



Intellectual Freedom

LIS 493 - Summer 2012
Laura Quilter

roadmap for today (June 12 / class #7)

- news.
- student presentations: Allyssa, Drug Censorship. Amanda, Appropriation.
- Lecture: Privacy. Constitutional privacy. Law enforcement inquiries.
- Workshop – Law enforcement inquiry



Privacy

privacy roadmap

- today
 - Constitutional privacy; state constitutions (*Stanley v. Georgia*; *Tattered Cover*).
 - Other approaches: FIPPs; EU Data Directive.
 - Statutory / Sectoral Privacy : VPPA (*Camfield*), COPPA, ECPA, FERPA; Data Retention Policies.
- wednesday
 - privacy rights of minors
 - technology concerns: data mining, RFID, GPS (*US v. Jones*)



Constitutional Privacy

(US) Constitutional Privacy

- reproductive autonomy
- criminal procedure (4th Amendment, etc.)
- First Amendment

- ?? *informational privacy* ??
 - *US Constitution: embedded within but not separately protected*

US Const., Fourth Amendment (1791)

The right of the people to be secure in their **persons, houses, papers, and effects**, against **unreasonable searches and seizures**, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

touchstone: the "reasonable expectation of privacy"

combine with Fifth (due process, no self-incrimination, Grand Jury & indictments -- i.e., evidentiary requirement, Double Jeopardy, takings) and Ninth ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.")

US Const., 5th, 9th Amendments

Fifth Amendment:

No person ... shall be compelled in any criminal case to be a witness against himself ...

Ninth Amendment:

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

Privacy as Sexual & Reproductive Autonomy

United States

Griswold v. Connecticut, 381 US 479 (1965) (J. Douglas): married couple access to contraceptives.

Roe v. Wade, 410 US 113 (1973) - abortion

Lawrence v. Texas, 539 US 558 (2003) (privacy +) - consensual sodomy

"Family privacy" -- EU, UDHR, etc.

i.e., sexual and reproductive privacy (autonomy)

- birth control
- reproduction
- pornography
- sexual activity

Privacy as Sexual & Reproductive Autonomy

Griswold v. Connecticut, 381 US 479 (1965) (J. Douglas):

"The foregoing [First Amendment] cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."

"Various guarantees create zones of privacy." -- cited 1A association; 3A quartering soldiers; 4A; 5A self-incrimination; 9A

"The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."



First & Fourth: Privacy

US Const., Fourth Amendment (1791)

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touchstone: the "reasonable expectation of privacy"

Fourth Amendment privacy: criminal procedure

- "reasonable expectation of privacy"
 - based on practice & custom
 - zones of privacy
 - shifts with technology; see, e.g., *Kyllo*; *Bartnicki*
 - test:
 - search or seizure?
 - reasonable expectation of privacy?
 - exception?

Fourth Amendment privacy: criminal procedure

- Fourth Amendment privacy standard:
 - "reasonable expectation of privacy"
 - *cf. tort law: "unreasonable"; objectionable or "highly objectionable to a reasonable person"*
 - analysis:
 - is there a "search" or "seizure" (by the govt)?
 - is there a "reasonable" expectation of privacy?
 - reasonable = "objective" question of fact
 - *** expectations change ***
 - does the govt have good reason for action?
 - warrant + probable cause
 - some other exception

Fourth Amendment

- Why do we care about criminal law?
 - criminal law includes sedition (speech), conspiracy (speech), ...
 - implicates: rights of association, speech, press ...
 - "chilling effects" – because fear of reprisal prevents speech at the outset
 - government actions include:
 - (a) investigations (surveillance; subpoenas; taking testimony)
 - (b) arrests & imprisonment

First & Fourth - Intersections & Conflicts

- zones of privacy: *Stanley v. Georgia*
- reporters privilege: *Branzburg*
- national security: *Mitchell v. Forsyth* (1985) (warrantless wiretapping in national security case; qualified immunity for AG)
- criminal speech: flag-burning [OK under 1st], child porn [not OK], etc.
- civil liability for speech: First Amendment generally trumps
 - victim identities: First Amendment trumps
 - satire & defamation: First Amendment trumps

problems

- distinctions between media (e.g., ECPA electronic vs. print)
- "reasonable expectation of privacy" & public spaces & anonymity
 - data mining
- "reasonable expectation of privacy" & non-expressive conduct
 - data mining

Stanley v. Georgia, 394 U.S. 557 (1969)

- search of bookmaker's home on bookie charges led to discovery of 3 film reels of porn; charged with "possession of obscene materials"
- US Supreme Court reversed conviction
 - Marshall maj. op.: First and 14th "mere private possession of obscene material"
 - right to receive info and ideas
 - context of home: Discussion of First Amendment animated by Fourth Amendment "sanctity of home"; cites *Griswold* (penumbras / emanating)
 - Black concurrence: 4th
- *consider Stanley v. Georgia (1969) in the context of the "penumbra" privacy case: Griswold v. Connecticut (1965)*

***Stanley v. Georgia*, 394 U.S. 557 (1969)**

"Moreover, in the context of this case - a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home - that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."

***Stanley v. Georgia*, 394 U.S. 557 (1969)**

"He is asserting the right to read or observe what he pleases - the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. ... But we think that mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. "

***Stanley v. Georgia*, 394 U.S. 557 (1969)**

"Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."

"Perhaps recognizing this, Georgia asserts that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion. ... Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits."

Osborne v. Ohio, 495 US 103 (1990)

- mere possession of child pornography may be criminalized;
- distinguish *Stanley v. Georgia*: Ohio's law aimed not a "paternalistic interest" in regulating citizen minds but market regulation, plus ongoing harm to subject children.
- Narrowed
 - from "nudity" to "lewd exhibition or graphic ... genitals" ;
 - plus "knowing" (that it's children)

***Branzburg v. Hayes*, 408 U.S. 665 (1972)**

- First Amendment reporters' privilege in testifying before Grand Jury; invalidated blanket privilege but granted qualified privilege
- *Louisville Courier-Journal* journalist story about hashish & marijuana inspired investigation; *NYT* & TV stories about Black Panthers
- does Press have special First Amendment rights? apparently not, quite.
- establishes test to determine if reporter can be compelled to testify before grand jury:
 - government must "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest"
- Powell notes: There is a reporter's privilege, but it is not a *Constitutional* privilege.
- Subsequent courts: There is a privilege, but (just) not in *Branzburg*.

In Re Kramerbooks (1998)

- KramerBooks & AfterWords cafe, DC, received a subpoena from Ken Starr to disclose books purchased by Monica Lewinsky (1997). Looking to see if ML bought books (specifically Nicholson Baker, *Vox*, a book about phone sex) for Pres. Clinton.
 - Barnes & Noble also subpoenaed
- reportedly considered complying; was boycotted by librarians & others; moved to quash; ordered in 1998 to comply with subpoena although particular materials denied; resisted & planned appeal; Starr withdrew subpoena.
 - "They are looking for us to hand over information about a specific customer's specific purchases, and that we will not do" -- Bill Kramer (Wash. Post, 1998/05/29)



National Security and Speech / Privacy

Fourth, First, and the Law of National Security

- Alien & Sedition Acts (1798-1802; + Alien Enemies Act still active)
- Civil War / suspension habeas corpus (Lincoln, 1861; *Merryman*, 1863; Congress, 1863; Reconstruction)
- 1st Red Scare; Sedition Act (1917), Palmer Raids ('19)
- WW2: "Alien Registration Act" ("Smith Act") - peacetime sedition law; press freedoms restrained by Smith Act, Exec. Order & self-censorship
- 1950s Red Scare, McCarthy, HUAC, blacklists (1950 list; 1954 "have you no shame" & censure)
- Cointelpro & FBI domestic surveillance of "subversive" (leftist) organizations (1956-71; 1976 Church Committee; COINTELPRO papers)
- PATRIOT Act (2001)

Fourth, First, and the Law of National Security

- *Olmstead v. US*, 277 US 438 (1928)
 - phones are not "papers", so 4A does not protect phone conversations from wiretaps
 - *Brandeis dissent & Holmes dissent penumbra*
 - 1934 *Communications Act* outlaws *disclosure* of wiretapped information
- *Katz v. US*, 389 US 347 (1967)
 - 4A protects people, not places; so wiretaps of phone booths need warrant
 - Omnibus Crime Control & Safe Streets Act (1968), Title III "Federal Wiretap Act" - illegal to intercept *or* disclose information from wiretaps
 - annual statistics: 15,041 requested, 1995-2005; 5 denied; approximately 80% extended

Fourth, First, and the Law of National Security

- COINTELPRO
 - Foreign Intelligence Surveillance Act (FISA) (1978)
 - Foreign Intelligence Surveillance Court authorizes wiretaps against "foreign powers" even without probable cause that a crime has been committed
 - annual statistics: 2005, all 2072 requests approved
 - Executive Order 12,333 (Reagan, 1982) - foreign wiretaps
 - no reporting
- *Smith v. Maryland*, 442 US 735 (1979)
 - record of phone #s called not protected by 4A; "pen registers" OK
 - court "shall" issue; no denials
 - no public tracking; DOJ alone in 1996 4,569 PR or trap & trace for 10,000+ people;

Fourth, First, and the Law of National Security

- Electronic Communications Privacy Act (ECPA) (1986)
 - ECPA amended Title III (Wiretap Act) to include access to private electronic communications
 - distinction between "in transit" (wire, oral, & electronic protected by Title I) and "stored" (less protection; see "Stored Communications Act", Title II)
 - US v. Councilman
 - Bartnicki v. Vopper

Fourth, First, and the Law of National Security

- PATRIOT Act (2001)
 - amended ECPA, FISA, *inter alia*
 - Section 215: “business records”, e.g., library records.
 - “National Security Letters” authorized silent inquiries: Subject was NOT PERMITTED to tell anyone else about the NSL inquiry (gag order). Librarians (CT) resisted. *Doe v. Gonzalez* (2d Cir 2008) held gag orders unconstitutional, but superseded because provisions changed to permit recourse in courts and increased Congressional oversight. “Radical librarians”. FOIA requests showed significant abuses (e.g., not targeted to individual but to a “community of interest”).
 - Provisions sunsetted & reauthorized with modifications. May 26, 2011, Obama signed 4-year reauthorization, including S.215.
 - Current status: Several federal agencies (FBI, DHS) can now issue NSLs, with gag orders. When challenged, gag orders have been lifted; but gag order provisions are still in the law; and few companies have challenged the 300,000+ NSLs issued (FBI 2012/05).
- Warrantless wiretaps authorized by Bush Admin. (2002). Litigation dismissed.



Reasonable Expectation of Privacy ?

Reasonable expectation of privacy?

- Do you have a REP? meaning the government must meet 4A requirements of a search warrant, supported by probable cause to believe that a crime has been committed?
- thermal imaging REP [*Kyllo v. US* (2001)]
- garbage no REP [*Cal. v. Greenwood* (1988)]
- dogs sniffing luggage no REP
- cheek swab mixed, likely headed for S.Ct.
- DNA from a coffee cup no REP
- searching student lockers no REP
- phone conversations on a public payphone [yes; *Katz* (1967)]
- the phone numbers you dial [no REP; *Smith v. Maryland* (1979)]
- aerial surveillance of your backyard [no; *Florida v. Riley* (1989)]
- "open fields" [no; *Hester v. US* (1924); *Oliver v. US* (1984)]
- strip search of student for ibuprofen REP [*Safford v. Redding* (2009)]
- mandatory urinalysis for students [no REP; *Vernonia* (1995); *Edwards v. Arizona* (1981); *Grain Processing v. US* (2002)]

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- "open fields" [no; *Hester v. US* (1924); *Oliver v. US* (1984)] ... *curtilage*
- strip search of student for ibuprofen: REP [*Safford v. Redding* (2009)]
- mandatory urinalysis for students [no REP; *Vernonia* (1995); *Pottawatomie v. Earls* (2002)]

Congressional protection?

- ... so you don't have a REP under the 4A, maybe Congress gave you something extra?
- broadcast of illegally taped phone conv.: OK [*Bartnicki v. Vopper*]
- email: [under ECPA, distinctions b/w stored & in-transit]
- the phone numbers you dial [no REP; *Smith v. Maryland* (1979)]
- student grades for pass-back grading [OK under FERPA; *Owasso v. Falvo* (2002)]

ECPA : Electronic Communications Privacy Act (1986)

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 - ECPA amended Title III (Wiretap Act) to include access to private electronic communications
 - distinction between "in transit" (wire, oral, & electronic protected by Title I) and "stored" (less protection; see "Stored Communications Act", Title II)
 - *Bartnicki v. Vopper*, 532 US 514 (2001)
 - Amended by USA PATRIOT Act (2001)
 - *Lane v. Facebook* (2010)
 - *US v. Graham* (2012)
 - Proposed revisions (2011)



Workshop

Workshop: Law Enforcement Inquiry

[http://gslis.simmons.edu/wikis/IntFreedom/Workshop_7_\(2012\)](http://gslis.simmons.edu/wikis/IntFreedom/Workshop_7_(2012))

[T]he local City Council has begun drafting a law that would ban registered sex offenders from residency near and access to local schools, playgrounds, and the public library.

The City Council has contacted the local police department for all relevant information relating to sex offenders in the city. The police department has contacted the public library to gather information about

(a) its hiring policies [does it do background checks on new employees; have any employees been convicted of any crimes]; and

(b) information about the 26 registered sex offenders -- do they have library cards; have they had access to the children's or YA rooms; what materials have they borrowed from the library.

The police department has described this request as "relating to an ongoing criminal investigation", without specifying what investigation, and as "in support of City Council legislative drafting."

Using the state library privacy statute you evaluated in [workshop 6](#), and referring as well to your state's Constitution, and the 1st and 4th Amendments to the US Constitution, please assess the library's legal duty in response to each of the police department's two requests.



... so what's missing from these protections?



Informational Privacy

Whalen v. Roe, 429 US 589 (1977)

- informational privacy case
- NYS registry of users of "dangerous yet legitimate" drugs, e.g., opium, cocaine
- Court agreed individuals have an interest in avoiding disclosure of personal matters
- but upheld the law b/c disclosures were typical in healthcare context & precautions were taken
- a few follow-up cases, e.g., *Doe v. City of New York* (2d Cir. 1994) (HIV status). See also *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) (Presidential Recordings & Materials Preservation Act requiring screening of corpus and preservation of selections does not violate Pres. Nixon's right to privacy).

NASA v. Nelson, (Jan. 19, 2011)

- informational privacy case
- NASA employee background check
- 9th Circuit saw a violation of right to privacy (530 F.3d 865); US Supreme reversed, 8-0 finding no violation of an *assumed but not decided* right to informational privacy
- "We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*."
- Scalia (+Thomas) (concurring in judgment): "I would simply hold that there is no constitutional right to 'informational privacy' ... The Court's sole justification for its decision to 'assume, without deciding' is that the Court made the same mistake before -- in two 33-year-old cases, *Whalen*... and *Nixon* ... It is unfathomable why these cases' passing, barely explained reference to a right separate from the Fourth Amendment -- an unenumerated right that they held to be not applicable -- should be afforded stare decisis weight."

Constitutional privacy doesn't really cover informational privacy... but Informational Privacy is popular (at least in theory)

political fall-out from *Roe v. Wade*: wholesale attack on notion of Constitutional privacy and particularly on "penumbra" and "emanations"

- e.g., Robert Bork & McCain in 1980s: *Griswold* was poorly decided
- constant attacks on *Roe* as based on a bad decision (*Griswold*)

yet at the same time widespread support for *idea* of "privacy":

- conservatives generally have fought ID reqmts.
- Palin said (2008) there was a const. right to privacy (probably not getting *Griswold* angle)



State Constitutional Privacy

State Constitutional Privacy

- *Fourth Amendment acts as a floor not ceiling*
- state 4A / criminal procedural protections
 - 49 states have their own wiretap statutes: 12 are 2-party consent
- 10 states with more general Constitutional "privacy" protections:
 - Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington
 - potentially applicable to private parties & informational privacy

Tattered Cover v. City of Thorndale, Colorado

- 44 P.3d 1044 (Colo. 2002) - subpoena to bookstore
- meth lab discovered, along with "how-to" books, and a TC receipt
- search warrant from law enforcement for records relating to residents of meth lab house
- TC asked for 5 day delay & then sued to enjoin
- connection between reading a book & committing a crime is tenuous
- Colorado Supreme Court held that police had not demonstrated nexus adequately, based on Colorado Constitution & US First Amendment
- books turned out to be unrelated Japanese calligraphy

Tattered Cover v. City of Thorndale, Colorado

Privacy - State Constitutional

Tattered Cover v. City of Thornton, 44 P.3d 1044 (Colo. 2002)

1. search warrant for purchase records about how to make methamphetamine; TC resisted on First Amendment ground
2. Colorado Supreme Court ruled on Colorado Constitutional grounds:
 - a. government must show a *compelling need* for the specific personal information in order to collect it
3. the book turned out to be Japanese calligraphy



Sectoral Privacy

democracy! statutory (& regulatory) protections

protection of personal data: US sectoral approach

- video privacy (VPPA 1988)
- cable television subscriber privacy (1992)
- library record privacy (state laws)
- financial privacy (FCRA 1970; GLB 1999)
- health privacy (HIPAA 1996; rules 2000)
- educational privacy (FERPA 1974)
- federal agency privacy (Privacy Act of 1974; FOIA)
- children's data (COPPA 1998)
- reporter shield laws (state laws)
- anonymous speech (First Amendment)
- whistleblower protections (various state & federal; but see *Garcetti v. Ceballos*, 547 US 410 (2006) - 1A does not protect federal employee whistleblowers)
- state constitutions
- data release statutes (notification; state laws)

Fourth Amendment-related

- electronic communications (ECPA)

Video Privacy Protection Act of 1988

- Bork's video rental history published in news
- VPPA prevents disclosure of "personally identifiable" rental records
 - unless written consent by consumer
 - unless warrant or court order by police
 - unless genre preferences for marketing
 - consumer opt-out required
- civil remedies of at least \$2500
- rental records destroyed w/in 1 year of acct termination
- applies to libraries!
- PATRIOT Act s.215 would apply
- floor not ceiling; CT, MD, CA, DE, IA, LA, NY, RI, MI ...
- very few cases

Video Privacy Protection Act of 1988

... very few cases:

- *Dirkes v. Borough of Runnemede*, 939 F.Supp. 235 DNJ 1996)
 - Internal Affairs Investigation of police pulled up video rentals.
 - Court held that both the video store and the requester of unauthorized records is liable under VPPA.
 - cf. ECPA & *Bartnicki v. Vopper*
- *Camfield v. Oklahoma City*, 248 F.3d 1214 (10th Cir. 2001)
 - "Tin Drum" (Günter Grass) child porn case
 - warrantless request of video rental records after citizen complaint & judge agreed "probably" child porn. Records of rentals included ACLU employee who checked out film.
 - 10th Cir. found Camfield's rights under VPPA were violated.
- Suits filed against Blockbuster for Facebook app; *Fraley v. Facebook* (ND Cal Dec. 16 2011); Netflix for insecure and unnecessary retention of circulation; etc.
- 2011 : Netflix & Rep. Goodlatte (VA) pushed amendment (HR 2471) allowing one-time user consent. Passed in House 330-116. Stalled in Senate.

Cable TV Consumer Protection & Competition Act of 1992

- originally ordered FCC to prohibit "indecent" shows;
 - *Denver Area Educational Television Consortium v. FCC*, 518 U.S. 727 (1996) struck down this sec.
- personally identifiable information collected
 - e.g., pay-per-view records
 - cable viewing habits
- modified by USA PATRIOT Act to permit cable operators (ISPs) to facilitate surveillance without notifying consumers

analyzing privacy statutes: Cable TV ...

- what level of government?
- what is being protected?
 - Fair Information Practice Principles?
- against whom or what is it protected?
- who is obliged to protect it? what other obligations / requirements do they have?
- exceptions? exemptions?
- enforcement?

Cable TV Consumer Protection & Competition Act of 1992

[C]able operators must notify the subscriber of the following: the nature of any personally identifiable information collected, or that will be collected, regarding the subscriber; the nature of the use of such information; the nature, frequency, and purpose of any possible disclosure of such information; including an identification of the types of persons to whom the disclosure may be made, the period during which such information will be maintained by the cable operator, the times and place at which the subscriber may gain access to such information, and the limitations with respect to collection and disclosure of information by a cable operator and the right of subscribers to enforce these limitations.

...

Cable TV Consumer Protection & Competition Act of 1992

...

Cable operators must provide a subscriber access to all personally identifiable information regarding that subscriber. ... The subscriber must be provided a reasonable opportunity to correct any error in such information. Cable operators must destroy personally identifiable information if such information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information. ... Any person aggrieved by a cable operator's violation of these provisions may bring a civil action in a United States district court.

New Approaches

- Data Retention Requirements
- Data Release Notification Statutes



Next Time

next time (wed 6/13):

- prep for next time --
 - Finish privacy readings
 - student presentations ... news.



Privacy Rights of Minors

privacy in the library

"In a library (physical or virtual), the right to privacy is the right to open inquiry without having the subject of one's interest examined or scrutinized by others." -- LBR Interpretation: Privacy (2002)