PRIVACY WITHOUT THE STATE?

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The purpose of this symposium on information privacy is,[1] as I understand it, to take stock of how far the development of privacy as a legal concept has come, self-critically examine where the concept should go, and figure out how to get there (wherever *there* is).[2] Academic navel-gazing projects such as these can be easy to lampoon because, well, academics (myself included)[3] generally don't need a lot of encouragement toward self-importance.[4] But facilitating individual scholars, and communities of them, to take a deep breath for some introspection is really valuable for disciplinary growth and development—to check in to see if our academic research and writing is making a difference and, if so, in what directions.[5] So, thank you to Professor Woody Hartzog and the editors of the

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[1] BOS. UNIV. SCH. L., *Information Privacy Law at the Crossroads: Boston University Law Review Conference* (Nov. 3, 2023), https://www.bu.edu/law/engagements/boston-university-law-review-conference/ [https://perma.cc/N5A7-87C4].

[2] Indulging the conceit that symposiums are intended to be conversations of sorts, please forgive the simultaneously informal yet breathless style of this piece.

[3] *See generally* Scott Skinner-Thompson, *Identity by Committee*, 57 HARV. C.R.-C.L. L. REV. 657 (2022) (citing no less than nine of my prior writings). Yes! Another citation!

[4] *See* Pierre Schlag, *The Faculty Workshop*, 60 BUFF. L. REV. 807, 808 (2012) ("A kindly gentleman with a grizzled stubble of white beard and a slight stoop walked up to me very slowly. He was carrying a crinkled yellow pad filled with densely packed small script. Old school—notebook lined. 'Have you seen my podium?' he asked. 'But what would you do with a podium?' I asked. 'I would lecture, of course.' 'But there's no one here to hear you.' 'But look,' he protested, waving down the length of the garden towards the east, 'there are all these other law professors here. Surely, you can see that. Can't you?' 'Yes, but they're all busy giving their own lectures. I don't think they will listen to you.' He smiled knowingly, like a mischievous child about to pull a magic trick on a grown-up. 'That doesn't matter,' he said. 'No one understands anyway.' He tottered away.").

[5] *See* Bert-Jaap Koops, *Goodbye to Publications, or Confessions of a Privacy Law Scholar*, 20 SURV. & SOC'Y 312, 315 (2022) ("The upshot of easy publishing and hard reading is, to put it bluntly, a lack of discussion. Despite frequent and fondly formulated references to 'the debate in the literature,' there is no real debate in scholarship. At least not in writing: there is

Boston University Law Review for providing the opportunity for some of us to come together and discuss "whither forward?"

Taking that invitation seriously (but not *too* seriously), I have a couple suggestions for nudging our collective research agenda forward. Embedded in the provocations are some gentle and hopefully constructive critiques of what we've done and rough ideas for how to improve. The critiques are in many instances as applicable to my own work as they are to others and so I hope they are taken in the spirit of comradery, admiration, and shared interest in the pursuit of justice and healing.

With that prefatory throat clearing aside, I want to underscore two principal points. First, privacy scholars and advocates increasingly prioritize studying the ways in which privacy loss subordinates minoritized communities and imposes material harms on their lives. This focus ought to deepen further still. Second, as suggested by the title of this piece, while there has been increasing attention to the privacy rights of minoritized communities and the ways in which privacy can serve as an antisubordination legal tool, at times, there has been over reliance on state-centric solutions that may in fact perpetuate privacy loss and subordination, including through reliance on the carceral state and its surveillance tools. To be clear, I am not suggesting that the state has no role to play in furthering privacy in every context—it does. But given the state's tendency toward causing its own privacy violations and inequality,[6] I'm increasingly of the mind that we—as lawyers and legal scholars—need to comprehensively consider potential risks before using the law to empower state-based approaches to privacy problems.[7]

As then-Justice William Rehnquist put it in one of the first constitutional informational privacy cases, "[t]he concept of 'privacy' can be a coat of many colors, and quite differing kinds of rights to 'privacy' have been recognized in the law."[8] Since *Nixon v. Administrator of General Services*[9] was decided in 1977, the colors on the coat of privacy—that is, our understanding of the many ways privacy matters—has only multiplied. We know that privacy advances a

some at conferences, although the ubiquitous format of paper presentations is not conducive to actual debate (rather, a shortcut to keep up with recent literature one has no time to read).").

[6] *See*, *e.g.*, Whalen v. Roe, 429 U.S. 589, 605 (1977) ("We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files.").

[7] *Cf.* Ryan Calo, *Privacy, Vulnerability, and Affordance*, 66 DEPAUL L. REV. 591, 602-03 (2017) (explaining that understanding privacy as an affordance that can perpetuate or mitigate vulnerability may help lead to more nuanced lawmaking with respect to consumer privacy protections).

[8] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 546 n.1 (1977) (Rehnquist, J., dissenting).

[9] *Nixon*, 433 U.S. at 429 (1977) (concluding that a federal statute requiring that Nixon's presidential paper be possessed by the Administrator of General Services for screening did not violate Nixon's constitutional privacy rights).

whole host of values, including but not limited to, autonomy,[10] dignity,[11] equality,[12] intimacy,[13] sexuality,[14] democracy,[15] free expression,[16] free association,[17] resistance,[18] antisubordination,[19] and more. We know that privacy isn't all-or-nothing, and context matters greatly.[20] But at the same time that privacy theory and scholarship have been advancing over the last few decades, including through increased focused on the rights of minoritized communities, a strong argument can be made that both lived-privacy and formal-privacy rights have eroded, particularly for the minoritized communities most vulnerable to privacy harms.[21] The sophistication and breadth of theory coupled with the deterioration of lived-privacy and formal-privacy rights should give us pause. Perhaps this is sacrilegious to ask as an academic, but what's the theory doing?[22] What's the scholarship doing? Does theoretical coherence (a subtopic of this conference) really matter?

In short, I think the privacy scholarship has done a lot—a lot of good. But at this particular sociopolitical moment, I think a focus on theory and theoretical coherence is of *comparatively* little importance. We are living in a country and a world beset by inequality and oppression along many dimensions and under a judicial *qua* political regime[23] that is unconcerned with theory and unconcerned with coherence; instead, it is focused on exercising power to advance a particular subordinating ideology.

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[10] *E.g.*, Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 236 (1977).

[11] *E.g.*, Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Posser*, 39 N.Y.U. L. REV. 962, 974 (1964).

[12] *E.g.*, KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 97 (2017); ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 123-28 (1988).

[13] *E.g.*, JULIE C. INNESS, PRIVACY, INTIMACY, AND ISOLATION 56 (1992); Karen E.C. Levy, *Intimate Surveillance*, 51 IDAHO L. REV. 679, 681 (2015).

[14] *E.g.*, Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159, 202 (2015).

[15] *E.g.*, Joel R. Reidenberg, *Privacy in Public*, 69 U. MIA. L. REV. 141, 143 (2014).

[16] *E.g.*, Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1946 (2013).

[17] *E.g.*, Anita L. Allen, *Associational Privacy and the First Amendment:* NAACP v. Alabama*, Privacy and Data Protection*, 1 ALA. C.R. & C.L. L. REV. 1, 3 (2011).

[18] *E.g.*, Scott Skinner-Thompson, *Performative Privacy*, 50 U.C. DAVIS L. REV. 1673, 1690-92 (2017).

[19] *E.g.*, SCOTT SKINNER-THOMPSON, PRIVACY AT THE MARGINS 140-43 (2021).

[20] *See generally* HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE (2010).

[21] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (overturning half-century of precedent and concluding that the Constitution contains no right to abortion, originally grounded in the right to privacy).

[22] *Cf.* Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1906 (2013) (suggesting privacy's "bad reputation has deep roots in privacy theory").

[23] That is, the Supreme Court. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-79 (1803) (demonstrating that the Supreme Court has always been a political institution).

By way of example, prevailing Supreme Court jurisprudence provides that a Black person who has actually been subject to a violent police chokehold based on racist police practices and policies does not have standing to challenge the policy as an unconstitutional Fourth Amendment seizure,[24] and that those who have experienced privacy loss via statutory violations do not have standing.[25] But, on the other hand, inoperative businesses that may or may not have been asked to serve phantom gay couples do, it seems, have standing to assert their First Amendment rights against LGBTQ nondiscrimination laws.[26]

As another example, with no sense of irony, in the same breath that they were working assiduously to strip women and pregnant people of their right to bodily privacy and the ability to have an abortion, the Supreme Court hand wrung over their own loss of institutional privacy upon the disclosure of a draft opinion of *Dobbs*.[27]

With apologies for the militaristic (and imperfect) metaphor, but when confronting nimble and unprincipled forces from many angles, you can imagine at least two distinct tactics for doing so: universally distributing limited resources in the hopes that all fronts hold (e.g., underscoring lots of reasons why privacy matters for everyone), or investing heavily to protect the weakest flank (e.g., focusing on harm reduction for those most vulnerable to privacy loss).

All of which is to say, perhaps the best thing we can do to advance privacy at this moment is to focus less on theory, show less solicitude to coherence, and even more attention to harm reduction and the concrete material problems that flow from privacy loss for minoritized communities. I continue to believe privacy violations are manifold, of course, and that privacy as a concept can help capture myriad harms (even though privacy isn't the most apt way of describing many harms). But as many in our community have underscored, some privacy violations matter more than others.[28] Some are more material than others.

And we are struggling to mitigate some of the most egregious violations. We are still struggling to get meaningful Fourth Amendment limitations—one of the initial focuses of privacy scholarship and a problem that, among others, leaves communities of colors vulnerable to all kinds of oppressive policing. For example, the Colorado Supreme Court recently relied on the good-faith

[24] *See* City of Los Angeles v. Lyons, 461 U.S. 95, 109-11 (1983).

[25] *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 342-43 (2016).

[26] *Cf.* 303 Creative LLC v. Elenis, 143 S. Ct., 2312-13 (2023) (implicitly endorsing Tenth Circuit's conclusion that there was standing in this case).

[27] Press Release, Supreme Court of the United States (May 3, 2022), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_05-03-22 [https://perma.cc/NCB9-28RY] (providing statement of Chief Justice Roberts, where he laments "betrayal of confidences" and "egregious breach" of trust and "confidentiality of the judicial process" following leak of draft opinion in *Dobbs*).

[28] Anita L. Allen, *Dismantling the "Black Opticon": Privacy, Race, Equity, and Online Data-Protection Reform*, 131 YALE L.J.F. 907, 912 (2022) ("[G]eneric calls on behalf of all population groups are insufficient to shield the African American community from the Black Opticon.").

exception to permit introduction of evidence obtained via a "reverse-keyword warrant."[29] Reproductive and decisional privacy, always out of reach for minoritized communities including Black women,[30] are now being threatened for all (and are insufficiently foregrounded in privacy law scholars' conferences and discussions).[31] Relatedly, privacy rhetoric has been weaponized against minoritized communities, with anti-trans forces arguing that the existence of trans people in public space threatens cis peoples' privacy,[32] echoing arguments that were made against legally mandated racial integration.[33]

As such, by way of triage or, as I said, harm reduction, we should redouble our focus on the problems impacting minoritized groups and explain how those harms are concrete and material—causing violence and subordination. And we should amplify the communities affected who have been sounding this drum. For me personally, of late, that has meant standing with trans people under attack from the wave of anti-trans laws sweeping the nation, dispelling the idea that they are needed to protect privacy, and explain how they violate privacy and are motivated by animus and a bare desire to harm.[34] These laws fall into at least twelve categories and many have privacy implications that, in turn, deny the lived existence of trans people and push them from both public space and historical counter-publics. I won't go into each in detail here, but those categories are: (1) bathroom bills, (2) carceral system segregation, (3) prohibitions on gender-affirming care for minors, (4) kidnapping children from gender-affirming parents, (5) restricting gender-affirming care for adults, (6) prohibiting accurate identification documents, (7) prohibitions on accurate pronouns in schools, (8) laws that literally dictate peoples' genders, (9) the erasure of queer people from curriculum, (10) outing students to parents, (11) banning trans female athletes, and (12) drag show bans.

These are horrific and need to be challenged as violating constitutional equality and privacy provisions.

But, and here I am turning to my second overarching point regarding overreliance on the state, even when attempting to facilitate equality and

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[29] People v. Seymour, 536 P.3d 1260, 1275-80 (Colo. 2023).

[30] BRIDGES, *supra* note 12, at 5, 12; Khiara Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 122-23 (2011).

[31] For example, in the lead up to the *Dobbs* decision, the Privacy Law Scholars Conference in 2022 contained no papers, as far as I can tell, centered on reproductive justice or abortion rights. *See PLSC 2022: Historical Conference Schedule*, PRIV. L. SCHOLARS CONF., https://privacyscholars.org/plsc-history/plsc-2022/ [https://perma.cc/F78N-2JQC] (last visited May 14, 2024). As a member of the Program Committee that helped select papers for that conference, I bear some of the responsibility for that.

[32] Susan Hazeldean, *Privacy as Pretext*, 104 CORNELL L. REV. 1719, 1723-24 (2019).

[33] *See* Hannah Arendt, *Reflections on Little Rock*, DISSENT, Winter 1959, at 45, 51 ("[W]ithout discrimination of some sort, society would simply cease to exist and very important possibilities of free association and group formation would disappear."). I'm grateful to Professor Anita Allen for flagging this work of Arendt's.

[34] *See generally* Scott Skinner-Thompson, *Trans Animus*, 65 B.C. L. REV. 965 (2024).

privacy, I think we need to scrutinize our attempts to do so via bureaucracy and regulation (including carceral) and how that might retrench subordination. For instance, as it relates to regulating gender, even when communities have sought to enfranchise transgender students and create the space for their privacy, they have done so by creating extensive bureaucratic regulations that involve a whole host of regulatory processes and gatekeepers—what I have labeled "identity by committee"—that prevent true freedom and, in many ways, simply perpetuate privacy loss, albeit in new ways.[35] This is particularly true for those without the social capital to navigate the complex identity bureaucracies.

Similarly, as it relates to nonconsensual disclosure of intimate images (sometimes referred to as "revenge pornography"), privacy scholars and advocates have done an inspiring job explaining the harms that can flow from such privacy violations, and how those harms are often gendered with disproportionate impacts on women and members of the LGBTQ community.[36] But in attempting to solve this important privacy problem, the carceral state has been relied on as one of the relevant legal tools (among others, to be sure), with an increasing number of jurisdictions imposing specific criminal penalties on distributors of revenge porn.[37] Relatedly, in an effort to reduce police violence and searches of minoritized people, increased surveillance via body-worn policy cameras has at times been embraced as a solution to policing.[38] But as we know from critical feminist,[39] queer, antiracist, and abolitionist scholars, leaning into the carceral state often legitimatizes it and its oppressive tools, often with disproportionate impact on racially minoritized communities and queer communities.[40]

As such, perhaps there is space to further explore whether there are other ways of addressing privacy harms that don't prop up the state, but instead center community-based ways of living and being together, including through mutual aid, becoming ungovernable, or principles of transformative justice. In other words, what would it mean for privacy law to incorporate an abolitionist ethic?

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[35] *See* Skinner-Thompson, *supra* note 3, at 659-60.

[36] Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 65, 65-66 (2009); Ari Ezra Waldman, *Law, Privacy, and Online Dating: "Revenge Porn" in Gay Online Communities*, 44 LAW & SOC. INQUIRY 987, 989-92 (2019).

[37] *See*, *e.g.*, Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 349 (2014).

[38] *See generally* BRYCE CLAYTON NEWELL, POLICE VISIBILITY: PRIVACY, SURVEILLANCE, AND THE FALSE PROMISE OF BODY-WORN CAMERAS (2021) (suggesting body cameras can lend false legitimacy to police while simultaneously increasing their powers of surveillance).

[39] *E.g.*, Elizabeth Bernstein, *The Sexual Politics of the "New Abolitionism,"* DIFFERENCES, Dec. 1, 2007, at 128, 143 (2007).

[40] *E.g.*, Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 435-36 (2018); Dean Spade, *Intersectional Resistance and Law Reform*, 38 SIGNS 1031, 1033-35 (2013).

For instance, for many trans people, as Eric Stanley underscores,[41] the most emancipatory path forward may involve "either refusing to look to the state for recognition or confounding the state's efforts to recognize."[42] By way of example, Stanley points to Miss Major, who, after seeking state recognition of her gender identity as "female," change backed to "male" because she did not want to be understood by the state as a cis female.[43]

For those interested in reducing the state's power to police and surveil, perhaps the answer isn't equipping police with more surveillance tools like body-worn cameras, but dramatically decreasing the scale of policing writ large.[44] Indeed, as it comes to certain surveillance tools like facial recognition, bans on law enforcement use have been enacted.[45]

For victims of privacy violations such as nonconsensual pornography or other intimate privacy violations, perhaps the solution isn't criminalization (or even civil lawsuits, as I've at times suggested),[46] but should start with attempts at reconciliation and restorative or transformative justice that foreground redemptive and nonpunitive approaches to individual acts of harm while simultaneously relying on truth-telling to name the harm and prevent its reiteration.[47] Indeed, as Danielle Citron has powerfully argued, before the carceral system is relied on, its "pathologies" including entrenched racism need to be addressed and, in any event, criminal enforcement should be used sparingly to address only the most egregious intimate privacy violations.[48]

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[41] ERIC A. STANLEY, ATMOSPHERES OF VIOLENCE: STRUCTURING ANTAGONISM AND THE TRANS/QUEER UNGOVERNABLE 122-23 (2021).

[42] Scott Skinner-Thompson, *Trans Emancipation Through Challenging the State*, LAW & POL. ECON. (Oct. 27, 2022), https://lpeproject.org/blog/trans-emancipation-through-challenging-the-state/ [https://perma.cc/2BNF-NSVC] (reviewing STANLEY, *supra* note 41).

[43] STANLEY, *supra* note 41, at 122-23.

[44] *See generally* Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020).

[45] EVAN SELINGER & WOODROW HARTZOG, THE CASE FOR BANNING LAW ENFORCEMENT FROM USING FACIAL RECOGNITION TECHNOLOGY 3-4 (2020), https://theappeal.org/wp-content/uploads/2020/12/20.08_Facial-Recognition-1.pdf.

[46] Scott Skinner-Thompson, *Privacy's Double Standards*, 93 WASH L. REV. 2051, 2071-80 (2018).

[47] *Cf.* DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 54-55 (1999) (explaining that under restorative justice approaches, "central concern is not retribution or punishment," but rather "healing of breaches, the redressing of imbalances, the restoration of broken relationships, a seeking to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community" they have injured by their offense).

[48] DANIELLE KEATS CITRON, THE FIGHT FOR PRIVACY: PROTECTING DIGNITY, IDENTITY, AND LOVE IN THE DIGITAL AGE 140-43 (2022).

I can imagine different answers in different contexts (for example, government regulation of surveillance capitalists seems essential)[49] and am not definitively putting my scale on the thumb of one universal approach to all privacy problems. Undoubtedly, solving privacy problems without overreliance on the liberal state and the costs of subordination that often attend to it will be difficult. But given the brilliance, resilience, and dedication of privacy law scholars, I feel confident that by continuing to pay attention to issues of antisubordination and questioning how proposed state-based solutions might retrench inequality, we can get closer to a world in which privacy is protected while other systems of social control are diminished.

[49] *See generally* Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369 (2016).