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Footnotes

Footnotes

Job Insecurity pg. 513 - Philip L. Gordon

- ¹ A recent study by the Privacy Foundation determined that 14 million workers worldwide are subject to workplace surveillance of their e-mail and Internet use. See Andrew Schulman, *The Extent of Systematic Monitoring of Employee E-mail and Internet Use* (July 9, 2001), available at <http://www.privacyfoundation.org/workplace/technology/cxent.asp>.
- ² See Neil A. Lewis, *Rebels in Black Robes Recoil at Surveillance of Computers*, N.Y. TIMES, Aug. 8, 2001, at A1.
- ³ See Alex Kozinski, *Privacy on Trial*, WALL ST. J., Sept. 4, 2001, at A22; *Greenfield at Large*, CNN.COM (Sept. 6, 2001), available at <http://www.cnn.com/TRANSCRIPTS/0109/06/gal.00.html>.
- ⁴ When enacted, the Federal Wiretap Act was Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Pub. L. No. 90-351, 82 Stat. 212 (1968) (codified as amended at 18 U.S.C. §§ 2510-2520 (2002)).
- ⁵ For sources addressing the effect on businesses of workplace Internet use, see Gary Krakow, *Battling 'Cyber-Slackers' at Work* (Dec. 8, 2000), available at <http://www.msnbc.com/news/500581.asp>; *Results of Vault Survey of Internet Use in the Workplace*, available at <http://www.vault.com/suveys/internetuse2000/index2000.jsp>.
- ⁶ Employers with operations in countries other than the United States may not have the same freedom to establish the rules of the game for electronic monitoring. The European Union, for example, has placed strict limits on workplace monitoring. See Article 29 - Data Protection Working Party, Opinion 8/2001, On The Processing Of Personal Data In The Employment Context, § 12 at 28. The law governing workplace monitoring in countries other than the United States is beyond the scope of this Article.
- ⁷ See generally *Olmstead v. United States*, 277 U.S. 438 (1928) (upholding federal conviction based upon use of evidence obtained through wiretaps conducted by federal officials in violation of state law).
- ⁸ 389 U.S. 347 (1967).
- ⁹ See *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).
- ¹⁰ See Senate Report on the Electronic Communications Privacy Act of 1986, S. REP. NO. 99-541, at 2 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3556.
- ¹¹ Electronic Communications Privacy Act of 1986 ("ECPA"), Pub. L. No. 99-508, Title I, §101(a)(6)(c), 100 Stat. 1848, 1848-1849 (codified at 18 U.S.C. § 2510(12)).
- ¹² See Senate Report on the Electronic Communications Privacy Act of 1986, *supra* note 10, at 12, 14.
- ¹³ Electronic Communications Privacy Act of 1986, *supra* note 11 (identifying Title II of the ECPA as the Stored Wire and Electronic Communications and Transactional Records Access [Act]).
- ¹⁴ 18 U.S.C. § 2701(a)(1) (2002). Even a personal computer can qualify as a "facility" under the Stored Communications Act. See *In re DoubleClick, Inc. Privacy Litigation*, 154 F. Supp. 2d. 497, 509 (S.D.N.Y. 2001) (holding implicitly that a personal computer could be a facility); *Chance v. Avenue A, Inc.*, 165 F. Supp. 2d. 1153, 1160-61 (W.D. Wash. 2001) (holding that plaintiffs had proved that a personal computer was a "facility").
- ¹⁵ See 18 U.S.C. § 2702(a)(1) (2002).
- ¹⁶ 36 F.3d 457 (5th Cir. 1994).
- ¹⁷ See *Steve Jackson Games v. United States Secret Serv.*, 36 F.3d 457, 458 (5th Cir. 1994).
- ¹⁸ See *id.* at 461-62.
- ¹⁹ See *id.* at 462.
- ²⁰ See 18 U.S.C. § 2701(c)(1) (2002).
- ²¹ See 18 U.S.C. § 2510(17)(A) (2002) (defining "electronic storage"); *In re Toys R Us, Inc., Privacy Litig.*, 2001 U.S. Dist. LEXIS 16947, at*10-11 (N.D. Cal. Oct. 9, 2001) (holding that "cookies placed on hard drives are not in 'electronic storage'").
- ²² See, e.g., *Wesley College v. Pitts*, 974 F. Supp. 375, 385 (D. Del. 1997) (following *Steve Jackson Games*); *United States v. Reyes*, 922 F. Supp. 818, 836 (S.D.N.Y. 1996 (same)).
- ²³ 236 F.3d 1035 (9th Cir. 2001).
- ²⁴ See *Konop v. Hawaiian Airlines, Inc.*, 236 F.3d 1035, 1046 (9th Cir. 2001).
- ²⁵ See *id.* at 1041.
- ²⁶ See *id.* at 1040-41.
- ²⁷ See *id.* at 1048.
- ²⁸ 155 F.3d 1051 (9th Cir. 1998).
- ²⁹ See *United States v. Smith*, 155 F.3d 1051, 1059 (9th Cir. 1998).
- ³⁰ See *Konop*, 236 F.3d at 1043-44.
- ³¹ See *Konop v. Hawaiian Airlines Inc.*, 262 F.3d 972 (9th Cir. 2001).
- ³² See *id.*
- ³³ See, *Steve Jackson Games*, 36 F.3d at 462-63. Compare The Federal Wiretap Act, 18 U.S.C. § 2516 (2002), with The Stored Communications Act, 18 U.S.C. § 2703 (2002) (a comparison which illustrates the more stringent requirements of the Federal Wiretap Act).
- ³⁴ *Smith*, 155 F.3d at 1059.
- ³⁵ See 18 U.S.C. § 1708 (2002).
- ³⁶ See *Steve Jackson Games*, 36 F.3d at 462.
- ³⁷ Even "real-time" interceptions are not actionable under the Federal Wiretap Act if the employer intercepts with the employee's consent, obtained, for example, through the distribution of a monitoring policy. See 18 U.S.C. § 2511(2)(d) (providing that it is not unlawful to intercept a communication with the consent of one of the parties to the communication). Employers should note that in some states, such as California and Maryland, an interception is unlawful unless both parties to the communication consent. See CAL. PENAL CODE § 631(a) (West 2002); MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(3) (Bender 2001).
- ³⁸ Electronic Communications Privacy Act of 1986, *supra* note 11, at § 101(a)(D).
- ³⁹ See Senate Report on the Electronic Communications Privacy Act of 1986, *supra* note 10, at 12.
- ⁴⁰ See, e.g., *United States v. Smith*, 978 F.2d 171, 173 (5th Cir. 1992); *Askin v. McNulty*, 47 F.3d 100, 101 (4th Cir. 1995); *United States v. Carr*, 805 F. Supp. 1266, 1267 (E.D.N.C. 1992).

⁴¹ See *Smith*, 978 F.2d at 181; *Askin*, 47 F.3d at 106; *Carr*, 805 F. Supp. at 1276.

⁴² Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended at 18 U.S.C. §§ 2510-2511 (2002)).

⁴³ H.R. REP. NO. 103-827, at (D)*10 (1994), reprinted in 1994 U.S.C.C.A.N. 3489, 3490 (extending the protections of the Federal Wiretap Act to communications over cordless telephones and to certain data communications transmitted by radio).

⁴⁴ Uniting And Strengthening America Act By Providing Appropriate Tools Required to Intercept And Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 209, 115 Stat. 272, 283.

⁴⁵ See 18 U.S.C. § 2511(2)(d) (2002) (providing that it is not unlawful to intercept a communication with the consent of one of the parties to the communication).

Little Brothers are Watching You pg. 517 - Sam Kamin

¹ The phrase "Little Brothers" has become almost a term of art in the area of privacy law. When authors write about "Little Brothers" they refer to non-governmental entities snooping in areas that many would consider private. See, e.g., Wendy R. Leibowitz, *Personal Privacy and High Tech: Little Brothers Are Watching You*, NAT'L L.J., Apr. 7, 1997, at B16; Thomas L. Friedman, *Foreign Affairs; Little Brother*, N.Y. TIMES, Sept. 26, 1999, Sec. 4 at 17; Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1396 (2001) ("Commentators have adapted the Big Brother metaphor to describe the threat to privacy caused by private sector databases, often referring to private sector entities as 'Little Brothers.'"). Rather than claiming to have coined a novel metaphor for the analysis of privacy concerns, I am merely using the phrase "Little Brothers" in this well-established sense.

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³ See, e.g., *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) (explaining that the provisions of the Bill of Rights regulate official conduct, not private conduct).

⁴ See, e.g., *U.S. v. Koenig*, 856 F.2d 843, 849 (7th Cir. 1988) ("Although the DEA may have known of Federal Express's security search policy, it is clear that Federal Express acted for its own private, business purposes."). Throughout this essay I attempt to use the word "search" only in its constitutional sense. As I discuss more fully below, unless a government actor intrudes on the reasonable expectation of privacy of an individual, no search, in a constitutional sense, has occurred.

⁵ *U.S. v. Ramirez*, 810 F.2d 1338, 1342 (5th Cir. 1987) (holding that at least so long as "[t]he manager was neither compensated for nor instructed by the [government] to seize and search the personal property in the room" his search of the hotel room did not constitute state action).

⁶ *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971) (finding that the crucial inquiry is whether the person conducting the search, at the time in question, was acting at the direction or encouragement of law enforcement).

⁷ *Id.* at 487-90.

⁸ 389 U.S. 347 (1967).

⁹ *Id.* at 361 (Harlan, J., concurring).

¹⁰ *Id.* Prior to *Katz*, the Court applied a more textual interpretation of the Fourth Amendment, focusing on whether the area in question was one that the language of the Constitution seemed intended to protect. So, for example, in the 1928 case of *Olmstead v. United States*, 227 U.S. 438, 464 (1928), the Supreme Court held that no search occurred when police tapped the defendant's telephone, because the Fourth Amendment contemplated only physical searches of tangible things:

The [Fourth] Amendment itself shows that the search is to be of material things - the person, the house, his papers or his effects.

The description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or things to be seized. . . . [t]he amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.

¹¹ *Katz*, at 351.

¹² *Id.* at 361 (Harlan J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

¹³ 486 U.S. 35 (1988).

¹⁴ *Id.* at 40-41. ("Accordingly, having deposited their garbage 'in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it,' respondents could have had no reasonable expectation of privacy in the incupatory items that they discarded.") (quoting *United States v. Reichert*, 647 F.2d 397, 399 (3rd Cir., 1981)).

¹⁵ *Id.* at 41.

¹⁶ *Id.* at 40.

¹⁷ *Id.* ("Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so."). Furthermore, as we saw above, no search occurs when private actors conduct a search and turn over the contents to law enforcement.

¹⁸ 442 U.S. 735 (1979).

¹⁹ *Id.* at 743.

²⁰ *Id.*

²¹ 425 U.S. 435 (1976).

²² *Id.* at 443. Note that Colorado law is currently contrary to both *Smith* and *Miller*. See, e.g., *People v. Carr*, 682 P.2d 20, 27-28 (Colo.1984)(holding that the Colorado state constitution provides a reasonable expectation of privacy in the numbers dialed from a home telephone); *Charnes v. DiGiacomo*, 612 P.2d 1117, 1119-21 (1980)(finding that the Colorado state constitution provides a reasonable expectation of privacy in bank records).

²³ A similar line of reasoning applies to the use of hidden microphones by undercover government agents. Federal courts have consistently held that no search occurs when a government agent wears a wire in a conversation with an unaware suspect. The rationale for these cases is that an individual who chooses to share her secrets with others runs the risk that her confidences will be exploited. See, e.g., *United States v. White*, 401 U.S. 745, 752 (1971) ("[O]ne contemplating illegal activities must realize and risk that his companions may be reporting to the police. . . . Given the

possibility or probability that one of his colleagues is cooperating with the police, it is only speculation to assert that the defendant's utterances would be substantially different or his sense of security any less if he also thought it possible that the suspected colleague is wired for sound."); *Hoffa v. United States*, 385 U.S. 293, 302 (1966) ("Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.").

²⁴ 476 U.S. 207 (1986).

²⁵ *Id.* at 213-14.

²⁶ *Id.* at 213. Of course, the defendant was not merely asking law enforcement officials to avert their eyes. See *id.* at 212. He was asking them not to fly over his property looking down on it for evidence of crimes. See *id.* However, the Court has discarded the line between looking for evidence and stumbling across it. See, e.g., *Horton v. California*, 496 U.S. 128, 138 (1990) ("The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement.").

²⁷ 533 U.S. 27 (2001).

²⁸ See *id.* at 34 ("We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search - at least where (as here) the technology in question is not in general public use." (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961))).

²⁹ See Andrew Schulman, *The Extent of Systematic Monitoring of Employee E-mail and Internet Use*, Privacy Foundation Report ("Fourteen million employees - just over one-third of the online workforce in the United States - have their Internet or e-mail use under continuous surveillance at work."), available at <http://www.privacyfoundation.org/workplace/technology/extent.asp> (July 9, 2001).

³⁰ Editorial, *Technology's Threats to Privacy*, N.Y. TIMES, February 24, 2002, § 4, at 12. Similarly, TiVo, a maker of digital video recorders, has been accused of gathering information on the viewing habits of its subscribers, in apparent violation of its privacy policy. See David Martin, *TiVo's Data Collection and Privacy Practices*, Privacy Foundation: Privacy Watch Report, available at <http://www.privacyfoundation.org/privacywatch/report.asp?id=62&action=0> (posted March 26, 2001); see also Janet Kornblum, *Privacy Organization Hits Recorder Maker*, USA TODAY, February 8, 2002, available at <http://www.usatoday.com/life/cyber/tech/2001-03-26-ebrief.htm> (updated February 8, 2002).

³¹ See, e.g., <http://www.spysshops.com/index1.html> (listing each of these items) (last visited March 17, 2002).

³² There are many exceptions, of course. For example, the government's Carnivore system, which would allow the government to intercept and read virtually all e-mails sent in the country, has received widespread coverage and criticisms. Compare <http://www.fbi.gov/hq/lab/carnivore/carnivore2.htm> (describing the Carnivore system on the FBI website) (last visited March 17, 2002), with <http://www.epic.org/privacy/carnivore/default.html> (providing criticisms of the Carnivore program, known as "The Carnivore FOIA Litigation") (updated August 9, 2001).

³³ See, e.g., Professor Dorothy Glancy, *At the Intersection of Visible and Invisible Worlds: United States Privacy Law and the Internet*, 16 SANITA CLARA COMPUTER & HIGH TECH. L.J. 357, 377 (2000) ("The focus of primary concerns about government invasions of privacy, such as those associated with Watergate, seem to [be] shifting toward enhanced concern about invasions of privacy by the private sector, such as those associated with disclosures of credit card numbers from Internet sites."); Honorable Ben F. Overton & Katherine E. Giddings, *The Right of Privacy in Florida in the Age of Technology and the Twenty-First Century: A Need for Protection from Private and Commercial Intrusion*, 25 FLA. ST. U. L. REV. 25, 27 (1997) ("It is no longer simply intrusion by the government of which we should be wary; it is intrusion by various commercial entities looking to profit from the use of private information as well.").

Security vs. Privacy pg. 519 - Shaun B. Spencer

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** President George W. Bush, Address on Terrorism Before a Joint Meeting of Congress (Sept. 20, 2001), reprinted in *A Nation Challenged*, N.Y. TIMES, Sept. 21, 2001, at B4.

¹ For a more expansive examination of secondary uses, unintended consequences, and incremental encroachment on the expectation-driven conception of privacy, see Spencer, *supra* note *, §§ I.C. & I.I.C.

² See Spencer, *supra* note *, § I.I.C.1.

³ In 1946, the Board was replaced by the Social Security Administration. The Official Website of the Social Security Administration, *Brief History*, at <http://www.ssa.gov/history/history6.html>.

⁴ See SIMSON GARFINKEL, DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY 18 (2000).

⁵ See H.R. Rep. No. 106-996(I) (2000), 2000 WL 1604000, at *23 ("The SSN was created in 1935 for the sole purpose of tracking workers' earnings so that Social Security benefits could be calculated upon retirement or disability . . . Because a unique SSN is assigned to each individual, the number is commonly used as a personal identifier, although it was never intended for this purpose."); accord Charlotte Twilight, *Constitutional Counterrevolution*, IDEAS ON LIBERTY, Oct. 2000, at 20.

⁶ Executive Order 9397 (3 CFR (1943-1948 Comp.) 283-284), cited in The Official Website of the Social Security Administration, *Social Security Number Chronology*, at <http://www.ssa.gov/history/ssn/ssnchron.html>.

⁷ U.S. Department of Health & Human Services, National Committee on Vital Health Statistics, *Unique Health Identifier for Individuals: A White Paper* § III.A.1 (July 2, 1998), available at <http://www.epic.org/privacy/medical/hhs-id-798.html> (visited Apr. 28, 2001).

⁸ See Flavio L. Komuves, *We've Got Your Number: An Overview of Legislation and Decisions to Control the Use of Social Security Numbers as Personal Identifiers*, 16 J. MARSHALL J. COMPUTER & INFO. L. 529, 535 (1998).

⁹ The history of identification systems throughout the world provides evidence of 'function creep' - application to additional purposes not announced, or perhaps even intended, at the commencement of the scheme. Uses of the Social Security Number in the U.S.A., the Social Insurance Number in Canada, the Tax File Number in Australia, the SOFI number in The Netherlands, and the Austrian Social Security Number have been extended progressively to include taxation, unemployment support, pensioner benefits, and in some cases health and higher education.

Simon G. Davies, *Touching Big Brother: How biometric technology will fuse flesh and machine*, 7:4 INFO. TECH. & PEOPLE *6 (1994), available at <http://www.privacy.org/pi/reports/biometric.html>.

¹⁰ See Electronic Privacy Information Center, *EPIC Files FOIA Suit for Profiling Records*, 9:02 EPIC ALERT § 3 (Jan. 29, 2002), available at http://www.epic.org/alert/EPIC_Alert_9.02.html (the Electronic Privacy Information Center is investigating “news reports that ChoicePoint, a profiling company, routinely sells personal information to federal law enforcement agencies.”).

¹¹ See, e.g., Stephanie Stoughton, *Poll: Firms Relaxed Privacy Rules*, BOSTON GLOBE, Oct. 8, 2001, at C4 (fifty-nine percent of “airlines, hotel chains, travel agencies, rental car companies, and other travel-related firms” surveyed said they “relaxed” their own privacy policies to aid law enforcement officials in the wake of September 11).

¹² *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001).

¹³ 18 U.S.C. § 2703(c)(2) (1994), as amended by USA Patriot Act § 210 (Oct. 26, 2001). Government agencies can simply use an administrative subpoena, grand jury subpoena, or trial subpoena to demand information from an electronic communication service provider. See *id.* The information can include when and for how long the Internet user surfed the net, the user’s unique Internet Protocol address, and the credit card or bank account number with which the user pays for the Internet service. See *id.*

¹⁴ See generally Spencer, *supra* note *, § II.C.2.

¹⁵ See Declan McCullagh, *Xenu Do, But Not on Slashdot*, WIRED NEWS, Mar. 17, 2001, at <http://www.wired.com/news/print/0,1294,42486,00.html> (a General Accounting Office report explained that the GAO had successfully hacked into sensitive IRS databases in March 2001, and “demonstrated that unauthorized individuals, both internal and external to IRS, could have viewed and modified electronically filed taxpayer data on IRS computers.”).

¹⁶ See Mark E. Budnitz, *Privacy Protection for Consumer Transactions in Electronic Commerce: Why Self-Regulation is Inadequate*, 49 S.C. L. REV. 847, 854 (1998); Charles Piller, *Web Mishap: Kids’ Psychological Files Posted*, L.A. TIMES, Nov. 7, 2001, at A1-1, available at <http://pqasb.pqarchiver.com/latimes/>.

¹⁷ See Federal Trade Commission, *Eli Lilly Settles FTC Charges Concerning Security Breach* (Jan. 18, 2002), available at <http://www.ftc.gov/opa/2002/01/elililly.htm>; *In the Matter of Eli Lilly & Co.*, File No. 012-3214, FTC, Proposed Agreement Containing Consent Order, available at <http://www.ftc.gov/os/2002/01/lillyagree.pdf>.

¹⁸ Brian McWilliams, *Congressional Committee Web Site Exposed Internal Database*, NEWSBYTES, Mar. 6, 2002, at <http://www.newsbytes.com/cgi-bin/udt/im.display.printable?client.id=newsbytes&story.id=175010>.

¹⁹ See generally ABUSE OF POWER: THE NEW NIXON TAPES (Stanley I. Kutler ed., 1997); Editorial, *Politics and the IRS*, WALL ST. J., Jan. 9, 1997, at A12 (quoting Nixon in 1971 as saying he intended to select an IRS Commissioner who “is a ruthless son of a bitch, that he will do what he’s told, that every income tax return I want to see I see, that he will go after our enemies and not go after our friends.”); CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS (1991); Orr Kelley, *The Secret Files of J. Edgar Hoover*, U.S. NEWS & WORLD REP., Dec. 19, 1983, at 45.

²⁰ Privacy International, *Identity Cards: Frequently Asked Questions*, § 13 (Aug. 24, 1996), at http://www.privacy.org/pi/activities/idcard/idcard_faqs.html:

Some privacy advocates in the UK argue against ID cards on the basis of evidence from various security threat models in use throughout the private sector. In these models, it is generally assumed that at any one time, one per cent of staff will be willing to sell or trade confidential information for personal gain. In many European countries, up to one per cent of bank staff are dismissed each year, often because of theft.

²¹ Electronic Privacy Information Center, *Your Papers, Please: From the State Drivers License to a National Identification System*, at 7 n.23 (Feb. 2002), available at http://www.epic.org/privacy/id_cards/yourpapersplease.pdf (citing *Legislators Order DMV Audit*, ORANGE COUNTY REG., Feb. 27, 2001).

²² Brooke A. Masters, *Va. Notary Gets 33 Months for ID Fraud; Woman Exploited State Law to Help Thousands of Illegal Immigrants*, WASH. POST, Nov. 17, 2001, at B1.

²³ See *id.*

²⁴ *Id.*

²⁵ See United States General Accounting Office, *National Crime Information Center: Legislation Needed to Deter Misuse of Criminal Justice Information*, GAO/T-GGD-93-41 (1993) (statement of Laurie E. Ekstrand, Associate Director, Administration of Justice Issues, General Government Division).

²⁶ *Id.* at 2.

²⁷ *Id.* at 3.

²⁸ *Id.* at 16-17.

²⁹ See *id.* at 16.

³⁰ See *id.*

³¹ See United States General Accounting Office, *National Crime Information Center: Legislation Needed to Deter Misuse of Criminal Justice Information*, GAO/T-GGD-93-41, at 25, 29, 30 (1993) (statement of Laurie E. Ekstrand, Associate Director, Administration of Justice Issues, General Government Division).

³² For a complete discussion of the expectation-driven conception of privacy, see Spencer, *supra* note *, § I.

³³ See *id.*; see also *Kyllo v. United States*, 533 U.S. 27, at 33, 39 (2001) (law enforcement use of thermal imaging device to scan heat radiating from defendant’s home violated reasonable expectation of privacy because thermal imaging technology was not in general use); *Katz v. United States*, 389 U.S. 347, 361 (1967) (proof of warrantless search in violation of Fourth Amendment requires not only subjective expectation of privacy, but an expectation of privacy “that society is prepared to recognize as “reasonable”); RESTATEMENT (SECOND) OF TORTS: INVASION OF PRIVACY § 652B(1) (1977) (intrusion on seclusion not actionable unless intrusion “would be highly offensive to a reasonable person”); RESTATEMENT (SECOND) OF TORTS: INVASION OF PRIVACY § 652D(1)(A) & cmt. c (disclosure of private facts not actionable unless disclosure “would be highly offensive to a reasonable person,” with offensiveness judged “relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens”); Frederick Schauer, *The Social Construction of Privacy*, at 10 (Mar. 20, 2000) (unpublished manuscript, discussion draft, available at <http://www.lsg.harvard.edu/presspol/publications/pdfs/schauer1.PDF>) (actionable harm flowing from privacy torts is “a function of going beyond what most of the people in the society have come to expect, so if those expectations change, then so too does the conception of harm that is based upon them”).

³⁴ See Spencer, *supra* note *, § I.B.

³⁵ See Spencer, *supra* note *, § I.C.3.

³⁶ For a complete discussion of incremental encroachment, see Spencer, *supra* note *, §§ I.C.1 & I.C.2 (explaining how the imprecision embedded in societal expectations, as well as society's internalization of privacy intrusions, facilitates the incremental erosion of privacy).

³⁷ See, e.g., Alan M. Dershowitz, *Why Fear National ID Cards?*, N.Y. TIMES, Oct. 13, 2001, at A23 (advocating an optional national ID card with a digitally encoded fingerprint as an "effective tool for preventing terrorism"). Dershowitz suggested that Americans already have a minimal expectation of privacy in a variety of areas essential to our society: "American taxpayers, voters and drivers long ago gave up any right of anonymity without loss of our right to engage in lawful conduct within zones of privacy." *Id.*

³⁸ Dershowitz does note that we should set criteria for when officials could ask to see the card, and that the card should contain only limited information about the person that it identifies. See *id.* The problem, however, is that the best intentions at the outset will inevitably fall to the irresistible temptation to use the card for additional purposes and to include additional information.

³⁹ For example, the American Association of Motor Vehicle Administrators (AAMVA), which has proposed uniform standards for driver's licenses, "supports and encourages the access by [state motor vehicle administrators] to other databases, such as SSA, INS and Vital Statistics to confirm identity, residency, citizenship and address verification." Electronic Privacy Information Center, *Your Papers, Please: From the State Drivers License to a National Identification System*, at 8 n.28 (Feb. 2002) [hereinafter *Your Papers, Please*], available at http://www.epic.org/privacy/id_cards/yourpapersplease.pdf, quoting AAMVA Special Task Force on Identification Security Report to the AAMVA Board at 8 ("AAMVA Task Force Report").

⁴⁰ See Spencer, *supra* note *, Conclusion.

⁴¹ See *Your Papers, Please*, *supra* note 39, at 5-6.

⁴² *Id.* at 1.

⁴³ See *id.* at 5.

⁴⁴ See *id.* at 6; see also Jennifer Lee, *Welcome to the Database Lounge*, N.Y. TIMES, Mar. 21, 2002, at G1 (describing a Boston bar using a license scanning machine to build a database of information about its patrons).

⁴⁵ See American Association of Motor Vehicle Administrators, *Uniform Identification Practices Working Group* § G, available at <http://www.aamva.org/drivers/drvDL&CuniformIdentificationWG.asp> (stating that one task of the working group is to promote the use of AAMVA's "Uniform Identification Practices model program" to "various potential customers, such as: . . . Insurance companies; Banks; Travel Industry; Car rental agencies; Retailers; Others").

⁴⁶ See generally Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994) (discussing incommensurability and different kinds of valuation).

⁴⁷ See *id.* at 798-99.

⁴⁸ See Alan M. Dershowitz, *Why Fear National ID Cards?*, N.Y. TIMES, Oct. 13, 2001, at A23 (suggesting that we trade "a little less anonymity for a lot more security"); cf. Jane Black, *Don't Make Privacy the Next Victim of Terror*, BUSINESSWEEK ONLINE (Oct. 4, 2001), at http://www.businessweek.com/bwdaily/dnflash/oct2001/nf2001104_7412.htm (quoting Oracle CEO Larry Ellison in a television appearance on KPX in San Francisco, where he said, "The privacy you're concerned about is largely an illusion. All you have to give up is your illusions, not any of your privacy.").

⁴⁹ See, e.g., Joseph Kupfer, *Privacy, Autonomy, and Self-Concept*, 24 AM. PHIL. Q. 81, 82-85 (1987) (arguing that autonomy depends upon the "concept of oneself as a purposeful, self-determining, responsible agent," which concept in turn depends upon privacy to facilitate self-determination, self-examination, and the perception of the self as worthy of acting autonomously); Hyman Gross, *Privacy and Autonomy*, in PRIVACY: NOMOS XIII 169, at 181 (J. Roland Pennock & John W. Chapman eds., 1971) (criticizing *Griswold v. Connecticut* for using the term "privacy" to obscure the individual's right to autonomous determination, and arguing that intrusions on privacy offend autonomy).

⁵⁰ See Richard Sobel, *The Degradation of Political Identity Under a National Identification System*, 8 B.U. J. SCI. & TECH. L. 37, 40 (2002).

⁵¹ See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

⁵² See, e.g., Ronald F. Wright, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127 (1984). Wright argues that courts trying to balance privacy against law enforcement needs may underestimate privacy, in part because "a privacy claim is highly subjective . . . A judge cannot actually know how different persons in different contexts perceive an invasion of privacy, yet it is something that he or she must know in order to arrive at an 'objective' value for privacy. Hence, every effort to place an objective value on privacy interests risks error." *Id.* at 1142-43 (footnotes omitted).

⁵³ Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1398 (2000) (arguing that a "privacy-as-choice" model in the marketplace rests on the flawed assumption that "data privacy can be valued using market measures").

⁵⁴ See *id.*

⁵⁵ See generally Wright, *supra* note 52, at 1142-44 (arguing that balancing privacy against law enforcement in the Fourth Amendment context consistently undervalues privacy interests).

⁵⁶ Michael Clarke, *Blunkett Defiant Over Crackdown on the Enemy Within*, DAILY MAIL (London), Nov. 13, 2001, at 19.

⁵⁷ *National ID Cards: Life, Liberty and the Pursuit of Terrorists*, Before the United States House of Representatives, Subcomm. on Gov't Efficiency, Fin. Mgmt., Comm. on Gov't Reform, Federal Document Clearing House, 107th Cong., 2001 WL 1468660 (2001) (statement of Larry Ellison, Founder, CEO Oracle Corp.).

⁵⁸ David Streitfeld & Charles Piller, *Big Brother Finds Ally in Once-Wary High Tech*, L.A. TIMES, Jan. 19, 2002, at A1.

⁵⁹ Clarke, *supra* note 56.

⁶⁰ See Ellison's statement, *supra* note 57; Streitfeld & Piller, *supra* note 58.

⁶¹ Cf. Ronald F. Wright, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127, 1143-44 (1984) (arguing that, because of the exclusionary rule, Fourth Amendment challenges generally arrive in the highly unfavorable context of a defendant who appears quite guilty).

⁶² See Mac Daniel, *Loose Plug Disrupts Logan - Again*, BOSTON GLOBE, Mar. 21, 2002, at B4. On ten occasions between November 2001 and March 21, 2002, the discovery of unplugged metal detectors required the evacuation of major American commercial airports. See *id.* After a National Guard member noticed the unplugged metal detector in Boston's Logan Airport, a security staffer tried to plug it back in without notifying authorities. See *id.* The National Guard member, however, "reported the incident, and the terminal was evacuated." *Id.*

⁶³ See Mac Daniel, *Lapses at Logan Fail to Catch Ticket Mix-Up; Wrong Identification Doesn't Prevent Man From Boarding Plane*, BOSTON GLOBE,

Mar. 19, 2002, at B1. After Delta Airlines ticket agents issued the same ticket to two passengers with similar names, the passenger whose name did not match the ticket passed through two security checkpoints where guards compared his license to the name on the ticket. When a Delta scanning machine at the gate rejected his boarding pass, a Delta flight attendant commented to a colleague, "This guy's already on the plane." *Id.* Nevertheless, they let the passenger board. *See id.* The mix-up finally surfaced when the second passenger found someone already sitting in his seat, and a flight attendant discovered that two tickets had been issued in the same passenger's name. *See id.*

⁶⁴ *See* Malcolm Gladwell, *Safety in the Skies: How Far Can Airline Security Go?*, THE NEW YORKER, Oct. 1, 2001, at 50, 52-53. Gladwell explains that as the "signal rate" declines, so does detection accuracy. *Id.* at 53. "In the wake of the September attacks, some commentators called for increased training for X-ray security operators. Yet the problem is not just a lack of expertise; it is the paucity of signals." *Id.*

⁶⁵ *See* Jeffrey Rosen, *A Watchful State*, N.Y. TIMES MAGAZINE, Oct. 7, 2001, at 38.

⁶⁶ *See id.* at 41.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *See id.* at 42.

⁷² *Id.*

⁷³ *See id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *See id.*

⁷⁷ *See* Julia Scherres, *ID Cards Are de Rigueur Worldwide*, WIRED NEWS, Sept. 25, 2001, at <http://www.wired.com/news/print/0,1294,47073,00.html>.

⁷⁸ Mike France et al., *Privacy in an Age of Terror*, BUSINESSWEEK ONLINE, Nov. 5, 2001, at http://www.businessweek.com/print/magazine/content/01_45/b3756001.htm?mainwindow.

⁷⁹ *See* Brooke A. Masters, *Va. Notary Gets 33 Months for ID Fraud; Woman Exploited State Law to Help Thousands of Illegal Immigrants*, WASH. POST, Nov. 17, 2001, at B1.

⁸⁰ *See* Dan Eggen & Mary Beth Sheridan, *Terrorist Pilots' Student Visas Arrive; Officials Blame 'Antiquated' System for Delay of Paperwork*, WASH. POST, Mar. 13, 2002, at A1. The INS actually approved the visas before the September 11 attacks, but did not issue notice of approval until March 2002. *See id.*

⁸¹ *See* Mac Daniel, *Lapses at Logan Fail to Catch Ticket Mix-Up; Wrong Identification Doesn't Prevent Man From Boarding Plane*, BOSTON GLOBE, Mar. 19, 2002, at B1.

⁸² Pew Research Center for the People & the Press, *American Psyche Reeling from Terror Attacks*, Sept. 19, 2001, available at <http://people-press.org/reports/print.php3?ReportID=3>.

⁸³ USA Today/CNN/Gallup Poll Results, Sept. 16, 2001, available at <http://www.usatoday.com/news/nation/2001/09/16/terrorism-poll2.htm> (citing Question 23).

⁸⁴ Jane Black, *Don't Make Privacy the Next Victim of Terror*, BUSINESSWEEK ONLINE (Oct. 4, 2001), at http://www.businessweek.com/print/bwdaily/dnflash/oct2001/nf20011104_7412.htm (quoting Oracle CEO Larry Ellison in a television appearance on KPIX in San Francisco, where he said, "The privacy you're concerned about is largely an illusion. All you have to give up is your illusions, not any of your privacy.").

⁸⁵ Lecture from Simson Garfinkel to Prof. Nolan Bowie's Fall 2000 Harvard University, JFK School of Government class on *Information, Media Regulation, and Public Policy* (unpublished notes, on file with author). For a similar sentiment, see Stephen Keating, *The Exxon Valdez of Privacy*, PRIVACY FOUND. (Feb. 27, 2002), at <http://www.privacyfoundation.org/commentary/tipsheet.asp> (arguing that privacy advocates need "a made-for-TV disaster, cast with distraught victims, dissembling corporate mouthpieces, a chorus of outraged elected officials and a media horde to amplify it all").

⁸⁶ Jennifer Lee, *Welcome to the Database Lounge*, N.Y. TIMES, Mar. 21, 2002, at G1.

⁸⁷ *See* SIMSON GARFINKEL, DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY 72 (2000).

⁸⁸ *See* JANNA MALAMUD SMITH, PRIVATE MATTERS: IN DEFENSE OF THE PERSONAL LIFE 27-32 (1997).

⁸⁹ *Id.* at 29.

⁹⁰ *Id.* at 30 (quoting NADEZHDA MANDELSTAM, HOPE AGAINST HOPE: A MEMOIR 89 (1970)).

⁹¹ *See* Smith, *supra* note 88, at 32 ("Terrorists of all sorts destroy privacy both by corrupting it into secrecy and by using hostile surveillance to undo its useful sanctuary.").

⁹² *See id.* at 31.

⁹³ *See id.*

⁹⁴ *Id.*

⁹⁵ *See* CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS 388 (1991).

⁹⁶ *Id.*

⁹⁷ *See* William Safire, *The Great Unwatched*, N.Y. TIMES, Feb. 18, 2002, at A15; Spencer S. Hsu, *D.C. Forms Network of Surveillance; Police System of Hundreds of Video Links Raises Issues of Rights, Privacy*, WASH. POST, Feb. 17, 2002, at C1.

⁹⁸ Safire, *supra* note 97.

⁹⁹ *See id.*

¹⁰⁰ *See id.*

¹⁰¹ *See id.*

¹⁰² *See id.*

¹⁰³ Spencer S. Hsu, *D.C. Forms Network of Surveillance; Police System of Hundreds of Video Links Raises Issues of Rights, Privacy*, WASH. POST, Feb. 17, 2002, at C1.

¹⁰⁴ Jeffrey Rosen, *A Watchful State*, N.Y. TIMES MAGAZINE, Oct. 7, 2001, at 38.

¹⁰⁵ *Id.* (emphasis added).

¹⁰⁶ Safire, *supra* note 97.

¹⁰⁷ Hsu, *supra* note 103.

¹⁰⁸ The goal of the new generation of face-recognition systems is to limit the number of false-positive matches to a tiny fraction, no more than one per 1,000 passengers screened . . . [and] to get the number of "correct positives" — fugitives who actually are caught by face-recognition technology — up in the range of 80 percent.

Jeffrey Leib, *Airport Eyeing Face-ID System; Test Program Would Screen DIA Workers*, DENVER POST, Dec. 3, 2001, at A1. "Biometric experts . . . say the [facial recognition] technology is easily foiled if the subject looks down or coughs while passing the camera, or has dark skin tone, wears a hat, or simply gets a fresh haircut or a shave." Dana Hawkins et al., *Tech vs. Terrorists*, U.S. NEWS & WORLD REP., Oct. 8, 2001, at 56.

¹⁰⁹ See Lowell Bergman & Don Van Natta, Jr., *Agents Pursue German Leads on Terror Trail*, N.Y. TIMES, Sept. 25, 2001, at A1.

¹¹⁰ President George W. Bush, Address on Terrorism Before a Joint Meeting of Congress (Sept. 20, 2001), reprinted in *A Nation Challenged*, N.Y. TIMES, Sept. 21, 2001, at B4.

Judging a Book pg. 522 - Joyce Meskis

¹ For an explanation of some of the legal concepts and the outcome of the Colorado Supreme Court case, see the following case summary. *Tattered Cover v. Thornton: The Right to Buy Books Anonymously*, by Corey Ann Finn.

² See *In re Grand Jury Subpeona to Kramerbooks & Afterwards*, 26 Media L. Rep. (BNA) 1599 (D.D.C. 1998) (concerning independent counsel Kenneth Starr's effort to obtain records of books purchased by former White House intern Monica Lewinsky).

³ *In re Grand Jury Subpeona to Kramerbooks & Afterwards, Inc.*, 26 Media L. Rep. (BNA) at 1601 (D.D.C. 1998).

⁴ Judith Krug, Executive Director of the Freedom to Read Foundation of the American Library Association.

⁵ *Tattered Cover v. Thornton* (Case No. 00 CV 1761) at 2 (October 28, 2000) (citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

⁶ *Id.* at 2-3 (quoting *United States v. Rumely*, 345 41, 57-58 (1953) (Douglas, J., concurring)).

Tattered Cover v. Thornton pg. 525 - Corey Ann Finn

¹ 44 P3d 1044 (Colo. 2002).

² *Tattered Cover*, 44 P.3d at 1048.

³ *Id.*

⁴ *Id.* at 1049.

⁵ *Id.* at 1051.

⁶ *Id.* at 1059.

⁷ *Id.* at 1061.

Privacy and Firms pg. 526 - Bruce Kobayashi & Larry Ribstein

¹ See, e.g., Richard A. Posner, *Privacy*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW, P. Newman, ed. 103 (1998); George J. Stigler, *An Introduction to Privacy in Economics and Politics*, 9 J. LEGAL STUD. 623 (1980); Jack Hirshleifer, *Privacy, Its Origin, Function, and Future*, 9 J. LEGAL STUD. 649 (1980); Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L. J. 2381 (1996).

² See Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 339-353 (1981) (discussing *Snepp v. U.S.*, 444 U.S. 507 (1980)).

³ See *infra* Section I.

⁴ See Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 9 J. LEGAL STUD. 683, 685 (1980).

⁵ R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

⁶ See Oliver E. Williamson, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1985); Armen A. Alchian & Susan Woodward, *Reflections on the Theory of the Firm*, 143 JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS 110, 111 (1987).

⁷ See Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972).

⁸ See Benjamin Klein, et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. L. & ECON. 297 (1978); Williamson, *supra* note 6, at 47-49.

⁹ See, e.g., Kitch, *supra* note 4, at 690 (discussing difficulties detecting theft of information).

¹⁰ Alchian and Woodward, *supra* note 6, at 115-17.

¹¹ For discussions of limitations on intra-firm information transfer in the absence of effective means to prevent inter-firm information transfers, see Robert M. Sherwood, INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES AND JUDICIAL SYSTEMS AND ECONOMIC DEVELOPMENT, Chapter 5, (Westview Press 1980), available at <http://www.kreative.net/ipbenefits/iped> (last visited February 28, 2002); David D. Friedman, et al., *Some Economics of Trade Secret Law*, 5 J. ECON. PERSP. 61, 67 (1991) available at http://davidfriedman.com/Academic/Trade/_Secrets/Trade_Secrets.html (last visited February 28, 2002).

¹² One example would be the misappropriation of a firm's information to engage in stock trading. See Easterbrook, *supra* note 2, at 314-39; Larry E. Ribstein, *Federalism and Insider Trading*, 6 SUP. CT. ECON. REV. 123 (1998).

¹³ See Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85 (1992) (discussing misappropriation of hot news in *INS v. AP*, 248 U.S. 215 (1918)); see also Kitch, *supra* note 4, at 684-85 (discussing transfer of business information though mobility of employees); Sherwood, *supra* note 11 (discussing "predatory hiring" and unrestricted employee mobility as primary ways in which valuable business information is transferred to third parties in developing countries); *infra* Section II.

¹⁴ See generally Alchian & Demsetz, *supra* note 7.

¹⁵ This assumes that the seller of information is unable to use speculative mechanisms to appropriate a normal return from the disclosure of his information. See Jack Hirshleifer, *The Private and Social Value of Information and the Reward to Inventive Activity*, 61 AM. ECON. REV. 561 (1971).

¹⁶ See George A. Akerlof, *The Market for 'Lemons': Qualitative Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970).

¹⁷ See, e.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); see also Bruce H. Kobayashi & Larry E. Ribstein, *Uniformity, Choice of Law, and Software Sales*, 8 GEO. MASON L. REV. 261 (1999).

¹⁸ See generally Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994) (discussing effects of

corporate criminal liability on a corporation's incentive to engage detection and monitoring of their agents); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996) (discussing and criticizing the recent increase in application of vicarious corporate criminal liability for the wrongdoings of their employees); Bruce H. Kobayashi, *Antitrust, Agency and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, GEO. WASH. L. REV. (forthcoming 2002) (discussing antitrust leniency policy for corporate monitoring and self detection); Jeffrey S. Parker, *Rules Without . . . Some Critical Reflections on the Federal Corporate Sentencing Guidelines*, 71 WASH. U. L.Q. 397, 404-10 (1993) (discussing corporate criminal liability and the U.S. Sentencing Guidelines).

¹⁹ See Epstein, *supra* note 13 (discussing relative advantages of bottom-up and top down approaches to lawmaking); see also Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131 (1996) (discussing benefits of a decentralized state law approach); Kobayashi and Ribstein, *supra* note 17; Larry E. Ribstein & Bruce H. Kobayashi, *State Regulation of Electronic Commerce*, EMORY L.J. (forthcoming 2002) (hereinafter *State Regulation*).

²⁰ See *infra* text accompanying note 45 and note 60.

²¹ *Id.* Note that the law of the state of incorporation, which firms can freely choose, provides the basic fiduciary duty rules governing managers. We see no reason why incentive and compensation arrangements should be treated differently for corporate employees than for corporate managers.

²² See Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999). That is, the scope of protection given to confidential business information is limited by the same use/creation tradeoff that is present during the productions of patentable inventions and copyrightable works. See generally, Easterbrook, *supra* note 2 (discussing general applicability of use/creation tradeoff to a broad set of legal cases); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989) (discussing limitations on the scope of copyright law); Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93 (1981) (finding that enforcement is consistent with the efficiency of balancing the costs and benefits of these restrictions).

²³ See Sherwood, *supra* note 11 (noting exit of human capital and suppression of information production from countries in which valuable business information is not effectively protected); see also Easterbrook, *supra* note 2 (discussing *ex ante* effects of enforcing restrictive employment contracts); Kitch, *supra* note 4, at 699-700 (same).

²⁴ See, e.g., Gilson, *supra* note 22; Kitch, *supra* note 4, at 690-91. But see Friedman, et al., *supra* note 11 (discussing trade secret law as generally consistent with economic efficiency).

²⁵ Insider trading, of course, is a separate problem. See *supra* note 12.

²⁶ See Eric A. Posner & George G. Triantis, *Covenants Not to Compete from an Incomplete Contracts Perspective*, available at http://papers.ssrn.com/paper.taf?abstract_id=285805 (September 2001).

²⁷ See Rubin & Shedd, *supra* note 22; Kitch, *supra* note 4.

²⁸ See Kitch, *supra* note 4, at 685.

²⁹ California Business and Professions Code, §16600.

³⁰ See Posner & Triantis, *supra* note 26.

³¹ See Gilson, *supra* note 22, at 577-79.

³² See Kitch, *supra* note 4, at 685-88.

³³ See Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383, 454-56 (1993).

³⁴ See Epstein, *supra* note 13, at 106 (suggesting that creation of quasi-property right to hot-news allowed the Associated Press to enforce existing customs that evolved between competing news gathering organizations).

³⁵ See Gilson, *supra* note 22, at 627-28.

³⁶ RESTATEMENT (SECOND) OF CONFLICTS § 188 (1971).

³⁷ *Id.* § 6.

³⁸ This result is particularly likely under a "comparative impairment" approach to choice of law, which looks to which state's interests would be most impaired by not enforcing the state's law. See William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 17-18 (1963); Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1172-74 (2000).

³⁹ RESTATEMENT (SECOND) OF CONFLICTS § 187(2) (1971).

⁴⁰ This controls under U.C.C. §§ 1-105 (2000). See *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677 (Tex. 1990) (describing this as a "party autonomy" approach).

⁴¹ See *Overholt Crop Ins. Serv. Co. v. Travis*, 941 F.2d 1361 (8th Cir. 1991) (upholding a choice of law stipulation contained in a non-competition agreement).

⁴² See, e.g., *Int'l. Bus. Machines Corp. v. Bajorek*, 191 F.3d 1033 (9th Cir. 1999) (denying application of California anti-non-compete statute to denial of stock options and holding that chosen New York law trumps California law).

⁴³ 61 Cal. App. 4th 881 (Cal. Ct. App. 1998).

⁴⁴ RESTATEMENT (SECOND) OF CONFLICTS § 6 (1971).

⁴⁵ *Hunter*, 61 Cal. App. 4th at 901.

⁴⁶ It has been said that applying the law of the employer's state provides necessary predictability. See *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 680 (Tex. 1990) (noting the problems companies may face if forced to abide by various state laws concerning employment contracts). To be sure, that may be a second-best solution if courts refuse to enforce contractual choice of law. But enforcing contractual choice gets the same result across employees without sacrificing the other advantages of contractual choice.

⁴⁷ To be sure, the parties may choose the law of a regulating state in order to obtain some of that state's other advantages if they are required to pick a single law for the entire contract rather than being permitted to choose the law specifically governing the restrictive covenant. For example, the parties might choose a state that is generally expert in employment matters even if the state does not enforce all non-competes. However, enforceability of a restrictive covenant may dominate the parties' choice of the applicable law.

⁴⁸ See O'Hara & Ribstein, *supra* note 38 at 1191.

⁴⁹ See *supra* text accompanying note 43. Note, however, that the predictability problem presented in the *Hunter* case was mitigated to some extent by the fact that the party relying on the choice-of-law clause was specifically aware of the possibility of recruitment by California employers and of the possible application of California law, and had structured its employment practices to minimize the possibility of being subject to the California law. See *infra* text following note 58.

⁵⁰ See generally Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371 (1983) (outlining an

economic approach to political behavior, choices and influence).

⁵¹ See O'Hara & Ribstein, *supra* note 38 at 1153.

⁵² See *Hulcher Serv., Inc. v. R.J. Corman R.R. Co.*, 543 S.E.2d 461, 465 (Ga. Ct. App. 2001) (noting that "[g]enerally, Georgia will follow a forum selection clause in an employment contract" but noting that the present case involved a law-selection clause); see also Ribstein & Kobayashi, *State Regulation*, *supra* note 19.

⁵³ See 9 U.S.C. § 2. For cases applying the FAA to claims arising under mandatory federal laws, see *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), *on remand*, 279 F.3d 889 (9th Cir. 2002) (holding arbitration clause unconscionable under California state law); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (subjecting a claim under the ADEA to compulsory arbitration pursuant to an arbitration agreement in a securities registration application); *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477 (1989) (holding a pre-dispute agreement to arbitrate claims under the Securities Act of 1933 as enforceable).

⁵⁴ See *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941).

⁵⁵ See Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 284-86 (1993) (applying an 'interest group' hypothesis to account for differences in results of state and federal court litigation concerning choice of law provisions).

⁵⁶ *Id.* at 285.

⁵⁷ See *id.* The count was 151 of 216 cases in the Restatement survey and 473 of 663 in the larger survey. The survey of restrictive covenant cases involving contractual choice of law showed that federal courts were slightly more likely to enforce than state courts - about 30% of federal decisions held the clauses unenforceable as compared with about 37% of state decisions. The larger number of federal cases might also reflect party preference for the quality of adjudication in federal court, together with the accessibility of federal court due to the size of the dispute and its multi-state character. See *id.* at 285 n.212.

⁵⁸ See *Hunter*, 61 Cal. App. 4th at 881.

⁵⁹ *Id.* at 77.

⁶⁰ *Id.* at 90 n.22.

⁶¹ See Michael Whincop & Mary Keyes, *The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments*, 23 MELB. U. L. REV. 416 (1999) (analyzing conflicts of law questions using game theory).

⁶² See *supra* text accompanying note 44.

⁶³ *Hunter*, 61 Cal. App. 4th at 905.

⁶⁴ See generally Richard A. Posner, *OVERCOMING LAW* 531-551, Harvard Univ. Press (1995); Stigler, *supra* note 1, at 628-29.

⁶⁵ See Jeffrey Rosen, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 123-24, 207 (2000).

⁶⁶ See *id.* at 46-48, 200-01.

⁶⁷ See Murphy, *supra* note 1, at 2397 (discussing avoidance of such costs as a "dynamic benefit" from protecting privacy).

⁶⁸ See *id.* at 2386.

⁶⁹ See Spencer R. Wood, *The Legal Risks of Monitoring Employee Conduct*, 89 ILL. B.J. 134 (2001) (collecting cases for proposition that business purpose justifies employer surveillance).

⁷⁰ See Murphy, *supra* note 1, at 2410-11 (discussing the general importance of setting the optimal default rule); see also Ribstein & Kobayashi, *State Regulation*, *supra* note 19.

⁷¹ See Murphy, *supra* note 1, at 2414.

⁷² See Wood, *supra* note 69, at 135.

⁷³ 255 F. 3d 683 (2001), *cert. denied*, 122 S.Ct. 806 (2002).

⁷⁴ *Cramer v. Consolidated Freightways, Inc.*, 209 F. 3d 1122, 1135-36 (9th Cir. 2000) (Fisher, J., dissenting), *rev'd en banc*, 255 F. 3d 683 (9th Cir. 2001).

⁷⁵ 255 F. 3d at 698-704 (O'Scannlain, dissenting).

Privacy and Public Policy pg. 532 - Richard D. Lamm

¹ See generally WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* 36-45 (1975).

² *Id.* at 37.

³ Leviticus 19:17 (King James) ("Thou shalt not hate thy brother in thine heart: thou shalt in any wise rebuke thy neighbour, and not suffer sin upon him.").

⁴ See NELSON, *supra* note 1, at 36-38.

⁵ See ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 4 (1988).

⁶ See *id.*

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- 182 David Orenstein, *Raising the Bar*, BUSINESS 2.0 (Aug. 2000), *available at* <http://www.business2.com/articles/mag/0,1640,1397513,FF.html>.
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- 184 John Goss, *Marketing the New Marketing: The Strategic Discourse of Geodemographic Information Systems*, in GROUND TRUTH: THE SOCIAL IMPLICATIONS OF GEOGRAPHIC INFORMATION SYSTEMS 130, 163 (John Pickles, ed., 1995).
- 185 See CASPIAN's Media Mentions page for a more complete listing, *available at* <http://www.nocards.org/press/mediamentions.shtml>.
- 186 See Welcome to CASPIAN, *available at* <http://www.nocards.org/welcome/index.shtml> (explaining CASPIAN's purpose and philosophy).
- 187 See, e.g., CLAIRE WOLFE & AARON ZELMAN, THE STATE VS. THE PEOPLE: THE RISE OF THE AMERICAN POLICE STATE 77-80 (2001).
- 188 See, e.g., *What Savings? CASPIAN Shoppers Discuss Kroger "Card Savings," available at* www.nocards.org/savings/savingsletterskroger.shtml (explaining that shoppers frequently send CASPIAN a large volume of copies of letters and emails they have written to grocery chains, along with the replies they receive).
- 189 *Id.*
- 190 See Katherine Albrecht, *Food for Thought, 10 Reasons Not to Use a Fake Card*, *available at* <http://www.nocards.org/essays/nofakes.shtml> (explaining why using a fake card is not a good long-term solution to the shopper card program).
- 191 See, e.g., Julia Lane, *Attitudes of Respondents Toward Data Confidentiality*, presented at the Work Session on Statistical Data Confidentiality, Statistical Commission and Economic Commission for Europe, Conference of European Statisticians, Mar. 14-16, 2001, *available at* <http://www.unecce.org/stats/documents/2001/03/confidentiality/crp.3.e.pdf> (explaining Prof. Julia Lane's findings).
- 192 Frank Franzak et al., *Online Relationships and the Consumer's Right to Privacy*, 18 J. OF CONSUMER MARKETING 631, 640 (2001).
- 193 Frederick Douglass, West India Emancipation (Aug. 4, 1857) & Dred Scott (May 1857), in TWO SPEECHES BY FREDERICK DOUGLASS, at 22, *available at* <http://memory.loc.gov/ammem/doughtml/dougFolder3.html>.
- 194 Albertsons press release, *Albertson's, Inc. Announces a Better way to Save*, *available at* http://www1.albertsons.com/corporate/default_news.asp?Action=Continue&ContentId=1070.
- 195 *Winn-Dixie to Reward Loyal Customers*, NEWSTREAM.COM (March 2002), *available at* http://www.newstream.com/us/story_pub.shtml?story_id=5277&user_ip=208.3.160.71.
- 196 See Avallone, *supra* note 13.
- 197 *Id.*
- 198 *Id.*
- 199 See <http://www.nocards.org/protest/IrvingAlbertsons/> (displaying photographs of the protest).
- 200 Maria Halkias, *Wal-Mart Gains in Dallas Fort-Worth Grocery Market*, DALLAS MORN. NEWS, Feb. 26, 2002, at 1D.
- 201 David Pringle, *Retailers Scrap High-Tech Ideas for Marketing—Safeway of Britain Finds Loyalty-Card Generated Useless Data*, WALL ST. J., June 19, 2000, at A9C.
- 202 Raley's Inc., HOOVER'S ONLINE, *available at* <http://www.hoovers.com/co/capsule/6/0,2163,40386,00.html> (profiling Raley's Inc.).
- 203 Wild Oats Markets, Inc., HOOVER'S ONLINE, *available at* <http://www.hoovers.com/co/capsule/7/0,2163,41717,00.html> (profiling Wild Oats Markets, Inc.).
- 204 ANDREW SETH & GEOFFREY RANDALL, THE GROCERS: THE RISE AND RISE OF THE SUPERMARKET CHAINS 193 (2d ed. 2001).
- 205 Esther Addley, *Card Tricks*, GUARDIAN UNLIMITED (May 11, 2000), *available at* <http://www.guardian.co.uk/Archive/Article/0,4273,4016830,00.html>.
- 206 *Safeway Sales Rise*, BBC NEWS (July 11, 2000), *available at* http://news.bbc.co.uk/hi/english/business/newsid_829000/829080.stm.
- 207 Addley, *supra* note 205.
- 208 C.S. LEWIS, MERE CHRISTIANITY 36 (1st paperback prtg. 1960).
- 209 Lane, *supra* note 191.
- 210 *Id.* at 2.
- 211 See, e.g., Brian Krebs, *Congress Reopens Debate On National ID Card*, NEWSBYTES (Nov. 16, 2001), *available at* <http://www.newsbytes.com/news/01/172252.html>.
- 212 *Id.*
- 213 See, e.g., Lisa Greene, *Face Scans Match Few Suspects*, ST. PETERSBURG TIMES (Feb. 16, 2001), *available at* http://www.sptimes.com/News/021601/TampaBay/Face_scans_match_few_.shtml.
- 214 See, e.g., R.J. RUMMEL, DEATH BY GOVERNMENT (New Jersey: Transaction Publishers, 1994).
- 215 Figures represent billions of dollars and have been rounded to the nearest billion. Sales figures are from the Food Marketing Institute. Current figures *available online at* http://www.fmi.org/facts_figs/faq/top_retailers.htm.

Right to Privacy of Medical Records pg. 540 - Joel Glover & Erin Toll

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²Ferguson v. City of Charleston, 532 U.S. 67, 78 (2001).

- ³ 5 U.S.C. § 552a (2000). Another federal law, the Gramm-Leach-Bliley Act, Pub. L. No. 106-102 (GLBA), signed by President Clinton on Nov. 12, 1999, also addresses privacy issues. While the GLBA's prohibitions apply to medical records, its main focus is on regulating the disclosure of non-public financial information by "financial institutions" defined in GLBA (i.e., the banking, insurance and securities industries). Accordingly, an analysis of the GLBA is outside the scope of this article.
- ⁴ *Whalen v. Roe*, 429 U.S. 589 (1977).
- ⁵ *Id.*
- ⁶ *Id.* at 601-06.
- ⁷ *Id.* at 591.
- ⁸ *Id.* at 603-04.
- ⁹ *Id.* at 599-600.
- ¹⁰ *Id.* at 601.
- ¹¹ *Id.* at 602.
- ¹² *Id.*
- ¹³ *Id.* at 605.
- ¹⁴ *Id.*
- ¹⁵ *E.I. du Pont de Nemours & Co. v. Finklea*, 442 F. Supp. 821, 824 (S.D.W.V. 1977).
- ¹⁶ *Id.* The court assumed "without deciding, that du Pont, in its status as an employer, has standing to raise the 'right of privacy' issue." *Id.*
- ¹⁷ *Id.* at 824-25.
- ¹⁸ *Id.*
- ¹⁹ *Id.* at 825-26.
- ²⁰ 451 F. Supp. 1355 (D.N.J. 1978).
- ²¹ *Id.* at 1381.
- ²² *Id.*
- ²³ *Id.*
- ²⁴ *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (citation omitted).
- ²⁵ *Id.* at 577.
- ²⁶ *Id.*
- ²⁷ *Id.* at 577. Medical records have been held to constitute "records" subject to the protections under the Privacy Act (5 U.S.C. § 552a (2000)) where they discussed medical history, clinical observations and suggested therapies. *Williams v. Dep't of Veterans Affairs*, 104 F.3d 670 (4th Cir. 1997).
- ²⁸ *In re Search Warrant*, 810 F.2d 67, 71-72 (3d Cir. 1987).
- ²⁹ *Doe v. S.E. Pa. Transp. Auth.*, 72 F.3d 1133, 1138 (3d Cir. 1995).
- ³⁰ *Id.*
- ³¹ *Jarvis v. Wellman*, 52 F. 3d 125, 126 (6th Cir. 1995).
- ³² 186 F.3d 469 (4th Cir. 1999).
- ³³ *Ferguson*, 186 F.3d at 482.
- ³⁴ *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001). To support this proposition, the Court cited to the "Brief for American Medical Association et al. as *Amici Curiae* 11; Brief for American Public Health Association et al. as *Amici Curiae* 6, 17-19." *Id.*
- ³⁵ *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).
- ³⁶ *Whalen*, 429 U.S. at 599-600.
- ³⁷ 854 F.2d 1379 (D.C. Cir. 1988).
- ³⁸ *Bowen*, 854 F.2d at 1389.
- ³⁹ *Id.* at 1383.
- ⁴⁰ *Id.*
- ⁴¹ *Id.* at 1389.
- ⁴² *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980).
- ⁴³ *Westinghouse*, 638 F.2d at 578.
- ⁴⁴ *Id.* at 578-80.
- ⁴⁵ *Id.* at 579.
- ⁴⁶ *Id.* at 580.
- ⁴⁷ *Id.* at 581.
- ⁴⁸ 810 F.2d 67 (3d Cir. 1987).
- ⁴⁹ *In re Search Warrant*, 810 F.2d at 72-73.
- ⁵⁰ 812 F.2d 105 (3d Cir. 1987).
- ⁵¹ *Fraternal Order of Police*, 812 F.2d at 114.
- ⁵² *Id.*
- ⁵³ *Doe v. Southeastern Pennsylvania Transp. Auth.*, 72 F.3d 1133, 1138 (3d Cir. 1995).
- ⁵⁴ *SEPTA*, 72 F.3d at 1138-39.
- ⁵⁵ *Id.* at 1143.
- ⁵⁶ *Id.* at 1138.
- ⁵⁷ *Id.* at 1140-1141.
- ⁵⁸ *Shoemaker v. Handel*, 608 F. Supp. 1151, 1159 (D.N.J. 1985).
- ⁵⁹ *Shoemaker*, 608 F. Supp. at 1160.
- ⁶⁰ *Id.*
- ⁶¹ *Id.* at 1161.
- ⁶² 85 F. Supp. 2d 545 (D. Md. 1999).
- ⁶³ *Board of Physician Quality Assurance*, 85 F. Supp. 2d at 548.

- ⁶⁴ *Id.* at 546.
- ⁶⁵ *Id.* at 548.
- ⁶⁶ 228 F.3d 341 (4th Cir. 2000).
- ⁶⁷ *Id.* at 344.
- ⁶⁸ *Id.* at 351.
- ⁶⁹ *Id.* The Fourth Circuit panel in *In Re: Subpoena Duces Tecum* did not discuss the purported division among the circuits on the right to privacy in medical records noted in the Fourth Circuit's decision in *Ferguson*.
- ⁷⁰ *Id.*
- ⁷¹ *Id.*
- ⁷² *Augustin v. Barnes*, 626 P.2d 625, 629-30 (Colo. 1981).
- ⁷³ *Id.* at 629.
- ⁷⁴ *Id.* at 629-30.
- ⁷⁵ *Id.* at 630.
- ⁷⁶ *Id.*
- ⁷⁷ *Id.*
- ⁷⁸ *Augustin v. Barnes*, 626 P.2d 625, 630 (Colo. 1981).
- ⁷⁹ *Belle Bonfils Memorial Blood Center v. District Court*, 763 P.2d 1003, 1012 (Colo. 1988).
- ⁸⁰ *Id.* at 1004.
- ⁸¹ *Id.* at 1005.
- ⁸² *Id.* at 1012.
- ⁸³ *Id.*
- ⁸⁴ *Id.*
- ⁸⁵ *Belle Bonfils Memorial Blood Center v. District Court*, 763 P.2d 1003, 1012 (Colo. 1988).
- ⁸⁶ *Id.* at 1014.
- ⁸⁷ Indeed, the existence of an individual right of privacy that is balanced by societal interests is also evident in Colorado statutes and agency regulations. See, e.g. COLO. REV. STAT. §§ 24-72-204(3)(a)(D), (open records laws prohibit inspection of medical or mental health data); COLO. REV. STAT. 10-3-1104.5(1) and (4)(b) ("The general assembly declares that a balance must be maintained between the need for information by those conducting the business of insurance and the public's need for fairness in practices for testing for the human immunodeficiency virus, including the need to minimize intrusion into an individual's privacy and the need to limit disclosure of the results of such testing."); COLO. REV. STAT. 10-3-1104.7(1)(C) and (3)(a) ("To protect individual privacy and to preserve individual autonomy with regard to the individual's genetic information, it is appropriate to limit the use and availability of genetic information.") 3 Colo. Code Regs. § 702-6, Regulation 6-4-1 (licensees shall not disclose nonpublic personal health information without authorization except where performing certain insurance functions, including the detection of insurance fraud, misrepresentation and criminal activity).
- ⁸⁸ See, e.g., *Ross v. Trumbull County Child Support Enforcement Agency*, 2001 Ohio App. LEXIS 495 (Ohio App. 2001) (citing *Levias v. United Airlines*, 27 Ohio App. 3d 222, 500 N.E.2d 370 (1985)).
- ⁸⁹ *Tureen v. Equifax, Inc.*, 571 F.2d 411, 416-417 (8th Cir. 1978) (The court rejected any liability for the alleged tort "[b]ecause there may be a legitimate purpose for the collection and even the disclosure, in certain circumstances, of an individual's past insurance history.")
- ⁹⁰ 98 A.L.R. 3d 561 (citing 62 Am Jur 2d, Privacy § 1; Restatement of Torts 2d §§ 652B-652E).
- ⁹¹ *Ross*, 2001 Ohio App. LEXIS 495, at 13 (citing *Hahn v. Kotten*, 43 Ohio St. 2d 237, 244, 331 N.E.2d 713 (1975)).
- ⁹² *Id.* at 2-4.
- ⁹³ *Id.*
- ⁹⁴ *Id.*
- ⁹⁵ *Id.* at 16.
- ⁹⁶ *Levias*, 500 N.E.2d at 373.
- ⁹⁷ *Id.*
- ⁹⁸ *Id.*
- ⁹⁹ *Id.* at 374.
- ¹⁰⁰ *Id.* at 375-76.
- ¹⁰¹ *Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 379 (Colo. 1997).
- ¹⁰² *Id.* at 377.
- ¹⁰³ See generally Health Insurance Portability & Accountability Act of 1996, Pub. L. No. 104-191, § 110 Stat. 1936 (1996).
- ¹⁰⁴ See generally *id.*
- ¹⁰⁵ See Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82464 (proposed Dec. 28, 2000) (to be codified at 45 C.F.R. pts. 160 and 164).
- ¹⁰⁶ See *id.*
- ¹⁰⁷ *HHS Fact Sheet*, July 6, 2001, available at <http://www.hhs.gov/news/press/2001pres/01fsprivacy.html>.
- ¹⁰⁸ See Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82464 (proposed Dec. 28, 2000) (to be codified at 45 C.F.R. pts. 160 and 164).
- ¹⁰⁹ See *id.* at 82465.
- ¹¹⁰ *Id.*
- ¹¹¹ *Id.* at 82466.
- ¹¹² See *id.* at 82466-67.
- ¹¹³ *Id.* at 82464.
- ¹¹⁴ Admittedly, the HIPAA regulations are complex and a comprehensive analysis of those regulations and compliance therewith would require much more extensive and detailed coverage. That level of analysis is beyond the scope of this article, which focuses on the extent to which medical records are private rather than on how to comply with HIPAA.

- 115 See Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82465.
- 116 See generally Health Insurance Portability & Accountability Act of 1996, Pub. L. No. 104-191, § 110 Stat. 1936 (1996).
- 117 Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82464.
- 118 See generally Health Insurance Portability & Accountability Act of 1996, Pub. L. No. 104-191, § 110 Stat. 1936 (1996).
- 119 *Id.*
- 120 *Id.*
- 121 Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82467.
- 122 45 C.F.R. § 164.502.
- 123 *Id.*
- 124 45 C.F.R. § 164.501.
- 125 45 C.F.R. § 164.514.
- 126 *Id.*
- 127 45 C.F.R. § 164.512.
- 128 *Id.*
- 129 Other examples include to persons subject to the Food and Drug Administration and to an employer, each under certain circumstances, and for judicial and administrative proceedings. 45 C.F.R. § 164.512.
- 130 45 C.F.R. § 164.512.
- 131 *Whalen*, 429 U.S. at 602.

Sodomy Laws and Privacy pg. 546 - Michael E. Brewer

- ¹ See THE BOOK OF THE GENERAL LAWS AND LIBERTIES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS (Harvard University Press, 1929). Along with adultery, murder, and lying with a beast, the crime of a man lying with another man is a capital offense.
- ² See 2 WILLIAM BLACKSTONE, COMMENTARIES 215 (1866).
- ³ See JOHN DE'MILIO & ESTELLE B. FREDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 122 (Harper & Row, 1988).
- ⁴ Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and after Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1722 (1993).
- ⁵ Contemporary examples of the identification of homosexuality and sodomy are common and sometimes tragically comic. A Queens Borough school board refused to allow teachers to mention the existence of same-sex parents because it did not want to promote acceptance of sodomy. Campaign buttons distributed in Oregon in opposition to a gay rights amendment to the state constitution declared, "Sodomy is not a special right." Sen. Strom Thurmond, when reminded that gays and lesbians were employed as congressional staffers, responded that "Sodomy is against the law. Why shouldn't they be arrested?" *Id.* at 1736-37.
- ⁶ Lawrence R. Murphy, *Defining the Crime Against Nature: Sodomy in the United States Appeals Courts, 1810-1940*, 19 J. HOMOSEXUALITY 49, 62 (1990).
- ⁷ See *People v. Hodgkin*, 53 N.W. 794, 795 (Mich. 1892).
- ⁸ See *Hodgkin*, 53 N.W. 794. The court reversed the conviction because there was no finding of emission by the lower court.
- ⁹ See *Prindle v. State*, 21 S.W. 360 (Tex. Crim. App. 1893); *Mitchell v. State*, 95 S.W. 500 (Tex. Crim. App. 1906) (citing *Wharton* in finding that fellatio is not a crime at common law); see also *Kinnan v. State*, 125 N.W. 594, 595 (Neb. 1910); *Munoz v. State*, 281 S.W. 857 (Tex. Crim. App. 1926) (finding that fellatio is not a crime defined by statutes adopting the common law).
- ¹⁰ See *Fennel v. State*, 32 Tex. 378 (Tex. 1869).
- ¹¹ See *People v. Boyle*, 48 P. 800 (Cal. 1887).
- ¹² See *State v. Smith*, 38 S.W. 717, 717-18 (Mo. 1897) (describing the actions of a police officer convicted of taking a 16-year-old boy to a lumber yard and initiating sexual contact).
- ¹³ See *State v. Murry*, 66 So. 963, 963-64 (La. 1914) (declining to detail the actions of defendant, convicted of perpetrating the act of buggery on a 12 year-old boy).
- ¹⁴ See *James v. State*, 134 S.W. 699 (Tex. Crim. App. 1911).
- ¹⁵ See *State v. Guerin*, 152 P. 747, 748 (Mont. 1915).
- ¹⁶ See *Guerin*, 152 P. at 748.
- ¹⁷ See *Thompson v. Aldredge*, 200 S.E. 799, 800 (Ga. 1939) (citing GA. CODE ANN. § 26-5901 (1933) (current version at GA. CODE ANN. § 16-6-2 (2001) (defining sodomy as "the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman."), and 1 FRANCIS WHARTON, CRIMINAL LAW § 754 (11th ed. 1912) ("[T]he crime of sodomy proper cannot be accomplished between two women, though the crime of bestiality may be.")).
- ¹⁸ For this paper, 148 appeals court cases from 26 states were retrieved in searches in the *Centennial Digest* (to 1919), LEXIS, and WESTLAW. The three states with the largest number of cases found are California (34), Texas (22), and Missouri (7). The chronological distribution of the cases is: 1880-89 (5), 1890-99 (18), 1910-19 (25), 1930-39 (24), 1900-09 (28), 1920-29 (23), 1940-44 (27). In his article on sodomy appeals from 1810 to 1940, Lawrence Murphy identified 226 sodomy appeals prior to 1950 in the *Centennial Digest*. His research yielded this chronological distribution:
1800-59 (2), 1870-79 (3), 1890-99 (15), 1910-19 (33), 1930-39 (32), 1860-69 (4), 1880-89 (5), 1900-09 (23), 1920-29 (40), and 1940-49 (68).
- Murphy, *supra* note 6, at 63, n. 3.
- ¹⁹ See *Bowers v. Hardwick*, 487 U.S. 186, 190-91 (1986).
- ²⁰ See, e.g., *Powell v. State*, 510 S.E.2d 18, 24 (Ga. 1998) (concluding that "unforced sexual behavior conducted in private between adults . . . is at the heart of the Georgia Constitution's protection of the right to privacy."); *Commonwealth v. Wasson*, 842 S.W.2d 487, 493 (Ky. 1992) (stating that "[d]eviate sexual intercourse conducted in private by consenting adults is not beyond the protections of . . . the Kentucky Constitution . . ."); *Campbell v. Sundquist*, 926 S.W.2d 250, 262 (Tenn. Ct. App. 1996) (holding the "Homosexual Practices Act, T.C.A. § 39-13-510 . . . unconstitutional" because ". . . our citizens' fundamental right of privacy . . . encompasses the right of the plaintiffs to engage in consensual, private, non-commercial, sexual conduct . . .").
- ²¹ The supreme courts of Louisiana and Minnesota have declined to invalidate their states' sodomy laws on the theory that those laws violate a

constitutionally guaranteed right to privacy. See *State v. Smith*, 766 So. 2d 501, 510 (La. 2000) and *State v. Gray*, 413 N.W.2d 107, 114 (Minn. 1987).

²² As of 1993, twenty-eight states and the District of Columbia had repealed their sodomy laws, seventeen states prohibited sodomy regardless of the sex of the parties, and five states prohibited same-sex sodomy without proscribing cross-sex sodomy. See Halley, *supra* note 4, at 1732.

²³ See Halley, *supra* note 4, at 1722.

²⁴ *Id.* at 1722.

²⁵ Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 110-128 (2000).

²⁶ See RICHARD A. POSNER, *SEX AND REASON* 291 (1992).

²⁷ *See id.*

²⁸ *See generally* POSNER, *supra* note 26.

²⁹ *See id.*

³⁰ *See id.*

³¹ *See id.*

³² *Id.* at 88.

³³ See Richard C. Friedman & Jennifer I. Downey, *Homosexuality*, 331 NEW ENG. J. MED. 923, 928 (1994).

³⁴ See POSNER, *supra* note 26, at 299.

³⁵ *See id.*

³⁶ *See id.*

³⁷ *See id.* at 157.

³⁸ *See id.* at 157-58.

³⁹ *Id.*

⁴⁰ Discussion of where they do lie is beyond the scope of this article. It is worth mentioning in this context, though, that some socio-biological theories relate anti-gay sentiment to the inherent drive of the species to reproduce, which, in theory, is inimical to the non-reproductive sex of gay people. However, these theories do not account for the demonstrable variations of acceptance of same-sex activity in different cultures, and Posner does not rely on them. An area which Posner does not explore in regard to anti-gay feeling is Judeo-Christian mores and literature, from which Anglo-American culture draws heavily. See DANIEL A. HELMINIAK, *WHAT THE BIBLE REALLY SAYS ABOUT HOMOSEXUALITY* (1994).

⁴¹ POSNER, *supra* note 26, at 201-02.

⁴² *See id.* at 207.

⁴³ *See id.* at 117, 207.

⁴⁴ See Friedman & Downey, *supra* note 33.

⁴⁵ See POSNER, *supra* note 26, at 207.

⁴⁶ Colorado attempted to do this in 1992 when it passed "Amendment 2" to its constitution.

⁴⁷ See POSNER, *supra* note 26, at 207.

I'm Watching You pg. 550 - Leslie E. Nunn, Dane Patridge, & Brian McGuire

¹ Gregory Weaver, *A Click Too Far*, INDIANAPOLIS STAR, June 12, 2000, at E01.

² Ann Carns, *Prying Times: Those Bawdy E-Mails Were Good for a Laugh—Until the Ax Fell*, WALL ST. J., Feb. 4, 2000, at A1.

³ *Id.*; Bill Wallace & Jamie Fenton, *Is Your PC Watching You? New Desktop Snoopware Products Let Anyone—Boss, Business Partner, or Spouse—Track Your PC Habits*, PC WORLD, Dec. 1, 2000, at 59, available at <http://www.pcworld.com/news/article/0,aid,32863,00.asp>.

⁴ American Management Association, *2001 Workplace Monitoring & Surveillance: Policies and Practices*, available at http://www.amanet.org/research/pdfs/emsfu_short.pdf (last visited Feb. 27, 2002).

⁵ *Id.*

⁶ *Id.*

⁷ Michael J. McCarthy, *Data Raid: In Airline's Suit, PC Becomes Legal Pawn, Raising Privacy Issues*, WALL ST. J., May 24, 2000, at A1.

⁸ See Michael J. McCarthy, *Thinking Out Loud: You Assumed 'Erase' Wiped Out That Rant Against the Boss? Nope*, WALL ST. J., March 7, 2000, at A1.

⁹ American Management Association, *supra* note 4.

¹⁰ Jerry Crimmins, *Even Federal Judges Come Under Surveillance When Online*, CHI. DAILY L. BULL., Aug. 14, 2001, at 1.

¹¹ *Id.* The entire United States Judicial Conference was scheduled to consider the recommendations of the Committee on Automation and Technology on September 11, 2001. *Id.*

¹² See 16A AM. JUR. 2d *Constitutional Law* § 399 (1998).

¹³ See *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968).

¹⁴ U.S. CONST. amend. IV.

¹⁵ *United States v. Jacobsen*, 466 U.S. 109, 113-14 (1984)(quoting *Walter v. United States*, 447 U.S. 649, 662 (1980)(Blackmun, J., dissenting)).

¹⁶ *Jacobsen*, 466 U.S. at 113.

¹⁷ See, e.g., *Dawson v. State*, 868 S.W.2d 363, 367 (Tex. App. 1993)(citing *Crosby v. State*, 750 S.W.2d 768, 773 (Tex. Crim. App. 1987)).

¹⁸ *Id.* (quoting *Crosby*, 750 S.W.2d at 773).

¹⁹ *Id.* (quoting *Crosby*, 750 S.W.2d at 773).

²⁰ See *United States v. Mankani*, 738 F.2d 538, 542 (2d Cir. 1984).

²¹ See *Mankani*, 738 F.2d at 542-43.

²² *Id.* at 543.

²³ See *Mapp v. Ohio*, 367 U.S. 643, 645 (1961).

²⁴ See *Katz v. United States*, 389 U.S. 347, 353 (1967).

²⁵ See *Kyllo v. United States*, 533 U.S. 27, 29-30 (2001).

²⁶ See *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

²⁷ See *Jacobsen*, 466 U.S. at 113.

²⁸ *California v. Ciraolo*, 476 U.S. 207, 213 (1986)(quoting *Katz*, 389 U.S. at 351).

²⁹ *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993).

³⁰ *State v. Bromell*, 596 A.2d 1105, 1108 (N.J. Super. Ct. Law Div. 1991).

- 31 Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir. 1986).
- 32 *Bromell*, 596 A.2d at 1108.
- 33 *Id.*
- 34 *Id.*
- 35 *Id.* (citing *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76-77 (1970); *State v. Rednor*, 497 A.2d 544, 546-47 (N.J. Super. Ct. App. Div. 1985)).
- 36 *Id.* (citing *State v. Turcotte*, 571 A.2d 305, 309-10 (N.J. Super. Ct. App. Div. 1990)).
- 37 *Id.* (citing *State v. Williams*, 417 A.2d 1046, 1049, 1051 (N.J. 1980)).
- 38 *Bromell*, 596 A.2d at 1108 (citing *State v. Bonaccorso*, 545 A.2d 853, 857 (N.J. Super. Ct. Law Div. 1988)).
- 39 *Id.* (citing *In re State Dep't of Envtl. Prot.*, 426 A.2d 534, 539 (N.J. Super. Ct. App. Div. 1981)).
- 40 *Id.* at 1109-12.
- 41 *Id.* at 1108 (citing *Donovan v. Dewey*, 452 U.S. 594, 606 (1980); *In re State Dep't of Envtl. Prot.*, 426 A.2d at 539).
- 42 *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)(quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).
- 43 U.S. CONST. amend. IV.
- 44 *State v. Thein*, 957 P.2d 1261, 1264 (Wash. Ct. App. 1998), *rev'd on other grounds*, 977 P.2d 582 (Wash. 1999).
- 45 *United States v. Vitek Supply Corp.*, 144 F.3d 476, 480 (7th Cir. 1998).
- 46 *Bustamonte*, 412 U.S. at 219 (1973)(quoting *Katz*, 389 U.S. at 357).
- 47 *See Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298 (1967) (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948)).
- 48 *Bustamonte*, 412 U.S. 218, 222 (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)).
- 49 *Colburn v. State*, 966 S.W.2d 511, 519 (Tex. Crim. App. 1998).
- 50 *Preston v. United States*, 376 U.S. 364, 367 (1964).
- 51 *See supra* notes 28-29 and accompanying text.
- 52 *State v. Chapman*, 596 N.E.2d 612, 614 (Ohio Ct. App. 1992)(quoting *Michigan v. Long*, 463 U.S. 1032, 1049 (1983)).
- 53 *United States v. Edwards*, 415 U.S. 800, 802-03 (1974).
- 54 *See United States v. Jacobsen*, 466 U.S. 109, 113 (1984).
- 55 *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 515 (1999).
- 56 *See Lochenmyer v. Didrickson*, 636 N.E.2d 93, 98 (Ill. App. Ct. 1994).
- 57 *See Stoker v. State*, 788 S.W.2d 1, 11 (Tex. Crim. App. 1989).
- 58 *United States v. Garlock*, 19 F.3d 441, 443 (8th Cir. 1994)(citing *Fidelity Fin. Corp. v. Federal Home Loan Bank*, 792 F.2d 1432, 1435 (9th Cir. 1986)).
- 59 *Garlock*, 19 F.3d at 443.
- 60 *See id.*
- 61 *United States v. Bazan*, 807 F.2d 1200, 1203 (5th Cir. 1986).
- 62 *Id.* (quoting *United States v. Miller*, 683 F.2d 652, 657 (9th Cir. 1982)).
- 63 *Garlock*, 19 F.3d at 442-43.
- 64 *Stoker v. State*, 788 S.W.2d 1, 11 (Tex. Crim. App. 1989)(quoting *Walter v. United States*, 447 U.S. 649, 656 (1980)).
- 65 *United States v. Kahan*, 350 F. Supp. 784, 791 (S.D.N.Y. 1972).
- 66 *Dawson v. State*, 868 S.W.2d 363, 369 (Tex. App. 1993)(quoting *Bazan*, 805 F.2d at 1203).
- 67 *See, e.g., Purelli v. State Farm Fire & Cas. Co.*, 698 So.2d 618, 620 (Fla. Dist. Ct. App. 1997).
- 68 *See* 62A AM. JUR. 2D *Privacy* § 38 (1990). Specifically, "(1) [u]nreasonable intrusion upon the seclusion of another; (2) [a]ppropriation of the other's name or likeness; (3) [u]nreasonable publicity given to the other's private life; [and] (4) [p]ublicity that unreasonably places the other in false light before the public." *Id.*
- 69 *Doe v. High-Tech Inst., Inc.*, 972 P.2d 1060, 1065 (Colo. Ct. App. 1998)(emphasis added). Aside from the common law cause of action for "intrusion upon seclusion," several states have sought to codify this prong of the invasion of privacy tort. *See Munson v. Milwaukee Bd. of Sch. Dirs.*, 969 F.2d 266, 271 (7th Cir. 1992)(quoting WIS. STAT. ANN. § 895.50(2)(a) (West 1991)); *Ritchie v. Walker Mfg. Co.*, 963 F.2d 1119, 1123 (8th Cir. 1992)(quoting NEB. REV. STAT. § 20-203 (1988)).
- 70 *High-Tech Inst., Inc.*, 972 P.2d at 1065 (citing RESTATEMENT (SECOND) OF TORTS § 625B (1981)).
- 71 *Id.* at 1068.
- 72 *See Sheppard v. Beerman*, 822 F. Supp. 931, 939-41 (E.D.N.Y. 1993)(holding that "the relationship between a judge and law clerk is *sui generis*" and that it is reasonable for a judge to search the files and desk of a former law clerk).
- 73 *See, e.g., State v. Charles*, 602 So. 2d 15, 17-19 (La. Ct. App. 1992), *amended by* *State v. Charles*, 607 So. 2d 566 (La. 1992)(holding that a defendant who was visiting his cousin's house and staying in a den that was a "highly trafficked area" and had no area set aside for his specific use, had a "severely diminished" expectation of privacy).
- 74 810 F. Supp. 1551 (S.D. Fla. 1992).
- 75 *Pottinger*, 810 F. Supp. at 1571.
- 76 *Id.* at 1573-76.
- 77 *See supra* notes 73-76 and accompanying text.
- 78 *See supra* notes 67-71 and accompanying text.
- 79 *State v. Brown*, 660 A.2d 1221, 1225 (N.J. Super. Ct. App. Div. 1995).
- 80 *See, e.g., United States v. Concepcion*, 942 F.2d 1170, 1171-72 (7th Cir. 1991)(holding that there is no expectation of privacy in a mailbox at an apartment because the mailboxes were in a common area shared with five other tenants).
- 81 *Katz*, 389 U.S. at 351.
- 82 *See supra* notes 28-29 and accompanying text.
- 83 557 F.2d 362 (3d Cir. 1977).
- 84 *Speights*, 577 F.2d at 362-64.
- 85 *Id.* at 363.

- 86 *Id.*
 87 *Id.*
 88 *Id.*
 89 *Id.* at 363-65.
 90 677 S.W.2d 632 (Tex. App. 1984).
 91 *Trotti*, 677 S.W.2d at 637.
 92 *Shaffer v. Field*, 339 F. Supp. 997, 1003 (C.D. Cal. 1972), *aff'd*, 484 F.2d 1196 (9th Cir. 1973).
 93 *Shaffer*, 339 F. Supp. at 1003.
 94 920 S.W.2d 48 (Ky. 1996).
 95 *Deemer*, 920 S.W.2d at 49.
 96 *Id.*
 97 *Id.*
 98 *Id.* at 49-50.
 99 *See id.*
 100 *Id.* at 50.
 101 *Deemer*, 920 S.W.2d at 50.
 102 *Id.*
 103 *See supra* text accompanying notes 94-102.
 104 *McCarthy*, *supra* note 8.
 105 *Id.*
 106 *Id.* Investigator software is manufactured by WinWhatWhere Corp. of Kennewick, Washington. *Id.*
 107 *See supra* text accompanying notes 105-06.
 108 *See Simpson v. Commonwealth, Unemployment Comp. Bd.*, 450 A.2d 305, 310 (Pa. Commw. Ct. 1982).
 109 *Mary-Kathryn Zachary, Technology and Employment Law, SUPERVISION*, Mar. 1, 2000, available at 2000 WL 7872876. The federal Electronic Communications Privacy Act of 1986, which forbids the interception of electronic communications, "does not appear to apply to e-mail, which is not intercepted, but electronically stored." *Id.*
 110 171 F.3d 711 (1st Cir. 1999).
 111 *Desilets*, 171 F.3d at 713.
 112 Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2520(a) (2000).
 113 *Desilets*, 171 F.3d at 713.
 114 Nancy Flynn, THE EPOLICY HANDBOOK (2001), available at <http://www.epolicyinstitute.com/disaster/stories.html>.
 115 *Id.*
 116 *See id.*
 117 *See Maura Kelly, Your Boss Maybe Monitoring Your e-mail* (Dec. 8, 1999), available at http://www.salon.com/tech/feature/1999/12/08/email_monitoring.
 118 *Id.*
 119 *Id.*
 120 *Zachary*, *supra* note 109.
 121 *Id.*
 122 *See Rutrell Yasin, Web Slackers Put on Notice* (Oct. 15, 1999), available at <http://www.internetweek.com/lead/lead101599.htm>
 123 *Zachary*, *supra* note 109.
 124 *Id.*
 125 *See Deborah Joseph, Unions and the Internet* (Sept. 1999), available at <http://www.laborresearch.org/tua/internet3.html>.
 126 *Id.*
 127 480 U.S. 709 (1987).
 128 *O'Conner*, 480 U.S. at 717.
 129 *Id.* at 710.

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- ¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).
² Foreign Intelligence Surveillance Act of 1971, 50 U.S.C. §§ 1801-1863 (2002).
³ Part of the Omnibus Safe Streets Act of 1968, 18 U.S.C. 2510-2520 (2000); see Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy under the USA Patriot Act*, 79 DEN. U. L. REV. (forthcoming 2002) (manuscript at 46-48, on file with the Denver University Law Review).
⁴ Mell, *supra* note 3 (manuscript at 28-29).
⁵ *Id.* (manuscript at 28).
⁶ *Id.* (manuscript at 27).
⁷ *Id.* (manuscript at 31).
⁸ *Id.* (manuscript at 30-31).
⁹ *See id.* (manuscript at 31-33).
¹⁰ *See id.* (manuscript at 32-33).
¹¹ *Id.* (manuscript at 33).
¹² *See id.* (manuscript at 43-44).
¹³ *See id.* (manuscript at 45-46).
¹⁴ *See d.* (manuscript at 36-38). After these abuses, President Reagan resurrected the CIA-FBI partnership by executive order. *Id.* (manuscript at 36).
¹⁵ *See id.* (manuscript at 37).
¹⁶ *Id.* (manuscript at 47).