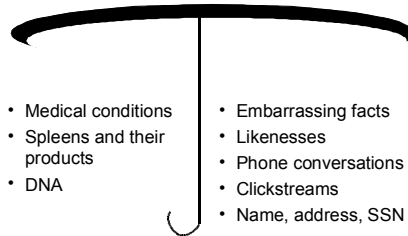


## Constitutional and Genetic Privacy

<http://wendy.seltzer.org/brooklaw/07privacy/>

1

## Is privacy's umbrella big enough?



2

## Privacy's penumbras

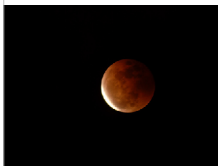


Photo by m00by on flickr

- 1<sup>st</sup> Amendment
- 3<sup>rd</sup> Amendment
- 4<sup>th</sup> Amendment
- 5<sup>th</sup> Amendment
- 9<sup>th</sup> Amendment
- 14<sup>th</sup> Amendment

3

## Whalen v. Roe

- New York's drug prescription oversight law required filling all prescriptions for Schedule II drugs in triplicate, recording prescriptions by computer at Dept. of Health.
  - Schedule II includes opium and derivatives, cocaine, methadone, amphetamines
  - Accepted uses include treatment of pain, epilepsy, narcolepsy, schizo-affective disorders
- What are Roe's privacy claims?

4

## Whalen v. Roe

- The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.

5

- When does disclosure of medical information raise constitutional issues?
- Can it be justified despite those constitutional claims?

- Disclosure to a state hospital chaplain?
- Police disclosure of a citizen's HIV infection?
- Audit of an employee's HIV medication?
- Blanket AIDS testing for firemen?
- Drug testing of pregnant women?

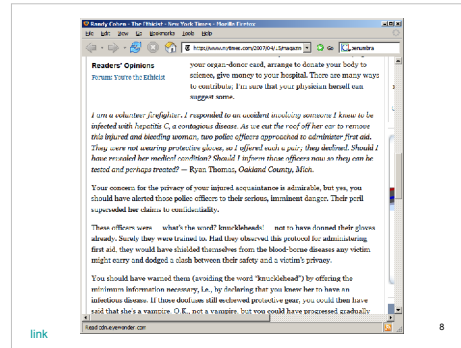
6

## U.S. v. Westinghouse, 3d Cir 1980

The factors which should be considered in deciding whether an intrusion into an individual's privacy is justified are the

- type of record requested,
- the information it does or might contain,
- the potential for harm in any subsequent nonconsensual disclosure,
- the injury from disclosure to the relationship in which the record was generated,
- the adequacy of safeguards to prevent unauthorized disclosure,
- the degree of need for access, and
- whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

7



8

## Moore v. Regents

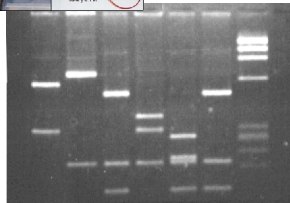
- Do you own your genetic material?
- Do you have a privacy-based right to control your genetic material?
  - Is this served by fiduciary duty?
  - By property rights?
- What is Moore's privacy interest?

9

## Genetic information and testing

- Opportunity for invidious discrimination or chance to bring more truthful information to the market?

10



11

## U.S. v. Kincade

- Kozinski, dissenting: "This highlights an important aspect of Fourth Amendment opinions: Not only do they reflect today's values by giving effect to people's reasonable expectations of privacy, they also shape future values by changing our experience and altering what we come to expect from our government."

12

