PRIVACY AS/AND CIVIL RIGHTS

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I. INTRODUCTION

> When we talk about privacy only as a civil liberty, we erase those patterns of harm, that color of surveillance. And when we talk about privacy only as a civil liberty, we also ignore the benefits of privacy: Surveillance threatens vulnerable people fighting for equality. Privacy is what protects them and makes it possible.—Alvaro Bedoya[1]

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1. Alvaro M. Bedoya, *Privacy as Civil Right*, 50 N.M. L. REV. 301, 306 (2020).

> Surveillance is nothing new to black folks. It is the fact of antiblackness. —Simone Browne[2]

Decades have passed since the modern American civil rights movement began, but the fight for equality is far from over. Systemic racism, sexism, and discrimination against many marginalized groups are still rampant in our society. Tensions rose to a fever pitch in 2020, when a summer of Black Lives Matters protests, sparked by the police killing of George Floyd, an unarmed Black man,[3] were met by a disturbing rise of white nationalist extremism[4] leading to an attempted armed insurrection and attack on the U.S. Capitol on January 6, 2021.[5] Asian-Americans faced rising rates of racism and hate crimes,[6] spurred in part by inflammatory statements from the then-sitting President of the United States, Donald Trump.[7] Members of the LGBT community faced attacks on their civil rights during the Trump administration,

2. SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 10 (2015).

3. *See* Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html; Ray Sanchez, *Black Lives Matter protests across America continue nearly 2 months after George Floyd's death*, CNN (July 23, 2020), https://www.cnn.com/2020/07/23/us/black-lives-matter-protests-continue/index.html.

4. *See* Katanga Johnson & Jim Urquhart, *White nationalism upsurge in U.S. echoes historical pattern, say scholars*, REUTERS (Sept. 4, 2020), https://www.reuters.com/article/us-global-race-usa-extremism-analysis/white-nationalism-upsurge-in-u-s-echoes-historical-pattern-say-scholars-idUSKBN25V2QH.

5. *See Woman dies after shooting in U.S. Capitol; D.C. National Guard activated after mob breaches building*, WASH. POST (Jan. 7, 2021), https://www.washingtonpost.com/dc-md-va/2021/01/06/dc-protests-trump-rally-live-updates/.

6. *See* STOP AAPI HATE, STOP AAPI HATE: NEW DATA ON ANTI-ASIAN HATE INCIDENTS AGAINST ELDERLY AND TOTAL NATIONAL INCIDENTS IN 2020 1 (2021), https://secureservercdn.net/104.238.69.231/a1w.90d.myftpupload.com/wp-content/uploads/2021/02/Press-Statement-re_-Bay-Area-Elderly-Incidents-2.9.2021-1.pdf; CTR. FOR THE STUDY OF HATE & EXTREMISM, CAL. STATE UNIV. SAN BERNARDINO, REPORT TO THE NATION: ANTI-ASIAN PREJUDICE & HATE CRIME 3 (2021), https://www.csusb.edu/sites/default/files/Report%20to%20the%20Nation%20-%20Anti-Asian%20Hate%202020%20Final%20Draft%20-%20As%20of%20Apr%2028%202021%2010%20AM%20corrected.pdf.

7. *See* Kimmy Yam, *Trump can't claim 'Kung Flu' doesn't affect Asian Americans in this climate, experts say*, NBC NEWS (June 22, 2020), https://www.nbcnews.com/news/asian-america/trump-can-t-claim-kung-flu-doesn-t-affect-asian-n1231812.

including a rolling back of protections awarded to transgender individuals.[8] There was also a sharp rise in antisemitism[9] and Islamophobia.[10]

At the same time, the world faced a deadly pandemic that exposed the inequalities tearing the fabric of our society. Poor families struggled to survive the economic consequences of the Covid-19 coronavirus pandemic, and rural communities suffered from lack of access to healthcare.[11] Black and Brown communities in the United States suffered a disproportionate rate of sickness and death due to the coronavirus.[12] Women also faced disproportionate harms economically and otherwise, partially due to existing structural inequalities surrounding caretaking and careers.[13] Individuals with disabilities often found themselves forgotten, as the push for expedient pandemic response overpowered even legal requirements for equal access.[14] Internationally, the Global South also suffered disproportionately, perhaps most apparent in differences in access to medical supplies and vaccines.[15]

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8. *See* Selena Simmons-Duffin, *'Whiplash' Of LGBTQ Protections And Rights, From Obama To Trump*, NPR: POLICY-ISH (Mar. 2, 2020, 3:12 PM), https://www.npr.org/sections/healthshots/2020/03/02/804873211/whiplash-of-lgbtq-protections-and-rights-from-obama-to-trump.

9. *See Antisemitic Incidents Hit All-Time High in 2019: ADL 2019 Audit of Antisemitic Incidents*, ANTI-DEFAMATION LEAGUE (May 12, 2020), https://www.adl.org/news/press-releases/antisemitic-incidents-hit-all-time-high-in-2019 ("The American Jewish community experienced the highest level of antisemitic incidents last year since tracking began in 1979.").

10. *See* Esther Yoon-Ji Kang, *Study Shows Islamophobia Is Growing In The U.S. Some Say It's Rising In Chicago, Too*, NPR (May 3, 2019), https://www.npr.org/local/309/2019/05/03/720057760/study-shows-islamophobia-is-growing-in-the-u-s-some-say-it-s-rising-in-chicago-too.

11. *See* Kelly A Hirko, Jean M Kerver, Sabrina Ford, Chelsea Szafranski, John Beckett, Chris Kitchen & Andrea L Wendling, *Telehealth in response to the COVID-19 pandemic: Implications for rural health disparities*, 27 J. AM. MED. INFORMATICS ASS'N 1816, 1816–18 (2020).

12. *See* Harmeet Kaur, *The coronavirus pandemic is hitting black and brown Americans especially hard on all fronts*, CNN (May 8, 2020), https://www.cnn.com/2020/05/08/us/coronavirus-pandemic-race-impact-trnd/index.html.

13. *See* Courtney Connley, *More than 860,000 Women Dropped out of the Labor Force in September, According to New Report*, CNBC (Oct. 2, 2020, 2:45 PM), https://www.cnbc.com/2020/10/02/865000-women-dropped-out-of-the-labor-force-in-september-2020.html.

14. *See* Andrew Pulrang*, How Covid Relief Will Help Disabled People, and What Was Left out*, FORBES (Mar. 11, 2021, 2:08 PM), https://www.forbes.com/sites/andrewpulrang/2021/03/11/how-covid-relief-will-help-disabled-people-and-what-was-left-out/?sh=758512e314fc (detailing the challenges for those with disabilities during the pandemic, such as students being unable to receive the assistance of one-on-one aides while schools provided only remote classes).

15. For references for the health disparities mentioned in this paragraph, the author discusses in greater depth the disparate impacts faced by marginalized communities in the pandemic in prior works, see Tiffany C. Li, *Post-Pandemic Privacy Law*, 70 AM. U. L. REV. 101,

The battle for civil rights is clearly not over, and the nation and the world have faced setbacks in the fight for equality. Most recently, the Supreme Court overturned *Roe v. Wade*, upsetting decades of national legal protection for the right to abortion, with implications for both privacy and equal protection.[16] Meanwhile, the role of technology is also changing, with new technologies like facial recognition, artificial intelligence, and connected devices, offering new threats and perhaps new hope for civil rights.

To understand privacy at our current point in time, we must consider the role of privacy in civil rights—and, as scholars like Alvaro Bedoya have suggested, privacy itself as a civil right.[17] This Article is an attempt to expand upon the work of privacy and civil rights scholars in conceptualizing privacy as a civil right and situating this concept within the broader field of privacy studies. This Article builds on the work of scholars like Anita L. Allen, Alvaro Bedoya, Khiara Bridges, Danielle Keats Citron, William Eskridge, Mary Anne Franks, Pamela Karlan, Scott Skinner-Thompson, and others who have analyzed critical dimensions of privacy and privacy law and advocated for changes in privacy law that can move our society forward to protect privacy and equality for all.[18]

To start, while much current scholarly discussion on privacy relates to privacy harms and negative rights against privacy violations, it is equally important to discuss privacy rights, including potential positive rights to privacy. If privacy can be a positive right awarded to individuals, what does it mean that not everyone is able to access that right equally? Perhaps it may mean that our conversation about privacy law must include ideas of equity, discrimination, and civil rights, in addition to the myriad other ways privacy rights are conceptualized currently. Under U.S. law, the right to privacy can be a "right to be let alone,"[19] "right to autonomy,"[20] or vaguely, "the penumbra"[21] of privacy rights. Privacy is a constitutional right, a civil liberty, a tort interest,

106–13 (2021); Tiffany C. Li, *Privacy in Pandemic: Law, Technology, and Public Health in the COVID-19 Crisis*, 52 LOY. U. CHI. L.J. 767 (2021) [hereinafter *Privacy in Pandemic*].

16. Dobbs v. Jackson Women's Health Org., 597 U. S. ___ (2022).

17. *See* Bedoya, *supra* note at 1 at 301.

18. This is a non-exhaustive list of inspirations and I remain grateful to the many scholars who have worked on these important, pressing issues of privacy and civil rights law.

19. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV L. REV. 193, 205 (1890); *see also* Olmstead v. United States, 277 U.S. 438, 572 (1928) (Brandeis, J., dissenting).

20. Daniel J. Solove, *Conceptualizing Privacy*, California Law Review (2002) at 1116 (explaining the connection between conceptions of rights to privacy and autonomy).

21. The penumbra theory of privacy is likely best encapsulated in Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (discussing the "First Amendment [as having] a penumbra where privacy is protected from governmental intrusion").

a consumer protection right, a contractual right, and, perhaps controversially, an intellectual property right.[22]

However, as Scott Skinner-Thompson notes in his book, *Privacy at the Margins*, conceptualizing privacy "as a broad, amorphous, universalist value—something akin to autonomy, dignity, or personhood" leads to a "fail[ure] to capture the discrete, particular, and *material* harms that directly result from privacy violations."[23] When privacy can mean almost anything, it can also mean almost nothing—and that is a problem, particularly for vulnerable populations who need privacy the most.

Existing privacy frameworks do not address the inequality in privacy rights afforded to different people.[24] For example, as a classical civil liberty, privacy protects the rights of assembly and speech for political dissidents and community advocates. However, conceptualizing privacy as only a civil liberty ignores the fact that these privacy rights, including the core rights to speech and assembly, have never been awarded equally to all Americans. If nothing else, a civil rights gloss on privacy rights can help us understand privacy in a way that might one day match protection for civil liberties.

Framing privacy primarily as a consumer protection right does not go nearly far enough to address the power imbalance between corporations and consumers[25] and does not address the ways in which consumer privacy rights and violations of those rights can shape laws and norms outside of the consumer context.[26] Furthermore, in the current data ecosystem, the public-private distinction can be unclear, and privacy harms can arise in grey areas not clearly governed by consumer protection law or any other specific area of law. For example, while laws like the Health Insurance Portability and Accountability Act (HIPAA) protect the privacy of health information,

22. For an analysis of the "privacy as intellectual property argument" (and why it arguably does not work), see generally Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125 (2000).

23. SCOTT SKINNER-THOMPSON, PRIVACY AT THE MARGINS 3 (2020).

24. For arguments that existing privacy frameworks necessitate further critique, see generally KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS (2017); VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR (2015); SKINNER-THOMPSON, *supra* note 23; Bedoya, *supra* note 1 at 301.

25. For more on the necessity of understanding larger structures of power and capital to understand the current status of privacy rights, see generally JULIE E. COHEN, BETWEEN TRUTH AND POWER (2019); SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2018).

26. *See* Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 585 n.2 (2014) (analyzing consumer privacy law's development and the role of the Federal Trade Commission, the federal agency leading the regulation of consumer privacy in the United States).

HIPAA only applies to particular covered entities (healthcare institutions, health plans, and healthcare clearinghouses), business associates, and particular types of information transmission.[27] HIPAA might not, for example, provide individuals with privacy protections for information they voluntarily share with a mobile phone application that provides counseling guidance, unless that application was linked to a covered entity or a covered entity's business associate.[28] In this circumstance, an individual might be interacting with the counseling application in a similar way as one would with a traditional mental healthcare provider. However, the patient might not receive the same level of privacy protection for the confidential information they share with the app. Arguably, HIPAA might not even apply to some health-related circumstances. Instead, lower standards of protection, like those in general consumer privacy law, but might be all that a healthcare patient is able to access.

Privacy rights are important for civil rights because the fight for civil rights is far from over. We have not nearly progressed enough in fighting discrimination in our government or in our society. Additionally, it is critical to consider privacy as a fundamental tool for protecting civil rights because our now technologically motivated world demands it. Technologies like facial recognition empower mass surveillance and discrimination at greater rates than ever before. Our increasingly connected world exposes all of us to ever more invasive violations of our privacy, both online and offline.

Technology in the wrong hands has great potential for harm. Even well-meaning technological pursuits may result in disparate harms to different marginalized groups. However, technology can also be a force for good. It is imperative that we consider the ethics of privacy and civil rights in developing new technologies and shaping the laws that regulate them to minimize the dangers and harms of technology and maximize the potential for technology to lead us to a more just and equal society.

This Article situate privacy in context with civil rights by exploring privacy as a civil right. Part I provides an overview of civil rights law in the United States and the unequal application of privacy protections to different people. Part II examines ways in which privacy can enhance or support civil rights and equality, including through the concept of cyber civil rights. Part III considers if, due to the inextricable links between privacy and civil rights protections, privacy itself ought to be considered a civil right. Part IV looks to framings of privacy in constitutional law, tort law, and sectoral consumer protection law and analyzes how a civil rights framework might resolve existing equity gaps

27. 45 C.F.R. § 160, 162, 164 (2013).

28. Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-91, 110 Stat. 1936 (1996).

in privacy law. Finally, Part V provides recommendations for how to better shape privacy law to protect both privacy and equality for all.

II. BACKGROUND

A. CIVIL RIGHTS IN U.S. LAW

Though the fight for equality is global (and must be global to truly reach its aims), this Article focuses primarily on American law. Under U.S. law, civil rights, broadly speaking, are rights granted by the government that protect citizens from discrimination by the government or other individuals.

One can generally understand "civil rights" as a set of rights that complements and contrasts with civil liberties, which are a set of individual freedoms enshrined in the Constitution that protect citizens against government intrusion on personal freedoms.[29] While the two terms are often oversimplified and conflated with one another, civil liberties grant you protections against government intrusion, and civil rights grant you protection against discrimination.

Much of our modern civil rights law is predicated on the Due Process Clause of the Fifth Amendment and the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment. Influential laws codifying core civil rights protections include the Civil Rights Act of 1964, a landmark law that prohibits discrimination based on race, color, religion, sex, or national origin ("protected characteristics"), in public establishments that have a connection to interstate commerce or are supported by a state.[30] Of particular note are Title VII and Title IX of the Civil Rights Act. Title VII protects employees from employer discrimination based on the aforementioned protected characteristics, including age,[31] pregnancy[32] or maternity status,[33] sexual orientation,[34] transgender identity,[35] marriage or civil partnership status,

29. *See, e.g.*, Christopher W. Schmidt, *The Civil Rights-Civil Liberties Divide*, 12 STAN. J. C.R. & C.L. 1, 1 (2016) (discussing the history of the civil rights and civil liberties divide in contemporary legal discourse).

30. Civil Rights Act of 1964, 42 U.S.C. § 1971 (1988).

31. Age Discrimination in Employment Act, 29 U.S.C. § 621 (1967).

32. Pregnancy Discrimination Act of 1978, 42 U.S.C. §§ 2000e.

33. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971).

34. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020).

35. *Id.* In *Bostock*, the Court specifically denotes "transgender status," but one could reasonably argue that all gender identities should be covered under the but-for analysis used by the Court in this case. *Id.* at 1739–41.

or disability.[36] Title IX protects against discrimination on the basis of sex in schools and educational institutions that receive federal funding.[37]

Other key civil rights laws include the Voting Rights Act (protecting against discrimination in access and ability to vote),[38] the Fair Housing Act (protecting against housing discrimination based on race, color, religion, sex, familial status, or national origin),[39] the Genetic Non-Discrimination Act (prohibiting discrimination on the basis of genetic information),[40] the Equal Pay Act (prohibiting wage discrimination on the basis of sex),[41] as well as the Americans with Disabilities Act (protecting against discrimination for people with disabilities in areas including employment, transportation, and access to government services and public accommodations).[42]

Outside of the federal context, there is, of course, a plethora of state civil rights laws as well. In addition, administrative agencies can enforce regulations that amount to civil rights protections, regardless of whether they are couched as civil rights laws. For example, the Federal Communications Commission regulates video accessibility standards, including obligations for television programmers to include closed captioning for disability access.[43] Effectively, these regulations can be understood to protect antidiscrimination rights of people with disabilities by mandating equal rights to access information.

Civil rights laws are useful because they recognize and attempt to prevent, mitigate, or correct harms suffered by different groups due to discrimination. Civil rights laws often focus on fundamental rights such as the right to vote and core social sectors such as employment and education. Privacy, a fundamental right, should be considered as integral for a person's civil rights protection as rights like employment and education. However, the relationship between privacy and civil rights has not always been clear, and privacy law often ignores crucial factors related to inequality and discrimination.

B. UNEQUAL ACCESS TO PRIVACY PROTECTION

This Article has already discussed the interplay between privacy as a civil liberty and privacy as a civil right. At first glance, privacy protections related to speech and assembly may seem like classical civil liberties, divorced from

36. Americans With Disabilities Act 1990, 42 U.S.C. §§ 12101–12213 (1990).
37. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688.
38. Voting Rights Act of 1965, 52 U.S.C. § 10301.
39. Fair Housing Act, 42 U.S.C. § 3604.
40. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122.
41. Equal Pay Act, 29 U.S.C. § 206(d).
42. 42 U.S.C. §§ 12101–12213.
43. Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260.

conceptions of civil rights. However, the United States has often awarded these privacy protections in unequal ways. Our constitutional privacy protections, the penumbra of privacy protections, do not adequately acknowledge the inequalities and inequities in privacy protections and privacy violations.

While surveillance can generate privacy violations and cause many people harm, these harms and violations often disproportionately injure people from marginalized populations. In her book *Dark Matters*, Simone Browne surveys the long history of surveillance against Black people in America, from the metaphor of the slave ship as a surveillance vessel to the phenomenon of TSA officers searching Black women's hair.[44] As Browne writes, "Surveillance is nothing new to black folks. It is the fact of antiblackness."[45]

Other scholars have also researched the disproportionate impact of government surveillance on Black and Brown people, women,[46] the poor,[47] immigrants and undocumented people,[48] people with disabilities,[49] and more. In *The Poverty of Privacy Rights*, Khiara Bridges explains how poor mothers, especially Black and Brown mothers, lack privacy protections.[50] It is important to note that for every marginalized group that suffers from disproportionate privacy harms or civil rights violations, there are also individuals who belong to more than one marginalized identity. Kimberlé Williams Crenshaw's concept of intersectionality[51] is key to understanding the discriminatory ways in which the law has awarded privacy protections and allowed for privacy violations. We must keep in mind the intersectional dimensions of civil rights violations, as well as privacy violations, if we are to work towards a theory of civil rights and privacy.

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44. *See generally* BROWNE, *supra* note 2 (a comprehensive study of the impact of surveillance on Blackness and vice versa).

45. *Id.* at 10.

46. *See generally* ANITA ALLEN, UNEASY ACCESS (1988) (arguing for greater privacy protections for women).

47. *See generally* EUBANKS, *supra* note 24 (exploring the discriminatory impact of algorithmic systems on the poor).

48. *The Color of Surveillance: Government Monitoring of American Immigrants*, GEORGETOWN LAW SCH. CTR. ON PRIV. & TECH. (June 22, 2017), https://www.law.georgetown.edu/news/web-stories/color-of-surveillance-immigrants.cfm.

49. Elizabette Guéçamburu, *My Disability Doesn't Erase My Right to Privacy*, THE MIGHTY (Apr. 29, 2018), https://themighty.com/2018/04/disability-and-the-right-to-privacy/.

50. *See generally* BRIDGES, *supra* note 24.

51. *See generally* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) (advocating for an intersectional analysis of race and gender to center the multidimensionality of Black women's experiences).

Unequal access to privacy is a civil rights problem. This is clearest when unequal privacy protections involve targeted surveillance of people from marginalized groups actively working to advance civil rights. For example, the United States has a long history of surveilling potential civil rights leaders, including civil rights legend Dr. Martin Luther King.[52] In the 1960s, the FBI created COINTELPRO (an abbreviation of Counter Intelligence Program), a program aimed at surveilling Black civil rights leaders during the height of the civil rights movement.[53] While Americans today would likely like to consider themselves much more progressive than pre-civil rights movement Americans, it is clear that America as a country has not changed enough. In 2017, a whistleblower exposed another secret FBI program specifically aimed at surveilling Black activists as "Black Identity Extremists."[54] Clearly, the battle for civil rights is not over, and privacy rights are still not afforded to all on an equal basis.

Modern civil rights law in the United States attempts to prohibit discrimination and equalize access to public accommodations and to rights we believe to be fundamental. Civil rights laws are an attempt to expose an inequity and remedy it. Today, our society faces a crisis of privacy discrimination in which people are unable to equally access their privacy rights, and some face disproportionate privacy violations and harms.

III. PRIVACY AS/AND CIVIL RIGHTS

Privacy is not only a foundational civil liberty, but also a core civil right. Conceiving of privacy as a civil liberty without understanding the interplay between privacy and equality does a disservice to both privacy and equality. As Alvaro Bedoya writes:

> When we talk about privacy only as a civil liberty, we erase those patterns of harm, that color of surveillance. And when we talk about privacy only as a civil liberty, we also ignore the benefits of privacy:

52. *See generally* Hannah Giorgis, *When the FBI Spied on MLK*, ATLANTIC (Jan. 18, 2021), https://www.theatlantic.com/culture/archive/2021/01/mlk-fbi-surveillance/617719/; Benjamin Hedin, *The FBIs Surveillance of Martin Luther King, Jr. Was Relentless. But Its Findings Paint a Fuller Picture for Historians*, TIME (Jan. 18, 2021, 8:23 AM), https://time.com/5930571/martin-luther-king-jr-fbi/.

53. Julia Craven, *Surveillance of Black Lives Matter Movement Recalls COINTELPRO*, HUFFPOST (Aug. 20, 2015), https://www.huffpost.com/entry/surveillance-black-lives-matter-cointelpro_n_55d49dc6e4b055a6dab24008.

54. Sana Sekkarie, *The FBI Has a Racism Problem and It Hurts Our National Security*, GEORGETOWN SEC. STUDS. REV. (Aug. 19, 2020), https://georgetownsecuritystudiesreview.org/2020/08/19/the-fbi-has-a-racism-problem-and-it-hurts-our-national-security/.

> Surveillance threatens vulnerable people fighting for equality. Privacy is what protects them and makes it possible.[55]

When we talk about privacy only as a civil liberty, we erase patterns of harm from privacy violations that amount to or exacerbate discrimination and disparate impacts on marginalized populations. For example, while surveillance can lead to privacy violations and related harms for many people, these harms are often worse for marginalized populations. Privacy conceived as a civil liberty ignores the problems of unequal access to privacy and ignores the necessary place privacy has in creating the conditions for the fight for civil rights to continue.

A. PRIVACY SUPPORTS CIVIL RIGHTS ADVANCEMENT

Privacy is necessary for the fight for civil rights to continue. Privacy allows for the free association and assembly needed to organize and advocate for civil rights. Core to our understanding of democratic culture is the necessity of private spaces for gathering with others in pursuit of aims that may be political, especially those that may be politically unpopular.

Not only does privacy protect the political conduct of activists and civil rights workers, but privacy protects the personal and intellectual development necessary to spark the continued fight for civil rights. Privacy allows for the intellectual development of scholars, activists, and community leaders to create social change. Protecting privacy protects the intellectual freedom of individuals to explore new ideas and understandings.[56] Privacy allows individuals to interact with others in ways that generate democratic discourse and the conditions necessary for democratic participation.[57]

Privacy protects the conditions necessary for a society to recognize, fight for, and protect civil rights. Earlier, this Article discussed the difference between civil liberties and civil rights.[58] Privacy supports fundamental freedoms like speech and assembly and the right against government intrusion into one's private affairs, and privacy is also critical in protecting civil rights. Privacy allows for the intellectual development, social interaction, and associational interactions necessary for societies to advance in civil rights.

Privacy protections are important for civil rights because the fight for civil rights is far from over. We have not nearly progressed enough in fighting

55. Bedoya, *supra* note 1, at 306.

56. *See* Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387 (2008) (explaining intellectual privacy).

57. *See* Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904 (2013) (arguing that privacy can protect the ability to engage in democratic discourse).

58. *See* Schmidt, *supra* note 29.

discrimination, in our government or in our society. We must protect the privacy rights that foster the conditions through which individuals and groups can advance the cause for civil rights.

B. PRIVACY AS CIVIL RIGHTS ACTIVISM

Privacy, or the performance of privacy, can be an act of civil rights activism. In *Privacy at the Margins*, Scott Skinner-Thompson writes on the usefulness of privacy as expression of anti-subordination and political views.[59] He argues that marginalized populations, in particular, often utilize privacy as a form of protest against surveillance and discrimination.[60] Skinner-Thompson extends Judith Butler's theory of performativity[61] to explain "performative privacy" as expressive conduct that ought to be understood as protected First Amendment expression.[62] He gives examples including individuals using encryption technology to hide communications as a protest against government internet monitoring, as well as individuals wearing hoodies as protest against visual surveillance monitoring.[63]

We can extend Skinner-Thompson's arguments even further and consider what a positive right to privacy as expressive conduct might be, particularly in light of the unique interactions between privacy and equality. Not only should individuals have the right to perform privacy, but they ought to be able to claim equal rights to the performance of privacy as a positive right. If there are laws or practices that make it difficult for some individuals to be able to perform privacy, then we should consider that to be a violation of First Amendment speech rights, privacy rights, and also equal protection and civil rights.

We can look to the example of the hoodie. Wearing a hoodie (a hooded sweatshirt or jacket) can be a form of protest—an act of performative privacy as civil rights activism. In 2012, 17-year-old Trayvon Martin, a Black boy, was shot dead by a neighborhood watchman while out buying Skittles. He was wearing a hoodie at the time.[64] Some stigmatized the hoodie as an article of clothing that either implied criminal association or could lead the wearer to be

59. *See generally* SKINNER-THOMPSON, *supra* note 23.

60. *See id.* at 45–107 (discussing performative privacy in theory and effect).

61. Skinner-Thompson discusses his inspirations in greater depth in Scott Skinner-Thompson, *Performative Privacy*, 50 U.C. DAVIS L. REV. 1673, 1690 (2017).

62. *See* SKINNER-THOMPSON, *supra* note 23, at 45–107 (discussing performative privacy in theory and effect).

63. Skinner-Thompson, *supra* note 61, at 1676.

64. CNN Wire Staff, *Police: Trayvon Martin's Death 'Ultimately Avoidable'*, CNN (May 18, 2012, 11:13 AM), http://www.cnn.com/2012/05/17/justice/florida-teen-shooting.

misidentified as such.[65] In the years after the fatal shooting, the symbolic meaning of a simple hoodie took on greater valence in American culture.[66] Because Martin had been wearing a hoodie when he was killed, a wave of protests included protestors who wore hoodies as a symbolic gesture, obscuring their identities, performing privacy and using the anonymity of the hoodie to show that what happened to Martin could happen again to anyone who looked like him or wore clothes like him, unless change occurred.[67]

Here, we can understand the wearing of a hoodie to be an act of performative privacy as conceptualized by Skinner-Thompson—a protest against the mass surveillance and associated harms of discrimination in policing. However, if the act of wearing a hoodie comes with more risks (including being stopped by police) to some individuals based on the wearer's race, then this form of performative privacy protest would not be equally accessible to all. A White woman may be able to wear a hoodie (and perform privacy) without fear of associated stigma, while a Black man may not be able to do the same.

If we understand performative privacy to be an act of civil rights activism, then this privacy right should be protected both as expressive speech and as civil right. Unequal access to privacy as a performative right then should be considered a civil rights problem that the law should remedy. Like housing, employment, and voting, privacy is a right that is fundamental to participation in our democratic society. And also like housing, employment, and voting, privacy is a right that is disproportionately awarded to and protected for some and not others.

C. CYBER CIVIL RIGHTS

The rise of the internet has changed many things, including our understanding of fundamental values like free speech, privacy, and equality. As more of life becomes intertwined with the internet and connected technologies, we must reconsider civil rights and how we can protect equality and antidiscrimination goals in online, offline, and hybrid contexts.

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65. Amy Kuperinsky, *Hoodies: Danger or Fashion?*, NJ.COM (Mar. 30, 2019, 6:27 PM),https://www.nj.com/entertainment/2012/04/trayvon_martin_hoodie_march.html; MJ Lee, *Geraldo: Martin Killed Due to 'Hoodie'*, POLITICO (Mar. 23, 2012, 9:54 AM), https://www.politico.com/story/2012/03/geraldo-martin-killed-due-to-hoodie-074392.

66. Priya Elan, *Nine years after Trayvon Martin's killing, hoodies still spark debate*, GUARDIAN (Feb. 27, 2021, 3:00 PM), https://www.theguardian.com/fashion/2021/feb/27/trayvon-martin-hoodies-black-young-people.

67. Casey Glynn, *Trayvon Martin shooting sparks "hoodie" movement*, CBS NEWS (Apr. 2, 2012, 5:21 PM), https://www.cbsnews.com/pictures/trayvon-martin-shooting-sparks-hoodie-movement/.

In the classical sense, Warren and Brandeis conceptualized privacy as the "right to be let alone,"[68] particularly the right for wealthy elites like them to protect the private facts of their lives from the public eye.[69] This conception of privacy was created in a time when newspapers publishing society gossip pages were the primary threat to a person's image. Warren and Brandeis did not conceive of deepfakes, nonconsensual sexual imagery, or the way that the internet would transform privacy violations related to defamation or harassment.

However, today, we live in a new world, where those harms exist and can impact a person's access to civil rights. To address these harms, scholars like Danielle Keats Citron and Mary Anne Franks conceive of cyber civil rights as extending the doctrine of civil rights law from offline spaces to online spaces.[70] Citron and Franks focus some of their work on the critical problems related to harassment and other targeted harms related to the online speech environment.[71] As they explain, technological privacy violations can impair a person's ability to meaningfully participate in democratic society, and to exercise their rights as an individual.

Citron writes,

> Civil rights laws are rarely invoked, even though cyber harassment and cyber stalking are fundamentally civil rights violations. Civil rights laws would redress and punish harms that traditional remedies do not: the denial of one's equal right to pursue life's important opportunities due to membership in a historically subordinated group.[72]

Today, much of life is lived in the online space. Access to online spaces, then, is reaching a state of equal importance to access to offline spaces. When individuals do not have equal access to online spaces, due to a privacy violation that relates to a protected characteristic, we can and should understand this as a civil rights violation. For example, increased police surveillance in certain locations may make it uncomfortable for people from overly policed populations to spend time in those locations.

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68. Warren & Brandeis, *supra* note 19, at 205.

69. For further discussion, see *infra* notes 117–118 and accompanying text.

70. *See generally* Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009); Danielle Citron & Mary Anne Franks, *Cyber Civil Rights in the Time of COVID-19*, HARV. L. REV. BLOG (May 14, 2020), https://blog.harvardlawreview.org/cyber-civil-rights-in-the-time-of-covid-19/.

71. *See generally* Citron, *supra* note 70; Danielle Keats Citron, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014); Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655 (2021).

72. DANIELLE CITRON, HATE CRIMES IN CYBERSPACE 23 (2014).

It is important to consider how we can protect civil rights in the online space and in the offline space. This is especially important when civil rights violations are connected to harms incurred online. For example, harassment against LGBTQ students in online spaces can lead to harassment in offline spaces, like public schools. It is empowering and novel to consider the extension of offline civil rights protections to online spaces. However, consideration is no longer enough. It is now time to take from the nascent doctrine of cyber civil rights to help solve technological privacy violations in the offline space as well.

It is now time to further extend the line of thinking within cyber civil rights into the offline realm as well. Today, the line between the cyber and physical realms is increasingly blurred. Moreover, extending the call for cyber civil rights to the equal protection of privacy in both online and offline spaces is a useful and cogent framework for the advancement of civil rights.

Civil rights laws create legal protections to prohibit discrimination against individuals. Some civil rights laws can afford individuals equal access to spaces and opportunities.[73] Cyber civil rights protections allow individuals equal access to online spaces and opportunities. The world of technologically driven civil rights violations exists neither purely online nor offline. One example of this is the phenomenon of mass surveillance. Mass surveillance is driven both by new technological dimensions of government surveillance as well as increasing consumer-led surveillance capitalism,[74] in which consumer-driven networked technology products create webs of surveillance.

If a person is barred entry into a public space on the basis of a protected characteristic, this could be considered a civil rights violation under modern civil rights law, including the Americans With Disabilities Act and the Civil Rights Act.[75] If a person is unable to access an online space due to policies or practices that amount to discrimination based on a protected characteristic, we can consider this a cyber civil rights violation. According to Citron and Franks, barriers to equal access do not have to be physical.[76] Indeed, policies and practices that allow for behavior with discriminatory effects can effectively bar a person from entry to an online space as a physical barrier in an offline space.

If a woman is refused entry into a public space due to her gender, it would be a civil rights violation—for example, a building with a sign saying, "Men

73. The Americans With Disabilities Act, for example, prohibits discrimination based on disability in access to public spaces. *See* 42 U.S.C. § 12101.

74. *See generally* ZUBOFF, *supra* note 25.

75. *See* Americans With Disabilities Act, 42 U.S.C. § 12101; Civil Rights Act of 1964, 42 U.S.C. § 1971. Both laws prohibit discrimination in public accommodations and public access.

76. *Id.*

only." If a woman is unable to access an online space due to gendered harassment that makes the online space uncomfortable or dangerous, this could be a cyber civil rights violation—for example, a web forum rife with harassing posts targeting women. If a woman is unable to access an offline space due to technological privacy violations that make the offline space uncomfortable or dangerous, this, too, could be considered a civil rights violation—for example, a public space with large, visible cameras that record and stream to an open feed, with the promise that recorded images will be uploaded to the internet.

The same theoretical framework that could protect the expressive rights of individuals in an online space can also aid in protecting the privacy and speech rights of individuals in offline public spaces. In the past, one might conceive of civil rights violations concerning public spaces or public accommodations. One could also more easily separate the government and private companies as actors in civil rights disputes. However, today, with the advent of the internet and our increasingly connected world, humanity faces a new space—cyberspace. It can be difficult to determine the boundaries of any particular space online, raising questions about what constitutes a public space, a public forum, or a space for public accommodation.[77]

Protecting privacy is necessary to protect civil rights, because much of our lives today are lived through technological means. This is particularly apparent now during the pandemic.[78] Today, much of society works online, studies online, and sometimes even celebrates, mourns, and worships online. To some extent, many people now spend much of their lives online. This increasingly connected world is causing a series of context collapses,[79] as the line between physical and virtual space is further eroded. While it is still necessary to protect privacy as appropriate for each informational and social interactional context,[80] it is also possible now to take the lessons from cyber civil rights and apply them to the offline world as well.

The more society moves to online spaces and the more individuals use connected technologies, the more opportunities there are for civil rights to be violated in non-traditional ways. Today, a growing body of jurisprudence concerns data-driven discrimination on social media websites. Researchers

77. *See, e.g.*, Robles v. Domino's Pizza, LLC, 913 F.3d 898, 905–06 (9th Cir. 2019) (analyzing whether ADA protections would require a restaurant's website to also be made accessible to people with disabilities).

78. *See Privacy in Pandemic*, *supra* note 15, at 804–06.

79. *Id.* at 784.

80. *See* HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE (2009).

have found that Facebook and other similar advertising sites will often target only certain populations with ads for jobs or housing.

For example, in *National Fair Housing Alliance v. Facebook*, the National Fair Housing Alliance and other organizations sued social media platform Facebook, alleging that the platform allowed advertisers to exclude users of certain races from viewing housing ads.[81] In the same year, the U.S. Department of Housing and Urban Development (HUD) filed a complaint against Facebook, similarly alleging that Facebook had practiced discrimination in regard to its housing ads.[82] *NFHA v. Facebook* ended in settlement, without lasting precedent. In the meantime, journalists at The Markup have found that Facebook still allowed discriminatory advertisements on its platform as of 2020.[83] In the Facebook housing advertisement cases, the company's digital advertising practices arguably amounted to civil rights violations because they prevented individuals from protected classes from accessing housing opportunities.

Effectively, companies like Facebook can practice, enhance, or enable discrimination against marginalized and protected groups simply by hosting targeted ads. Targeted advertising generally relies on the collection and analysis of a bevy of data collected on or about an individual.[84] Thus, the discriminatory effect of job ads that exclude certain groups can, in one sense, be considered a privacy harm—i.e., a downstream harm that arises only due to invasive data collection. The discriminatory harms of targeted housing advertisements are inextricably linked to the privacy harms of bulk data collection and behavioral ad targeting. These are civil rights violations not simply due to the lack of access to housing opportunities but also the difference in strength and expansiveness of protection for the privacy of the users' data. In fact, one could argue that a Facebook users who had their data used to exclude them from accessing some housing ads effectively suffered a disproportionate privacy harm. This unequal privacy harm is not one that the law currently remedies.

More broadly, many of these joint online and offline civil rights violations can be linked to privacy violations, due to the interconnected nature of the

81. Complaint, Nat'l Fair Hous. All. v. Facebook, Inc., No. 1:18-cv-02689 (S.D.N.Y. Feb. 6, 2019).

82. *See* Charge of Discrimination, Dep't. of Hous. & Urb. Dev. v. Facebook, Inc., FHEO No. 01-18-0323-8 (filed Mar. 28, 2019).

83. Jeremy B. Merrill, *Does Facebook Still Sell Discriminatory Ads?*, THE MARKUP, (Aug. 25, 2020, 8:00 AM), https://themarkup.org/ask-the-markup/2020/08/25/does-facebook-still-sell-discriminatory-ads.

84. Rebecca Jennings, *Why targeted ads are the most brutal owns*, VOX, Sep. 25, 2018. https://www.vox.com/the-goods/2018/9/25/17887796/facebook-ad-targeted-algorithm

data ecosystem. Many online and offline civil rights violations now occur due to or are exacerbated by technological developments like big data, artificial intelligence, mass surveillance, facial recognition, and more. Digital privacy violations may harm all individuals whose data are collected or used. However, the misuse of individual data may disproportionately harm some people on the basis of protected characteristics. Protecting privacy, then, can protect individuals against these new technological (or cyber) civil rights violations.

IV. A CIVIL RIGHTS FRAMEWORK FILLS GAPS IN PRIVACY LAW

U.S. law has often treated privacy as a consumer protection right (in the sectoral privacy regime), as a civil liberty (in constitutional jurisprudence), or as a civil or criminal wrong (in [context]). Privacy has also been conceptualized as a property right and as a contractually determined right. These privacy frameworks all provide valuable ways to understand privacy in law and society, but they do not help us understand privacy protection as an antidiscriminatory or equalizing force. Framing privacy as a civil right is crucial because many privacy harms are disproportionately suffered by marginalized populations, and remedies are often inadequate.

A. CONSTITUTIONAL PRIVACY AND EQUALITY PROTECTIONS

Civil rights laws protect the vision of America as a country where "all men are created equal."[85] The quest for civil rights has also been an influential factor in Supreme Court decisions on privacy, and it is possible to read civil rights into many major decisions that purport to focus on privacy. Privacy cases involving sexual conduct, contraception, and abortion necessarily involve civil rights, as the harms from restriction of these forms of conduct disproportionately harm individuals from certain protected classes, e.g., women and non-heterosexual people.

For example, *Lawrence v. Texas* invalidated criminal sodomy laws, partially based on a protected privacy interest in intimate sexual relations.[86] The majority opinion rejected arguments that the statute was invalid on Equal Protection Clause grounds. Instead, it focused on the due process violations apparent in a state law criminalizing a form of sexual conduct in a way that did not pass the strict scrutiny standard. Writing for the majority, Justice Kennedy argues:

85. In this phrase from the Declaration of Independence, as in elsewhere in the founding documents of our nation, we see the complex duality where structural inequalities in history and culture blinded or impeded a laudable quest for equality.

86. Lawrence v. Texas, 539 U.S. 558, 564–66 (2003).

> 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. . . . "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[87]

Arguably, this discussion of personal liberty as tied to respect for private lives is an extension of Supreme Court precedent on privacy, which continues to be vaguely and broadly constructed. Yet, the realm of personal liberty that the government may not enter is a clean construction of the civil liberty of privacy: the right against government intrusion into one's private affairs.

Justice O'Connor's concurrence in *Lawrence* takes another view.[88] O'Connor argues that the Texas law should be struck down not on due process grounds but due to its violation of the Equal Protection Clause. O'Connor argues that the Texas law is unconstitutional not because it improperly restricts personal liberty but because the law does not apply equally to all individuals. Instead, the restriction is tantamount to "a law branding one class of persons as criminal solely based on the State's moral disapproval of that class and the conduct associated with that class."[89] This contrasts with the majority opinion, which argues that the stigma of criminalization could remain even if the law was found unconstitutional for equal protection reasons.[90]

One way to read *Lawrence* is to evaluate the majority opinion as a privacy opinion and the O'Connor concurrence as an equality opinion. However, this would be a limiting analysis of the case. Though the majority opinion focuses on liberty (and thus privacy), equality also appears to be a motivating factor. Indeed, Kennedy writes that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[91] The Court makes clear the link between the right to privacy (the right to not have the government intrude upon your private conduct) and equality, where the privacy interest is linked to the conduct of a specific protected class.[92]

Specifically, the Court says that any law criminalizing conduct specific to a protected class essentially discriminates against that class—"When homosexual conduct is made criminal by the law of the State, that declaration

87. *Id.* at 578.
88. *See id.* at 585 (O'Connor, J., concurring).
89. *Id.*
90. *Id.* at 575.
91. *Id.*
92. *See id.*

in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[93] The majority opinion tells us that, regardless of equal treatment in the application of a law criminalizing a form of sexual conduct, the fact that the conduct in question was specific to "homosexual persons" means that criminalization of such conduct discriminates against those persons.

Privacy and equality are inextricably linked in many important cases. One can see echoes of the Court's intentional melding of privacy and equality rights in cases like *Obergefell v. Hodges* that rely in part on *Lawrence*, as well as in cases both before and after *Lawrence* involving harms related to sex, contraception, and abortion.[94] For example, in *Eisenstadt v. Baird*, which the Court cites in *Lawrence*, the majority opinion relies in large part on an analysis of both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to protect the privacy rights of unmarried people using contraceptives.[95]

Indeed, even in cases not specifically involving harms that are discriminatory toward a protected class, courts could potentially bring the values of civil rights and equality into discussions of privacy, e.g., the need to protect unpopular political groups in many First Amendment cases. For example, though this line of reasoning does not appear so much in the majority opinion, Sotomayor's concurrence in *United States v. Jones* notes the effect of GPS surveillance as particularly harmful due to the potential for such sustained location surveillance in creating a record that "reflects a wealth of detail about [a person's] familial, political, professional, religious, and sexual associations."[96] Sotomayor cites *People v. Weaver*[97] to further explore the kinds of personal data such a record might entail:

93. *Id.*

94. *See generally* Obergefell v. Hodges, 574 U.S. 118 (2015) (holding that same-sex marriage was a right guaranteed under the Due Process and Equal Protection clauses of the Fourteenth Amendment); *see, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (protecting the right of unmarried couples to purchase and use contraception); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (upholding the constitutional right to abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972); United States. v. Windsor, 570 U.S. 744 (2013) (holding that a federal regulation banning-same-sex marriage was unconstitutional under the Fifth Amendment's Equal Protection clause); Bostock. v. Clayton Cty., 140 S. Ct. 1731 (2020) (holding that Title VII of the Civil Rights Act prohibited discrimination against employees based on sexual orientation).

95. *See* Eisenstadt v. Baird, 405 U.S. 438, 447–49 (citing Griswold v. Connecticut, 381 U.S. 479, 498 (1965) (White, J., concurring in judgment)) (1972).

96. United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring).

97. People v. Weaver, 12 N.Y. 3d 433, 441–42 (2009).

> Disclosed in [GPS] data . . . will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on.[98]

What is interesting about the inclusion of this specific quote from the lower court opinion is that most of the examples it describes relate to conduct that is specific to protected classes. Trips to the psychiatrist may be more common for those with mental health disabilities. Plastic surgeons may see more patients who are women, and plastic surgery services are targeted more toward women.[99] Abortion clinics, AIDS treatment center, strip clubs, by-the-hour-motels, and gay bars similarly are places frequented by or targeted at people from protected classes due to sex, gender, sexual orientation, health status, and more. Mosques, synagogues, and churches are also frequented by specific groups due to and for the practice of religions, and religion is another protected characteristic. Union meetings are frequented by people with specific political aims, which are often protected under civil rights laws. Finally, due to systemic inequalities in policing and criminal justice, even trips to visit a criminal defense attorney may be more common for people from certain groups, particularly due to race.

One could extend this line of thinking to *Jones* and other cases by arguing that privacy and civil rights are inextricably linked. Keeping certain facts about oneself private may be more critical for people from protected classes. Note that civil rights laws protect certain "protected classes," which is an imperfect analogue for protecting marginalized populations. Indeed, people from protected classes may require a higher threshold of privacy protections in order to achieve the same level of privacy and autonomy awarded to others. People who do not belong to marginalized groups may protect their own privacy with greater ease because the facts and behaviors they seek to keep private may be less prone to external interference or censure. It is far easier to use abortion clinic records to discriminate against women than against men, for example. Thus, some people may suffer from unequal access to privacy protection, just due to these people belonging to certain protected classes or even certain marginalized identities that do not fall under legally protected classification. If we consider privacy to be a public service, a public accommodation of a kind,

98. *Id.*

99. Sammy Sinno, Gretl Lam, Nicholas D. Brownstone & Douglas S. Steinbrech, *An Assessment of Gender Differences in Plastic Surgery Patient Education and Information in the United States: Are We Neglecting Our Male Patients?*, 36 AESTHETIC SURGERY J. 1 (2016).

or at the very least, a right the public ought to have, then privacy must be protected as a matter of civil rights and equality. The fact that types of personal information can identify someone as being a member of a protected class makes the privacy interest so demonstrably clear and necessary to protect.

It can also be useful to understand the thread of civil rights values across different strands of legal thought on privacy. When arguing that equal protection and privacy are inextricably linked in women's rights cases, Elizabeth M. Schneider suggests "concepts of equality are necessary for a robust understanding of privacy, and concepts of privacy are necessary for the full realization of equality."[100] Indeed, an understanding of privacy that lacks acknowledgement of inequity and discrimination cannot truly protect privacy for all.

B. SECTORAL PRIVACY LAWS

Outside of constitutional rights, privacy in the United States is often protected as a tort interest and as a consumer protection right. Privacy rights can also be protected in criminal law, e.g., criminal laws against stalking. While hopefully few individuals will ever find themselves fighting for or against tort or criminal privacy claims in a court of law, an increasing number of people may find themselves the main subject of another area of privacy law: privacy as a consumer right.

There is no federal privacy law in the United States, which differentiates the United States from the European Union, where the General Data Protection Regulation (GDPR)[101] acts as an omnibus regulation that attempts to comprehensively govern data protection throughout the EU member states.[102] In the absence of a U.S. federal privacy law, much of what constitutes U.S. privacy law becomes a matter of federal sectoral privacy laws, federal administrative codifications of privacy principles, and state privacy laws. Many of these state laws frame privacy as a consumer protection right.

With the modern omnipresence of technology, companies like Facebook, Google, and Apple—a smart phone in every pocket, a camera on every street corner—privacy has become a buzzword, so hotly debated and loudly degraded that it has, in some ways, become a concept almost devoid of

100. Elizbeth M. Schneider, *The Synergy of Equality and Privacy in Women's Rights*, 2002 U. CHI. LEGAL F. 137, 138 (2002).

101. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1.

102. *See generally* Meg Leta Jones & Margot E. Kaminski, *An American's Guide to the GDPR*, 98 DENVER L. REV. 1 (providing a succinct overview of the GDPR aimed at U.S. readers).

meaning.[103] Whether consumer, user, citizen, or human being, most of us harbor some implicit understandings of privacy, but it would be hard to argue that humanity has reached a general consensus on how best to protect privacy. This is particularly apparent in the United States, despite our nation's self-belief of ours as a nation above all others in devotion to freedom and liberty.

U.S. federal sectoral privacy laws regulate privacy for different industries, often focusing on harms to consumers. Some federal sources of authority for privacy as consumer protection law include the Fair Credit Reporting Act (FCRA),[104] the Health Information Portability and Accountability Act (HIPAA),[105] the Children's Online Privacy Protection Act (COPPA),[106] and general Federal Trade Commission (FTC) privacy common law.[107] Still, privacy laws that attempt to protect consumers as a monolith do not effectively protect all consumers, because the harms suffered by individuals are not suffered equally.

Furthermore, the sectoral nature of U.S. consumer privacy protection law provides unequal access to privacy protection for different classes of individuals and groups, as well as to different environments and against different actors. Some of the unequal access to privacy protections comes down to the fact that many consumer protection laws rely on individual consumers raising complaints to agencies or filing suits against companies. The legal process is inaccessible for many, and any form of privacy protection that relies on a legal system rife with inequality will likely also produce unequal results.

This consumer rights framework for privacy can also be insufficient because the growing collaboration between public and private actors can cause disparate harms and the way that connected technologies function make the larger data ecosystem more difficult to govern. For example, Amazon marketed its Ring camera products directly to consumers as home security systems.[108] However, the company also marketed to police departments. In

103. This is not to say that privacy is dead but merely that the myriad of unresolved questions about privacy, a myriad aided and abetted by changing social understandings of technology, contributes to a bit of confusion for the average consumer (or the average lawyer), that is, what privacy is and what is it for, and what is it not and what is it not for?

104. Fair Credit Reporting Act, 15 U.S.C. § 1681.

105. HIPAA, 45 C.F.R. §§ 160, 162, 164.

106. Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501–06.

107. *See* Solove & Hartzog, *supra* note 26 (arguing that FTC jurisprudence has constituted a body of privacy law).

108. RING, https://ring.com/ (last visited Aug. 4, 2022).

partnership with over 500 police departments,[109] Amazon allows police to contact Ring users and ask for surveillance footage. In exchange, Amazon provides departments with free or low-cost Ring devices to distribute to residents. Essentially, Amazon supports a government surveillance effort through consumer-grade products that are regulated primarily under consumer protection privacy laws. Previously, Amazon also sold to law enforcement agencies its "Rekognition network," a facial recognition system that aimed to identify faces, objects, and scenes from images. Amazon announced a moratorium on police use of its facial recognition programs in 2020 and renewed that moratorium in 2021.[110] Private-public partnerships like the Amazon-police department partnerships can create disparate harms. Surveillance programs may increase privacy violations for marginalized communities, and consumer protection law may not be enough to ward off those harms.

Privacy violations cause disparate harms to marginalized populations, particularly in an age of surveillance capitalism. This happens for a variety of reasons. Some groups may be less able to access or use new technologies. For example, poor people have less access than wealthy people to new consumer technologies or even internet access, despite the fact that they endure more surveillance and have less ability to fight back.[111] While it can be expensive to buy a new computer or afford stable housing with internet, it is free to be surveilled by the state. Due to disproportionate access to technology, any privacy protective benefits from new technologies could accrue less for people from marginalized populations.

Additionally, companies may have less of a market incentive to design products and services that cater to the needs of underprivileged consumers or minority consumers. This may occur simply because there are fewer people in minority groups and thus less of a market for products and services. Additionally, underprivileged consumers may be less able to spend on products and services, which decreases the market incentive for companies to build in privacy protections for those consumers. Thus, it is possible that fewer protections will be built into products to specifically address the privacy needs of those populations. Take stalkerware, for example. Stalkerware is the

109. Rani Molla, *Activists are pressuring lawmakers to stop Amazon Ring's police surveillance partnerships*, VOX (Oct 8, 2019, 7:00 AM), https://www.vox.com/recode/2019/10/8/20903536/amazon-ring-doorbell-civil-rights-police-partnerships.

110. Karen Weise, *Amazon indefinitely extends a moratorium on the police use of its facial recognition software.*, N.Y. TIMES (May 18, 2021), https://www.nytimes.com/2021/05/18/business/amazon-police-facial-recognition.html.

111. *See generally* EUBANKS, *supra* note 24 (thoughtfully exploring multiple ways in which algorithmic systems discriminate against the poor).

colloquial term for digital applications that can help someone track and surveil another person, usually an intimate partner, disproportionately a woman or a girl.[112] However, technological design choices can stop developments like stalkerware,[113] but without regulatory pressure, companies may have little incentive to solve these problems of privacy and equality.

Conversely, consumers with less means may be more attractive targets of exploitative data collecting practices. For example, Worldcoin, a cryptocurrency project, gained its first half a million users by targeting people in developing countries and promising cash and other financial benefits in exchange for users giving up their biometric data (body, face, and eye/iris scans).[114] So far, Worldcoin has not produced any tangible products or services, and no cryptocurrency has emerged.

Consumer technologies today often rely on vast quantities of personal and other information that are then fed into a dangerous cyclical data ecosystem. This data ecosystem transfers individual consumer data to private and public parties that can then weaponize that data and use it for discriminatory purposes. For example, Clearview AI, a data aggregator, scraps personal images from social media websites and uses those images to power facial recognition algorithms that Clearview AI then sells to unknown entities, potentially helping empower authoritarian governments seeking to discriminate against political, religious, or ethnic minorities.[115]

In the absence of a strong federal privacy law, sectoral privacy laws leave many gaps where privacy violations can occur. This problem is not solely related to privacy but also to equality and civil rights. The sectoral privacy regime does not provide the regulatory push necessary to get companies to protect privacy equally for all individuals (or all consumers). A civil rights-

112. Christopher Parsons, Adam Molnar, Jakub Dalek, Jeffrey Knockel, Miles Kenyon, Bennett Haselton, Cynthia Khoo & Ron Deibert, *The Predator in Your Pocket: A Multidisciplinary Assessment of the Stalkerware Application Industry*, CITIZEN LAB (June 12, 2019), https://citizenlab.ca/2019/06/the-predator-in-your-pocket-a-multidisciplinary-assessment-of-the-stalkerware-application-industry/.

113. *See generally* Thomas E. Kadri, *Networks of Empathy*, 2020 UTAH L. REV. 1075 (2020) (arguing that technological and norms-based solutions can help fill in the gaps where regulation of digital abuse fails).

114. Eileen Guo and Adi Renaldi, "Deception, exploited workers, and cash handouts: How Worldcoin recruited its first half a million test users," MIT Tech Review, https://www.technologyreview.com/2022/04/06/1048981/worldcoin-cryptocurrency-biometrics-web3/ (April 6, 2022)

115. Caroline Haskins, Ryan Mac & Logan McDonald, *Clearview AI Wants to Sell its Facial Recognition Software to Authoritarian Regimes Around the World*, BUZZFEED NEWS, (Feb. 5, 2020, 8:15 PM), *https*://www.buzzfeednews.com/article/carolinehaskins1/clearview-ai-facial-recognition-authoritarian-regimes-22.

based understanding of privacy requires us to attempt to mitigate and resolve the distributed discrimination harms of the interconnected data ecosystem, including the downstream harms of data aggregation and use of data in artificial intelligence and machine learning systems.

C. THE PRIVACY TORTS

Privacy is an important value to individuals as citizens of a government, as consumers in an economy and as people in a society. Privacy protections in tort law can help shape the way our society recognizes privacy, including the way individuals interact with each other.[116] Tort law has its limitations, and some of these limitations are particularly apparent when considering the cause of civil rights and the quest for equality.

In their landmark article conceptualizing the right of privacy in the United States, Samuel Warren and Louis Brandeis wrote that privacy was "the right to be let alone."[117] Critical scholars have suggested that this right to be let alone was, in particular, framed as such to protect the right for wealthy elites like Warren and Brandeis to conceal the private facts of their and their families' lives from the public eye.[118]

Scholars like Amy Gajda, Anita L. Allen, and Erin Mack have written about how the right to privacy developed as a right for a privileged few (those who may have found themselves the subject of press gossip),[119] perhaps with a

116. *See generally* Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957 (1989) (arguing that the common law tort of invasion of privacy safeguards social and community norms).

117. Warren & Brandeis, *supra* note 19, at 193.

118. *See* Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. U. L. REV. 441, 457 (1991) ("Personal experiences with unwanted publicity concerning his Boston Brahmin family's social life may have prompted Warren to coauthor the famous article."); Samantha Barbas, *Saving Privacy from History*, 61 DEPAUL L. REV. 973, 983 (2012) ("Warren was incensed at finding details of his family's home life and social affairs spread on the society pages of several newspapers. More broadly, the authors were outraged by the new trend of invasive news reporting and what they considered to be the unwarranted and tasteless depiction of private life in the press."); *cf.* Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 9 (1979) (arguing that Warren and Brandeis did not bow to elitism in their framing of the right to privacy, particularly in comparison to E. L. Godkin, who specifically denoted particular rights to privacy for different categories of people in his contemporaneous article, *The Rights of the Citizen: To His Own Reputation*, 8 SCRIBNER'S MAG. 58, 65 (1890)).

119. *See generally* Amy Gajda, *What if Samuel D. Warren Hadn't Married a Senator's Daughter?: Uncovering the Press Coverage that Led to "The Right to Privacy,"* 2008 MICH. STATE L. REV. 35, (2007) (examining contemporary news coverage of the Warren family that may have inspired Warren to coauthor *The Right to Privacy*, *supra* note 19); Allen & Mack, *supra* note 118, at 456 ("Overwrought by today's standards, the Warren and Brandeis article was a lofty defense of values of affluence and gentility.").

special eye toward enshrining in it certain values including "traditional norms of female modesty."[120] Charles E. Colman has suggested that Warren may have been motivated to frame privacy in the way that he did out of concern for the privacy of his gay brother, Ned, and out of fear that Ned's secrets would be exposed in a dangerous manner.[121]

This is all to say that even the origins of privacy are not devoid of considerations of equality and what many now call civil rights. Even the absence of such considerations in the original framing can be useful in understanding the limitations of privacy torts today and why reform is necessary to protect both privacy and civil rights in social interactions between individuals.

In Warren and Brandeis's time, gossipy society pages in print newspapers may have been among the greatest threats to a person's reputation. However, today, with the explosion of the internet and online communications, there are many more threats to reputation and privacy. For example, Warren and Brandeis likely did not foresee deepfakes[122] or nonconsensual sexual imagery. However, today, we live in a new world, where those harms exist, and those technologically driven privacy harms can impact a person's access to equality and civil rights.

Today's contemporary understanding of privacy in tort law undeniably also reflects William Prosser's influential formalization of privacy torts in the *Second Restatement of Torts*[123] and elsewhere.[124] Prosser conceptualized privacy as four distinct torts: the right against reasonable intrusion, the right to publicity, the right against appropriation, and the right against publicity that places one in a false light.[125] Although the privacy torts can be useful in some cases, tort law has its limits in protecting privacy.[126]

120. Allen & Mack, *supra* note 118, at 444.

121. Charles E. Colman, Comment, *About Ned*, 129 HARV. L. REV. F. 128, 151 (arguing that Warren may have been motivated to coauthor *The Right to Privacy* due to a desire to protect the privacy of his gay brother Ned).

122. *See* Danielle K. Citron & Robert Chesney, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753 (2019) (explaining privacy, democracy, and national security challenges related to deepfakes).

123. *See generally* Restatement (Second) of Torts § 652 (Am. L. Inst. 1975).

124. *See generally e.g.*, Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805,(2010) (discussing in part the lasting influence of Prosser's conceptualization of privacy torts).

125. *See* Restatement (Second) of Torts.

126. *See generally, e.g.*, Citron, *supra* note 124, at 1805; Neil M. Richards, *The Limits of Tort Privacy*, 9 J. TELECOMM. & HIGH TECH. L. 357 (2011); Patricia Sánchez Abril, *A (My)space of One's Own: On Privacy and Online Social Networks*, 6 NW. J. TECH. & INTELL. PROP. 73 (2007); Barbas, *supra* note 118, at 973.

Privacy torts provide some legal basis for individuals who wish to use litigation to enforce their privacy rights. However, privacy torts do not account for inequality in privacy violations and protections. There will always be some who have more access to protection than others and more ability to litigate to enforce their rights. This power discrepancy is fundamentally antithetical to privacy as a civil right.

For example, in arguing for the conceptualization of the cyber civil rights discussed earlier in Section III.C, Danielle Keats Citron has noted the failings of tort law in protecting victims of cyber harassment, cyber stalking, and nonconsensual sharing of intimate imagery ("revenge porn").[127] According to Citron, "Law's shortcomings have made combating cyber harassment difficult. Tort remedies for defamation, intentional infliction of emotional distress, and privacy invasions exist only in theory for some victims, due to the high cost of litigation and the absence of specific privacy protections."[128] Not only is the high cost of litigation a factor— the financial cost as well as the emotional and psychological cost—but the distributed and often anonymous nature of the internet may make it difficult to find and stop the perpetrators.

In any system of law, it is an unfortunate reality that those with greater economic means are often better able to pursue their legal rights in court. For privacy and tort law, this inequality exists here as well. As Scott Skinner-Thompson argues when discussing the inequality in applications of privacy torts, wealthy or famous people have greater ability to protect their tort interests, both due to having more means to sue and also due to a greater leeway afforded to them by unequal application of privacy tort law to public figures.[129] Thus, a tort law understanding of privacy that does not include civil rights can lead to further inequities for people from already marginalized populations.

V. RECOMMENDATIONS

To protect privacy and civil rights, and privacy as a civil right, it is important to consider equality and privacy as values that go hand in hand. Across different sectors of privacy regulation, the law can and should incorporate an understanding of the civil rights, antidiscrimination, and anti-subordination impacts of privacy laws.

We should understand privacy both as a civil right and as a core component to creating the conditions that allow civil rights to flourish. Not

127. *See generally* Citron, *supra* note 71.
128. CITRON, *supra* note 72, at 24.
129. SKINNER-THOMPSON, *supra* note 23, at 195.

only do individuals deserve equal privacy protections, but they also deserve protections for the privacy necessary to advocate for equality. Traditional civil rights laws protect equal access to spaces and opportunities. Cyber civil rights protect these rights in the online world. Now it is time to understand how to protect both privacy and civil rights in a world where technology blurs the line between online and offline and where technologically mediated civil rights violations in the offline world can harm individuals. Where access to privacy protection is unequally distributed in a discriminatory fashion or where certain privacy practices (invasions of privacy or protections of privacy) discriminate against individuals from protected classes, the law ought to view this as a civil rights violation.

Constitutionally, courts should begin to understand privacy as integral to both due process and equal protection. That is, there may be policies and practices that violate privacy in a way that violates an individual's due process and equal protection rights as well. The category of claims that should give rise to a combined privacy and civil rights interest, constitutionally, should not be limited to only laws against gay marriage and abortion. Laws and practices that promote surveillance, mandate the use of biased algorithmic assessments, and allow for gendered harms related to cyber stalking, should also be considered unconstitutional based on due process and equal protection. Individuals should be able to claim a constitutional right to privacy under the Equal Protection Clause, recognizing that privacy has never been awarded equally to all people across society.

Tort laws for privacy merit reform as well. There are clear limitations on the ability for privacy torts to truly protect the privacy rights of all individuals, particularly given the disparity in ability to bring or prevail on tort privacy claims and the difficulty of traditional privacy tort doctrine in applying to modern technologies like social media platforms. We should recognize the equal access interests for plaintiffs in privacy tort actions and understand the civil rights implications of privacy torts. Where possible, civil procedure can also be reformed to balance the disparity of power between plaintiffs who belong to protected classes (and other marginalized groups, e.g., the poor) and those who do not. In short, equal protection principles should be applied to the protection of privacy in tort law to protect both privacy and civil rights.

State and sectoral privacy laws, particularly those that perceive of privacy as a consumer protection right, must take into account civil rights as well. For example, Ifeoma Ajunwa has called for Congress to add a disparate impact clause into the Genetic Information Nondiscrimination Act to fully address

the potential for genetic discrimination, particularly the outsized impact on certain protected classes.[130] Congress should heed this call.

The United States should pass a federal privacy law to fill in the gaps of the sectoral privacy regime, and this federal privacy law must be written with civil rights in mind. A federal privacy law must take into account the civil rights implications of privacy. The law must recognize that privacy risks and harms are unequally distributed. This must be part of the framing as a signaling move to enshrine privacy and civil rights into our legal system.

U.S. jurisprudence tends to shy away from stipulating positive rights for individuals. However, critically, one space where this may be less of a factor is concerning civil rights. Antidiscrimination laws often amount to laws that impose positive obligations on state actors to create conditions that make equality possible.[131] For example, in mandating compliance with the Americans with Disabilities Act (ADA) standards, the government arguably creates positive obligations for entities that offer public accommodations to create accessible spaces for accommodation, even in online spaces.

If we are to truly believe in the importance of privacy and the rights of all individuals to have equal access to privacy and equal protection against privacy violations, then we ought to protect privacy as a civil right. Individuals should be able to raise civil rights claims when they believe they are the subject of a privacy violation that amounts to discrimination on the basis of a protected characteristic, even when that discrimination occurs online or in a hybrid context. Individuals should also have civil rights claims against unfair and unequal privacy violations, like the disproportionate use of surveillance technology against marginalized populations. The civil right of privacy should be codified into a federal privacy law or an extensions of current privacy laws or civil rights laws.

A civil rights-oriented right to privacy should conceptualize privacy as a positive right. To do so, legislators can borrow from international conceptions of privacy rights, including conceptions of privacy as a primarily dignitary interest (as in Article 7 of the Charter of Fundamental Rights of the European Union[132]) and privacy as a fundamental human right (as in Article 12 of the

130. Ifoema Ajunwa, *Genetic Data and Civil Rights*, 51 HARV. C.R.-C.L. L. REV. 75, 100 (2016).

131. Of course, one could say that a positive obligation to create conditions that make equality possible is functionally equivalent to a negative obligation against creating conditions that make equality impossible. To which I say, oh well.

132. Charter of Fundamental Rights of the European Union, art. 7, 2000 O.J. (C 364) 1.

Universal Declaration of Human Rights[133] and Article 17 of the International Covenant on Civil and Political Rights).[134] Viewed in this manner, privacy becomes not a right to be let alone or a right against government intrusion, but a positive right for individuals that obligates the government to provide the conditions that make privacy possible. Centering equality and civil rights into our privacy laws can also create a strong signaling factor to other nations, shifting the global norms for privacy in a way that moves us toward a more open, democratic, and equal future.

VI. CONCLUSION

Before final publication of this article, the Supreme Court released its decision in the controversial case, *Dobbs v. Jackson Women's Health Organization*.[135] This decision effectively overturned *Roe v. Wade*, the monumental case that legalized the right to abortion nationwide.[136] The *Dobbs* decision has upset decades of national legal protection for the right to abortion and, potentially, decades of precedent on the scope of a person's right to privacy as well as the limits of equal protection as related to substantive due process.

Not only has the *Dobbs* decision reinforced the need for greater privacy protections, generally, but this recent ruling has also cast more light on the impact that technology can have on privacy rights.[137] In states where abortion is or may soon be criminalized, a person's digital data may potentially be used against them in court. For example, location data from cell phones could be used as evidence to show that a person visited an abortion clinic. Emails and messaging data could include conversations about seeking or providing abortions, which could implicate a person in illegal actions, if in a state where abortions are illegal.

In post-*Roe* America, digital privacy, health privacy, bodily autonomy, and equal protection are more intertwined than ever. Losing the nationwide right to abortion creates harm that disproportionately affects already marginalized,

133. Universal Declaration of Human Rights, art. 12, U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1948) ("No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.")

134. *See* International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, 999 U.N.T.S. 171 S. Treaty Doc. 95-20.

135. Dobbs v. Jackson Women's Health Org., 597 U. S. ___ (2022).

136. Roe v. Wade, 410 U.S. 113 (1973).

137. Tiffany Li, *In post-Roe America, your cell phone is now a reproductive privacy risk*, MSNBC DAILY, https://www.msnbc.com/opinion/msnbc-opinion/states-abortion-bans-can-weaponize-your-own-data-against-you-n1296591 (June 25, 2022).

vulnerable groups, including Black women, who are more likely to live in states that already ban or may soon ban abortion, more likely to seek abortion care, and more likely to die in childbirth.[138] The right to abortion is a privacy right, and it should also be considered a civil right. As with many other forms of privacy violations, restrictions on the right to abortion amount to restrictions on the right to privacy that are unequally applied and disparate in impact – violations of civil rights.

While civil rights law in the United States has its limitations, conceptually situating privacy rights in a civil rights context can help us remedy, or at least expose, some of the inequities in access to privacy protections. Protecting privacy as a civil right serves the dual function of protecting the civil right of privacy and protecting the ability for privacy to support and enhance other civil rights. Furthermore, it is critical to consider privacy as a fundamental tool for protecting civil rights because our new technologically motivated world demands it.

As citizens of the future, we must recognize that the ever-changing nature of new technologies will continue to shape our conceptions of privacy and civil rights. Privacy should be considered a civil right, particularly because our new, connected world has changed the way we understand our data and ourselves. No longer is it enough to protect equal access to physical spaces and equal rights in the offline world. Now, we must protect our privacy online, offline, and in situations where the line between cyber and physical space is blurred.

The right to privacy is core to civil rights and the fight for freedom and equality worldwide. There cannot be a just and equal society when the rights to privacy are not protected equally—when some are unable to access privacy protections afforded to them by law, while others are the subject of disproportionate privacy violations. Privacy and civil rights are inextricably intertwined, and the law and legal scholars must understand this complexity in order to better protect both core values for the future.

138. Nandita Bose, *Roe v Wade ruling disproportionately hurts Black women, experts say*, REUTERS, https://www.reuters.com/world/us/roe-v-wade-ruling-disproportionately-hurts-black-women-experts-say-2022-06-27/ (June 27, 2022).