

# Surveillance and “Nothing to Hide”



*CSE/ISE 312: Legal, Social, and Ethical Issues*  
*Stony Brook University*

*Source: D. Solove, “‘I’ve Got Nothing to Hide’ and Other Misunderstandings of Privacy” (2008)*

*“Perhaps the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is.”*

*— Judith Jarvis Thomson, “The Right to Privacy”*

# Order of Topics



- *Introduction*
- *The “Nothing to hide” Argument*
- *Conceptualizing Privacy*
- *The Problem with “Nothing to hide”*

# Introduction



# Privacy Invasions



- *After 9/11/01, the Bush administration secretly authorizes NSA to engage in warrantless wiretapping of American citizens' phone calls*
- *2002: DoD's Total Information Awareness data-mining project*
- *2006: NSA obtains customer records from major telephone companies to identify potential terrorists*

# The “Nothing to Hide” Argument



*“[I]f these people had done bad things they ought to be ashamed of themselves and he couldn’t pity them, and if they hadn’t done them there was no need of making such a rumpus about other people knowing.”*

*— Henry James, The Reverberator (1888)*

*“If you’ve got nothing to hide,  
you’ve got nothing to fear”*

*— Campaign slogan for British CCTV system*



*“Everyone is guilty of something or has something to conceal. All one has to do is look hard enough to find what it is.”*  
— Aleksandr Solzhenitsyn

# Forms of the Argument



- *All law-abiding citizens should have nothing to hide*
- *Posner: “[People] want more power to conceal information about themselves that others might use to their disadvantage”*
- *Relative value of privacy interest vs. gov’t interest in promoting security*

# How the Argument Proceeds



- 1. The program in question will disclose particular pieces of information to a few gov't officials*
- 2. This limited disclosure is not likely to threaten the privacy of law-abiding citizens*
- 3. The security interest in preventing attacks is very high and outweighs whatever minimal privacy interests law-abiding citizens may have in this information*

# Conceptualizing Privacy



# The Traditional Approach



- *Look for necessary and sufficient elements*
- *This leads to overly narrow or overly broad definitions*
  - *Privacy as intimacy*
  - *Privacy as the “right to be let alone”*

# Prosser on Privacy (1960)

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- *Four types of harmful activity (based on tort law)*
  - *Intrusion upon the plaintiff's solitude or into his private affairs*
  - *Public disclosure of embarrassing private facts about the plaintiff*
  - *Publicity which places the plaintiff in a false light in the public eye*
  - *Appropriation, for the defendant's advantage, of the plaintiff's name or likeness*

# Solove's Interpretation



- *Privacy is a set of “family resemblances”*
- *Concepts are related to one another rather than having one thing in common*

# Which Metaphor Should We Use?



- *1984 (Orwell)*
  - *Surveillance leads to inhibition*
- *The Trial (Kafka)*
  - *Bureaucracy makes decisions about people, denies them control over use*
  - *Reflects imbalance of power*



# A Taxonomy of Privacy



- *Information Collection*
- *Information Processing*
- *Information Dissemination*
- *Invasion*

# Information Collection



- *Surveillance*
- *Interrogation*
- *Activity may disrupt others' activities*
  - *Chilling behavior, power imbalances*

# Information Processing



- *Aggregation*
- *Identification*
- *Insecurity*
- *Secondary Use*
- *Exclusion*

# Information Dissemination



- *Breach of Confidentiality*
- *Disclosure*
- *Exposure*
- *Increased Accessibility*
- *Blackmail*
- *Appropriation*
- *Distortion*

# Invasion



- *Intrusion*
- *Decisional Interference*

# A Social View of Privacy




- *Privacy is often viewed as an individual right*
  - *Protect individual against community*
  - *Conflicting interests also involve autonomy and dignity*

# Views on Privacy



- *Etzioni: “Privacy... does not trump all other rights or concerns for the common good.”*
- *Dewey: individual rights are protections from society due to its intrusiveness*
- *Post: privacy is society’s attempt to promote rules of behavior and decorum*

# The Problem with “Nothing to Hide”





# Privacy Has Many Dimensions



- *“Nothing to hide” assumes that privacy is about hiding bad things*
  - *Views privacy as secrecy*
- *This is just one of many problems with gov’t programs like NSA surveillance and data mining*

# Information Collection



- *“Reasonable expectation of privacy”*
- *Dataveillance, transaction surveillance*
- *Chilling effects: speech and association*
  - *Harm to society by reducing degrees of freedom*
  - *Problem: hard to demonstrate*

# Information Processing



- *Threat posed by aggregation*
  - *Data mining aims to predict actions*
- *Exclusion creates power imbalance*
- *Hard to assess risk of secondary use*

# Structural Problems



- *“Nothing to hide” looks for visceral injury, not structural one*
- *Threat of a series of relatively minor acts that gradually begin to add up*
- *Breach of confidentiality, secondary use*
- *Issue should be what kinds of oversight and accountability we want in place*

# Next Time



- *Chapter 3 (Freedom of Speech)*