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Privacy-related crimes in US law

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Abstract
Since criminal law is usually considered a last resort for regulators, it provides a particularly focused lens through which to study privacy protection: privacy crimes are the most poignant forms of privacy infringements. This paper provides an overview of how privacy is protected through substantive criminal law in the United States. As part of a large-scale project on privacy protection in the 21st century, together with similar country studies, it will facilitate comparative legal analysis of privacy crimes (a relatively under-researched field), and also help to better understand privacy, as the forms and scope of privacy protection in criminal law tell us something about how privacy is conceptualized in law, and what legislators consider particularly protection-worthy in privacy. This paper offers a descriptive, bird's-eye overview of offences relating to spatial, personal, relational, and informational privacy. After an introduction into US criminal law, I describe a broad range of offences against places, computers, body and mind, reputation, papers, secrets, and data.

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CONTENTS

1. Introduction

This report provides an overview of how privacy is protected through substantive criminal law in the United States. Because criminalization is generally reserved for offenses that are seen as particularly damaging to society or morally undesirable (or, as Dressler and Garvey have formulated it, as the consequence of "a formal and solemn pronouncement of the moral condemnation of the community"[1]), an analysis of substantive privacy crimes provides a particularly focused lens through which to study privacy protection. If these assumptions about the criminal law hold true, then those privacy intrusions that are criminalized, as opposed to those subject to only civil liability (e.g. under federal or state statutory legislation, tort law, or other theories), may be seen as examples of those forms of privacy that are seen by legislators within the United States as the most morally reprehensible or damaging to American society.

This working paper, which is part of a larger and on-going project, provides an overview of (selected) privacy violations in US criminal law. We structure our analysis along four types of objects of the right to privacy, as identified in our earlier work: the protection of persons, places,

[1] Joshua Dressler and Stephen P Garvey, CASES AND MATERIALS ON CRIMINAL LAW 3 (Sixth ed., St. Paul: West Academic Publishing, 2012).

things, and data.[2] Because the overall goal of this project is to generate a better understanding of the concept of privacy and its importance in our contemporary society filled with myriad new forms of surveillance and other privacy intrusions (and to do so from a comparative perspective), we conceptualize privacy broadly and include criminal provisions that relate to the broad theme of protecting aspects of persons and their personal lives (encompassing the various types and dimensions of privacy we present in Koops, et al. (2017)). This conceptualization undoubtedly encompasses a large part of criminal law (e.g. even the crime(s) of homicide often involve physical contact with a person's body, which raise privacy questions about physical privacy and the right to limit access to our bodies). As such, we do not describe all privacy violations in great detail, and we limit our discussion to crimes that have clear connections to privacy interests. The current working version of this draft also includes more substantive analysis of particular offenses (those prioritized by our on-going research to date), and additional analysis and analysis of additional provisions will continue to be added as the research progresses.

In section 2, we provide a high-level overview of US criminal law, briefly outlining the history, structure, and foundational concepts required to place the later discussion into context. Sections 3-6 outline criminal provisions related to protecting places (section 3), persons (both as individuals and in the context of social and/or intimate relationships) (section 4), things (section 5), and information or data (section 6).

Where code provisions are referenced in the text (e.g., s. 1030), these refer to the Federal Criminal Code (Title 18 of the Federal Code, 18 U.S.C. s. 1, *et seq.*), unless otherwise stated. State criminal provisions are cited using the state's name or two-letter abbreviation (e.g., California or CA), and references to the Model Penal Code are indicated by the use of the abbreviation, MPC.

2. Basic elements of US criminal law and privacy

2.1. A brief overview of criminal law

US criminal law owes its origins to the English criminal law that existed at the time of the American independence, which was generally uncodified, judge-made common law.[3] Early criminal laws related to privacy were generally those of homicide, assault, battery, and rape, but more recently, privacy crimes have become more varied. Interestingly, Warren and Brandeis, in their seminal law review article, *The Right to Privacy*, noted in 1890 that:

> It would doubtless be desirable that the privacy of the individual should receive the added protection of the criminal law, but for this, legislation would be required. Perhaps it would be deemed proper to bring the criminal liability . . . within narrower limits; but that the community has an interest in preventing such invasions of privacy, sufficiently strong to justify the introduction of such a remedy, cannot be doubted.[4]

The purpose of the criminal law is to impose punishment for bad behavior, but there are quite a few (and often conflicting) theories about how and whether the law actually influences human

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[2] *See* Koops, et al., *A Typology of Privacy*, 38 U. PA. J. INT'L L. __ (2017) (forthcoming).

[3] Paul H. Robinson, *United States*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, p. 564, edited by Kevin Jon Heller and Markus D. Dubber (Stanford: Stanford University Press, 2011); Dressler and Garvey, *supra* note 1 at 3-4; Wayne R. LaFave, *Common Law Crimes*, in 1 SUBSTANTIVE CRIMINAL LAW § 2.1(b), (c) (2d ed., West, 2014).

[4] Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 219 (1890).

behavior away from the bad or undesirable and towards the more desirable, including *prevention*, *deterrence*, and *retribution*.[5] Importantly, the US Constitution vests most authority to define and penalize criminal conduct with the states,[6] and the federal government retains only limited authority except where offenses relate to a "special federal interest."[7] As a consequence, there are fifty-two criminal justice systems (and criminal codes) in the United States, encompassing the fifty states, the District of Columbia, and the federal criminal code.[8] For some time after gaining independence, US courts refined the criminal law, diverging from the law of England in some respects. Ultimately, however, legislatures stepped in and began codifying the criminal law into state and federal codes (although, prior to the 1960s, early efforts were somewhat limited and often "ad-hoc" responses to current events).[9] This eventual shift from common law to statutory law was driven by adherence to the *legality principle*, namely that "criminal liability and punishment can be based only on a prior legislative enactment of liability rules expressed with adequate precision and clarity."[10]

This principle (also referred to as *the rule of law*) is based on ideas that existed prior to, but were enshrined in, the Magna Carta in 1215,[11] as well as a number of legal doctrines, including the prohibition on *ex post facto* laws (retroactivity), the constitutional prohibition against vagueness in the criminal law (the "void-for-vagueness" doctrine), legislative authority to define criminal law (the principle of *legislativity*), and the *rule of* lenity—or the idea that criminal provisions should be read strictly and ambiguities should be resolved in favor of the defendant.[12] The first two of these doctrines maintain constitutional status, while the latter two do not.[13] The legality principle is also supported by arguments in favor of procedural fairness, making criminalization a matter for the legislature rather than courts, ensuring clear and adequate notice so that citizens may conduct themselves in accordance with the rules (part of the *rule articulation* function), outlining the proper boundaries for legitimate adjudication, ensuring consistency between cases, and avoiding the abuse of discretion during all stages of the criminal justice system, from policing to prosecution and sentencing.[14]

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[5] *See* Wayne R. LaFave, *Purposes of the criminal law—Theories of punishment*, in 1 SUBSTANTIVE CRIMINAL LAW § 1.5 (2d ed., West, 2014).

[6] *See* Rochin v. California, 342 U.S. 165, 168 (U.S. Supreme Court, 1952) ("Broadly speaking, crimes in the United States are what the laws of the individual States make them, subject to the limitations of Art. I, s 10, cl. 1, in the original Constitution").

[7] Robinson, *supra* note 3, at 567-68.

[8] *Id.* at 567-68.

[9] *Id.* at 564; Dressler and Garvey, *supra* note 3, at 4; *but see* LaFave, *supra* note 3, at §§ 2.1(c)-(e) (noting that common law crimes do still exist in some states, as well as in the District of Columbia).

[10] *Id.* at 564, 566.

[11] *See* Magna Carta, art. 39 (1215); Magna Carta, art. 29 (1354); Emily Silverman, *Principle of legality (nullum crimen sine lege) in the USA*, in NATIONAL CRIMINAL LAW IN A COMPARATIVE LEGAL CONTEXT: GENERAL LIMITATIONS ON THE APPLICATION OF CRIMINAL LAW, vol. 2.1, 153 (Ulrich Sieber, Susanne Forster, and Konstanze Jarvers (eds.), Berlin: Duncker & Humblot, 2011).

[12] Robinson, *supra* note 3, at 566; Silverman, *supra* note 11, at 156.

[13] The prohibition on retroactive (ex post facto) criminal laws is stated expressly in the Constitution. U.S. Const. art. 1 §§ 9, 10; *see also* Collins v. Youngblood, 497 U.S. 37 (U.S. Supreme Court, 1990); California Dep't of Corrections v. Morales, 514 U.S. 499 (U.S. Supreme Court, 1995). The void-for-vagueness doctrine is not expressly stated in the text of the Constitution, but it maintains constitutional status by virtue of its inclusion within the Due Process Clauses of the Constitution. Silverman, *supra* note 11, at 156; *see also* A.G.A., Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PENN. L. REV. 67 (1960).

[14] Robinson, *supra* note 3, at 566-67; see also Paul H. Robinson, Michael T. Cahill, and Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 N.W. UNIV. L. REV. 1, 1, 3 (2000).

As mentioned above, the criminal law remained largely uncodified—or at least not the subject of comprehensive and internally coherent codes—prior to the 1960s and, as has been argued, the most important contributions made by many of these early attempts was generally just to alphabetize the offenses developed by the courts.[15] Dressler has called the state of these early statutory systems "disastrous," because they lacked the minimal components of a code:

> [A] criminal code should set out with reasonable clarity all of the criminal offenses recognized in the jurisdiction, define critical statutory terms, avoid overlapping and contradictory statutory provisions, set out a comprehensive system of defenses and rules of accountability, and provide a rational and just sentencing system.[16]

As such, the criminal law in 1962 has been described as "archaic, inconsistent, unfair, and unprincipled."[17] However, in 1962, the American Law Institute, an independent scholarly organization devoted to the development and clarification of the law, promulgated its Model Penal Code (MPC), which has since "served as the basis for wholesale replacement of existing criminal codes in almost three-quarters of the states."[18] The development of the MPC has been hailed as "one of the most successful law reform projects of American history,"[19] and the drafted document itself, "a dramatic improvement over prior law."[20] In contrast to even some of the most comprehensive modern criminal codes in some parts of the world (e.g. Germany), the MPC was designed to "articulate all of the rules needed to adjudicate criminal liability and to set the level of seriousness (the grade) of each offense."[21] Despite the MPC serving as an extremely influential catalyst, nearly one quarter of the states (and the federal government) still do not have a modern criminal code, instead relying on more skeletal codes (e.g. more akin to alphabetical listings of offenses) developed in the past.[22] Even in many states that did promulgate comprehensive codes (often modelled on the MPC) in the 1960s and 1970s, politics and subsequent ad-hoc amendments have made these statutes "dramatically less systematic and internally consistent" than they once were.[23]

In any event, legislators in every state and the federal government now exercise the primary authority for promulgating criminal laws and establishing the appropriate boundaries of

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[15] *Id.* at 564; *see also* Dressler and Garvey, *supra* note 3, at 5.
[16] Joshua Dressler, *The Model Penal Code: Is It Like a Classic Movie in Need of a Remake?*, 1 OHIO. ST. J. CRIM. L. 157, 157 (2003), *citing* Robinson, Cahill, and Mohammad, *supra* note 14, at 1.
[17] Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 947 (1999); Dressler, *supra* note 16, at 157.
[18] Robinson, *supra* note 3, at 564-65; Paul H. Robinson, *The Rise and Fall and Resurrection of American Criminal Codes*, 53 U. LOUISVILLE L. REV. 173, 173 (2015); *see also* Robinson, Cahill, and Mohammad, *supra* note 14, at 1-2.
[19] Dressler, *supra* note 16, at 157, *quoting* Gerard E. Lynch, *Revising the Model Penal Code: Keeping It Real*, 1 OHIO ST. J. CRIM. L. 219, 219 (2003).
[20] *Id.* At 157-58, *quoting* Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 204 (2003)
[21] Robinson, *The Rise and Fall*, *supra* note 18, at 174 (comparing the MPC to the German Penal Code, and arguing that the German "approach is comprehensive in its coverage but skeletal in its articulation. That is, it has a full 'special part' and 'general part' and does not allow the judicial creation of offenses, but it does not purport to be a full statement of the liability and grading rules that a judge might need to adjudicate a case.").
[22] *Id.*
[23] Robinson, Cahill, and Mohammad, *supra* note 14, at 2; Robinson, *The Rise and Fall*, supra note 18, at 177; *see also* Dressler, *supra* note 16, at 159 ("[L]egislatures have responded to pressures from lobbyists and the general public to enact… 'designer offenses and crimes du jour'—offenses defined with non-Code terminology and punishing conduct already adequately handled by existing MPC provisions. The effect of such legislation has been to undermine the coherence and comparative clarity of many MPC-inspired codes.").

punishment[24] (which is handed down by the judicial branch in individual cases). The MPC, because of its comprehensive nature and influence on the criminal law of many American states, also serves as a valuable tool for comparative analysis.[25]

2.2. The nature and structure of the criminal law

The criminal law itself serves at least two broad purposes. First, it serves a "rule articulation function" that defines what conduct is prohibited, allowed, or required, and what possible sanction might follow as a consequence of failing to meet these rules.[26] Secondly, it serves an "adjudication function" that contains two elements, liability and grading, which define when criminal liability ought to attach to certain acts (or omissions) and what range of punishment would be appropriate, respectively.[27] The criminal law fulfils (or not) these two functions by providing notice of the general principles of the law (often found in the "General Part") and by outlining the specific acts or omissions that may attract criminal liability (often defined in the "Special Part"). The following subsection outlines the general structure and function of the General Part and/or general principles of criminal law in the United States, and sections 3 to 6 present specific privacy-related crimes contained in the criminal law, with reliance on the MPC and Title 18 of the United States Code (hereafter referred to as "Title 18" or the "federal criminal code").

Because of the overwhelming number of different criminal codes in the United States (52, including all 50 states, the District of Columbia, and the federal code—and excluding the MPC), it is impossible in this project to outline the structure and contents of each code independently. In this and the succeeding sections of this chapter, we outline the contours of US criminal law by reference to the MPC (because of its broad influence) and the federal criminal code (because some of the privacy-related crimes discussed in subsequent chapters are contained within the federal code).

The MPC (and many of the state codes influenced by it) contain two parts: the General Part and the Special Part. The General Part of the MPC, just as the general part of the criminal codes of many European civil-law countries, outlines the general principles that should apply to each of the specific crimes defined in the Special Part.[28] These include principles of culpability (including *actus reus* and *mens rea*); defences, excuses, and justifications; inchoate offenses, and sentencing.[29] The Special Part, on the other hand, outlines the specific acts that have been criminalized. These parts form an integrated whole, but serve different purposes and are treated separately in the literature.[30] The MPC's Special Part is organized into five sections of offenses: those that involve "danger to the person" (including homicide, assault, kidnapping, and sexual offenses), "offenses against property" (including arson, burglary, robbery, theft, and forgery), "offenses against the family" (including bigamy and polygamy, incest, abortion, and failing to support or care for children), "offenses against public administration" (including bribery,

[24] Dressler and Garvey, *supra* note 3, at 4.
[25] Markus D. Dubber, AN INTRODUCTION TO THE MODEL PENAL CODE 6, 25 (2nd ed., New York: Oxford University Press, 2015).
[26] Robinson, Cahill, and Mohammad, *supra* note 14, at 3; *see also* Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 857 (1994).
[27] Robinson, Cahill, and Mohammad, *supra* note 14, at 3-4; Robinson, *supra* note 26.
[28] See Paul H. Robinson and Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 330 (2007).
[29] *See generally* Model Penal Code; Dubber, *supra* note 25; *see also* Robinson and Dubber, *supra* note 28, at 330.
[30] See e.g. the sources cited *id.*

corruption, and perjury), and "offenses against public order and decency" (including rioting, disorderly conduct, and public indecency).

On the other hand, the federal criminal code, codified in 1948 as Title 18 of the United States Code,[31] is not really a comprehensive code. Rather, it has been described as "a haphazard grabbag of statutes accumulated over 200 years, rather than a comprehensive, thoughtful, and internally consistent system of criminal law."[32] Robinson has argued that this random accumulation of laws over the last two centuries has resulted in "serious overlaps in coverage and irrationalities among offense penalties."[33] Title 18 contains no real division between a general part and a special part, although Chapter 1 of Part 1 does provide some general definitions.[34] Despite the internal inconsistencies and non-comprehensive nature of the code, it is within this framework that most federal crimes have been placed. Beyond substantive criminal law, Title 18 also includes a variety of laws related to criminal procedure, prisons and corrections, juvenile delinquency, and witness immunity. Title 18 does include one chapter entitled "Privacy," which criminalizes video voyeurism as a misdemeanor punishable by fine and up to one year in prison,[35] as well as a number of additional sections that relate to privacy in various ways (these will be discussed more fully in the sections that follow).

Crimes in US criminal law are generally divided into three primary categories, felonies, misdemeanors, and petty misdemeanors,[36] although each of these broader categories frequently contains various classes of offenses with different levels of possible sanction (for example, a conviction for a "Class C" or "third degree" felony would result in a less serious range of punishment than a "Class A" or "first degree" felony).[37] Felonies are generally defined as crimes that are punishable by more than one year in prison, while misdemeanors are those crimes punishable by sentences of a year or less.[38] The MPC has five gradations of sentences (three classes of felonies along with misdemeanors and petty misdemeanors)[39] while the federal code has nine (five degrees of felonies, three degrees of misdemeanors, and minor infractions).[40]

2.3. Main elements of the general part

As previously mentioned, the General Part of the MPC outlines the general principles of the criminal law that apply to each specific crime detailed in the Special Part. In the paragraphs that follow, we examine the major principles contained in the General Part. Section 1.02 of the MPC outlines the primary purposes and principles of the code, and subsequent sections provide additional detail. An offense is defined as "conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests."[41] Conduct, in this definition, is understood to include both voluntary action or the omission to act (*actus reus*) and the requisite

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[31] 18 U.S.C. §§ 1 *et seq*. (Crimes and Criminal Procedure).
[32] Julie R. O'Sullivan, *The Federal Criminal "Code" is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 643 (2006)
[33] Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV. 225, 233 (1997); *see also* O'Sullivan, *supra* note 32, at 644.
[34] *See* 18 U.S.C. §§ 2–27.
[35] 18 U.S.C. § 1801.
[36] *See e.g*. Model Penal Code § 1.04.
[37] *See* Model Penal Code §§ 6.01, 6.06.
[38] Model Penal Code § 1.04; 18 U.S.C. § 3581.
[39] Model Penal Code §§ 1.04, 6.01(1).
[40] 18 U.S.C. § 3581.
[41] Model Penal Code § 1.02(1)(a); Dubber, *supra* note 25, at 22.

mental state (*mens rea*).[42] An *offender* is defined as a person "whose conduct indicates that they are disposed to commit crimes."[43]

2.3.1. General principles of liability

Generally, US criminal laws include both objective elements and (subjective) culpability requirements within their theory of liability.[44] Each of the objective elements of an offense also "has a corresponding culpability element"[45] that must concur with each objective element.[46] First, the "fundamental predicate for all criminal liability" is actual (objective) conduct, or *actus reus*.[47] In MPC section 2.01, the code requires that, for liability to attach to a person's conduct, such conduct must be either a *voluntary* act or "an omission to act contrary to a legal duty" when physically capable to do so.[48] The concept of voluntariness, as used in the MPC, is tied to *volition* (or an act as the external manifestation of the person's will[49]), as involuntary reflexes and subconscious conduct do not implicate liability.[50] This requirement includes what are often called the "objective elements: conduct, circumstances, and results."[51] That is, for the requisite *actus reus* to exist, the conduct, attendant circumstances, and results of a person's voluntary act or omission must match all of the requirements designated in the code.[52] Each of the relevant objective elements of the *actus reus* must correspond with a culpable mental state (*mens rea*) and, for crimes requiring a specific result (or harm) to occur, the conduct must also have a causal connection to the result.[53]

Generally, for every codified offense, at least one *conduct* element is present, and many offenses contain circumstance elements that often help define and clarify the prohibited conduct (for example, age-based restrictions on certain actions or increased penalties for murdering persons engaged in certain activities or professions, like on-duty police officers).[54] Fewer offenses contain a *results* element (for example, actual harm, injury, or death resulting from a person's act), but when they do, the law also generally requires a showing of *causation* between the act and the result – stemming from the American notion of "causal accountability."[55] Causation requires both factual (also known as "but-for," "actual," or *sine qua non*) cause as well as legal (proximate) cause.[56] Factual cause requires an act to be "an antecedent but for which the result in question would not have occurred."[57] On the other hand, proximate cause

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[42] Dubber, *supra* note 25, at 25.
[43] Model Penal Code § 1.02(1)(b); Dubber, *supra* note 25, at 22.
[44] Robinson, *supra* note 3, at 571; Emily Silverman, *Objective Aspects of the Offense in USA*, in NATIONAL CRIMINAL LAW IN A COMPARATIVE LEGAL CONTEXT: GENERAL LIMITATIONS ON THE APPLICATION OF CRIMINAL LAW, vol. 3.1, 298 (Ulrich Sieber, Susanne Forster, and Konstanze Jarvers (eds.), Berlin: Duncker & Humblot, 2011).
[45] Robinson, *supra* note 3, at 571-72.
[46] Silverman, *supra* note 44.
[47] See the ALI's explanatory note to Model Penal Code § 2.01
[48] Wayne R. LaFave, SUBSTANTIVE CRIMINAL LAW §§ 6.1(a), 6.2 (2d ed., West, 2014); *see also* Model Penal Code § 2.01(1); Silverman, *supra* note 44, at 301.
[49] Silverman, *supra* note 44, at 301; LaFave, *supra* note 48, at § 6.1(c).
[50] *See* Model Penal Code § 2.01(2); LaFave, *supra* note 48, at § 6.1(c).
[51] Robinson, *supra* note 26, at 859; Model Penal Code § 1.13(9).
[52] Model Penal Code § 1.13(9).
[53] Model Penal Code § 2.03; LaFave, *supra* note 48, at § 6.3.
[54] Robinson, *supra* note 3, at 572.
[55] Robinson, *supra* note 3, at 572; Silverman, *supra* note 44, at 298-99.
[56] Robinson, *supra* note 3, at 572.
[57] Model Penal Code § 2.03(1)(a); Robinson, *supra* note 3, at 572.

requires that the actual result of a person's conduct not be "too remote or accidental"[58] or, in some cases, "too… dependent on another's volitional act"[59] to justify imposing liability.[60] This inquiry often involves a subjective normative judgment by a court or jury into what intervening circumstances (or acts by others) ought to break the chain of causation and absolve the actor from liability for the (unforeseeable) results of their conduct.[61] In cases without intervening acts or circumstances, this subjective evaluation is replaced by the rule that: "An act that is a direct cause of a social harm is also a proximate cause of it."[62]

In addition to the requirements of *actus reus*, the MPC also defines four mental states that must be present in order to impose liability (the culpability requirement): purpose, knowledge, recklessness, or negligence.[63] Thus, the MPC requires that conduct be committed "purposely, knowingly, recklessly or negligently" before criminal liability can be attached to such action,[64] although some forms of strict (absolute) liability are allowed.[65] This mental state requirement is also referred to as *mens rea*, *scienter*, criminal intent, or fault.[66] The code requires that a person's action be accompanied by an appropriate mental state before the action will be considered blameworthy enough "to deserve the condemnation and reprobation of criminal conviction," even in cases where the action would otherwise support a finding of civil liability in tort.[67] And, in many cases, US jurisdictions do not punish defendants with criminal sanctions for purely negligent conduct unless really egregious consequences (e.g. death) result, on the theory that such conduct is not necessarily "blameworthy or deterrable."[68] Importantly, as stated before, the presence of one of these four mental states must be found for each "material element of the offense"[69]—for example, for the crime of battery, a defendant must have had the *mens rea* to act (or fail to act when under a legal duty to act) but also the *mens* rea to succeed in the result (e.g. to make harmful contact with the body of another person).[70] This redefinition of the relevant mental states within the MPC (consolidating and reframing numerous approaches under previous state-based common law) is perhaps one of the most important—and influential—contributions that the MPC has made to US criminal law,[71] and most state penal codes have utilized the MPC's four mental states.[72] The four mental states are defined by the MPC as follows:

Purpose. A person acts purposively when:

> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

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[58] Model Penal Code § 2.03(2)(b); Robinson, *supra* note 3, at 572.
[59] *See e.g.* N.J Stat. Ann. § 2C:2-3 (West 2015); 9 Guam Code Ann. § 4.50 (West 2015).
[60] Robinson, *supra* note 3, at 572-73.
[61] *See* Robinson, *supra* note 3, at 573.
[62] Joshua Dressler, UNDERSTANDING CRIMINAL LAW § 14.03, at 189 (LexisNexis, 2012); see also Silverman, *supra* note 44, at 310.
[63] Robinson and Dubber, *supra* note 28, at 335; Robinson, *supra* note 3, at 571; LaFave, *supra* note 48, at § 5.1(c).
[64] Model Penal Code § 2.02(1); *see also* Robinson, *supra* note 3, at 571.
[65] *See* Model Penal Code § 2.05.
[66] LaFave, *supra* note 48, at § 5.1.
[67] Robinson, *supra* note 3, at 573.
[68] Robinson, *supra* note 3, at 575.
[69] *Id.*; Paul H. Robinson, STRUCTURE AND FUNCTION IN CRIMINAL LAW 159 (Clarendon Press, 1997).
[70] LaFave, *supra* note 48, at § 5.1(d).
[71] Dressler, *supra* note 16, at 157-58.
[72] Robinson, *supra* note 26, at 859.

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.[73]

Knowledge. A person acts knowingly when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.[74]

Recklessness. A person acts recklessly when "he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct" and when such "disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."[75]

Negligence. A person acts negligently when "he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct," and the risk is:

…of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.[76]

In addition to liability for conduct that meets the objective and culpability tests outlined above, some doctrines also allow defendants to be held liable for criminal offenses when some element of the offense can be attributed to the person through the doctrine of *imputation*.[77] Imputation may occur in cases of *complicity*[78] (also called accomplice liability[79]). These crimes provide criminal penalties for "persons who are accountable for crimes committed by another" even though they may have not, for example, engaged in the specific act of misconduct.[80] This sort of liability is traditionally reserved for individuals who have assisted or encouraged criminal actions (or failed to act to stop such conduct) with some level of criminal intent (or at least knowledge that the conduct was criminal).[81] The MPC also includes provisions creating imputed liability for causing innocent persons to engage in criminal conduct,[82] soliciting criminal conduct,[83] or agreeing or attempting to aid in the planning or commission of a crime.[84]

Individuals may also generally be held liable for inchoate offenses such as *attempt*, *conspiracy*, or *solicitation*.[85] Liability for these inchoate offenses is typically premised on the idea that guilty individuals have demonstrated their *disposition* towards criminality (which makes them a danger to society).[86] An attempt to commit a crime becomes criminal at some point after a person's conduct moves beyond "mere preparation" or when a person takes a "substantial step"

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[73] Model Penal Code § 2.02(2)(a).
[74] Model Penal Code § 2.02(2)(b).
[75] Model Penal Code § 2.02(2)(c).
[76] Model Penal Code § 2.02(2)(d).
[77] Robinson, *supra* note 3, at 571.
[78] Model Penal Code § 2.06; Robinson, *supra* note 3, at 577, 579-580.
[79] LaFave, *supra* note 48, at § 13.2.
[80] LaFave, *supra* note 48, at § 13.2; Robinson, *supra* note 3, at 577.
[81] LaFave, *supra* note 48, at § 13.2; Robinson, *supra* note 3, at 577.
[82] Model Penal Code § 2.06(2)(a).
[83] Model Penal Code § 2.06(3)(a)(i).
[84] Model Penal Code § 2.06(3)(a)(ii).
[85] Robinson, *supra* note 3, at 571; LaFave, *supra* note 48, at §§ 11.1, 11.2, 12.1.
[86] *See* LaFave, *supra* note 48, at §§ 12.1, 11.2.

towards the commission of an offense.[87] Importantly, if a person voluntarily and completely renounces their attempt prior to actually completing the underlying crime, they may escape liability for both the underlying crime as well as the attempt.[88] There is some disagreement among jurisdictions about the requisite level of culpability to sustain an attempt charge—with many holding that knowledge or purposefulness are required and that recklessness and negligence are not enough, even if they would be for the commission of the underlying substantive offense.[89]

Conspiracy, on the other hand, generally requires "an agreement between two or more conspirators that at least one of them will commit a substantive offense."[90] In many cases, the law also requires at least one of the conspirators to engage in an overt act in furtherance of the conspiracy.[91] Relatedly, *solicitation* can be seen as an attempt to commit conspiracy, by seeking to convince another person to commit (or attempt) a substantive offense.

2.3.2. General principles of justification

Conduct becomes criminal only when it matches conduct prohibited by the code, includes the requisite mental state(s), and is without legally sufficient justification or excuse.[92] However, even when the objective and culpability requirements are met, liability may be avoided when a defendant can meet the requirements of a general defense.

2.4. The relationship between privacy crimes and civil claims

US jurisdictions generally criminalize fewer privacy-related behaviors than some of the European countries discussed in our other country reports—or at least privacy is not as clearly the impetus for the criminalization of certain behaviors as it is in some of these countries. Conduct such as physical intrusion into a person's privacy may be actionable, under US law, as a civil (tort) action, but such conduct is not generally criminal unless the intrusion also constitutes an offense such as criminal trespass or burglary—crimes tied directly to property rights. As another example, conduct such as stalking is not generally defined in terms of privacy unless the behavior also includes voyeurism (the unlawful recording or image capture of a person, and generally restricted to recordings of the 'private parts' of another person's body) or audio recording of private conversations without consent. In tort, the primary civil actions identified in many US jurisdictions include the privacy torts of intrusion upon seclusion, publication of private facts, publicly placing a person in a false light, and appropriation of name or likeness for commercial purposes[93] as well as other torts related to offensive or harmful bodily contact, confinement or false imprisonment, or the intentional infliction emotional distress.[94] However, some of these types of conduct would not attract criminal penalties absent certain circumstances or criteria established by particular criminal statutes (the intentional infliction of emotional distress may be criminally actionable in cases related to stalking or revenge porn, for instance, but not in many other cases).

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[87] Robinson, *supra* note 3, at 579; *but see* LaFave, *supra* note 48, at § 13.4 (noting various approaches to drawing this line by different jurisdictions).
[88] Robinson, *supra* note 3, at 579.
[89] Robinson, *supra* note 3, at 579; LaFave, *supra* note 48, at § 13.3(a).
[90] Robinson, *supra* note 3, at 579; *see also* LaFave, *supra* note 48, at § 13.3(a).
[91] Robinson, *supra* note 3, at 579-80.
[92] Dubber, *supra* note 25, at 27.
[93] *See* Restatement (Second) of Torts, Chapter 28A; William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960).
[94] *Id.* at chapter 2 (Intentional Invasions of Interests in Personality).

Interferences with a person's physical body (e.g. murder, kidnapping, rape) are also not generally understood as privacy crimes, although individuals do have privacy-based procedural rights to object to unwarranted or unreasonable bodily interference (e.g. arrest, body cavity searches, forced blood draws, forced confessions) by government agents under the Fourth and Fifth Amendments to the US Constitution. At least one author[95] has connected the seminal decisional privacy case of *Griswold v. Connecticut*[96] to debates about the extent that the criminal law should play in regulating intimate behavior, a theme also prominent in the 2003 Supreme Court decision in *Lawrence v. Texas*[97] and various other decisions invalidating criminal prohibitions of fornication, adultery, and sodomy on constitutional privacy grounds. In this sense, rather than outlining and focusing on privacy crimes, the clearest connections between privacy and the criminal law in the US have been procedural efforts to limit the ability of the state to interfere or criminalize private conduct and sexual activity. Despite this procedural focus, however, there have been a number of efforts to define and codify privacy-related criminal offenses, especially in the face of privacy violations aided by the emergence of new recording and information technologies.

The following sections describe many of the primary privacy crimes found in US criminal law. The scope of the investigation is based on an analysis of the MPC (and, to a lesser extent, the federal criminal code) with reference to interesting and illustrative examples drawn from state criminal codes and other statutes. However, the following discussion does not claim to be an exhaustive empirical examination of every possible privacy crime contained in any of the numerous US criminal codes, but rather a summary of common themes and trends.

3. The protection of places

A number of criminal laws relate to both place and privacy. Most prominently, the common law has a long history of civil and criminal penalties for trespass to physical property, and many US states continue to have criminal sanctions in place for various types of trespass. In recent decades, trespass to computer systems has also become the subject of both federal and state criminal law. The focus of this section is primarily on physical trespass, and computer trespass laws will be discussed in more detail in Section 5, below, under the protection of things.

3.1. Trespass to places/property

Many commentators have noted the links between trespass and privacy in US law.[98] Most commonly, trespass crimes involve unauthorized entrance onto real property (including land, buildings, and homes), or remaining on the premises after being asked to leave, but federal espionage law also prohibits the publication or distribution of photographs, drawings, maps, or sketches of "vital military or naval installation[s],"[99] providing a different form of privacy-related protection for these sorts of federal facilities that, in relation other types of property, is usually restricted to civil tort-based remedies for private plaintiffs.

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[95] Melissa Murray, Griswold*'s Criminal Law*, 47 Conn. L. Rev. 1045 (2015).
[96] Griswold v. Connecticut, 381 U.S. 479 (1965).
[97] Lawrence v. Texas, 539 U.S. 558 (2003) (striking down Texas sodomy law as an unconstitutional encroachment into decisional privacy). *See also* Murray, *supra* note 95 at 1048.
[98] *See e.g.,* DANIEL J. SOLOVE & PAUL SCHWARTZ, PRIVACY, INFORMATION AND TECHNOLOGY 27 (Aspen Publishers, 2nd ed., 2006).
[99] 18 U.S.C. § 797.

In the US, physical trespass onto real property has long attracted both civil and criminal penalties. Due to the nature of US property law and limitations on federal powers in respect to real property, most trespass law is state based.[100] However, in separating civil and criminal trespass, the US Supreme Court has held that the federal Constitution does provide due process guarantees (related to the legality principle, discussed above) against criminal sanctions for conduct not clearly identified, a priori, as subject to criminal penalties.[101] In addition to this adherence to the legality principle, common law trespass is also not generally criminal unless it constitutes a breach of the peace.[102] Thus, as might be expected, civil trespass encompasses a broader range of conduct than does the criminal law. In particular, where civil trespass may encompass offenses ranging from trespass to chattel (personal property), physical (or even non-physical) interference with a person's body, interference with real property (even interference or surveillance of real property conducted from the airspace, e.g. using an unmanned aerial vehicle to surveil a dwelling or agricultural facility[103]), and entrance onto real property, criminal trespass laws have generally been restricted to interferences with real property and dwellings or, more recently, computers and computer networks.

The MPC provides for two types of trespass offenses: trespass into buildings or occupied structures (a misdemeanor if entrance is into a dwelling at night, otherwise a petty misdemeanor) and trespass onto any property that features a notice against trespassing (e.g. fencing, signs, or actual communication) (a petty misdemeanor if the trespasser defies a personally communicated request from the property owner to leave the premises).[104] The MPC provisions also extend to persons remaining surreptitiously on property without the legal right to do so, even when the person initially had the legal right to enter.[105]

Some state codes extend criminal trespass to aircraft, watercraft, railroad cars, and other vehicles rather than just real property interests.[106] Some codes also provide penalties for entrance onto property with a concealed handgun without effective consent from the property owner,[107] for damage to property of another[108] (including, in California, damaging or removing trees, timber, produce, soil, or stone),[109] damaging or defacing grave markers,[110] or hunting on or shooting across the land of another.[111] Entrance into buildings is sometimes punished more severely than entrance onto land.[112] More serious penalties (e.g. felony-level punishments) are generally attached to a trespass onto a private residence when the intruder knows (or has reason to know) that the residence is occupied, especially when the intruder is armed with a deadly

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[100] The federal criminal code only explicitly prohibits trespass onto property controlled by the Bureau of Prisons and onto National Forest land. *See* 18 U.S.C. §§ 1793, 1863.
[101] Bouie v. City of Columbia, 378 U.S. 347, 362 (1964).
[102] 87 C.J.S. Trespass § 152. *See also* State v. Birkhead, 48 N.C. App. 575 (1980); State v. Herder, 65 Ohio App. 2d 70 (1979); State v. Von Loh, 157 Wis. 2d 91 (1990); State v. Occhino, 572 N.W.2d 316 (Minn. Ct. App. 1997).
[103] Idaho Code Ann. § 21-213(2)(a) (2013). *See also* Arthur B. Macomber, *Trespass, Privacy, and Drones in Idaho: No Snooping Allowed!*, 58-APR ADVOCATE (IDAHO) 45 (2015) ("In Idaho, real property includes land and land includes airspace").
[104] Model Penal Code § 221.2.
[105] *Id.*
[106] *See, e.g.*, Georgia Code Ann. § 16-7-21 (2010); Texas Penal Code § 30.05(a) (2016).
[107] *See, e.g.*, Texas Penal Code § 30.06 (2016).
[108] *See, e.g.*, Georgia Code Ann. § 16-7-21 (2010); New Hampshire Criminal Code § 635:2(II).
[109] Cal. Penal Code § 602.
[110] *See, e.g.*, Georgia Code Ann. § 16-7-21 (2010).
[111] 87 C.J.S. Trespass § 159; Zigler v. State, 172 Tex. Crim. 644, 362 S.W.2d 109 (1962).
[112] *See, e.g.*, Rev. Code Wash. § 9A.52.070 (gross misdemeanor), *compared to* Rev. Code Wash. § 9A.52.080 (misdemeanor).

weapon, threatens or causes physical harm to the occupants, or enters with the intention to commit a felony.[113]

3.2. Short summaries of state trespass offenses in four US states

3.2.1. California

The California Penal Code prohibits trespass onto industrial property and general criminal trespass. Trespass onto industrial property is criminalized in Article 1 of Chapter 12. It is unlawful to enter or remain upon any posted property without the written permission of the owner, tenant, or occupant in legal possession or control thereof (actus reus). The law requires that it is a posted property, which can be an oil well, gas plant, water well, railroad bridge, etcetera. The law describes methods of posting depending on the location, enclosed within a fence or not, and structures of the property. Exempted are lawful activities for the purpose of engaging in any organizational effort on behalf of any labor union, agent, etcetera, and also lawful activities for the purpose of safety investigation of working conditions by a union representative that is authorized. Other exemptions are entry in the course of duty of any police officer or authorized public officer, and lawful use of the public road. Each day of trespass of posted property qualifies a separate offense. Violation of this Article constitutes a misdemeanor, punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding $1000. Furthermore, trespass of property belong to the University of California in connection with scientific research is criminalized. A violator enacts in a misdemeanor and is punished by a fine of not more than $600 dollar or/and by imprisonment for not more than 30 days.

California Penal Code section 602 prohibits the offense of criminal trespass. It is unlawful to enter or to remain on property without the owner's consent or with no lawful business on that property (actus reus). Section 602 PC sums up number of circumstances that are a crime of trespass, such as entering animal enclosure at a zoo or lands under cultivation. All crimes of this section, except for subdivisions (u), (v), and (w), and 602.08 constitute a misdemeanor. Subdivision (u) criminalizes unauthorized entrance of a posted airport area (actus reus). A person convicted of such violation shall be punished by a fine not exceeding $100, or by imprisonment in a county jail not exceeding 6 months or/and a fine not exceeding $1000 if the person refuses to leave the area, or for a second or subsequent offense. Furthermore, intentionally avoiding airport control upon entering a sterile area of an airport is a violation of trespass, punishable by imprisonment for not more than 1 year, or/and by a fine not to exceed $1000. In case of a first violation that is responsible for the evacuation of an (area of an) airport, it is punishable by imprisonment not exceeding 1 year. Another crime of trespass is refusing or failing to leave a battered women's shelter upon request. This is punishable by imprisonment of not more than 1 year, and the court may order to make a restitution to a battered woman.

3.2.2. Florida

Florida Crimes Law section 810 criminalizes trespass. This law distinguishes between trespass within a structure or conveyance and trespass on property other than a structure or conveyance. It also contains separate sections for trespassing upon school property.

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[113] *See, e.g.*, Mass. Gen. Laws Ann. Ch. 265 § 18C (West 2004) (minimum sentence of 20 years imprisonment, with possible life sentence); Michigan Penal Code § 750.110a (ranging sentences, for various levels of offense, with a maximum sentence of 20 years with a $5,000 fine).

Any person who willfully enter or remain in any structure of conveyance, without being authorized, licensed, or invited commits the offense of trespass in a structure or conveyance.[114] This crime is a misdemeanor of the second degree, unless there is a human being in the structure or conveyance, then it is a misdemeanor of the first degree. Depending on the degree of the offense, a person can be sentenced to an imprisonment not exceeding 60 days or 1 year, and a fine not exceeding $500 or $1000 dollars.[115] If the offender is armed while trespassing, it constitutes a felony of the third degree, punishable by a 5-year imprisonment or a fine not exceeding $5000. For this last offense, a violator may be taken into custody by the owner of the property.

In addition, willfully entering upon or remaining in any property other than a structure or conveyance is an offense of trespass, if the person is not authorized or invited.[116] It is required that it is communicated the property may not be entered or the property is posted, fenced, or cultivated, or the property is the unenclosed curtilage of a dwelling and the offender enters or remains with the intent to commit an offense other than the offense of trespass. Trespass on property other than a structure or conveyance is a misdemeanor of the first degree. If the offender is armed, he/she is guilty of a felony of the third degree, punishable by a 5-year imprisonment or a fine not exceeding $5000 dollar.

The law explicitly criminalizes trespass of school property with a firearm or other weapon.[117] This constitutes a felony of the third degree, punishable by a 5-year imprisonment or a fine nog exceeding $5000. Furthermore, a person who enters school property without authorization, license or invitation, or a student under suspension that enters school property, commits the act of trespass upon the grounds of a school facility and is guilty of a misdemeanor of the second degree.[118] Such person shall be sentenced to an imprisonment not exceeding 60 days and a fine not exceeding $500. Any person who enters or remain upon school property after the principal has directed that person to leave or not to enter the facility, commits a trespass and is guilty of a misdemeanor of the first degree, punishable by an imprisonment of 1 year or a fine not exceeding $1000. A person who enters a school's safety zone during the period of 1 hour prior to the start of a school session until 1 hour after it ends, commits the offense of trespass.[119] It is required that the person has no legitimate business in the school safety zone, or any other authorization, license, or invitation. It constitutes a misdemeanor of the second degree, or a misdemeanor of the first degree when that person has been convicted before for an offense of chapter 847. When a person fails to remove himself or herself from the school safety zone after the principal request him or her to leave the zone, while that person has not legitimate business or without authorization, etcetera, that person commits a misdemeanor of the second degree. A violator who has been convicted before of any defense contained in chapter 847 commits a misdemeanor of the first degree. A misdemeanor of the second degree is punishable by 60 days of imprisonment and a fine not exceeding $500, while a misdemeanor of the first degree is punishable by a 1-year imprisonment and a fine not exceeding $1000.

Finally, the law provides a number of circumstances that are prima facie evidence of trespass.[120] This section makes unauthorized entry into or upon any enclosed and posted land, prima facie

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[114] Fla. Sta.810.08
[115] Fla. Sta.S.775.022 and S.775.023 (punishments)
[116] Fla. Sta.810.09
[117] Fla. Sta.810.095
[118] Fla. Sta.810.097
[119] Fla. Sta.810.0975
[120] Fla. Sta. 810.12

evidence of the intention to commit and act of trespass. If the act of entry is committed by any worker, servant, employee, or agent while engaged in the performance of his/her work or duties, it shall be a prima facie evidence of the causing and procurement of such act by the supervisor, foreman, employer, principal, or other person. The act of taking, transporting, operating, or driving, or the act of permitting or consenting to the taking or transporting of, any machine, tool, motor vehicle, or draft animal into or upon any enclosed and posted land shall be a prima facie evidence of the intent of the owner of such machine, tool, vehicle, or animal to cause or procure an act of trespass. This law requires that permission of the owner of the land is lacking, but the owner of the object had knowledge or given his/her consent. The section does not apply to any official or employee of the state or county, municipality, or other governmental agency authorized to enter upon lands. Furthermore, the provisions shall not apply to the trimming or cutting of tress or timber by municipal or private public utilities. Such trimming needs to be required for the establishment or maintenance of the service furnished by any such utility. This section also provides that the unlawful dumping of any litter in violation of s.403.413(4) is prima facie evidence of the intention of a person to commit an act of trespass.

3.2.3. New York

New York Penal Code distinguishes between the offense of trespass and criminal trespass in several degrees. A person commits the offense of trespass when he/she knowingly enters or remains unlawfully in or upon premises.[121] A person enters or remains unlawfully in or upon premises when he is not licensed or privileges to do so.[122] Trespass is a violation, punishable by an imprisonment not exceeding 15 days and a fine not exceeding $250.[123]

A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in a building or upon real property (actus reus).[124] It is required that the building or property is a) fenced or otherwise enclosed, b) is utilized as an elementary or secondary school or a children's overnight camp, c) located within or outside a city with a population in excess of one million and utilized as elementary or secondary school and the person has been requested to leave by a person in charge, d) used as a public housing project and posted rules or regulations governing entry are violated, f) is used as a public housing project and a personally communicated request to leave by a person in charge is violated, g) consist of a right-of-way or year of a railroad which has been designated and conspicuously posted as a no-trespass railroad zone. Criminal trespass in the third degree is a class B misdemeanor, punishable by an imprisonment not exceeding 3 months and a fine not exceeding $500.[125]

Second degree criminal trespass constitutes knowingly entering or remaining in a dwelling, or being a level two or three sex offender and entering or remaining in a public or private school knowing that the victim of the offense attends or formerly attended such school.[126] This crime is a Class A misdemeanor, punishable by an imprisonment not exceeding 1 year and a fine not exceeding $1000.

A person is guilty of criminal trespass in the first degree when he knowingly enters or remains unlawfully in a building (actus reus).[127] It is required that the person in the course of committing

[121] New York. Pen. S.140.05
[122] New York Pen. S.140.00(5)
[123] New York Pen. S.70.15
[124] New York Pen. S.140.10
[125] New York. Pen. S.70.15 and S.80.05 (punishments)
[126] New York Pen. S.140.15
[127] New York Pen. S.140.17

such crime, possesses or knows that another participant in crime possesses an explosive or deadly weapon, or possesses/knows that another participant in crime possesses a firearm, rifle or shotgun with a readily accessible quantity of ammunition, or knows that another participant. Criminal trespass in the first degree is a class D felony, punishable by imprisonment not exceeding 7 years or a fine not exceeding $5000.[128]

3.2.4. Texas

The offense of criminal trespass is committed in Texas when a person enters or remains on or in property of another (actus reus). It is required that the person had not effective consent and the person had notice that the entry was forbidden or received notice to depart but failed to do so. The section includes a non-exhaustive list of property, namely residential land, agricultural land, a recreational vehicle park, a building, or an aircraft or other vehicle. Notice in this section means an oral or written communication by the owner, fencing or other enclosure, a sign or signs posted on the property, the placement of identifying purple paint marks on trees or posts, the visible presence on the property of a crop grown for human consumption. The offense of criminal trespass is a Class B misdemeanor and punishable by a confinement in county-jail not exceeding 180 days or/and a fine not exceeding $2000. If the offense is committed on agricultural land within 100 feet of the boundary of the land or on residential land and within 100 feet of protected freshwater area, it is a class C misdemeanor and punishable by a fine not exceeding $500. In case the offense is committed in a habitation or a shelter center, on a Superfund site, on or in a critical infrastructure facility, or if the person carries a deadly weapon, it is a class A misdemeanor, and punishable by a 1-year imprisonment or/and a fine not exceeding $4000.

The section provides a number of defenses, namely when the actor at the time of the offense was a firefighter or emergency medical services personnel, or a person who was an employee or agent of amongst others an electric utility, or telecommunication provider and performing a duty within the scope of that employment or agency. It is furthermore a defense, in case the entry with a handgun was forbidden, and the person was carrying a license, and a handgun in a concealed manner or in a holster. Another defense to prosecution is that of an employee or a representative of employees entering a railroad switching yard. At the punishment stage of trial, a defendant may raise the issue that he/she entered or remained in or on critical infrastructure facility as part of a peaceful or lawful assembly (increase of punishment does not apply). The entire section does not apply if the entry with a handgun or other weapon was forbidden and the violator was a peace officer.

Furthermore, criminalized is trespass by a license holder with a concealed handgun (actus reus), in case he/she has no effective consent and received notice that entry was forbidden. Notice can be given orally or in writing. Trespass by a license holder is a Class C misdemeanor, punishable by a fine not exceeding $200. It constitutes a Class A misdemeanor if it is shown on trial that the license holder was personally given notice by oral communication and failed to depart. This act is punishable by a 1-year imprisonment or/and a fine not exceeding $4000. An exception to this section is when the property is owned or leased by a governmental entity and is not a premises on which the license holder is prohibited from carrying the handgun.

3.2.5. Quick Comparison (CA, FL, NY, TX)

California places trespass within criminal code chapters of crimes against property and malicious mischief, while Florida and Texas place it under burglary and (criminal) trespass,

[128] New York Pen. S.70.00 and S.80.00

and New York includes it in the law as burglary and related offenses. The States criminalize different forms of trespass. California Penal Code includes separate sections on industrial property trespass and criminal trespass. New York Penal Code distinguishes between the offense of trespass and criminal trespass. Florida distinguishes between trespass within a structure or conveyance and trespass on property other than a structure or conveyance. It also contains separate sections for trespassing upon school property. Texas law only includes a section on criminal trespass and trespass by license holder with a concealed handgun.

The actus reus is in all jurisdictions similar, 'forbidden to enter or remain on property'. California requires that this happens 'without the owner's consent or with no lawful business on that property'. New York requires the violator enter or remains upon premises when he is 'not licensed or privileged to do so'. Florida requires that act to take place 'without being authorized, licensed, or invited'. Texas requires that the violator had 'no effective consent and the person had notice that the entry was forbidden or received notice to depart but failed to do so'. Notice in this section means 'an oral or written communication by the owner, fencing or other enclosure, a sign or signs posted on the property' (and more).

In all four states, there is a requirement of 'posting or fenced', depending on the form of trespass. According to California law trespass of industrial property is 'unlawful without the permission of the owner, tenant, or occupant, and when the property is posted'. This requirement is also laid down in Florida Crimes Law when it concerns property other than a structure or conveyance. 'It is required that it is communicated the property may not be entered or the property is posted, fenced, or cultivated, or the property is the unenclosed curtilage of a dwelling. In addition, the offender has the 'intent to commit an offense other than the offense of trespass'. New York sums up a number of substitutable requirements for trespass in the third degree, concerning building or real property, one of the requirements is that it is 'fenced or otherwise enclosed'. In Texas a non-exhaustive list of property is included in trespass law. It is required that the violator 'received a notice by the owner', which can be down via posting.

However, there are also differences between the four States. California Penal Code differs from the other states by setting out a large number of circumstances where the offense of trespass might occur, such as unlawfully entering animal enclosure at a zoo or land under cultivation. New York Penal Code contains a system of degrees of criminal trespass. Trespass in the third degree concerns 'unlawfully entering or remaining in a building or upon real property'. Trespass in the second degree constitutes 'knowingly entering or remaining in a dwelling, or being a level two or three sex offender and entering or remaining in a public or private school knowing that the victim of the offense attends or formerly attended such school'. Trespass in the first degree concerns committing such crime 'with a deadly weapon or explosive, firearm, rifle or shotgun with a readily accessible quantity of ammunition, or knowing that another participant in crime possesses' such objects. Florida differs from the other states in that trespass when a human being is in the structure or conveyance, is punished more severe than trespass without a human being in the structure or conveyance.

Unlike other states, Florida has a number of sections that are specifically focused on trespass of school property. The law explicitly criminalizes trespass of school property with a firearm or other weapon. This constitutes a felony of the third degree, punishable by a 5-year imprisonment or a fine nog exceeding $5000. Furthermore, a person who enters school property without authorization, license or invitation, or a student under suspension that enters school property, commits the act of trespass upon the grounds of a school facility and is guilty of a misdemeanor of the second degree. Furthermore it contains a section on schools' safety zones. A person who enters a school's safety zone during the period of 1 hour prior to the start of a school session until 1 hour after it ends, commits the offense of trespass. It is required that the

person has no legitimate business in the school safety zone, or any other authorization, license, or invitation. Of the other states, only New York mentions schools in trespass law.

In several States criminal trespass with a deadly weapon is punished more severe. In New York, it constitutes criminal trespass in the first degree. Criminal trespass in the first degree is a class D felony, punishable by imprisonment not exceeding 7 years or a fine not exceeding $5000. In Florida if the 'offender is armed when trespassing on property, he/she is guilty of a felony of the third degree, punishable by a 5-year imprisonment or a fine not exceeding $5000 dollar'. A person in Texas committing criminal trespass with a deadly weapon, is punishable by a 1-year imprisonment or/and a fine not exceeding $4000. Texas Penal Code clearly contains a less severe punishment for trespass with a deadly weapon than New York and Florida.

3.3. Unauthorized access to computers

The CFAA and some related state laws generally prohibit "unauthorized access"—or "exceeding authorized access"—to computers (in the CFAA context, called a "protected computer").[129] The CFAA itself applies to any computer, even personal computer devices, that engage in interstate commerce or communication (triggering federal jurisdiction based on the Constitution's commerce clause) and defines seven different crimes.[130] 18 U.S.C. section 1030(a)(2) prohibits a person from "intentionally access[ing] a computer without authorization or exceed[ing] authorized access, and thereby obtain[ing] . . . information from any protected computer."[131] Section 1030(a)(3) prohibits intentional and unauthorized access to "any nonpublic computer of a department or agency of the United States."[132] Section 1030(a)(4) prohibits unauthorized access to a computer

> with intent to defraud . . and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period.[133]

Other provisions criminalize the dissemination of certain sensitive information related to national defense or foreign relations obtained through unauthorized access to a computer,[134] causing damage to protected computers,[135] trafficking in passwords or other information that would grant unauthorized access to a protected computer for fraudulent purposes,[136] and forms of extortion that include threats to damage or obtain information from a protected computer.[137] Other sections of the CFAA also prohibit the fraudulent use of any "access device" (meaning a card or code or any other means to access an account).[138]

Some related state laws also provide for similar state crimes. For example, Washington State criminalizes "computer trespass" in either the first or second degree, as a class C felony and gross misdemeanour, respectively. Washington law defines computer trespass as when a person "intentionally gains access to a computer system or electronic database of another" without

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[129] *Id.*; Orin S. Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes*, 78 NYU L. Rev. 1596, 1615 (2003).
[130] SOLOVE AND SCHWARTZ, *supra* note 98 at 217.
[131] 18 U.S.C. § 1030(a)(2).
[132] 18 U.S.C. §1030(a)(3).
[133] 18 U.S.C. §1030(a)(4).
[134] 18 U.S.C. § 1030(a)(1).
[135] 18 U.S.C. § 1030(a)(5).
[136] 18 U.S.C. § 1030(a)(6).
[137] 18 U.S.C. § 1030(a)(7).
[138] 18 U.S.C. § 1029.

authorization.[139] If the unauthorized access is to a government computer or is made with the intent to commit another crime, the crime is aggravated to felony status.[140]

3.4. Other laws related to place and privacy

Place-based considerations are also often relevant in various voyeurism laws. As discussed above at section 3.2.1, some voyeurism laws prohibit surreptitious surveillance of individuals in places where they maintain a reasonable expectation of privacy,[141] and this often includes private homes, buildings, or parts of enclosed spaces (e.g. bathrooms). Kansas law, as an additional example, prohibits entering a private place "with intent to listen surreptitiously to private conversations . . . or to observe the personal conduct of any other person or persons entitled to privacy therein,"[142] as well as using an amplifying device to hear, record, or broadcast any sounds originating from within a private place.[143]

4. The protection of persons

In US law, interferences with the person *qua* human being (in particular the human body and mind) are, in some cases, directly linked to privacy concepts, but many of these offenses are also generally understood as interferences with other rights, such as the right to life, the right to bodily integrity, and the right to personal liberty, or are defined by the use of terms like harassment and safety that do not carry any explicit privacy connotations. For example, crimes such as homicide, assault, battery, kidnapping, or rape are generally discussed in terms of the rights to liberty, bodily integrity, and safety despite also protecting privacy interests in physical bodies. Additionally, crimes such as stalking are often described as offensive due to their potential to cause safety concerns and to constitute harassment, despite also having clear connections to privacy. As such, we do not discuss these sorts of crimes in great detail in the pages that follow, except where the law or academic discourse has linked these concepts to privacy.

On the other hand, state access to individual bodies has been directly linked to privacy interests under the constitutional restrictions on government search and seizure contained in the Fourth Amendment to the US Constitution. The Supreme Court of the United States has also held that the Constitution also protects what it has called "decisional privacy"—or the right of individuals to make intimate decisions about the use of their bodies without government restrictions or interference. Elsewhere, some academic authors have argued for forms of intellectual privacy—or the right to read, think, and develop beliefs—as a predicate to exercising First Amendment free speech rights. However, in each of these cases, these constitutional provisions provide procedural rights, but do not define substantive criminal conduct by private actors.

4.1. Protection from interference with the body

As in other countries in our study, US Criminal law protects the human body from acts performed by oneself (e.g. historical laws criminalizing suicide) and from the acts of third parties (e.g. assisted suicide, homicide, sexual offenses), with a focus on protecting against the non-consensual interferences by others. As mentioned above, US criminal typically defines

[139] Rev. Code Wash. §§ 9A.52.110-120.
[140] Rev. Code Wash. § 9A.52.110.
[141] Cal Pen Code § 647(j)(1).
[142] Kansas Stat. Ann. § 21-6101(a)(3) (West 2011) (a "nonperson misdemeanor").
[143] *Id.* at (a)(4) (a "nonperson misdemeanor").

criminal penalties for crimes such as murder (of various degrees of moral turpitude),[144] manslaughter,[145] rape and unwanted sexual contact,[146] assault and battery,[147] and kidnapping.[148] These provisions appear in the MPC under the chapter on "Offenses Involving Danger to the Person." In Title 18, these offenses are spread out across separate chapters on "Homicide," "Sexual Abuse," "Kidnapping," and "Assault."

Additional MPC provisions cover crimes with connections to bodily privacy and the protection of the person, including assisted suicide,[149] reckless endangerment,[150] felonious restraint,[151] false imprisonment,[152] and indecent exposure.[153] The MPC also contains provisions related to bodily privacy within the chapter on "Offenses Against the Family," including restrictions on bigamy and polygamy,[154] incest,[155] and abortion.[156] In cases of sexual assault, offenses may attach, or become aggravated, when acts are committed against family members or by a person with guardianship over the victim.[157] On the other hand, the MPC's provisions on rape and other sexual offenses (which have been the subject of additional reform efforts) do not cover offenses by a spouse.[158]

Under various chapters, the federal criminal code also explicitly covers female genital mutilation,[159]; blocking access to reproductive health clinics[160] (restricting physical movement); assisting in partial-birth abortions[161]; harming unborn children[162]; peonage, slavery, forced labor, and human trafficking[163]; sexual exploitation of children[164]; domestic violence[165]; stalking;[166] video voyeurism[167]; robbery (theft involving violence or physical force)[168]; terrorism[169]; torture[170]; war crimes[171]; and genocide (including killing or harming members of a group, or preventing birth).[172] Among these offenses, only video voyeurism is

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[144] Model Penal Code § 210.2; 18 U.S.C. § 1111.
[145] Model Penal Code § 210.3; 18 U.S.C. § 1112.
[146] Model Penal Code §§ 213.0-213.6; 18 U.S.C. §§ 2241-2248.
[147] Model Penal Code § 211.1; 18 U.S.C. §§ 111-119.
[148] Model Penal Code §§ 212.0-212.5; 18 U.S.C. §§ 1201-1204.
[149] Model Penal Code § 210.5.
[150] Model Penal Code § 211.2.
[151] Model Penal Code § 212.2.
[152] Model Penal Code § 212.3.
[153] Model Penal Code § 213.5.
[154] Model Penal Code § 230.1.
[155] Model Penal Code § 230.2.
[156] Model Penal Code § 230.3.
[157] *See e.g.* Model Penal Code § 213.4(7).
[158]
[159] 18 U.S.C. § 116.
[160] 18 U.S.C. § 248.
[161] 18 U.S.C. § 1531.
[162] 18 U.S.C. § 1841.
[163] 18 U.S.C. §§ 1581-1597.
[164] 18 U.S.C. §§ 2251-2260A.
[165] 18 U.S.C. § 2261.
[166] 18 U.S.C. § 2261A.
[167] 18 U.S.C. § 1801.
[168] 18 U.S.C. § 2111.
[169] 18 U.S.C. §§ 2331-2339D.
[170] 18 U.S.C. §§ 2340-2340B.
[171] 18 U.S.C. § 2441.
[172] 18 U.S.C. § 1091.

explicitly connected to privacy—and it also the sole offense defined within Chapter 88 of the federal criminal code, entitled "Privacy."

4.2. Protection from interference with the mind

The criminal law penalizes a variety of offenses related to causing fear or emotional distress, including assault, threats, stalking, voyeurism, and revenge pornography. Simple assault, mentioned in the preceding section because of its connection to battery and physical harm, can also consist solely of placing another person in fear of imminent serious bodily injury[173] (although many states require some physical injury). Threats of various kinds have also been criminalized. The federal code criminalizes threats of kidnapping, physical injury, reputational harm, or property damage made in interstate commerce[174] or communicated through the mail (using the Postal Service),[175] and the MPC penalizes threats to terrorize another person or intended or likely to cause an evacuation of a building or certain other public places.[176] The federal criminal code also contains provisions protecting child victims and child witnesses who may suffer fear or emotional trauma if forced to recount testimony in public courtrooms, including providing alternatives and requiring confidentiality of information,[177] with criminal contempt charges applicable for knowing violation.[178]

4.2.1. Stalking

Stalking was first criminalized in California in 1990, and all other states and the federal government have since enacted laws criminalizing stalking in various ways.[179] In 1996, the US Congress enacted an anti-stalking law prohibiting inter-state stalking that has also been updated to account for stalking through the use of electronic communications or communication systems.[180] The federal law prohibits interstate travel or the use of communication services in interstate commerce "with the intent to kill, injure, harass, [or] intimidate" a person, or to place another person "under surveillance with [the] intent to kill, injure, harass, or intimidate" when such activity places the other person in reasonable fear for his or her safety or the safety of a spouse or immediate family member or "causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress."[181]

As an example from state law, California's current stalking law, Penal Code section 646.9, states:

> Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking…[182]

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[173] Model Penal Code § 211.1(c). *See also* Cal. Penal Code § 240 ("An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another").
[174] 18 U.S.C. §§ 875.
[175] 18 U.S.C. §§ 876.
[176] Model Penal Code § 211.3.
[177] 18 U.S.C. § 3509.
[178] 18 U.S.C. § 403.
[179] National Center for Victims of Crime, *The Model Stalking Code Revisited: Responding to the New Realities of Stalking* 10-11 (Washington DC: National Center for Victims of Crime, 2007) (refers to stalking as "a crime of intimidation and psychological terror that often escalates into violence against its victims").
[180] 18 U.S.C. § 2261A.
[181] *Id.*
[182] Cal Pen Code § 646.9. Stalking. (2008).

Harrassment is defined as:

> a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose.[183]

A *credible threat*, under that section, is defined as:

> A verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family.[184]

Further, a credible threat can be made using a variety of communication technologies, including "telephones, cellular phones, computers, video recorders, fax machines, or pagers."[185]

4.2.2. Blackmail and extortion

Criminal prohibitions on blackmail and extortion prohibit an individual from coercing someone to do something, for example by threat of exposing sensitive personal information.[186] The federal criminal code prohibits extortion, blackmail, and mailing threatening communications, including those activities that would threaten or injure a person's reputation.[187] Many state laws also prohibit forms of extortion or blackmail.[188]

4.2.3. Obscenity offences

The federal criminal code and the MPC both contain provisions for obscenity or indecent behavior, as do the laws of many states. Obscene material is not protected by the free speech rights under the First Amendment, but state laws regulating obscene material are subject to fairly stringent scrutiny[189] and, consequently, US obscenity laws may be more limited than the laws in many other jurisdictions. Obscenity, in US law, is also defined to incorporate community standards, meaning that what may be legally obscene in one part of the country may not necessarily be obscene elsewhere. According to the Supreme Court, obscene works are those that

> depict or describe sexual conduct… which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.[190]

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[183] Cal Pen Code § 646.9(e).
[184] Cal Pen Code § 646.9(g).
[185] Cal Pen Code § 646.9(h).
[186] *See, e.g.,* 18 U.S.C. §§ 871-880.
[187] *See* 18.U.S.C. §§ 872-873, 875-877.
[188] *See, e.g.,* Revised Code of Washington §§ 9A.56.110-130 (2011) (prohibiting extortion that would "expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule . . . [or] reveal any information sought to be concealed by the person threatened." Revised Code of Washington §§ 9A.56.120,9A.04.110(27)(e)-(f) (2011)); Code of Virginia § 18.2-59; PA. CONS. STAT. § 3923 (1976) (prohibiting the obtaining or withholding of property by threatening to "expose any secret tending to subject any person to hatred, contempt or ridicule").
[189] Miller v. California 413 U.S. 15, 23-24 (1973) ("obscene material is unprotected by the First Amendment… [but] …statutes designed to regulate obscene materials must be carefully limited.").
[190] *Id.* at 24.

In determining whether something is obscene (and thus subject to regulation or criminal penalty), the Court has developed a three prong test (the so-called "Miller Test") that requires a trier of fact to determine:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[191]

The federal criminal code contains twelve sections in its chapter on obscenity. Section 1460 prohibits the sale (or possession with intent to sell) of obscene material on federal property (a felony, subject to up to two years in prison).[192] Subsequent sections criminalize mailing obscene material (including immoral material and objects designed to produce abortions or for other "indecent or immoral use") or objects with obscene packaging[193]; importing or transporting obscene material across state lines[194]; broadcasting "obscene, indecent, or profane language" over the radio[195] or via cable or subscription television[196]; and producing, transporting, or selling obscene matter.[197]

Federal law also contains a variety of provisions related to possessing, producing, or distributing child pornography or visual representations of the sexual abuse of children. Title 18 section 1466A criminalizes the knowing production, distribution, receipt, and possession of any obscene visual depiction of minors "engaging in sexually explicit conduct" or "graphic bestiality, sadistic or masochistic abuse, or sexual intercourse" that "lacks serious literary, artistic, political, or scientific value."[198] Violation carries mandatory minimum sentences of five years (up to 20), or 15 years (up to 40) for individuals with prior related offenses.[199] Other sections of the criminal code provide the same penalties for the production of child pornography[200] and the knowing transportation, receipt, or distribution of child pornography or depictions of the sexual exploitation of children.[201]

The MPC, on the other hand, defines obscenity as a misdemeanor offense, prohibiting the knowing or reckless sale, presentation, publication, possession with intent to sell, or advertisement of obscene material.[202] Some state laws, such as that of California, outline both misdemeanor and felony penalties for obscenity offenses.[203] The MPC also prohibits lewdness, or "any lewd act" done with knowledge that the act "is likely to be observed by others who would be affronted or alarmed" as a petty misdemeanour[204] as well as prostitution[205] and

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[191] *Id.* (internal citations omitted).
[192] 18 U.S.C. § 1460(a).
[193] 18 U.S.C. §§ 1461, 1463.
[194] 18 U.S.C. § 1462.
[195] 18 U.S.C. § 1464.
[196] 18 U.S.C. § 1468.
[197] 18 U.S.C. §§ 1465, 1466.
[198] 18 U.S.C. § 1466A.
[199] 18 U.S.C. § 2252A(b)(1).
[200] 18 U.S.C. § 2251.
[201] 18 U.S.C. §§ 2252, 2252A.
[202] Model Penal Code § 251.4.
[203] *See, e.g.,* Cal. Penal Code § 311 *et seq.*
[204] Model Penal Code § 251.1.
[205] Model Penal Code § 251.2.

loitering with the intent to solicit "deviate sexual relations."[206] Many states also have indecent exposure laws[207] and some local municipalities have also criminalized public lewdness alongside, or in the absence of, related state laws.[208]

4.2.4. Spam and fraudulent email

In 2003, the Controlling the Assault of Non–Solicited Pornography and Marketing Act (the "CAN–SPAM Act") added sections just after the CFAA provisions in Title 18 at section 1037. Like the CFAA's unauthorized access to computers provisions, 18 U.S.C. section 1037 prohibits, at least in part, activity related to access and use of protected computers. The CAN-SPAM Act criminalizes the mailing of commercial electronic messages (e.g. emails) from a protected computer when the sender has accessed the computer without authorization, the use of any protected computer to relay electronic messages with the intent to mislead recipients or an internet service provider about the origin of the messages, materially falsifying header information and sending multiple electronic messages, using false identity information to register and use email or domain name accounts, or Internet Protocol addresses, in order to send multiple commercial electronic mail messages.[209] Criminal penalties include both felony and misdemeanor charges, depending on the seriousness of the offense, with a maximum punishment of a fine and up to five years imprisonment.[210]

4.3. Protection from interference with behaviour

4.3.1. Voyeurism and unlawful visual observation

In the United States, criminal laws prohibiting certain forms of unlawful visual observation by private parties often cover a wide range of surreptitious surveillance, sometimes (but not always) including photography or videography-related behaviors. Unlawful visual observation is often referred to as "voyeurism," while unlawful observation accomplished through the use of a video camera or other visual recording device is also sometimes referred to as "video voyeurism."[211] Beyond the criminal law, many jurisdictions within the US may also protect against some forms of visual observation or recording through civil remedies (e.g., through the tort of "intrusion upon seclusion"[212] or statutory law[213]).

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[206] Model Penal Code § 251.3.
[207] *See, e.g.,* Revised Code of Washington § 9A.88.010.
[208] *See, e.g.,* Everett (Washington) Municipal Code § 10.24.020 (defining a "lewd act," a misdemeanor, as "An exposure of one's genitals, anus, or any portion of the areola or nipple of the female breast;… The touching, caressing or fondling of the genitals or female breasts;… Masturbation; or… Sexual conduct").
[209] 18 U.S.C. § 1037(a).
[210] 18 U.S.C. § 1037(b).
[211] See 18 U.S.C. § 1801.
[212] *But see* Plaxico v. Michael, 735 So.2d 1036 (Miss. 1999) (court held that a man did not commit intrusion upon solitude or seclusion when he took nude photographs of his ex-wife and her lesbian lover through the window of the ex-wife's bedroom window because he did so to gather evidence to seek custody of his daughter).
[213] *See, e.g.,* Cal. Civ. Code § 1708.8(b) ("A person is liable for constructive invasion of privacy when the person attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity, through the use of any device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the device was used.").

The nature and forms of voyeurism offenses.

Offenses range from those prohibiting only mere visual observation[214] (e.g., the traditional "peeping-Tom" scenario) to those prohibiting visual observation only when accomplished by the use of a technical device[215] (e.g., binoculars, telescope, camera) or a recording device[216] (e.g., camera, camcorder, or mobile phone). Of course, some jurisdictions prohibit a combination of unaided observation, technically enhanced observation, and recording,[217] whether lumped together in a single provision or spread out between different provisions (defining alternate forms) of the offense. A growing number of jurisdictions also include offenses that criminalize the distribution, dissemination, or live broadcasting of images obtained through voyeuristic activities,[218] a trend that is connected to the increasing criminalization of so-called "revenge porn"—generally defined as the unlawful dissemination of intimate images of another person without the other person's consent.[219] In some states, these two forms of dissemination-related offenses are distinct, while in others (such as California) recent amendments to older voyeurism-related laws have created provisions that cover both voyeuristic and revenge porn-related conduct.[220] Some jurisdictions also criminalize being an accessory to unlawful observation, recording, or dissemination, and/or attempting to commit an underlying voyeurism-related offense.

The legal goods (interests) protected.

Voyeurism is criminalized under the federal criminal code (18 U.S.C. § 1801) and in the criminal codes of a number of states,[221] and forms of the offense are variously formulated as

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[214] *See, e.g.*, Fla. Stat. § 810.14; Rev. Code Wash. § 9A.44.115; Code of Laws of South Carolina § 16-17-470; Texas Penal Code § 21.16; Cal. Penal Code § 647(i).

[215] Rev. Code Wash. § 9A.44.115 ("device designed or intended to improve visual acuity"); Cal. Penal Code § 647(j)(1) ("any instrumentality, including, but not limited to, a periscope, telescope, binoculars…").

[216] *See, e.g.*, 18 U.S.C. § 1801(b)(1) ("capture" means "to videotape, photograph, film, record by any means, or broadcast"); Fla. Stat. § 810.145(1)(b) ("imaging device" means "any mechanical, digital, or electronic viewing device; still camera; camcorder; motion picture camera; or any other instrument, equipment, or format capable of recording, storing, or transmitting visual images of another person"); Code of Laws of South Carolina § 16-17-470(A) ("video or audio equipment"); Code of Laws of South Carolina § 16-17-470(B) ("photographs, audio records, video records"); Ill. Comp. Stat. § 720 ILCS 5/26-4 (prohibits "knowingly" making "a video record or transmit[ing] live video"); Cal. Penal Code § 647(j)(1) ("any instrumentality, including, but not limited to, a… camera, motion picture camera, camcorder, or mobile phone"); Cal. Penal Code § 647(j)(2), (j)(3)(A) ("concealed camcorder, motion picture camera, or photographic camera of any type"); Texas Penal Code § 21.15(b)(1), (b)(2), (b)(3) ("photographs or by videotape or other electronic means records, broadcasts, or [transmits]").

[217] *See, e.g.*, Rev. Code Wash. § 9A.44.115(1)(e) (prohibits "the intentional looking upon of another person for more than a brief period of time, in other than a casual or cursory manner, with the unaided eye or with a device designed or intended to improve visual acuity").

[218] *See, e.g.*, Fla. Stat. § 810.145(3); Cal. Penal Code § 647(j)(4); Ill. Comp. Stat. §§ 720 ILCS 5/26-4(a), (a-5), (a-6), (a-10), (a-25) (to "knowingly disseminate, or permit to be disseminated"); 18 U.S.C. § 1801(b)(2) ("'broadcast' means to electronically transmit a visual image with the intent that it be viewed by a person or persons"); Texas Penal Code § 21.15(b)(1), (b)(2), (b)(3) (covers broadcasting and transmission of images).

[219] *See, e.g.*, Rev. Code Wash. § 9A.86.010 (disclosing intimate images); Texas Penal Code § 21.15 (invasive visual recording); Texas Penal Code § 21.15 (unlawful disclosure or promotion of intimate visual material).

[220] For example, the California legislature has amended the voyeurism-related provisions of Penal Code § 647 multiple times since 2013 to incorporate "revenge-porn"-like prohibitions into the older law. *See* 2013 Cal. Legis. Serv. Ch. 466 (S.B. 255) (West); 2014 Cal. Legis. Serv. Ch. 863 (S.B. 1255) (West).

[221] *See, e.g.*, Cal. Penal Code §§ 647(i)-(j); Fla. Stat. §§ 810.14-810.145;

sexual offenses,[222] trespass-related offenses,[223] forms of disorderly conduct,[224] privacy-related offenses,[225] or as a mixture of the preceding types.[226] Because different jurisdictions classify unlawful visual observation in different ways (e.g., as a sexual-, privacy-, or trespass-based crime) and because jurisdictions often criminalize different forms of the offense in different provisions, it is difficult to generalize about what legal interest(s) these provisions are primarily intended to protect as a matter of US law for comparative purposes. However, we can see a few important lines of convergence.

Many voyeurism laws appear designed to primarily protect against nonconsensual observation of another person's body (especially when nude or in a state of undress) or of sexual activities, although some do so only when the observer does so for sexually-related purposes. For example, some voyeurism offenses include (at least as an alternate form of the offense) the criterion that the offender view or record another person in some state of nudity, engaged in sexual conduct, and/or for the purpose of sexually gratifying the offender or another person. Another set of offenses (or at least forms of the offense) are designed primarily to protect against nonconsensual visual observation into another person's home (or other private, enclosed area). These forms of the offense are often closely connected to physical trespass, and generally do not contain any requirement of nudity or intimate activity. For example, one form of voyeurism prohibited in California prohibits peeking "in the door or window of any inhabited building or structure, without visible or lawful business with the owner or occupant" while loitering, prowling, or wandering upon the private property of another."[227]

For purposes of rough categorization, the most **sexually-focused voyeurism offenses** only cover visual observation when perpetrated with the intent to sexually arouse or gratify a person (often the perpetrator and/or, in cases of recording, a third party). These offenses may also limit culpability to cases where a perpetrator has violated the victim's reasonable expectation of privacy (regardless of physical location) and/or where the observation is conducted while the victim is located in a certain type of place (e.g., a home or dwelling). **Privacy-focused offenses**

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[222] *See, e.g.,* Rev. Code Wash. § 9A.44.115 (defined as a sexual offense, and requiring the visual observation be done "for the purpose of arousing or gratifying the sexual desire of any person"); Texas Penal Code § 21.16 (criminalizes voyeurism carried out with "intent to arouse or gratify the sexual desire of the actor"; also includes property-related restrictions in connection to a person's reasonable expectation of privacy).

[223] *See, e.g.,* Cal. Penal Code § 647(i) (penalizing anyone "[w]ho, while loitering, prowling, or wandering upon the private property of another, at any time, peeks in the door or window of any inhabited building or structure, without visible or lawful business with the owner or occupant."); Fla. Stat. §§ 810.14 (situated within the Florida criminal code's chapter on "burglary and trespass." However, the law also requires violation of a reasonable expectation of privacy, making it somewhat of a mix between a property-based and a privacy-based offense).

[224] *See, e.g.,* Cal. Penal Code § 647(i) (also noted at fn. 223 due to its nature as essentially a trespass-based offense); Ill. Comp. Stats. § 720 ILCS 5/26-4 (a form of disorderly conduct within a chapter on "Offenses Affecting Public Health, Safety and Decency"; various forms of the offense relate to property and restrictions on recording another person's body or undergarments).

[225] *See, e.g.,* 18 U.S.C. § 1801 (despite requiring the capture of images of the private areas of another person, like many of the sexually-based offenses, the federal offense hinges on the reasonable expectations of privacy test, and does not include a sexual motive (*men rea*) element); NY Penal Law §§ 250.45, 250.50 (unlawful visual surveillance; situated in a code title focused on privacy. Certain forms of the offense contain sexually-oriented (voyeuristic) restrictions, while others include property-based elements); Texas Penal Code § 21.15 (includes a subjective *mens rea* requirement to "invade the privacy of the other person").

[226] See, e.g., some of the parentheticals contained in the previous fns. *See also* Fla. Stat. §§ 810.145 (situated within the Florida criminal code's chapter on "burglary and trespass," but focused primarily on privacy invasion rather than only spatial/property-based considerations); Code of Laws of South Carolina § 16-17-470(A) (combining elements of trespass with invasion of privacy); Code of Laws of South Carolina § 16-17-470(B) (combining a sexual purpose with both spatial and reasonable expectations of privacy elements).

[227] California Penal Code § 647(i).

are those where the primary test is whether a violation of a victim's privacy has occurred (usually in reference to reasonable expectations), and that do not require any specific sexually-related *mens rea* element. Property-based considerations are frequently present in both of the aforementioned types of voyeurism offenses (either as essential or optional elements), but some forms of visual observation are still primarily **trespass-related crimes**—that is, they do not require any sexually-motivated intent and are not dependent on the violation of someone's reasonable expectation of privacy.[228] Property-related elements can refer to actual physical trespass, to the physical location of the victim when observation takes place (either by itself or in connection to a reasonable expectation of privacy test). Offenses defined formally by their placement in criminal codes as forms of disorderly conduct (e.g., California, Illinois) or as violations of public policy (e.g., South Carolina, Illinois) can usually be categorized as primarily based on (or as combinations of) sex-, trespass-, or privacy-related concerns.

From this, we classify offenses as voyeurism-related (sexual) and intrusion-related offenses. Voyeurism-related offenses can be considered "sexual" by virtue of the inclusion of a sexually-motivated *mens rea* element (e.g., the observation is done for a sexual purpose). Intrusion-related offenses can be subdivided into two primary categories: 1) those focused on intrusions into personal privacy (including those limited to the observation of specific subject matter—such as nudity or sexual activity—which might otherwise be considered sexual in nature), and 2) those limited to physical trespass in violation of underlying property rights.

Factors affecting the reasonable expectation of privacy.

Many US voyeurism laws only prohibit visual observation that violates another person's "reasonable expectation of privacy," regardless of the sort of conduct specifically prohibited or the context in which protection is provided. Some criminal codes define what constitutes a "reasonable expectation of privacy" (for a specific offense or for purposes of the larger code), but others leave that determination completely up to the judiciary (who often apply tort or Fourth Amendment-influenced tests to determine whether the subjective expectations of a victim are reasonable in a given case). Across a variety of US jurisdictions, we can see a few common factors that determine whether a victim can claim a reasonable expectation of privacy in a given case.

***Physical location*.** Many offenses link reasonable expectations of privacy to specific types of physical places or areas—most often the place where a victim is physically located when s/he is observed or recorded. For example, multiple forms of voyeurism under California law explicitly link reasonable expectations of privacy to certain types of indoor or enclosed physical spaces, including "the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which [the occupant has a reasonable expectation of privacy]."[229] Florida law prohibits secret observation "when the other person is located in a dwelling, structure, or conveyance and such location provides a reasonable expectation of privacy."[230] Texas law specifically covers recording or transmitting a "visual image of another in a bathroom or changing room."[231] Washington law is not directly linked to specific types of places, but rather to any type of physical places "where a reasonable person would believe that he or she could disrobe in privacy" or "where one may reasonably expect to

[228] *See, e.g.,* Cal. Penal Code § 647(i).
[229] Cal. Penal Code §§ 647(j)(1), (j)(3)(A).
[230] Fl. Stat. § 814.10(1).
[231] Texas Penal Code § 21.15(b)(2).

be safe from casual or hostile intrusion or surveillance."[232] (Note that this is almost identical to the federal voyeurism law discussed below, except that the federal law refers to *circumstances* rather than *places*, although it does state that such circumstances may be found in a "public or private place,"[233] just as the Washington law does.[234]) As also discussed below, New York law covers unlawful surveillance occurring at "a place and time when a reasonable person would believe that he or she could fully disrobe in privacy."[235]

Nudity and/or sexual activity. Some voyeurism laws also link reasonable expectations of privacy to nudity and/or sexual activity, either directly or (indirectly) by reference to *circumstances, places*, or *places and times* that attract some expectation of privacy. In the latter form, nudity and sexual activity may sometimes be simply a required (or alternative) *subject matter* under the offense, but not clearly and directly linked to the reasonable expectations requirement on its own.

The definition of nudity is generally consistent across jurisdictions, regularly codified as either "the naked or undergarment clad genitals, pubic area, buttocks, or female breast… mean[ing] any portion of the female breast below the top of the areola,"[236] or more broadly as "any portion of a person's body or undergarments that is covered by clothing and intended to be protected from public view."[237] In a few places, some other variations also exist.[238] Many of these laws were promulgated in reaction to the practice of peeping-Toms peering into homes or (would be) perpetrators making up-skirt or down-shirt recordings.[239]

Texas law connects reasonable expectations of privacy directly to nudity by prohibiting the recording or transmitting of visual images of the "intimate area of another" as long as the "other person has a reasonable expectation that the intimate area is not subject to public view" at the time the recording or transmission was made.[240] Florida law specifically prohibits secret observation of "another person's intimate areas in which the person has a reasonable expectation of privacy" (but, interestingly, only when the victim "is located in a public or private dwelling, structure, or conveyance").[241] Video voyeurism provisions in both Florida and New York make it crime to secretly or surreptitiously "view, broadcast, or record a person without that person's knowledge and consent, who is dressing, undressing, or privately exposing the body, at a *place and time* when that person has a reasonable expectation of privacy."[242] Specifically, this would encompass places and times "when a reasonable person would believe that he or she could fully

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[232] Rev. Code Wash. § 9A.44.115(1)(c).
[233] 18 U.S.C. §§ 1801(b)(5)(A)-(B).
[234] Rev. Code Wash. § 9A.44.115(2)(b).
[235] NY Penal Law §§ 250.40(1).
[236] 18 U.S.C. § 1801(b)(3)-(4); Cal. Penal Code § 647(j)(4)(C); NY Penal Law § 250.40(3); Texas Penal Code §§ 21.15(a)(1)-(2).
[237] Fl. Stat. § 810.14(1)(b); Rev. Code Wash. § 9A.44.115(1)(a).
[238] *See e.g.*, Fl. Stat. § 810.145(2)(a) (covers observation of a person while they are "dressing, undressing, or [exposing a sexual organ]");
[239] *See e.g.*, Statement of Mr. Dewine, *Statements on Introduced Bills and Joint Resolutions*, 149 Cong. Rec. S8234-01 (June 19, 2003) ("Video voyeurism encompasses what is referred to as 'upskirting' or 'downshirting.' As the terms imply, this subset of video voyeurism involves the use of a tiny, undetectable camera to film up the skirt or down the shirt of an unsuspecting target, most often a woman.").
[240] Texas Penal Code § 21.15(b)(1).
[241] Fl. Stat. § 814.10(2).
[242] Fl. Stat. §§ 814.145(2)(a), (b); NY Penal Law §§ 250.45(1), (2) (similar, but not identical, phrasing to the quoted provision from Florida law).

disrobe in privacy."[243] California law prohibits the covert use of a recording device to record "under or through the clothing being worn by [an identifiable] person, for the purpose of viewing the body of, or the undergarments worn by, that other person… under *circumstances* in which the other person has a reasonable expectation of privacy" (but only when done for a sexual purpose).[244]

In some formulations however, and as mentioned above, nudity is a required *subject matter* of observation that is prohibited when it is observed while the person is in a place in which they can maintain a reasonable expectation of privacy (in this formulation, it is still the physical space that is directly linked to the expectation of privacy).[245] For example, the federal offense of video voyeurism only covers visual observation and recording "under circumstances in which the [victim] has a reasonable expectation of privacy,"[246] and these circumstances include those "in which a reasonable person would believe that he or she could disrobe in privacy" or "in which a reasonable person would believe that a private area of the individual would not be visible to the public."[247]

Technical device. The use of a technical device (or a recording device, as this term is also used to cover a slightly narrower range of devices in some code provisions) is often, but not always, an element of the offense.[248] This element serves multiple purposes; it may cover any use of a technical device to commit the prohibited act, it may cover situations where the use of the device would allow or facilitate observation where it would otherwise be impossible (e.g. a periscope, hidden camera, binoculars, or telephoto lens), and/or it may cover the use of a device capable of recording or transmitting visual images.

Importantly, the use of a technical (or recording) device is not always a relevant factor in determining whether a reasonable expectation of privacy exists.[249] However, in some provisions

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[243] NY Penal Law § 250.40(1); Fl. Stat. § 810.145(1)(c) (same, but with the following also appended: "without being concerned that the person's undressing was being viewed, recorded, or broadcasted by another, including, but not limited to, the interior of a residential dwelling, bathroom, changing room, fitting room, dressing room, or tanning booth").

[244] Cal. Penal Code § 647(j)(2) (emphasis added). This form of the offense is not limited to recording that occurs in 'private' places. *See* Bohnert v. Roman Catholic Archbishop of San Francisco, 136 F. Supp. 3d 1094, 1121 (N.D. Cal. 2015); People v. Johnson, 184 Cal. Rptr. 3d 850 (Cal. App. 2d Dist. 2015) (victims had reasonable expectations of privacy in various stores and shopping centers).

[245] Cal. Penal Code § 647(j)(3)(A).

[246] 18 U.S.C. § 1801(a).

[247] 18 U.S.C. §§ 1801(b)(5)(A)-(B).

[248] *See e.g.*, 18 U.S.C. § 1801(b)(1) ("'capture'… means to videotape, photograph, film, record by any means, or broadcast"); Cal. Penal Code § 647(j)(2) (covers the use of "any instrumentality, including, but not limited to, a periscope, telescope, binoculars, camera, motion picture camera, camcorder, or mobile phone"); Cal. Penal Code § 647(j)(2), (j)(3)(A) (prohibits the use of a "concealed camcorder, motion picture camera, or photographic camera of any type"); Fl. Stat. § 810.14(1)(b) (cover the use of an "imaging device," meaning "any mechanical, digital, or electronic viewing device; still camera; camcorder; motion picture camera; or any other instrument, equipment, or format capable of recording, storing, or transmitting visual images of another person"); NY Penal Law § 250.40(2) (covers the use of an "imaging device," meaning "any mechanical, digital or electronic viewing device, camera, cellular phone or any other instrument capable of recording, storing or transmitting visual images that can be utilized to observe a person"); Tex. Penal Code § 21.15(b)(1) (prohibits photographing, videotaping, or other forms of electronic recording, broadcasting, or transmitting); Rev. Code Wash. § 9A.44.15(1)(b) (covers a "photograph, motion picture film, videotape, digital image, or any other recording or transmission of the image of a person");

[249] *See e.g.*, Cal. Penal Code § 647(j) (does not tie use of a device to the test for determining whether a reasonable expectation exists); 18 U.S.C.§ 1801((b)(5)(B) (questions whether "a private area of the individual would not be visible to the public"); Fl. Stat. §§ 810.14(1)()-() (prohibits secret observation); Fl. Stat. §§ 810.145(2)(a)-(c) (prohibits secret recording done without consent).

that define expectations of privacy as existing in circumstances or places where a person can expect to not be observed, the use of a technical or recording device may be implied, but not explicitly referenced as part of the test.[250] In a number of state laws, the reasonableness requirement is specifically defined to encompass voyeuristic conduct in circumstances where a person would not expect to be recorded, viewed, and/or to have their image broadcasted. For example, in Washington, the relevant provisions cover observation of persons in places "where a reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed or filmed by another"[251] or subject to "casual or hostile intrusion or surveillance."[252] Florida's video voyeurism provision similarly prohibits voyeuristic recording at "a place and time when a reasonable person would believe that he or she could fully disrobe in privacy, without being concerned that the person's undressing was being viewed, recorded, or broadcasted by another."[253] Similar language exists in the federal code.[254]

Surreptitiousness, force, deceit. Voyeurism offenses typically only cover conduct that is done surreptitiously[255] or, at least, without consent.[256] This element of the offense is often not connected to the reasonable expectations of privacy test, except indirectly insofar as a person only subjectively expects to remain unobserved when they are not aware of the presence of another person or a technical or recording device that might facilitate observation from a distance.

Intent. Most voyeurism offenses include a requisite *mens rea* element. However, the specifics of this requirement range from simply "knowingly"[257] engaging in voyeuristic conduct to acting with the specific "intent to invade the privacy of [another] person."[258] The federal law covers conduct where the perpetrator has the subjective "intent to capture an image of a private area of an individual without their consent… under circumstances in which the individual has a reasonable expectation of privacy."[259] Some laws also allow a broad range of motivation or intent to satisfy the mental culpability standard (e.g., one form of the New York offense of unlawful surveillance covers any covered conduct done for any "person's amusement, entertainment, or profit, or for the purpose of degrading or abusing a person,"[260] while another form covers conduct done for any "person's sexual arousal or sexual gratification"[261]).

California's law prohibits (as a misdemeanor for disorderly conduct) merely looking through "a hole or opening" (with the intent to invade a person's privacy) into a place where a person maintains a reasonable expectation of privacy (such as a bathroom, bedroom, tanning bed, or dressing room).[262] South Carolina's "peeping Tom" law likewise prohibits similar behaviors

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[250] *See e.g.*, NY Penal Law § 250.40(1); Tex. Penal Code § 21.15(b)(1); Rev. Code Wash. §§ 9A.44.115(2)(a)-(b) (prohibits viewing or recording another person "without that person's knowledge and consent").
[251] Rev. Code Wash. § 9A.44.15(1)(c)(1).
[252] Rev. Code Wash. § 9A.44.15(1)(c)(2).
[253] Fl. Stat. § 810.145(1)(c).
[254] 18 U.S.C. § 1801(b)(5)(A).
[255] Cal. Penal Code § 647(j)(2) (prohibits secret recording);
[256] 18 U.S.C. § 1801(a) ("without… consent"); Cal. Penal Code § 647(j)(2) ("without… consent or knowledge");
[257] Rev. Code Wash. §§ 9A.44.115(2).
[258] Tex. Penal Code § 21.15(b).
[259] 18 U.S.C. § 1801(a).
[260] NY Penal Law § 250.45(1). See also a similar provision in Florida law. Fl. Stat. §§ 810.145(2)(a)-(c) (covers conduct done for the "amusement, entertainment, sexual arousal, gratification, or profit" of the voyeur or another person).
[261] NY Penal Law § 250.45(2).
[262] Cal Pen Code § 647(j)(1).

(as a misdemeanor) regardless of whether a recording is made,[263] and provides for felony-level penalties for subsequent offenses involving audio or visual recording for purposes of sexual arousal,[264] or for selling or distributing such recordings.[265]

4.3.2. Short summaries of voyeurism offences in four US states

California

Californian Penal Code covers mere observations when loitering upon private property, voyeurism by means of a technical device, video voyeurism, and the distribution of such images.

A) Observation

Article 647(i) Penal Code covers mere observations when loitering upon the private property. The violators must 'peek in the door or window of any inhabited building or structure, without visible or lawful business with the owner or occupant'. This criminal act requires physical trespass.

B) Observation by means of electronic equipment

California's Penal Code criminalizes observation by means of a technical device in article 647 (j)(1). The law prohibits the act of 'looking through a hole or opening, into, or otherwise views, by means of any instrumentality, including but not limited to, a periscope, telescope, binoculars, camera, motion picture camera, camcorder, or mobile phone, the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy'.

It is required that the victim is located in the interior of an area in which he/she has a "reasonable expectation of privacy". While the law explicitly refers to particular spatial considerations: "the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth", this is not an exhaustive list. The law does not require physical trespass, so the observation can be accomplished from a distance. Furthermore, no observation of nudity is required. The violator has to have the "intent to invade the privacy of a person or persons inside" (mens rea). An exception to the foregoing are observation in the areas of a private business used to count currency or other negotiable instruments. These are specifically excluded from the definition of invasion of privacy by the language of subsection (j)(2).

C) Video voyeurism

In addition, California's Penal Code distinguishes between two types of video voyeurism in 647(J)(2) and 647(J)(3). Article 647(j)(2) Penal Code, covers 'using a concealed camcorder, motion picture camera, or photographic camera of any tape, to secretly videotape, film, photograph, or record by electronic means under or through the clothing being worn by another person'. It is required that it happens 'without consent or knowledge' of the victim 'under circumstances in which the other person has a reasonable expectation of privacy', and it must concern an 'identifiable person'. The violator must have the intent "to arouse to arouse, appeal

[263] Code of Laws of South Carolina 1976 § 16-17-470(A).
[264] Code of Laws of South Carolina § 16-17-470(B) ("A person commits the crime of voyeurism if, for the purpose of arousing or gratifying sexual desire of any person, he or she knowingly views, photographs, audio records, video records, produces, or creates a digital electronic file, or films another person, without that person's knowledge and consent, while the person is in a place where he or she would have a reasonable expectation of privacy.").
[265] Code of Laws of South Carolina § 16-17-470(C).

to, or gratify the lust, passions, or sexual desires of that person and invade the privacy of that other person", so a sexual purpose is covered.

Taking a photo or video under a person's clothing is a crime. See Cal. Penal Code § 647(j). It is a serious invasion of privacy and highly upsetting to a reasonable person. Bohnert v. Roman Catholic Archbishop of San Francisco, 136 F. Supp. 3d 1094, 1121 (N.D. Cal. 2015)

In this case which was about the identifiability of victims, it was not contested that the victims had a reasonable expectation of privacy in a supermarket, when the defendant secretly recorded photos and videos under their skirts. People v. Johnson, 184 Cal. Rptr. 3d 850 (Cal. App. 2d Dist. 2015)

Article 647(j)(3)(A) Penal Code, covers the act of 'using a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another, identifiable person who may be in state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person'. It is required that it happens "without consent or knowledge" of the victim "under circumstances in which the other person has a reasonable expectation of privacy", and it must concern an 'identifiable person'. The law requires that the victim is located "in the interior of any area in which he/she has a reasonable expectation of privacy", and explicitly refers to particular spatial considerations: 'in the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth', as a non-exhaustive list. Furthermore, the violator must have the 'intent to invade the privacy of that other person' (mens rea).

D) Dissemination

Article 647(j)(4)(A) Penal Code covers the intentional distribution of sexual images that include an identifiable person. It is required that the distribution 1) happens "under circumstances in which the persons agree or understand that the image shall remain private", 2) "the person distributing the image knows or should know that distribution of the image will cause serious emotional distress", and 3) "the person depicted suffers that distress". This subdivision provides for a number of exemptions. It shall not be a violation if the distribution is made in the course of reporting an unlawful activity, the distribution is made in compliance with a subpoena or other court order, or the distribution is made in the course of a lawful public proceeding.

E) Penalties

All the above acts are classified as misdemeanors, more specifically disorderly conduct. The maximum penalty for these acts is a sentence of 2 days to 6 months in county jail, a fine of up to $1,000 for each violation, or both jail and fine. A second or subsequent violation of subdivision (j), is punishable by imprisonment in a county jail not exceeding 1 year, or by a fine not exceeding $2,000, or by both that fine and imprisonment. The violation is equally punishable if the victim of a violation of subdivision (j) was a minor at the time of the offense.

Florida

Florida's law criminalizes peeping-tom observations, the use and installation of equipment, and dissemination.

A) Observation

Florida's law provides the offense of voyeurism in section 810.14. This law seems to cover mere observations. An act of voyeurism constitutes 'observation of a victim', when that 'person is located in a dwelling, structure, or conveyance and such location provides a reasonable expectation of privacy'.

It also covers 'observation of a victim's intimate areas in which that person has a reasonable expectation of privacy'. The term "intimate area" in this paragraph means any portion of body or undergarments that is covered by clothing and intended to be protected from public view. The victim has to be located in a "public or private dwelling, structure, or conveyance'. Dwelling means a building or conveyance of any kind, including any attached porch, which has a roof and is designed to be occupied by people lodging therein at night, together with the curtilage. Structure means a building of any kind together with the curtilage thereof. Conveyance means any motor vehicle, ship, vessel, railroad vehicle or car, trailer, aircraft, or sleeping car. The person committing the offense described in these subdivisions must have "lewd, lascivious, or indecent intent" (mens rea). The offense of voyeurism does not require trespass.

B) Video voyeurism

Section 810.145 prohibits video voyeurism. Subdivision (2)(a) covers the "intentional use and installation of an imaging device, to secretly view, broadcast, or record a person who is dressing, undressing, or privately exposing the body." It is required that the installation happens without the victim's knowledge and consent. Furthermore, the use and installation must be undertaken "at a place and time when that person has a reasonable expectation of privacy". Criminal liability arises only where the use or installation of an image devices is undertaken for the purpose of one's own 'amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person' (mens rea).

Subdivision (2)(b) provides that a person commits an offense if he 'intentionally permits the use or installation of an imaging device', for the amusement, entertainment, sexual arousal, gratification, or profit of another'. The offense of permission of use or installation has similar requirements as the act of use or installation of (2)(a). Subdivision (2)(c) criminalizes using a technical device 'to view, broadcast, or record under or through the clothing' of a victim. Criminal liability arises only where the use or installation of an image devices is undertaken for the purpose of 'viewing the body of, or undergarment' of the victim for the 'amusement, entertainment, sexual arousal, gratification, or profit of oneself or another'. It is required that the it is undertaken without the victim's knowledge and consent.

C) Dissemination

The law distinguishes in section 810.145(3) and (4) between video voyeurism dissemination and commercial video voyeurism dissemination. Subdivision (3) criminalizes the dissemination of voyeurism images. The act that is covered by this offense is 'intentionally disseminate, distribute, or transfer the image to another person'. Criminal liability arises only where the image is disseminated 'for the purpose of amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person'. It is required that the it is undertaken with knowledge or having reason to believe that the image was created in a manner described in Subdivision (2).

Subdivision (4) cover the offense of commercial dissemination. That is the act of selling the image for consideration to another person. Criminal liability arises when that person 'knows or has reason to believe that the image was created in a manner described in Subdivision (2)', or disseminates such Image to another person for that person to sell the image to others.

D) Exceptions and penalties

The law provides exceptions in subdivision (5) for section 810.145, namely 'surveillance conducted by law enforcement agencies for law enforcement purposes, security systems when a written notice about the surveillance is conspicuously posted on the premise, video surveillance devices that have been installed that the presence is clearly and immediately

obvious'. Furthermore, dissemination, distribution, or transfer of images subject to this section by a provider of an electronic communication service as defined in 18 U.S.C. s. 2510(15), or a provider of a remote computing service as defined in 18 U.S.C. s. 2711(2) is also exempted.

A person who violates section 810.14 commits a misdemeanor of the first degree for the first violation, and may be sentenced to a 1-year imprisonment or by a fine not exceeding $1000. A person who violates this section and has been previously convicted or adjudicated delinquent two or more time of any violation of 810.14 commits a felony of the third degree, and may be sentenced to a 5-year imprisonment or a fine not exceeding $5000.

A person who is under 19 years of age and who violates section 810.145, commits a misdemeanor of the first degree, and may be sentenced to a 1-year imprisonment or a fine not exceeding $1000. A person who is 19 years of age or older and who violates this section, commits a felony of the third degree, and may be sentenced to a 5-year imprisonment or a fine not exceeding $5000. Furthermore, a person who violates this section and who has previously been convicted for any violation of this section, or a person who is 18 years of age or older and who is responsible for the welfare of a child younger than 16 years and who commits and offense against that child, or a person who is 18 years of age or older and who is employed at a private school and who commits an offense against a student, or a person who is 24 year of age or older who commits and offense against a child younger than 16 years (regardless of whether the person knows or has reason to know the age of the child), commits a felony of the second degree, and is punishable to an imprisonment not exceeding 15 years or a fine not exceeding $10.000.

New York

A) Video voyeurism

Mere observation is not criminalized in New York state law. The law does provide the offense of video voyeurism in section 250.45 Penal Law. (1) An act of video voyeurism constitutes 'use, installation, or giving permission for utilization or installation of an imaging device to view, broadcast or record a person dressing/undressing or person's intimate parts'. This section covers viewing, broadcasting or recording with an imaging device. It is required that the purpose is 'one's own or another person's amusement, entertainment, or profit, or to degrade or abuse a person' or the purpose may be 'one's own, or another person's sexual arousal or sexual gratification' (mens rea). In addition, it is required that the victim is located at a place and time when he/she has a 'reasonable expectation of privacy', and the victim had 'no knowledge or had not given consent' for the act.

(3) The act of voyeurism is also prohibited when it is undertaken in a 'bedroom, changing room, fitting room, restroom, toilet, bathroom, washroom, shower or any room assigned to guests or patron in a motel, hotel or inn'. This is formulated as an exhaustive list. It is required that the violator had 'no legitimate purpose' for doing so, and the victim had not consented or had no knowledge about it. Note that when the act described above is undertaken, there is a 'rebuttable presumption' that the violator had no legitimate purpose. This subdivision seems to place the burden of proof on the violator to prove that he/she had a legitimate purpose.

The act of voyeurism also constitutes 'intentional use, installation, or giving permission to use or install an imaging device to surreptitiously view, broadcast or record, under the clothing being worn, the sexual or other intimate parts' of a victim. It is required that the victim had 'no knowledge or had not consented' to the act. This section does not require any specific purpose of the conduct, nor any spatial considerations.

Section 250.45 also prohibits as an act of voyeurism 'intentional use, installation, or giving permission to use or install an imaging device to surreptitiously view, broadcast or record an

identifiable person, when that person is engaging in sexual conduct, or in the same image with the sexual or intimate part of any other person, and the victim is located at a place and time when he/she has a reasonable expectation of privacy'. Sexual conduct meaning sexual intercourse, oral sexual conduct, anal sexual conduct, aggravated sexual contact, or sexual contact.

Reasonable expectation of privacy

Victim had reasonable expectation of privacy, for purposes of unlawful surveillance criminal statute, at time that defendant made video recording of her while she toweled off after her shower, applied lotion to herself, and performed other necessaries; plain language of statute defined "reasonable expectation of privacy" as place and time when reasonable person would believe that he or she could fully disrobe in privacy, and search and seizure jurisprudence, which defined term as whether individual had generally exposed some thing or activity to plain view, did not apply to trump statutory definition. People v. Schreier, 2010, 29 Misc.3d 1191, 909 N.Y.S.2d

Evidence that victim was in her second-floor bathroom early in the morning when defendant videotaped her while she was naked, and that, when she realized she was being videotaped, she immediately closed the bathroom door, was sufficient to show that victim had reasonable expectation of privacy, as required for defendant's conviction for unlawful surveillance in the second degree. People v. Schreier, 2014, 22 N.Y.3d 494, 982 N.Y.S.2d 822, 5

As used in provisions of unlawful surveillance statute proscribing surreptitious use of device to record person at a place and time when person had reasonable expectation of privacy, phrase "reasonable expectation of privacy," which was defined to include circumstances in which reasonable person would believe that he or she could fully disrobe in privacy, was not impermissibly vague, in violation of due process, as applied to defendant who recorded his sexual encounters without other participants' knowledge or consent; reasonable people expected to be safe from casual or hostile intrusion within a bedroom, and, when engaged in sexual relations in bedroom of private home, expected to be free from surveillance. People v. Piznarski (3 Dept. 2013) 113 A.D.3d 166, 977 N.Y.S.2d 104,

B) Dissemination

New York Penal law distinguishes between second degree dissemination and first degree dissemination. The conduct of second degree dissemination is criminalized in section 250.55. It constitutes 'intentionally dissemination of an image or images, obtained in a manner defined in section 250.50 or 250.45'. It is required that the violator has 'knowledge of the unlawful conduct by which the image was obtained'.

A person is guilty of dissemination in the first degree when he/she 'sells or publishes such image or images'. Again it is required that the violator had 'knowledge of the unlawful conduct by which it was obtained'. Dissemination in the first degree also constitutes 'dissemination of unlawfully created image', when that person has 'created surveillance image in violation of section 250.45 or 250.50, or in violation of the law in any other jurisdiction which includes all of the essential elements of either such crime, or has acted as an accomplice to such crime, or an agent to the person committed such crime'. Essentially, a violator faces heavier penalties when he/she has contributed to the recording of unlawfully obtained image or images. Furthermore, when a person commits the crime of dissemination of an unlawful surveillance image in the second degree and has previously been convicted within the past ten years of dissemination of an unlawful surveillance image in the first or second degree, that person is guilty of unlawful surveillance in the first degree.

C) Exception and penalties

The provision sections 250.45, 250.50, 250.55 and 250.60 do not apply with respect to: a) law enforcement personnel engaged in the conduct of their authorized duties; b) security system wherein a written notice is conspicuously posted on the premises stating that a video surveillance system has been installed for the purpose of security; or (c) video surveillance devices installed in such a manner that their presence is clearly and immediately obvious.

Unlawful surveillance described in section 250.50 in the second degree is a class E felony, punishable with an imprisonment not exceeding 4 years, or a fine not exceeding $5000. A person is guilty of unlawful surveillance in the first degree when he or she commits the crime of unlawful surveillance in the second degree and has been previously convicted within the past ten years of unlawful surveillance in the first or second degree. Unlawful surveillance in the first degree is a class D felony, punishable by imprisonment not exceeding 7 years or a fine not exceeding $5000.

Dissemination of an unlawful surveillance image in the second degree is a class A misdemeanor, sentenced to an imprisonment not exceeding 1 year, or a fine not exceeding $1000. Dissemination of an unlawful surveillance image in the first degree is a class E felony, punishable with an imprisonment not exceeding 4 years, or a fine not exceeding $5000.

Texas

A) voyeurism

21.16(a) provides that a person commits an offense if that person 'observes another person with the intent to arouse or gratify the sexual desire, and without the other person's consent'. This section requires the victim to be "in a dwelling or structure in which he/she has a reasonable expectation of privacy".

B) Invasive visual recording

21.15(b) provides that a person commits an offense if that person 'by electronic means records, broadcasts, or transmits a visual image of an intimate area', with the 'intent to invade the privacy of the other person', and 'without the other person's consent'. Intimate area according to 21.15(a), meaning 'the naked or clothed genitals, pubic area, anus, buttocks, or female breast'. The victim must have a 'reasonable expectation that the intimate area is not subject to public view'.

It also constitutes an offense if a person 'uses an electronic device to record, broadcast, or transmit a visual image of another in a bathroom or changing room'. Changing room" means a room or portioned area provided for or primarily used for the changing of clothing and includes dressing rooms, locker rooms, and swimwear changing areas. For this offense reasonable expectation of privacy is not required.

Ex parte Thompson (Cr.App. 2014) 442 S.W.3d 325 about former section 21.15(b)(1)

In this case the Appellant stands charged with twenty-six counts of improper photography or visual recording under Texas Penal Code § 21.15(b)(1). Each count of the indictment alleges that appellant, "with intent to arouse or gratify the sexual desire of the defendant, did by electronic means record another ... at a location that was not a bathroom or private dressing room. The provision that prohibited the photography or videotaping, recording, broadcasting, or transmitting a visual image of another at a location that was not a bathroom or private dressing room without the other's consent and with intent to arouse or gratify the sexual desire of any person was held overbroad and, thus, violated the First Amendment; breadth of statute was breathtaking, applying to any non-consensual photograph, occurring anywhere, as long as the actor had an intent to arouse or gratify sexual desire, and could have applied to an entertainment reporter who took a photograph of an attractive celebrity on a public street. The

Court of Appeals held that photographs and visual recordings are inherently expressive, and, thus, protected by the First Amendment.

C) Dissemination

Furthermore, it is prohibited in section 21.15 'to promote a photograph, recording, broadcast, or transmission described by Subdivision (1) or (2)', 'knowing the character and content of it'. Promote means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.

D) Penalties

An offense as described in section 21.16 is a Class C misdemeanor, punishable by a fine not exceeding $500. Unless if it is shown on trial that the actor has previously been convicted two or more times of an offense under this section, then it classified as a Class B misdemeanor, punishable by a confinement in jail for a term not exceeding 180 days, or/and a fine not exceeding $2,000. In case the victim was a child younger than 14 years of age at the time of the offense, the offense is classified as a state jail felony, punishable by confinement in a state jail for not more than two years or less than 180 days, or a fine not exceeding $10,000.

An offense under section 21.15 is a state jail felony, a person shall be punished by confinement in a state jail for not more than two years or less than 180 days, or a fine not exceeding $10,000.

Comparison

In Texas voyeurism is included in the criminal law as a sexual offense. Florida places voyeurism within criminal code chapters on "trespass and burglary", while California places voyeurism within chapters on "disorderly conduct." In New York voyeurism is included in the criminal law as an offense against to right to privacy. Across these four US States, four different types of voyeurism-related offenses arise: two primary offenses (observation and recording), the preparatory offense of installing equipment and (primary or secondary) offenses related to disseminating images.

The act of mere observation for voyeuristic purposes is only covered in California, Florida and Texas. New York does not cover that specific act. However, the State of California only prohibits peeping-tom situations in cases of trespassing private property. In contrary, California and Florida do not require trespass in case of mere observation. In addition, in Florida and Texas it is required that the victim is located in a dwelling or structure in which he/she has a reasonable expectation of privacy.

In all four states observation through imaging devices for voyeuristic purposes is criminalized. However, Texas criminal law does not do so explicitly, because it criminalizes observation in general (it does not specify with or without a device). The States used in this research may require, for the law to be applicable, different intent/purposes of the act. Californian law applies when the act is conducted with the 'intent to invade the privacy of a person or persons inside'. While in Florida and New York the requirement is the act to be committed for the purpose of one's own 'amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person'. In Texas, the intent requirement is the most restrictive of the four States, because it is required the act to be committed with the 'intent to arouse or gratify the sexual desire'. All States require the victim to be located in a place (and time) where he/she has a 'reasonable expectation of privacy'.

Table 1. Forms of conduct criminalized under the voyeurism provisions in the each state.

	Observation	Recording	Installing	Operating	Dissemination

Jurisdiction	Naked-eye	Only w/ device				Possession	Publication	Broadcast
California	Pen. Code §647(i)	Pen. Code §647(j)(1)	Pen. Code §647(j)(2) Pen. Code §647(j)(3)(A)	—	—	—	Pen. Code §647(j)(4)(A)	—
Florida	810.14 Crimes	810.145(2) Crimes	810.145(2)(a) 810.145(2)(c)	810.145(2)(a) 810.145(2)(c)	—	—	810.145(3) Crimes	810.145(2)(a) 810.145(2)(c)
New York	—	250.45 Penal law	250.45 Penal law	250.45 Penal law	—	—	§ 250.55 Penal law § 250.60 Penal law	250.45 Penal law
Texas	21.16(a) Penal code	21.16 Penal code	21.15(b)(1-2) Penal code		—	—	21.15(b)(3)	21.15(b)(1-2)

Furthermore, in all four states recording of voyeuristic images through technical devices is criminalized. While Florida, New York, and Texas prohibit the broadcasting of voyeuristic images, this is not criminalized in California. In addition, in Florida and New York the act of intentionally permitting the use or installation of an imaging device for voyeuristic purposes constitutes a crime, while in California and Texas this is not the case. With regard to voyeuristic acts through or under the clothing being worn by a person, this is explicitly criminalized in California, Florida, and New York. It can also be read into the criminal law of Texas.

Note that in New York, if video voyeurism is undertaken in a 'bedroom, changing room, fitting room, restroom, toilet, bathroom, washroom, shower or any room assigned to guests or patron in a motel, hotel or inn', there is a rebuttable presumption that the violator had no legitimate purpose to commit the act. This places a burden of proof on the violator.

Dissemination of voyeuristic images is criminalized in all four researched States. The requirements for a criminal act of dissemination in Californian law are strict when compared to the other States. Not only is it required that 'the persons agreed or understand that the images shall remain private, and the person distributing the image knows or should know that distribution will cause serious emotional distress', the victim also 'must suffer that distress'.

Criminal law in Florida and New York distinguish between video voyeurism dissemination and commercial video voyeurism dissemination.

A wide range of possible sentences and punishment across the jurisdictions.

4.4. Protection from interference with identity, reputation or honor

The common law tort of appropriation has, in a number of states, been adapted into so-called right of publicity statutes that prohibit the commercial use of a person's name or likeness (and sometimes even voice) for advertising purposes. In at least one state, violating this right potentially attracts criminal penalties. The New York State Civil Rights Law makes it illegal for any "person, firm or corporation" to use "the name, portrait or picture of any living person" for trade-related or advertising purposes "without having first obtained the written consent of such person, or if a minor of his or her parent or guardian."[266] The offense is a misdemeanor.[267]

[266] New York Civil Rights § 50 (McKinney 2015).
[267] *Id.*

4.4.1. Revenge porn (non-consensual pornography)

Relatedly, many state laws now also prohibit so-called "revenge pornography," and both state and federal laws prohibit various types of voyeurism. Often, these laws are closely linked and, in some cases, part of the same sections of law. Revenge pornography is defined by the Oxford Dictionaries as:

> Revealing or sexually explicit images or videos of a person posted on the Internet, typically by a former sexual partner, without the consent of the subject and in order to cause them distress or embarrassment.[268]

Relatedly, California's revenge pornography law prohibits the intentional distribution of images that depict the intimate body parts of another person or that depict another person engaging in various sexual acts, "under circumstances in which the persons agree or understand that the image shall remain private" and when "the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress."[269] Colorado's law prohibits the online posting of a private image that depicts the "private intimate parts" of another person (of at least 18 years or age) with the intent to harass and inflict serious emotional distress[270] or for "the intent to obtain a pecuniary benefit from any person as a result of the posting, viewing, or removal of the private image."[271] A number of states, such as California and Colorado, categorize revenge porn as a misdemeanor,[272] although some allow for aggravating factors to increase penalties to the felony level.[273]

4.4.2. Identity theft (and privacy of financial information)

The US has a variety of financial information privacy laws, but only some have criminal penalties. On the other hand, identity theft has become a prominent area of criminal law in recent decades. The Financial Modernization Act of 1999 (also known as the "Gramm-Leach-Bliley Act") provides criminal penalties for obtaining information about customers of financial institutions by false pretenses,[274] an offense that encompasses "pretexting" and forms of identity theft.[275] Any person who, for the purpose of obtaining or disclosing (or attempting to obtain or disclose) "customer information of a financial institution relating to another person," makes a false representation to an agent or customer of a financial institution (or solicits another to do so)[276] is subject to felony charges, including a fine and up to five years imprisonment, with aggravated penalties available in certain cases.[277]

Additionally, the Identity Theft and Assumption Deterrence Act of 1998[278] makes it a crime when a person

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[268] Revenge porn, Oxford Dictionaries (Oxford, UK: Oxford University Press), http://www.oxforddictionaries.com/definition/american_english/revenge-porn.
[269] California Penal Code § 647(j)(4).
[270] Colorado Revised Statutes § 18-7-107.
[271] Colorado Revised Statutes § 18-7-108.
[272] *See, e.g.*, California Penal Code § 647(j)(4); Arkansas Code § 5-26-314; Colorado Revised Statutes §§ 18-7-107-108; Title 18 Pennsylvania Consolidated Statutes § 3131.
[273] *See, e.g.*, Delaware Code, Title 11, § 1335(9)(c); Rev. Code Wash. § 9A.86.010(7) (felony enhancement for second and subsequent offenses).
[274] PL 106–102, § 251, November 12, 1999, 113 Stat 1338 (codified at 15 U.S.C. § 6821).
[275] ALLEN, *supra* note 335 at 810-11.
[276] 15 U.S.C. §§ 6821(a)-(b).
[277] 15 U.S.C. § 6823 (West 2015).
[278] PL 105–318, October 30, 1998, 112 Stat 3007.

> knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.[279]

Such conduct is subject to felony-level punishment of a fine and/or up to 15 years imprisonment for a base offense, with aggravated penalties available in certain cases.[280] The act adds that provision to a section of the federal criminal code that also defines a variety of offenses relate to producing, transferring, using, or possessing fraudulent "identification documents, authentication features, and information."[281] The term "means of identification" includes names and numbers "that may be used, alone or in conjunction with any other information, to identify a specific individual," including (but not limited to) social security numbers; dates of birth; driver's license or state identification numbers; passport, immigration, or taxpayer identification numbers; unique biometric data (e.g. fingerprints, voiceprints, retina, etc.); electronic numbers, addresses, or routing codes; and telephone numbers.[282]

Since 1998, most states have also passed identity theft legislation.[283] State laws range in the serious in which they grade the offense and, in many states, penalties are tied to the amount of money an identity thief steals.[284] California has untypically robust and comprehensive identity theft laws, primarily unique in their ability to assist victims recover from an incident.[285] In addition, California law also covers a broad range of prohibited action. As one example, the state's penal code prohibits credible impersonation of another on the internet:

> any person who knowingly and without consent credibly impersonates another actual person through or on an Internet Web site or by other electronic means for purposes of harming, intimidating, threatening, or defrauding another person is guilty of a public offense punishable [by up to one year in county jail and/or a $1,000 fine].[286]

Identity theft is generally a felony in most state laws.[287]

4.5. Offenses against communications

4.5.1. Communications privacy

Across federal and state law, there are a number of criminal provisions for interfering with or eavesdropping on communications. At the federal level, it is a crime to obstruct the passage of mail (with a penalty of up to six months in jail),[288] remove mail from a mailbox or other authorized receptacle in order to obstruct delivery "or to pry into the business or secrets of

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[279] 18 U.S.C. § 1028(a)(7) (West 2015).
[280] 18 U.S.C. § 1028(b)(1)(D) (West 2015); 18 U.S.C. § 1028A (West 2015). The aggravated penalties were added by the Identity Theft Penalty Enhancement Act of 2004. PL 108–275, July 15, 2004, 118 Stat 831.
[281] 18 U.S.C. §§ 1028(a)(1)-(8) (West 2015).
[282] 18 U.S.C. § 1028(d)(7) (West 2015).
[283] SOLOVE AND SCHWARTZ, *supra* note 98 at 252-53.
[284] *Id.* at 253.
[285] *Id.*
[286] Cal. Penal Code §§ 528.5(a), (d) (West 2015).
[287] *See, e.g.*, Ala Code §13A-8-190 et seq. (Class B felony); Alaska Stat. §§ 11.46.100 et seq., 11.46.180 (first and second degree offenses are felonies); Ariz. Rev. Stat. Ann. §§ 13-2008, 13-2009, 13-2010; Ark. Stat. Ann. §5-37-227; Colo. Rev. Stat. §18-5-901 et seq.; Conn. Gen. Stat. §53a-129a et seq. For a summary of all state statures and criminal penalties, see National Conference of State Legislatures, *Identity Theft*, http://www.ncsl.org/research/financial-services-and-commerce/identity-theft-state-statutes.aspx (last accessed January 8, 2016).
[288] 18 U.S.C. § 1701.

another" (up to five years in prison),[289] damage or destroy mail in a mailbox (up to three years in prison),[290] or steal or obtain mail through fraudulent means (up to five years in prison).[291] Federal law also prohibits postal workers from delaying or obstructing delivery, opening, or destroying another person's mail.[292]

In terms of eavesdropping, the federal code prohibits the intentional interception or attempt to intercept "any wire, oral, or electronic communication"[293] unless the person intercepting the communication is a party to the communication or has obtained the consent of at least one party to the communication (as long as the person is also acting under the color of law or is not intercepting the communication for any illegal purpose).[294] The term *interception* "means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device"[295] or, in other words, recording the contents of a communication. Federal law also penalizes the intentional disclosure or use of the contents of "any wire, oral, or electronic communication" by any person who knows or has reason to know that the communication was intercepted unlawfully.[296] Likewise, using or attempting to use (or causing someone else to use) a device to intercept an oral communication is also prohibited in a number of circumstances.[297] Elsewhere, 47 U.S.C. section 605 also criminalizes the unauthorized publication of a communication (or of details about a communication) by any "person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio."[298] If done "willfully and for purposes of direct or indirect commercial advantage or private financial gain," the offense is a felony punishable by up to two years and fined up to $50,000 for a first offense.[299]

Many states have similar provisions regarding wiretapping and eavesdropping (many tied to audio recording, but some also explicitly cover video), and about a dozen states have stricter laws that prohibit interception without gaining the consent of all parties to a communication or conversation.[300] For example, Massachusetts law defines interception as:

> to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication.[301]

Washington State law also requires all-party consent (as do about a dozen states), but allows for fairly lenient implied consent in some circumstances:

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[289] 18 U.S.C. § 1702.
[290] 18 U.S.C. § 1705.
[291] 18 U.S.C. § 1708.
[292] 18 U.S.C. § 1703.
[293] 18 U.S.C. § 2511(1)(a).
[294] 18 U.S.C. §§ 2511(2)(c)-(d).
[295] 18 U.S.C. § 2510.
[296] 18 U.S.C. §§ 2511(1)(c).
[297] 18 U.S.C. §§ 2511(1)(b).
[298] 47 U.S.C. § 605(a).
[299] 47 U.S.C. § 605(e)(2).
[300] *E.g.*, CAL. PENAL CODE § 632 (WEST 2009); DEL. CODE ANN. TIT. 11, § 1335(A) (2010); FLA. STAT. § 934.03 (2010); HAW. REV. STAT. §711-1111 (2010); 720 ILL. COMP. STAT. 5/14-2 (2010); KAN. STAT. ANN. § 21-4001 (2010); MASS GEN. LAWS CH. 272, § 99 (2010); MD. CODE ANN., CTS. & JUD. PROC. §10-402 (WEST 2010); MICH. COMP. LAWS § 750.539C-D (2010); MONT. CODE ANN. § 45-8-213(1)(C) (2009); N.H. REV. STAT. ANN. § 570-A:2 (2010); 18 PA. CONS. STAT. ANN. § 5704(4) (WEST 2010); WASH. REV. CODE § 9.73.030 (2010). See also Bryce Clayton Newell, *Crossing Lenses: Policing's New Visibility and the Role of 'Smartphone Journalism' as a Form of Freedom-Preserving Reciprocal Surveillance*, 2014 U. ILL. J.L. TECH. & POL'Y 59 (2014).
[301] MASS GEN. LAWS CH. 272, § 99(B)(4).

> [C]onsent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.[302]

Generally, as in Washington State, consent is only required to intercept or record *private* conversations,[303] although Illinois's law ostensibly prohibited the recording of even non-private conversations until the end of 2014[304] (when the law was changed after being declared unconstitutional because of that provision).[305] Many eavesdropping statutes also criminalize the sharing or distribution of communications or contents of a conversation captured in violation of wiretapping or eavesdropping laws.[306]

4.5.2. Stored communications data

The Stored Communications Act (part of the Electronic Communications Privacy Act of 1986, which also included wiretapping and procedural provisions), extends criminal penalties from interfering with communication in transit (the subject of the Wiretap Act, discussed above at section 3.2.2) to communications that are in *electronic storage*, defined as:

> (A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication.[307]

The act states that, whoever

> (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or
>
> (2) intentionally exceeds an authorization to access that facility;
>
> and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system

may be subject to a felony ("if the offense is committed for purposes of commercial advantage, malicious destruction or damage, or private commercial gain, or in furtherance of any criminal or tortious act") or a misdemeanor (for lesser offenses).[308]

4.6. Interferences with family life (including decisional privacy)

As mentioned earlier, decisional privacy in the US is largely considered to be a procedural right against government intrusion and interference in personal (and often intimate) choices. However, a number of substantive criminal laws also penalize private intrusions of this sort. For example, many US states historically had laws criminalizing suicide (although these have disappeared),[309] and some still penalize causing or assisting another person to commit suicide. The MPC includes provisions that prohibit a person from purposively using force, duress, or

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[302] WASH. REV. CODE § 9.73.030(3).
[303] *See, e.g.,* Rev. Code Wash. § 9.73.030; Kan. Stat. Ann. § 21-6101(a)(1) (West 2015).
[304] Public Act 98–1142 (Illinois), 2014 Ill. Legis. Serv. P.A. 98-1142 (S.B. 1342) (West 2015).
[305] People v. Clark, 6 N.E.3d 154 (2014); People v. Melongo, 6 N.E.3d 120 (2014); American Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583 (7th Cir. 2012).
[306] *See, e.g.,* Kan. Stat. Ann. § 21-6101(a)(2) (West 2015).
[307] 18 U.S.C. § 2510(17).
[308] 18 U.S.C. § 2701(b).
[309] *See* Dennis E. Hoffman and Vincent J. Webb, "Suicide As Murder At Common Law: Another Chapter in the Falsification of Consensus Theory," 19 CRIMINOLOGY 372, 372-375 (1981).

deception to cause a person to commit suicide[310] or to assist or solicit another person to commit suicide.[311] The US Supreme Court has held that there is no constitutional right to assisted suicide, allowing states to prohibit such conduct if they so choose.[312] Similarly, the MPC prohibits various forms of abortions, including assisted and self-abortions (after 26 weeks) as third-degree felonies,[313] as well as the sale or advertisement (except to certain individuals, e.g. physicians or druggists) of "anything specially designed to terminate a pregnancy."[314] The MPC also defines incest as a third-degree felony, prohibiting a person from knowingly marrying, cohabitating with, or having sexual intercourse with ancestors, descendants, or other persons related by "the whole or the half blood."[315] The MPC likewise prohibits polygamy (both parties are subject to third-degree felony charges) and bigamy (a misdemeanor).[316]

5. The protection of things

Criminal laws protect a variety of "things" besides persons, places (real property), and data. As mentioned in section 4, some trespass laws extend to interference with personal property and vehicles as well as objects and natural resources connected to real property. Larceny, burglary, robbery, and other theft-related crimes also protect the privacy interest a person might have in items of personal property, especially in the context of property that contains personal information or is taken from a private place. Other laws criminalize the destruction or damaging of the property of another person.[317] One prominent criminal provision in federal law, the Computer Fraud and Abuse Act of 1984 (CFAA),[318] prohibits unlawful access to computers.[319]

Theft, often equated with the term *larceny* in the US,[320] is related to privacy interests in things, as well as personal information that may be contained in (or on) personal property. Theft and related offenses are included in the federal criminal code,[321] the MPC,[322] and state criminal codes.[323] The MPC classifies theft as either a third-degree felony, misdemeanour, or petty misdemeanour, based on the value of the stolen property, the type of property stolen, and the nature and manner of the theft itself.[324]

As aggravated forms of theft, robbery and burglary also implicate other types of privacy violations in combination with the interest in protecting "things." Robbery, for instance, usually involves theft from a person that involves actual or threatened bodily harm[325] (implicating the protection of the person, or bodily privacy). In some robbery statutes, spatial considerations are

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[310] Model Penal Code § 210.5(1).
[311] Model Penal Code § 210.5(2).
[312] Washington v. Glucksberg, 521 U.S. 702 (1997); Vacco v. Quill, 521 U.S. 793 (1997).
[313] Model Penal Code § 230.3(4).
[314] Model Penal Code § 230.3(6).
[315] Model Penal Code § 230.2.
[316] Model Penal Code § 230.1.
[317] *See, e.g.*, 18 U.S.C. §§ 32 (aircraft), 33 (motor vehicles); Model Penal Code §§ 220.1 (arson); Rev. Code Wash. § 9A.48.070-100 (malicious mischief).
[318] 18 U.S.C. § 1030.
[319] SOLOVE AND SCHWARTZ, *supra* note 98 at 217.
[320] *See, e.g.*, Rev. Code Wash. § 9A.56.100.
[321] *See, e.g.*, 18 U.S.C. §§ 655-56, 664-670, 1028a, 1163, 1167-68, 1506, 1707-10, 1832.
[322] Model Penal Code §§ 223.0-223.9.
[323] *E.g.*, Rev. Code Wash. §§ 9A.56.020-050.
[324] Model Penal Code §§ 223.1(2)(a)-(c).
[325] *E.g.*, Model Penal Code § 222.1(1).

also implicated when robbery is defined to include violent theft that occurs "in the presence" of the victim. For example:

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone.[326]

Although burglary encompasses (and relies on the intent to engage in) the commission of a variety of crimes besides theft, it also often functions as an aggravated form of theft—that is, the underlying crime intended by the perpetrator is often related to theft—that involves physical intrusion into a building or residential dwelling[327] (implicating the protection of place, or spatial privacy). In the MPC, burglary is situated alongside criminal trespass in the article on "Burglary and Other Criminal Intrusion."[328] In determining the seriousness of burglary offenses, place-based considerations often play an important role—e.g. residential burglary[329] or a burglary "perpetrated in the dwelling of another at night"[330] is often subject to more punitive punishment than other forms of burglary.

5.1. Secrecy of mail

As discussed above in subsection 4.5.1 in relation to communication privacy, mail also attracts particularly focused criminal provisions in Title 18, and many of these are related to theft, delaying delivery, or otherwise interfering with mail.[331] Some states also have criminal laws addressing mail theft and the possession of stolen mail.[332]

6. The protection of data

The protection of data, often called "informational privacy" in the US, involves numerous dedicated statutes and sections within broader statutes, as well as provisions of state and federal constitutions. Unlike the broader, more universal, data protection laws in Europe and Canada, US data privacy laws are generally more targeted to specific contexts, industries, and to specific types of data within those contexts—sometimes referred to as a "sectoral" approach to data privacy protection. A number of these laws include criminal sanctions for certain types of violations, as discussed below. Notably, however, the MPC does not enumerate crimes based on the breach of informational privacy.

6.1. Personal information

The Privacy Act of 1974[333] regulates the collection, maintenance, use, and release of personal information about US citizens and lawful permanent residents that is part of a federal "record"

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[326] Rev. Code Wash. § 9A.56.190.
[327] *E.g.*, Model Penal Code § 221.1(1).
[328] Model Penal Code art. 221, §§ 221.0-221.3.
[329] Rev. Code Wash. § 9A.52.025 (under Washington law, residential burglary is also defined to attract more stringent criminal punishment than regular second-degree burglary).
[330] *See, e.g.*, Model Penal Code § 221.1(2) (such a burglary is defined as a second-degree felony, while all others constitute third-degree felonies).
[331] See sources cited *supra* at notes 161-165.
[332] *See, e.g.*, Rev. Code Wash. §§ 9A.56.370 (theft of at least 10 pieces of mail addressed to at least three different addresses is a class C felony), 9A.56.370 (possession of stolen mail, in the amounts required for mail theft, is a class C felony).
[333] 5 U.S.C. § 552a.

and maintained in a "system of records"—meaning the record is retrievable "by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual."[334] The act has been referred to as "an omnibus 'code of fair information practices.'"[335] It generally prohibits the disclosure of information about a person without written consent by the individual, subject to a dozen exceptions.[336] With some exceptions, the act also prohibits the government from collecting information "describing how any individual exercises rights guaranteed by the First Amendment,"[337] regulates intra-agency data transfers and "matching programs."[338] According to the act,

> the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.[339]

The act includes broad civil remedies for government breach of the act's provisions, as well as three criminal provisions (all misdemeanors with no provisions for incarceration), even though it is not part of the federal criminal code. First, subsection (i)(1) states that:

> Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.[340]

The final two criminal provisions prohibit government employees from operating a "system of records" without providing appropriate notice to the Federal Register[341] or "knowingly and wilfully" requesting or obtaining protected records "under false pretenses"[342] and carry the same maximum $5,000 penalty.

6.1.1. Health-related information

The federal Health Insurance Portability and Accountability Act of 1996 (HIPAA)[343] regulates the disclosure of personally identifiable health information by health care providers and other covered health care entities.[344] The "HIPAA Rules" define three criminal offenses under the act: 1) knowing use of a "unique health identifier," 2) obtaining "individually identifiable health information relating to an individual," and 3) disclosing "individually identifiable health information to another person."[345] Although individual employees (or non-employees) of covered entities are not subject to the general requirements of HIPAA, they may be individually

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[334] 5 U.S.C. § 552a(a)(5).
[335] ANITA L. ALLEN, PRIVACY LAW AND SOCIETY 658 (St. Paul, MN: West, 2nd ed., 2011) (citing an outdated Justice Department webpage; content cited is currently online at U.S. Dept. of Justice, Privacy Act of 1974, http://www.justice.gov/opcl/privacy-act-1974 (last accessed Jan. 7, 2015).
[336] 5 U.S.C. §§ 552a(b)(1)-(12).
[337] 5 U.S.C. §§ 552a(e)(7).
[338] *E.g.*, 5 U.S.C. §§ 552a(a)(8), 552a(o) *et seq*.
[339] 5 U.S.C. § 552a(a)(4).
[340] 5 U.S.C. § 552a(i)(1).
[341] 5 U.S.C. § 552a(i)(2).
[342] 5 U.S.C. § 552a(i)(3).
[343] PL 104–191, August 21, 1996, 110 Stat 1936.
[344] *See* 42 U.S.C. § 1320d-1(a).
[345] 42 U.S.C. § 1320d-6(a).

subject to criminal penalties for violations of HIPAA's criminal provisions.[346] The baseline penalty consists of a maximum $50,000 fine and/or up to one year in prison, increasing to up to $100,000 and up to five years (a felony) if the crime "is committed under false pretenses" or up to $250,000 a maximum of 10 years imprisonment for violations "committed with intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm."[347]

6.1.2. Motor vehicle-related records

In 1994, Congress enacted the Driver's Privacy Protection Act (DPPA), partly in order to curb the sale of drivers' personal information to private parties by state departments of motor vehicles.[348] The act was ruled unconstitutional by the 11th Circuit in 1999, but was revived a year later by the Supreme Court. [349] The DPPA prohibits department of motor vehicles employees or contractors from knowingly disclosing "personal information . . . about any individual obtained by the department in connection with a motor vehicle record," [350] subject to a number of exceptions.[351] The act also prohibits any person from disclosing personal information from motor vehicle records, unless an exception applies, or for making false representations to obtain personal information from a motor vehicle record.[352] Any violation of the provisions of the act is subject to a criminal fine.[353] For purposes of the act, personal information means

> information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.[354]

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[346] *Id.* ("a person (including an employee or other individual) shall be considered to have obtained or disclosed individually identifiable health information in violation of this part if the information is maintained by a covered entity (as defined in the HIPAA privacy regulation described in section 1320d-9(b)(3) of this title) and the individual obtained or disclosed such information without authorization"). *See also* Peter A. Winn, *Criminal Prosecutions under HIPAA*, 2005 (Sept.) United States Attorneys' Bulletin 21 (September 2005) (noting the lack of clarity about whether individual employees and others can be held criminally liable under the act). At least some criminal defendants, as individuals employed by covered entities, have been convicted of violating section 1320d-6. U.S. v. Martin, 572 Fed. Appx. 334 (Mem) (6th Cir. 2014) (unpublished) (court upheld defendant's sentencing, after guilty plea, for charges of "wrongful disclosure of personal-health information, in violation of 42 U.S.C. § 1320d–6." Defendant was an employee of a health clinic.); United States v. Hall, 704 F.3d 1317 (11th Cir. 2013) (defendant, an employee of a health care office, pleaded guilty to, and was sentenced for, violating 42 U.S.C. § 1320d–6(a)(2)). At least one person, who violated the act *after* his employment had been terminated. United States v. Zhou, 678 F.3d 1110 (9th Cir. 2012) (upholding the conviction of defendant, a past employee of a covered entity, for violation of 42 U.S.C. § 1320d–6(a)(2). Another defendant was convicted of conspiracy to violate HIPAA's privacy rules under a separate federal conspiracy provision. United States v. Charette, 471 Fed.Appx. 752 (9th Cir. 2012) (unpublished) (upholding conviction and sentencing for engaging conspiracy to violate 42 U.S.C. § 1320d–6).

[347] 42 U.S.C. § 1320d-6(b).

[348] Reno v. Condon, 528 U.S. 141, 143 (2000) ("The DPPA regulates the disclosure and resale of personal information contained in the records of state DMVs . . . . Congress found that many States, in turn, sell this personal information to individuals and businesses").

[349] Pryor v. Reno, 171 F3d 1281 (11th Cir. 1999), *overruled*, 528 U.S. 141 (2000)

[350] 18 U.S.C. § 2721(a)(1).

[351] 18 U.S.C. § 2721(b).

[352] 18 U.S.C. § 2722.

[353] 18 U.S.C. § 2723(a).

[354] 18 U.S.C. § 2725(3).

6.1.3. Child victims/witnesses and court records

As mentioned above in section 3.2.1, section 3509 of the federal criminal code outlines certain privacy protections related to information about child victims and witnesses in court proceedings—specifically, that such information should be kept confidential from anyone not listed in the statute as having a reason to access the information as part of court proceedings and that documents containing such information should be filed under seal.[355] The section also provides a mechanism for obtaining preventative protective orders in cases where disclosure of name or other personal information would be detrimental to the child.[356]

6.2. Wrongful disclosure of video tape rental or sale records

In one remarkably narrow, but well known, part of the federal criminal code (enacted as part of the Video Privacy Protection Act of 1988, or VPPA), it is an offense for any person "engaged in the business . . . of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials" (a "service provider")[357] to disclose "personally identifiable information concerning any consumer of such provider."[358] The law was originally enacted to prohibit video rental stores from disclosing video rental histories of their customers to third parties, but also applies to streaming video websites that maintain a history of their customers' viewing choices. The VPPA doesn't outline any specific criminal penalties, but allows for private civil actions and monetary remedies.

A number of states have enacted similar, and sometimes more protective, related laws. For example, Michigan state law extends similar prohibitions on records of the sale or rental of books, audio recordings, and video recordings,[359] specifically defining the offense as a misdemeanor.[360]

[355] 18 U.S.C. § 3509. Breach of these confidentiality provisions carry misdemeanour-level criminal sanctions under 18 U.S.C. § 403.
[356] 18 U.S.C. § 3509(d)(3).
[357] 18 U.S.C. § 2710(a)(4).
[358] 18 U.S.C. § 2710(b).
[359] Mich. Comp. Laws ann. § 445.1712 (West 2015).
[360] Mich. Comp. Laws ann. § 445.1714 (West 2015).