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Privacy in the Age of Digits

- Historical roots to notion of privacy
 - The state vs. “the people” (notice the modern terminology) in the British Empire, 1640-1780
 - Traditionally based in security of one’s goods and property—negative notion of freedom; need a more positive notion of constitutive public space built on private individuals, as in Europe
 - Fourth Amendment protects against “unreasonable search and seizure”: there is no prima facie “right to privacy”
 - Warrants and judicial review as early protections in the US

Infections to the Notion of Privacy

- Should corporations as “legal persons” be protected by the same privacy rights as “real persons”? *Santa Clara County v. Southern Pacific RR*, 1886...
- Corporations have a right to privacy but, on the flip side, cannot be punished
- Again, issues of accountability
- Libertarian notion: “...the right to be left alone,” Judge Thomas M. Cooley, *MI Supreme Court* (1880), Lewis D. Brandeis, *US Supreme Court* (1929): a thin foundation...
- This leaves public space uninhabited
- Need a positive, constitutive notion of privacy, as constructive

A Contemporary Interpretation of Privacy

- Fourth Amendment litigation since 1960
 - Griswold v. Connecticut, 1964: Sex information as “private,” restriction on its diffusion as invasion of privacy
 - Roe v. Wade, 1973: The privacy of reproductive choice decisions
 - Lawrence v. Texas, 2003; overturned Bowers v. Hardwick, 1986: privacy of choices about sexual orientation
 - 2003: MA Court on gay marriage: combo of privacy and equal protection
 - 2005: Alito SCOTUS nomination key issue: “is there a constitutional right to privacy?” Very controversial.
- 1960s rise of databanks, Alan Westin’s work and more— new notion of “constructive” dangers to privacy
 - *Privacy and Freedom* (1967) and *Databanks in a Free Society* (1972);
Simson Garfinkel, *Database Nation* (2000)

Westin and Privacy, 1970 and after

- Emerging recognition of power of database linking: privacy can be violated (by the state) constructively by record-matching, data mining, and “business intelligence” or semantic matching techniques
- Data-doubles as affordances for privacy invasions
 - What “data crumbs” do we leave behind in everyday life?
 - Can our data doubles be detached from us and used against us?
 - Identity thefts and identity “spoofing”
- Result: first wave of data-integrity and privacy legislation at Federal and State levels, esp. Privacy Act of 1974
 - Note delicate balancing of privacy against FOIA (1966): a public “right to know” vs. personal privacy

Barriers to Privacy Incursions by Business

- [caveat: journalism and “public personalities” excluded]
- Financial Records
 - Fair Credit Reporting Act (1971) & later amendments: right to review; context of credit reporting services; revisions now in Congress, thanks in part to ChoicePoint leakages
- Medical records
 - Danger of diffusion of private information to third parties (Eagleton imbroglio, 1972)
 - Health Insurance Portability and Accountability Act of 1996 (“HIPAA”)
 - A rare instance of “opt-in” approach in the US, as different from Europe, where “opt-in” is usually the rule, especially under the EU’s Privacy Directives
- Problem: few protections against data sales to 3rd parties— it’s a “free market”!

Current Business Practices that Impinge on Right to Privacy

- Data mining/harvesting and records linkage
 - “Constructive” invasions by assembling disparate data
 - EFTs, automatic payments; information on consumer purchases
 - Insurance records, job applications, [some] health records
 - Marketing surveys
 - Data resales
- “Spam” and junk mail
 - Are these privacy invasions or mere annoyances?
 - Can we put a cost incurred by consumers on these practices, then charge-back to the culprits?
 - Larger issue: if attention is a major personal asset in the information society, when businesses grab our attention, are they stealing from us?

Marketers' Invasions

- Sociologists meet marketers: using census data for Zip Codes and census tracts
- The market for customer lists; data resales
 - Direct Marketing Association and friends
 - Where does “marketing info” end and privacy invasions begin?
 - Should we consider privacy a right that can be licensed out or, if it is violated, should we be able to collect fees?
- Emergence of real-time tracking and data harvesting
 - loyalty cards: trade privacy for discounts?
 - “smart” devices tracking shoppers
 - RFIDs replacing UPCs & bar codes: powerful data integration
- “Do Not Call” legislation (2003) and the rise of “opt-out” as the current mode for privacy protections

The Bad Guys... Solutions?

- Phishing
- Identity theft
- [Industrial espionage]
- Spam, rootkits, zombie machines/hijacking; failure of CAN-SPAM Act
- Will government-mandated “back-doors” (under the PATRIOT Act) be used by the bad guys?
- Overt discrimination when private info is *not* required
- Solution[?]: Pamela Samuelson’s proposal to treat personal data as intellectual property

Public Perceptions of Privacy Issues

- UCLA Internet use study (11/2001): fears of privacy incursions by business as barrier to Net adoption
 - Data sales: genies out of the bottle?
 - Data integrity: the danger of “false positives”
 - ChoicePoint and other disasters
 - Anti-“terrorist” mistakes--or not(?)
- As noted earlier, vast amounts of data “out there” that can be reassembled
 - Invasive “prof ling”
 - Identity theft
- Note well, however: most identity theft arises from dumpster diving, not IT incursions

Dilemmas in Locating Responsibility to Preserve Privacy

- Medical and financial records as the key
- Who really invades more, business or the state?
- post-911 sea change: government can invade privacy almost at will in search of “terrorists”
- Should business be allowed to have a similar right to snoop based on notion of preëmptive presumptions about piracy?

Opt-In vs. Opt-Out

- Recent legislation as “opt-out”
 - Note your recurring Privacy Statements from banks
 - A consequence of failure of earlier self-regulation via “privacy policies”: “opt-out” links are often used to validate email addresses
 - Spotty record of business’ self-regulation
 - failures historically in workplace safety, environment, etc.
 - currently, a widespread ignoring of NAB’s “Code of Conduct” in broadcasting: end of “fairness doctrine” in 1980s
 - late-1990s: widespread recognition that companies violated their own privacy policies, posted on the Web
- Would “opt-in” be more effective?
 - A new market for volunteered information?
 - This would reflect issues of cost-bearing

Post 9/11 Issues

- USA PATRIOT Act, 2001
 - Not only “preventative detention,” but law allows officials to demand that news of incursions be suppressed
 - Library circulation info; re: PATRIOT Act vs ALA traditions. USAG’s office claims no use of this provision, while ALA has counted dozens.
 - Expanded powers to subpoena almost any records in the interest of “national security”
 - “Back doors” [again], DoJ “letters,” etc.
- We know that racial profiling is unacceptable; what of ethnic profiling after 9/11?
- Recent Supreme Court caveats on expanded snooping and detention powers...

A “Deep Meaning” to Post-911?

- Intercepting Net communications at ISPs—vast change from old telecommunications practices
 - Old system held telecomm providers harmless for acts of telephone & fax users; now they are subject to contempt of court if they refuse to divulge user info (Verizon issue, 2003):
<http://www.eff.org/Cases/RIAA_v_Verizon/>
 - Ministry of Homeland Security & other agencies can examine ISP logs without warrants
 - Following that practice, RIAA, using DMCA, now subpoenas ISPs
- The new surveillance régime
 - Liberty vs. security (Franklin: those who seek the latter to assure the former deserve neither!)
 - Accountability: requests for info & FOIA requests can put one under surveillance
- TIPs TIA, and other snooping initiatives