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Early (more or less) Security and Privacy: Privacy Issues and Protections

510 - Data Security and Privacy: Legal, Policy, and Enterprise Issues
University of Michigan School of Information
Week 1

English History

- Small town life the norm
- Domesday Book - 1086
- Monarchy tempered by Magna Carta but it provided for due process, not privacy - 1215
- Some early protections
 - “Home is castle” (1499?); William Pitt (1763)
 - Eavesdroppers that spread “*mischievous tails*” “*are a common nuisance*” & can be fined
 - Blackstone: book 4, chap 13 (1769)

Continued in Colonial US

- Small towns again
- Puritan rules
- Rooted in practical at times (?)
 - Not allowed to live alone

Cooley on Torts

- Right to be let alone
 - 2d ed., 1888

Prosser on Privacy

- William Prosser survey of privacy cases
Privacy, 48 Cal.L.Rev. 383 (1960)
 - appropriation of name or likeness of another
 - false light (if presents false impression of subject)
 - intrusion on the seclusion or private affairs of another
 - public disclosure of private facts
- Also tort-based

Early Legal Analysis

- Warren & Brandeis, “Right to Privacy” - 1890 Harvard Law Review
- Privacy is a personal, not property, right
- Six general rules
 - Public/general interest overrides privacy right
 - Slander/libel privilege overrides privacy right
 - Generally no redress for spoken words
 - Subject publication of facts voids privacy right
 - Truth is not a defense
 - Absence of malice not a defense

Brandeis/Warren Context

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone" [10] Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons;[11] and the evil of invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer.[12] The alleged facts of a somewhat notorious case brought before an inferior tribunal in New York a few months ago,[13] directly involved the consideration of the right of circulating portraits; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration.

Supreme Court and Privacy

- Word “privacy” not in U.S. Constitution
- Supreme Court has found that a right of privacy is implied by a number of the amendments in the Bill of Rights

Bill of Rights - Explicit

- *4th Amendment* - The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....
- *5th Amendment* - No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law....

Bill of Rights - Enumeration

- *9th Amendment* - The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Extended to States

- *14th Amendment* - No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

Supreme Court and Privacy

- *Penumbra right*

- Griswold v. Connecticut (1965)
- Law against contraception unconstitutional
- “Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance”

- *Zones of privacy*

- Right of association
- Zone of privacy and repose

Griswold Penumbra

“The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." . Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

“We deal with a right of privacy older than the Bill of Rights.... Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.”

Protections Expanded

- Person protected as well as place
 - Katz v. U.S. (1967)
 - Warrantless phone booth wiretap violated Fourth Amendment
- “Reasonable assumption of privacy” test
 - Did person exhibit personal expectation to privacy
 - Does society recognize expectation as reasonable

Protections Limited

- Garbage placed at the curbside is public property
 - California v. Greenwood, 1988

Statutory Approach

- No systematic approach or basic concepts
- Solutions for specific problems
 - Types of records
 - Kinds of institutions

U.S. Security and Privacy Laws

- Freedom from disclosure
 - Restrict public disclosure of private facts
- Freedom from theft
 - Data security
- Freedom from seizure
 - Law enforcement powers and limits
- Freedom from nuisance
 - Intrusion on the seclusion of another
- May overlap

U.S. Privacy Laws up to 1968

- Privacy of mail (1782 & 1825)
- Warrant required to open mail (1877)
- State laws against disclosure of telegrams (1880s)
- Privacy of census (1919) – regulations before
- Communications Act of 1934
 - prohibited federal officials from disclosing info about intercepted communications
- Omnibus Crime and Control Act of 1968 (Wiretap Act)

Attempts at Rational Policy

- *Records, Computers and the Rights of Citizens*
 - US Department of Health, Education, and Welfare, 1973
- *Personal Privacy in an Information Society*
 - US Privacy Protection Study Commission, 1977

HEW Report

- Proposed set of “fair information practices”
 - No secret databases
 - Mechanism to find what in database and how used
 - Prior approval to put info obtained for one purpose to use for another purpose
 - Mechanism to correct errors or amend record
 - Organizations must ensure reliability of data for intended use and take reasonable precautions to prevent misuse

Privacy Commission

- Study areas
 - Industry specific - credit, banks, insurance, medical, investigative/reporting, education
 - Issue specific – employment, medical care, government access to private records, tax records, research and statistical studies, social security number, use of mailing list data
 - Statute specific – Privacy Act of 1974
- 162 recommendations

U.S. Laws in the 1970s

- Fair Credit Reporting Act of 1970
- Bank Secrecy Act of 1970
- Privacy Act of 1974
 - Amended FOIA
 - Regulates collection of information about individuals
 - Prohibits unauthorized disclosure
 - Gives individuals right to access & correct their records in federal databases

1970s Laws – Part Deux

- Family Educational Rights and Privacy Act of 1974 (FERPA)
 - Federal law that protects the privacy of student education records and gives control control directory
- Right to Financial Privacy Act of 1978
- Fair Debt Collection Practices Act - 1978
- Foreign Intelligence Surveillance Act of 1978

U.S. Laws in the 1980s

- Privacy Protection Act of 1980
- Cable Communications Policy Act of 1984
 - Protects privacy of cable records, including viewing habits, and limits collection
- Electronic Communications Privacy Act of 1986
 - Extended Wiretap Act to computer-based data
 - Stored vs. in transit distinction

1980s Laws - 2

- Employee Polygraph Protection Act of 1988
 - Restricts use of polygraphs by private sector
- Video Privacy Protection Act of 1988
 - Protects privacy of video tape rental & purchase records