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### A Prolegomenon to Any Future Restatement of Privacy Symposium: Restatement of

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#### Recommended Citation

Ronald J. Krotoszynski Jr., *A Prolegomenon to Any Future Restatement of Privacy Symposium: Restatement of*, 79 Brook. L. Rev. 505 (2013).

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# A Prolegomenon to Any Future Restatement of Privacy\*

Ronald J. Krotoszynski, Jr.<sup>†</sup>

## INTRODUCTION: THE ALI AND PRIVACY RIGHTS

The American Law Institute (ALI) has played an important, indeed crucial, role in the advancement of privacy rights. Most notably, the ALI advocated for the repeal of anti-sodomy laws<sup>1</sup> almost a full half century before the Supreme Court's landmark ruling in *Lawrence v. Texas*<sup>2</sup> held such enactments to be unconstitutional.<sup>3</sup> As Professor Bill Eskridge, Jr. notes, the ALI "had in 1955 voted to exclude consensual sodomy from the Model Penal Code (which the Institute ultimately adopted in 1962)."<sup>4</sup> The ALI's reasoning for this decision "was that consensual sodomy laws inevitably engendered police corruption and arbitrary enforcement and

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<sup>†</sup> John S. Stone Chair, Director of Faculty Research, and Professor of Law, University of Alabama School of Law. With thanks to Professor Anita Bernstein, for both organizing and inviting me to participate in the *Restatement of . . .* symposium, and to the American Law Institute and Brooklyn Law School for supporting the event. Thanks also to the other presenters and attendees, who generously offered very helpful and constructive comments on this Article; my contribution reflects the benefit of their ideas and suggestions. I would like to acknowledge the support of the University of Alabama Law School Foundation, which provided generous research support for my work on this project (in the form of a summer research grant). I also wish to thank the Lewis & Clark Law School for hosting me as a visiting scholar in residence during the summer of 2013, while I was working on this project. As always, any and all errors and omissions are my responsibility alone.

<sup>1</sup> See MODEL PENAL CODE § 213.2 (Proposed Official Draft 1962); MODEL PENAL CODE § 207.5 (Tentative Draft No. 4, 1955); see also William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1926 (2012) (observing that "the drafters of the Model Penal Code were not inclined to criminalize conduct that pleased its perpetrators and did not harm other persons, and they did not care that such conduct violated some natural law ideal" and noting that "the final version of the Code, ratified by the ALI in 1962, decriminalized consensual fornication, adultery, sodomy, and cohabitation").

<sup>2</sup> 539 U.S. 558 (2003).

<sup>3</sup> See *id.* at 562, 577-79.

<sup>4</sup> William N. Eskridge, Jr., *The Marriage Cases—Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, 97 CALIF. L. REV. 1785, 1798 (2009).

that invading people's private consensual sexual activities did not advance the public interest."<sup>5</sup>

So too, the ALI promoted the liberalization of abortion laws over a decade before the Supreme Court's decision in *Roe v. Wade*.<sup>6</sup> As one commentator observed, "Although there has been continued agitation for abortion law reform or repeal in this country since at least the 1920s, the modern abortion-rights movement generally traces its origins to 1959, when the American Law Institute (ALI) published its proposed revisions to existing state abortion laws."<sup>7</sup>

In light of these tremendously important contributions to the development and protection of privacy rights in the United States, it would be fair to say that although the ALI has never undertaken to create a formal *Restatement of the Law of Privacy*, the organization has been at the forefront of advancing and securing privacy for many years. Both of these earlier law reform proposals were, at least in the context of their times, strikingly bold. Indeed, it has always been a hallmark of the ALI to ask and answer hard questions—and to refuse to simply credit the argument that "this is how things are" as a persuasive rationale for maintaining particular legal rules and practices.<sup>8</sup>

In this article, I will sketch some of the problems and issues that would confront an effort to create a *Restatement of the Law of Privacy*. In some important respects, the ALI's reform efforts aimed at securing the repeal of state criminal laws regulating private sexual conduct and abortion were substantially easier to address—notwithstanding the controversial nature of the underlying subject matter—than the many and varied legal

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<sup>5</sup> *Id.*; see also WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003 118-24 (2008) (describing and discussing the ALI's important role in promoting the repeal of anti-sodomy laws).

<sup>6</sup> 410 U.S. 113 (1973). The ALI's draft of the MODEL PENAL CODE, issued in 1959, called for substantial liberalization of abortion regulations, to permit legal abortions (1) if necessary to protect the life or health of the mother, (2) if a pregnancy was the result of either rape or incest, or (3) if the gestating fetus was likely to suffer from significant birth defects. MODEL PENAL CODE § 207.11 (Tentative Draft No. 9, 1959).

<sup>7</sup> Brian W. Clowes, *The Role of Maternal Deaths in the Abortion Debate*, 13 ST. LOUIS U. PUB. L. REV. 327, 328 (1993).

<sup>8</sup> See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). Justice Holmes famously argued that:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

*Id.*; see also *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (citing and quoting to Holmes on this point).

and policy questions surrounding the concept of privacy more generally. One has only to look at contemporary newspaper headlines to see that the issue of privacy, in 2014, presents myriad complexities.<sup>9</sup> Whether you are concerned about Google Earth filming your street and home or the National Security Agency snooping on whom you call on your cell phone and what websites you visit, privacy issues have cross-cutting and polycentric attributes that render them difficult to collect, synthesize, and restate.

The ALI presently has a principles project underway on privacy and data protection, but even this project faces serious difficulties because of the transnational nature of data flows. Simply put, a privacy regime limited to the United States will not be sufficient to prevent or deter the collection and dissemination of personal data in the wider world.

To facilitate the successful completion of a *Restatement of Privacy*, the ALI must effectively address two major problems. First, the concept of privacy would need to be defined with greater precision. At present, privacy lacks clear contours and meaning.<sup>10</sup> As Professor James Q. Whitman has observed, “[H]onest advocates of privacy protections are forced to admit that the concept of privacy is embarrassingly difficult to define.”<sup>11</sup> We would have to agree on the discrete interests that fall under the rubric of privacy before we could seek to restate the field. Second, and to a degree not present in most other areas of the law, successfully securing privacy interests would require transnational cooperation.<sup>12</sup> Restating privacy law, at least in the context of data protection and the privacy torts, cannot be solely a domestic affair.

I do not suggest that it would be impossible to create a Restatement of privacy; I do believe that such a project would

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<sup>9</sup> See, e.g., Ron Nixon, *Postal Service Is Watching, Too: Outside of All Mail Is Recorded*, N.Y. TIMES, July 4, 2013, at A1, A16 (describing high-tech spying operations conducted by the U.S. Postal Service, which include photographing and storing “the exterior of every piece of mail that is processed in the United States—about 160 billion pieces last year”). There is no judicial review or oversight of the use of the data gathered by the USPS. See *id.* Of course, government spying efforts are only one piece of the puzzle; the increased use of networked computers has created vast opportunities for private companies to collect, store, and sell personal data too. See, e.g., Julia Angwin & Jennifer Valentino-DeVries, *Google’s iPhone Tracking*, WALL. ST. J., Feb. 17, 2012, <http://online.wsj.com/article/SB10001424052970204880404577225380456599176.html> (describing and discussing Google’s practice of “bypassing the privacy settings of millions of people using Apple Inc.’s Web browser on their iPhones and computers”).

<sup>10</sup> See *infra* notes 13-23 and accompanying text.

<sup>11</sup> James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1153 (2004).

<sup>12</sup> See *infra* notes 54-58 and accompanying text.

be very difficult. In the balance of this article, I will explore and explicate these themes.

## I. TOWARD A RESTATEMENT OF PRIVACY LAW: THE PROBLEM OF DEFINING “PRIVACY”

The current absence of a *Restatement of the Law of Privacy* should not be entirely surprising. Privacy is a protean concept that seems to mean everything—and nothing—at the same time. In a previous work, I have explored in some detail the ambiguity of privacy—both in U.S. law and transnationally.<sup>13</sup> Although I will not repeat my argument in full, some of the main points have immediate relevance here.

A comprehensive and effective Restatement of privacy would, as an initial matter, have to establish a persuasive working definition of precisely what interests fall within its rubric. Given the difficulty of this definitional project, it might well be easier, and perhaps even more effective, to disaggregate privacy interests and only address discrete privacy issues incident to other Restatements. Under this approach, privacy is not restated, nor in need of restatement as such, because it does not really constitute a discrete and self-contained area of law, like torts, property, or contract. For example, Prosser’s privacy torts could be left in the *Restatement of Torts*;<sup>14</sup> privacy issues in the workplace could be addressed in the *Restatement of Employment Law*; search and seizure law incident to police law, and the rules governing reproductive rights would be located elsewhere—wholly separate and distinct from Restatement rules governing data protection and privacy in the workplace. Continuing that idea, a Restatement of consumer law could include data protection protocols for web-based transactions, but would not address the privacy torts. And so forth. In other words, rather than attempt to create an independent law of privacy, privacy could simply be disaggregated and assimilated into other substantive areas of the law. Thus, this approach would avoid the difficulty of articulating and applying a more concrete and functional definition of privacy.

Although this potential solution to the problem of privacy initially might seem quite promising, I am not convinced that it presents a viable solution. We speak of privacy and privacy

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<sup>13</sup> See Ronald J. Krotoszynski, Jr., *The Polysemy of Privacy*, 88 IND. L.J. 881 (2013). I am presently at work on a book-length treatment of the concept of privacy, from a comparative law perspective, forthcoming from Oxford University Press in 2015 or 2016.

<sup>14</sup> RESTATEMENT (SECOND) OF TORTS § 652A–E (1977).

interests in our regular everyday lives and the concept plays a central role in contemporary human rights jurisprudence in the United States.<sup>15</sup> Privacy is a concept with tremendous social, political, moral, and even economic salience. To pretend that privacy *qua* privacy does not exist would probably not constitute a workable solution in the long run. If we cannot slay the privacy hydra, then we must learn to live with the privacy hydra.

Toward this end, we should start by identifying and explicating those interests that, properly understood, come within the rubric of “privacy.” I will not attempt a comprehensive listing of privacy interests here. But in the United States, privacy encompasses readily identifiable interests, such as freedom from unreasonable searches and seizures, data protection, and Prosser’s famous basket of torts rights,<sup>16</sup> including intrusion upon seclusion, false light, public disclosure of private facts, and appropriation of personality.<sup>17</sup> In the United States, we also tend to assimilate fundamental liberty interests associated with the most important life choices into the concept of privacy.<sup>18</sup>

The concept of privacy is no less broad, or dense, than the concept of “property,” another legal construct used to define and protect myriad related, but distinct, legal interests.<sup>19</sup> An important difference exists, however, between privacy on the one hand, and property on the other. In both the United States and the wider world, we seem to have worked out a reasonably choate list of things that constitute “property” and we have general transnational agreement about what does—and does not—constitute a legitimate property interest. Because a reasonably broad global consensus exists regarding the content

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<sup>15</sup> See *infra* notes 38-53 and accompanying text.

<sup>16</sup> William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). For a thoughtful discussion of Prosser’s contribution to privacy as tort, see generally Neil M. Richards & Daniel J. Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887 (2010).

<sup>17</sup> RESTATEMENT (SECOND) OF TORTS § 652A-E (1977); see also Krotoszynski, *supra* note 13, at 882-88.

<sup>18</sup> See Krotoszynski, *supra* note 13, at 882, 906-07.

<sup>19</sup> Interestingly, the RESTATEMENT (THIRD) OF PROPERTY has been divided into different sections, so although property presents a more unified field of law than privacy, the drafting committee has decided that dividing the subject would bring greater coherence to the restatement effort. Thus, the restatement of property law spans four separate and distinct subfields: the RESTATEMENT (SECOND) OF PROPERTY (LANDLORD AND TENANT LAW) (1977), the RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) (1997); the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) (2000); and the RESTATEMENT (THIRD) OF PROPERTY (WILLS AND OTHER DONATIVE TRANSFERS) (2013). For an instructive discussion of how nomenclature and descriptive divisions matter in property law, see generally Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105 (2003).

and scope of property rights, securing these interests effectively should be considerably easier than securing privacy interests.<sup>20</sup> Simply put, privacy is a concept that is more locally situated than property; accordingly, domestic understandings of privacy vary more widely than do domestic understandings of property. Local culture strongly informs and shapes the articulation and protection of privacy interests with particular legal systems.

Other definitional interests also would have to be addressed and resolved in framing the scope of a Restatement of privacy. For starters, privacy straddles, indeed criss-crosses, the public/private law dichotomy.<sup>21</sup> By this, I mean that privacy rights involve expectations and demands running against both the state and non-state actors.<sup>22</sup> We certainly expect the government to respect our privacy, but we should be equally concerned about our privacy vis-à-vis each other and private corporations.<sup>23</sup>

Google and Microsoft present as much of a threat to *privacy as non-disclosure*<sup>24</sup> as the local city government (and

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<sup>20</sup> The nature of property also makes effective regulation easier—although I should not overstate this point. Intellectual property, which need not be tangible, presents some of the same difficulties as privacy. Tangible property, by way of contrast, exists within only one jurisdiction. Accordingly, the ability to make and enforce property regulations can be accomplished with reasonable efficacy.

<sup>21</sup> See Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); see also Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1368-69 (2003) (noting that many government functions are being delegated to nominally private entities and that “[p]rivatization is now virtually a national obsession”).

<sup>22</sup> See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 884-86 (1986) (discussing the state action doctrine and its potential relevance to establishing obligations on government to regulate private action); Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302 (1995) (discussing and critiquing the state action doctrine’s relevance to limiting the scope and effect of constitutional rights).

<sup>23</sup> See generally Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1412-16 (1986) (arguing that, in the context of free speech, the power of private companies to censor or restrict speech can be every bit as harmful to the marketplace of ideas—perhaps even more harmful—than government efforts at censorship). Professor Fiss suggests that the use of government regulatory power could actually enhance, rather than degrade, the marketplace of ideas. He suggests that “[j]ust as it is no longer possible to assume that the private sector is all freedom, we can no longer assume that the state is all censorship.” *Id.* at 1415. The same basic argument holds true with respect to securing privacy interests against large, monopolistic corporations as well. Government regulation of entities like Google, Microsoft, and Facebook might well enhance personal freedom rather than inhibit it—especially with respect to vesting effective control over personal information and data in those who use the platforms that these companies provide.

<sup>24</sup> One could also characterize this interest as “informational privacy,” that is, the ability to control the gathering and dissemination of personal information, whether by the government or other persons. See *R. v. Cole*, [2012] 3 S.C.R. 34, para. 42 (Can.) (“Our concern is thus with *informational privacy*: “[T]he claim of individuals, groups, or institutions to

probably more). Monopolistic or oligopolistic corporations that collect, store, and sell personal data on a massive scale likely present a serious, but largely unaddressed, threat to privacy as non-disclosure in the United States. At the same time, however, privacy rights certainly involve expectations running against the state as well. Thus, unlike tort, contract, or foreign relations law, a comprehensive and universal Restatement of privacy law would need to expressly address privacy standards for both government and non-government actors.

An additional difficulty would involve how best to create and define privacy rights. Are these primarily individual rights or are they collective rights? Or perhaps both? Do we think privacy protections are primarily designed to protect an individual's interest in non-disclosure and autonomy? Or should privacy rights, properly conceived, be thought of in terms of groups that might have collective expectations of privacy (such as students, office workers, or journalists)?<sup>25</sup> To provide another concrete example, one could think about privacy in the workplace as being about the status of workers as a group or, alternatively, about the rights of individuals who happen to be in a workplace. As I have previously noted, "in the United States more often than not we tend to frame human rights in terms of the individual rather than the group."<sup>26</sup>

The conceptualization of privacy rights as being individual or collective could have important implications for their scope. For instance, in the area of free speech jurisprudence, the Supreme Court has tended to create context-specific rules for speech—thus, the free speech rights of public school students<sup>27</sup> and public employees<sup>28</sup> are not the same as those of an angry proselytizer speaking from a soap box located on a public sidewalk or in a park.<sup>29</sup> Government employees as a class, for example, possess significantly degraded free speech rights within the workplace.<sup>30</sup>

I suppose that theorizing privacy rights in terms of groups rather than individuals need not necessarily imply reduced rights

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determine for themselves when, how, and to what extent information about them is communicated to others" (quoting *R v. Tessling* [2004] 3 S.C.R. 432, para. 23 (Can.)).

<sup>25</sup> See Krotoszynski, *supra* note 13, at 910-13.

<sup>26</sup> *Id.* at 911.

<sup>27</sup> See *Morse v. Frederick*, 551 U.S. 393 (2007); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>28</sup> See *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

<sup>29</sup> See *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Hague v. C.I.O.*, 307 U.S. 496 (1939).

<sup>30</sup> *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011); *Garcetti v. Ceballos*, 547 U.S. 410 (2006).



for those in groups (such as government workers in the free speech context), but this could well be how matters would come to rest. More absolute rights, drawn around the individual, without regard to the particular context at issue, might better secure privacy interests against government abridgment. On the other hand, government would likely resist broader privacy protections in the context of schools, government workplaces, and the like precisely because it would claim a managerial need for snooping.<sup>31</sup>

Other conceptual difficulties would have to be addressed. For example, in the jurisprudence of many European domestic constitutional courts, and also the European Court of Human Rights, it is possible to be “private in public.”<sup>32</sup> In other words, the fact that one happens to be in a public place does not automatically defeat a claim of a reasonable expectation of privacy.<sup>33</sup> In the United States, our jurisprudence generally rejects out of hand the notion that one can be private in public.<sup>34</sup> We could certainly maintain this position with respect to a purely domestic Restatement of privacy, but such an approach would complicate the creation of a more global consensus about the proper meaning and scope of privacy rights. For privacy protections to effectively protect our personal data, some sort of transnational system of regulation will probably be essential.

A more generalized problem is the interplay of privacy with commitments to expressive freedom—particularly the freedom of speech and of the press. In the United States, we generally privilege expressive freedom over safeguarding privacy, human dignity, and personal honor. The Supreme Court’s relatively recent decisions in *Sorrell v. IMS Health Inc.*<sup>35</sup> and

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<sup>31</sup> On the government as a manager and how that role could legitimately inform the potential scope of constitutional rights within the workplace, see Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 153, 164-67 (1996).

<sup>32</sup> See N.A. Moreham, *Privacy in Public Places*, 65 CAMBRIDGE L.J. 606 (2006) (discussing the commonly held position in Europe that it is possible for a public official or public figure to possess a reasonable—and legally protected—expectation of privacy while in an otherwise public place or area).

<sup>33</sup> See, e.g., *Campbell v. MGN Ltd.*, [2004] 2 A.C. 457 (H.L.) (appeal taken from Eng.).

<sup>34</sup> See *Snyder v. Phelps*, 131 S. Ct. 1207, 1213, 1217-20 (2011).

<sup>35</sup> 131 S. Ct. 2653, 2668-72 (2011). For a thoughtful and highly persuasive discussion of the possible implications that a broad interpretation of the holding in *Sorrell* could have on government efforts (whether legislative or judicial) to protect privacy, see Ashutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855 (2012). Professor Bhagwat argues that the broader implications of Justice Kennedy’s majority opinion in *Sorrell* could “have dramatic, and extremely troubling, implications for a broad range of existing and proposed rules that seek to control disclosure of personal information in order to protect privacy.” *Id.* at 856.

*Snyder v. Phelps*<sup>36</sup> reflect this ordering of values. In both cases, expressive freedom trumped state law efforts to protect privacy.<sup>37</sup>

## II. THE SALIENCE OF PRIVACY IN THE UNITED STATES: WHY THE LAW OF PRIVACY MIGHT BE WORTH RESTATING

Privacy's salience, at least in the United States, arises in no small measure because of the weight and importance of the autonomy interests that the Supreme Court of the United States has brought under the privacy aegis. Simply put, we look to privacy to protect autonomy interests central to human self-definition and dignity, such as reproductive rights and the ability to enjoy some measure of sexual autonomy—at least between consenting adults, in private, and not for direct forms of remuneration.

The joint opinion in *Planned Parenthood v. Casey*<sup>38</sup> provides an important and highly relevant illustration of the centrality of constitutional *privacy as autonomy*<sup>39</sup> in U.S. human rights law:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education . . . . Our precedents “have respected the private realm of family life which the state cannot enter.” *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>40</sup>

In *Casey*, the concept of constitutional privacy relates directly to the freedom to make central decisions about our personal lives free and clear of state compulsion. Individuals have

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<sup>36</sup> 131 S. Ct. at 1217-20.

<sup>37</sup> See *id.* at 1218-20 (rejecting privacy justification for imposing liability for speech on a matter of public concern); *Sorrell*, 131 S. Ct. at 2668, 2672 (rejecting a privacy-based justification for a legal prohibition on the sale of physicians' prescription data to pharmaceutical companies for use in marketing programs aimed at doctors).

<sup>38</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (joint opinion).

<sup>39</sup> By “privacy as autonomy,” I mean the ability to exercise agency or control over important decisions central to one's self-definition and happiness. See, e.g., *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 166 (Can.) (Wilson, J., concurring) (“Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.”).

<sup>40</sup> *Casey*, 505 U.S. at 851.

a constitutional right to “define one’s own concept of existence, of meaning, of the universe, and the mystery of human life.”

Of course, the authors of the joint opinion cannot mean literally what they seem to be saying. Moreover, subsequent cases, such as *Washington v. Glucksberg*,<sup>41</sup> and *Gonzalez v. Raich*,<sup>42</sup> demonstrate that concrete limits and exceptions cabin the scope of this constitutionally protected realm of individual liberty. To be clear, I am not suggesting that Justices O’Connor, Kennedy, and Souter—the authors of the *Casey* joint opinion—erred in finding a constitutionally protected liberty interest that encompasses reproductive choice. On the other hand, *Casey*’s remarkably broad language does little to help clarify the actual metes and bounds of this constitutionally protected zone of personal autonomy.

At least arguably, the *Casey* joint opinion’s broad but imprecise language about the centrality of human freedom and dignity both establishes the need for a Restatement of privacy and also the profound difficulty of undertaking the task. The problem with constitutional privacy, running all the way back to *Lochner*-era cases like *Pierce v. Society of Sisters*<sup>43</sup> and *Meyer v. Nebraska*,<sup>44</sup> is a lack of adequate specificity regarding how the conflicting values at issue—the right of the individual to be self-regulating in matters of central importance to happiness and identity on the one hand, and the right of the community, acting through democratically constituted institutions of government, to establish rules that permit peaceful coexistence over time, on the other—should be reconciled.

*Casey* provides a salient example of the Supreme Court embracing privacy as a means of describing and delimiting fundamental liberty interests. *Lawrence v. Texas*<sup>45</sup> provides another. Writing for the majority in *Lawrence*, Justice Kennedy argues:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. “It is a

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<sup>41</sup> 521 U.S. 702 (1997); see also *Vacco v. Quill*, 521 U.S. 793 (1997).

<sup>42</sup> 545 U.S. 1 (2005).

<sup>43</sup> 268 U.S. 510 (1925).

<sup>44</sup> 262 U.S. 390 (1923).

<sup>45</sup> 539 U.S. 558 (2003).

promise of the Constitution that there is a realm of personal liberty which the government may not enter.”<sup>46</sup>

This language reflects the same general framing device used in the *Casey* joint opinion—that the government may not legitimately “control the destiny” of human beings, at least insofar as private, consensual sexual conduct between consenting adults is at issue. But, as with *Casey*, the exact scope of this “realm of personal liberty which the government may not enter” goes largely undefined.

To be sure, Justice Kennedy’s opinion does seem to place significant weight on the notion of privacy within one’s home or dwelling. He explains that:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person in both its spatial and more transcendent dimensions.<sup>47</sup>

In that portion of the opinion, Justice Kennedy plainly invokes a tradition, reflected in the common law, that conveys autonomy on individuals when in their own home.<sup>48</sup> But, even here, Justice Kennedy almost immediately discards this limitation in favor of endorsing broader, more open-ended language: “Freedom extends beyond spatial bounds,”<sup>49</sup> and constitutionally protected liberty “presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>50</sup>

The problem, obviously enough, is that these unrelated interests are quite disparate and canvass a great deal of wholly unrelated territory. Were the ALI to undertake an effort to restate the law of privacy, the discrete interests to be protected would need to be identified and described in much finer detail. The language in *Casey* and *Lawrence* reads quite nicely as poetry, but fails to provide adequate concrete guidance regarding

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<sup>46</sup> *Id.* at 578 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992)).

<sup>47</sup> *Id.* at 562.

<sup>48</sup> See *Stanley v. Georgia*, 394 U.S. 557, 564-66 (1969); see also *Whitman*, *supra* note 11, at 1211-19 (discussing the deep-seated tradition in U.S. law of relating legally protected privacy interests to “the sanctity of the home”).

<sup>49</sup> *Lawrence*, 539 U.S. at 562.

<sup>50</sup> *Id.*

the inevitable balancing that privacy claims require. More specifically, neither decision clearly addresses how lower federal and state courts should go about balancing an individual's privacy claim against the government's response that a particular regulation advances a sufficiently important interest in a reasonably tailored way to survive constitutional review.<sup>51</sup>

Like Justice Hugo L. Black, we can all like our privacy as much as the next person, even if one person's concept of privacy varies considerably from another person's understanding of the concept.<sup>52</sup> And, to borrow Justice Stewart's infelicitous turn of phrase, perhaps we are to know privacy when we see it.<sup>53</sup> In any event, any potentially successful attempt to restate privacy law comprehensively would require identifying with far greater precision precisely what rights and interests fall within the concept of privacy—and which do not. At the same time, however, the *centrality* and the *persistence* of privacy as an important legal construct suggest that an effort to better articulate precisely what privacy means could help bring needed clarity to an important area of the law.

### III. THE NEED FOR A GLOBAL APPROACH: AN EFFECTIVE RESTATEMENT OF PRIVACY WOULD REQUIRE TRANSNATIONAL AGREEMENT ON HOW BEST TO SECURE BOTH PRIVACY INTERESTS AND CONFLICTING VALUES SUCH AS FREE SPEECH AND PRESS RIGHTS

At least in some important respects, a workable system of privacy protection will have to be transnational in scope if it is to secure privacy interests reliably and effectively against abridgment (whether by the state or non-government actors). For example, an effective data protection regime cannot rely solely on a single sovereign, unless the Internet can somehow be cabined within a single national jurisdiction. To be sure,

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<sup>51</sup> See AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 75-78, 340-78 (Doron Kalir, trans., 2012) (discussing the judge's inevitable task of balancing when constitutional rights come into conflict with legitimate social policies).

<sup>52</sup> *Griswold v. Connecticut*, 381 U.S. 479, 510 (1965) (Black, J., dissenting) ("I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.")

<sup>53</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of obscenity]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.")

China's successful efforts at censorship on a mass scale<sup>54</sup> suggest that it is possible to nationalize and police the content available to one's citizens on the web. But in most democratic nations committed to the rule of law, official government censorship of this scope would be politically unthinkable (or so I would have thought, prior to the lack of much of a domestic public response to Edward Snowden's highly troubling revelations about the NSA's massive domestic spying programs).<sup>55</sup> So too, if privacy law should afford some measure of protection against disclosure of private facts, it would be helpful to publishers of all stripes, and in all jurisdictions, to have a better sense of where to draw the line between matters of public concern and a subject's legally protected private life.

Most legal and policy questions do not require transnational agreement for a system of regulation to be effective. For example, a nation can make a more or less free choice regarding when to permit the lawful sale of alcohol or tobacco based on age. If a jurisdiction establishes a minimum age of 21 for the lawful purchase, possession, and use of these products, this legal rule will have no necessary effect on a neighboring polity's decision to adopt 18 years of age instead. The decision of where to set the age of majority for these products is largely, if not entirely, local in effect and capable of effective enforcement on a local basis.

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<sup>54</sup> See Didi Kirsten Tatlow, *U.S. Prism, Meet China's Golden Shield*, INT'L HERALD TRIB. (June 28, 2013, 3:10 AM), [http://rendezvous.blogs.nytimes.com/2013/06/28/u-s-prism-meet-chinas-golden-shield/?\\_r=0](http://rendezvous.blogs.nytimes.com/2013/06/28/u-s-prism-meet-chinas-golden-shield/?_r=0) (noting that "Golden Shield is over a decade old, an overarching monitoring network spun by the state that encompasses the colloquially-named Great Firewall of Internet censorship"); see also Ronald J. Krotoszynski, Jr., *The Irrelevant Wasteland: An Exploration of Why Red Lion Doesn't Matter (Much) in 2008, the Crucial Importance of the Information Revolution, and the Continuing Relevance of the Public Interest Standard in Regulating Access to Spectrum*, 60 ADMIN. L. REV. 911, 919 n.27, 936-37 (2008) (discussing the censorship of the Internet in China and several other nations, including North Korea and Cuba).

<sup>55</sup> See, e.g., Michael Birnbaum & Ellen Nakashima, *U.S. Accused of Eavesdropping on German President*, WASH. POST, Oct. 24, 2013, at A10 (noting that although Edward Snowden's revelations had largely "settled in the United States" only a few months after their release, his revelations remained highly charged and politically relevant in Western Europe). Even a relatively modest proposal to improve the oversight powers of the FISA court produced predictable political responses and seems unlikely to be enacted. See Siobhan Gorman, Carol E. Lee, & Janet Hook, *Obama Vows Spying Overhaul: NSA Leaker Snowden's Revelations Hasten Call to Revamp Surveillance Court and Patriot Act*, WALL ST. J. (Aug. 10, 2013, 5:40PM), <http://online.wsj.com/news/articles/SB40001424127887324522504579002653564348842> (reporting on reforms proposed by the Obama Administration to NSA oversight by the FISA court and noting that the president's proposed reforms "drew sharp responses from Republican lawmakers who suggested the president was retreating under political pressure").

The same would be true with respect to setting a minimum age for voting in national elections—most nations use 18 as the age of voting majority, but this not universally true.<sup>56</sup> In Austria, persons at least 16 years of age are entitled to vote in national, state, and local elections (but not in elections for the European Parliament, which requires that all electors be at least 18 years of age).<sup>57</sup> As with the minimum age of majority for alcohol and tobacco products, one nation's policy choice on this question will not significantly affect or impede another's.

However, given the interconnected and global nature of information technology systems, a single nation will be unable to regulate data flows beyond its own borders. Thus, for a system of privacy protection of personal data to be effective, some level of global consensus will be necessary. Data located in the cloud is arguably everywhere and nowhere at the same time. Certainly, it would be difficult, perhaps impossible, to determine the physical location of the data. So too, if a web page can be viewed anywhere in the world at any time, attempting to ascertain its "real" physical location would constitute an exercise in futility.

Information captured and stored in one jurisdiction will not be subject to regulations made and enforced by a government somewhere else—even if the data relates to citizens of that jurisdiction. Privacy, at least with respect to control over the disclosure or non-disclosure of personal data, raises difficult questions about the potential efficacy of domestic regulatory efforts. In this field, going it alone will likely not produce acceptable results. The question of whether an effective national regulatory regime for data storage and transfer could be successfully enforced represents the second wave (with the first being the definitional problems associated with privacy as a legal construct).<sup>58</sup> The transnational aspects of the problem of privacy regulation begin, but do not end, with the problem of data existing simultaneously within multiple jurisdictions.

Conflicts between constitutionally protected rights of free expression and privacy are another area that would seem to

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<sup>56</sup> See Vivian E. Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority*, 77 BROOK. L. REV. 1447 (2012) (arguing that the U.S. should follow the lead of several other democratic polities and lower the minimum voting age below 18).

<sup>57</sup> Joshua Gans, *Why It's Time To Give Children The Right To Vote*, FORBES (Apr. 20, 2012, 5:17 PM), <http://www.forbes.com/sites/joshuagans/2012/04/20/its-time-to-give-children-the-vote/>.

<sup>58</sup> See *supra* notes 13-24 and accompanying text.

require some form of transnational agreement and cooperation.<sup>59</sup> An exclusively local effort at restating, and renormalizing, privacy law would be insufficient because a blog post in Indianapolis can have serious reputational effects in Brisbane, Australia, or Frankfurt, Germany. Because a great deal of speech is no longer truly local, an exclusively U.S.-based effort to conceptualize privacy will not succeed in providing clear guidance to either publishers or those who trade in personal data.

The different nomenclature used to afford protection to privacy interests also must be taken into consideration.<sup>60</sup> In other democratic polities, like Germany, the nomenclature of privacy is different than in the United States.<sup>61</sup> As Professor Whitman argues, “[c]ontinental privacy protections are, at their core, a form of protection of a right to *respect* and *personal dignity*.”<sup>62</sup>

In fact, the word “privacy” simply does not appear in the German Basic Law (Germany’s constitution).<sup>63</sup> Instead, the Basic Law conveys protection for legal interests such as “dignity,” “free development of the personality,” and “personal honor”;<sup>64</sup> these concepts, individually and in conjunction, create and protect a sphere of personal autonomy and privacy.<sup>65</sup> However, privacy lacks much constitutional salience as a legal construct in Germany. If one wishes to consider the concept of privacy in Germany, one must investigate judicial decisions implicating dignity, personal development, and honor.<sup>66</sup> The law’s goals and

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<sup>59</sup> See Timothy Zick, *The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. REV. 941 (2011); Timothy Zick, *Falsely Shouting Fire in a Global Theater: Emerging Complexities of Transborder Expression*, 65 VAND. L. REV. 125, 174 (2012).

<sup>60</sup> See Whitman, *supra* note 11, at 1153-59.

<sup>61</sup> See *id.* at 1160-64.

<sup>62</sup> *Id.* at 1161.

<sup>63</sup> See Krotoszynski, *supra* note 13, at 906.

<sup>64</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 1(1) (Ger.) (“Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”); *id.* art. 2(1) (“Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.”); *id.* art. 5(2) (limiting the scope of protected expressive freedoms under the Basic Law when such limits arise by operation of “the provisions of general laws, in provisions for the protection of young persons, and *in the right to personal honor*”) (emphasis added).

<sup>65</sup> Krotoszynski, *supra* note 13, at 903-06; see Whitman, *supra* note 11, at 1180-89 (discussing and describing the development and sources of “privacy” protection in Germany, which generally relate to laws aimed at protecting personal honor, reputation, and dignity).

<sup>66</sup> See Whitman, *supra* note 11, at 1153-60 (discussing legal, cultural, and political differences in framing and protecting autonomy interests in the United States and Europe). As Professor Whitman notes, “[e]vidently, Americans and continental Europeans perceive privacy differently.” *Id.* at 1159.



objectives are quite similar in Germany as in the United States, but the precise means used to advance and achieve these goals is somewhat different.<sup>67</sup> Any serious effort to create a general model, or template, for recognizing and protecting privacy interests would need to take careful account of the variation that exists in labeling these interests.<sup>68</sup>

Moreover, these differences in nomenclature are not merely semantic; the labels used to describe protected autonomy interests reflect deep socio-jurisprudential commitments, not mere accidents of legal drafting.<sup>69</sup> For example, Germany uses “dignity” in lieu of “privacy” precisely because the phrase implies a strong commitment to both individual and collective autonomy interests.<sup>70</sup> In Germany, both individuals and groups have a constitutionally protected interest in human dignity.<sup>71</sup> In contrast, privacy, by its very nature, reflects and incorporates a less communitarian ideal and reflects a legal order that conveys legal protection to individuals, not groups.<sup>72</sup>

There is a significant potential upside to systematic consideration of these differences between and among legal systems. A comparative law approach to analyzing and restating privacy would yield important insights about how best to resolve difficult questions of public policy involving conflicting claims by the government and individuals about the proper scope of individual autonomy.<sup>73</sup> I suspect that some questions will have easy and obvious answers—for example, most democratic societies do not tolerate the use of hard drugs,

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<sup>67</sup> *Id.* at 1219-21.

<sup>68</sup> Krotoszynski, *supra* note 13, at 916-18.

<sup>69</sup> See Whitman, *supra* note 11, at 1171-1211 (discussing the normative and jurisprudential values that inform “privacy” protections in France and Germany and also noting the broader social and cultural values that helped to sustain and inform these legal constructs).

<sup>70</sup> See Krotoszynski, *supra* note 13, at 907.

<sup>71</sup> *Id.* at 906-16; Whitman, *supra* note 11, at 1160-64.

<sup>72</sup> See Krotoszynski, *supra* note 13, at 906-16.

<sup>73</sup> It bears noting that the ALI has used an empirical, comparative law methodology to help inform its law reform efforts before—and in the area of privacy to boot. When proposing the repeal of state and federal anti-sodomy laws, the ALI noted that many nations in Europe had already acted to decriminalize consensual sexual behavior between adults. See Yao Apasu-Bgotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 526-27 (1986). The authors of this important survey, cited in Justice White’s unfortunate majority opinion in *Bowers v. Hardwick*, see 478 U.S. 186, 192, 194 (1986), observe that the ALI “noted that such nations as France, Great Britain, Canada, Mexico, Italy, Denmark, and Sweden had repealed their sodomy statutes.” Yao, *supra* at 526. In this sense, then, I am simply suggesting that the ALI use this same empirical, comparative law methodology when addressing the myriad new privacy questions that technological capabilities, in both government and private hands, have created. See Greg Gordon, *Surveillance Databases Could Be Massive*, OREGONIAN, July 5, 2013, at A1.

such as heroin, even if an individual claims that heroin use is essential to her happiness and self-actualization. By way of contrast, the law governing search and seizure, data protection, and access to abortion varies widely from place to place, and from society to society.

One final point merits both mention and consideration. Notwithstanding the protean nature of privacy, the concept retains tremendous cultural, legal, and political salience. Simply put, people have come to expect the law to protect privacy interests. Outside the United States, global outrage arose in response to the revelations unleashed by Edward Snowden's leaking of classified information; this leaked information established that U.S. government intelligence agencies routinely engage in broad-based spying efforts on allies of the United States (such as Germany and France).<sup>74</sup> This global response provides concrete evidence that privacy, at least as non-disclosure with respect to government, has great transnational appeal. One U.S. intelligence program, called PRISM, seeks to collect, synthesize, and analyze virtually all communications transmitted over the Internet.<sup>75</sup> In many important respects, the very existence of a program like PRISM renders the concept of privacy, if not meaningless, then certainly less meaningful than we previously thought it to be.<sup>76</sup>

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<sup>74</sup> See Michael Birnbaum, *Allegations Imperil Cooperation with U.S. on Key Fronts*, WASH. POST, Oct. 25, 2013, at A1 (discussing outrage in Europe over the NSA's routine surveillance of government officials in Germany, France, the EU, and elsewhere in Europe); Birnbaum & Nakashima, *supra* note 55 (noting that "[r]evelations of NSA spying in Germany has caused major political uproar in the country this year, with investigations and fallout lasting long after outrage over Snowden's revelations had settled in the United States" and also that "swift condemnation of the United States came from across the political spectrum in Germany").

<sup>75</sup> Barton Gellman & Laura Poitras, *U.S. Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST, June 6, 2012, at A1; Glenn Greenwald & Ewen MacAskill, *NSA Taps in to Internet Giants*, GUARDIAN (U.K.), June 6, 2012, at A1; see also Barton Gellman, *U.S. Surveillance Architecture Includes Collection of Revealing Internet, Phone Metadata*, WASH. POST, June 15, 2013, at A1. Of course, the United States is hardly alone in operating massive, secret data collection operations. See Steven Erlanger, *France, Too, Is Sweeping Up Data, Newspaper Reveals*, N.Y. TIMES, July 5, 2013, at A3.

<sup>76</sup> An equally distressing point is the apparent failure of the federal judges sitting on the FISA court to take seriously their obligation to protect constitutional values (rather than serve as a virtual rubber stamp for government requests to gather vast amounts of private data). See Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. TIMES, July 7, 2013, at A1, A15 ("In more than a dozen classified rulings, the nation's surveillance court has created a secret body of law giving the National Security Agency the power to amass vast collections of data on Americans."). The FISA court evidently has issued rulings on "broad constitutional questions" in a completely *ex parte* process, and with no public disclosure of its constitutional decisions. *Id.*

I am not at all sure that an ALI Restatement of privacy would restrain governments bent on violating our privacy and spying on us in ways that make the world imagined in George Orwell's dystopian masterpiece, *1984*, seem like our present lived reality. On the other hand, it does seem to be a particularly opportune moment to reconsider the concept of privacy in a sustained and thoughtful fashion. If those who believe in the importance and salience of privacy rights do not demand their effective protection under law—against both government and private entities—it seems almost certain that we will cease to enjoy them.

A good way to begin working toward a Restatement of privacy would be for the ALI to constitute a transnational working group, including legal scholars from multiple jurisdictions, that could undertake an empirical project of identifying and classifying privacy interests within specific domestic legal systems. In other words, before we attempt to say what privacy *should* or *could* be, it would make sense to first understand what privacy *is* from a more global perspective.

Rather than making bald normative claims about privacy, I would argue that a better approach would first seek to understand the ways in which the law already succeeds and fails in securing interests that fall within the ambit of privacy (or its German first cousin, dignity). At least initially, we should undertake an effort to understand privacy from the bottom up, rather than the top down. Such an approach would also help to facilitate forging a global legal consensus on how best to address privacy interests.

## CONCLUSION

In some important respects, pinpointing discrete subjects related to privacy interests and addressing them incident to larger and broader restatement projects might constitute the best approach to restating the law of privacy. Rather than attempt to address the definitional and operational problems, one could simply seek to avoid them by locating privacy rules deeply within other domestic law subjects. Under this approach, the ALI should simply continue to do what it already has been doing—addressing privacy interests incident to Restatements of other, more general, areas of law.

Nevertheless, we should pursue a bigger, bolder, and more unified approach to the question of privacy law. To the extent that law reform projects seek to bring order to areas of law that seem to lack focus, definition, and clarity, privacy law would appear to

be an ideal candidate for restatement. The fact remains that designing and implementing such a project would be difficult.<sup>77</sup>

A comparative and empirical approach would undoubtedly shed light on the meaning and scope of privacy; both points of tangent and points of divergence would emerge from such an undertaking. To be clear, I am not suggesting that the United States should simply fall into lockstep behind other nations with respect to privacy law—whether the question at issue relates to search and seizure law, data protection, or reproductive rights. I do, however, think that careful consideration of how other democratic societies have addressed common problems might shed important, and non-obvious, light on how best to address these issues, both in the United States and more globally.

At its best, of course, this is precisely what the ALI's restatement projects attempt to do: synthesize legal understanding, not merely as part of a descriptive enterprise, but instead as part of an effort to improve and advance the underlying values that the law seeks to protect. A Restatement of privacy would be particularly difficult to accomplish, but it would also be particularly useful in advancing and improving the state of legal knowledge in this important field of law.

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<sup>77</sup> See *supra* notes 59-68 and accompanying text.

