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 disclose sensitive information, to gather such information, and to install comprehensive surveillance. And such 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’ obligation of “reasonable care.”

Moreover, these tort law rules can increase government surveillance power as well as demanding greater 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 this area, and to discuss which legal institutions—juries, judges, or legislatures—should resolve the privacy vs. safety questions that routinely arise within tort law.

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I. INTRODUCTION

Through the privacy torts, tort law aims to protect privacy. 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. 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. And technological change is likely to magnify this pressure still further. Yet this tendency has gone largely undiscussed.

Modern negligence law (including the law of product design defects) 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. We also have duties to affirmatively protect some people—customers, tenants, other business visitors, and likely social guests—even against threats that we didn't help create. All these duties may require us to take reasonable precautions against criminal acts by others. And some of those required precautions may involve disclosing information about ourselves, or gathering and disclosing information about others.

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

3 Product design defect law in practice largely applies negligence principles, since it imposes liability for "unreasonable" product designs—designs that could have, reasonably and cost-effectively, been made safer. See, e.g., Restatement (Third) of Torts (Prod. Liab.) § 2 cmt. d, reporter's note cmt. a. (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 our purposes.) For purposes of this article, I will use "negligence law" to refer both to standard negligence law and product design defect law.

4 Restatement (Third) of Torts (Phys. & Emot. Harm) §§ 3, 7 (own actions); id. § 41(b)(3) (actions of employees); Restatement (Third) of Torts (Prod. Liab.) §§ 1, 2 (products); Restatement (Second) of Torts § 390 (entrustment of property).

5 "The conduct of a defendant can lack reasonable care insofar as it foreseeably... permits the improper conduct of... a third party." Id. § 19. "The improper action or misconduct in question can take a variety of forms. It can be negligent, reckless, or intentional in its harm-causing quality. It can be either tortious or criminal, or both." Id. § 19 cmt. a.
Under the Learned Hand formula for determining negligence, the requirement of “reasonable precautions” is often understood as requiring cost-effective precautions. Liability for failure 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 ($L$). And even those courts and commenters who reject the Hand formula would usually view these three variables as relevant to deciding whether failure to take a precaution is reasonable.

Gathering or disclosing information about people’s backgrounds, tendencies, and actions is increasingly inexpensive, and increasingly effective at helping avoid, interrupt, or deter harm. The $B$ (burden) of such precautions thus gets lower. The $P$ (probability) that they will prevent harm gets higher.

Failure to take those precautions thus becomes negligent. When comprehensive nationwide background checks were expensive and ineffective, they weren’t required by the duty to exercise reasonable care. Now they are cheap, quick, and more comprehensive, so failing to do a background check is often seen as negligent. And employers do indeed report the desire to avoid legal liability as a major reason for investigating the backgrounds of job applicants.

Likewise, as video surveillance cameras became cheap enough to be cost-effective, courts began to hold that defendants may be negligent.
for failing to install surveillance cameras. 14 Failure to provide camera surveillance is now a common claim in negligence cases. 15 “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 confrontations. 16 Facial recognition software will make it easier to keep track of who is present where and when, 17 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 e-mail the police or call 911 whenever the car goes over 80 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 their drivers’ breath alcohol level and report to the police attempts to drive drunk. As such technologies get cheap enough—cellular communication already has, and breathalyzer ignition overrides likely will, too—it becomes much more plausible to claim that a manufacturer is negligent for designing a deadly machine that fails to inexpensively monitor its operator for signs of dangerous driving.

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14 See, e.g., the many cases cited infra note 146.


16 Daniel Strain, New Search Technique for Images and Videos Has Broad Applications, States News Serv., Nov. 10, 2009 (UC Santa Cruz press release) (“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.”).

17 Husna Haq, Drones Above New York ’Scary’ but Inevitable, Mayor Bloomberg Says, Christian Sci. Mon., Mar. 27, 2013 (“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.”); Bridget Mallon, “Every Breath You Take, Every Move You Make, I’ll Be Watching You”: The Use of Face Recognition Technology, 48 Vill. L. Rev. 855 (2003).
These tendencies also bear on the likely future scope of government surveillance, and not just private surveillance, as Part III.F will discuss. First, duties imposed on private property owners and employers are generally applicable to the government as property owner and employer. Surveillance data collected by the government in those capacities can easily be shared with law enforcement agencies.

Second, as the NSA PRISM story vividly illustrates, surveillance data collected by private entities can easily be subpoenaed or otherwise obtained by law enforcement agencies, without a warrant or probable cause. What the private sector gathers, the government can easily demand.

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 I call “privacy-implicating precautions”: disclosing information about employees, customers, tenants, students, and the like, gathering information about them, and surveilling them. 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 molded by the limits on the privacy that they have grown used to.

What then, should the tort system demand privacy-implicating disclosure, information gathering, or surveillance? This is a question that people who care about privacy, whether academics, advocates, citizens,
judges, or legislators, should confront. If I am right, 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 try to 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 protection for privacy, the legal system has developed many different privacy rules to deal with different kinds of intrusions.21 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. I don’t want to commit myself to 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 actor in the tort system should provide it. Should these privacy-vs.-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 define what I mean by privacy here—essentially “control over the processing—i.e., the acquisition, disclosure, and use—of personal information,”22 which includes limitations on surveillance.23 Part II will then 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 restrictions to juries; the parts will outline the arguments for jury decisionmaking (Part III), judicial decisionmaking via “no duty rules” (Part IV), and judges’

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

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

23 See supra note 1.
leaving the matter to legislative and administrative agency decisionmaking (Part V). In the process, the discussion will point to the relatively few court cases that have discussed these questions, almost all of them discussing them very briefly. My tentative view is that this is an area where courts should avoid allowing liability in the absence of legislative or administrative agency guidance; but I hope that the analysis offered throughout the article will be useful even to those who come to a different bottom line.

II. 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 information about you.\(^{24}\) Sometimes it means freedom from unwanted communications, such as telephone calls.\(^{25}\) Sometimes it means autonomy: the constitutional right to do certain things to your body, such as have an abortion.

But in this context I am referring to information privacy: people’s “control over the processing—i.e., the acquisition, disclosure, and use—of personal information”\(^{26}\) 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 report to the government their patients’ sexually transmitted diseases. So would a rule that pressures car manufacturers to build cars that analyze the drivers’ 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—any more than the fact that a tort rule diminishes people’s liberty, consumer choice, or other important values means 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.\(^{27}\)

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\(^{25}\) See, e.g., Restatement (Second) of Torts § 652B ill. 5.

\(^{26}\) See supra note 22.

\(^{27}\) See, e.g., U.S. Const. amend. IV (authorizing warrants to search people’s homes, persons, and papers on a showing of probable cause).
dence law, and many other areas. It might well do the same when it comes to tort law.

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. 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 that 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 a probable cause and a warrant, but once those requirements are satisfied, the police can quite rightly undermine my privacy.)

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

Indeed, several state constitutions, including the California Constitution, expressly recognize a right to privacy. The Supreme Court has also suggested that the federal Constitution secures some right to informational privacy, 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. And this must surely be right, to the extent privacy is seen as a constitutional right—as courts have recognized for centu-

28 See, e.g., Cal. Evid. Code § 1024 (recognizing an exception to psychotherapist-patient privileges when the psychotherapist reasonably believes the patient is dangerous to himself or others).
29 See infra Part V.A.
30 Daniel J. Solove, Understanding Privacy 1, 23 (2008); Sanders v. ABC, 978 P.2d 67, 71 (Cal. 1999) (rejecting the view that, to be protected, privacy must be “absolute or complete privacy”).
31 See Alaska Const. art. 1, § 22; Cal. Const. art. 1, § 1; Haw. Const. art. 1, § 6; La. Const. art. 1, § 5; Mont. Const. art. 2, § 10; see also In re June 1979 Allegheny County Investigating Grand Jury, 415 A.2d 73, 77 (Pa. 1980) (interpreting the Pennsylvania Constitution as protecting the right to informational privacy).
32 Whalen v. Roe, 429 U.S. 589, 605 (1977); compare NASA v. Nelson, 131 S. Ct. 746, 755–56 & n.9 (2011) (assuming the existence of such a right, and noting that lower courts have mostly interpreted Whalen as securing some such right), with id. at 764 (Scalia, J., concurring in the judgment) (arguing that no such right exists).
ories in the context of free speech rights,\textsuperscript{34} and more recently in other contexts as well,\textsuperscript{35} the prospect of civil liability may pose constitutional problems.

But even if privacy is seen not as a constitutional right but just something that many people value, privacy costs deserve to be considered when courts are considering the costs and benefits of particular tort policies.\textsuperscript{36} In particular, they need to be considered along financial costs in deciding which proposed precautions are so cost-effective to be required by the duty of reasonable care.

Finally, I should note that the theoretical explanation for why privacy is valuable are famously contested.\textsuperscript{37} But precisely because the purposes of privacy are so controversial, I won’t take a stand on them here. Instead, I hope to make some observations that will be helpful to those who subscribe to a wide range of such explanations.

### III. How Negligence Law Implicates Privacy

Let’s turn now to how negligence cost-benefit analysis may implicate privacy, if privacy costs are not weighed as part of that analysis.

#### A. Obligations to Reveal Information About Yourself

1. **Obligation to reveal diseases and disease symptoms**

The duty of reasonable care sometimes requires people to reveal private information about themselves, and about the danger they pose to others. Someone who has a casually communicable disease must warn those who might be infected.\textsuperscript{38} Someone who has a sexually transmissible disease must warn his sexual partners.\textsuperscript{39} The same is true when someone has symptoms that he should recognize as indicating a communicable disease.\textsuperscript{40}


\textsuperscript{35} Kentucky Fried Chicken of Cal., Inc. v. Superior Court, 927 P.2d 1260 (Cal. 1997) (state constitutional right of self-defense).

\textsuperscript{36} See, e.g., O’Neil v. Schuckardt, 733 P.2d 693, 698 (Idaho 1986) (abolishing the cause of action for alienation of affections, partly because alienation affection trials involve the publicizing of the underlying allegations, which causes embarrassment to the spouses and to their children).

\textsuperscript{37} See Solove, supra note 30, at 1.


\textsuperscript{40} See, e.g., John B. v. Superior Court, 137 P.3d 153, 163–64 (Cal. 2006); Meaney v. Meaney, 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 that duty to warn was triggered by “recurring sores on the genitals,” coupled with doctor’s recommending a herpes test).
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.\(^{41}\)

Liability here is not for nonfeasance as such—rather, it is for misfeasance, in the sense of acting (by coming into contact with someone) without taking the proper precautions (such as a warning).\(^{42}\)

2. Obligation to reveal risk factors

But the obligation to disclose may go beyond situations where a person knows he has a disease or symptoms of a disease. Many people have no such knowledge, but do know that they have engaged in behavior that substantially increases their risk of having the disease.

They might, for instance, know that one of their past sexual partners has since learned that he has the disease. They might know that they have had many sexual partners recently, even if they don’t know whether any of the partners have a disease. They might know that they have had sex with someone who has had very many sexual partners (such as a prostitute).

They might know that they have had sex without condoms, or have repeatedly had receptive anal sex, which is much likelier to transmit HIV than are other forms of sex.\(^{43}\) They might simply know that they (if they are men) have had sex with other men in the past. 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 spouse or lover 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, don’t reliably reveal very recent infections.\(^{44}\)

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\(^{41}\) Restatement (Third) of Torts (Phys. & Emot. Harm) § 18(a).
\(^{42}\) See id. § 37 cmt. c.
can’t be reliably tested for.\textsuperscript{45} And the Centers for Disease Control does not recommend testing for herpes in asymptomatic men or women.\textsuperscript{46}

Under standard tort law principles, there would be a good case for a duty to warn of much of this high-risk behavior.\textsuperscript{47} The potential benefit in disease averted is great. The likelihood of transmission is substantial, both as to HIV and as to more common diseases such as herpes, HPV, and Hepatitis B. The financial cost of disclosure is slight.

Warning of risk is thus a cost-effective precaution, which can help avoid the injury that would otherwise have been caused by the potential defendant. Tort law routinely imposes a duty to warn even about relatively modest risks.\textsuperscript{48}

One court has 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.\textsuperscript{49} Another court has 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).\textsuperscript{50} Another court has suggested that some such duty to warn might exist, but wasn’t specific except to say that it doesn’t extend when the only high-risk behavior is infidelity.\textsuperscript{51}

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

\textsuperscript{45} Centers for Disease Control & Prevention, HPV and Men—Fact Sheet, \url{http://www.cdc.gov/std/hpv/stdfact-hpv-and-men.htm}.

\textsuperscript{46} Centers for Disease Control & Prevention, Genital Herpes Screening, \url{http://www.cdc.gov/std/herpes/screening.htm}.

\textsuperscript{47} See generally Restatement (Third) of Torts § 18 (setting forth the duty to warn).

\textsuperscript{48} See, e.g., Advance Chemical Co. v. Harter, 478 So.2d 444, 448 (Fla. Ct. App. 1985); \textit{John B.}, 137 P.3d at 164, 165 n.9. There’s 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.

\textsuperscript{49} \textit{John B.}, 137 P.3d at 163–65 & n.9.

\textsuperscript{50} See, e.g., Doe v. Johnson, 817 F. Supp. at 1388, 1394. To be precise, “no duty to warn” mean that a general duty to take reasonable precautions, see, e.g., Restatement (Third) of Torts (Phys. & Emot. Harm) § 7, should be seen as not extending to the particular precaution of conveying a certain kind of warning. See generally id. § 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.”).

\textsuperscript{51} See, e.g., Endres v. Endres, 968 A.2d 336, 342 n.* (Vt. 2008) (rejecting a duty to warn one’s spouse about the fact that one has been cheating, but suggesting that other high-risk behavior might suffice, seemingly favorably noting that, “At least with respect to the transmission of HIV/AIDS, one commentator has argued that constructive knowledge should be found for defendants who engage in high risk activities, including intravenous drug use, homosexual intercourse, unprotected sex with multiple partners, and prostitution. J. Turcotte, When You Should Have Known: Rethinking Constructive Knowledge in Tort Liability for Sexual Transmission of HIV, 52 Me. L. Rev. 261, 296 (2000).”).
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; an actress being pursued by a crazed fan; a gang member or an innocent bystander 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 harassment. If your enemy comes to your property to attack you, others might be caught in the crossfire.

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. 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). If the other person is a visitor to your property who might be mistaken for a lover, or just caught in the crossfire, you may have a duty of reasonable care stemming from your obligations as property owner. You might thus have to warn all repairmen or delivery people that you and therefore they are in danger.

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

53 Compare Apolinar v. Thompson, 844 S.W.2d 262, 263–64 (Tex. Ct. App. 1992) (holding that a homeowner could be liable to a housesitter for failing to warn the housesitter that the homeowner “had received harassing phone calls and threats”), with Faulkner v. Lopez, 2006 WL 2949070, *4 (Conn. Super. Ct. Sept. 29) (holding that a woman could not be liable to visitors to her apartment for failing to warn them that she had gotten a restraining order against a violent ex-boyfriend).

54 See, e.g., Apolinar, 844 S.W.2d 262; Rojas, 2002 WL 1292996; see also Christopher Goffard & Nicole Santa Cruz, Transcripts Detail Horror of Massacre, L.A. Times, May 4, 2012, at AA1 (describing the Seal Beach nail salon mass shooting, in which the murderer was the ex-husband of one of the employees); Nicole Santa Cruz, Killings’ Effect on Residents to Figure in Death Penalty Bid, L.A. Times, May 3, 2012, at AA5 (noting that the murderer had a long criminal history, and had threatened to shoot his wife in one incident several years before the shooting).

55 See, e.g., Restatement (Third) of Torts (Phys. & Emot. Harm) §§ 18(a), 19.

56 See, e.g., id. 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.

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

58 Compare 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 poten-
More significantly, if you are a business owner who is targeted for violence—for instance, by stalker, by a religious fanatic outraged by your blasphemy, or a gang running a protection racket—you might have to warn all your customers. And this might mean more than extra difficulty in hiring willing house-sitters or gardeners. It might mean that you will be driven out of business, as customers stay away as a result of your legally required warning.

B. Obligations to Reveal Information About Others

1. Obligation to reveal others' criminal propensities

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

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

59 See, e.g., Restatement (Second) of Torts § 344 ("A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, 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.").

60 See, e.g., Apolinar, 844 S.W.2d 262.

61 See, e.g., Rojas, 2002 WL 1292996.

62 Restatement (Third) of Torts (Phys. & Emot. Harm) § 51; see also Restatement (Second) Agency § 471 (duty to warn one’s agents, including employees).


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. The landlord’s duty also extends to universities acting as landlords of dorms. 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.

Nor is this limited to situations where one’s tenant, employee, or housemate 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. 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.

In addition to a duty to affirmatively protect people on your property, you also have a duty to avoid causing harm to others—such as neighbors—even when your actions are only one step in the causal chain. Thus, if what you do may foreseeably (though indirectly) assist someone in injuring someone, your action may be seen as negligent. And even if your action is not itself negligent, you may have a duty to warn people in order to minimize the risk that it poses.

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65 See Giggers v. Memphis Housing Authority, 277 S.W.3d 359, 369–70 (Tenn. 2009); Kargul v. Sandpiper Dunes Ltd. Partnership, 3 Conn. L. Rptr. 154 (Super. Ct. 1991) (applying such a duty even to a cotenant who invites someone with a criminal history to live with her); T.W. v. Regal Trace, Ltd., 908 So. 2d 499 (Fla. Ct. App. 2005) (finding that a 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”). See generally Shelley Ross Saxer, “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); David Thacher, The Rise of Criminal Background Screening in Rental Housing, 33 L. & Soc. Inq. 5, 15 (2008).

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

67 See Kargul, 3 Conn L. Rptr. 154.

68 See Nero, 861 P.2d 768 (involving such a situation).

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


71 Restatement (Third) of Torts (Phys. & Emot. Harm) § 18 cmt. h.
Say that you let a family member who has just been released from prison stay in your house, and it is foreseeable that he will commit crimes against your neighbors. If he does commit such crimes, your affirmative act of having him in your house, as well as your failure to warn the neighbors, may be both an actual cause and a proximate cause of the attack. You would have acted in a way that helped cause physical harm to another, and the question would then be whether it was reasonable for you to allow the dangerous person to stay in your house without warning neighbors of the danger.72

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.73 This is the rare duty that stems from the duty-bearer’s (here, the psychiatrist’s) relationship with the dangerous person. The rest of us generally do not have such a duty.

But we do have duties that stem from our relationship with the potential target, for instance when the potential target is a tenant, business invitee, or social guest. So if someone tells us something that shows that he is a danger to such a tenant, invitee, or guest, we may have a duty to warn the prospective target.74

2. Obligation to reveal that others may be crime targets

As discussed above,75 the presence of a person who is likely to be targeted for crime—whether by a stalker, a political killer, a rival gang member, or a jealous ex-lover—may also create danger to bystanders. Those innocent targets might have a duty to warn others of this danger.

But of course the potential targets of criminals will often ignore this duty. If they are small businesspeople, they may decide to run a risk of liability for nondisclosure, when the alternative is a near certainty of losing some clients if they do disclose. Other potential targets may often lack assets, and thus not much worry 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 you know that your tenant’s jealous ex-husband has threatened to shoot her, you may have to warn other tenants or prospective tenants, since his foreseeable attack may fore-

72 See, e.g., Kargul, 3 Conn L. Rptr. 154; cf. Miles v. Melrose, 882 F.2d 976, 991–92 (5th Cir. 1989) (holding that union could be liable for failing to warn employer that an employee referred to the employer via the union hiring hall had violent propensities, and reasoning that the union’s action in sending the employee was negligent affirmative conduct rather than just a failure to warn).


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

75 See supra Part III.A.3.
seeably injure them as well. You might likewise have to warn your customers and other business visitors (delivery people, contractors who aren’t covered by worker’s compensation regimes that preempt tort liability, and so on) if your employee is in danger of being attacked at work.

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

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

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 employers who would normally prefer not to dismiss the employee are likely to change their mind 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. Likewise, liability for foreseeable crimes against tenants or customers sometimes requires property owners to install surveillance cameras.

An employer might similarly be required to monitor employees’ use of the employer’s computer in order to deter or prevent criminal misuse, such as employee use of the computer to upload nude pictures of a child to a child pornography site. A party host might be required to monitor

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76 See supra note 54, citing sources discussing the Seal Beach nail salon mass shooting, in which the murderer was the ex-husband of one of the employees. I’ve seen no evidence that the nail salon owner was aware of the threats against her employee; but it’s easy to imagine a case in which the owner does learn of such threats.

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


80 See infra note 146.

his adolescent guests’ behavior, including by watching whether people are sneaking off to the bathroom to have sex. 82 An employment 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 employee. 83

Likewise, universities and trade schools could in principle be held liable for negligently failing to investigate the background of their students, or failing to report suspicious behavior to the police: Consider a lawsuit arising when a student uses his learned skills to commit a crime (consider the al-Qaeda terrorist training in a flight school), or even simply if the student commits a crime against a classmate. 84

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

We are likely to see similar calls for privacy-implication precautions under the law of product design defects. A product manufacturer is liable on a design defect theory if “the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe.” 85 This includes foreseeable risks of harm to third parties, and not just to the buyers.

Many products are usually used lawfully, but sometimes used criminally: guns, knives, cars, 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” 86 then manufacturers wouldn’t have to adopt that alternative. So though the risks of speeding would be reduced by blocking cars from driving faster than 75 miles per hour, that probably doesn’t make cars that can go faster than 75 “not reasonably safe.” 87 Sometimes driving over 75 may

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83 Keck v. Am. Employment Agency, Inc., 652 S.W.2d 2, 4–5 (Ark. 1983) (faulting the agency because it “made no check at all on [the putative employer],” who had said he wanted to “open a motorcycle repair shop,” and particularly pointing to the fact that the putative employer “ad on blue jeans and a T-shirt with the word ‘bullshirt’ on it, had long hair and a beard, and was evidently unkempt”).
84 Cf. J.W. ex rel. B.R.W. v. 287 Intermediate Dist., 761 N.W.2d 896 (Minn. Ct. App. 2009) (noting that school districts may be liable for negligently failing to prevent foreseeable attack by one student on another); Estate of Butler v. Maharishi Univ. of Management, 589 F. Supp. 2d 1150, 1168 (S.D. Iowa 2008) (noting likewise as to universities, where part of the allegations against the defendant was a failure to investigate further a student’s mental illness).
85 Restatement (Third) of Torts (Product Liability) § 2(b).
86 Id. cmt. f(1).
be safe and legal (for instance, if one is taking an injured person to the hospital, or on the few highways where the speed limit is 80).

But modern technology makes it possible to deter many misuses, especially of cars, simply by automatically reporting likely misuse to the police. Modern cars already have computerized control systems, and are expensive enough that the new technology would add comparatively little to the cost, without stripping the product of valuable features—at least if one counts only those features that are used legally.88

A car could, for instance, be designed to send a cellular e-mail to the police every time the driver exceeded 75 miles per hour. Or the software could be more sophisticated still, for instance calculating the likely speed limit based on the car’s GPS-calculated location, so that even driving 40 could lead to an e-mail to the police, if the speed limit is 25.89 Or the software could monitor the driver’s driving for signs of drunkenness, such as weaving around,90 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 would substantially deter speeding. And if someone has to speed to get a friend to the hospital, he could still do so and either accept the ticket or raise necessity as a defense to the ticket.

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

Say, then, that you’re injured by someone who is driving drunk. You sue the car manufacturer for defectively failing to include a breathalyzer ignition interlock, or for defectively failing to include a feature that senses repeated weaving between lines and calls 911 to alert the police to such behavior. Drunk-driving-related injuries to third parties are certainly a “foreseeable risk[] of harm posed by the product.” They could probably “have been reduced . . . by the adoption” of the 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 po-

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

89 The speed limit calculation would require a database mapping locations to speed limits; but such a database shouldn’t be hard to create. And even if the database simply provides a high estimate for the speed limits, that would still provide some extra protection against speeding.

90 See, e.g., Amundsen v. Jones, 533 F.3d 1192, 1199 (10th Cir. 2008) (noting that repeatedly weaving between lanes is a sign of drunk driving).
lice. And because of this, you would argue, “and the omission of the alternative design renders the product not reasonably safe.”91

Unlike in the other areas I describe, I know of no directly analogous cases.92 But the tort law logic of the argument is fairly strong, likely strong enough to send the case to the jury—unless a court concludes that drivers’ 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.

The disclosure of private facts tort generally applies only to speech to the public, and not to speech to a few people.93 It also excludes information that is of legitimate interest to the listeners; many of the warnings I mention would qualify.94 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

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

92 For two examples of analogous business practice—though apparently chosen as a business decision rather than because of liability risk—consider two features of the Taser electric stun gun. First, “The TASER C2 ships in a locked state and can only be unlocked by with an activation code received upon successful registration with an identification verification and [felony] background check approval from the privacy of using a secure web site or a toll-free number.” Taser International, Taser Citizen Defense System Fact Sheet, http://www.taser.com/Documents/PDF/Detailed_Information_Sheet_C2.pdf (last visited Oct. 29, 2009). Second, “Every time a TASER cartridge is deployed, 20-30 small confetti-like Anti-Felon Identification (AFID) tags are ejected. Each AFID is printed with the serial number of the cartridge deployed, allowing law enforcement to determine which cartridge was fired.” Taser International, Anti-Felon Identification (AFID), http://www.taser.com/research/technology/Pages/AFID.aspx (last visited Oct. 29, 2009). These features 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).


94 Id. cmt. g; Restatement (Second) of Torts §§ 595, 652G; Taus v. Loftus, 151 P.3d 1185, 1208 (Cal. 2007) (setting forth the “legitimate public concern” test, and finding such a legitimate public concern in a context where the material was not of interest to the general public but to the specific public—there, researchers interested in a particular study—to which the statement was made).

Brief Amicus Curiae of Pacific Legal Foundation, Western Investments, Inc. v. Urena, at 11–13, 162 S.W.3d 547 (Tex. 2005), argued that disclosure of such information 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, if the landlord discloses to other tenants information about a threat that the tenant poses to his neighbors.
subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know.”

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. 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. Likewise, disclosing the fact that a crime victim had 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.

The intrusion upon seclusion tort generally doesn’t preclude surveillance in places open to large numbers of people. 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 surveiller’s property or program. "This means that property owners, employers, and others who are pressured by negligence law to institute surveillance—for instance, put up surveillance cameras—could likely comply with that duty without incurring a substantial risk of liability for invasion of privacy.

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95 Restatement (Second) of Torts § 596; id. § 652G (providing that these privileges apply to privacy lawsuits and not just defamation lawsuits).

96 See, e.g., Sullivan v. Conway, 157 F.3d 1092, 1099 (7th Cir. 1998) (union's announcements of why an employee was fired were privileged because they were made to local union members, "who had a vital interest in receiving candid communications from the trustee concerning his administration of the local"); Young v. Jackson, 572 So. 2d 378, 383–85 (Miss. 1990) (even revelation of an innocent employee’s having been hospitalized for a hysterectomy is privileged when it rebuts rumors being spread among nuclear power plant’s employees that the employee’s hospitalization was caused by radiation exposure).


98 Id. at 562; Florida Star v. B.J.F., 491 U.S. 524 (1989).


101 See, e.g., Hill v. NCAA, 856 P.2d 633 (Cal. 1994) (stating that “notice and consent” to drug testing may prevent liability for invasion of privacy, even when refusal to consent means exclusion from college athletics); Hernandez v. Hillsides, Inc., 211 P.3d 1063, 1077 (Cal. 2009) (so stating as to employer video surveillance of the workplace); Restatement (Second) of Torts § 891A (treating consent as a general defense to intentional torts, of which the 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) (so holding, and citing other cases that so hold), with Jennings v. Minco Technology Labs, Inc., 765 S.W.2d 497, 502 (Tex. Ct. App. 1989) (holding that such a urinalysis program didn’t constitute intrusion upon seclusion because of the employee’s consent, even though the employee faced the loss of her job if she consented).
I have seen two opinions stating that the privacy torts would indeed limit the information gathering and disclosure described in this Article, but I think neither of them is likely to persuade other courts.

The first opinion, and the only precedential one of the two, is *Roman Catholic Bishop v. Superior Court*. Emmanuel Omemaga, a Catholic priest, molested a 14-year-old girl. The girl and her parents sued the church, arguing (among other things) that the church should have investigated Omemaga’s background further. 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).

The court rejected any such duty, on the grounds that the presence of such sexual relationships with adults isn’t probative enough of the likelihood that the priest would molest children. 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. (See *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal.App.4th 1595, 1599-1600 [18 Cal.Rptr.2d 692].)

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. (*Kees v. Medical Board* (1992) 7 Cal.App.4th 1801, 1812-1813 [10 Cal.Rptr.2d 112].) We conclude the church did not fail to use due care in hiring Omemaga.

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 can’t apply to a Catholic Church’s questions to prospective priests: Priests aren’t supposed to be having sex, with parishioners or with others, and a church is entitled to police that even if normal employers aren’t. Indeed, under *EEOC v. Hosanna-Tabor Evangelical Lutheran Church* (and the lower court cases that anticipated it and that came before *Catholic Bish-
op\textsuperscript{106} state law can’t interfere with church choices about whom to appoint or retain as priests. It follows, I think, that state law can’t interfere with church questions to priests aimed at determining whether the priests should be 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 wouldn’t 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 \textit{Newman v. Santiago Creek}.\textsuperscript{107} Joel Martin, who lived in the Santiago Creek mobile home park, killed a neighbor within the park and wounded her daughter (Reba Newman). 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.\textsuperscript{108}

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. 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.

The California Court of Appeal, however, rejected this theory, on various grounds, including that, if the park “had posted some general warning \textit{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.”\textsuperscript{109}

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).\textsuperscript{110} Such statements would almost certainly not be seen as so “outrageous” as to justify an intentional infliction of emotional distress claim.\textsuperscript{111} (A defamation claim is a different matter, but one that wouldn’t generally apply to warnings that the speaker knows is accurate.)\textsuperscript{112}

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\textsuperscript{106} See id. at 705 n.2 (collecting cases).
\textsuperscript{108} Id. at *4.
\textsuperscript{109} Id. at *10.
\textsuperscript{110} See supra p. 20.
\textsuperscript{111} See Restatement (Third) of Torts (Phys. & Emot. Harm) § 47.
\textsuperscript{112} See, e.g., id. at *11 (noting that the park manager “would have been on firmer footing telling the Newmans about [items that] were directly within her personal knowledge.”)\
\end{flushright}
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 don’t warn and an expensive—even if ultimately unsuccessful—lawsuit if they do warn. Perhaps this is all that 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” was meant to say. 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 I describe 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 aren’t seen as having a tort law duty to reasonably protect individual citizens. 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 landlord of public housing and university dormitories) is generally subject to tort law rules similar to those imposed on private entities. And what government entities gather in their proprietary capacity, they may easily share with the government’s law enforcement branches.

Second, even private entities’ surveillance files may be subpoenaed or otherwise obtained by the police, by intelligence agencies, or by regulators. No warrant and no showing of probable cause is needed for the government to get this information. A subpoena based generally on the possibility that the tapes contain evidence would suffice, and often the property owner might voluntarily over the material even without the subpoena.

A database of video collected by a shopping center is thus a database of video that can be demanded by the government. Indeed, given the NSA’s recently revealed gathering of bulk e-mail and phone records, though also noting that there was a risk of liability even then, if “Martin assert[ed] they were false and defamatory and making it her word against his”).

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


117 See Gellman & Poitras, supra note 18.
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. 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 by government more generally. This is especially likely because our society does not “have a clear definition of what privacy is,”118 so instead of relying on such a definition we look to what has in fact been accepted so far.

“[T]o 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.”119 “[E]ach new form of surveillance” that is approved “becomes a springboard for tolerance of further incursions into individual privacy.”120 As surveillance mandated by the judicial system becomes 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.”121 When tort law sets a norm that investigation, disclosure, or surveillance are “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.

119 Id.
120 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.

IV. 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—would be 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.”122 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.”123

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. And 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 like with claims about proposed precautions more generally.

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.”124 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

122 Restatement (Third) of Torts (Phys. & Emot. Harm) § 8(b).
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 not absolute, but is a thing which 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, as the majority does here, inevitably means that in numerous cases the law will require something other than optimal care. . . .

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 our 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 with 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 in-

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125 927 P.2d at 840–41.
to a straitjacket of prescribed conduct removes the incentive for them to lower the cost and increase the level of precautions they provide.\textsuperscript{126}

Technological change is indeed an important force in driving privacy-implicating precautions.\textsuperscript{127} 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.

When a court announces a rule (such as “reasonable care doesn’t 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 jury isn’t 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:

[The 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.”\textsuperscript{128}
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.

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.\(^\text{129}\)

B. Courts’ Ignoring Privacy = 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 “send it to the jury” norm. Let me offer four examples.

1. \textit{Giggers v. Memphis Housing Authority}: Landlord’s duty to “identify[] and exclud[e] potentially dangerous tenants”

The clearest example of a conscious decision to leave privacy questions to jurors comes in \textit{Giggers v. Memphis Housing Authority}.\(^\text{130}\) The broad question in \textit{Giggers} was whether a landlord had a “duty to act with reasonable care to reduce its tenants’ unreasonable risk of physically injurious attack [on other tenants].”\(^\text{131}\) Plaintiffs were the relatives of Charles Brown, who was shot by L.C. Miller; both were tenants of the Authority, and the shooting took place on Authority property. Miller had behaved badly in the past, attacking another tenant and cutting him with a knife.\(^\text{132}\) Plaintiffs argued that, given this history of Miller’s, the Authority had a duty “to monitor [Miller’s] actions or evict him from the premises.”

The court agreed with the plaintiffs, though it acknowledged that recognizing a broad duty to prevent violence among tenants might re-

\(^{129}\) See Restatement (Third) of Torts (Phys. & Emot. Harm) § 8(b).

\(^{130}\) 277 S.W.3d 359 (Tenn. 2009).

\(^{131}\) Id. at 369–70.

\(^{132}\) Id. at 361–62.
quire not just evicting tenants who commit crimes on the property, but also investigate potential tenants. 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, 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.\footnote{Id. at 369–70 (citing \textit{Glesner}, supra note 63, at 683, 763, which specifically mentions privacy concerns as a reason against holding landlords liable for not screening tenants).}

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.”\footnote{Id. at 371.}

2. \textit{Kargul v. Sandpiper Realty}: Tenant’s duty to warn neighbors about a roommate’s criminal history

The allegations in \textit{Kargul v. Sandpiper Realty, Inc.}\footnote{3 Conn. L. Rptr. 154 (Super. Ct. 1991).} 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. She also volunteered at a prison-based mental health program for sex criminals, where she met Lafate Ables.

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

A few months after Ables moved in, he was arrested for allegedly raping Scott’s oldest daughter, but entered into a plea bargain that led to another two or three months in jail.\footnote{The opinion at one point says he served 90 days in jail and at another point that he served 60 days in jail. Id. at 155, 162.} Scott, nonetheless, allowed

\footnote{Ables was arrested for first-degree sexual assault, which at the time meant forcible rape and apparently required a minimum one-year sentence, Conn. Pub. Act 82–48, sec. 2, but ultimately pled guilty pursuant to a plea bargain. The opinion offers no further details on the offense to which Ables pled.}
Ables to keep living with her. Finally, six months later, Ables raped and repeatedly stabbed Kargul, another tenant in the same apartment complex. Kargul sued Scott, arguing that Scott was negligent in failing to warn her fellow tenants that Scott was dangerous.

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

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’ 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 wasn’t unreasonable. Let the jury decide, based on its own “collective wisdom and understanding concerning the conditions and circumstances of everyday life.” And let different juries decide differently based on the particulars of each case—for instance, the 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.

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137 Kargul, 3 Conn. L. Rptr. at 160.
138 Id.
139 But see N.W. v. Anderson, 478 N.W.2d 542 (Minn. Ct. App. 1991) (reaching the opposite result in a case where a landlord was sued for not warning one tenant that another was a convicted sex offender, though noting that “we are troubled by the decision we are required to make,” and concluding that the decision was mandated by Cairl v. State, 323 N.W.2d 20 (Minn. 1982), a Minnesota Supreme Court case that imposed an unusually narrow duty to warn of risk of crime); Murphy v. Eddinger, 1999 WL 1212445, *4 n.4 (Conn. Super. Ct. Nov. 30) (dictum) (suggesting that a landlord does not have the duty to warn tenants of another tenant’s dangerous propensity, at least when the propensity is for negligence, such as when a tenant is “a particularly inept driver” whose driving jeopardizes other cars in the parking lot).
140 Kentucky Fried Chicken, 927 P.2d at 1278 (Kennard, J., dissenting).
3. Apolinar v. Thompson: Homeowner’s duty to warn visitors about threats to the homeowner

In Apolinar v. Thompson,141 Charles Thompson invited Roger Apolinar to house-sit while Thompson was out of town. (The court says nothing about whether Thompson was being paid for the house-sitting.) While staying at Thompson’s house, Apolinar was attacked by some third party.

Apolinar sued, claiming that “Thompson had received harassing phone calls and threats and, therefore, Thompson had a duty to warn Apolinar or make conditions reasonably safe.”142 The court concluded that Apolinar stated a negligence claim.

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, isn’t limited to house-sitters, but extends to any “invitee or licensee,”143 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 their home, or any romantic partners (or prospective partners).144 Like-

142 Id. at 264. If the threats were distant enough and vague enough, they might not have sufficed. See Larson v. Larson, 373 N.W.2d 287, 289 (Minn. 1985) (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 that the risk of attack was “too speculative to impose a duty on appellant to warn”); Burks v. Madyun, 435 N.E.2d 185 (Ill. App. Ct. 1982) (no duty to warn babysitter that children had been threatened by gangs at school, because plaintiff hadn’t alleged that “her children were previously assaulted by gangs on her premises or elsewhere”). But in many instances, the threats might be more recent and repeated.
143 Id.
144 See Rojas v. Diaz, 2002 WL 1292996 (Cal. Ct. App. June 12) (involving a similar claim, though the court rejected it on the grounds that the attacker in that case wasn’t predictably dangerous enough to trigger a duty to warn); Patzwald v. Krey, 390 N.W.2d 920, 923 (Minn. Ct. App. 1986) (likewise, though focusing on the attackers having only threatened the defendant, and not having threatened anyone else, though he ultimately came to defendant’s house and shot at her guests indiscriminately); id. (Crippen, J., dissenting) (concluding that the question whether the attack on the guests was foreseeable should have gone to the jury). Compare also Wilkins v. Siplin, 13 Cal. Rptr. 2d 634 (Ct. App. 1992) (depublished but not reversed), which allowed a lawsuit to proceed on the theory that defendant was negligent in letting her estranged and habitually jealous husband into the cabin where she was staying with plaintiff, a male friend. Though the case didn’t involve a failure to warn the male friend of the risk posed by the husband, 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 hadn’t warned plaintiff of the danger of that happening. But see Fiala v. Rains, 519 N.W.2d 386, 389 (Iowa 1994) (rejecting such a claim on the grounds that it called for “liability for nonfeasance” rather than for affirma-
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.

And such an obligation would intrude substantially on people’s privacy. Many people may feel it emotionally humiliating to be seen as a vulnerable target of a powerful prospective attacker, and 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 juicier gossip than stories of warnings about icy pavement.¹⁴⁵

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 just gotten 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 surveillance cameras likewise uniformly say nothing about the privacy implications of such a duty.¹⁴⁶ 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

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¹⁴⁵ Privacy is also a tool that people can use to minimize the social and financial impact of being a crime victim—and forced disclosure of the information can increase this impact, compounding the damage the criminal did. A person who must reveal that he or she is the target of a criminal’s attention may lose prospective lovers, guests, and customers. To the damage caused by fear and risk of physical injury will be added the damage caused by social ostracism and economic loss. Cf. Ellen M. Bublick, Citizen No-Duty Rules: Rape Victims and Comparative Fault, 99 Colum. L. Rev. 1413, 1446 n.185 (1999) (noting that imposing similar duties on victims “could let [the prospective attacker’s] violence control [the victim’s] life”).

norms, as applied to the particulars of each case. And such jury deci-
sions, the argument would go, could easily adapt to technological
change, for instance as cameras become more accurate and thus more
effective at preventing harm.

V. LEAVING DECISIONS ABOUT PRIVACY-IMPLECTING PRECAUTIONS TO
JUDGES

A. “No Duty” Rules Generally

So we have seen 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”147—that some such precautions are too burdensome to be re-
quired by the standard of care.

Tort law has long recognized that the duty of reasonable care, in-
cluding the broad discretion that this duty leaves to jurors, is rightly
modified by judges in certain classes of cases where there are other so-
cial values to be balanced beyond safety and cost. The Third Restate-
ment offers a helpful analysis of why many such no-duty rules exist.148

As the Restatement points out, “when an articulated countervailing
principle or policy warrants denying or limiting liability in a particular
class of cases, a court may decide that the defendant has no duty or that
the ordinary duty of reasonable care requires modification.” 149 This is
especially so when “negligence-based liability might interfere with im-
portant principles reflected in another area of law”150—an area of law
that deals with values other than safety and efficiency. But, more ge-
erally, it is so whenever negligence-based liability trenches on im-
portant “social norms” that courts think ought to be protected.151

Thus, for instance, the duty of reasonable care is limited by a prop-
erty 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.”152 In-
stead of applying the standard negligence test in cases where a flagrant
trespasser is suing a landowner, most courts apply categorical rules that
deny liability.153

147 Restatement (Third) of Torts (Phys. & Emot. Harm) § 7 cmt.a.
148 Id. cmt. c.
149 See, e.g., id. § 7(b).
150 Id. cmt. d.
151 See, e.g., id. cmt. c (discussing the general rule that social hosts should not be held
liable for serving alcohol to their guests, even when the serving of the alcohol ends up con-
tributing to the guest’s driving drunk and injuring someone).
152 See, e.g., Restatement (Third) of Torts (Phys. & Emot. Harm) § 52.
153 Id.
Likewise, 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.\(^{154}\)

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.\(^{155}\) Rather than leaving to each jury in each case the decision whether to so affect social relations—and thus in the process imposing the risk of liability and litigation costs even if most juries rule against liability\(^{156}\)—courts have made the judgments themselves, using a no-duty rule.

Tort law likewise protects the value of consumer choice in products liability cases. When plaintiff claims that defendant’s product is “so dangerous that it should not have been marketed at all,”\(^{157}\) 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).\(^{158}\) 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,\(^ {159}\) 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).\(^ {160}\)

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 courts generally do not allow juries to engage in the cost-benefit balancing that involves such consumer choice questions.\(^ {161}\)

Courts have similarly imposed no-duty rules in cases where the plaintiff claimed that the defendant was unreasonable for failing to

\(^{154}\) Id. § 7 cmt. a.


\(^{156}\) 788 P.2d at 164.

\(^{157}\) Restatement (Third) of Torts (Product Liability) § 2 cmt. d.

\(^{158}\) Id.


\(^{161}\) See Restatement (Third) of Torts (Product Liability) § 2 cmt. e & reporter’s note cmt. e (discussing the very limited exceptions to this rule).
comply with a robber’s demands,\textsuperscript{162} for distributing newspaper articles, books, or video materials that allegedly inspire or help people to act negligently or criminally,\textsuperscript{163} or for playing a contact sport in an allegedly negligent way (setting aside cases of reckless or intentional injury).\textsuperscript{164} And courts have 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.\textsuperscript{165} 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.”\textsuperscript{166}

\textbf{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,”\textsuperscript{167} 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 that one of the tenants is being stalked, but who is worried about the risk of liability for preserving that tenant’s privacy, comes to you for ad-

\textsuperscript{162} See, e.g., Kentucky Fried Chicken of Cal., Inc. v. Superior Court, 927 P.2d 1260 (Cal. 1997).


\textsuperscript{164} See, e.g., Knight v. Jewett, 834 P.2d 696 (Cal. 1997) (plurality); id. at 712 (Mosk, J., concurring in part and dissent in part).

\textsuperscript{165} Trianon Park Condominium Ass’n, Inc. v. City of Hialeah, 468 So. 2d 912, 920 (Fla. 1985); Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1021–22 (Fla. 1979). In some jurisdictions, this discretionary function exception is expressly provided for by statute, see, e.g., 28 U.S.C. § 2680(a), but Commercial Carrier and other cases have recognized it as a common-law no-duty rule even in the absence of a statutory provision.

\textsuperscript{166} See Restatement (Third) of Torts (Phys. & Emot. Harm) § 7 cmt. g (treating the discretionary function exception as a form of no-duty rule).

\textsuperscript{167} See, e.g., id. § 7(b).
vice. “Don’t worry, a jury will probably find such concealment of the information to be reasonable” isn’t much of an assurance to the landlord.

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

This then is the flip side of the jury-sensitivity-to-facts argument that is often given in favor of jury decisionmaking. Even assuming that a jury, considering all the facts of a case after an injury takes place, would rightly decide whether the defendant’s behavior was reasonable—weighing privacy costs and safety benefits at their fair weights—a prospective defendant can’t 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.

Moreover, privacy cases are likely to be classic situations in which “liability depends on factors applicable to categories of actors or patterns of conduct,” in which “a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases,” and in which such clear rules may be necessary to protect the “social norm” of privacy. A rule that, for instance, landlords need not warn tenants that other tenants are being persecuted by criminals—even when the persecution creates a risk to everyone—can be evaluated and either adopted or rejected as a general proposition, just as courts have done with rules that property owners aren’t liable to flagrant trespassers, that social hosts who serve alcohol aren’t 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

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168 See supra Part IV.A.1.
169 See supra Part III.E.
170 See, e.g., Restatement (Third) of Torts (Phys. & Emot. Harm) § 7 cmt. a.
171 See id. cmt. c.
how they were applied to the facts set forth in the opinions. Legislatures can then revise the rules.

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

Nor can the public effectively review most 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 are privacy-implicating. 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.

And beyond this, the great bulk of the cases in which the court lets the matter go to the jury don’t actually reach the jury. Faced with the expense and uncertainty of trial, parties settle. 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 reaction. But the settlement is even more secret and unevaluable than a jury verdict.

Consider, for instance, the decision in *Kargul v. Sandpiper Realty*, 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, condominium owners, and condominium associations). The court’s decision lets a jury implement something

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172 Richard D. Friedman, Anchors And Flotsam: Is Evidence Law “Adrift”? 107 Yale L.J. 1921, 1954 (1998) (“If summary judgment is granted properly, the case ends; if it is denied, the case likely settles.”).


174 See supra p. 30.

175 See Restatement (Third) of Torts § 40(b)(6) (noting that landlord has affirmative duty to take reasonable care to protect its tenants from crime).

176 The rationale of *Kargul* wasn’t based on any special relationship between a tenant and other tenants in the apartment building; tort law doesn’t 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. 3 Conn. L. Rptr. at 160. The same rationale would apply to a condominium owner or a homeowner. See also Riley v. Whybrew, 185 S.W.3d 393 (Tenn. Ct. App. 2005) (landlord of single-family home who failed to investigate tenants’ alleged crimes may be liable to neighbors for nuisance and negligent infliction of emotional distress); Patton v. Strogen, 908 So. 2d 1282 (La. Ct. App. 2005) (shopping center owner may be liable to patron of neighboring store, when the patron was injured by a shot fired from within the shopping center).

177 See Lewis Montana, Community Association Board Concern About a Resident Sex Offender, 32 Westchester Bar J. 23 (2005).
like a “Megan’s Law” 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’s nothing in the opinion that would keep the duty to notify from applying when a roommate has been convicted of robbery, burglary, or assault, or any other crime that shows a foreseeable propensity to act in ways that threaten one’s neighbors.

Megan’s Laws, though, rightly drew a good deal of debate, in which the privacy impact was considered. And the laws contained express 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 wouldn’t be implicated.

Likewise, when American cities propose installing surveillance cameras on public streets, public debate often erupts. The privacy implications are discussed, and often carry the day. 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 (see Part IV.A), 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 I think that even a reasonable trust in juries shouldn’t justify letting rules that affect the privacy of millions of people be made in a process that usually draws lit-

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


181 See, e.g., Mallon, supra note 17, at 963 n.44 (collecting examples of articles condemning public surveillance and the use of facial recognition software); Editorial, Lawful Frown on Red-Light Cash Cows, Atlanta J.-Const., Feb. 21, 2007, at 17A.

tle attention, is subject to extremely modest judicial review, and is hard for the public and for scholars to review as well.

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

But where free speech issues are involved, courts review such application-of-law-to-fact judgments de novo, partly to prevent erroneous denials of free speech rights and partly to better elaborate the legal rules. 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.

Privacy cases likewise involve important interests that courts need to protect. In some states, the interests are of constitutional dimension, because of state constitutional guarantees protecting the right to privacy. They might also be of constitutional dimension under the federal constitution, to the extent that cases such as Whalen v. Roe recognize a federal constitutional interest in informational privacy. And even if such privacy interests are not of constitutional statute, 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 protected and defined.

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 aren’t directly represented in court. If an

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183 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. See, e.g., Hurd v. Williamsburg County, 579 S.E.2d 136, 142–44 (S.C. App. 2003).
186 See generally Volokh & McDonnell, supra note 185, at 2437–38, 2443–44.
187 See supra note 31.
188 See supra note 32.
employer must alert customers whenever an employee is the target of a stalker, part of the cost will be borne by the employer and to other employers, as frightened customers go away. But the greater cost will be borne by the stalking victims, whom the employer is likely to dismiss in order to avoid the loss to itself.

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

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

The plaintiff is in the courtroom, arguing about the harm that was inflicted on him. The defendant is in the courtroom, arguing about the cost that taking plaintiff’s proposed precautions would have imposed on him. But the third parties aren’t there to talk about such matters.

And when the defendant asserts the third parties' interests, it might not come across as especially credible. Employers, for instance, are often perceived as having interests that are generally antagonistic to their employees'. 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 represented. First, organizations representing those parties—for instance, privacy rights advocates such as the Electronic Privacy Information Center or the ACLU, or groups that represent stalker victims—could file amicus briefs.¹⁸⁹

Second, judges, who see a wide range of cases, may be more likely to be able to see the implications of the proposed rule beyond this case. And third, judges, 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.¹⁹⁰ Un-

¹⁸⁹ Such groups would generally lack a concrete enough stake in the case to intervene in the trial itself, and argue to the jury. See, e.g., Fed. R. Civ. Proc. 24.

¹⁹⁰ Cost internalization is often used an argument for strict liability, but given that American tort law usually prefers negligence over strict liability, see James A. Henderson, Jr., Why Negligence Dominates Tort, 50 UCLA L. Rev. 377 (2002), the cost internalization argument has also often been adapted to justify negligence-based liability when the choice
nder 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 defendants remain free to do what they like, but just have to pay for the extra risk that this imposes on others.191

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

Someone who doesn’t tell his sexual partners about past “high risk” behavior, such as having had many past sexual partners or having engaged in male homosexual sex, and then ends up transmitting a sexually transmitted disease will have to pay (if he can) for the damage caused by the disease. Likewise, someone who doesn’t 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 don’t want this information disclosed could find landlords who are willing to trade off the risk of liability for a sufficient increase in rent. If car manufacturers are liable if their cars don’t report speeding to the police or don’t 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 aren’t entirely internalized.192 Surveillance, for instance, is often thought as producing citizens who are reluctant to resist even unreasonable government impositions, because they are intimidated by their

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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. 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 can’t internalize the social benefits of privacy would overdeter socially useful privacy protection.

Moreover, the premise of negligence law is that it aims to stigmatize behavior as negligent, unreasonable, and careless, and not only to require payment for it. (If we were talking about a strict liability regime, the matter would be different, but rightly or wrongly our legal system generally deals with these problems using a negligence test.) Indeed, this is why negligence that shows a “conscious disregard of public safety” can even lead to punitive damages liability, which is what happened, for instance, in the famous McDonald’s coffee case and the Ford Pinto case. If punitive damages are available, then the efficient cost internalization story doesn’t apply, since defendants would have to pay for more than the harm that they inflicted. But beyond this, the availability of punitive damages further reflects that negligence law involves the making and enforcement of moral judgments.

And this legal stigmatizing of behavior as “negligent” or “unreasonable” is, as Part III.F discussed, likely to affect how the public understands privacy. If failing to surveil is unreasonable, negligent behavior,

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193 See Richards, supra note 1, at 1945–52.
194 See, e.g., Hurn v. Greenway, 293 P.2d 480 (Alaska 2013) (refusing to hold woman liable for allegedly provoking an attack by a jealous man, in which someone was killed, because imposing such liability would unduly burden the victims of abuse).
195 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 judge or the legislature) should be limited to the socially beneficial privacy-seeking behavior, rather than to all such behavior.
196 See, e.g., Victor E. Schwartz, et al., Prosser, Wade and Schwartz’s Torts 703–04 (10th ed. 2000) (noting that strict liability is “not called negligence because a court makes determination 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) (“Tort law at its foundation relies heavily on irrationality or unreasonable-ness as an attribute of the carelessness which it must and does condemn. Irrationality is clearly an attribute of carelessness employed by tort law.”).
197 Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Ct. App. 1981); see, e.g., Restatement (Second) of Torts § 908(2) (calling for punitive damages in cases of “reckless indifference” to others’ safety).
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 take privacy-implicating precautions wouldn’t just require them to internalize the costs of their choice; it will also affect future public expectations of privacy.199

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. And 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, I hope the analysis in this Article can help prod courts to discuss such matters more overtly, the way that they have at times done with regard to other no-duty rules.200 Nonetheless, these decisions show that 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 courts and not by juries.

1. Privacy as limiting hotel owners’ obligation to surveil

*Shadday v. Omni Hotels Management Corp.*201 offers one illustration. Shadday was raped by another hotel guest (Alfredo Rodriguez Mahuad202) in a hotel elevator, and sued the hotel, claiming that it failed to discharge its duty of reasonable care to its guests.

The Seventh Circuit expressly applied the Hand formula: “The practical question (and law should try to be practical) is whether the defendant knows or should know that the risk is great enough, in relation to the cost of averting it, to warrant the defendant’s incurring the cost.”203

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199 Requiring people to pay if they are to preserve their privacy is also a substantial burden—for some, an unaffordable burden—one 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 available 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.


201 477 F. 3d 511 (7th Cir. 2007).


203 477 F.3d at 1513.
It dismissed some precautions, seemingly on the grounds that they would be too expensive (“a hotel court hardly be required to have security guards watching every inch of the lobby every second of the day and night”).204 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.”205

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.206 Landlords had no duty to routinely investigate whether their tenants’ dogs were indeed dangerous.207

The court mostly relied on precedents, both in-state and many out-of-state.208 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.”209

3. Privacy as limiting landlords’ obligation to investigate tenants’ mental conditions

Gill v. N.Y. City Housing Authority210 likewise considered privacy in rejecting an argument that a landlord had a duty to investigate and monitor a mentally ill tenant.

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 tenants211 “when it failed to evict Ernest Lamb prior to the assault, or to post warning signs, or to take steps to control Lamb.”212 “[T]he records of Ernest Lamb’s psychiatric hospitalization,” Gill argued, “should have been examined; . . . Ernest Lamb should have been made to submit to psychiatric examination; and . . .

204 Id. at 1516.
205 Id. at 1517.
207 Id. at 32.
208 Id. at 31–32.
209 Id. at 32.
211 See id. at 262 (acknowledging such a general duty).
212 Id. at 257.
Lamb’s parents should have been forced [through threat of eviction] to provide psychiatric information.”

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. But the court also noted Lamb’s “right of privacy,” and expressly rejected the possibility that a landlord would have to “monitor[] treatment” or “post[] warnings (i.e., ‘Beware of your neighbor’).”

On the other hand, Giggers v. Memphis Housing Authority (discussed above at p. 29) 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.”

4. Privacy as limiting employers’ obligation to investigate or supervise employees

Though employers have been increasingly obligated to gather job applicants’ criminal records, 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, discussed above at p. 20, a 14-year-old girl and her family sued a church based on a priest’s molestation of the girl. 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.” (The priest had no criminal history of child molestation, so a background check alone wouldn’t have uncovered his propensity.) The court rejected this claim, reasoning that either of these investigations would have unacceptably interfered with the priest’s privacy.

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. (The meeting was not

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213 Id. at 261.
214 Id. at 266.
215 Id. at 261.
216 Id. at 266.
217 277 S.W.3d 359, 369–70 (Tenn. 2009).
218 Id.
219 See, e.g., Cramer v. Housing Opportunities Comm’n of Montgomery County, 501 A.2d 35, 41 (Md. 1985) (so holding despite acknowledging the possible privacy cost of such investigations).
for church business or spiritual counseling.) Napieralski argued that the church was negligent in supervising its employee, but the Maine Supreme Court rejected this, partly because, “Where 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.”

On the other hand, Doe v. XYC Corp. (discussed in more detail below in Part V.D) concluded that employers had a duty to monitor their employees’ office computer usage, in order to prevent the employees from uploading child pornography. 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,”222 the employer not only could monitor its employees’ computer usage but was obligated to take reasonable steps 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.223 (The Fifth Amendment was the name of the bar that chartered the boat.224) One of the patrons, Clark, was an off-duty police officer who had a loaded but improperly secured gun on him. Clark dropped the gun, which went off, killing plaintiff Nash’s husband. Nash sued the boat operator, arguing that it was negligent in failing to screen guests for concealed weapons.

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.”225 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

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221 802 A.2d 391, 393 (Me. 2002). See also M.L. v. Magnuson, 531 N.W.2d 849, 858–59 (Minn. Ct. App. 1995) (“Even assuming that Magnuson’s abuse of M.L. occurred within his scope of employment, there was insufficient evidence for the jury to conclude that Redeemer failed to exercise ordinary care in supervising Magnuson. 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. There was no evidence that the supervision provided by Redeemer differed from the supervision a reasonable church would provide.”).

222 Id. at 1166.


225 Id.
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 hand bags 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.\textsuperscript{226}

\emph{Dupont v. Aavid Thermal Technologies, Inc.}\textsuperscript{227} 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.\textsuperscript{228}

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,\textsuperscript{229} or the negligent supervision theory accepted in \emph{Doe v. XYC Corp.}\textsuperscript{230} 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, \emph{Chazen v. Centennial Bank}\textsuperscript{231} and \emph{Chicago Title Ins. Co. v. Superior Court}\textsuperscript{232} 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 cus-

\begin{footnotesize}
\begin{itemize}
  \item Id.\textsuperscript{226}
  \item 798 A.2d 587 (N.H. 2002).\textsuperscript{227}
  \item Id. at 592.\textsuperscript{228}
  \item See, e.g., Restatement (Second) of Torts § 390 (describing the negligent entrustment theory); Restatement (Third) of Torts (Phys. & Emot. Harm) § 19 cmt. e (indicating how negligent entrustment qualifies as a special case of negligence generally).\textsuperscript{229}
  \item See infra Part V.D.\textsuperscript{230}
  \item 61 Cal. App. 4th 532, 538 (1998).\textsuperscript{231}
  \item 174 Cal. App. 3d 1142, 1159 (1985).\textsuperscript{232}
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tomers, and we thereby avoid the loss of privacy, expense and commercial havoc that would result from such a holding.”233

7. Privacy as limiting the Tarasoff duty to warn

Tarasoff v. Regents famously imposed on psychiatrists a duty to warn a person when the psychiatrist learns that a patient poses a threat to that person.234 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.235

And 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. 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.”236

And courts have indeed been cautious in expanding the Tarasoff duty to require broader disclosures that would further jeopardize “the privacy of [the] patient.” J.A. Meyers & Co. v. L.A. County Probation Dep’t, for instance, rejected a proposed duty of probation departments to warn a probationer’s prospective employers about his past crimes.237 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. 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.”238

Likewise, Bellah v. Greenson rejected a proposed duty of psychotherapists to warn a patient’s parents of “the conditions which might cause her to commit suicide,” or of the risk that she posed to the par-

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233 Id. (also quoted in Chazen, 61 Cal. App. 4th at 538).
235 Id. at 346–47.
236 Id. at 347.
238 Id. See also Sharpe v. S.C. Dep’t of Mental Health, 354 S.E.2d 778, 783 (S.C. 1987) (Bell, J., concurring in the judgment) (declining to expand Tarasoff into “a legal duty to warn the public at large when a mental patient is released,” partly because such a duty ‘would intrude on the patient’s privacy’).
ents’ property.\footnote{81 Cal. App. 3d 614, 620, 622 (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 the patient had HIV, even though the family members were nursing the patient during his illness and where exposed to his bodily fluids).} \textit{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.”\footnote{81 Cal. App. 3d at 621.}

8. Privacy as limiting people’s duty to reveal disease risk factors to sexual partners

In \textit{Doe v. Johnson},\footnote{817 F. Supp. 1382 (W.D. Mich. 1993).} plaintiff allegedly contracted HIV from having sex with Magic Johnson. Doe claimed that Johnson should have warned her that he had contracted HIV; or, if he didn’t know he had HIV, he should have warned that he had experienced symptoms indicative of HIV; or, if he didn’t know of such symptoms, he should have at least warned her “that he had a high risk of becoming infected with the HIV virus because of his ‘sexually active, promiscuous lifestyle.’”\footnote{Id. at 1385.}

As in \textit{Tarasoff}, the \textit{Doe} court recognized the privacy implications of the woman’s claim:

[Re]cognition of a duty to warn in certain contexts necessarily invades the constitutionally protected privacy rights of individuals in their sexual practices and in marriage, by requiring people to disclose prior sexual history to every potential sex partner . . . . Certainly, court supervision of the promises made by, and other activities engaged in, two consenting adults concerning the circumstances of their private sexual conduct is very close to an unwarranted intrusion into their right to privacy.\footnote{Id. at 1391.}

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.’”\footnote{Id.} And, in light of the dangerousness of HIV (a matter that, in the court’s view, distinguished it “from other sexually transmitted disease, such as herpes”) the court concluded that “for the most part, the burden on defendant in this case”—apparently referring to the privacy burden—“is not very high”:

[If] 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.245

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. This partly stemmed from line-drawing concerns, but partly also from a concern about “privacy implications.”

“[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.”246 This was not, I think, just a judgment about probabilities: even fairly low risks may be foreseeable and may give rise to a duty to warn when the cost of the warning is low enough.247 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 requiring a higher level of foreseeability for privacy-implicating precautions.

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As was noted above, these cases (like many tort cases) don’t go into a deep discussion of the underlying policy issues, or even label their references to privacy as “no-duty” (or “limited-duty”)248 rules. Yet they do rely on privacy concerns in reaching results that amount to a finding of no duty as a matter of law, or as a limitation on 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 do sometimes 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.249

245 Id.
246 Id. at 1394.
247 See supra note 48.
248 Restatement (Third) of Torts (Phys. & Econ. Harm) § 7 cmts. a & d.
249 Naturally, if a statute provides that some precaution is required, a court can impose liability based on failure to comply with the statute. Cf. J.S. v. R.T.H., 714 A.2d 924, 931–32 (1998) (holding wife liable for doing nothing while her husband was sexually abusing neighbors’ children, partly based on a statute that expressly “require[d] any person having reasonable cause to believe that a child has been subject to abuse to report the abuse immediately to the Division of Youth and Family Services,” a statutory duty “not limited to professionals, such as doctors, psychologists, and teachers, 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 Health-General § 18-357(d) (“A physician acting in good faith may not be held liable in any cause of action for choosing not to disclose information
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 actions nor required to take such actions.\footnote{The same is true of the liberty we enjoy. In many states, for instance, employers aren’t barred from firing employees based on the employees’ speech or political activity. See generally Eugene Volokh, Private Employees’ Speech and Political Activity: Statutory Protection Against Employer Retaliation, 16 Tex. Rev. L. & Pol. 295 (2012). Nonetheless, a combination of social norms and market pressures means that, as a practical matter, we can generally 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 for not restricting their employees’ off-the-job speech, this zone of practical freedom would be dramatically narrowed.} How much privacy we should have in those 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 shouldn’t be seen as an authorization for courts to require it.

Consider, for instance, \textit{Doe v. XYC Corp.}\footnote{887 A.2d 1156 (N.J. Super. Ct. App. Div. 2005).} XYC’s employee, the then-stepfather of 10-year-old Jill Doe, had secretly photographed Jill in the nude and then used his work computer to upload the photographs to a child porn site. After the employee was eventually exposed, Jill’s mother Jane Doe (the employee’s ex-wife) sued XYC on Jill’s behalf.

The employer, Doe argued, had a “duty to exercise reasonable care so to control his [employee] while acting outside the scope of his employment as to prevent him from intentionally harming others . . . [when the employee] is using a chattel”—here, the computer—“of the [employer].”\footnote{Restatement (Second) of Torts § 317.} 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. 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 porn sites, because its computer logs revealed that the ex-husband was accessing “obvious porn sites (‘Big Fat Monkey Blowjobs,’ ‘Yahoo Groups-Panties R Us Messages’ and ‘Sleazy Dream Main Page’) as well as one that specifically spoke about children: ‘Teenflirts.org: The Original Non Nude Teen Index.’”\footnote{887 A.2d at 1159–60. The ex-husband’s privacy was already in some measure compromised by the employer’s surveillance. But there’s a difference between someone knowing that you’re accessing porn, and their closely tracking exactly what sort of porn you’re accessing. (Such tracking could well reveal tastes in lawful adult porn, not just criminal child porn; even “teen porn” sites may depict “barely legal” 18- and 19-year-olds rather than containing illegal pornography depicting minors.) And more broadly the principle may apply even to companies that don’t actively scan computer log files. The compa-}
The appellate court held that, if the facts were as plaintiffs alleged, the employer would indeed have a duty of reasonable care to prevent its computers from being used to injure Jill. And the court rejected the privacy-based objections to imposing such a duty: Because XYC had a right to monitor the use of its computers, and because 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.”254 And this rested on XYC’s power as owner of the computer, and not on some respondeat superior theory based on XYC’s power as employer. The same analysis could apply to an Internet café or library that doesn’t monitor its patrons’ use of its computer systems.255

Yet that A may gather and reveal information without violating B’s legally enforceable privacy rights doesn’t 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.256 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.”257

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.258 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.259 Our right to speak has been seen as weighty enough to overcome the privacy cost caused by such speech. But it doesn’t follow that a legal requirement that we reveal such information about our friends—even when we don’t want to exercise our right to speak—poses no privacy cost.

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254 Id. at 1166.
255 See Restatement (Second) of Torts § 308 (providing for negligent entrustment liability even outside the employment context); id. § 318 (providing for negligent supervision liability even outside the employment context).
256 See supra note 93 (noting that in most jurisdictions such communications to individual friends don’t implicate the disclosure tort).
257 See Restatement (Second) of Torts § 652D (describing these limitations on the tort of disclosure of embarrassing private facts).
259 See Restatement (Second) of Torts § 652D.
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.260

Yet this doesn’t 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 doesn’t follow that privacy concerns should be weighed at zero when the question arises whether all landlords have a duty to install such cameras.

The same goes for 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).261 They can videotape and audiorecord us at work. They can monitor our use of work computers, or even work-provided computers that we take home with us.262 They can to a large extent investigate our off-the-job behavior.263

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 doesn’t follow that our privacy at work is therefore of no weight in the tort law privacy-safety tradeoff, what they may do under the law of employer-employee relations is something that they must do under tort law.

Cramer v. Housing Opportunities Comm’n of Montgomery County264 committed, I think, the same error. 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. 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 any area for which the person is suited, and the societal interest in rehabilitation of offenders.”265 But, the court reasoned, the “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 in-

260 See supra Part III.E.
265 Id. at 41.
formation 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.266

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 didn’t make the decision that employers must consult it, just as they didn’t 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 didn’t actually make.

VI. LEAVING DECISIONS ABOUT PRIVACY-IMPlicATING PRECAUTIONS TO JUDGES 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 actions 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; I myself am not sure of whether it would be sound. But I think the argument is worth considering.

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

To begin with, legislative actions (a term that I’ll use to also include administrative actions) 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.”267

266 Id.

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 in certain situations would likely lack any such clear boundary. To date, courts have just made the rule be that property owners must institute video surveillance when it’s “reasonable.” But even if they try to implement narrower rules (for instance, requiring that crime in this area be especially likely\textsuperscript{268}), they are unlikely to draw crisp lines about where surveillance is required and where it’s 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 wouldn’t 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 linedrawing issues, though of course the results they have reached using such linedrawing are often controversial. They routinely decide what information should be released by the government, whether through sex offender notification, rules related to expungement or sealing of criminal records, rules related to the revealing or concealing of various professional disciplinary records or government employee records, and more. And they routinely decide what disclosures of private information various businesses and individuals have to make, both to customers and to the government.\textsuperscript{269} 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.

\textbf{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

\textsuperscript{268} Cf. Sharon P. v. Arman, Ltd., 989 P. 2d 121 (Cal. 1999) (providing that security measures including “operational surveillance cameras” would be required only if there is evidence of “prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location”).

a big part of legislators’ job: drawing lines based on the felt moral and practical attitudes of the majority.

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

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. But given the state of the law as summarized in the Restatement, courts almost invariably decline to make such judgments, and leave it to voters and their elected representatives to decide which classes of products should be removed from the market.

The same is probably true—though there is less discussion about this—when a proposed rule would treat people unequally along certain dimensions. It’s 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 com-

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270 See supra text accompanying note 157.
275 See generally Restatement (Third) of Torts (Product Liability) § 2 cmt. e & Reporter’s Note to cmt. e (noting that only one jurisdiction takes the contrary view as a matter of judicial holding, and only one other takes it as a matter of statute, and even then “in a very limited manner”); Bojorguez v. House of Toys, Inc., 133 Cal. Rptr. 483, 484 (Cal. Ct. App. 1976) (“Here Diane wants us to hold the retailer and distributor negligent for selling toy slingshots to the class of persons for whom they were intended—the young; in effect, she asks us to ban the sale of toy slingshots by judicial fiat. Such a limitation is within the purview of the Legislature, not the judiciary.”). For an unsuccessful call for imposing tort liability on sellers of radar detectors, see Richard A. Olsen, Human Factors Engineering Experts and Product Design, 4 Prod. Liab. L.J. 23, 31-32 (1992).

Yet even if there is evidence that sports cars were unusually dangerous in the hands of under-25-year-olds, I doubt that a court would or should endorse holding car dealers liable under a negligent entrustment or negligent distribution theory for selling a sports car to someone who is too young.\footnote{Cf. Robison v. Enterprise Leasing Company–South Cent., Inc., 57 So.3d 1 (Miss. Ct. App. 2010) (refusing to send case to jury on a theory that it was negligent for a car rental company to rent a car knowing that an 18-year-old would be driving it).} Legislatures may draw age classifications even among adults, and constitutional equality guarantees don’t generally forbid this.\footnote{Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).} But courts don’t generally make such judgments, and probably shouldn’t 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.

We see the same approach in some of the cases dealing with social host liability for drunk driving by their guests. Many state courts expressly rejected such liability largely because,

A change in the law which has the power to so deeply affect social and business relationships should only be made after a thorough analysis of all the relevant considerations. . . . The type of analysis required is best conducted by the legislature using all of the methods it has available to it to invite public participation.\footnote{Garren v. Cummings & McCrady, Inc., 345 S.E.2d 508 (S.C. Ct. App. 2010) (quoting Miller v. Moran, 421 N.E.2d 1046, 1049 (Ill. Ct. App. 1981)); see also Burkhart v. Harrod, 755 P.2d 759, 762 (Wash. 1988) (“It is also difficult to estimate the effect that social host liability would have on personal relationships. Indeed, judicial restraint is appropriate when the proposed doctrine, as here, has implications that are ‘far beyond the perception of the court asked to declare it.’”); Ferreira v. Strack, 652 A.2d 965 (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. It is abundantly clear that greater legislative resources and the opportunity for broad public input would more readily enable the Legislature to fashion an appropriate remedy to deal with the scope and severity of this problem.”); Shea v. Matassa, 918 A.2d 1090, 1093 (Del. 2007) (likewise).} It is not for judges, the courts concluded, to decide whether hosts should be required to police their guests’ alcohol consumption. Such balancing of host and guest autonomy vs. safety can be done, but it should be done by legislators. This is primarily so, the courts often say, because legislatures can hold more comprehensive hearings. 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.”\footnote{Shea, 918 A.2d at 1097 (citation omitted) (“[M]ost courts which have faced the issue [of social host liability] have deferred to legislative process where such controversial public policy issues might be resolved through societal consensus.”); see also, e.g., Ferreira, 652 A.2d at 968 (“The majority of courts in other jurisdictions faced with the ques-}
The weighing of privacy versus safety has the same characteristics as the weighing of consumer choice vs. safety, of equality vs. safety, and of autonomy vs. safety. It involves comparing incommensurable values that are far removed from the familiar efficiency vs. safety tradeoff that courts routinely consider in negligence cases. It involves making judgments that are hard to defend as a matter of legal principle, but easy to defend as a matter of what the public, through its representatives, chooses. And it requires considering the interests of people beyond the parties to a case. Judges (especially appellate judges) are better able than juries to consider such interests of third parties, but legislators are even more accustomed and equipped to do so:

Because 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. . . . “Of 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.

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 judges’ 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 disagrees with the court’s analysis. Indeed, of the few pro-social-host liability that courts have rendered, most have been reversed by state legislatures.

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. Legislatures are thus likely to fix unduly privacy-restricting tort law decisions more rarely than they should.

281 See supra p. 40.
282 Burkhart, 755 P.2d at 761 (quoting Bankston v. Brennan, 507 So.2d 1385, 1387 (Fla. 1987)).
VII. Conclusion

My aim in this Article has been to do three things.

First, I have tried to describe just how negligence law (and product design defect law) can pressure prospective defendants to implement what I’ve called “privacy-implicating precautions”—disclosure of sensitive information about themselves and others, gathering of such information, 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, I have tried to alert people who are interested in protecting privacy (whether they are academics, advocacy group employees, legislators, judges, lawyers, or citizens) to the existence of the issue. If the tendencies I describe are to be resisted, people who care about privacy should focus more closely on them.

Third, I have 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, I think that even if judges do not leave these matters to legislatures, they shouldn’t 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. And, in Part V.C, I have discussed cases that can be used as foundations for such privacy-protecting legal doctrines.

But I hope that even readers who disagree with me on this jury vs. judge vs. 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.