2d 686, 688 (App. Div. 1968) (concluding, in negligent hiring case, "any more exhaustive search into an employee's background"—apparently referring to search that would include out-of-state convictions—"would place an unfair burden on the business community"), *aff'd*, 254 N.E.2d 339 (N.Y. 1969).

13. See, e.g., *Malorney v. B & L Motor Freight, Inc.*, 496 N.E.2d 1086, 1089 (Ill. App. Ct. 1986) ("[T]here is no evidence . . . that the cost of checking on the criminal history of all truck driver applicants is too expensive and burdensome when measured against the potential utility [(preventing sexual assault of hitchhikers)] of doing so."); *Carlsen v. Wackenhut Corp.*, 868 P.2d 882, 887–88 (Wash. Ct. App. 1994) (concluding employer may have duty to conduct background check for certain employees, including unarmed concert security guards); Ryan D. Watstein, Note, Out of Jail and Out of Luck: The Effect of Negligent Hiring Liability and the Criminal Record Revolution on an Ex-Offender's Employment Prospects, 61 Fla. L. Rev. 581, 592–93 (2009) ("Lower costs and easier access provide [an] incentive to perform [background] checks, potentially leaving employers who choose not to conduct such checks in a difficult position when trying to prove they were not negligent in hiring." (footnotes omitted)).

14. See Soc'y for Human Res. Mgmt., PowerPoint, Background Checking: Conducting Criminal Background Checks 3–4 (2010), available at <http://shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckCriminalChecks.aspx> (on file with

Similarly, as video surveillance cameras became cheap enough to be cost effective,¹⁵ courts began to hold that defendants may be negligent for failing to install surveillance cameras.¹⁶ Failure to provide camera surveillance is now a common claim in negligence cases.¹⁷ “Take reasonable care” translates into a steady and growing pressure: investigate, surveil, disclose.

Still more comprehensive surveillance is likely to become technically feasible soon. Image recognition software will likely make it easier for one guard to monitor many more video cameras by alerting the guard to which screen is showing a potentially dangerous confrontation.¹⁸ Facial

the *Columbia Law Review*) (reporting 73% of 347 respondents, though in self-selected sample, conducted criminal background checks on *all* job candidates, with 19% more conducting them only on candidates for particularly sensitive classes of positions); *id.* at 7 (reporting 55% of 310 respondents gave “reduc[ing] liability for negligent hiring” as one of “the primary reasons that [their] organization conducts criminal background checks on job candidates”).

Of course, employers may also want to conduct background checks for reasons other than the threat of liability. Likewise, businesses may want to install surveillance cameras for business reasons of their own. But in many situations, the threat of tort liability will be a prominent source of pressure to implement such privacy-implicating precautions, as the survey noted above shows.

15. See, e.g., *Rodriguez-Quinones v. Jimenez & Ruiz, S.E.*, 402 F.3d 251, 256 (1st Cir. 2005) (noting low cost of camera as part of reason property owner might have duty to install one).

16. See, e.g., *infra* note 176 (citing many cases).

17. Besides the cases cited *infra* note 176, many other cases mention such claims but either do not deal with them for procedural reasons or reject the claims on the facts (for instance, because the particular criminal attack was not sufficiently foreseeable or because plaintiff did not show that on those facts the presence of cameras could have helped avert or interrupt the crime). See, e.g., *Palma v. BP Prods. N. Am., Inc.*, 594 F. Supp. 2d 1306, 1310 (S.D. Fla. 2009) (rejecting claim based on lack of foreseeability); *Birge v. Dollar Gen. Corp.*, No. 04-2531 B/P, 2006 WL 5175758, at *1 (W.D. Tenn. Sept. 28, 2006) (excluding expert testimony relating to, among other things, utility of security cameras); *Baptiste v. Better Val-U Supermarket, Inc.*, 811 A.2d 687, 691 (Conn. 2002) (rejecting claim based on lack of foreseeability); *Home Ins. Co. v. Am. Ins. Grp.*, No. Civ.A. 97C-04-024, 2003 WL 22683008, at *3-*4 (Del. Super. Ct. Oct. 30, 2003) (examining whether criminal act arose out of failure of duty of insured party to see if insurance company had duty to defend insured); *Alqasim v. Capitol City Hotel Investors, LLC*, 989 So. 2d 488, 493 (Miss. Ct. App. 2008) (holding defendant “had no ownership interest” and “thus, [defendant] did not owe a duty” to exercise reasonable care to prevent reasonably foreseeable injury); *Cole v. Sunnyside Marketplace, LLC*, 160 P.3d 1, 8 (Ore. Ct. App. 2007) (discussing whether suit is barred by statute of limitations); *Bass v. Gopal, Inc.*, 716 S.E.2d 910, 917 (S.C. 2011) (rejecting claim based on lack of foreseeability).

18. See Daniel Strain, *New Search Technique for Images and Videos Has Broad Applications*, Univ. of Cal., Santa Cruz (Nov. 9, 2009), <http://news.ucsc.edu/2009/11/3359.html> (on file with the *Columbia Law Review*) (“By using videos of aggressive behavior as templates, the technology could help surveillance systems learn to recognize potentially dangerous situations. If a man reached for a weapon on camera and that action matched a template of such behavior, surveillance software could alert a busy security guard.”); see also Bob Hennelly, *A Look Inside the NYPD Surveillance System*, WNYC News (May 21, 2010), <http://www.wnyc.org/story/71535-a-look-inside-the-nypd-surveillance-system/> (on file with the *Columbia Law Review*) (“[W]e can run video analytics on every single camera

recognition software will make it easier to keep track of who is present where and when,¹⁹ and to instantly look up visitors in criminal records databases. Again, under modern negligence law, as these precautions against crime become feasible, they may become legally mandated (on pain of liability should a crime take place in the absence of such precautions).

Likewise, product manufacturers can increasingly monitor misuse of their products by customers. Car manufacturers can design cars that email the police or call 911 whenever the car goes over eighty miles per hour. They can likely design cars that monitor the driver for signs strongly associated with drunk driving and call 911 when those signs are present. They can design cars with breathalyzer ignition interlocks that check the driver's breath alcohol level and report attempts to drive drunk to the police.

Such technologies are getting cheaper—cellular communication already has, and breathalyzer ignition overrides likely will, too. And when the technologies become cheap enough, it becomes plausible to claim that a manufacturer is negligent for designing a deadly machine that fails to inexpensively surveil its operator for signs of dangerous driving and to inexpensively report the operator's dangerous driving to the authorities.

These tendencies also bear on the likely future scope of government surveillance, not just private surveillance, as Part II.F discusses. First, duties imposed on private property owners and employers generally also apply to the government as property owner and employer.²⁰ Surveillance data collected by the government in those capacities can easily be shared with law enforcement agencies.

Second, as the National Security Agency PRISM story vividly illustrates,²¹ surveillance data collected by private entities can easily be

and so if we are doing a video canvas and we know we are looking for a guy on a bike we can type into our video analytics program 'guy on a bike' . . . It will search every camera on our network.'").

19. See Husna Haq, Drones Above New York 'Scary' but Inevitable, Mayor Bloomberg Says, *Christian Sci. Monitor* (Mar. 27, 2013), <http://www.csmonitor.com/USA/Politics/2013/0327/Drones-above-New-York-scary-but-inevitable-Mayor-Bloomberg-says-video> (on file with the *Columbia Law Review*) ("The NYCLU estimates there are 2,400 surveillance cameras in Manhattan alone, which combined with the city's new facial recognition unit, can scan faces in surveillance images or social media and match them against mugshots to hone in on suspects in criminal investigations."); see also Bridget Mallon, Comment, "Every Breath You Take, Every Move You Make, I'll Be Watching You": The Use of Face Recognition Technology, 48 *Vill. L. Rev.* 955, 957–68 (2003) (explaining use of facial recognition technology).

20. See, e.g., *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d 359, 364–66 (Tenn. 2009) (applying normal tort law landlord-tenant duties to government landlord).

21. See Barton Gellman & Laura Poitras, U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program, *Wash. Post* (June 6, 2013), http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970cb04497_story.html (on file with the *Columbia Law Review*) (describing PRISM's collection

subpoenaed or otherwise obtained by law enforcement agencies, without a warrant or probable cause.²² What the private sector gathers, the government can easily demand, whether through ordinary subpoenas or National Security Letters.²³

Third, the increasing prevalence of private surveillance may subtly make people more willing to accept government surveillance. If private entities are, for instance, *required* to maintain surveillance cameras with face recognition software on private property, it will be much harder to argue that police departments should be *prohibited* from doing the same on government-owned streets.

Negligence law, then, can pressure potential defendants into taking what this Article terms “privacy-implicating precautions”: disclosing information about employees, customers, tenants, students, and the like; gathering information about them; and surveilling them.²⁴ This pressure can sometimes have immediate and striking effects. An employer who must, for instance, warn customers about the threat posed by an employee—either because the employee has committed crimes, or because the employee is being stalked by a criminal who might injure bystanders in a future attack—will likely dismiss the employee, or not hire him in the first place. The same may be so for a landlord who must disclose this information about a tenant. And the pressure can also have long-term effects that are even more pervasive, as people’s understanding of the privacy they should demand is shaped by the limits on privacy that they have grown used to.²⁵

of data from internet companies, including “audio and video chats, photographs, e-mails, documents, and connection logs”); Charlie Savage et al., U.S. Confirms that It Gathers Web Data Overseas, N.Y. Times (June 6, 2013), <http://www.nytimes.com/2013/06/07/us/nsa-verizon-calls.html> (on file with the *Columbia Law Review*) (describing National Security Agency PRISM program, which gathered and archived a vast range of data collected by telephone companies about subscriber telephone calls).

22. See, e.g., *Zurcher v. Stanford Daily*, 436 U.S. 547, 559 (1978) (subpoena of photographs taken by newspaper reporter); *United States v. Miller*, 425 U.S. 435, 440 (1976) (subpoena of depositor records kept by bank); *Virgin Islands v. Encarnacion*, No. SX-10-CR-342, 2010 WL 7708836, at *3 (V.I. Super. Ct. Aug. 19, 2010) (subpoena of surveillance camera records); Gellman & Poitras, *supra* note 21 (discussing PRISM program, under which government demanded bulk records from internet service providers related to whom their customers were emailing).

23. See Andrew E. Nieland, Note, National Security Letters and the Amended Patriot Act, 92 Cornell L. Rev. 1201 (2007) (describing history of National Security Letters and of litigation related to them).

24. This Article deliberately does not label these “privacy-violating precautions,” because it may well be that some of these precautions should be required in some situations (whether by juries, judges, or legislatures) despite their privacy costs. In such situations, the precautions may not be seen as violating the legitimate scope of the right to privacy, just as the law may restrict speech without violating the freedom of speech. But all the precautions do implicate privacy in the sense that they impose privacy costs that ought to be considered in analyzing whether the precautions ought to be required.

25. See *infra* notes 135–137 and accompanying text (discussing lack of uniform societal definition of privacy and how privacy attitudes can therefore easily change).

So when should the tort system demand privacy-implicating disclosure, information gathering, or surveillance? This is a question that people who care about privacy should confront, whether they are academics, advocates, citizens, judges, or legislators. If this Article's observations are correct, then tort law could affect privacy in largely unseen but substantial ways. Those who are interested in privacy should consider how they can participate in controlling and perhaps limiting these effects, whether through legislation, amicus briefs, or scholarly analysis.

This Article will not offer a general answer to the question. Perhaps there is no single answer but rather different answers for different contexts. When it comes to affirmative protections for privacy, the legal system has developed many different privacy rules to deal with different kinds of intrusions.²⁶ Maybe there should likewise be several different privacy doctrines constraining the scope of negligence law. Moreover, people who value privacy differently, and for different reasons, will likely come to different answers.²⁷ Thus, this Article does not make substantive proposals that rely on a theory of privacy that many readers and many judges may not share.

Instead, this Article will try to explore not what the answer ought to be, but which actors in the tort system could provide it. Should these privacy-versus-safety decisions generally be made by jurors, applying the "reasonable care" standard? Should judges decide as a matter of law that certain precautions need not be taken because of the burden they impose on privacy? Or should the decisions be left to legislators or administrative agencies, with judges generally rejecting demands for privacy-implicating precautions unless a legislative or administrative body has mandated such precautions?

Part I of the Article will briefly explain the definition of privacy used here: essentially "control over the processing—i.e., the acquisition, dis-

26. For some common-law examples, see Restatement (Third) of Agency § 8.05 (2006) (describing agent's duty of confidentiality); Restatement (Third) of Law Governing Lawyers § 60 (2000) (describing lawyer's duty of confidentiality); Restatement (Second) of Torts § 652B (1977) (describing liability for intrusion upon seclusion); *id.* § 652D (describing liability for disclosure of private facts); see also *id.* § 652C (describing liability for appropriation of name and likeness tort, often characterized as protecting privacy); *id.* § 652E (describing liability for false light tort, likewise often characterized as protecting privacy); Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 *Geo. L.J.* 123, 158–64 (2007) (discussing historical breach of confidence tort, applicable to friends and lovers and not just professionals such as lawyers or psychotherapists); Paul M. Schwartz & Edward J. Janger, *Notification of Data Security Breaches*, 105 *Mich. L. Rev.* 913, 923–24 (2007) (discussing possible negligence-based action against businesses that negligently fail to properly secure private customer data). And there are many statutory examples. See, e.g., Video Privacy Protection Act, 18 U.S.C. § 2710 (2012) (specifying liability for willful disclosure of video rental records).

27. See, e.g., James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *Yale L.J.* 1151, 1153–60 (2004) (discussing different understandings of why privacy is important).

closure, and use—of personal information,”²⁸ which includes limitations on surveillance.²⁹ Part II will catalog some of the specific ways that negligence law and product design defect law may require behavior that undermines privacy or mandates surveillance.

Parts III, IV, and V will discuss which institutions could take the lead in evaluating such privacy-implicating proposed precautions: Part III will outline the arguments for jury decisionmaking, Part IV for judicial decisionmaking via “no-duty rules,” and Part V for legislative and administrative agency decisionmaking. In the process, the discussion will point to the relatively few court cases that have discussed these questions, almost all of which discuss the questions only very briefly. This Article tentatively suggests that this is an area in which courts should avoid allowing liability in the absence of legislative or administrative agency guidance; but the analysis offered throughout the Article should be useful even to those who come to a different bottom line.

I. WHAT PRIVACY MEANS HERE

Privacy means many things in many contexts. Sometimes it means, for instance, physical privacy: the absence of other humans in close proximity, whether or not they are gathering personal information.³⁰ Sometimes it means freedom from unwanted communications, such as telephone calls.³¹ Sometimes it means autonomy: the constitutional right to do certain things to one’s body, such as have an abortion.

But when this Article refers to “privacy,” it means information privacy: people’s “control over the processing—i.e., the acquisition, disclosure, and use—of personal information”³² about themselves and their activities. This in practice means, among other things, the absence of

- (1) disclosure to the public, to particular individuals, or to the government of information about a person that many people would prefer not be revealed to others,
- (2) gathering of such information, and
- (3) surveillance that may end up gathering such information.

Thus, a legal rule that pressures landlords (through threat of liability) to reveal their tenants’ criminal histories to other tenants would be seen as limiting privacy. So would a rule that pressures doctors to

28. Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 *Stan. L. Rev.* 1193, 1203 (1998); see also Alan F. Westin, *Privacy and Freedom* 7 (1967).

29. See *supra* note 2 and accompanying text (describing tort law pressures toward reducing privacy).

30. See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 484–88 (1988) (describing picketing outside person’s home as destructive of residential privacy).

31. See, e.g., *Restatement (Second) of Torts* § 652B ill. 5 (1977) (describing tort liability for harassing telephone calls).

32. See *supra* note 28 and accompanying text (defining “privacy” as used in this Article).

report to the government their patients' sexually transmitted diseases. So would a rule that pressures car manufacturers to build cars that analyze the driver's breath for excessive alcohol content. So would a rule that pressures shopping malls to put up surveillance cameras.

That a tort rule diminishes people's privacy does not mean that the rule should necessarily be rejected—just as the fact that a tort rule diminishes people's liberty, consumer choice, or other important values does not mean that the rule should necessarily be rejected. Privacy is not necessarily the most important value, and privacy might often need to yield to safety (the chief value that negligence law aims to protect). Safety often trumps privacy when it comes to criminal procedure,³³ evidence law,³⁴ and many other areas. It might well do the same when it comes to at least some kinds of tort law rules.

But costs to privacy ought to be considered when evaluating the costs and benefits of tort law proposals, just as costs to liberty, consumer choice, and the like ought to be.³⁵ One goal of this Article is simply to help courts, scholars, and advocacy groups identify those costs. Those who greatly value privacy might see the costs as counseling against certain forms of tort law liability, though those who think privacy has less value might take a different view.

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

But privacy is often considered valuable in many ways, and for many reasons. And that is also true even of imperfect privacy: privacy even as to things about you that some people know about you, and that most people can unearth if they try, but that are nonetheless not widely known.³⁶

33. See, e.g., U.S. Const. amend. IV (authorizing warrants to search people's homes, persons, and papers on showing of probable cause).

34. See, e.g., Cal. Evid. Code § 1024 (West 2009) (recognizing exception to psychotherapist-patient privilege for psychotherapists who reasonably believe their patients are dangerous to themselves or others).

35. See *infra* Part IV.A (describing no-duty rules, which rest on conclusion that some precautions need not be undertaken because they are too intrusive on various private or social interests).

36. See *Sanders v. ABC*, 978 P.2d 67, 71 (Cal. 1999) (rejecting view that privacy must be "absolute or complete privacy" to be protected); see also Daniel J. Solove, *Understanding Privacy* 1, 23 (2008) (discussing limitations of privacy-as-secrecy conception).

Indeed, several state constitutions, including the California Constitution, expressly recognize a right to privacy.³⁷ The U.S. Supreme Court has also suggested that the U.S. Constitution secures some right to informational privacy,³⁸ though the contours of that right are hazy. The California courts have held that the right to privacy is a potential constraint on tort law.³⁹ And this must surely be right, to the extent privacy is seen as a constitutional right—as courts have recognized for centuries in the context of free-speech rights,⁴⁰ and more recently in other contexts as well,⁴¹ the prospect of civil liability may pose constitutional problems.

Even if privacy is seen not as a constitutional right but just something that many people value, privacy costs deserve to be included when courts are considering the costs and benefits of particular tort policies.⁴² In particular, they need to be considered alongside financial costs in deciding which proposed precautions are so cost effective as to be required by the duty of reasonable care.

Finally, the theoretical explanations for why privacy is valuable are famously contested.⁴³ But precisely because the purposes of privacy are so controversial, this Article will not take a stand on them here. Instead, it aims to make some observations that will be helpful to those who subscribe to a wide range of such explanations.

37. See Alaska Const. art. I, § 22 (protecting right to privacy); Cal. Const. art. I, § 1 (same); Haw. Const. art. I, § 6 (same); La. Const. art. I, § 5 (same); Mont. Const. art. II, § 10 (same); see also *In re June 1979 Allegheny Cnty. Investigating Grand Jury*, 415 A.2d 73, 77 (Pa. 1980) (interpreting Pennsylvania Constitution as protecting right to informational privacy).

38. *Whalen v. Roe*, 429 U.S. 589, 605 (1977) (suggesting government right to collect data and accompanying obligations to avoid unwarranted disclosures is constitutionally required). Compare *NASA v. Nelson*, 131 S. Ct. 746, 755–56 & n.9 (2011) (assuming existence of right to informational privacy, and noting lower courts have mostly interpreted *Whalen* as securing some such right), with *id.* at 764 (Scalia, J., concurring in the judgment) (arguing no such right exists).

39. See, e.g., *Roman Catholic Bishop v. Superior Court*, 50 Cal. Rptr. 2d 399, 405 (Ct. App. 1996) (so holding); see also *Chazen v. Centennial Bank*, 71 Cal. Rptr. 2d 462, 465 (Ct. App. 1998) (referring to right of privacy more generally, but in context suggesting court is considering a constitutional right); *Chicago Title Ins. Co. v. Superior Court*, 220 Cal. Rptr. 507, 519 (Ct. App. 1985) (same).

40. Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, 96 Iowa L. Rev. 249, 250 & n.4 (2010) (collecting cases).

41. See, e.g., *Kentucky Fried Chicken of Cal., Inc. v. Superior Court*, 927 P.2d 1260, 1270 (Cal. 1997) (rejecting claim that store was negligent in refusing to comply with robbers' demands, partly on grounds that claim was inconsistent with state constitutional right to defend property).

42. See, e.g., *O'Neil v. Schuckardt*, 733 P.2d 693, 698 (Idaho 1986) (abolishing cause of action for alienation of affections, partly because alienation of affections trials involve publicizing underlying allegations, which causes embarrassment to spouses and children).

43. See Solove, *Understanding Privacy*, *supra* note 36, at 1 (discussing difficulties in defining scope of right to privacy).

II. HOW NEGLIGENCE LAW IMPLICATES PRIVACY

So just how might negligence cost-benefit analysis implicate privacy, if privacy costs are not weighed as part of that analysis?

A. *Obligations to Reveal Information About Oneself*

1. *Obligation to Reveal Diseases and Disease Symptoms.* — The duty of reasonable care sometimes requires people to reveal private information about themselves, and about the danger they pose to others. People with communicable diseases must warn those whom they might infect.⁴⁴ People with sexually transmissible diseases must warn their sexual partners.⁴⁵ The same is true when people have recognizable symptoms of communicable diseases.⁴⁶

The principle underlying such liability is simple and in many ways appealing: It is unreasonable to cause others to face serious health risks without giving them an opportunity to avoid those risks. This just applies the broader principle that:

A defendant whose conduct creates a risk of physical or emotional harm can fail to exercise reasonable care by failing to warn of the danger if: (1) the defendant knows or has reason to know: (a) of that risk; and (b) that those encountering the risk will be unaware of it; and (2) a warning might be effective in reducing the risk of harm.⁴⁷

Liability here is not for nonfeasance as such—rather, it is for misfeasance, in the sense of acting (by coming into contact with someone) without taking the proper precautions (such as warning people).⁴⁸

2. *Obligation to Reveal Risk Factors.* — But the obligation to disclose may go beyond situations where people know they have a disease or symptoms of a disease. Many people have no such knowledge, but do know that they have engaged in behavior that substantially increases their risk of having the disease.

They might, for instance, know that one of their past sexual partners has since learned that he or she has the disease. They might know that

44. E.g., *Kliegel v. Aitken*, 69 N.W. 67, 68 (Wis. 1896).

45. See, e.g., *Doe v. Johnson*, 817 F. Supp. 1382, 1393 (W.D. Mich. 1993) (requiring notification for HIV); *Berner v. Caldwell*, 543 So. 2d 686, 689 (Ala. 1989) (requiring notification for genital herpes), overruled on other grounds by *Ex parte Gen. Motors Corp.*, 769 So. 2d 903 (Ala. 1999).

46. E.g., *John B. v. Superior Court*, 137 P.3d 153, 159–64 (Cal. 2006); *Meany v. Meany*, 639 So. 2d 229, 234–36 (La. 1994) (giving genital sores or urethral drippage as examples of such symptoms); *M.M.D. v. B.L.G.*, 467 N.W.2d 645, 647 (Minn. Ct. App. 1991) (holding duty to warn was triggered by “recurring sores on the genitals” coupled with doctor’s recommending herpes test).

47. Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 18(a) (2010).

48. See *id.* § 37 cmt. c (2012).

they have had many sexual partners recently, even if they do not know whether any of the partners have a disease. They might know that they have had sex with someone who has had very many sexual partners.

They might know that they have had sex without condoms, or have repeatedly had receptive anal sex, which is much likelier to transmit HIV than are other forms of sex.⁴⁹ They might simply know that they (if they are men) have had sex with other men in the past.⁵⁰ Or they might know that they have cheated on their spouse or their lover to whom they had promised fidelity.

All these factors elevate those people's risk of having and transmitting a communicable disease beyond the risk posed by the average person or by the kind of person their spouses or lovers may expect them to be. And these high-risk behaviors are especially relevant when testing is unlikely to produce a reliable result. HIV tests, for instance, do not reliably reveal very recent infections.⁵¹ Asymptomatic male HPV infection cannot be reliably tested for.⁵² And the Centers for Disease Control and Prevention do not recommend testing for herpes in asymptomatic men or women.⁵³

Under standard tort law principles, there would be a good case for a duty to warn about much of this high-risk behavior.⁵⁴ The potential benefit in disease averted is great. The likelihood of transmission is substantial, both as to HIV and as to more common diseases such as herpes, HPV, and hepatitis B. The financial cost of disclosure is generally nil. Warning of risk is thus a cost-effective precaution, which can help avoid the injury that would otherwise have been caused by the potential

49. E.g., Eric Vittinghoff et al., Per-Contact Risk of Human Immunodeficiency Virus Transmission Between Male Sexual Partners, 150 *Am. J. Epidemiology* 306, 310 (1999). This is not just a concern of the past; regrettably, unprotected sex between men has apparently recently been on the rise, despite the HIV risks. CDC, HIV Testing and Risk Behaviors Among Gay, Bisexual, and Other Men Who Have Sex with Men—United States, 62 *Mortality & Morbidity Weekly Rep.* 958, 958–62 (2013) [hereinafter CDC, Risk Behaviors].

50. “Although [men who have sex with men] are a small proportion of the population, they represent the majority of persons diagnosed with HIV in nearly every U.S. state.” CDC, Risk Behaviors, *supra* note 49, at 959.

51. HIV/AIDS: Testing, CDC, <http://www.cdc.gov/hiv/basics/testing.html> (on file with the *Columbia Law Review*) (last visited Mar. 27, 2014).

52. Human Papillomavirus (HPV): HPV and Men—Fact Sheet, CDC, <http://www.cdc.gov/std/hpv/stdfact-hpv-and-men.htm> (on file with the *Columbia Law Review*) (last visited Mar. 27, 2014).

53. Herpes: Genital Herpes Screening, CDC, <http://www.cdc.gov/std/herpes/screening.htm> (on file with the *Columbia Law Review*) (last visited Mar. 27, 2014).

54. See generally Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 18 (2010) (describing duty to warn).

defendant. And tort law routinely imposes a duty to warn even about relatively modest risks.⁵⁵

Indeed, one court applying standard tort law principles said there is a duty to warn of one particular known risk factor—the fact that a past sexual partner has been found to have HIV.⁵⁶ Another court said the same, but also that there is no duty to warn of general high-risk activity, such as homosexual conduct, promiscuity, or high-risk sexual practices (such as anal sex).⁵⁷ Another court suggested that some such duty to warn might exist, but did not specifically define the duty except to say that it does not apply when the only high-risk behavior is infidelity.⁵⁸

Of course, this cost-benefit analysis does not mean that such warnings should be mandated by the duty of reasonable care, especially as to some risk factors (such as a history of promiscuity or same-sex sexual behavior): The warnings carry a privacy cost as well as a financial cost, and the privacy cost may make it unreasonable to require such warnings. The point here, though, is that if the duty to warn of certain risk factors is rejected, it would likely be precisely because privacy costs are included as part of the risk-benefit analysis.

3. *Obligation to Reveal that One May Be the Target of Crime.* — One can pose a threat to others not only because of one's disease, but also because of one's enemies. Say you are a woman being pursued by an abusive ex-spouse,⁵⁹ an actress being pursued by a crazed fan, a gang

55. See, e.g., *John B. v. Superior Court*, 137 P.3d 153, 164, 165 n.9 (Cal. 2006) (“A low risk of transmission is insufficient to relieve the infected individual of a duty where the harm itself is great and the duty of care to prevent that harm is not onerous.”); *Advance Chem. Co. v. Harter*, 478 So. 2d 444, 448 (Fla. Dist. Ct. App. 1985) (“[I]f the particular injury is reasonably foreseeable, however rare, the manufacturer or seller has the duty to warn.”). There is no need here for courts to recognize a special affirmative duty to act; the duty here is simply to help prevent the harm that one's own behavior would otherwise cause.

56. *John B.*, 137 P.3d at 163–65 & n.9.

57. *Doe v. Johnson*, 817 F. Supp. 1382, 1388, 1394 (W.D. Mich. 1993). To be precise, “no duty to warn” means that a general duty to take reasonable precautions should be seen as not extending to the particular precaution of conveying a certain kind of warning. See, e.g., Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 7(b) (“In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.”).

58. See *Endres v. Endres*, 968 A.2d 336, 342 (Vt. 2008) (rejecting duty to warn spouse about cheating, but suggesting other high-risk behavior might trigger duty to warn). The court elaborated on this suggestion in a footnote, observing, “At least with respect to the transmission of HIV/AIDS, one commentator has argued that constructive knowledge should be found for defendants who engage in high risk activities, including intravenous drug use, homosexual intercourse, unprotected sex with multiple partners, and prostitution.” *Id.* at 342 n.* (citing John A. Turcotte, When You Should Have Known: Rethinking Constructive Knowledge in Tort Liability for Sexual Transmission of HIV, 52 Me. L. Rev. 261, 296 (2000)).

59. The hypothetical is a variation on *Rojas v. Diaz*, No. B144346, 2002 WL 1292996 (Cal. Ct. App. June 12, 2002). *Rojas* worked as a gardener at *Diaz*'s house, where *Diaz* had

member or a gang victim caught up in a gang feud, an author or cartoonist being pursued by a religious fanatic who thinks that you have committed blasphemy, or some other target of threats or violence.⁶⁰ If your enemy comes to your property to attack you, others might be caught in the crossfire.⁶¹

Again, under standard tort law principles, there would be a good case for a duty to warn others of the peril you are in and that you are thus placing them in.⁶² If the other person is a new lover, who might be attacked by a jealous ex-lover, your own actions in starting a relationship with the new lover might create a duty to warn (even though there is nothing unreasonable in starting the relationship as such).⁶³ If the other person is a visitor to your property who might be mistaken for a lover, or who may just get caught in the crossfire, you may have a duty of reasonable care stemming from your obligations as property owner.⁶⁴ You might

provided shelter for her friends Patricia and Veronica Alvarez, who were fleeing Patricia's abusive husband, David Alvarez. Id. at *1. David Alvarez came to the house to try to forcibly take back Patricia, and in the process killed Rojas. Id. at *1–*2. Rojas's family sued Diaz for, among other things, failing to warn Rojas of the danger posed by Diaz's harboring of Patricia Alvarez. Id. at *2. The court rejected the claimed duty to warn, but on the grounds that Diaz only knew of David Alvarez's generalized threats against Patricia, so that the specific attack at the house was unforeseeable. Id. at *2–*3. But under other factual circumstances, the attack might well be foreseeable, especially if (as in the hypothetical in the text) the homeowner was herself the threatened party and thus knew more about the details and credibility of the threat.

60. Compare *Apolinar v. Thompson*, 844 S.W.2d 262, 263–64 (Tex. App. 1992) (holding homeowner could be liable to housesitter for failing to warn housesitter that homeowner "had received harassing phone calls and threats"), with *Faulkner v. Lopez*, No. HHBCV01511200, 2006 WL 2949070, at *4–*5 (Conn. Super. Ct. Sept. 29, 2006) (holding tenant could not be liable to visitors to her apartment for failing to warn them of her restraining order against her violent ex-boyfriend).

61. See, e.g., *Rojas*, 2002 WL 1292996, at *1–*2 (noting victim was killed at home where he was working, by person seeking to kidnap or harm defendant homeowner's houseguest); *Apolinar*, 844 S.W.2d at 262–63 (noting plaintiff had been injured, while housesitting for defendant, by person seeking to harm defendant); see also Christopher Goffard & Nicole Santa Cruz, Grand Jury Transcripts Detail Horror of Seal Beach Mass Killing, L.A. Times (May 4, 2012), <http://articles.latimes.com/2012/may/04/local/la-me-0504-seal-beach-killing-20120504> (on file with the *Columbia Law Review*) (describing Seal Beach nail salon mass shooting, in which murderer was ex-husband of one employee); Nicole Santa Cruz, Mass Slaying's Effect on Seal Beach to Figure in Death Penalty Bid, L.A. Times (May 3, 2012), <http://articles.latimes.com/2012/may/03/local/la-me-seal-beach-slaying-20120503> (on file with the *Columbia Law Review*) (noting murderer had long criminal history and had threatened to shoot his wife in one incident several years before shooting).

62. E.g., Restatement (Third) of Torts: Liab. for Physical & Emotional Harm §§ 18(a), 19 (2010).

63. See, e.g., id. § 18 cmt. h ("In some instances, the defendant's activity creates a risk that, standing on its own, is quite reasonable; in these instances, the plaintiff's only claim of negligence may relate to the defendant's failure to warn.").

64. See, e.g., id. § 51 cmt. a (2012) (noting modern view that property owners generally owe duty of reasonable care to social visitors, and not just business invitees).

thus have to warn all repairmen or delivery people that you are, and therefore they are, in danger.⁶⁵

More significantly, if a business owner is targeted for violence—for instance, by a stalker, by a religious fanatic outraged by her blasphemy, or by a gang running a protection racket—she might have to warn all her customers.⁶⁶ This might mean more than just the inconvenience of finding it harder to hire willing housesitters⁶⁷ or gardeners.⁶⁸ It might mean that the business owner will be driven out of business, as customers stay away as a result of her legally required warning.

B. *Obligations to Reveal Information About Others*

1. *Obligation to Reveal Others' Criminal Propensities.* — Generally, landowners have a duty to protect people on their property—customers, service people, employees, tenants, and even social visitors.⁶⁹ This duty has long been understood to include warnings about dangerous conditions (and dangerous people) that owners know about but that visitors might miss.⁷⁰

65. See *Jobe v. Smith*, 764 P.2d 771, 771 (Ariz. Ct. App. 1988), which held that a homeowner has a duty to warn repairmen that one of the homeowner's visitors is potentially dangerous. This logic may likewise extend to people who have threatened to attack the homeowner, even if the homeowner is unaware that they are currently on the premises or nearby. Cf. *Apolinar*, 844 S.W.2d at 264 (holding defendant property owner liable for shooting of housesitter committed by unknown person who had previously threatened defendant).

66. As the Restatement says:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to [visiting] members of the public . . . for physical harm caused by the . . . intentionally harmful acts of third persons . . . and by the failure of the possessor to exercise reasonable care to . . . give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Restatement (Second) of Torts § 344 (1965).

67. See, e.g., *Apolinar*, 844 S.W.2d at 262–63 (holding homeowner liable for injuries to housesitter).

68. See, e.g., *Rojas v. Diaz*, No. B144346, 2002 WL 1292996, at *5 (Cal. Ct. App. June 12, 2002) (refusing to hold homeowner liable for murder of gardener caught in hostage situation perpetrated by abusive relative because homeowner could not foresee third party's actions, but implicitly suggesting result might be different if attack had been more foreseeable).

69. Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 51 (2012) (explaining land possessors' duties to entrants on their land); see also Restatement (Second) of Agency § 471 (1958) (explaining duty of principal to warn one's agents, including employees).

70. See, e.g., *O'Hara v. W. Seven Trees Corp. Intercoast Mgmt.*, 142 Cal. Rptr. 487, 490 (Ct. App. 1977) (holding defendant liable for not warning plaintiff of risk of sexual assault when risk was foreseeable); *Samson v. Saginaw Prof'l Bldg., Inc.*, 224 N.W.2d 843, 849–50 (Mich. 1975) (holding landlord that leased part of building to mental health clinic had duty to warn other tenants about foreseeable risks from patients); Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 18 (2010) (explaining defendants

Under normal negligence principles, this duty may well include warning visitors about the dangers posed by others who are lawfully present—guests, roommates, family members, employees—if the owner knows that they are dangerous (e.g., unreasonably jealous, occasionally belligerently drunk, or prone to criminal violence) and that an attack is thus foreseeable. For instance, when a repairman is attacked at a home by such a person, the homeowner could be sued for failing to warn the repairman about the person’s dangerous propensities. As the Arizona Court of Appeals reasoned, “We can see no reason to say that there is a duty to warn about a freshly waxed and slippery kitchen floor, but not about a homicidal maniac in the back bedroom.”⁷¹

Likewise, landlords may have an obligation to warn their tenants about other tenants’ criminal histories, if those histories suggest a foreseeable risk of attack on a tenant.⁷² Universities owe students in their dorms “the same duty to exercise due care for their protection as a pri-

may be held liable for failure to exercise reasonable care if “defendant knows or has reason to know: (a) of [a] risk; and (b) that those encountering the risk will be unaware of it”); B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 *Case W. Res. L. Rev.* 679, 705 (1992) (“Thus, where the landlord knows of identifiable third persons who may present specific dangers to tenants, but does not issue warnings to the tenants, he may be liable for resulting injuries.”).

71. *Jobe v. Smith*, 764 P.2d 771, 771 (Ariz. Ct. App. 1988) (citation omitted); see also *Shurben v. Dollar Rent-a-Car*, 676 So. 2d 467, 468 (Fla. Dist. Ct. App. 1996) (holding car rental company had duty to warn customer about past pattern of crimes targeting car renters, even when crimes occurred off rental company’s premises); *Kinsey v. Bray*, 596 N.E.2d 938, 943–45 (Ind. Ct. App. 1992) (denying summary judgment on grounds reasonable jury could find homeowner had duty to warn his guest—his ex-wife—that another guest, his new girlfriend, had made threats against ex-wife); *Gould v. Taco Bell*, 722 P.2d 511, 515–16, 518 (Kan. 1986) (finding property owner had duty to warn customer about another customer’s potential dangerousness, based on latter customer’s having “been involved in a similar altercation” about two weeks before); *Arvanitis v. Hios*, 705 A.2d 355, 360 (N.J. Super. Ct. App. Div. 1998) (holding wife had duty to warn guest—husband’s nephew, whom she asked for help in getting husband to take his medication—about husband’s violent propensities); *Eastep v. Jack-in-the-Box, Inc.*, 546 S.W.2d 116, 119–20 (Tex. Civ. App. 1977) (discussing property owner’s duty to warn customer about another customer’s apparently agitated and pugnacious state).

72. See *Kargul v. Sandpiper Dunes Ltd. P’ship*, 3 Conn. L. Rptr. 154, 162 (Super. Ct. 1991) (applying such duty even to cotenant who invites someone with criminal history to live with her); *T.W. v. Regal Trace, Ltd.*, 908 So. 2d 499, 501 (Fla. Dist. Ct. App. 2005) (*per curiam*) (finding landlord “had a duty to warn about and a duty to investigate a child molester operating at the complex and believed to be a tenant”); *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d 359, 371 (Tenn. 2009) (holding landlord had duty to warn tenants of foreseeable danger learned through criminal background checks). See generally Shelley Ross Saxon, “Am I My Brother’s Keeper?”: Requiring Landowner Disclosure of the Presence of Sex Offenders and Other Criminal Activity, 80 *Neb. L. Rev.* 522 (2001) (discussing duty to reveal threat of criminal activity); David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 *Law & Soc. Inquiry* 5, 15 (2008) (same).

vate landowner owes its tenants.”⁷³ Business owners likewise presumably have an obligation to warn their business visitors, including customers, about employees’ criminal histories (if the employer is bold enough to hire an employee with a criminal history). And tenants who live with dangerous people may have an obligation to warn tenants in other apartments.⁷⁴

Nor is this limited to situations where one’s tenant, employee, or roommate has a criminal conviction record. The question is simply whether a reasonable person would think that an attack by such an employee or tenant is foreseeable. That the person has been indicted but is out on bail might put one on notice of this risk.⁷⁵ The same is true if one has just heard a plausible-sounding accusation against the person, even if it has not turned into a legal proceeding.⁷⁶

Psychotherapists have been assigned a special duty to warn the targets of their patients’ anger or hostility if the patients say things to the psychotherapists that reveal a serious enough danger to the target.⁷⁷ This is the rare duty that stems from the duty-bearer’s (here, the psychotherapist’s) relationship with *the dangerous person*. The rest of the public generally does not have such a duty.

But people who are not psychotherapists do have duties that stem from their relationship with *the potential target*, for instance when the person’s potential target is a tenant, business invitee, or social guest. So if one is told something that shows that a particular person is a danger to such a tenant, invitee, or guest, one may have a duty to warn the prospective target.⁷⁸

In addition to a duty to affirmatively protect people on one’s property, one also has a duty to avoid affirmatively acting in ways that help cause harm to others—such as neighbors—even when one’s actions are only one step in the causal chain. Thus, if what one does may foreseeably (though indirectly) assist someone in injuring someone, one’s action

73. *Nero v. Kan. State Univ.*, 861 P.2d 768, 780 (Kan. 1993); see also Robert C. Cloud, *Safety and Security on Campus: Priority Number One in Higher Education*, 295 *Educ. L. Rep.* 457, 464 (2013) (drawing principle that “students have a right to be informed about dangerous people . . . on or near the campus” from *Nero*).

74. *Kargul*, 3 *Conn. L. Rptr.* at 160.

75. See *Nero*, 861 P.2d at 771–72 (involving such a situation).

76. See *T.W.*, 908 So. 2d at 505 (finding duty to warn when landlord knew “some sort of sexual assault had occurred against K.G. on its premises, likely by a tenant”); see also *Lambert v. Doe*, 453 So. 2d 844, 848 (Fla. Dist. Ct. App. 1984) (finding duty to warn when alleged attacker-tenant had not been convicted, because landlord “had received, several months prior to the subject incidents, reports of assaultive and bizarre conduct” by attacker).

77. E.g., *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

78. See, e.g., *Kinsey v. Bray*, 596 N.E.2d 938, 944–45 (Ind. Ct. App. 1992) (holding homeowner had duty to warn guest—his ex-wife—that another guest, his new girlfriend, had made threats against ex-wife).

may be seen as negligent.⁷⁹ And even if one's action is not itself negligent, one may have a duty to warn people in order to minimize the risk that the action poses.⁸⁰

Thus, say that a woman lets a family member who has just been released from prison stay in her house, and it is foreseeable that he will commit crimes against her neighbors. If he does commit such crimes, her affirmative act of having him in her house, as well as her failure to warn the neighbors, may be both an actual cause and a proximate cause of the attack. The woman would have acted in a way that helped cause physical harm to another, and the question would then be whether it was reasonable for her to allow the dangerous person to stay in her house without warning neighbors of the danger.⁸¹

2. *Obligation to Reveal that Others May Be Crime Targets.* — As discussed above, the presence of a person who is likely to be targeted for crime—whether by a stalker, a political killer, a rival gang member, or a jealous ex-lover—may also help create danger to bystanders.⁸² Those innocent targets might have a duty to warn others of this danger.

Of course, the potential targets of criminals will often ignore this duty. If they are small-business owners, they may decide to run a risk of liability for nondisclosure when the alternative is a near certainty of losing many clients if they do disclose. Other potential targets may often lack assets, and thus not worry much about liability at all. And many of them might not know about the liability rule in the first place.

Yet the targets' employers, landlords, and others might also have a duty to warn in such situations. If one knows that one's tenant's jealous ex-husband has threatened to shoot her, one may have to warn other tenants or prospective tenants, since the ex-husband's foreseeable attack may foreseeably injure them as well.⁸³ One might likewise have to warn one's customers and other business visitors (delivery people, contractors

79. See, e.g., *Estate of Trobaugh ex rel. Trobaugh v. Farmers Ins. Exch.*, 623 N.W.2d 497, 504 (S.D. 2001) (considering liability for negligent entrustment of motor vehicle).

80. E.g., *La Russa v. Four Points at Sheraton Hotel*, 821 A.2d 1168, 1172 (N.J. Super. Ct. App. Div. 2003) (holding deliveryman owed duty to warn property owner of puddle deliveryman left on property, on which someone later slipped); Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 18 cmt. h (2010) (describing this duty).

81. See, e.g., *Kargul v. Sandpiper Dunes Ltd. P'ship*, 3 Conn. L. Rptr. 154, 160 (Super. Ct. 1991) (concluding tenant might be liable for assault committed by tenant's guest against neighbor, because tenant had brought guest into building); cf. *Miles v. Melrose*, 882 F.2d 976, 991–92 (5th Cir. 1989) (holding union could be liable for failing to warn employer that employee referred to employer via union hiring hall had violent propensities, and reasoning union's action in sending employee was negligent affirmative conduct rather than just failure to warn).

82. See *supra* Part II.A.3 (discussing obligation to reveal one may be target of crime).

83. See *supra* note 61 (citing sources discussing Seal Beach nail salon mass shooting, in which murderer was ex-husband of an employee). There seems to be no evidence that the nail salon owner was aware of the threats against her employee, but it is easy to imagine a case in which the owner does learn of such threats.

who are not covered by workers' compensation regimes that preempt tort liability, and so on) if an employee is in danger of being attacked at work.⁸⁴

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

To be sure, sometimes the risk of financial loss from providing the warning may be very high, for instance if an employer is contemplating warning customers that an employee is the prospective target of a stalker. But that simply means that the duty to warn will pressure the employer to dismiss the employee. It is not against the law for an employer to dismiss an employee who is a potential target of violence and thus an innocent danger to bystanders.⁸⁵

Some employers may be inclined to dismiss the threatened employee in any event, just to protect themselves, other employees, or customers against the risk of being injured if the threatened employee is attacked. But even employers who would normally prefer not to dismiss the employee are likely to change their minds if they know that they have a legal duty to warn customers about the peril that the employee poses.

C. *Obligation to Gather Information About Others*

Negligent hiring law effectively obligates employers to gather criminal history information about some of their employees.⁸⁶ Likewise, liability for foreseeable crimes against tenants or customers sometimes requires property owners to install surveillance cameras.⁸⁷

An employer might similarly be required to monitor employees' use of the employer's computers in order to deter or prevent criminal misuse, such as employee use of a computer to upload nude pictures of a child to a child pornography site.⁸⁸ A party host might be required to monitor his adolescent guests' behavior, including by watching whether people are sneaking off to the bathroom to have sex.⁸⁹ An employment

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

85. Nicole Buonocore Porter, *Victimizing the Abused?: Is Termination the Solution when Domestic Violence Comes to Work?*, 12 Mich. J. Gender & L. 275, 289 (2006).

86. E.g., *Malorney v. B & L Motor Freight, Inc.*, 496 N.E.2d 1086, 1086 (Ill. App. Ct. 1986); *Carlsen v. Wackenhut Corp.*, 868 P.2d 882, 886–88 (Wash. Ct. App. 1994).

87. See sources cited *infra* note 176 (holding thus).

88. *Doe v. XYZ Corp.*, 887 A.2d 1156, 1167–68 (N.J. Super. Ct. App. Div. 2005).

89. *Doe v. Jeansonne*, 704 So. 2d 1240, 1244 (La. Ct. App. 1997).

agency might be required to investigate a prospective employer, at least when the employer seems “unkempt” and otherwise unprofessional-looking, in order to determine whether he might pose a threat to the prospective employee.⁹⁰

Likewise, universities and trade schools could in principle be held liable for negligently failing to investigate the backgrounds of their students, or failing to report suspicious behavior to the police. A school might, for instance, be sued when a student uses his learned skills to commit a crime (such as the Al-Qaeda terrorist training in a flight school) or even simply if the student commits a crime against a classmate.⁹¹

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

There will likely be similar calls for privacy-implicating precautions under the law of product design defects. Under the Restatement view, a product manufacturer is liable on a design defect theory if “the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe.”⁹² Under the view of some other states, a product manufacturer may be liable even if plaintiff cannot show a reasonable alternative design;⁹³ this standard is even more likely to lead to a finding of product defect. And design defect liability can be based on foreseeable risks of harm to third parties, not just to the buyers.⁹⁴

Many products are usually used lawfully, but sometimes used criminally: guns, knives, cars, computers, and more. Historically, there have been few alternative designs that could avoid the risk of criminal misuse, without dramatically diminishing the utility of the product. And if the alternative design “deprive[s] a product of important features which make it desirable and attractive to many users and consumers,”⁹⁵ then manufacturers would not have to adopt that alternative. So though the

90. *Keck v. Am. Emp't Agency, Inc.*, 652 S.W.2d 2, 4–5 (Ark. 1983) (faulting agency because it “made no check at all on [putative employer],” particularly pointing to fact putative employer “had on blue jeans and a T-shirt with the word ‘bullshirt’ on it, had long hair and a beard, and was evidently unkempt”).

91. See, e.g., *J.W. ex rel. B.R.W. v. 287 Intermediate Dist.*, 761 N.W.2d 896 (Minn. Ct. App. 2009) (noting school districts may be liable for negligently failing to prevent foreseeable attack by one student on another); see also *Estate of Butler v. Maharishi Univ. of Mgmt.*, 589 F. Supp. 2d 1150, 1169 (S.D. Iowa 2008) (noting same as to universities, where one allegation against defendant was failure to further investigate student’s mental illness).

92. Restatement (Third) of Torts: Prods. Liab. § 2(b) (1998).

93. E.g., *Mikolajczyk v. Ford Motor Co.*, 901 N.E.2d 329, 345 (Ill. 2008).

94. E.g., *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38, 54–55 (3d Cir. 2009).

95. Restatement (Third) of Torts: Prods. Liab. § 2(b) cmt. f(1).

risks of speeding would be reduced by blocking cars from driving faster than seventy-five miles per hour, that probably does not make cars that can go faster than seventy-five “not reasonably safe.”⁹⁶ Sometimes driving over seventy-five may be safe and legal (for instance, if one is taking an injured person to the hospital or driving on one of the few highways where the speed limit is eighty).

But modern technology makes it possible to deter many misuses, especially of cars, simply by automatically reporting likely misuse to the police. Modern cars already have computerized control systems, and the cars are expensive enough that the new technology would add comparatively little to the cost, without stripping the product of valuable features—at least if one counts only those features that are used legally.⁹⁷

A car could, for instance, be designed to wirelessly send an email to the police every time the driver exceeded seventy-five miles per hour. Or the software could be more sophisticated still, for instance calculating the likely speed limit based on the car’s GPS-calculated location. With this software, even driving forty could lead to an email to the police, if the speed limit is twenty-five.⁹⁸ Or the software could monitor the driver’s driving for signs of intoxication, such as repeatedly weaving around⁹⁹ and alert the police if enough such signs are present.

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

Likewise, a car could have a breathalyzer ignition interlock that alerts the police when the driver tries to start a car while drunk. Such a feature could deter some dangerous drivers, and could help the police catch others. One can imagine many other such monitoring and reporting features.

Say, then, that someone is injured by a drunk driver. She sues the car manufacturer for defectively failing to include a breathalyzer ignition interlock or for defectively failing to include a feature that senses

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

97. Cf. *Roberts v. Rich Foods, Inc.*, 654 A.2d 1365, 1374–75 (N.J. 1995) (concluding manufacturer of onboard computer for tractor trailers could be held liable for not having sensor to stop computer from being used when vehicle is moving and where use of computer would likely distract driver).

98. The speed limit calculation would require a database mapping locations to speed limits, but such a database should not be hard to create. And even if the database simply provided a high estimate for the speed limits, that would still provide some extra protection against speeding.

99. See, e.g., *Amundsen v. Jones*, 533 F.3d 1192, 1199 (10th Cir. 2008) (noting “repeatedly weaving between lanes” tends to indicate drunk driving).

repeated weaving between lines and calls 911 to alert the police to such behavior. Drunk-driving-related injuries to third parties were certainly a “foreseeable risk[] of harm posed by the product.” They could probably “have been reduced . . . by the adoption” of the breathalyzer interlock or weaving-reporting feature.

Had such a feature been present, a jury could find that the driver would probably have been prevented from driving, stopped by the police as a result of the automatic 911 call, or deterred by the risk of the car’s reporting his drunk driving to the police. And because of this, the jury could find that “the omission of the alternative design renders the product not reasonably safe.”¹⁰⁰

As with the other examples, the proposed precautions implicate privacy. Some of the precautions would involve the car reporting your behavior to the police. Some, such as the ignition interlock that prevents the car from even being started if the driver failed a breathalyzer test, would involve the car gathering information about what you are doing—essentially performing something that would be viewed as a “search” if done by the government directly¹⁰¹—and then controlling your behavior based on that information.

Unlike in the other areas described in this Article, there do not appear to be any cases directly dealing with such situations.¹⁰² But the tort law logic of the argument is likely strong enough to send the case to the jury—unless a court concludes that drivers’ privacy interests in not being monitored or reported to the police by their own cars defeat the tort claim.

E. Not Much Countervailing Pressure from the Privacy Torts

This negligence law pressure to investigate, surveil, and disclose is unlikely to face much counterpressure from the threat of liability under the privacy torts.

100. See Restatement (Third) of Torts: Prods. Liab. § 2(b) & cmt. d (availability of safer designs may help satisfy the “renders the product not reasonably safe” prong).

101. *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 616–17 (1989).

102. For two examples of analogous business practices—though apparently chosen as a business decision rather than because of liability risk—consider two features of the TASER electric stun gun. First, TASER C2 buyers “have to pass a felony background check in order to activate” the stun gun. Frequently Asked Questions, TASER Int’l, <http://www.taser.com/products/self-defense-products/taser-c2/faqs> (on file with the *Columbia Law Review*) (last visited Mar. 27, 2014). Second, when “a [TASER] cartridge is deployed, 20–30 small confetti-like AFID tags are ejected. Each AFID tag is printed with the serial number of the cartridge deployed, allowing law enforcement agencies to determine the registered owner of the cartridge and track use if ever used in a criminal act.” TASER Int’l, *TASER C2 ECD User Manual 18* (2010), available at http://www.taser.com/images/support/downloads/downloads/mk-inst-c2-001_rev_a_c2_manual.pdf (on file with the *Columbia Law Review*). These features could in some measure prevent or deter criminal misuse of a weapon, by either gathering information about the user (for the background check) or by threatening to reveal information about misuses (using the confetti).

The disclosure-of-private-facts tort generally applies only to speech to the public, and not to speech to a few people.¹⁰³ It also excludes information that is of legitimate interest to the listeners; many of the warnings mentioned above would qualify.¹⁰⁴ And it excludes information shielded by the “common interest” privilege, applicable “if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know.”¹⁰⁵ Warnings about the danger posed by a particular person to tenants, customers, and others would likely qualify as being within this “common interest” of the speaker and the listeners.¹⁰⁶

Moreover, disclosing information about people’s past criminal records—or current indictments—would not constitute actionable disclosure of private facts, because reports of judicial actions are excluded from that tort.¹⁰⁷ Likewise, disclosing the fact that a crime victim had

103. Restatement (Second) of Torts § 652D cmt. a (1977). A few jurisdictions depart from this strict requirement and impose liability even for certain disclosures to individual listeners. E.g., *McSurely v. McClellan*, 753 F.2d 88, 113 (D.C. Cir. 1985); *Johnson v. K Mart Corp.*, 723 N.E.2d 1192, 1197 (Ill. App. Ct. 2000); *Beaumont v. Brown*, 257 N.W.2d 522, 531 (Mich. 1977), overruled on other grounds by *Bradley v. Bd. of Educ.*, 565 N.W.2d 650 (Mich. 1997); *Pontbriand v. Sundlun*, 699 A.2d 856, 864 (R.I. 1997) (applying R.I. Gen. Laws § 9-1-28.1, which omits “publicity” requirement).

104. See *Taus v. Loftus*, 151 P.3d 1185, 1208 (Cal. 2007) (setting forth “legitimate public concern” test and finding such legitimate public concern in context where material was of interest not to general public but to specific public to which statement was made—there, researchers interested in particular study); Restatement (Second) of Torts §§ 595, 652G (establishing conditional privileges to publish statements involving privacy or defamation concerns); *id.* § 624D cmt. g (including news as within scope of legitimate public concern).

Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners, *Western Investments, Inc. et al. at 11–13, W. Invs., Inc. v. Urena*, 162 S.W.3d 547 (Tex. 2005) (No. 03-0919), 2004 TX S. Ct. Briefs LEXIS 551, at *18–*20, argues that a landlord’s disclosure of private information about a tenant, such as the tenant’s potential dangerous propensities, could indeed create a risk of litigation, and that may well be right, given the vague boundaries of the disclosure tort. But it seems unlikely that any such litigation would be successful, given that information about a threat that the tenant poses to neighbors is likely to be viewed as of “legitimate public concern” or at least within a conditional privilege.

105. Restatement (Second) of Torts § 596; see also *id.* § 652G (providing privileges applied to privacy lawsuits and not just defamation lawsuits).

106. See, e.g., *Sullivan v. Conway*, 157 F.3d 1092, 1098 (7th Cir. 1998) (holding union’s announcements of why employee was fired were privileged because they were made to “the members of the local union, who had a vital interest in receiving candid communications from the trustee concerning his administration of the local [union]”); *Young v. Jackson*, 572 So. 2d 378, 383–85 (Miss. 1990) (holding revelation of innocent employee’s hysterectomy privileged because it rebutted rumors spread among nuclear power plant’s staff that employee’s hospitalization was caused by radiation exposure).

107. See, e.g., *Gates v. Discovery Commc’ns, Inc.*, 101 P.3d 552, 562 (Cal. 2004) (“[A]n invasion of privacy claim based on allegations of harm caused by a media defendant’s publication of facts obtained from public official records of a criminal proceeding is barred by the First Amendment . . .”).

been threatened by a stalker would likely not be actionable either, so long as that fact was learned from a police report or from some other criminal record.¹⁰⁸

The intrusion-upon-seclusion tort generally does not preclude surveillance in places open to large numbers of people.¹⁰⁹ A good motive, such as a desire to prevent or investigate improper conduct, also cuts against liability.¹¹⁰

Moreover, consent is generally a defense both to the disclosure tort and to the intrusion tort, even if refusing consent means losing access to the surveillant's property or program.¹¹¹ This means that property owners, employers, and others who are pressured by negligence law to institute surveillance—for instance, to put up surveillance cameras—could likely comply with that duty without incurring a substantial risk of liability for invasion of privacy.

Two opinions state or suggest that the privacy torts would indeed limit the information gathering and disclosure described in this Article, but neither of them is likely to persuade other courts.

108. *Florida Star v. B.J.F.*, 491 U.S. 524, 532 (1989); *Gates*, 101 P.3d at 562.

109. See, e.g., *Curry v. Whitaker*, 943 N.E.2d 354, 358 (Ind. Ct. App. 2011) (noting defendant may be liable for intrusion into private affairs only if intrusion has invaded area “which one normally expects will be free from exposure to the defendant”); *Creel v. I.C.E. & Assocs.*, 771 N.E.2d 1276, 1281 (Ind. Ct. App. 2002) (rejecting tort liability for intrusion into private affairs where surveillance occurred in areas of church open to public and holding plaintiffs had “no reasonable expectation of privacy in their activities” in such areas); Restatement (Second) of Torts § 652B cmt. c (1977) (“Nor is there liability for observing him or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye.”).

110. See, e.g., *Hernandez v. Hillside, Inc.*, 211 P.3d 1063, 1080–82 (Cal. 2009) (considering defendants’ “legitimate business concerns” in deciding against liability); *Sitton v. Print Direction, Inc.*, 718 S.E.2d 532, 537 (Ga. Ct. App. 2011) (holding workplace surveillance in order to obtain evidence of employee wrongdoing “does not rise to the level of an unreasonable intrusion” because it was reasonable in light of employer’s interests).

111. See, e.g., *Hernandez*, 211 P.3d at 1077 (suggesting “notice of and consent to” employer video surveillance of workplace may prevent liability for invasion of privacy); *Hill v. NCAA*, 865 P.2d 633, 637 (Cal. 1994) (stating notice and consent to drug testing may prevent liability for invasion of privacy, even when refusal to consent means exclusion from college athletics); Restatement (Second) of Torts § 892A (1979) (treating consent as general defense to intentional torts, of which intrusion upon seclusion is one). There may be an exception for demands that people consent to being surveilled while urinating or performing some other highly private bodily functions, as would be the case with drug-testing programs in which the employer monitors the provision of the urine. Compare, e.g., *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 621–27 (3d Cir. 1992) (holding thus, and citing other cases that so hold), with *Jennings v. Minco Tech. Labs, Inc.*, 765 S.W.2d 497, 502 (Tex. App. 1989) (holding such urinalysis program did not constitute intrusion upon seclusion because of employee’s consent, even though employee faced loss of her job if she did not consent).

The first opinion, and the only precedential one of the two, is *Roman Catholic Bishop v. Superior Court*.¹¹² Emmanuel Omemaga, a Catholic priest, molested a fourteen-year-old girl, Jane D.¹¹³ The girl and her parents sued the church, arguing (among other things) that the church should have investigated Omemaga's background further.¹¹⁴ But Omemaga had no discoverable history of child molestation, so plaintiffs argued that the church should have probed whether the priest had had sexual relationships with adults, in violation of his vows.¹¹⁵

The court rejected any such duty, on the grounds that the presence of such sexual relationships with adults is not probative enough of the likelihood that the priest would molest children.¹¹⁶ And the court also added that any inquiries into past adult sexual relationships would have violated the priest's privacy rights:

More important, the legal duty of inquiry Jane seeks to impose on the church as an employer would violate the employee's privacy rights. Privacy is a fundamental liberty implicitly guaranteed by the federal Constitution and is explicitly guaranteed under the California Constitution as an inalienable right.

The right encompasses privacy in one's sexual matters and is not limited to the marital relationship. Although the right to privacy is not absolute, it yields only to a compelling state interest. Here there was no compelling state interest to require the employer to investigate the sexual practices of its employee. Moreover, the employer who queries employees on sexual behavior is subject to claims for invasion of privacy and sexual harassment.

Similarly, Jane's contention the church should have required Omemaga to undergo a psychological evaluation before hiring him is unavailing. An individual's right to privacy also encompasses mental privacy. We conclude the church did not fail to use due care in hiring Omemaga.¹¹⁷

This reasoning, though, is likely mistaken. Whatever limits there may be on a typical employer's right to question prospective employees about their history of lawful sexual behavior, surely that cannot apply to a Catholic Church's questions to prospective priests: Priests are not supposed to be having sex, with parishioners or with others, and a church is entitled to ask questions aimed at enforcing this rule even if normal employers are not. Indeed, under *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*¹¹⁸—and the lower court cases that anticipated it and

112. 50 Cal. Rptr. 2d 399 (Ct. App. 1996).

113. Id. at 401.

114. Id.

115. Id. at 405.

116. Id.

117. Id. at 405–06 (citations omitted).

118. 132 S. Ct. 694, 706 (2012).

that came before *Roman Catholic Bishop*¹¹⁹—state law cannot interfere with church choices about whom to appoint or retain as priests. It follows that state law cannot interfere with church questions to priests aimed at determining whether the priests should be ordained, appointed, or retained.

But in any event, even if as a general matter it would be tortious for most employers to generally quiz their employees about their past love lives, that stems from the particular nature of employer questions about lawful sex—questions that are unlikely to be required by the duty of reasonable care, precisely because lawful sexual practices are unlikely to signal an employee’s dangerousness. The reasoning would not apply to employer investigation or disclosure of an employee’s past criminal history, landowner installation of visible surveillance cameras, and so on.

The second opinion, a nonprecedential California Court of Appeal decision, is *Newman v. Santiago Creek*.¹²⁰ Joel Martin, who lived in the Santiago Creek mobile home park, killed a neighbor within the park and wounded her daughter, Reba Newman.¹²¹ Three days before the shooting, Martin’s wife had told some other tenants that “Joel was swinging a gun around saying he was going to shoot some people,” and those tenants relayed that account to the park manager.¹²²

Newman sued the park, arguing (among other things) that the park should have warned the Newmans and the other neighbors about the danger that Martin posed.¹²³ Just as psychotherapists had a duty to provide such warnings, the Newmans reasoned, so property owners—who had a well-established duty to take reasonable steps to protect those on their property from violence—had a duty to provide similar warnings.¹²⁴

The California Court of Appeal, however, rejected this theory, on various grounds, including that, if the park “had posted some general warning *to the community* about Martin’s reported rant . . . [t]he opprobrium and probable ostracization of such a move would not only invite a defamation suit, but a suit for intentional infliction of emotional distress, and perhaps invasion of privacy as well.”¹²⁵

Yet accurately publicizing threats of violence made by a neighbor would likely be seen as being speech “of legitimate public concern,” at least within the particular public to whom the threats are publicized (the neighbors).¹²⁶ Such statements would almost certainly not be seen as so

119. See *id.* at 705 n.2 (collecting cases).

120. No. G037975, 2007 WL 4465809 (Cal. Ct. App. Dec. 20, 2007).

121. *Id.* at *1.

122. *Id.* at *4.

123. *Id.* at *9–*10.

124. *Id.*

125. *Id.* at *10.

126. See *supra* note 104 (discussing “legitimate public concern” test and possibility of defining “public” narrowly).

“outrageous” as to justify an intentional infliction of emotional distress claim.¹²⁷ (A defamation claim is a different matter, but one that would not generally apply to warnings that the speaker knows are accurate.¹²⁸)

To be sure, a court might properly be concerned about sparing defendants the risk and expense of privacy litigation. A court may therefore decline to put landlords in a position where they face negligence liability if they do not warn, and an expensive—even if ultimately unsuccessful—lawsuit if they do warn. Perhaps this is all that the court meant to say by the off-hand reference to “invite a defamation suit, [as well as] a suit for intentional infliction of emotional distress, and perhaps invasion of privacy.”¹²⁹ But in any event, a successful invasion of privacy lawsuit would be unlikely in these circumstances.

F. *How Such Duties May Affect Government Surveillance*

The duties this Article describes most directly affect property owners, employers, and other private actors. They do not themselves obligate law enforcement to implement particular surveillance or disclosure rules. Generally speaking, police departments are not seen as having a tort law duty to reasonably protect individual citizens.¹³⁰ But despite this, these duties are likely to indirectly affect what information is available to law enforcement, for three reasons.

First, the government as employer and as property owner (and especially as landlord of public housing and university dormitories) is generally subject to tort law rules similar to those imposed on private entities.¹³¹ And what government entities gather in their proprietary capacity, they may easily share with the government’s law enforcement branches.¹³²

Second, even private entities’ surveillance files may be subpoenaed or otherwise obtained by the police, by intelligence agencies, or by regu-

127. Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 47 (2012).

128. See, e.g., *Newman*, 2007 WL 4465809, at *11 (noting park manager “would have been on firmer footing telling the Newmans about [items that] were directly within her personal knowledge,” though also noting there was risk of liability even then, if “Martin assert[ed] they were false and defamatory and making it her word against his”).

129. *Id.* at *10; see also *id.* (noting “horrendous uncertainty of a lawsuit and the incursion of attorney fees” even if defendant prevails).

130. E.g., *Riss v. City of New York*, 240 N.E.2d 860, 861 (N.Y. 1968).

131. *Nero v. Kan. State Univ.*, 861 P.2d 768, 779 (Kan. 1993) (holding government liable as landlord of university dorms); *Cramer v. Hous. Opportunities Comm’n*, 501 A.2d 35, 41 (Md. 1985) (holding government liable as employer); *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d 359, 367–71 (Tenn. 2009) (holding government liable as landlord of public housing).

132. See, e.g., *Harris v. Woods*, No. 05 Civ. 5582 (PAC) (AJP), 2006 WL 1140888, at *2 (S.D.N.Y. May 1, 2006) (noting police officer “obtained video surveillance footage [showing defendant] from the security cameras positioned around the public housing project buildings”); *People v. Duran*, 921 N.Y.S.2d 826, 829 (Crim. Ct. 2011) (noting police department had gotten New York City Housing Authority videotapes).

lators. No warrant or showing of probable cause is needed for the government to get this information.¹³³ A subpoena based generally on the possibility that the tapes contain evidence would suffice, and often the property owner might voluntarily turn over the material to law enforcement even without the subpoena.

A database of video collected by a shopping center is thus a database of video that can be demanded by the government. Indeed, given the NSA's recently revealed gathering of bulk email and phone records,¹³⁴ it is easy to imagine the government ordering private businesses to continuously turn over video surveillance records as they are gathered.

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

After all, if the legal system *requires* surveillance by private and public property owners, it becomes harder to argue that the law should *forbid* such surveillance (or even broader surveillance) by the government. This is especially likely because “we, as a society, do not have a clear definition of what privacy is,”¹³⁵ so instead of relying on such a definition we look to what has in fact been accepted so far.

“To the extent that any privacy debate considers privacy issues outside the context of the particular case, all prior intrusions into privacy, which society has accepted, form a baseline for comparison to the type of intrusion.”¹³⁶ “[E]ach new form of surveillance” that is approved “becomes a springboard for tolerance of further incursions into individual privacy.”¹³⁷ As surveillance mandated by the judicial system becomes

133. See *United States v. Miller*, 425 U.S. 435, 445–46 (1976) (holding Fourth Amendment does not require warrants or probable cause for subpoenas of business records).

134. See Gellman & Poitras, *supra* note 21 (discussing PRISM project).

135. Craig M. Cornish & Donald B. Louria, *Employment Drug Testing, Preventive Searches, and the Future of Privacy*, 33 *Wm. & Mary L. Rev.* 95, 114 (1991).

136. *Id.*

137. *Id.* at 118. The full text of the passage, which deals with the specific privacy issues raised in Fourth Amendment debates, reads:

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

Id. (footnotes omitted).

commonplace, surveillance by other branches of government will become more politically palatable.

“American tort law” is, by design, one of “the major means for setting norms and standards for social and economic behavior.”¹³⁸ When tort law sets a norm that investigation, disclosure, or surveillance is “reasonable” for private businesses—indeed, that failing to investigate, disclose, or surveil is unreasonable to the point that it incurs legal liability—it becomes more likely that the public will accept similar actions by the government.

III. LEAVING DECISIONS ABOUT PRIVACY-IMPLICATING PRECAUTIONS TO JURIES

Many cases, then, raise the question: When should failure to take certain privacy-implicating precautions be treated as negligent, and when should it be treated as reasonable, partly because of the desire to protect privacy? One possible institution for answering the question—in a sense, the default institution under normal negligence principles—is the jury.

A. *The Case for Juries Generally*

Modern American negligence law generally leaves “reasonable care” decisions to juries. “When, in light of all the facts relating to the actor’s conduct, reasonable minds can differ as to whether the conduct lacks reasonable care, it is the function of the jury to make that determination.”¹³⁹ It is better, the argument goes, to leave “the judgment of the reasonableness of a defendant’s conduct to the jury as a matter for case-by-case determination, rather than having courts, under the rubric of ‘duty,’ establish as a matter of law fixed and unvarying rules of conduct for various categories of human activity.”¹⁴⁰

The three reasons most commonly offered to support this position are (1) jury sensitivity to the specific facts of each case, (2) jury flexibility in the face of technological or social change, and (3) the jury’s greater representativeness of community experience and norms. These reasons could be used to justify having juries decide on plaintiffs’ claims that the defendant acted unreasonably in failing to gather information about people, disclose information about those people or about himself, or to install surveillance mechanisms, just as they are used to justify claims about proposed precautions more generally.

138. P.S. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, 1987 *Duke L.J.* 1002, 1018.

139. Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 8(b) (2010).

140. *Kentucky Fried Chicken of Cal., Inc. v. Superior Court*, 927 P.2d 1260, 1276–77 (Cal. 1997) (Kennard, J., dissenting).

1. *Decisionmaking that Turns Closely on the Specific Facts of Each Case.* — The first argument in favor of jury decisionmaking is what the Restatement labels the “ethics of particularism, which tends to cast doubt on the viability of general rules capable of producing determinate results and which requires that actual moral judgments be based on the circumstances of each individual situation.”¹⁴¹ In the words of California Supreme Court Justice Joyce Kennard,

[Because of] the irreducible variety of circumstances which may surround an event that causes harm to someone . . . , an individualized rather than categorical determination of what constitutes reasonable care to avoid a particular type of harm usually will provide a more precise measure of what conduct is reasonable under the circumstances.

. . . [J]udging the reasonableness of a defendant’s conduct on a case-by-case basis provides a more precise determination of the contours of liability[.] . . .

. . . [“]Negligence . . . is always relative to the particular circumstances of which it is sought to be predicated. For this reason it is very rare that a set of circumstances is presented which enables a court to say as matter of law that negligence has been shown. As a very general rule, it is a question of fact for the jury—an inference to be deduced from the circumstances”

The greater accuracy that results from determining the propriety of the defendant’s conduct by application of the reasonable person standard of care advances the economic function of tort law An individualized determination of reasonableness increases efficiency because it allows for the optimal level of care to be determined under the circumstances of each case; it asks not whether in general the cost of additional precautions would be greater than the cost of additional injuries but whether, under the specific circumstances of the case at hand, additional precautions would have been cost effective To fix the conduct required to avoid a given harm as an absolute standard that does not vary with the accompanying circumstances . . . inevitably means that in numerous cases the law will require something other than optimal care.¹⁴²

141. Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 8 cmt. c; see also W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. Cal. L. Rev. 671, 728 (2008) (“[R]ecognizing a default duty of reasonable care leaves to the other elements of a negligence case the fact-intensive matters that are particularly appropriate for juries to decide.”); Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 Vand. L. Rev. 813, 855 (2001) (interpreting Restatement to suggest jury’s role is “tied to the need for ‘moral judgments,’ not factual ones”).

142. *Kentucky Fried Chicken*, 927 P.2d at 1277–78 (Kennard, J., dissenting) (citations omitted) (quoting *Fox v. Oakland Consol. St. Ry.*, 50 P. 25, 26–27 (Cal. 1897)).

Likewise, one can argue that sensible privacy judgments are so focused on particular details of each case—the precise nature of the proposed disclosure or surveillance, the harm that such a privacy-implicating precaution seeks to avoid, the likelihood that the precaution will actually succeed, the presence or absence of effective alternatives to the precaution, the potential plaintiff's ability to avoid the harm even without the defendant's having taken the precaution, and so on—that any judge-made rule would be too over- and underinclusive, and jury application of a broad reasonableness standard is the best the legal system can do.

2. *Decisionmaking Free to Take Changing Technology or Social Attitudes into Account.* — Second, leaving judgments about precautions to the jury can allow for greater flexibility in light of changing technology or changing norms:

[A case-by-case reasonableness standard] allows successive juries to reassess what precautions are reasonable as social, economic, and technological conditions change over time: “[R]oom is left for a change of standard when a change in the physical conditions of life, or a change in the public valuation of the respective interests concerned, require it.” Accordingly, the reasonable person standard of care, because it does not dictate a fixed course of conduct to avoid the harm in question, encourages innovations that reduce the cost of precautions and substitutions of less costly preventative measures that are equally or more effective in avoiding the harm. By contrast, locking defendants forever into a straitjacket of prescribed conduct removes the incentive for them to lower the cost and increase the level of precautions they provide.¹⁴³

Technological change is indeed an important force in driving privacy-implicating precautions.¹⁴⁴ And jury decisionmaking would indeed leave more room for consideration of technological change, given that the costs and benefits of a precaution may be much different one year than just a few years before. Moreover, social norms related to privacy also evolve, in part precisely because of changing technology; jurors can also be sensitive to that, in evaluating the privacy costs of a particular precaution.

When a court announces a rule (such as “reasonable care does not require the installation of surveillance cameras in parking lots”), that rule will have *stare decisis* force—it will bind lower courts and strongly influence later cases before the same court. A court could reverse the rule, to be sure, in light of technological change, but such overrulings of past decisions are rare and generally disfavored by most judges. But one

143. *Id.* at 1278 (citation omitted) (quoting Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. Pa. L. Rev. 111, 117 (1924)).

144. See *supra* text accompanying notes 11–19 (discussing how improved technology makes precautions less expensive and thus more likely to be required by duty of reasonable care).

jury is not bound by the decisions of another jury from five years ago. Lawyers can argue based on the new technology, or new evidence about the effectiveness of old technology, without a contrary jury decision from the past looming over the dispute.

3. *Decisionmaking that Is Representative of the Practical Judgment and Moral Sensibility of the Community.* — Third, it can be argued that the jury better captures both the practical wisdom and the moral attitudes of the community:

[T]he jury . . . has the potential to bring a wider array of practical experience and knowledge to that task than could a single individual such as a judge. The jury is a repository of collective wisdom and understanding concerning the conditions and circumstances of everyday life that it can bring to bear on the determination of what conduct is reasonable. As the conscience of the community, the jury plays an essential role in the application of the reasonable person standard of care. . . .

. . . “Our ideas as to what would be proper care vary according to temperament, knowledge, and experience. A party should not be held to the peculiar notions of the judge as to what would be ordinary care. That only can be regarded as a standard or rule which would be recognized or enforced by all learned and conscientious judges, or could be formulated into a rule. In the nature of things no such common standard can be reached in cases of negligence, where reasonable [persons] can reach opposite conclusions upon the facts. In such cases . . . ‘It is said to be the highest effort of the law to obtain the judgment of twelve [persons] of the average of the community, comprising [individuals] of learning, [individuals] of little education, [individuals] whose learning consists only of what they have themselves seen and heard, the merchant, mechanic, the farmer, and laborer, as to whether negligence does or does not exist in the given case.’”¹⁴⁵

A jury may not be a perfect cross-section of the community, but it surely is more representative than appellate judges, who fall into a relatively narrow age range, an even narrower economic range, and an extremely narrow professional range. It is likewise more representative than the ostensible representatives of the people who sit in the legislature, given how much legislators tend to differ demographically and economically from the public (and given the influence of economic interest groups on the legislative process). So, the argument would go, when there are value judgments to be made about the relative weight of security and privacy, those value judgments should be made by the cross-section of citizens represented on the jury.

145. *Kentucky Fried Chicken*, 927 P.2d at 1278 (Kennard, J., dissenting) (second through sixth alterations in original) (citations omitted) (quoting *Herbert v. S. Pac. Co.*, 53 P. 651, 651 (Cal. 1898)).

All of these arguments counsel in favor of leaving to juries judgments about what precautions are reasonable—perhaps including privacy-implicating precautions—except in rare cases where judges conclude that a precaution is so burdensome compared to its benefit that no reasonable jury could view it as required by the standard of care.¹⁴⁶

B. *Courts Ignoring Privacy, and Leaving Privacy Decisions to Jurors*

Under the leave-it-to-the-jury model, courts faced with lawsuits alleging a negligent failure to disclose, surveil, or gather information should generally refrain from opining on the privacy implications of the proposed precaution and leave the matter to the jury. And indeed this seems to be what is happening in some such cases, whether as a deliberate decision to leave privacy questions to jurors, or at least as an unconscious application of a leave-it-to-the-jury norm. Four examples follow.

1. *Giggers v. Memphis Housing Authority: Landlord's Duty to Investigate Potential Tenants.* — The clearest example of a conscious decision to leave privacy questions to jurors comes in *Giggers v. Memphis Housing Authority*.¹⁴⁷ The broad question in *Giggers* was whether a landlord had a “duty to act with reasonable care to reduce its tenants’ unreasonable risk of physically injurious attack [by other tenants].”¹⁴⁸ Plaintiffs were the relatives of Charles Brown, who was shot by L.C. Miller; both Brown and Miller were tenants of the Authority, and the shooting took place on Authority property.¹⁴⁹ Miller had behaved badly in the past, attacking another tenant and cutting him with a knife.¹⁵⁰ Plaintiffs argued that, given Miller’s history, the Authority had a duty “to monitor [Miller’s] actions or evict him from the premises.”¹⁵¹

The court agreed with the plaintiffs, though it acknowledged that recognizing a broad duty to prevent violence among tenants might require not just evicting tenants who commit crimes on the property, but also investigating potential tenants.¹⁵² This, the court noted, implicated privacy:

While more careful scrutiny of potential tenants might serve to limit the risks of harm to current tenants, enforcing a more aggressive policy of identifying and excluding potentially dangerous tenants would force MHA to deny housing to some individuals who present indications of future risk but who, if provided with housing, might never harm anyone. Moreover,

146. Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 8(b) (assigning juries task of determining reasonability of action in situations where rational minds can reasonably differ).

147. 277 S.W.3d 359 (Tenn. 2009).

148. *Id.* at 371.

149. *Id.* at 360–61.

150. *Id.* at 361–62.

151. *Id.* at 362.

152. *Id.* at 369–70.

preventive policies will inevitably result in a further intrusion on the privacy of tenants, rendering public housing a less attractive option for many of the blameless individuals whom MHA is charged to serve.¹⁵³

But the weighing of privacy against safety, the court said, should be done by juries. “[T]he question of what steps, if any, are required by the [landlord’s] duty of reasonable care will inevitably depend on the facts of individual cases and should be left to the finder of fact, not the courts.”¹⁵⁴

2. *Kargul v. Sandpiper Dunes: Tenant’s Duty to Warn Neighbors About a Roommate’s Criminal History*. — The allegations in *Kargul v. Sandpiper Dunes Limited Partnership*¹⁵⁵ tell a remarkable story of a defendant’s unusual tendency to give people a second chance. The reader can decide whether to commend this tendency or condemn it.

Defendant Linda Scott had been the director of a sexual assault crisis service, which counseled sexual assault victims.¹⁵⁶ She also volunteered at a prison-based mental health program for sex criminals, where she met Lafate Ables.¹⁵⁷

Ables had been convicted of a sexual assault when he was a teenager, and then of another sexual assault shortly after being released from his sentence for the first assault.¹⁵⁸ Nonetheless, Scott and Ables became romantically involved.¹⁵⁹ When Ables was let out of prison, Scott let him live with her, in the apartment that she rented.¹⁶⁰

A few months after Ables moved in, he was arrested for allegedly raping Scott’s oldest daughter, but entered into a plea bargain that led to another two or three months in jail.¹⁶¹ Scott, nonetheless, allowed Ables to keep living with her.¹⁶² Finally, six months later, Ables raped and repeatedly stabbed Kargul, another tenant in the same apartment com-

153. *Id.* (citing Glesner, *supra* note 70, at 683, 763 (noting privacy concerns as reason against holding landlords liable for not screening tenants)).

154. *Id.* at 371; see also *Lambert v. Doe*, 453 So. 2d 844, 848 (Fla. Dist. Ct. App. 1984) (landlord had duty to warn even when alleged attacker-tenant had not been convicted of any crime, because landlord “had received, several months prior to the subject incidents, reports of assaultive and bizarre conduct” by attacker).

155. 3 Conn. L. Rptr. 154 (Super. Ct. 1991).

156. *Id.* at 155.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. The opinion at one point states that he served about ninety days in jail and at another point that he served about sixty days. *Id.* at 155, 162. Ables was arrested for first-degree sexual assault, which at the time meant forcible rape and apparently required a minimum one-year sentence, 1982 Conn. Acts 1046 (Reg. Sess.), but ultimately pled guilty pursuant to a plea bargain. The opinion offers no further details on the offense to which Ables pled. See *Kargul*, 3 Conn. L. Rptr. at 154.

162. *Kargul*, 3 Conn. L. Rptr. at 155.

plex.¹⁶³ Kargul sued Scott, arguing that Scott was negligent in failing to warn her fellow tenants that Ables was dangerous.¹⁶⁴

The trial court held that Kargul's claim survived summary judgment. Scott, like anyone else, had a duty "not to create an unsafe condition" for others by her "affirmative act" (here, the act of letting Ables live with her without warning the neighbors).¹⁶⁵ Scott's action breached that duty, by "increas[ing] the risk of harm occurring to the plaintiff."¹⁶⁶ And because a sexual assault by Ables was reasonably foreseeable—both based on his criminal history and on his assaulting Scott's daughter—Scott's actions could be seen as a proximate cause of Kargul's injury.¹⁶⁷

The court's analysis says nothing about the possible privacy costs of applying a duty to warn in this situation. To be sure, Scott seems unusually culpable: She ignored not just Ables's past criminal record, but also his sexual assault on Scott's own daughter. But the rationale of the court decision would seemingly apply equally even in the absence of the assault on the daughter, if a future defendant knows only that her roommate had committed sexual assaults in the past.

Yet advocates of jury decisionmaking may conclude that this silence is a virtue of the court's decision, not a vice. There are plausible arguments, the theory would go, for why Scott's failure to warn was unreasonable. There are plausible arguments for why it was not unreasonable. Let the jury decide, based on its own "collective wisdom and understanding concerning the conditions and circumstances of everyday life."¹⁶⁸ And let different juries decide differently based on the particulars of each case—for instance, the specific crimes that the roommate had committed in the past, the roommate's recent behavior, the physical layout of the property and thus the neighbors' vulnerability to the roommate, and so on.

163. *Id.* at 154.

164. *Id.*

165. *Id.* at 160.

166. *Id.*

167. For an analogous case, though one involving a claim that the landlord had a duty to warn, rather than that the renter who invited the housemate had a duty to warn, see *Lambert v. Doe*, 453 So. 2d 844, 848 (Fla. Dist. Ct. App. 1984). In *Lambert*, the court imposed a duty to warn even when the alleged attacker-tenant had not been convicted of any crime because the landlord "had received, several months prior to the subject incidents, reports of assaultive and bizarre conduct" by the attacker. The court in *N.W. v. Anderson*, 478 N.W.2d 542, 544 (Minn. Ct. App. 1991), likewise expressed support in principle for a landlord's duty to warn one tenant that another was a convicted sex offender, but concluded that such a duty was barred in Minnesota by precedent imposing an unusually narrow duty to warn of the risk of crime. See *id.* (noting "we are troubled by the decision we are required to make" under that precedent). But see *Murphy v. Eddinger*, No. CV 980086973, 1999 WL 1212445, at *4 n.4 (Conn. Super. Ct. Nov. 30, 1999) (suggesting in dictum that landlord does not have duty to warn tenants of another tenant's dangerous propensity, at least when propensity is for negligence, such as when tenant is "particularly inept driver" whose driving jeopardizes other cars in parking lot).

168. *Kentucky Fried Chicken of Cal., Inc. v. Superior Court*, 927 P.2d 1260, 1278 (Cal. 1997) (Kennard, J., dissenting).

3. *Apolinar v. Thompson: Homeowner's Duty to Warn Visitors About Threats to the Homeowner.* — In *Apolinar v. Thompson*, Charles Thompson invited Roger Apolinar to housesit while Thompson was out of town.¹⁶⁹ (The court says nothing about whether Thompson was being paid for the housesitting.) While staying at Thompson's house, Apolinar was attacked by an unidentified third party.¹⁷⁰ Apolinar sued, claiming that "Thompson had received harassing phone calls and threats and, therefore, Thompson had a duty to warn Apolinar or make conditions reasonably safe."¹⁷¹ The court concluded that Apolinar's theory could lead to a negligence recovery.¹⁷²

Again, the court's analysis says nothing about the privacy implications of imposing liability in such a case, even though the court's theory is potentially quite broad. The theory, after all, is not limited to housesitters, but extends to any "invitee or licensee,"¹⁷³ which would include social visitors and not just people who stay overnight. Nor is the theory limited to defendants who are in some measure culpable for being in danger of attack, such as criminal gang members who have been threatened by rival gang members. (The opinion says nothing to suggest that Thompson was so culpable.) It would equally apply to anyone who is aware that he or she has been targeted for a possible attack.

Under the court's logic, then, a woman who is targeted by a stalker would have a similar duty to warn any party guests whom she lets into her home, or any romantic partners (or prospective partners), so long as the danger from the stalker to bystanders seems foreseeable enough.¹⁷⁴ Like-

169. 844 S.W.2d 262, 262–63 (Tex. App. 1992).

170. *Id.*

171. *Id.* at 263. If the threats were old enough and vague enough, they might not have sufficed to create a duty to warn. See *Burks v. Madyun*, 435 N.E.2d 185, 189 (Ill. App. Ct. 1982) (finding no duty to warn babysitter that children had been threatened by gangs at school, because plaintiff had not alleged defendant's "children were previously assaulted by gangs on [defendant's] premises or elsewhere"); *Larson v. Larson*, 373 N.W.2d 287, 289 (Minn. 1985) (finding no duty to warn housesitter when "almost two months had elapsed since appellant received a vague threat from a drunk," who "evidenced no intent to carry out the threat," so risk of attack was "too speculative to impose a duty on appellant to warn"). But in many instances, the threats might be more recent and repeated.

172. *Apolinar*, 844 S.W.2d at 264.

173. *Id.*

174. Similar lawsuits had been brought in past cases, though they were rejected on the grounds that the threat was not specific and clear enough to trigger a duty to warn. See *Rojas v. Diaz*, No. B144346, 2002 WL 1292996, at *5 (Cal. Ct. App. June 12, 2002) (dismissing lawsuit on grounds that attacker's "generalized threats of violence" did not create "requisite foreseeability" to trigger duty to warn); *Patzwald v. Krey*, 390 N.W.2d 920, 923 (Minn. Ct. App. 1986) (dismissing lawsuit filed by wedding guests injured by someone who had come to attack defendant, because attacker specifically threatened only defendant, who had "no indication" others were at risk); *id.* (Crippen, J., dissenting) (concluding question whether attack on guests was foreseeable should have gone to jury).

wise, someone—an abortion provider, an alleged blasphemer against Islam, and so on—who is credibly targeted by a politically or religiously motivated criminal would have to warn his friends and other guests of the danger, at least so long as an attack is foreseeable.

Such an obligation would intrude substantially on people's privacy. Many people may find it emotionally humiliating to be seen as a vulnerable target of a powerful prospective attacker, especially when the targeting stems from past crimes, such as domestic abuse (whether or not it involved sexual abuse). A woman who is fleeing an abusive ex-boyfriend—to give just one example—might thus feel a grave privacy violation in having to tell people her story, even the parts that are the bare minimum needed to give them an adequate warning. And this is especially so since a warning given to one person is likely to spread. Tales of stalking or past abuse make for more interesting gossip than stories of warnings about icy pavement.¹⁷⁵

Yet again, one could argue that these arguments should go to the jury. If the jury believes that Apolinar acted reasonably in not disclosing the threats against him, the jury can hold him not liable. If it believes he acted unreasonably, it can hold him liable. Juries in the other hypothetical cases could do the same, perhaps reaching different results based on all the facts in each case—for instance, treating someone who is trying to avoid having her life ruled by a stalker or a terrorist differently from someone who has simply received a random threat.

4. *Commercial Property Owners' and Hotel Owners' Duty to Install Surveillance Cameras.* — The cases holding that commercial property owners and hotel owners could be negligent for failing to set up surveil-

But see *Wilkins v. Siplin*, 13 Cal. Rptr. 2d 634, 638 (Ct. App. 1992) (depublished), which allowed a lawsuit to proceed on the theory that the defendant invited the plaintiff (a male friend) to her cabin, told her estranged husband that she was going to the cabin, neglected to conceal her or the plaintiff's parked cars, and unlocked the door and let her husband in when he appeared at the cabin banging on the door (unsurprising, given that the husband was a co-owner of the cabin). Though the case did not involve a failure to warn the male friend of the risk posed by the husband, much of the logic of the case would apply equally to a situation in which the husband forced his way into the cabin, and the plaintiff's objection was that defendant had not warned the plaintiff of the danger of that happening. But see *Fiala v. Rains*, 519 N.W.2d 386, 389 (Iowa 1994) (rejecting similar claim because it called for "[l]iability for nonfeasance" rather than for affirmative negligence, even though defendant had invited plaintiff into her house knowing of her boyfriend's jealousy).

175. Privacy is also a tool that people can use to minimize the social and financial impact of being a crime victim; forced disclosure of the information can increase this impact, compounding the damage the criminal did. A person who must reveal that he or she is the target of a criminal's attention may lose prospective lovers, guests, and customers; the damage caused by social ostracism and economic loss will be added to the damage caused by fear and risk of physical injury. Cf. Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 Colum. L. Rev. 1413, 1446 n.185 (1999) (noting imposing similar duties on victims "could let [prospective attacker's] violence control [victim's] life").

lance cameras likewise uniformly say nothing about the privacy implications of such a duty.¹⁷⁶ Again, though, this could be defended as a means of leaving the matter to juries, which can decide the matter based on their view of community norms, as applied to the particulars of each case. And such jury decisions, the argument would go, could easily adapt to technological change—for instance, as facial recognition software makes video surveillance even better at identifying potentially dangerous visitors, and thus more effective at preventing harm.

IV. LEAVING DECISIONS ABOUT PRIVACY-IMPLICATING PRECAUTIONS TO JUDGES

A. “No-Duty” Rules Generally

Part III has described the case for leaving privacy-implicating precautions to juries, with only minimal gatekeeping by judges. But there is also a case for having judges consider such questions in the first instance, and concluding as a matter of law—using what the Restatement calls a “no-duty rule”¹⁷⁷—that some such precautions are too burdensome to be required by the standard of care.

Tort law has long recognized that the duty of reasonable care, including the broad discretion that this duty leaves to jurors, is rightly modified by judges in certain classes of cases where there are other social values to be balanced beyond safety and cost. The Third Restatement offers a helpful analysis of why many such no-duty rules exist.¹⁷⁸

176. See, e.g., *Bonilla v. Motel 6 Operating L.P.*, No. 2:09cv712, 2011 WL 4345786, at *9 (W.D. Pa. Sept. 15, 2011) (holding reasonable juror could conclude presence of cameras would have prevented incident from occurring); *Potdevin v. Dorset Hotel Co.*, No. 87 Civ. 3603 (JFK), 1991 WL 12312, at *2 (S.D.N.Y. Jan. 30, 1991) (citing lack of surveillance cameras in hotel where murder of guest occurred); *Madhani v. Cooper*, 130 Cal. Rptr. 2d 778, 782 (Ct. App. 2003) (permitting jury to determine whether installation of cameras would have prevented violent incident between tenants); *Doe v. Fairfield Hillcroft, LLC*, No. CV115008892S, 2012 WL 3089718, at *3 (Conn. Super. Ct. July 2, 2012) (denying motion to strike in suit alleging camera installation could have prevented rape); *Williams v. State*, 786 So. 2d 927, 929, 932 (La. Ct. App. 2001) (finding cause of action where student alleged university’s failure to install security cameras led to robbery); *Pinsonneault v. Merchs. & Farmers Bank & Trust Co.*, 738 So. 2d 172, 186 (La. Ct. App. 1999) (awarding damages for wrongful death in bank robbery case, where part of plaintiff’s negligence claim was that no cameras were installed); *Clohesy v. Food Circus Supermarkets, Inc.*, 694 A.2d 1017, 1029 (N.J. 1997) (finding supermarket had duty to provide some security, including cameras, for customers); *Banayan v. F.W. Woolworth Co.*, 622 N.Y.S.2d 24, 25 (App. Div. 1995) (finding presence of security guards and cameras may have prevented criminal activity on store premises); *Chang v. Bd. of Managers of Fifth Ave. Condo.*, No. 111967-2007, 2010 WL 2262288, at *6 (N.Y. Sup. Ct. May 10, 2010) (denying defendant’s motion for summary judgment in suit involving failure to install security cameras).

177. Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 7 cmt. a (2010).

178. *Id.* § 7 cmt. c.

As the Restatement points out, “[W]hen an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.”¹⁷⁹ This is especially so when “negligence-based liability might interfere with important principles reflected in another area of law”¹⁸⁰—an area of law that deals with values other than safety and efficiency. But, more generally, it is so whenever negligence-based liability trenches on important “social norms” that courts think ought to be protected.¹⁸¹

Thus, for instance, the duty of reasonable care is limited by a property owner’s right not to worry about protecting flagrant trespassers because of the special value recognized by property law—and by social attitudes—in “the possessor’s right of exclusive control of real property and the freedom to use that property as the possessor sees fit.”¹⁸² Instead of applying the standard negligence test in cases where a flagrant trespasser is suing a landowner, most courts apply categorical rules that deny liability.¹⁸³

The duty of reasonable care is also limited in some measure by conventions related to social relationships. As the Restatement notes, under ordinary negligence principles,

A jury might plausibly find [a] social host negligent in providing alcohol to a guest who will depart in an automobile. Nevertheless, imposing liability is potentially problematic because of its impact on a substantial slice of social relations. Courts appropriately address whether such liability should be permitted as a matter of duty.¹⁸⁴

And most state courts have indeed rejected such social host liability, partly because accepting liability would affect “social relations” by requiring social hosts to police their guests’ behavior.¹⁸⁵ Rather than leaving to each jury in each case the decision whether to so affect social relations—and thus in the process imposing the risk of liability and litigation costs

179. *Id.* § 7(b).

180. *Id.* § 7 cmt. d.

181. See, e.g., *id.* § 7 cmt. c (discussing general rule that social hosts should not be held liable for serving alcohol to their guests, even when serving of alcohol ends up contributing to guest’s driving drunk and injuring someone).

182. *Id.* § 52 cmt. a (2012).

183. See *id.* § 52(a) (“The only duty a land possessor owes to flagrant trespassers is the duty not to act in an intentional, willful, or wanton manner to cause physical harm.”).

184. *Id.* § 7 cmt. a (2010).

185. E.g., *Johnston v. KFC Nat’l Mgmt. Co.*, 788 P.2d 159, 163 (Haw. 1990); *Miller v. Moran*, 421 N.E.2d 1046, 1049 (Ill. App. Ct. 1981); *Garren v. Cummings & McCrady, Inc.*, 345 S.E.2d 508, 510 (S.C. Ct. App. 1986); *Burkhart v. Harrod*, 755 P.2d 759, 762 (Wash. 1988).

even if most juries rule against liability¹⁸⁶—courts have made the judgments themselves, using a no-duty rule.

Tort law likewise protects the value of consumer choice in products liability cases. When a plaintiff claims that the defendant's product is "so dangerous that it should not have been marketed at all,"¹⁸⁷ courts generally refuse to send such cases to the jury: The decision whether to effectively deny consumers access to certain products, courts conclude, ought to be made by other government actors (such as legislatures and administrative agencies).¹⁸⁸ The same is true when the plaintiff urges an alternative design that would eliminate features that many consumers find especially appealing, such as a convertible's open roof,¹⁸⁹ or a Volkswagen van's design that "provide[s] the owner with the maximum amount of either cargo or passenger space in a vehicle inexpensively priced and of such dimensions as to make possible easy maneuverability" (albeit with some loss of safety in a front-end collision).¹⁹⁰

Legislatures and administrative agencies, of course, sometimes do choose to ban products that they see as on balance more harmful than valuable—fireworks, illegal drugs, alcohol, and the like. But tort law leaves such decisions to elected representatives (and their appointees in agencies), not to jurors.

Courts have similarly imposed no-duty rules in cases where the plaintiff claimed that the defendant was unreasonable for failing to comply with a robber's demands;¹⁹¹ for distributing newspaper articles, books, or video materials that allegedly inspire or help people to act negligently or criminally;¹⁹² or for playing a contact sport in an allegedly negligent way (setting aside cases of reckless or intentional injury).¹⁹³ And courts have

186. See *Johnston*, 788 P.2d at 164 (observing host will incur cost of defending against suit where wrongdoer was served alcoholic beverage at host's event, even if host is eventually found not liable).

187. Restatement (Third) of Torts: Prods. Liab. § 2 cmt. d (1998).

188. *Id.*; see also *id.* at cmt. e & reporters' note cmt. e (discussing very narrow exceptions to this rule).

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

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

191. E.g., *Kentucky Fried Chicken of Cal., Inc. v. Superior Court*, 927 P.2d 1260, 1269 (Cal. 1997).

192. See, e.g., *James v. Meow Media, Inc.*, 300 F.3d 683, 695–99 (6th Cir. 2002) (finding no duty of care for companies producing or maintaining video games, movies, and websites that allegedly desensitized classmate to violence); *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830, 834 (5th Cir. 1989) (finding no duty where magazine published classified advertisement through which victim's husband hired assassin to kill her); *Orozco v. Dall. Morning News, Inc.*, 975 S.W.2d 392, 395 (Tex. App. 1998) (finding no duty where newspaper published address of gang member, leading to retaliatory murder); Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 7 cmt. d (2010).

193. See, e.g., *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1997) (plurality opinion) (finding no duty among participants in social game of touch football); *id.* at 712 (Mosk, J., concurring in part and dissenting in part) (agreeing there is no duty in such situation).

also imposed a no-duty rule where the plaintiff has sued a government defendant for making an allegedly unreasonable “policy-making [or] planning” judgment, such as judgments about how and when to enforce criminal laws.¹⁹⁴ Here, too, the decisions have been based on a reluctance to let juries weigh not just cost and safety, but also other values, such as people’s right to resist crime, people’s freedom of expression, people’s enjoyment of sports that necessarily involve some risk of injury, and the executive branch’s power to “allocate resources or make other policy judgments.”¹⁹⁵

These no-duty rules sometimes arise when courts are defining the boundaries of affirmative duties, such as a property owner’s duty to protect those on its property against natural hazards, or against attacks by third parties.¹⁹⁶ But they also sometimes arise when courts are limiting the scope of the background duty to take reasonable precautions to prevent harm caused by our own actions—limits on social host liability and product design defect liability offer examples of that. The important point is that, even when courts might otherwise impose a duty of reasonable care on a defendant, they may carve out an exemption from that duty in order to protect social values other than safety.

B. “No-Duty” Rules and Privacy

Courts could likewise conclude that the “countervailing principle or policy” of privacy protection “warrants denying or limiting liability in a particular class of cases,”¹⁹⁷ rather than leaving matters to juries. There are three main reasons why one might want courts to adopt this position: (1) the importance of relatively clear rules to protecting privacy; (2) the importance, in cases of balancing safety against privacy, of openly stated reasons that can be evaluated by observers; and (3) the need to consider the interests of the third parties who will often not be easily visible to the jury.

1. *Clarity About Which Privacy-Implicating Precautions Need Not Be Taken.* — To begin with, if some privacy-protecting behavior needs to be encouraged or at least tolerated, only a relatively clear preannounced rule is likely to do the job. Say a landlord would rather not tell his tenants

194. *Commercial Carrier Corp. v. Indian River Cnty.*, 371 So. 2d 1010, 1021–22 (Fla. 1979); see also *Trianon Park Condo. Ass’n, Inc. v. City of Hialeah*, 468 So. 2d 912, 920 (Fla. 1985). In some jurisdictions, this discretionary function exception is expressly provided for by statute (see, for example, 28 U.S.C. § 2680(a) (2012)), but *Commercial Carrier* and other cases have recognized it as a common-law no-duty rule even in the absence of a statutory provision.

195. Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 7 cmt. g (treating discretionary-function exception as form of no-duty rule).

196. See, e.g., *supra* notes 182–183 and accompanying text (discussing property owner’s limited duty to trespassers, which normally does not contain affirmative duty component).

197. Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 7(b).

that one of the tenants is being stalked, but is worried about the risk of liability for preserving that tenant's privacy, and he goes to you for advice. Your saying, "Don't worry, a jury will probably find such concealment of the information to be reasonable," is not much of an assurance to the landlord.

You cannot have much confidence that most juries will indeed say that, as jury assessment of vague standards such as "reasonable[ness]" is often unpredictable. And even if you are right in your prediction, the overwhelming majority of civil cases do not go to the jury.¹⁹⁸ Your advice thus does not mean "expect victory," but rather "expect settlement for less than the full amount of damages, after a considerable amount of litigation expenses." Even a clear holding by a court might not give your client absolute predictability, but it will at least give considerably more than your guess about jury behavior would.

This, then, is the flip side of the jury-sensitivity-to-facts argument that is often given in favor of jury decisionmaking.¹⁹⁹ Even assuming that a jury, considering all the facts of a case after an injury takes place, would correctly decide whether the defendant's behavior was reasonable—weighing privacy costs and safety benefits at their fair weights—a prospective defendant cannot anticipate how the jury will evaluate those facts. The result will generally be that a cautious defendant will err on the side of underprotecting privacy, especially in the absence of legal pressures (or strong market pressures) to protect privacy.²⁰⁰

Moreover, privacy cases are likely to be classic situations in which "liability depends on factors applicable to categories of actors or patterns of conduct,"²⁰¹ in which "a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases,"²⁰² and in which such clear rules may be necessary to protect the "social norm" of privacy.²⁰³ A rule that, for instance, landlords need not warn tenants that other tenants are being persecuted by criminals—even

198. "Civil jury trial rates have now been below 1.0% since 2005, while bench trials dropped below 1.0% seven years earlier, in 1998." Marc Galanter & Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*, 2011 *Pound Civ. Just. Inst. F. for St. App. Ct. Judges* (manuscript at 4), available at <http://poundinstitute.org/docs/2011%20judges%20forum/2011%20Forum%20Galanter-Frozena%20Paper.pdf> (on file with the *Columbia Law Review*).

199. See *supra* Part III.A.1 (discussing jury-sensitivity-to-facts argument).

200. See *supra* Part II.E (discussing limited availability of privacy torts in such situations). This is analogous to the often-discussed danger that online intermediaries—such as YouTube, Facebook, and the like—would oversuppress speech by their users, in the absence of some well-established and judicially enforced immunity from third-party liability for such speech. See, e.g., Seth Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 *U. Pa. L. Rev.* 11, 29–30 (2006) (discussing this danger).

201. Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 7 cmt. a.

202. See *id.*

203. See *id.* § 7 cmt. c.

when the persecution creates a risk that bystanders will be caught in the crossfire—can be evaluated and either adopted or rejected as a general proposition, just as courts have done with rules that property owners are not liable to flagrant trespassers, that social hosts who serve alcohol are not liable for injuries caused by drunken guests, and the like.

2. *Susceptibility to Reasoned Evaluation.* — Second, the role of privacy in determining people’s duties is the sort of social judgment, the argument would go, that should be made in a way that is easily subject to reasoned analysis, criticism, and revision. Judges have the opportunity to give reasons for their no-duty decisions and to explain why they balanced privacy and safety in a particular way.

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

Jury decisionmaking about whether an action was reasonable under a particular set of facts, on the other hand, yields no written opinion. Appellate courts review it only to see if a reasonable jury could so find, a relatively deferential standard.²⁰⁴ An affirmance of the jury verdict would simply mean that liability is permissible in such a situation, not that the court concludes liability is correct.

Nor can the public effectively review such verdicts and decide whether (for instance) a legislative change to the tort rule is required. Even if a jury verdict makes the news, it may be hard for observers to tell the precise basis for the jury’s decision, for instance if a plaintiff argues that the defendant failed to take several different precautions, only some of which implicate privacy. A general verdict by a jury may make it hard for the public to determine whether or not privacy-implicating precautions are indeed being required.²⁰⁵

And beyond this, most cases in which the court lets the matter go to the jury do not actually reach the jury. Faced with the expense and uncertainty of trial, parties settle.²⁰⁶ To be sure, the anticipated jury reaction is relevant, since—if the parties and their lawyers are clear-sighted enough—the decision will be made in the shadow of that anticipated

204. See *infra* notes 217–218 and accompanying text (discussing deference given to jury verdicts).

205. Having special verdicts that specifically ask the jury which precautions they think should have been taken would solve this last problem, but not the others.

206. Richard D. Friedman, *Anchors and Flotsam: Is Evidence Law “Adrift”?*, 107 *Yale L.J.* 1921, 1954 (1998) (reviewing Mirjan R. Damaška, *Evidence Law Adrift* (1997)) (“If summary judgment is granted properly, the case ends; if it is denied, the case likely settles.”).

reaction.²⁰⁷ But the settlement is even more secret and unevaluable than a jury verdict.

Consider, for instance, the decision in *Kargul v. Sandpiper Dunes*,²⁰⁸ which held that a tenant could be liable for not warning neighbors about her roommate's history of sex crimes (and which would likewise impose such a duty on landlords,²⁰⁹ condominium owners,²¹⁰ and potentially condominium associations²¹¹). The court's decision lets a jury implement something like Megan's Law²¹² by way of the tort system, albeit with the duty to warn imposed on tenants and others rather than on the police. And, unlike the notification system provided by various Megan's Laws, this duty would likely not be limited to sex offenders. There is nothing in the *Kargul* opinion that would keep the duty to notify from applying when a roommate has been convicted of robbery, burglary, assault, or any other crime that shows a foreseeable propensity to act in ways that may threaten neighbors.²¹³

Megan's Law, though, rightly drew a good deal of debate, in which the privacy impact was considered.²¹⁴ And the law contained express

207. Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *Yale L.J.* 950, 997 (1979) (discussing considerations of parties in negotiated settlements).

208. See *supra* Part III.B.2 (discussing case).

209. See Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 40(b)(6) (2012) (noting landlord has affirmative duty to take reasonable care to protect tenants from risks).

210. The rationale of *Kargul* was not based on any special relationship between a tenant and other tenants in the apartment building; tort law does not recognize any such relationship. Rather, the theory was that *Kargul* affirmatively created a risk to her neighbors by bringing a dangerous person into her home and that reasonable care required that she warn the neighbors of this risk. *Kargul v. Sandpiper Dunes Ltd. P'ship*, 3 Conn. L. Rptr. 154, 160 (Super. Ct. 1991). The same rationale would apply to a condominium owner or a homeowner. See *Patton v. Stroger*, 908 So. 2d 1282, 1290 (La. Ct. App. 2005) (holding shopping center owner might be liable to patron of neighboring store, when patron was injured by shot fired from within shopping center); *Riley v. Whybrew*, 185 S.W.3d 393, 401 (Tenn. Ct. App. 2005) (finding landlord of single-family home who failed to investigate tenants' alleged crimes might be liable to neighbors for nuisance and negligent infliction of emotional distress).

211. See Lewis Montana, *Community Association Board Concern About a Resident Sex Offender*, 32 *Westchester B.J.* 23, 23 (2005).

212. See, e.g., Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (requiring release of information to protect public from sex offenders); Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 4-5 (2003) (discussing public disclosure required by such statutes).

213. The duty would not be as reliably enforced as Megan's Law would be, of course, since the communications would have to come from private citizens, who may not know their duties or abide by them. But the principle would be like a broader version of Megan's Law: To act reasonably, landlords and renters would have to notify all neighbors of the violent criminal history of someone moving into the neighborhood.

214. See, e.g., *Doe v. Franklin*, 930 S.W.2d 921, 929 n.5 (Tex. App. 1996) (noting "current debate surrounding Megan's Law"); Joseph F. Sullivan, *Whitman Approves Stringent Restrictions on Sex Criminals*, *N.Y. Times* (Nov. 1, 1994), <http://www.nytimes.com/1994/11/01/nyregion/whitman-approves-stringent-restrictions-on-sex-criminals.html>

limitations on who must disclose and which past crimes trigger the duty to disclose, thus providing a clear rule that made sure that non-sex-offenders' privacy interests would not be implicated.

Likewise, when American cities propose installing surveillance cameras on public streets, public debate often erupts.²¹⁵ The privacy implications are discussed and often carry the day.²¹⁶ But leaving privacy decisionmaking to jury verdicts—and to settlements that anticipate jury verdicts—is much less likely to draw public attention and debate, whether by the public generally or even by legal scholars. And, turning to the *Apolinar v. Thompson* example, if the legal system is to require innocent victims to warn others (neighbors, customers, and the like) that they are targets, such a decision should be made in a way that is backed by a reasoned opinion and can be reviewed by higher courts.

To be sure, if one really has high confidence in the legitimacy of juries as decisionmakers,²¹⁷ then the opacity of a jury verdict may not matter. A supporter of jury decisionmaking might say: “Well, the jury said that landlords ought to publicize their tenants' criminal histories, and I respect jury decisionmaking.” But even a reasonable trust in juries should not justify letting rules that affect the privacy of millions of people be made in a process that usually draws little attention, is subject to extremely modest judicial review,²¹⁸ and is difficult for the public and scholars to evaluate.

Judicial review in free-speech cases, both involving tort law and otherwise, may offer a good analogy. Many of the standards under which liability for speech may be imposed—for instance, whether a statement was made with “actual malice”—are questions about the application of law to fact. Generally, jury verdicts involving applications of law to fact are reviewed deferentially.²¹⁹ But where free-speech issues are involved,

(on file with the *Columbia Law Review*) (“A handful of states have already struck down community notification statutes as unconstitutional.”).

215. See, e.g., Mallon, *supra* note 19, at 963 n.44 (collecting articles condemning public surveillance and use of facial recognition software at 2001 Super Bowl); Bob Barr, Editorial, Lawful Frown on Red-Light Cash Cows, *Atlanta J.-Const.*, Feb. 21, 2007, at A17 (condemning use of red-light traffic surveillance cameras).

216. See, e.g., No Police Surveillance Cameras for Jefferson City, *KRCG-13* (July 12, 2013, 12:02 AM), <http://www.connectmidmissouri.com/news/story.aspx?id=920619> (on file with the *Columbia Law Review*) (noting “police department has no plans to set up street cameras” because of “high costs and concerns over privacy”); Mike Riggs, Seattle Presses Pause on Its Mass Surveillance Plans, *Atlantic Cities* (Nov. 15, 2013), <http://www.theatlanticcities.com/technology/2013/11/seattle-presses-pause-its-mass-surveillance-plans/7598/> (on file with the *Columbia Law Review*) (describing deactivation of citywide surveillance network following newspaper exposé).

217. See *supra* Part III.A (discussing reasons given for such confidence).

218. If the question whether a precaution is reasonably called for is indeed a question for the jury, then appellate courts will review jury decisions on this with great deference. E.g., *Hurd v. Williamsburg Cnty.*, 579 S.E.2d 136, 142–44 (S.C. Ct. App. 2003).

219. E.g., *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431 (7th Cir. 1995); *Meyers v. Chapman Printing Co.*, 840 S.W.2d 814, 822–23 (Ky. 1992).

courts review such application-of-law-to-fact judgments de novo, partly to prevent erroneous denials of free-speech rights and partly to better elaborate the legal rules.²²⁰ And this review happens not just after a verdict, on appeal, but also on pretrial motions. A court deciding whether speech is unprotected—whether against criminal punishment or tort liability—has to decide by itself whether the historical facts (seen in the light most favorable to the nonmoving party) fit within an exception to protection.²²¹

Privacy cases likewise involve important interests that courts need to protect. In some states, the interests are of constitutional dimension because of state constitutional guarantees protecting the right to privacy.²²² They might also be of constitutional dimension under the U.S. Constitution, to the extent that cases such as *Whalen v. Roe*²²³ recognize a federal constitutional interest in informational privacy.²²⁴ And even if such privacy interests are not of constitutional stature, they remain important enough that courts should look closely at decisions that may implicate such rights.

Of course, rights to privacy are not absolute—but neither is the right to free speech. The point of independent judicial decisionmaking about the legal rules defining the boundaries of free speech and privacy is precisely to make sure that these limited but important rights are adequately defined and protected.

3. *Greater Likelihood of Considering Effects on Third Parties.* — Finally, in many tort cases, the potential privacy harm is not just to the defendant—or even to others similarly situated to the defendant—but also to third parties who are not directly represented in court. If an employer must alert customers whenever an employee is the target of a stalker, part of the cost will be borne by the employer and other employers, as they are likely to lose frightened customers. But the greater cost will be borne by stalking victims, whom employers will be likely to dismiss in order to avoid the loss to themselves.

Likewise, if property owners must put up cameras, coupled with facial recognition software, all over their apartment buildings or shopping centers, the property owners will have to pay a financial cost. But future customers will bear the privacy costs, as their comings and

220. E.g., *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510–11 (1984); Eugene Volokh & Brett McDonnell, Freedom of Speech and Independent Judgment Review in Copyright Cases, 107 Yale L.J. 2431, 2439–40 (1998). For examples in negligence cases involving liability for speech, see *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1021 (5th Cir. 1987); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071 (Mass. 1989).

221. See Volokh & McDonnell, *supra* note 220, at 2437–38, 2443–44 (describing speech cases in which *Bose* has been applied).

222. See *supra* note 37 (listing such provisions).

223. 429 U.S. 589 (1977).

224. See *supra* note 38 (discussing this possibility).

goings—and possibly embarrassing stolen kisses or associations with political radicals—will be recorded and analyzed.

To be sure, defendants who are trying to explain why their actions were reasonable will bring up these harms to third parties. But such arguments may lack vividness and credibility to jurors, precisely because they are not made by the people whose interests are at stake.

The plaintiff is in the courtroom, arguing about the harm that was inflicted on him. The defendant is in the courtroom, arguing about the cost that taking plaintiff's proposed precautions would have imposed on him. But the third parties are not there to talk about such matters. And when the defendant asserts the third parties' interests, it might not come across as especially credible. Employers and employees, for instance, are often perceived as having conflicting interests. An employer who brings up employee privacy interests as a means of avoiding tort liability can easily come across as insincere and thus unpersuasive.

But when judges, and especially appellate judges, decide, the third parties' interests are more likely to be effectively highlighted. First, organizations representing those interests—for instance, privacy rights advocates such as the Electronic Privacy Information Center or the ACLU, or groups that represent stalker victims—could file amicus briefs.²²⁵

Second, judges, who see a wide range of cases, may be more likely to be able to see the implications of the proposed rule beyond the particular case. And third, judges are trained to consider indirect consequences of proposed rules, whether the training comes in law school, in law practice, through hearing such arguments on the bench, or through seeing amicus briefs, which by definition focus on the interests of absent parties. Judges are thus more likely to consider absent parties' interests on an equal footing.

This effect on third parties also helps explain why cost internalization is not an adequate rationale for imposing liability on defendants when the proposed precautions implicate third parties' privacy.²²⁶ Under one vision of tort law, the purpose of tort law is to require people to internalize the costs of their behavior, even if their behavior is morally proper. This is often used as an argument for broad liability: Potential

225. Such groups would generally lack a sufficiently concrete stake in the case to intervene in the trial itself and to argue before the jury. See, e.g., Fed. R. Civ. P. 24 (permitting only parties with sufficiently direct stake in outcome to intervene).

226. The cost internalization argument has often been used to justify negligence-based liability when the choice is between negligence liability and no liability. See, e.g., Miller & Perry, *supra* note 8, at 328 (describing Hand formula as justified partly because “[i]mposing liability on negligent injurers forces potential injurers to take into account, or internalize, the externalities of inefficient conduct, thereby preventing such conduct”). Cost internalization has been used even more often as an argument for strict liability, but despite this, American tort law usually prefers negligence over strict liability. See generally James A. Henderson, Jr., *Why Negligence Dominates Tort*, 50 *UCLA L. Rev.* 377 (2002).

defendants remain free to do what they like, but just have to pay for the extra risk that this imposes on others.²²⁷

In the context of privacy-versus-safety tradeoffs, this would be an argument for having no privacy constraints on tort liability, which is to say for having both judges and juries weigh privacy costs at zero. Liability would then be potentially imposed in all the cases that this Article describes, though privacy might still be protected for those who are willing to pay for such protection.

Someone who does not tell his sexual partners about past high-risk behavior, such as having had many past sexual partners or having engaged in unprotected sex, who then ends up transmitting a sexually transmitted disease would have to pay (if he can) for the damage caused by the disease. Likewise, someone who does not reveal to a new lover a different danger stemming from having sex with him—the risk of violent retaliation by a jealous ex-lover—would have to pay for the damage if the ex-lover does indeed retaliate against the new one.

The same would apply if the negligence claim rests on the defendant's failure to gather or disclose information about someone else. If tort law makes landlords liable for not informing their tenants about other tenants' criminal history, or about other tenants being targeted by stalkers, then in principle, tenants who do not want this information disclosed could find landlords who are willing to trade off the risk of liability for a sufficient increase in rent. If car manufacturers are liable if their cars do not report speeding to the police or do not analyze the driver's breath, people who want more privacy-protecting cars could buy them so long as they pay enough of a markup to compensate the manufacturer for the higher risk of liability.

Privacy, though, is seen by many as often providing social benefits that are not entirely internalized.²²⁸ Surveillance, for instance, is often thought of as producing citizens who are reluctant to resist even unreasonable government impositions, because they are intimidated by their

227. E.g., *Bamford v. Turnley*, (1862) 122 Eng. Rep. 27 (Ex.) 33; 3 B. & S. 67, 85 (opinion of Bramwell, B.); William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 62–82 (1987); David G. Owen, *Deterrence and Desert in Tort: A Comment*, 73 *Calif. L. Rev.* 665, 670 (1985).

228. E.g., Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* 221 (1995); Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* 196–97 (2000); Cohen, *supra* note 2, at 1912–18; A. Michael Froomkin, *The Death of Privacy?*, 52 *Stan. L. Rev.* 1461, 1502–04 (2000); Robert C. Post, *The Social Foundations of Privacy: Community and the Self in the Common Law Tort*, 77 *Calif. L. Rev.* 957, 1008–10 (1989); Paul M. Schwartz & William M. Treanor, *The New Privacy*, 101 *Mich. L. Rev.* 2163, 2177 (2003); Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 *Iowa L. Rev.* 553, 560–61 (1995); Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 *Harv. L. Rev.* 2055, 2084–90 (2004); Daniel J. Solove, *“I’ve Got Nothing to Hide” and Other Misunderstandings of Privacy*, 44 *San Diego L. Rev.* 745, 763 (2007).

habit of always thinking that the government is watching.²²⁹ A duty to disclose that one is a target of criminal attackers—whether ideological enemies, jealous exes, or gangsters—would add a weapon to the criminals’ arsenal, and would further discourage people from resisting the criminals’ coercive demands.²³⁰ Freedom from such surveillance and disclosure is seen as providing corresponding social benefits. And even if requiring people to internalize both the costs and benefits of an activity theoretically provides optimal deterrence, requiring them to internalize the costs of privacy when they cannot internalize the social benefits of privacy would overdeter socially useful privacy protection.²³¹

Moreover, the premise of negligence law is not only to require payment for certain behavior, but also to stigmatize such behavior as negligent, unreasonable, and careless.²³² Indeed, this is why negligence that shows a “conscious disregard of public safety” can even lead to punitive damages liability,²³³ which is what happened, for instance, in the famous McDonald’s coffee case and the Ford Pinto case.²³⁴ If punitive damages are available, then the efficient-cost-internalization story does not apply, since defendants would have to pay for more than the harm that they inflicted. But beyond this, the availability of punitive damages further

229. E.g., Richards, *supra* note 2, at 1945–52.

230. See, e.g., *Hurn v. Greenway*, 293 P.3d 480, 484 (Alaska 2013) (refusing to hold woman liable for allegedly provoking attack by jealous man in which someone was killed, because imposing liability would unduly burden abuse victims).

231. Of course, not all privacy seeking is indeed socially beneficial; consider, for instance, the desire to conceal one’s communicable disease. But that just implies that no-duty rules (whether defined by judges or the legislature) should be limited to the socially beneficial privacy-seeking behavior, rather than to all such behavior.

232. See, e.g., Victor E. Schwartz et al., *Prosser, Wade and Schwartz’s Torts* 709 (11th ed. 2005) (noting strict liability is “not called negligence because a court makes a judgment that [the hazardous activity’s] value to the community is sufficiently great that the mere participation in the activity is not to be stigmatized as wrongdoing”); John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 *Cornell L. Rev.* 1123, 1149 (2007) (“When an opinion in a tort case speaks about the defendant’s conduct in terms of breach of duty, injury, and the like, and that language is taken at face value, notions of blame and morality are in play.”); Nelson P. Miller, *The Attributes of Care and Carelessness: A Proposed Negligence Jury Instruction*, 39 *New Eng. L. Rev.* 795, 829 (2005) (“[T]ort law at its foundation relies heavily on irrationality or unreasonableness as an attribute of the carelessness which it must and does condemn. Irrationality is clearly an attribute of carelessness employed by tort law.”).

If we were talking about a strict liability regime, the matter would be different, but rightly or wrongly the U.S. legal system generally deals with the cases described in the Article using a negligence test.

233. *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 382 (Ct. App. 1981); see, e.g., *Restatement (Second) of Torts* § 908(2) (1979) (calling for punitive damages in cases of “reckless indifference” to others’ safety).

234. *Liebeck v. McDonald’s Rests.*, No. CV-93-02419, 1995 WL 360309, at *1 (Dist. Ct. N.M. Aug. 18, 1994), vacated per stipulation, 1994 WL 16777704 (Dist. Ct. N.M. Nov. 28, 1994); *Grimshaw*, 174 Cal. Rptr. at 348.

reflects that negligence law involves the making and enforcement of moral judgments.

This legal stigmatizing of behavior as “negligent” or “unreasonable” is, as Part II.F discusses, likely to affect how the public understands privacy. If failing to surveil is unreasonable, negligent behavior, then surveillance becomes not just a choice that a property owner may make or not make, so long as it is willing to pay for the costs of the choice. Instead, it becomes something that all reasonable property owners must do. If failing to disclose that a tenant or an employee is an ex-felon, or is the target of a stalker, is negligent, then that too becomes something reasonable landlords or employers must do. Again, then, imposing liability on defendants who choose not to take privacy-implicating precautions would not just require them to internalize the costs of their choice; it will also affect future public expectations of privacy.²³⁵

C. Courts Considering Privacy in Negligence Cases

There is reason, then, for courts to sometimes conclude, because of a concern about privacy, that a defendant does not have the duty to impose a particular privacy-implicating precaution. Some courts do precisely this.

To be sure, those courts often reach such conclusions offhandedly, with little explanation and with no attempt to articulate the judgments in a way that is maximally useful for future precedents. Indeed, one goal of this Article is to help prompt courts to discuss such matters more overtly, the way that courts have at times done with regard to other no-duty rules.²³⁶ Nonetheless, these decisions show that some courts are willing to conclude, as a matter of law, that certain precautions would undermine privacy too much, and that these decisions should be made by judges and not by juries.

1. *Privacy as Limiting Hotel Owners’ Obligation to Surveil.* — *Shadday v. Omni Hotels Management Corp.* offers one illustration.²³⁷ Shadday was raped by another hotel guest, Alfredo Rodriguez Mahuad, in a hotel

235. Requiring people to pay if they are to preserve their privacy is also a substantial burden—for some, an unaffordable burden—on the underlying privacy right. If one sees privacy, or certain aspects of privacy, as something like driving or economic activity, such a burden may be acceptable, just as requiring people to buy liability insurance in order to drive or go into a line of business is seen as acceptable. But if one sees certain aspects of privacy as a deeper right, such as a right to speak or a right to sexual intimacy, such requirements should be more suspect. The poor as well as the rich should be able to enjoy the benefits of privacy, free of government-imposed taxes on such privacy, even if this may sometimes impose a cost on third parties.

236. See, e.g., *Castaneda v. Olsher*, 162 P.3d 610, 621–22 (Cal. 2007) (holding landlord “did not have a tort duty to prevent [gang activity]”); *Kentucky Fried Chicken of Cal., Inc. v. Superior Court*, 927 P.2d 1260, 1262 (Cal. 1997) (holding store owner “does not have a duty to comply with the unlawful demand of an armed robber”).

237. 477 F.3d 511 (7th Cir. 2007).

elevator and sued the hotel, claiming that it failed to discharge its duty of reasonable care to its guests.²³⁸

The Seventh Circuit expressly applied the Hand formula: “The practical question (and law should try to be practical) is whether the defendant knows or should know that the risk is great enough, in relation to the cost of averting it, to warrant the defendant’s incurring the cost.”²³⁹ It dismissed some precautions, seemingly on the grounds that they would be too expensive.²⁴⁰ And in the process it also suggested that continuous surveillance might also be an undue intrusion on “privacy”: “The hotel cannot keep [guests] under continuous surveillance—they would be unwilling to surrender their privacy so completely.”²⁴¹

2. *Privacy as Limiting Landlords’ Obligation to Proactively Monitor Their Tenants.* — Likewise, in *Plowman v. Pratt*, the court concluded that landlords could only be liable for dog bites by their tenants’ dogs if they actually knew the dog was dangerous and did nothing about it.²⁴² Landlords had no duty to routinely investigate whether their tenants’ dogs were indeed dangerous.²⁴³

The court mostly relied on precedents, some in-state and many out-of-state.²⁴⁴ But the court also briefly mentioned that “the actual knowledge standard is appropriate because it holds landlords responsible for failing to act against certain known, unreasonable risks, while recognizing that, as a general rule, tenants enjoy a level of privacy in their rental premises.”²⁴⁵

3. *Privacy as Limiting Landlords’ Obligation to Investigate Tenants’ Mental Conditions.* — *Gill v. New York City Housing Authority* likewise considered privacy in rejecting an argument that a landlord had a duty to investigate and monitor a mentally ill tenant.²⁴⁶

Gill, who lived in public housing, was stabbed by another tenant, Ernest Lamb. Gill sued the housing authority, arguing that the authority knew that Lamb was mentally ill, and that the authority breached its duty as a landlord to protect its tenants²⁴⁷ “when it failed to evict Ernest Lamb prior to the assault, or to post warning signs, or to take steps to control

238. *Shadday v. Omni Hotels Mgmt. Corp.*, No. 1:04-CV-1219-JDT-WTL, 2006 WL 693680, at *1 (S.D. Ind. Mar. 13, 2006), *aff’d*, 447 F.3d 511.

239. 477 F.3d at 513.

240. See *id.* at 516 (“[A] hotel could hardly be required to have security guards watching every inch of the lobby every second of the day and night.”).

241. *Id.* at 517.

242. 684 N.W.2d 28, 31–32 (Neb. 2004).

243. *Id.* at 32.

244. *Id.* at 31–32.

245. *Id.* at 32.

246. 519 N.Y.S.2d 364 (App. Div. 1987).

247. See *id.* at 369–70 (acknowledging landlord’s general duty to take “reasonable security measures to protect his tenants from the intentional criminal acts of others”).

Lamb.”²⁴⁸ “[T]he records of Ernest Lamb’s psychiatric hospitalizations,” Gill argued, “should have been examined; . . . Ernest Lamb should have been made to submit to psychiatric examination; and . . . Lamb’s parents should have been forced [through threat of eviction] to provide psychiatric information.”²⁴⁹

The court rejected Gill’s claims, partly because of the landlord’s lack of “competen[ce] to assess the dangerous propensities of [its] mentally ill tenants,” partly because of the landlord’s lack of “the resources, or control over [its] tenants necessary to avert the sort of tragedy presented by this case,” and partly because the consequence of such a duty would be the “almost commonplace” eviction of mentally ill patients.²⁵⁰ But the court also noted Lamb’s “right of privacy,”²⁵¹ and expressly rejected the possibility that a landlord would have to “monitor[] treatment” or “post[] warnings (i.e., ‘Beware of your neighbor’).”²⁵²

On the other hand, *Giggers v. Memphis Housing Authority*, discussed in Part III.B.1, took a different view, holding that it is up to juries to decide whether landlords should have “a more aggressive policy of identifying and excluding potentially dangerous tenants” notwithstanding the resulting “intrusion on the privacy of tenants.”²⁵³

4. *Privacy as Limiting Employers’ Obligation to Investigate or Supervise Employees.* — Though employers have been increasingly obligated to gather job applicants’ criminal records,²⁵⁴ a thoroughgoing commitment to maximum safety without regard to privacy might demand even more investigation or surveillance. But some courts have balked at that result for privacy reasons.

For instance, in *Roman Catholic Bishop v. Superior Court*, a fourteen-year-old girl and her family sued a church because of a priest’s molestation of the girl.²⁵⁵ Plaintiffs claimed that the church should have (a) investigated the priest’s background, including whether the priest had had sexual relationships with adults, or (b) required the priest “to undergo a psychological evaluation before hiring him.”²⁵⁶ (The priest had no criminal history of child molestation, so a background check alone would not have uncovered his propensity.²⁵⁷) The court rejected these claims,

248. *Id.* at 366.

249. *Id.* at 369.

250. *Id.* at 370, 372.

251. *Id.* at 369.

252. *Id.* at 372.

253. 277 S.W.3d 359, 369–70 (Tenn. 2009).

254. See, e.g., *Cramer v. Hous. Opportunities Comm’n*, 501 A.2d 35, 41 (Md. 1985) (holding employer may be negligent in not seeking employee information, despite acknowledging possible privacy cost of such investigations).

255. 50 Cal. Rptr. 2d 399, 400–01 (Ct. App. 1996); see *supra* Part II.E (discussing *Roman Catholic Bishop*).

256. *Roman Catholic Bishop*, 50 Cal. Rptr. 2d at 405–06.

257. *Id.* at 404.

reasoning that either of these investigations would have unacceptably interfered with the priest's privacy.²⁵⁸

Likewise, in *Napieralski v. Unity Church of Greater Portland*, Napieralski was allegedly sexually assaulted by a minister while meeting with him at the minister's church-provided home.²⁵⁹ (The meeting was not for church business or spiritual counseling.²⁶⁰) Napieralski argued that the church was negligent in supervising its employee, but the Maine Supreme Judicial Court rejected this, partly because "[w]here an employer does provide a residence for employees, it is very different from the employer's premises as addressed in the Restatement. The employee retains rights of privacy and quiet enjoyment in the residence that are not subject to close supervision or domination by the employer."²⁶¹

On the other hand, *Doe v. XYZ Corp.* concluded that employers had a duty to monitor their employees' office computer usage in order to prevent the employees from uploading child pornography.²⁶² Because an employee "had no legitimate expectation of privacy that would prevent his employer from accessing his computer to determine if he was using it to view adult or child pornography,"²⁶³ the employer not only could monitor its employees' computer usage but was obligated to take reasonable steps to do so.

5. *Privacy as Limiting Businesses' Obligations to Search Customers or Employees, or to Implement Similarly Intrusive Security Measures.* — *Nash v. Fifth Amendment* involved an accident on a party boat.²⁶⁴ (The Fifth Amendment was the name of the bar that chartered the boat.²⁶⁵) One of the patrons, Clark, was an off-duty police officer who was carrying a loaded but improperly secured gun.²⁶⁶ Clark dropped the gun, which went off, killing plaintiff Nash's husband.²⁶⁷ Nash sued the boat operator,

258. *Id.* at 405–06.

259. 802 A.2d 391, 392 (Me. 2002).

260. *Id.*

261. *Id.* at 393; see also *M.L. v. Magnuson*, 531 N.W.2d 849, 858 (Minn. Ct. App. 1995) ("By the nature of the position, a clergyperson has considerable freedom in religious and administrative leadership in a church. The clergy also require privacy and confidentiality in order to protect the privacy of parishioners.").

262. 887 A.2d 1156, 1168 (N.J. Super. Ct. App. Div. 2005); see *infra* notes 298–306 and accompanying text (discussing case).

263. *XYZ Corp.*, 887 A.2d at 1166.

264. 279 Cal. Rptr. 465, 465–66 (Ct. App. 1991).

265. *Id.* at 465. For somewhat more apt constitutional bar names, see Jay Wexler, Bars Called the "Twenty-First Amendment": Should I Do a Tour of Them?, *Odd Clauses Watch* (Mar. 15, 2011, 2:04 PM), <http://oddclauses.wordpress.com/2011/03/15/bars-called-the-twenty-first-amendment-should-i-do-a-tour-of-them/> (on file with the *Columbia Law Review*).

266. *Nash*, 279 Cal. Rptr. at 465.

267. *Id.* at 465–66.

arguing that it was negligent in failing to screen guests for concealed weapons.²⁶⁸

The court dismissed this, largely on practical grounds, including the likelihood that the plaintiff's proposed precautions would have caused "passenger annoyance" (a serious concern for places where people come to party) and the view that the incidents that would be avoided by such screening are "statistically insignificant."²⁶⁹ But the court also briefly mentioned "privacy":

The installation of metal detectors may not be burdensome for locations such as train stations, bus depots, or dockside wharves. But plaintiff's logic is not limited to such obvious points of commerce: private social events would be within its sweep. Must the persons or organizations that engage banquet rooms in hotels or restaurants also make provision for detection either by device or by human ingenuity? If detection devices are not used, are handbags to be searched and persons frisked? These few hypothetical permutations show that the costs would not only be financial; so would trust, privacy, and the civility of everyday life. . . . The "consequences to the community" would amount to a virtual re-ordering of civil society in the hope of preventing statistically insignificant incidents.²⁷⁰

*Dupont v. Aavid Thermal Technologies, Inc.*²⁷¹ took a similar approach in dealing with a lawsuit against an employer based on an employee's murder of a coworker in the employer's parking lot. The court "decline[d] to adopt a rule that employers have a general duty to protect their employees from third party criminal acts," partly because otherwise employers

could be required to maintain a security force, search all employees for weapons, and implement other intrusive safety procedures to address the potential for workplace violence. Such a rule could be very costly, particularly if employers were unable to obtain general liability insurance coverage for the intentional acts of third parties. In addition, some such measures may conflict with the employer's duty to comply with laws protecting, among other things, an employee's right to privacy.²⁷²

6. *Privacy as Limiting Bank Investigation of Customer Transactions.* — In principle, when a company uses its bank account for financial fraud against a third party, banks might be seen as liable for negligently failing to supervise the company's actions. This would be something like a negligent entrustment theory,²⁷³ or the negligent supervision theory

268. *Id.* at 467.

269. *Id.* at 469–70.

270. *Id.* at 470 (citation omitted).

271. 798 A.2d 587 (N.H. 2002).

272. *Id.* at 592.

273. See generally Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 19 cmt. e (2010) (discussing how negligent entrustment qualifies as special case of

accepted in *XYC Corp.*²⁷⁴ The accountholders are using the bank's services to perpetrate their frauds, so that the bank's actions in providing the services—like a negligent entruster's actions in loaning someone a car or a gun—are helping affirmatively cause the fraud.

Nonetheless, *Chazen v. Centennial Bank* and *Chicago Title Insurance Co. v. Superior Court* reject this theory, partly based on privacy concerns:

If . . . banks had a duty to reveal suspicions about their customers, they would violate their customers' right to privacy, not to mention be forced to act as the guarantor of checks written by the depositors. We refuse to recognize such a duty by banks to inform on suspicious customers, and we thereby avoid the loss of privacy, expense and commercial havoc that would result from such a holding.²⁷⁵

7. *Privacy as Limiting the Tarasoff Duty to Warn.* — *Tarasoff v. Regents of the University of California* famously imposed on psychiatrists a duty to warn a person when the psychiatrist learns that a patient poses a threat to that person.²⁷⁶ In the process, the court noted the privacy burden posed by such a rule, but concluded that the safety benefits outweighed that privacy cost:

We recognize the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy, and the consequent public importance of safeguarding the confidential character of psychotherapeutic communication. Against this interest, however, we must weigh the public interest in safety from violent assault.²⁷⁷

The court reasoned that “[t]he Legislature has undertaken the difficult task of balancing the countervailing concerns” by allowing psychotherapists to testify about such threats, notwithstanding the psychotherapist-patient testimonial privilege.²⁷⁸ Indeed, the court further acknowledged the importance of privacy by stating that the therapist's usual professional obligations of confidentiality continue to require that any disclosure be done “discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger.”²⁷⁹

And courts have indeed been cautious in expanding the *Tarasoff* duty to require broader disclosures that would further jeopardize “the

negligence generally); Restatement (Second) of Torts § 390 (1965) (describing negligent entrustment theory with regard to chattels and physical harm).

274. See *infra* notes 298–306 (discussing *XYC Corp.*).

275. *Chicago Title Ins. Co. v. Superior Court*, 220 Cal. Rptr. 507, 519 (Ct. App. 1985); accord *Chazen v. Centennial Bank*, 71 Cal. Rptr. 2d 462, 465 (Ct. App. 1998).

276. 551 P.2d 334, 343 (Cal. 1976).

277. *Id.* at 346–47 (citation omitted).

278. *Id.*

279. *Id.* at 347.

privacy of [the] patient.”²⁸⁰ *J.A. Meyers & Co. v. Los Angeles County Probation Department*, for instance, rejected a proposed duty of probation departments to warn a probationer’s prospective employers about his past crimes.²⁸¹ Part of the rationale was that a court’s decision to place someone on probation was itself a judgment that the probationer is “a proper subject for rehabilitation” and is thus not unduly dangerous.²⁸² But part of the rationale expressly relied on privacy: “[A] large degree of privacy is required in the rehabilitative program,” the court reasoned, given that “disclosure of a probationer’s record would prejudice him with prospective or current employers, and effectively nullify the judge’s [probation] order.”²⁸³

Likewise, *Bellah v. Greenson* rejected a proposed duty of psychotherapists to warn a patient’s parents of “conditions which might cause her to commit suicide,” or of the risk that she posed to the parents’ property.²⁸⁴ *Tarasoff*, the court reasoned, “requires that a therapist *not* disclose information *unless* the strong interest in confidentiality is counterbalanced by an even stronger public interest, namely, safety from violent assault.”²⁸⁵

8. *Privacy as Limiting People’s Duty to Reveal Disease Risk Factors to Sexual Partners.* — In *Doe v. Johnson*, plaintiff allegedly contracted HIV from having sex with the famous basketball player Magic Johnson.²⁸⁶ Doe claimed that Johnson should have warned her that he had contracted HIV or, if he did not know he had HIV, he should have warned her that he had experienced symptoms indicative of HIV; or, if he did not know of such symptoms, he should have at least warned her “that he had a high risk of becoming infected with the HIV virus because of his ‘sexually active, promiscuous lifestyle.’”²⁸⁷

As in *Tarasoff*, the *Johnson* court recognized the privacy implications of the woman’s claim:

[R]ecognition of a duty to warn in certain contexts necessarily invades the constitutionally protected privacy rights of individuals in their sexual practices and in marriage, by requiring people to disclose prior sexual history to every potential sex

280. *Id.*

281. 144 Cal. Rptr. 186, 188 (Ct. App. 1978).

282. *Id.*

283. *Id.*; see also *Sharpe v. S.C. Dep’t of Mental Health*, 354 S.E.2d 778, 783 (S.C. Ct. App. 1987) (Bell, J., concurring in the judgment) (declining to expand *Tarasoff* into “legal duty to warn the public at large when a mental patient is released,” partly because such duty “would intrude on the patient’s privacy”).

284. 146 Cal. Rptr. 535, 539–40 (Ct. App. 1978); see also *Lemon v. Stewart*, 682 A.2d 1177, 1183 (Md. Ct. Spec. App. 1996) (rejecting, largely based on privacy concerns, proposed duty of doctors to warn family members—who were not patient’s sexual partners—that patient had HIV, even though those family members were nursing patient during his illness and were exposed to his bodily fluids).

285. *Bellah*, 146 Cal. Rptr. at 539.

286. 817 F. Supp. 1382, 1385 (W.D. Mich. 1993).

287. *Id.* (quoting complaint).

partner. . . . Certainly, court supervision of the promises made by, and other activities engaged in, two consenting adults concerning the circumstances of their private sexual conduct is very close to an unwarranted intrusion into their right to privacy.²⁸⁸

But, the court went on to say “the right of privacy is not absolute, and it, ‘does not insulate a person from all judicial inquiry into his/her sexual relations, especially where one sexual partner, who by intentionally tortious conduct, causes physical injury to the other.’”²⁸⁹ And, in light of the dangerousness of HIV (a matter that, in the court’s view, distinguished it “from other sexually transmitted diseases, such as herpes”), the court concluded that “for the most part, the burden on defendant in this case”—apparently referring to the privacy burden—“is not very high”:

[I]f Mr. Johnson (1) had actual knowledge that he was HIV-positive, (2) knew he was suffering symptoms of the HIV virus, or (3) knew of a prior sex partner who was diagnosed with the HIV virus, all he needed to say to Ms. Doe was, “I have the HIV virus” or “I may have the HIV virus.” In light of the risk associated with this disease, it is not much to ask a potential defendant to utter these few words. On the other hand, recognizing human nature, it is often difficult at intimate moments to bring up potentially embarrassing facts about oneself. Nonetheless, in the case of the HIV virus, it can be a matter of life and death.²⁹⁰

Yet despite this decision that privacy must yield to safety in some measure, the court concluded that a person does *not* have the duty to reveal his mere “high risk” status or conduct.²⁹¹ This partly stemmed from line-drawing concerns, but partly also from a concern about “privacy implications.”²⁹²

“[A]s a matter of law,” the court concluded, “it was not foreseeable that [Johnson] would pass the HIV virus to Ms. Doe simply because he had unprotected sex with multiple partners prior to his encounter with Ms. Doe.”²⁹³ This does not seem to have been just a judgment about probabilities: Even fairly low risks may be foreseeable and may give rise to a duty to warn when the cost of the warning is low enough.²⁹⁴ Rather, the judgment of unforeseeability “as a matter of law” seemed to stem partly from the court’s consideration of privacy—the court appeared to be

288. *Id.* at 1391.

289. *Id.* (quoting *Barbara A. v. John G.*, 193 Cal. Rptr. 422, 430 (Ct. App. 1983)).

290. *Id.* at 1392 (footnote omitted).

291. *Id.* at 1394.

292. *Id.*

293. *Id.*

294. See *supra* note 55 and accompanying text (recognizing duty to warn for even modest risks).

requiring a higher level of foreseeability for privacy-implicating precautions.

As was noted above, these cases (like many tort cases) do not go into a deep discussion of the underlying policy issues, or even label their references to privacy as “no-duty” (or “limited-duty”) rules.²⁹⁵ Yet they do rely on privacy concerns in reaching results that amount to a finding of no duty as a matter of law or in limiting the scope of the duty. They are thus the building blocks from which a broader privacy-protecting tort law doctrine may be built.

D. How Not to Decide Whether to Have No-Duty Rules: Borrowing from What Is Allowed to What “Reasonableness” Requires

So courts sometimes do try to decide whether a proposed privacy-implicating precaution ought to be rejected as a matter of law. But one justification sometimes used for this decision—whether a particular form of surveillance, information gathering, or disclosure is *allowed*—is a poor basis for determining whether such activity should be *required* as part of the duty of reasonable care.²⁹⁶

Much of the privacy that we enjoy arises in zones of private discretion, where employers, property owners, and others are neither forbidden from taking certain privacy-implicating precautions nor required to take such precautions.²⁹⁷ How much privacy there should be in those

295. Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 7 cmts. a, d (2010).

296. Naturally, if a statute provides that some precaution is required, a court can impose liability based on failure to comply with the statute. Cf., e.g., *J.S. v. R.T.H.*, 714 A.2d 924, 931–32 (N.J. 1998) (holding wife liable for not reporting husband’s sexual abuse of neighbors’ children, partly because statute expressly “require[d] any person having reasonable cause to believe that a child has been subject to abuse to report the abuse immediately,” a statutory duty “not limited to professionals, . . . but . . . required of every citizen”). And if a statute or a constitutional law rule provides that some surveillance, information gathering, or disclosure is either forbidden or optional, a court ought to abide by that. See, e.g., Md. Code Ann., Health—Gen. § 18-337(f) (LexisNexis 2009) (“A physician acting in good faith may not be held liable in any cause of action for choosing not to disclose information related to a positive test result for the presence of human immunodeficiency virus to an individual’s sexual and needle-sharing partners.”). The question discussed here arises when statutory and constitutional rules are silent on some form of surveillance, information gathering, or disclosure, thus making it permissible without stating either that it is mandatory or that it is optional.

297. The same is true of the liberty we enjoy. In many states, for instance, employers are not barred from firing employees based on the employees’ speech or political activity. Eugene Volokh, *Private Employees’ Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 *Tex. Rev. L. & Pol.* 295, 302–30 (2012). Nonetheless, a combination of social norms and market pressures means that, as a practical matter, employees can generally engage in a good deal of off-the-job speech or political activity without employer retaliation. If, though, the legal system began to hold employers liable under some theory of failure to restrict their employees’ off-the-job speech, this zone of practical freedom would be dramatically narrowed.

contexts is negotiated (and often renegotiated) by social mores and market pressures, not by the law. A legislature's judgment not to prohibit disclosure, information gathering, or surveillance in this context should not be seen as an authorization for courts to require such privacy-implicating behavior.

Consider, for instance, *Doe v. XYZ Corp.*²⁹⁸ XYZ's employee, the then-stepfather of ten-year-old Jill Doe, had secretly photographed Jill in the nude and then used his work computer to upload the photographs to a child pornography site.²⁹⁹ After the employee was eventually exposed, Jill's mother Jane Doe (the employee's ex-wife) sued XYZ on Jill's behalf.³⁰⁰

The employer, Doe argued, had a "duty to exercise reasonable care so to control his [employee] while acting outside the scope of his employment as to prevent him from intentionally harming others . . . [when the employee] is using a chattel"—here, the computer—"of the [employer]."³⁰¹ Had the employer properly monitored the ex-husband's computer use, Doe argued, it would have noticed that the ex-husband was accessing child pornography sites.³⁰² And the employer could then have put a stop to such access, for instance by firing the ex-husband, which would have prevented the uploading of the photos of Jill. Moreover, Doe argued, the employer should have realized that the ex-husband might be accessing child pornography sites, because its computer logs revealed that the ex-husband was accessing "obvious porn sites ('Big Fat Monkey Blowjobs,' 'Yahoo Groups-Panties R Us Messages' and 'Sleazy Dream Main Page') as well as one that specifically spoke about children: 'Teenflirts.org: The Original Non Nude Teen Index.'"³⁰³

The court held that, if the facts were as plaintiffs alleged, the employer would indeed have had a duty of reasonable care to prevent its computers from being used to injure Jill.³⁰⁴ And the court rejected the

298. 887 A.2d 1156 (N.J. Super. Ct. App. Div. 2005).

299. *Id.* at 1160.

300. *Id.* at 1158.

301. *Id.* at 1161–62 (quoting Restatement (Second) of Torts § 317 (1965)).

302. *Id.* at 1161.

303. *Id.* at 1159–60. The ex-husband's privacy was already in some measure compromised by the employer's surveillance. But there is a difference between computer network managers knowing that one is accessing pornography and their closely tracking exactly what sort of pornography one is accessing. (Such tracking could well reveal tastes in lawful adult pornography, not just criminal child pornography; even "teen porn" sites may depict eighteen- and nineteen-year-olds, and appeal to viewers who are interested in sexual depictions of young-looking people but who do not want to be prosecuted for possessing illegal child pornography.) And more broadly, the principle may apply even to companies that do not actively scan computer log files. The companies certainly could scan those files at low cost, which would suggest, under the court's reasoning, that they had a duty to do so. See *supra* text accompanying note 262 (quoting court's reasoning).

304. *XYZ Corp.*, 887 A.2d at 1168 (clarifying duty applied *both* because XYZ owned computer and had ability to control employee).

privacy-based objections to imposing such a duty: Because XYZ had a right to monitor the use of its computers, and because the “[e]mployee’s office . . . did not have a door and his computer screen was visible from the hallway, unless he took affirmative action to block it,” the employee “had no legitimate expectation of privacy that would prevent his employer from accessing his computer to determine if he was using it to view adult or child pornography.”³⁰⁵ And though the court relied on the Restatement (Second) of Torts § 317, which applied to an employer’s duty to control employees’ use of property with which the employee is entrusted (here, a computer), Restatement (Second) of Torts § 318 imposes a similar duty on non-employers that entrust property to customers or to others.³⁰⁶ The *XYZ Corp.* analysis could thus equally apply to an internet café or library that does not monitor its patrons’ use of its computer systems.

Yet that *A* may gather and reveal information without violating *B*’s legally enforceable privacy rights does not dispose of whether there is too great a privacy cost to *requiring A* to do so (on pain of liability). We often have the right to gather information about people, or to reveal it. For instance, we may tell a friend about another friend’s sexual history, or repeat a statement that suggests a friend may pose a danger to someone.³⁰⁷ We may even reveal such information about our friends to the world at large, “if the matter publicized is of a kind” that would not “be highly offensive to a reasonable person,” or if it is “of legitimate concern to the public.”³⁰⁸

Our right to do this may be a First Amendment right, especially if the information about the friend is a matter of public record, for instance that the friend has a criminal conviction, or has gotten a restraining order against a stalker.³⁰⁹ And even setting aside the First Amendment, the disclosure tort has long been crafted to protect people’s ability to gossip with friends or to publicize newsworthy information.³¹⁰ Our right to speak has been seen as weighty enough to overcome the privacy cost caused by such speech. But it does not follow that a legal requirement that we reveal such information about our friends—

305. *Id.* at 1166.

306. Restatement (Second) of Torts § 318 (1965) (providing for negligent supervision liability even outside employment context); see also *id.* § 308 (providing for negligent entrustment liability even outside employment context).

307. See *supra* note 103 and accompanying text (noting in most jurisdictions such communications to individual friends do not implicate disclosure tort).

308. See Restatement (Second) of Torts § 652D (1977) (describing limitations on tort of disclosure of embarrassing private facts).

309. See, e.g., *Gates v. Discovery Commc’ns, Inc.*, 101 P.3d 552, 566 (Cal. 2004) (holding First Amendment precluded liability for publishing facts obtained from public records).

310. Restatement (Second) of Torts § 652D(b).

even when we do not want to exercise our right to speak—poses no privacy cost.

Likewise, property owners have broad authority to observe what is happening on their property, especially if they warn people in advance that they have such authority. For instance, an apartment building owner probably may videorecord everything that happens in common spaces.³¹¹

Yet this does not stem from a judgment that such videorecording has no effect on tenant or visitor privacy. Rather, it stems from a judgment that the owner's property rights authorize him to do this notwithstanding tenant privacy interests. So it does not follow that privacy concerns should be weighed at zero when the question arises whether all landlords have a duty to install such cameras.

The same goes for our employers' decisions about what information to gather or disclose about us. Employers do have a great deal of access to information about us. They can perform a wide range of investigations, at least if they ask our permission as a condition of continued employment (which many employers do).³¹² They can videorecord and audiorecord us at work. They can monitor the use of work computers, or even work-provided computers that we take home with us.³¹³ They can to a large extent investigate our off-the-job behavior.³¹⁴

But these powers stem from their right to control their property and to condition access to other property (our paychecks) on our agreement to let them monitor us to some extent. It does not follow that our privacy at work is therefore of no weight in the tort law privacy-versus-safety tradeoff, and that what employers *may* do under the law of employer-employee relations is something that they *must* do under tort law.

*Cramer v. Housing Opportunities Commission*³¹⁵ committed the same error as *XYC Corp.* did. The question in *Cramer* was whether an employer should be held liable for failing to check an employee's criminal history before hiring that employee.³¹⁶ The court acknowledged that mandating such checks implicated "the individual's right of privacy" as well as "the desire of the previously convicted individual to secure employment in

311. See *supra* text accompanying notes 109–111 (discussing surveillance of public places).

312. E.g., *Frye v. IBP, Inc.*, 15 F. Supp. 2d 1032, 1041–42 (D. Kan. 1998) (holding employer had right to order drug test of employee as condition of continued employment).

313. E.g., *Doe v. City & Cnty. of San Francisco*, 835 F. Supp. 2d 762, 769 (N.D. Cal. 2011); *TBG Ins. Servs. Corp. v. Superior Court*, 117 Cal. Rptr. 2d 155, 162–65 (Ct. App. 2002).

314. E.g., *York v. Gen. Elec. Co.*, 759 N.E.2d 865, 868 (Ohio Ct. App. 2001) (holding employer was entitled to hire private investigator to surveil employee in publicly visible places—including when working in his own yard—in order to get evidence employee was not entitled to certain workers' compensation benefits).

315. 501 A.2d 35 (Md. 1985).

316. *Id.* at 36.

any area for which the person is suited, and the societal interest in rehabilitation of offenders.”³¹⁷ But, the court reasoned, there was also a “significant need to protect society from the enhanced risk of careless employment practices” because of legislative choices to disseminate criminal history information:

In the first instance that balance is struck by the Congress, the General Assembly, and the agencies charged with the collection and dissemination of criminal history record information, through the enactment of laws and regulations specifying the circumstances under which the information should be provided to employers. That policy decision has been made, and where it has been determined that the balancing of interests does not warrant dissemination of the information, the employer cannot be faulted for not having obtained it. Where, however, the decision has been made to provide the information, it becomes a jury question as to whether an employer is negligent in not seeking it.³¹⁸

Yet this is something of a non sequitur. Congress, the state legislature, and various agencies have indeed made a “policy decision” to provide criminal history record information, so that employers *may* consult it. But the legislatures and agencies did not make the decision that employers *must* consult it, just as they did not make the decision that landlords must screen their would-be tenants’ criminal histories or that car dealers must screen car buyers for past drunk driving convictions. All the statutes and regulations do is leave the public with the discretion to investigate or not investigate those with whom they deal.

Perhaps tort law ought to impose duties to check criminal records, whether on employers, landlords, or car dealers. But if courts are to make that decision, they should justify it as their own decision, rather than claiming to defer to a legislative judgment that the legislature did not actually make.

V. LEAVING DECISIONS ABOUT PRIVACY-IMPLICATING PRECAUTIONS TO LEGISLATURES AND ADMINISTRATIVE AGENCIES

Judges thus have the power to develop “no-duty” rules under which defendants would have no duty to take certain precautions when those precautions sufficiently affect privacy. But judges can also adopt a broader across-the-board no-duty presumption, under which people should be required to take privacy-impairing precautions only when legislatures or administrative agencies have so decided (perhaps with some exceptions for longstanding, well-established privacy-implicating doctrines). Readers may or may not agree with such a presumption, but the argument is worth considering.

317. *Id.* at 41.

318. *Id.*

A. *The Value of the Legislature's Line-Drawing Power*

To begin with, legislative actions (a term used here to also include administrative actions within the scope of an agency's authority) can draw sharp lines in ways that courts have historically been reluctant to do. For example, legislatively created rules that require the government to publicize sex offenders' identities have generally clearly defined which crimes lead to such publicity and which do not. Judicial decisions imposing potential liability on landlords and others for failing to disclose someone's criminal history have not drawn such lines—instead, they have required disclosure when failure to disclose is “unreasonable.”³¹⁹

Likewise, a legislative decision mandating cameras on, say, ATMs would clearly define the zone of mandated surveillance. A judicial decision that required property owners to install cameras under certain conditions would likely lack any such clear boundary. To date, courts have held that property owners must institute video surveillance when “reasonable care” so demands. But even if they try to implement narrower rules (for instance, requiring that crime in the area be especially likely³²⁰), courts are unlikely to draw crisp lines about where surveillance is required and where it is not.

And vague standards will often yield a greater interference with privacy than sharper standards would, especially when prospective defendants are asked to surveil third parties or disclose information about third parties, rather than reveal information about themselves. The risk of lawsuits—which are expensive whether they are lost, settled, or even won—may pressure such defendants to disclose or surveil even in cases where a judge or jury would have ultimately found that disclosure or surveillance would not have been mandated.

To be sure, erring on the side of overdisclosing or oversurveilling means alienating some customers. But erring on the side of underdisclosing or undersurveilling means vast potential costs in attorney fees and damages awards. And this makes it likely that businesses will err on the side of greater disclosure and surveillance.

In fact, legislatures have a good deal of experience dealing with privacy line-drawing issues, though the results they have reached are often controversial. Legislatures routinely decide what information about people should be released by the government—whether through sex offender notification, rules related to expungement or sealing of crimi-

319. See, e.g., *Kargul v. Sandpiper Dunes Ltd. P'ship*, 3 Conn. L. Rptr. 154, 162 (Super. Ct. 1991) (finding, under “reasonable care” standard, tenant had duty to warn neighbors about her roommate's sex crime history, but giving no indication about what other kinds of criminal history would trigger such duty).

320. Cf. *Sharon P. v. Arman, Ltd.*, 989 P.2d 121, 132–33 (Cal. 1999) (stating security measures including “operational surveillance cameras” would be required only if there were evidence of “prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location”).

nal records, rules related to the revealing or concealing of various professional disciplinary records or government employee records, and more. And they routinely decide what disclosures of private information various businesses and individuals have to make, both to customers and to the government.³²¹ The resulting system may be better than a system that requires or allows “reasonable” disclosure, with decisionmaking to be left to judges or juries in each particular case.

B. Legislative Legitimacy in Weighing Incommensurables

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

As noted above, for instance, courts are reluctant to decide when a product’s harms outweigh its benefits to the point that it should not be sold at all.³²² But legislators routinely make such decisions. Thus, for instance, legislatures may ban various classes of guns or ammunition. (The Second Amendment and state constitutional rights to bear arms likely do not preclude such bans, so long as the bans do not extend to all guns or to all handguns.³²³) But even before Congress preempted tort lawsuits against gun manufacturers that were based on claims that certain guns failed a risk-benefit balancing,³²⁴ only one court accepted such a claim.³²⁵

321. See, e.g., Amy L. Fairchild, James Colgrove & Ronald Bayer, *The Myth of Exceptionalism: The History of Venereal Disease Reporting in the Twentieth Century*, 31 *J.L. Med. & Ethics* 624, 624 (2003) (discussing role of state legislatures in mandating venereal disease reporting).

322. See *supra* text accompanying note 188.

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

324. *Protection of Lawful Commerce in Arms Act*, 15 U.S.C. §§ 7901–7903 (2012).

325. *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1152–59 (Md. 1985), superseded by statute, 1988 Md. Acts ch. 533. See generally *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 207 & n.16 (Ct. App. 1999) (Haerle, J., concurring in part and dissenting in part) (“I am impressed by the many times the relevant court has declared that invitations to impose a duty not to produce or market a given gun or ammunition are properly addressed to the appropriate legislative body rather than the courts.”), *rev’d*, 28 P.3d 116 (Cal. 2001). The California Supreme Court ultimately agreed with Judge Haerle’s bottom-line result, though on statutory grounds. *Merrill*, 28 P.3d at 119.

Likewise, radar detectors tend to facilitate criminal and dangerous conduct and might be seen as failing a risk-benefit balance. This is why some state legislatures have banned them.³²⁶ But given the state of the law as summarized in the Restatement,³²⁷ courts almost invariably decline to make such judgments and leave it to voters and their elected representatives to decide which classes of products should be removed from the market.³²⁸

The same is probably true—though there has been less discussion about this—when a proposed rule would treat people unequally along certain dimensions. It is possible, for instance, that sports cars are unusually likely to be driven dangerously by younger drivers. Certainly younger drivers are generally more dangerous; this is why many car rental companies do not rent to those under twenty-five years old, or charge them extra.³²⁹ And some cars are especially appealing to people who want to drive fast.

Yet even if there were evidence that sports cars are unusually dangerous in the hands of younger drivers, a court probably would not or should not endorse holding car dealers liable under a negligent entrustment or negligent distribution theory for selling a sports car to someone who is too young.³³⁰ Legislatures may draw age classifications even among adults, and constitutional equality guarantees do not generally forbid this.³³¹ But courts do not generally make such judgments and probably should not make these judgments. If the law is to divide adults into classes based on age, that should be done by legislators elected to make such decisions.

326. See, e.g., Va. Code Ann. § 46.2-1079 (West 2013) (“It shall be unlawful for any person to operate a motor vehicle . . . when such vehicle is equipped with any device or mechanism . . . to detect or purposefully interfere with or diminish the measurement capabilities of any . . . device or mechanism employed by law-enforcement personnel to measure the speed of motor vehicles . . .”).

327. See Restatement (Third) of Torts: Prods. Liab. § 2 cmt. e & reporters’ note cmt. e (1998) (noting only one jurisdiction takes contrary view as matter of judicial holding, and only one other takes it as matter of statute, and even then “in a very limited manner”).

328. See *Bojorquez v. House of Toys, Inc.*, 133 Cal. Rptr. 483, 484 (Ct. App. 1976) (“[Plaintiff] wants us to hold [defendants] negligent for selling toy slingshots to the class of persons for whom they were intended—the young; in effect, she asks us to ban the sale of toy slingshots by judicial fiat. Such a limitation is within the purview of the Legislature, not the judiciary.”). For an unsuccessful call for imposing tort liability on sellers of radar detectors, see *Olsen*, supra note 96, at 31–32.

329. See, e.g., *Budget Rent A Car Sys., Inc., Restrictions and Surcharges for Renters Under 25 Years of Age*, <http://www.budget.com/budgetWeb/html/en/common/agePopUp.html> (on file with the *Columbia Law Review*) (last visited Mar. 12, 2014) (describing Budget’s car rental policy by state for renters under twenty-five).

330. Cf. *Robison v. Enterprise Leasing Co.-S. Cent.*, 57 So. 3d 1, 5 (Miss. Ct. App. 2010) (refusing to send case to jury on theory it was negligent for car rental company to rent car knowing eighteen-year-old would be driving it).

331. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 316–17 (1976).

Courts take the same approach in some of the cases dealing with social host liability for drunk driving by their guests. Many state courts expressly reject such liability, largely because:

A change in the law which has the power to so deeply affect social and business relationships should only be made after a thorough analysis of all the relevant considerations. . . . The type of analysis required is best conducted by the legislature using all of the methods it has available to it to invite public participation.³³²

It is not for judges, those courts have concluded, to decide whether hosts should be required to police their guests' alcohol consumption. Such balancing of host and guest autonomy versus safety can be done, but it should be done by legislators. This is primarily so, the courts often say, because legislatures can hold more comprehensive hearings to investigate the costs and benefits of such measures. But the courts also seem to be influenced by the view that "such controversial public policy issues [should] be resolved through societal consensus" in the "legislative process."³³³

The weighing of privacy versus safety has the same characteristics as the weighing of consumer choice against safety, of equality against safety, and of autonomy against safety. It involves comparing incommensurable values that are far removed from the familiar efficiency-against-safety tradeoff that courts routinely consider in negligence cases. It involves making judgments that are hard to defend as a matter of legal principle, but easy to defend as a matter of what the public, through its representatives, chooses. And it requires considering the interests of people beyond the parties to a case. Judges (especially appellate judges) are better able

332. *Garren v. Cummings & McCrady, Inc.*, 345 S.E.2d 508, 510 (S.C. Ct. App. 1986) (quoting *Miller v. Moran*, 421 N.E.2d 1046, 1049 (Ill. App. Ct. 1981)); see also *Shea v. Matassa*, 918 A.2d 1090, 1097 (Del. 2007) ("[T]he creation of a cause of action against a social host raises controversial and competing public policy issues that are best addressed by the General Assembly, not this Court."); *Ferreira v. Strack*, 652 A.2d 965, 968 (R.I. 1995) ("The imposition of liability upon social hosts for the torts of guests has such serious implications that any action taken should be taken by the Legislature after careful investigation, scrutiny, and debate."); *Burkhart v. Harrod*, 755 P.2d 759, 762 (Wash. 1988) ("It is also difficult to estimate the effect that social host liability would have on personal relationships. Indeed, judicial restraint is appropriate when the proposed doctrine, as here, has implications that are 'far beyond the perception of the court asked to declare it.'" (quoting *Hamm v. Carson City Nugget, Inc.*, 450 P.2d 358, 359 (Nev. 1969))); cf. Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* 83 (1988) (condemning courts' resolution of "[m]atters of public policy" that are "so broad-ranging that only the political branches of government could address them").

333. *Shea*, 918 A.2d at 1097 (citation omitted); see also, e.g., *Ferreira*, 652 A.2d at 968 ("The majority of courts in other jurisdictions faced with the question of extending common-law tort liability to the social-host guest context have deferred to the Legislature . . . [because] the question raised is one of broad public policy rather than an interpretation of the common law.").

than juries to consider such interests of third parties,³³⁴ but legislators are even more accustomed and equipped to do so:

[B]ecause judicial decisionmaking is limited to resolving only the issues before the court in any given case, judges are limited in their abilities to obtain the input necessary to make informed decisions on issues of broad societal impact like social host liability. . . . “[O]f the three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions based on a societal consensus.” It is for this very reason that public policy usually is declared by the Legislature, and not by the courts.³³⁵

C. *Waiting for Legislative Action or Acting Subject to Legislative Revision?*

Of course, decisions in favor of liability can be revised by legislatures, just as decisions against liability can be. A court could therefore conclude that liability ought to be imposed, based on the judge’s own analysis of the privacy costs and safety benefits—however imperfect such an analysis might be—and then the legislature could overturn that decision if it disagreed with the court’s analysis. Indeed, of the few decisions favoring social host liability that courts have rendered, most have been reversed by state legislatures.³³⁶

Such an approach, though, seems likely to be inapt when it comes to privacy. There is good reason to think that privacy values are generally undervalued in the legislative process, especially when they are balanced against safety concerns.³³⁷ Legislatures are thus likely to fix unduly privacy-restricting tort law decisions more rarely than they should.

CONCLUSION

This Article has aimed to do three things.

First, this Article has tried to describe just how negligence law (and product design defect law) can pressure prospective defendants to implement “privacy-implicating precautions”—disclosure of sensitive information about themselves and others, gathering of such information

334. See *supra* Part IV.B.3 (giving reasons why judges more effectively represent third parties’ interests).

335. *Burkhart*, 755 P.2d at 761 (citations omitted) (quoting *Bankston v. Brennan*, 507 So. 2d 1385, 1387 (Fla. 1987)).

336. E.g., Cal. Bus. & Prof. Code § 25602 (West 1997); Iowa Code § 123.92 (2014); Minn. Stat. § 340A.801 (2013).

337. See, e.g., Patricia L. Bellia, *Surveillance Law Through Cyberlaw’s Lens*, 72 *Geo. Wash. L. Rev.* 1375, 1379 (2004) (arguing Congress may “believe that it can safely overvalue law enforcement interests and undervalue privacy interests because courts will right the balance”); Lillian R. BeVier, *Information About Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection*, 4 *Wm. & Mary Bill Rts. J.* 455, 502 (1995) (“Congress never has substantively valued informational privacy . . . more than or even as much as government efficiency.”).

about others, and surveillance of physical places and computer systems. This tendency has been largely ignored in both the tort law literature and the privacy literature.

Second, this Article has tried to alert people who are interested in protecting privacy (whether they are academics, advocacy group employees, legislators, judges, lawyers, or laypeople) to the existence of the issue. If the tendencies this Article described are to be resisted, people who care about privacy should focus more closely on them.

Third, this Article has tried to discuss which legal institutions—juries, judges, and legislatures—are best positioned for determining when privacy should prevail and when it should yield. Readers might gather that my preference is for a rule that leaves the matter to legislatures, with privacy-implicating precautions generally not being required unless there is legislative authorization for such a requirement.

At the very least, even if judges do not leave these matters to legislatures, they should not leave them to juries, either. Instead, judges should articulate “no-duty” or “limited-duty” rules that make it clear to various people and institutions that they have no obligation to impose certain kinds of privacy-implicating precautions in certain kinds of cases. Part V.C has discussed cases that can be used as foundations for such privacy-protecting legal doctrines.

But hopefully even readers who disagree with this Article on this jury-versus-judge-versus-legislature question have found something in this Article that can help them analyze these issues. Negligence law does have a tendency, in many important areas, to undermine privacy. Maybe that is a sound tendency and maybe it is unsound, but it needs to be systematically considered.