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## Session II: Historical Perspectives on Privacy in American Law, 29 J. Marshall J. Computer & Info. L. 319 (2012)

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**SESSION II:  
HISTORICAL PERSPECTIVES ON  
PRIVACY IN AMERICAN LAW**

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PROFESSOR SORKIN: Welcome back. I have one more administrative announcement before we resume. We ask that you please keep your name tag and bring it back with you for tomorrow's sessions. We're going to continue now with the session considering historical perspectives on privacy law. Our moderator is my colleague, Professor Steven Schwinn of The John Marshall Law School, who teaches and writes about constitutional law and human rights.

PROFESSOR SCHWINN: Thank you, David, and welcome back. Good afternoon. We've got a wonderful panel for you this afternoon. I'm really very excited that we were able to put together these four individuals and persuade them to come here to John Marshall to share their thoughts and wisdom with us.

What I thought we would do is give each speaker about twenty minutes to talk and then save some time for Q&A at the end. What I'll do as moderator is give a very brief introduction of each speaker, let them get going, and then get out of the way. And so we've agreed that we're going to go in alphabetical order. We'll start with John Marshall's very own Alberto Bernabe. Alberto has been on faculty here at The John Marshall Law School since 1992. Before that he was a teaching fellow at Temple University where he taught mass media law and collaborated in teaching torts, products liability and legal ethics. He also teaches frequently as a visiting professor at the University of Puerto Rico Law School. He teaches torts and professional responsibility here at John Marshall and he's the author of a couple of blogs that I'm a really big fan of, the torts blog and a professional responsibility blog. So with that, Professor Bernabe.<sup>1</sup>

(Applause.)

PROFESSOR SCHWINN: Thank you, Alberto. So next up we have Kathryn Kolbert. Kathryn Kolbert is the Constance Hess Williams Director of the Athena Center for Leadership Studies and Professor of Leadership Studies at Barnard College, an interdisciplinary center dedicated to advancing women's leadership. She's a public interest attorney, a journalist and executive in a non-for-profit world. She really has a very interesting background. Prior to coming to Barnard, Professor Kolbert spent a year in Washington, DC, as the president and CEO of People for the American Way and People for the American Way Foundation, two of the nation's premiere civil rights organizations.

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1. Alberto Bernabe's article, *Giving credit where credit is due: A Comment on the theoretical foundation and historical origin of the tort remedy for invasion of privacy*, is enclosed in lieu of his comments on this panel.

Before she became a journalist, she was a public interest attorney specializing in women's rights. She directed the domestic violence litigation and public policy programs for the Center for Reproductive Law and Policy where she was cofounder and vice president. She's also served as the state coordinating counsel of the ACLU's Reproductive Freedom Project in New York and a staff attorney with both the Women's Law Project and Community Legal Services in Philadelphia. Please help me welcome Professor Kolbert.

(Applause.)

PROFESSOR KOLBERT: So what Steve didn't mention in that very kind introduction, and I appreciate that, it's very nice to be here, is that my real claim to fame is that I argued *Planned Parenthood v. Casey* in 1992 and spent probably almost fifteen years doing work around the constitutional right of privacy at the Supreme Court level, from 1986, which is a case called *Thornburgh v. ACOG*, which I argued as well through the *Webster* litigation and the *Casey* litigation.

And so I have a very kind of firsthand view of how the Court and how the public has really looked at the right of privacy. And so it's really interesting to me this morning to hear, or right before us, to hear a lot about Justice Goldberg and his life and what he brought to the Court and why he was so central to the Court's first really big look at these issues in *Griswold*. And it struck me very much that his life reflected that of an activist attorney, that is, somebody who was a part of a social justice movement and looked at law as a way to help further both the political aims of that movement and to further social justice.

And that's no accident that *Griswold* was a result of that, because the history of these issues really go toward how politics is played out through the courts and the law and is a way of protecting what I consider to be, and I think which most Americans consider to be, very fundamental issues of decision-making in people's lives. So I was struck very much about how he came from a movement and that is reflected very much in *Griswold*. So the history I'd like to talk about is really a pretty modern history. It hasn't played out completely. We're still very much in the throes of what these decisions mean. But it starts in many respects with *Griswold*.

And the two things that I think are important about that case is not what they say but what they don't say. Because in *Griswold* the foundation of the rights to use contraception—remember, this was a case in which the State of Connecticut had tried to, or had banned the ability of married couples, as well as single women, to use contraception. This was 1965, not all that long ago. It's hard in our minds now to remember a time in which contraception was prohibited by law. Some of this audi-

ence might remember that. But it does seem like that shouldn't have happened as recently as 1965, but it had. And a number of activists, part of a movement, the women's movement that was just beginning in the second wave of the women's movement, in '65, really came to try to challenge that law. And in some ways it was a contrived piece of litigation.

But the important part of *Griswold* is that what it recognized was protection for the privacy of the marital bedroom, the privacy that arose between the married couple. It wasn't a right that was bestowed upon women generally. It wasn't a right that was bestowed upon an individual to make important health care decisions. Rather, it was a right that was bestowed upon the marriage and the importance that the government could not be viewed as an institution that would intrude or force that marriage to be public about the private relationship between husband and wife. And I think that's really significant because if you then look a number of years later, in 1973, where the Court was looking at the right to choose abortion, that same notion that privacy attached to a relationship as opposed to an individual was very much present. And we see that concept throughout.

The other piece I want to say about *Griswold*, and I think this is important, is that the notion about where to ground the right of something that everybody kind of agreed to be fundamental or important or worth protecting was up in the air. No one really knew where to put it. And I think the Court has since arrived at the liberty clause of the Constitution, or the Fourteenth Amendment, as the locus of that right. The Court in *Casey* began to think about it as a question of equality, again a Fourteenth Amendment concept, but not based in liberty but more in equality. And so the locus of the right to privacy has really, in a textual sense, shifted significantly.

What hasn't shifted, and I think this is the most important part of all of these cases, is the notion that the society as a whole ought to be protective of things that are important to people's lives, important in many different respects, important in different ways to different people. But the question of whether you use contraception, whether or not you have a child, whether or not you make decisions about medical care, who it is you sleep with, those are fundamental questions, things that really go to the heart of one's being, one's relationship as an individual to their world, and that that is what is deserving of constitutional protection.

So I think Justice Goldberg struggled a bit about where to locate that right. Today we're talking about liberty and equality. But in all of these decisions you really see this notion of a protection for fundamental important decision-making. So now we get from 1965 to 1973. We've got *Roe v. Wade*. I want to remind us all that *Roe v. Wade* was a seven-to-two decision of the Court. It was a Court that was very much dominated by Democratic appointees. It was by far one that reflected their political

view of the world. And it was one that strove again to try to find some understanding about how the Constitution ought to protect important decision-making.

The important part of *Roe*, in my view, again is not what it says but what it didn't say. And that is that the right protected in *Roe* was not absolute by any means. The right was lodged, again, not with the individual woman's ability to make decisions, but was lodged in the relationship—in this case not between her and her husband or not between the woman and her partner, which would seem to be a fairly important relationship given the fact that we're talking about the ability to have children—but was lodged in the relationship between an individual, a woman and her doctor.

And Justice Blackmun did that, I think, in some ways for very much the same reason that Justice Goldberg looked to the Ninth Amendment, because he was looking for a political compromise that would, in fact, have weight beyond just: It should be protected between the woman and her partner. He was looking for some history of support and, you know, what better history, from a justice who was the general counsel to the Mayo Clinic, than the doctor-patient relationship. And that's what *Roe* did, it supported a right that was given to the woman in *Roe* with her physician. Now, the other two notions that were underlying *Roe* was a control over medical decision-making more generally. And that it was not the government's business to pry into things that seemed private. And I think in some ways the rights in *Griswold*, the rights in *Roe*, have been talked about as privacy, and yet to me they are the branch of privacy that is very different in all respects from the rights that we think of in terms of technological privacy, in terms of informational privacy.

We're talking about a privacy that's protecting autonomy, the ability to make important, central, in this case, medical decisions, free of governmental intrusion and the rights that these things somehow should be shielded from public view, but more importantly shielded from governmental intrusion. That they shouldn't be making the decisions, they should be left to doctors and patients.

Now, many of you have known that obviously a seven-to-two decision in 1973 has become kind of the cause célèbre of politics up until the current day. And it's no accident that the questions that you really were presented by the Court then are very much central and a part of the political dialogue in America today. And that has meant a variety of things. I think the first thing it means is that *Roe* was attacked as being an undemocratic decision, that is, these are things health and the woman's interest in health and the interest in the protection of fetal life later in pregnancy. But more than all of these things, the history from *Griswold* to today is really about the politics of these issues, the politics

of women's equality, the politics of our nation that has been played out through the Supreme Court.

And I want to just say three things about that. When I first started arguing or litigating in this area, the thing that became the most apparent to me was that litigating before the Supreme Court was a lot like watching Sesame Street, that is, you had to learn to count. And you had to learn to count to five, okay, because that really was the important number. Obviously it didn't matter how you got to five, but you had to count to five. The history of *Casey* really started in 1991 when the Court of Appeals decided and, essentially, in our view, in a relatively shocking way, to uphold the Pennsylvania abortion law that had been previously struck down by the Supreme Court, almost an identical statute, in 1986. And the way they did that is they said we're going to adopt a new standard of review, an undue burden standard, that Justice O'Connor had talked about in concurring and dissenting opinions before the Court, and say that is the standard, that is the law.

To us, our view was we knew we'd get to the Supreme Court, we knew that the Court was going to review the constitutionality of this statute, but we thought that we would be before the Court, looking at what the new standard ought to be, and that the lower court, even though they wouldn't have liked to do so, would have said *stare decisis* means we have to apply a strict scrutiny standard, we have to look at abortion rights as a fundamental right. The Court of Appeals for the Third Circuit, however—and I will remind you that Justice Alito was on the panel in the Third Circuit—they said, however, there's a new standard where it was no longer the law, it's no longer a fundamental right, we're going to apply an undue burden standard. And this occurred, and just in terms of constitutional history, a week after Justice Thomas was sworn in as a new justice, about a month and a half after the Anita Hill controversy, his confirmation hearings and Anita Hill's testimony before Congress, and at the tail end of that time in which a case could get to the Court for review before the end of the term.

So at that point, and again this really looked at the politics of this issue, but that's how these issues have played out in so many respects. We were faced with the fact that *Roe* had already been overturned in the circuit, and there was a Presidential election coming up the following November, and we no longer had the critical five votes on the Supreme Court in order to reaffirm *Roe*. Four justices had explicitly said in earlier cases that *Roe* should be overturned. And Justice Thomas had just joined the Court. And therefore, our view was there wasn't a chance in any formulation that we could win reaffirmation of *Roe* in the way that we knew it as a fundamental constitutional right under the highest level of constitutional review.

And so as litigators, the question then became: So what do you do? And that's why I say so much of this issue really is the politics of the issue, because the way those five justices had been put together as a coalition was a political decision by the Republican Party to appoint justices who would reverse *Roe v. Wade*. It was also a political judgment of the Justice Department, starting back as early as 1986, to come in and ask for the reversal of a constitutional right, the first time in the history of our nation in which the Justice Department came in and said we want a reversal, we want to take away a fundamental constitutional right that women had. And that started in 1986. So we began to see this over and over again in those intervening cases. And our view was what do you do, as late as we were, with the election coming up, how do you say to a nation, This is what is at stake?

What we ended up doing is what at the time was considered a very, very radical litigation strategy. Our clients decided that it was more important to risk the loss of a fundamental constitutional right before an election than after an election. So basically we sped up review of the case so that the case would be decided in June as opposed to the June following the '92 election, on the theory that if we lost, which we fully predicted we would, it could become a political issue in the 1992 Presidential election, which it did, but even though we partially won *Casey*.

So it was a very radical decision. We ended up filing our petition for certiorari in two weeks. It was a petition for certiorari that read a lot more like a press release than a petition for certiorari. We asked one question to the Court: Is *Roe v. Wade* still the law of the land?

That's why it was a press release. It was not intended to influence the Court, who in our view had pretty much made up their minds on this question, but it was intended to be a focal point for the American public to show them what was at stake.

And in many respects that political activity, the one that led up to the creation of *Griswold*, the one that was very much a part of *Roe* being decided, the one that was a part of *Casey*, which was women marching, families marching in the streets, so half a million people in Washington, DC, right before the argument in *Casey*, was in part what I think ended up influencing the Court to preserve the portion of *Roe* that they did in *Casey*. They didn't continue to give credence to the right to choose abortion as a fundamental right. They adopted a less protective undue burden standard. But let me tell you that given what we thought was going to happen, that was an extraordinarily important victory. It was a win by all regards.

And when we look at the actual history that we have now put together about what happened at the Court, Justice Blackmun's papers had all kinds of really unbelievably interesting tidbits that helped us put



all of this together, but the most important thing to know is that Chief Justice Rehnquist had written an opinion overruling *Roe*. There were five votes for that opinion at the conference following the oral argument, exactly the five votes we thought would be there. And if you read that opinion, what he does is he basically says that the right to choose abortion, the right to make important medical decisions—and he doesn't really distinguish between abortion and contraception—are things that ought to be left to the democratic processes of the states. We will only give the most minimal rational basis review of those statutes. And he doesn't explicitly say "We are overruling *Roe*," but he says "The only interest that's protected is a liberty interest that's entitled to rational basis review." So that's about as effective an overruling as you can get without an explicit headline to that effect.

The important part of all of this history, however, is that that's what happened, at least in my mind, ever since. And I think that we can see two developments that have come from *Casey*. So there's two really critical developments we've seen since *Casey*. One is by winning half the loaf, or only part of the argument, what ended up happening, I think, is two very good things and a number of very bad things.

The good thing is that it managed to give protection for women's decision-making against the most Draconian kinds of statutes that we saw being introduced in states before *Casey*. Many of you may well have remembered that the Island of Guam, the State of Utah, the State of Louisiana, banned abortion in the days before *Casey*. And those cases were going through the courts when *Casey* was decided. By giving and preserving an undue burden standard or a middle standard of review, the Court was very explicit to say that women do have the right to make these important decisions.

The second important thing that *Casey* did, and I think this is important, is it started to shift where it grounded the rights that we're talking about here. Liberty had been kind of the common notion of where this notion of autonomy lived in the Constitution. In *Casey*, the Court was much more explicit to ground the right in the notion of equality that it belonged to the woman in consultation with her doctor; not to the doctor-patient relationship, but to the woman. And that her ability to function as part of society, to participate equally in the workforce, to make sure that she could have control over decisions about when and where to have children, was really critical to her ability to function as a participating and equal member of society.

Justice Blackmun had pushed the Court a bit to do that in the intervening years, but it wasn't until *Casey* that we began to see privacy thought of as an equality interest as much as an economy or privacy interest. And I think historically we will see more of that, particularly as the Court addresses—or at least I hope we'll see more of that—as the

Court addresses other sexuality issues, particularly around gay and lesbian rights, where they have focused on equality almost more than the autonomy questions, but nevertheless ones that are important.

The thing that we didn't win, and I think these are the downsides of *Casey*, is that the undue burden standard, even though written in the decision, was more protective than the one that Justice O'Connor had talked about in her earlier case, in her earlier concurring and dissenting opinion, the undue burden standard has not proved to be particularly protective, certainly of women who are poor, women who are young, and women who are in need of very late abortions. It's been protective enough against bans and protective enough against husband notification or consent laws; but young women, poor women, women who live far away from cities have not been protected by the laws.

And the second thing it did is it sent a message as a win for *Roe* to those who supported the right to choose, that this issue is done, that this issue is resolved, that this issue is, you know, you can go on and do other things. And I think what we saw in the aftermath of *Casey* is a lot of relief among those who had been fighting for this issue for twenty to twenty-five years and, as a result, kind of an interest in doing other things and not being particularly concerned to continue the political activism that was necessary for the preservation of the right.

And that's what brings me to the end, which is, this is a story about politics, because what happened is at the end those who opposed abortion became much more politically powerful in the ten years following *Casey*. In the last two to three years we've seen eighty statutes be passed at the state legislative level that restrict a woman's ability to make reproductive choices, much greater than even in the days of *Casey*.

And so all of the energies, the movements on both sides of these issues are playing themselves out again in light of this, in this case, the 2012 election. And I think that's really the story, that we need to see how this right is going to develop in the long term. I've been encouraged, as a pro-choice activist, been very encouraged in recent months to see a reactivation of women's concern around these issues. The Komen for a Cure controversy and the attacks on Sandra Fluke feel a lot like the activism in 1992. The fact that it's become a Presidential election issue is very much a reflection of 1992. And let me just add one more thing. I think the decision in the health care debate is very, very much in my view linked to the decision in *Casey*.

Now, remember, I said we needed five votes, we didn't have it going in. Rehnquist wrote that decision overruling *Roe*, but what happened—what happened was Justice Kennedy switched his vote. And he switched his vote primarily because of a concern over the institutional integrity of the Court. Justice Kennedy didn't want the Supreme Court of the

United States to be perceived to be based on the politics of who sits on it as opposed to the rule of law. And that is very, very much a part of the *stare decisis* and the part of the opinion that Justice Kennedy wrote. It's very much a concern that motivated a shift.

That same concern, in my view, is what motivated the shift of Justice Roberts in the health care decision upholding the Affordable Care Act. A notion that the Court is bigger than the politics of who appoints the justices to that Court. I don't think that the Affordable Care Act decision is one that will ultimately be replicable, it will not ultimately be one that has great precedential value, although I think the commerce clause decision there may, but the taxing and spending power I don't think really will be.

But I think that Justice Roberts' concern that our nation has to support a Court based on the rule of law, not on the politics of who appointed the justices, is the message of *Casey* and is the message of this particular Court in this past term, and I hope that is the message that we can take forward as the right to privacy develops in the future.

Thank you.

(Applause.)

PROFESSOR SCHWINN: Thank you very much. Next up we have Dr. Adam Moore, an Associate Professor in the Philosophy Department and Information School at the University of Washington. Dr. Moore examines the ethical, legal and policy issues surrounding intellectual property, privacy and information control. And he's got just a dizzying list of publications: Two books, two edited anthologies, and over twenty-five articles. We look forward to hearing from Dr. Moore. Please help me welcome him.<sup>2</sup>

PROFESSOR SCHWINN: Thank you, Dr. Moore. Last, and certainly not least, we have Marc Rotenberg. Marc Rotenberg is the Executive Director of the Electronic Privacy Information Center in Washington, DC. He teaches information privacy law at Georgetown and has testified before Congress on many issues, including access to information, encryption policy, consumer protection, computer security and communications privacy. He's also testified before the 9/11 Commission on security and liberty and before the OECD and a number of other bodies. He's the editor of "Privacy and Human Rights" and "The Privacy Law Sourcebook" and coeditor of "Information Privacy Law." And here is a fun fact, he's a tournament chess player who won, in 2007, the Wash-

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2. Dr. Adam D. Moore's article, *Drug Testing and Privacy in the Workplace*, is enclosed in lieu of his comments on this panel.

ington, DC, chess championship. So please help me welcome Marc Rotenberg.

(Applause.)

MR. ROTENBERG: I keep that chess thing going on the side just in case this privacy thing doesn't work out. And I'm also very much aware that I'm the last talk before the reception. And following on Professor Moore's remark, you don't need a drink to have a good time, but why take a chance?

That comment, by the way, I'm going to be very frank and tell you I just read that today, and it's actually ascribed to Justice O'Connor's husband. And she recounts it favorably in this new book by Jeff Toobin called "The Oath." So that's a little insight too—isn't it a great line though? I'm going to use it more. Okay. I may not attribute it next time though.

And I also wanted to especially thank The John Marshall Law School for organizing this symposium. We actually go way back. And I have a special fondness for Professor George Trubow, who approached me about twenty-five years ago, when I had just finished up a job with Senator Patrick Leahy, to get involved in the ABA and the committee he was chairing at the time on information privacy issues. And I think George was really, as others have said, very forward-looking about the importance of this issue. And I know the work that David and Leslie and others are doing is just great and very much in this tradition. It's also always good to see Amitai and Peter. I don't know that we agree all the time, but we seem to appear quite a bit together, so it's really kind of special.

David approached me about this conference around the time that I had just read an article in a law school magazine, one of these privacy articles that kind of scares you to death about everything that's going on with your mobile phone and the cameras on the streets and the NSA. The list is long, as we all know here, and then it ended up basically with two conclusions: This is the way technology is, get used to it; and if you have any concerns about it, it's all on you. Right?

And we actually read, I think, a lot of these articles, not simply in law journals, but in the newspapers, of course. We're constantly reminded of the threats to privacy. And then we're told (a) that privacy is gone, get over it. Scott McNealy's company is gone, I wonder if he got over it? But that's a separate story.

And then two, if you're really concerned about privacy, kind of stay up late at night, work out those privacy settings, go back and check them the next day to make sure that Facebook didn't change them back while

you were asleep, because they do that, by the way, and it really kind of makes Sisyphus's life seem like a Club Med, right?

And then I thought about it some more and said, "Well, geez, there was a reason I went to law school and spent all that money." I mean, we have legal institutions. And one of the remarkable things about legal institutions is that they give you the opportunity to make change. They don't guarantee change. It is, as my kids like to say, it's on you. It's on you to make the change. But legal institutions provide the opportunity.

And thinking about Justice Goldberg's concurrence in *Griswold* and how he read the Ninth Amendment, I think it was a bit of a call. I mean, it was a bit of a call in the way that he wrote about the abolition of the death penalty before other members of the Court did, which became an invitation for many people who cared deeply about human rights in the United States to actually get a little bit more ambitious than they had in the past about one of the key concerns in the U.S. criminal justice system.

And I think we live, in that sense, with a very wonderful legacy. And so I'm just going to spend a few minutes to explain what we have tried to do through EPIC, through what are to us the three key legal institutions in the United States, to try to protect the right to privacy.

And the main point of my talk I hope you will take away from this is that we have an enormous opportunity as students and lawyers and academics and jurists to engage this issue. We may reach different conclusions. We may decide in a particular set of facts that the privacy claim must give way to some other claim. But if we fail to take this first step of engaging the debate, then I believe we've lost a great opportunity. And this was my answer, in fact, to that law journal. I said, basically, "You all who think this issue is over have missed out what's going on right now in Washington." And I recounted some of the recent opinions from the Supreme Court's last term.

Many of you are probably familiar with *U.S. v. Jones*. Now, this is a remarkable opinion. This is the GPS tracking case out of the DC circuit. Very interesting question in *U.S. v. Jones* is whether the police should be required to obtain a warrant prior to installing a tracking device on a car.

Privacy rules, by the way, rarely operate as prohibitions. Typically they try to establish some mechanism of accountability. And in the Fourth Amendment realm, the mechanism of accountability we're typically looking for is judicial oversight, the Warren determination, which in the *Jones* matter the police believed that they did not need to obtain because their suspect was traveling on public streets. And according to prior decisions from the courts, from the Court in the 1980s, they had basically given up their expectation of privacy.

Well, I looked at that case—as I say, this is a fascinating case—and I’m actually going to predict that the Court is going to uphold Judge Ginsburg’s opinion finding the need for the warrant. And I’m even going to predict—I put this in an envelope, by the way, and sealed it—well, almost—so you can verify it – I said, “I’m even going to predict that there is going to be an argument over whether the basis of the right to privacy in this particular case is kind of a physical trespass notion, which I sort of think Scalia and some of the other members of the Court would be comfortable with, or whether it will be more of a data collection, Orwellian, 1984-is-around-the-corner kind of notion, which I think Justice Ginsburg will probably be drawn to.”

And of course, the first thing people said to me about this case is “Oh, this is ridiculous. You know what’s going to happen, the Court took it to reverse it, right, so you’re not going to find the decision you want.”

And I said, “Well, actually I’m prepared to predict we’re probably going to have six or seven votes to affirm.” And there is going to be some weird plurality thing going on. And we wrote amicus, by the way, we write lots of amicus for the courts on lots and lots of issues. We just did two for this term. One, *Clapper v. Amnesty International*, that’s standing to challenge wire surveillance under the FISA: How do you know when you’ve actually been intercepted? The other one that we did is a very interesting Florida case involving dog sniffing and whether that’s reliable and whether it even requires trespass, showing of trespass, actually two cases that the Court granted cert. from Florida.

But here is the thing about *Jones* in support of my argument. So, of course, you know, the opinion comes out, actually multiple opinions come out. Scalia for the Court says “Yes, it’s trespass.” Justice Sotomayor says, in concurrence, “It’s trespass, but something much, much more. There’s obviously a lot more going on in the twenty-first century with police tracking techniques than our eighteenth century notions of physical trespass.”

And then there is this remarkable concurrence by Alito, right? Justice Alito concurs in the result but says “This can’t be trespass. We talk about privacy in the modern era with regard to *Katz*, with regard to our expectation of privacy. And I think under that analysis, which I didn’t necessarily vote for, but I think is the law, this was a violation of the expectation of privacy,” right?

What is happening in the Court, at least in the *Jones* case, they’re not arguing over whether there is a right to privacy, they’re arguing over the shape of the right, the base of the right, the scope of the right, which is a remarkable thing to observe.

Now, of course, I’m reading this, I’m thrilled, I’m imagining it couldn’t be much better and people say “Boy, Scalia’s opinion was aw-

fully narrow, right, not a very good result.” There is just no way to win, right, no way to win. But it illustrates the point that I’m trying to make that there is a debate. There is a debate taking place right now not only in the courts but elsewhere.

Congress, of course, has the fascinating responsibility of trying to set out by means of statute what we in the United States mean when we talk about a right to privacy. And in my view this actually answers a bit of the challenge that was left by the *Katz* opinion, which many people have noted has this essential circularity about it. I mean, if you talk about an expectation of privacy, and technology makes possible the intrusion upon privacy, then how can you have an expectation of privacy that is otherwise aligned than with what technology makes possible. It is almost certainly a downward spiral.

Now, there are a couple of ways to answer that. Judges can make determinations. The other way to answer that is that the legislators can make a determination. And they’ve done so repeatedly, by the way, in instances where the Court has decided not to find a right to privacy in the search of newsrooms, for example, that was the *Zurcher* case, and a couple of years later you have Congress passing the Privacy Protection Act protecting newsrooms.

There was the California, Smith—well, *Smith v. Maryland* is the toll record case which Congress addresses through the Electronic Communications Privacy Act. But part of my point with respect to the Congress is that there is actually a dialogue that’s taking place. There is a dialogue that’s taking place between our legal institutions as to what the scope of that right to privacy should look like.

And if the Court decides, for example, that it doesn’t believe that a right to privacy should be established, that actually doesn’t end the discussion. That’s a little unsettling, I know, for law professors to hear that, because so much of our orientation is around the decisions of the Supreme Court. But it doesn’t end the discussion because Congress can legislate. It doesn’t end the discussion because states under their own state constitutions may actually choose to go further than federal courts have gone under the federal Constitution.

That’s happening, by the way, in another very interesting area which has to do with the collection of DNA in the criminal justice context and should there be limits on how DNA is collected from people who are actually not suspected of crimes. You can look to state constitutions, as a Maryland Supreme Court did a number of years ago, to reach a result different from the result that a federal court might have reached given the same facts.

Another very interesting question regarding the role of Congress and the protection of privacy is what meaning should we give to statutes that are passed before a new business practice emerges?

So I'll tell you about one law I'm a little bit familiar with, it's called the Video Privacy Protection Act. It was passed in the late 1980s when people who wanted to watch movies at home went down to the video store and rented a videotape and slid the cassette in the thing and watched 12:00 kind of blinking in front of them and eventually actually got the cables right – we had kerosene lamps, by the way, and quill pens as well, which were easier to manage than the cables on the video box— but eventually we got the cassette in there and we got to watch the movies.

The problem, I think, for Judge Bork during his nomination hearing was that the reporters who were covering that hearing were getting a little tired of all the discussion of the law review articles, and someone wanted to just get to the heart of the matter and went to the local video rental store and actually got the rental list of Judge Bork and his family and published an article describing this list of video rental records.

And by the way, I should say, there wasn't very much on the list. It was like James Bond and John Wayne. And there was one R-rated movie which was the rock video by the group Tommy, but that was actually his daughter and he didn't get any credit for it. He commented later that maybe if it was a more interesting list he would have ended up on the Supreme Court. So, you know, who knows.

But, of course, it was a very interesting moment because suddenly a world of information that was largely analog, a broadcast world, a world of television and radio and print, where you could receive information and not be identified by an event or a transaction for something that you listened to or watched or read, was being transformed, it was being digitized. And those acts of viewing information and receiving information were now being recorded, which was a very significant change in the information landscape.

And Congress and the public, I think understandably, said there should be some privacy protections there with regard to the rental information of consumers, who gets access to this information. Not that there may not be reasons to collect the information or not that the merchant might not need to use the information or that there would be appropriate ways to market the information, but in a sense these stores were now collecting kind of personal information that did not previously exist and along with that came certain responsibilities.

And so the Congress passed, almost twenty-five years ago, in 1998, the Video Privacy Protection Act, which also, as the privacy debate with the Europeans began to accelerate, the Europeans having established a



comprehensive privacy framework, became the bit of a butt of a joke. Because in Europe they had the EU data directive that presumptively regulated the collection and use of all personal information, and in the United States we protected the privacy of videocassette rentals. A bit of a contrast, I get the point.

But here is how it gets interesting. So fast forward, to use the VCR term, to Hulu and to Netflix. These are companies today that are offering services that are functionally equivalent, I would argue, to the rental of the videocassette twenty-five years ago. Does the same privacy protection apply?

The statute says video rental cassettes and other similar materials, or other similar audiovisual materials, I think, that's probably the definition, other similar audiovisual materials. Interactive video on the Internet. Well, you know, the district court has recently said, "Yes, that's the purpose of this law is to try to protect the viewing habits of people who receive information in this digital environment."

Is that correct? I don't know. If another Court makes a different decision, Congress could come back and amend the law. Someone could argue today: This isn't what Congress intended. We don't want it. Congress should amend the law so that it doesn't apply. I mean, these are all, I think, very interesting questions. They are also the material of the privacy debates that are taking place now in Washington.

I'm going to jump over to the third category, which is in some respects for us maybe the most interesting. It's a category that, frankly, didn't exist at the time, for our purposes, at the time of the *Griswold* decision or the *Roe* decision and, that is, the role of the U.S. Federal Trade Commission, which has by its organic statute really nothing to do with privacy.

The FTC was established—although it does go back to Brandeis, so there is a common lineage here—but the FTC was established during the progressive era to police unfair and deceptive trade practices. In other words, if you ran an advertisement that said you were offering a new BMW for \$5,000 and everyone came to your lot to buy that new BMW for \$5,000, and you said, "Oh, didn't you see, it said Sunday mornings between 2:10 and 2:25 a.m., that was the time period that I offered. I'm sorry. But now that you're here, I'd like to show you some other cars."

Well, those were the kinds of traditional unfair and deceptive trade practices that the FTC had policed. Remarkably, just over the last five years, the U.S. Federal Trade Commission has become the primary agency within the U.S. to protect consumer privacy interest, to protect Internet privacy interest, because the Federal Trade Commission has entered into significant settlements with Google and with Facebook concerning the collection of the data on their users.

So, for example, in 2009 when Facebook had in place certain privacy preferences, and users had expressed their preferences based on the consent to disclose their photos, for example, to their roommates but not to their parents—we might say friends, but not friends of friends—Facebook went back in and said, “Well, we’re going to offer you something that we think is kind of cool, and to make this work we’re going to kind of change a few of your settings. Now, if you’re not happy about that, you can go back and change them back; but we think this is a really good change for you and we’re going to go ahead and change the privacy settings.”

We, and the group of other consumer privacy organizations, wrote to the FTC and we said, “That’s unfair. You can’t ask people once they’ve made these choices to select their privacy settings, which they have to rely on, in fact, because there is no generally legal obligation with regard to this type of data collection in the United States, to then go back and reassert their privacy interests.” And over some period of time the Commission conducted an investigation and agreed with us. Consent order.

The Google matter arose, and some of you may have actually experienced this, when Google, in February of 2010, wanted to launch a social network service to compete with Facebook. And their social network service was called Buzz. And the way they were planning to populate the social network service was by taking the G-mail users and saying, “Guess what, you guys are now users of our new social network service called Buzz.”

Now, I’m simplifying a bit, but this is roughly what happened. And the privacy consequence was that the personal e-mail address books that people had created for the use of G-mail then became available as a social network public user account accessible to others.

And the privacy concerns there were quite significant. And again, we went to the Federal Trade Commission. We said this was unfair and deceptive. And there was an extensive investigation and the FTC agreed with us and another consent order was established with Google.

Now, this would sound like a very happy story in terms of the evolution of consumer privacy rights in the United States. But we ran into an interesting problem, which is that although the FTC had established these significant settlements with the two leading Internet companies that were collecting user data, they seemed reluctant to enforce them.

So I just want to—how many people here are on Facebook?

(Show of hands.)

Well, you remember timeline. I mean, most of you I think have been timelined—verb transitive – in other words, Facebook made a decision several months ago to change the architecture of your wall so that all of

your posts basically become available, when in the past they had become largely inaccessible, you might say archived. And we said that was a problem under the consent order, objected to that. Nothing happened with Facebook.

And then with Google, they announced in January of this year that they were going to consolidate all of their privacy policies across the sixty different services on March 1st of this year, which from a privacy perspective is actually quite bad. Because one of the key concepts in the privacy realm is that you give information in a particular context for a particular service. So if you're signing up for an e-mail service, the information you give is relative to that e-mail service, not for the social network service, not for online books, mapping, and so it goes.

So that was the case where we actually sued the Federal Trade Commission to enforce its consent order against Google. And a district court judge ruled against us, not that she didn't see the problem, but she said that it was ultimately for agencies to decide when to enforce their orders.

I would say the epilogue of this story is that two months later the Federal Trade Commission announced in the settlement of the Safari browser hack matter with Google, it's largest fine in history, which was \$22 million against Google for representing to users that they could rely on the Safari privacy settings, and at the same time they were using, exploiting the Safari browser settings to obtain user information.

Well, I know this has been kind of a bouncing around type of survey, but I am trying to support a central point here, which is that it is vitally important with regard to the right of privacy that we engage in these debates and pursue these claims through our legal institutions.

You know, when Justice Goldberg wrote that concurrence, there was not a lot of support for the view that the Ninth Amendment could be read in the way that he proposed. And I'm not sure today, in fact, if there's a lot of support for viewing the Ninth Amendment in that way. But I think what he was doing was saying when we have these new challenges to our fundamental rights, to the right of privacy, we need to think creatively and we need to draw on our legal traditions and we should not walk away. We should engage these problems and find solutions.

So the next time you read one of these stories that tells you about all the threats to privacy and then says, you know, either get used to it or, if you want to do something about it, this is how to change your privacy settings—think like a lawyer, think big, litigate.

(Applause.)

PROFESSOR SCHWINN: Thank you, Marc. Really wonderful presentations. Very different ideas of privacy and I'm thrilled that we were able to get all four of these scholars and thinkers together and talk

about this. We do have a few minutes to take some questions. Does anybody have any questions?

FROM THE FLOOR: Dr. Moore, first of all, my background, my undergrad was also moral philosophy. But I just wanted to give you a hypothetical. I actually know of a company that, I know of two companies, one that requires BMI testing for employees. In most cases it's voluntary and employees are given an incentive. Do you still consider this the kind of, pardon me, gun to the head that it would be require? Because this is for additional pay, you do this additional thing.

PROFESSOR MOORE: In that kind of case I guess I would say—I want to go into this hypothetical when I think of this case—if it's a pro-employee environment, lots of jobs and few workers, then I really don't have a problem with that kind of thing, or if they incentivize in certain kinds of ways. It can be very difficult when you start throwing in money on top, because then it really gets, the choice situation becomes very oddly stacked in certain kinds of ways. If I give you millions of dollars, you might waive all kinds of rights.

But if it's the other way around, it's something forced or required, then I get a little squirmy. And that's really what the point of that case was supposed to bring up. But interesting, I did not know that.

PROFESSOR SCHWINN: I'm curious, does anybody else want to weigh in on that? Other questions?

FROM THE FLOOR: I have a question for Dr. Moore. You said that lack of privacy can lead to depression. What do you think of these new office designs. I work in a place that has a lot of creative folks and they have these open cubicles, aren't even walls around them, they're just like little desk stations. What do you think of that?

PROFESSOR MOORE: It's kind of like Bentham's Panopticon, right? Jeremy Bentham, a philosopher, actually designed a prison where you could have this kind of thing. And it looks like in many cases the modern workplace is that kind of prison.

We do know that people can, I think the studies I've looked at, say individuals can suffer quite a bit of that kind of observation and be more or less okay. But as systematic over the long haul, I think the study showed that if you spend years at this kind of place under that kind of scrutiny, you will not be very loyal as an employee. You will develop ways of defeating the monitoring. And I have all kinds of anecdotes on that and how it happens.

And they're actually online now selling fake eyeballs that you—well, like things that glue over your eyes so you can actually be sleeping on the job and it looks like you're actually working. And on and on it goes, right? And there is somebody who is saying I don't like this way of monitoring me and I'm going to opt out using technology.

FROM THE FLOOR: I don't know if it's for monitoring as much as getting a lot more space in the office. I just think that people don't have any privacy in the workplace when a neighbor can hear everything they say.

PROFESSOR SCHWINN: Just don't tell our JMLS students about the eyeballs.

FROM THE FLOOR: Ms. Kolbert, with a woman's right to choose abortion under *Roe v. Wade*, has there ever been a challenge by the father to prevent giving him some rights?

PROFESSOR KOLBERT: Yes, there has actually been quite a lot of case law in that area, and the fathers have always lost on a bodily integrity argument, essentially that the woman has, as long as the pregnancy is within her, she has the right. Ultimately, in the conflict between the woman and the man, she has the right to make that decision.

There's been some interesting case law around reproductive technologies, however. I used to do a lot of litigation around trying to essentially represent the women in cases where men were trying to prevent her from having abortions. We always won those cases. But ironically, in the reproductive technology area, where you're talking about a fertilized egg outside of the woman's body, then it seems to me you have a much greater interest of equality of the man to basically say "I don't want my reproductive matter to be used."

We did, you would remember, a number of years ago, the case about the fertilized egg and the woman wanted to get pregnant, the husband said—it was a frozen embryo—the husband said, "I don't want her to get pregnant with my fertilized egg." And that went up to the Court. The Court actually, in that case, had argued that the woman needed to be impregnated because it was a life, because the egg was fertilized and sitting in a freezer. We came in on behalf of the father and were successful in getting that overturned and giving him a right to make an equal judgment that he didn't want his genetic material used. So yes, it goes both ways.

PROFESSOR MOORE: Just real quick, there is a famous article by Judith Jarvis Thomson, she's a philosopher who wrote on defense of abortion, and on her, it's a very different kind of defense of abortion, it

came out in the mid '70s, and on that, if she's right, then you would actually have the woman's right is a right to disassociate, not that the fetus actually dies, and that the father can also have a right to disassociate or take custody. And so that article, many people love it, because they think it's actually a better justification for a woman's right to choose, but it also opens up this other Pandora's box of questions.

FROM THE FLOOR: Mr. Rotenberg, I guess the pretext for much of the reduction in the boundaries of right to privacy on the Internet and such is the consent issue. You go on Facebook, you know what you're getting into. But you really don't. And without belaboring my question, where does consent come in from your perspective in these types of situations where there's cookies and so on and so on?

MR. ROTENBERG: Well, you know, it's a very interesting issue that runs throughout the law. I think it's a part of moral philosophy. You mentioned that your thesis was related to Locke.

We run some risk, I would say, as privacy advocates, in suggesting that people can't make choices. I mean people make different choices about the degree of publicity, which is part of how they shape their identity. But at the same time, I think particularly in the data collection environment, many of these choices are not meaningful, because people can't evaluate what the consequence is of agreeing to the terms of service that they're presented with. And I think for that reason, in the data collection context, you need to impose some norms.

One norm, for example, might simply be transparency. You might require companies, when they collect and use personal data, to be open with respect to the person whose data is being collected about how the data is used and say to the company that's a necessary condition, you can't ask someone to give that up.

Another obligation might put on the company a security. You might say to a company with the best of intentions, "You're planning to only use the data for good purposes, but you still have an obligation to protect it." So we get into this very interesting space that's not without some reference to competing moral claims, where we say, in effect, we respect the right of people to make choices but those choices have to be informed and meaningful. And for the most part today they're not.

FROM THE FLOOR: Mr. Rotenberg, you talked about an enforcement on companies with your personal data and informing you what they're going to do with your data. Isn't that in place now in the privacy policies that you read, usually they tell you, "This is what we collect on you and what we do with it," or is that just a voluntary privacy policy

that they just put up for your benefit and that they don't really have to do that?

MR. ROTENBERG: Well, I actually think the privacy policy is mostly for the company's benefit. I think the privacy policy operates primarily as a waiver or disclaimer. In other words, it's the company saying to you: If you do business with us, this is how we will use your information. So you can hold them to those representations, but the representations they're making are with regards to the conduct that they want to pursue. And they may even change at some point in the future, which they frequently do, once they've acquired your data.

One of the things that to me has been most frustrating about the self-regulatory system in the United States is that even the people who work hard to try to make it work, because they read the policies or they go through the privacy settings, then have the experience of the policy and the settings change, right, and they make the very rational decision that this is a waste of time.

And so we've started to work with economists in this field called behavioral economics, where it's quite sensible that people don't take steps to protect their privacy. I mean this is the other news story you read. If people cared so much about their privacy, they would do more.

But if you actually understood what was required to try to protect your privacy and how futile it ends up being, you would realize that what people are doing is actually quite natural, which is another way of saying we need the legal institutions in the U.S. to provide these safeguards. We need the courts, the Congress, the Federal Trade Commission and others, because individuals can't. And it's not through a fault of their own, it's because of the way these systems are designed.

FROM THE FLOOR: I would agree with you from my own personal experience. Does the EU protect individual privacies better than our basically ad hoc system?

MR. ROTENBERG: Well, I mean, the short answer is yes. It's an imperfect system. But what's so fascinating comparing the EU system with the U.S. system is that the European Union had in place a legal framework prior to this Internet revolution and the U.S. did not. So we've patched some things together. I wouldn't say that none of it is useful. Some of it is actually quite good. The President, for example, has announced a consumer privacy bill of rights, a good set of principles, but no legal force.

The EU, you have a very elaborate legal structure and you have privacy institutions. So you have places where people can go to bring complaints, right?

Now, I'll just mention, because we're here actually, in credit to the Illinois Attorney General, she's responsible for the recent investigation of the companies that were renting computers and using the cameras on the computers that they rented to spy on their customers, right, including children and people in a state of undress, I guess that's the phrase. It's quite a remarkable story if you read, in fact, what these companies were doing. They claimed it was for security purposes, that they would remotely enable the cameras on the computers that they were renting. Apparently they captured images of half a million people. So the Attorney General here, working with the Federal Trade Commission, went after that.

How in the world could a person have anticipated that kind of—you would have had to put masking tape, right, on top of the camera lens? Maybe you should, I don't know.

PROFESSOR SCHWINN: I think we have time for one more question given that we started late.

FROM THE FLOOR: I'm just curious related to especially the loss of information online and the lack of security, has there been any actual successful malpractice claims against people online from not actually having proper security in their databases?

MR. ROTENBERG: It's a big area of practice, in fact, on both sides. I mean, both plaintiff attorneys who were bringing these cases against companies for inadequate security and then attorneys defending the companies. I think part of the problem is that a lot of companies are collecting data that they just can't keep track of. There's so much data collection nowadays. And you saw in the financial services sector over the last couple of years the amount of information they had, they didn't even realize they had it. And then when there were breaches, credit card numbers, Social Security numbers, everything became available.

PROFESSOR SCHWINN: What a wonderful, wonderful panel. Please join me in thanking our panelists.

(Applause.)

(Whereupon the symposium was adjourned at 5:40 p.m., September 27, 2012 to September 28, 2012 at 8:30 a.m.)