The Right to Information Privacy in a Post-Dobbs United States

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In 2022, Dobbs v. Jackson Women’s Health Organization sent shockwaves throughout the United States. There, the Supreme Court overturned Roe v. Wade, the case from 1973 that had legalized abortion. Dobbs suggested that ‘[t]he Constitution makes no reference to abortion’ and that ‘no such right [was] implicitly protected by any constitutional provision.’ The Dobbs majority chided the Roe Court’s suggestion that abortion was an integral part of an entrenched right that Roe had called a ‘right to privacy.’

Given that broad language, some worried that the Court had effectively wiped away privacy rights completely in its Dobbs opinion. One article’s headline read ‘After Dobbs, the right to personal privacy no longer exists for anyone.’ Another was titled ‘Betrayal of Trust: The Death of Privacy in the Supreme Court in Dobbs.’

It’s true that the Dobbs opinion ended the constitutional right of privacy in abortion and that its reasoning puts at risk other older rulings that protect contraception and same-sex marriage on constitutional grounds. That’s because the Dobbs Court wrote that a fundamental constitutional right springing from the Due Process Clause in the United States Constitution—one that is not explicitly laid out in its words—must be ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’

Abortion was neither deeply rooted in history nor implicit in ordered liberty, the Justices in the Dobbs majority decided.

But despite what certain headlines suggested in 2022, Dobbs didn’t end all privacy rights in the United States. Intriguingly, the Dobbs opinion itself suggests precisely that sort of limitation to its breadth: the Justices wrote that the Roe Court had ‘found support for a constitutional ‘right of personal privacy,’ but [that] it [had] conflated two very different meanings of the term: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference.’ While the Court went on to cast doubt on the continuing viability of the

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1 597 U. S. ____ (2022).
2 410 U. S. 113 (1973).
second kind of constitutional privacy right, it was careful to distinguish and push to the side any intimation about legal protection for informational privacy.

And what that means is that the law of information privacy—and clearly the right to shield information from disclosure—remains untouched by the Court’s holding in *Dobbs*.

In part, this reflects the fact that most of the law protecting information privacy—at least outside of criminal procedural protections against governmental searches and seizures and compelled self-incrimination—resides outside the Constitution in statutes, common-law doctrine, or regulatory frameworks. Consider as a prime example, data privacy statutes passed by a number of states\(^5\) with still more pending, including perhaps a federal one someday soon. These laws continue to exist in a post-*Dobbs* world, including those that have become the basis for successful class-action privacy litigation.

The *Dobbs* opinion didn’t do a thing to tort privacy in the United States either. The highly influential Second Restatement of the Law of Torts written by the American Law Institute and its privacy-relevant sections continue to exist and continue to be used by courts that decide privacy cases.\(^6\) That means that plaintiffs continue to recover for misappropriation (for the unauthorized use of their names or photos generally in advertising); intrusion into seclusion (for another’s peering in on them when they are in a secluded space); publication of private facts (for the publication of highly offensive but truthful information about them as long as that information is not newsworthy); and false light (for the publication of highly offensive inaccurate information about them).

And well more than 100 state and federal courts have continued to use those privacy principles in their analyses post-*Dobbs*,\(^7\) from Summer of 2022 when *Dobbs* was decided through Winter of 2023. As even stronger proof, some of those decisions have sided with plaintiffs:

- In September 2022, a federal trial court in California decided that the plaintiff in *Board of Trustees v. Zhang Yuzhen*\(^8\) had a valid tort claim for the publication of private facts against Stanford University. There, the university archives had given the public access in a university reading room to a man’s ‘diary entries, letters and poetry’ that ‘reflect[ed] deeply personal and private affairs’ of a woman who was still living.

- That same court ruled that same month in *Ji v. Naver Corporation*\(^9\) that there could be biometric privacy in faces, rejecting the defense’s argument that ‘an individual

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\(^5\) See, e.g., the California Consumer Privacy Act, 1798.100, and the Illinois Biometric Information Privacy Act, 740 ILCS 14.

\(^6\) Restatement (Second) of Torts § 522B-E (1977).

\(^7\) This is based upon a search of the Lexis database in February of 2023.

\(^8\) 2022 U.S. Dist. LEXIS 176335 (N.D. Cal. Sept. 28, 2022).

has no privacy interest in their own face,’ even though, as the defense pointed out, the plaintiffs allegedly had willingly scanned their own faces in order to use an app designed to digitally alter their appearance.

– In October 2022, a federal court in Kansas ruled in Link v. Lawrence Memorial Hospital[10] that an employer’s release by email of the plaintiff’s unredacted medical records containing ‘particularly sensitive and embarrassing’ medical information could become the basis for a publication-of-private-facts claim.

– In December 2022, in Jackson v. Angela Kogan & Perfection Plastic Surgery,[11] a federal trial court in Florida ruled that the rapper and actor known as 50 Cent had valid misappropriation and false light claims based on an Instagram video post. That post showed the defendant, who owned a plastic surgery business, scrolling through another’s published article that suggested through an unrelated photograph that 50 Cent had had a penile enhancement procedure. ‘Because [the business owner and her business had taken] it upon themselves to post the video onto their Instagram accounts,’ the court wrote, 50 Cent ‘can plausibly argue that [they] unauthorized used his likeness to promote their business regardless of whether the [they] had any role in [the original article’s] publication.’

Even the Supreme Court itself has joined the call to protect that sort of privacy. Less than a year before it decided Dobbs, the Justices wrote in Americans for Prosperity Foundation v. Bonta[12] that there were ‘privacy concerns’ in data that included ‘sensitive details such as a person’s home address.’ ‘[A]nyone with access to a computer [can] compile a wealth of information about anyone else,’ they suggested, and they were particularly concerned about ‘threats and harassment,’ ‘intimidating and obscene emails,’ and ‘protests, stalking, and physical violence.’ The Justices decided in that case that, given those privacy concerns, charities could keep their donors’ names and addresses secret despite a California tax law that suggested otherwise.

Relatedly, and perhaps most strikingly, Dobbs itself leaves open the possibility that this very-different-from-abortion-rights ‘right to shield information from disclosure’ could well be considered a constitutional right as well. It matters much that that right has a decidedly rich history in the United States, from all the way back before the First Amendment was ratified when Founders first suggested the propriety of limitations on press freedom to preserve personal privacy.[13] That and other similar discussions over time arguably could provide the evidence that respect for personal information privacy was ‘deeply rooted in this Nation’s history and tradition’ in ways the Court found lacking when it came to respect for personal autonomy in electing abortion.

Any such argument will surely take some years to develop before the Supreme Court might be called upon to say so. Until then, the viability of that sort of constitutional privacy right remains uncertain. In the meantime, other forms of legal protection for information privacy will surely continue to expand in the United States no matter what the Dobbs Court decided.