

# Thoughts on Privacy, Freedom of Assembly, and the Law

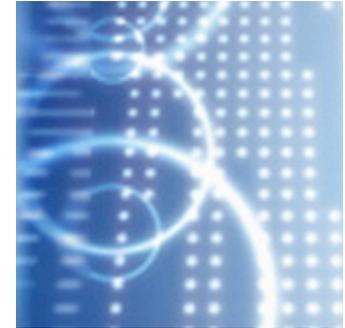
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MIT CSAIL & MIT CFP

Plenary, Cambridge, MA May 5, 2011



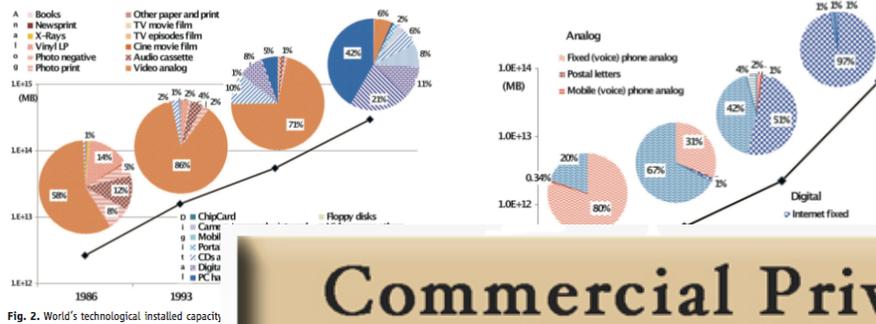
# Recent events



Storage and comms up by 58% and 28% annually respectively



**The World's Technological Capacity to Store, Communicate, and Compute Information**  
 Martin Hilbert, *et al.*  
*Science* **332**, 60 (2011);  
 DOI: 10.1126/science.1200970

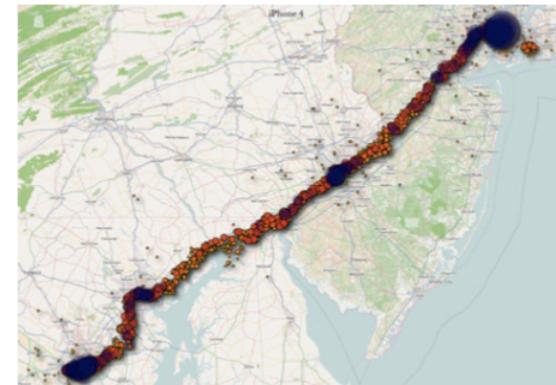


Commercial Privacy  
*Bill of Rights*

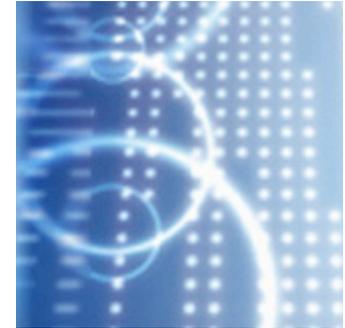
## NATIONAL STRATEGY FOR TRUSTED IDENTITIES IN CYBERSPACE

Enhancing Online Choice, Efficiency, Security, and Privacy

### 3G Apple iOS Devices Are Storing Users' Location Data



# Outline



- ▶ **Background**
  - ▶ Legal basis
  - ▶ Definition of privacy
  - ▶ Definition of freedom of association
  - ▶ Technological advances
- ▶ **The challenges**
  - ▶ Interplay between technology and rights
  - ▶ Interplay between two kinds of rights
  - ▶ Interplay between business opportunities and rights
- ▶ **Where we are now: a few statutory and regulatory highlights**

# Open vs. closed?



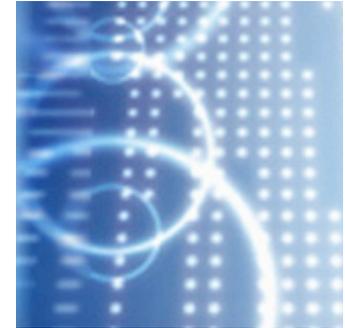
- ▶ Privacy
  - ▶ What can I know about other people?
  - ▶ What can I know about what other people know about me?
  - ▶ Can I be free from observation, surveillance, etc.?
- ▶ Freedom of association
  - ▶ Can I find like-minded people with whom I would like to associate?
  - ▶ Who can know with whom I associate, individually or in groups?
  - ▶ What can they know about our association?
- ▶ Does open/closed = private or freely able to associate?

# Privacy and Freedom of Association



- ▶ **History of privacy:**
  - ▶ Found in postal services in England, before the US Revolution
  - ▶ In the US, huge issue with respect to abolitionists
  - ▶ Seminal document by S. Warren and L. Brandeis, 1890
- ▶ **History of freedom of association**
  - ▶ US Constitution, Bill of Rights
  - ▶ A number of other countries, e.g. Canada, Germany, Hong Kong, Turkey, India, Rep. of Ireland, etc. (All 20<sup>th</sup> c.)
  - ▶ The European Convention (1999-2000)

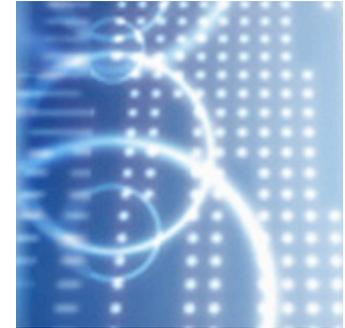
# The US Bill of Rights Fourth Amendment



## ***Right to privacy***

*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.*

# The US Bill of Rights First Amendment



## ***Right to freedom of association***

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

# Enforcement and recourse



- ▶ Fourth amendment: Kerry/McCain bill, no private right to individual action
- ▶ First amendment: specific that individual goes to government for “redress”

# Defining Privacy



- ▶ Warren/Brandeis (1890)
- ▶ Prosser (1960)
- ▶ Nissenbaum (2004, 2009)

# Warren and Brandeis “The Right to Privacy”



- ▶ Examples: Daughter’s wedding, Prince Albert v. Strange
- ▶ Control of degree “thoughts, sentiments, and emotions” made public: does private disclosure negate right to control?
- ▶ Not based on:
  - ▶ Literary or artistic rights (personal intellectual ownership)
  - ▶ Property rights (no understood value)
  - ▶ Breach of confidence (legal term) because that implies a contract
  - ▶ Defamation
- ▶ Conclusion: distinct right, to be compared to right to not be assaulted, imprisoned without justification, etc.

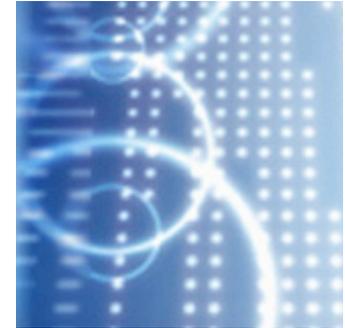
# Prosser “Privacy”



- ▶ Four distinct torts about right to be left alone
  - ▶ Intrusion into “seclusion or solitude, or...private affairs”
  - ▶ “Public disclosure of embarrassing private facts” (Warren and Brandeis)
  - ▶ “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”

# Nissenbaum

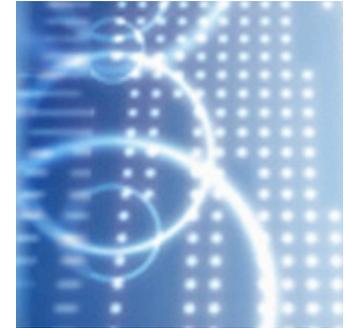
## Privacy as Contextual Integrity



- ▶ Scope: “information, activities, decisions, thoughts, bodies, and communication” applying to the individual, not an organization or institution
- ▶ 3 key current principles
  - ▶ Limiting surveillance and use of personal information by agents of the government
  - ▶ Restricting access to sensitive and personal information
  - ▶ Reducing or limiting incursions into what is considered private and personal
- ▶ Inadequate: points to “reasonable expectation of privacy”
  - ▶ Must exhibit expectation of privacy
  - ▶ Expectation must be one society recognizes
  - ▶ Does little if anything to support people’s preferences against surveillance

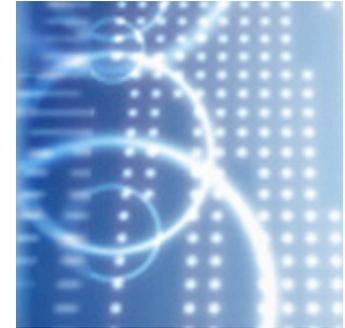
# Nissenbaum

## Contextual Integrity: Information flow



- ▶ Two kinds of “norms of information flow”
  - ▶ Norms of appropriateness
    - ▶ Each context has defined what kinds of information is appropriate and what not
    - ▶ Each context may have different degrees of restriction, appropriateness or explicitness with respect to kinds of information
    - ▶ Consider married couple, doctor and patient, parent and child, etc.
  - ▶ Norms of flow or distribution: about flow of information from one person to another
    - ▶ Considers not only pairwise motion, but whole flow

# Contextual Integrity: norms and the law?



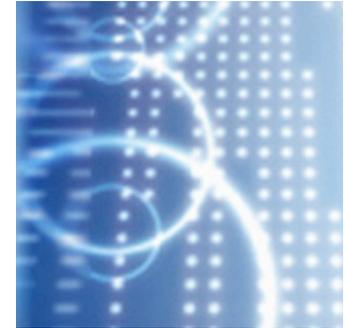
- ▶ Contextual norms
  - ▶ Suggests that information “tagged” with context
  - ▶ Norms internal to context, hence relative, not universal
  - ▶ May be conservative, embodying status quo, current practice
- ▶ Question: should law reflect context in privacy considerations?

# Defining Freedom of Association



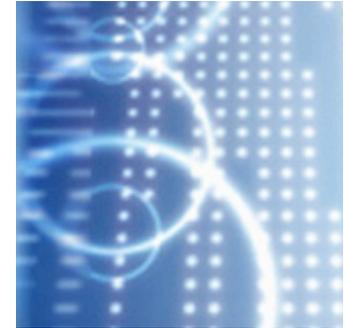
- ▶ In the abstract
  - ▶ Nature of the association
    - ▶ Intimate
    - ▶ Expressive
  - ▶ Exposure of association
    - ▶ Freedom to keep associations private
    - ▶ Freedom to find like-minded people
- ▶ Torts: no clear definitions (that I can find)
- ▶ Contextual integrity: applicable here as well?

# Technology: new and advancing opportunities



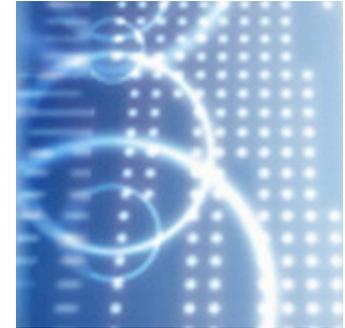
- ▶ Increased capacities and capabilities
  - ▶ Storage
  - ▶ Communications: information exchange
  - ▶ Computation: data mining, improved statistical tools for exhibiting inherent structure in communications patterns
- ▶ The disappearance of remoteness
  - ▶ No business model in remoteness: nothing is “far away”
  - ▶ Scalability
  - ▶ Perspective: everything (all information) equally accessible
- ▶ Social networking, Google, but also supporting communications services: capabilities and analytical tools

# Technology and rights: Privacy Issues



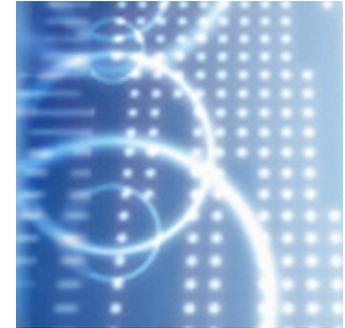
- ▶ Many overlapping sources of identifying information
- ▶ Merging: information and policy, not equally well handled
- ▶ Legal consensus: only governments can bring suit for violations
- ▶ Increased publicity and social pressure

# Technology and Rights: Freedom of Association Issues



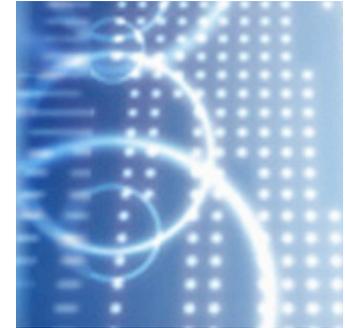
- ▶ Information availability: improved ability to make associations
- ▶ Behavioral information collected for other reasons, increasingly available
- ▶ Improving technologies for understanding inherent social clustering
- ▶ Fewer legal precedents for “violations”, torts not well understood

# Other approaches



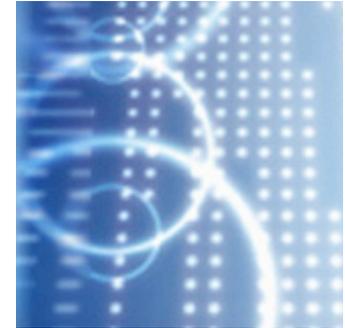
- ▶ Other approaches: accountability, contextual integrity
  - ▶ Accountability vs. enforcement
  - ▶ Contextual Integrity
  - ▶ Where we are:
    - ▶ Early work in privacy
    - ▶ None in freedom of association

# Conflicting or complementary rights



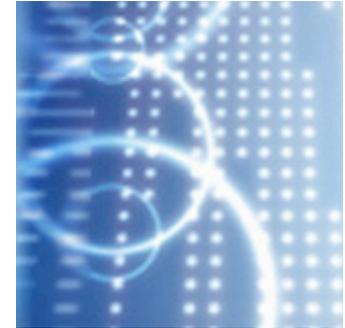
- ▶ “Data empowerment” vs. freedom of association (Swire)
  - ▶ Two kinds of judicial criteria
    - ▶ Compelling state interest (less restrictive for protecting interest, e.g. content in freedom of speech)
    - ▶ Significant state interest (more restrictive for protecting interest, e.g. location, timing of freedom of speech)
    - ▶ Issue: which criteria applicable and when conflicts occur, which right takes precedence, what other remedies might be available, etc.
- ▶ Data restrictions
  - ▶ Complementary: privacy and freedom to keep associations private
  - ▶ Conflicting: privacy and freedom to find associations

# Business opportunities and legal rights



- ▶ What we see now:
  - ▶ Email service providers, search engines, social networking sites collect huge amounts of personal and behavioral data while providing those services
  - ▶ Communications providers collect huge amounts of personal and behavioral data while providing those services (balance may be different)
- ▶ Questions one might ask
  - ▶ Same services, same opportunities: Should they equally be allowed to use their collected information to provide the same additional services (ability to target advertising, discovery of associations, etc.)? If not, what is different?
  - ▶ Business models for rights: Are there effective business models in providing either privacy or freedom of association? This might mean business or social benefits for which customers would pay additionally.
  - ▶ Regulation and enforcement: Is it the right balance for the government to define torts with respect to the Bill of Rights and to retain the only right to suit for violations?

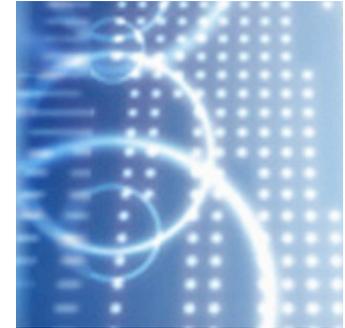
# What is coming down the road? (Example 1)



## NSTIC (Nat'l Strategy for Trusted Identities in Cyberspace)

- ▶ Identity Ecosystem Framework:
  - ▶ Participants: Fed. Gov't, state and local gov'ts, private sector
  - ▶ Trust: trustmark scheme
  - ▶ Voluntary
- ▶ Oversight and Process: Steering group, effort led by NIST, standards setting, accreditation process

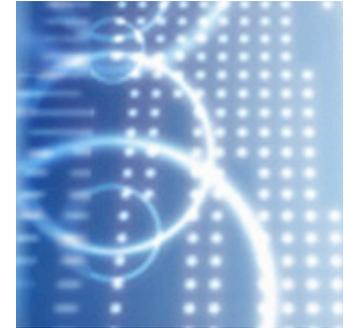
# What is coming down the road? Example 2



## Proposed “Commercial Privacy Bill of Rights” (Kerry/McCain)

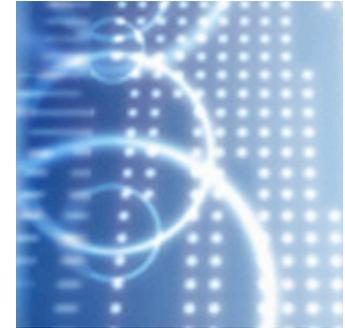
- ▶ Clear statement that privacy belongs front and center: privacy based in Fair Information Practice Principles (FIPPs)
- ▶ Applies to organization overseen by Federal Trade Commission
- ▶ Specifies kinds of personally identifying information
  - ▶ PII
  - ▶ Unique identifier information
  - ▶ Information collected that may uniquely identify a specific individual
  - ▶ Does not include IP address, small group (household), inferred characteristics
- ▶ Enforcement by FTC and State Attorney Generals only, no private rights of action

# Open vs. Closed?



Is this a relevant question?

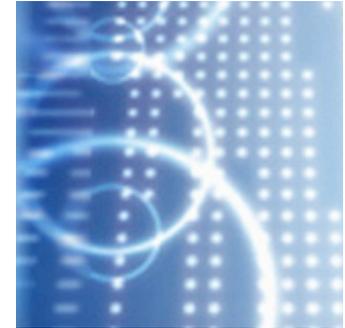
# The End



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Questions?

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