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CRIMINAL INVASION OF PRIVACY: A SURVEY OF COMPUTER CRIMES

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ABSTRACT: Computers, databases, and the Internet have made personal information readily available. All states have enacted criminal laws to protect against abuses of accessing or using such data. This article traces the history of privacy as it pertains to personal information and explores the criminal laws against invasion of privacy.

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With the click of a mouse, a sophisticated computer user can gather vast amounts of information about almost any topic. For years computers have provided effective means for collecting and storing data. The combination of more powerful computers, the World Wide Web, and large databases has dramatically changed the quantity and quality of data that may be readily available to even a novice user. Some of these data include personal and private information. As is always the case when technology produces dramatic changes, the law must change to keep pace with these advances. When new abuses arise, new remedies and sanctions inevitably follow.

This pattern is emerging with respect to online data protection and online privacy. Part I of this Article discusses the creation and development of the right to privacy and the tort of invasion of privacy. Part II examines computer crime legislation and statutes that criminalize invasion of privacy.

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I. THE RIGHT TO PRIVACY

A. Common Law

The recognition of a broad right to privacy begins with the famous 1890 article by Samuel Warren and Louis Brandeis espousing the creation of the tort of invasion of privacy.[1] Warren and Brandeis discussed cases decided on such grounds as defamation, loss of property rights, breach of implied contract, and breach of confidence. They reasoned that these decisions really spoke of, and should have been decided upon, a right to privacy. Borrowing a phrase from a commentator of the day, they argued that it was time for the law to recognize the right "to be let alone."[2]

During the next fifteen years or so, several cases addressed the idea of a civil remedy for invasion of privacy. All involved an appropriation of name or likeness, usually for advertising or promotional purposes. The first cases to consider the Warren-Brandeis theory rejected it.[3] In 1905, however, the Supreme Court of Georgia fervently embraced the notion of a right to privacy in *Pavesich v. New England Life Insurance Co.*[4] The court ruled in favor of a man whose picture had been used to sell life insurance without his permission. The court invoked natural law and constitutional protection against unreasonable searches and seizures to hold that the state and federal constitutions guaranteed the right to privacy.[5]

1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The impetus for the article came from Warren, a successful Boston businessman, a member of the social elite, and a former law school classmate of Brandeis. Warren was upset with what he felt was excessive and obtrusive newspaper coverage of his daughter's wedding. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 383–84 (1960).

2. THOMAS MCINTYRE COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888), *quoted in* Warren & Brandeis, *supra* note 1, at 195; Prosser, *supra* note 1, at 389.

3. In 1899, the Supreme Court of Michigan rejected the privacy claim of a well-known deceased politician whose name was used to sell a cigar. In *Atkinson v. John E. Doherty & Co.*, 80 N.W. 285 (Mich. 1899), the court insisted that only those rights based on sound and recognized principles of property were cognizable. In 1902, the New York Court of Appeals rejected a claim by a woman whose picture was used to advertise flour. Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902). In a 4-3 decision, the majority declared that a right to privacy did not exist and that there was no remedy against such behavior. *See id.* at 448. The court stated that there was no precedent for protecting against an invasion of privacy and feared the vast amount of litigation that might ensue if it granted such protection. *Id.* at 443. In response to a public outcry, New York enacted legislation making it a misdemeanor and a tort to use a name or picture for commercial purposes without written consent of the individual. *See* Prosser, *supra* note 1, at 385.

4. 50 S.E. 68 (Ga. 1905).

5. The court quoted approvingly the dissenting opinion in *Roberson*, which argued that the common law provides an "absolute right to be let alone." *Id.* at 78 (*quoting* COOLEY, *supra* note 2, at 29). Modern opinions in Georgia proudly recite the fact that the right to privacy "was birthed by this court." Cox Broad. Corp. v. Cohn, 200 S.E.2d 127, 130 (Ga. 1973), *rev'd on other grounds*, 420 U.S. 469 (1975). The Supreme Court of Georgia observed recently "the 'right to be let alone' guaranteed by the Georgia Constitution is far more extensive than the right of privacy protected by the U.S. Constitution." Powell v. Georgia, 510 S.E.2d 18, 22 (Ga. 1998). For a discussion of state constitutions that specifically provide for the right of privacy, see *infra* notes 23–44 and accompanying text.

Over the next several decades, state after state considered the tort of invasion of privacy. In another influential law review article in 1960, Professor William Prosser[6] outlined four forms of invasion of privacy: (1) intrusion upon plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity that places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[7] Prosser stated that an overwhelming majority of the states had recognized, in some form or another, the right to privacy.[8] Today all but two states, North Dakota and Wyoming, have adopted some form of the tort of invasion of privacy.[9] Most have adopted all four prongs of the definition.[10]

B. Federal Constitution

The United States Constitution does not specifically refer to a right to privacy, but it does protect various interests subsumed within the notion of privacy. In 1928, in *Olmstead v. United States*,[11] the Supreme Court held that the Constitution did not prevent federal officials from wiretapping telephone conversations without probable cause or a warrant as long as they did not trespass on private property in doing so. Five justices saw no illegal search or seizure under the Fourth Amendment and no compelled self-incrimination under the Fifth Amendment. In a strong dissent, Justice Brandeis continued his quest for recognition of a right to privacy:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.[12]

6. Prosser, *supra* note 1.

7. *Id.* at 389; *see also* RESTATEMENT (SECOND) OF TORTS § 652 (1977).

8. Prosser listed 26 states that had recognized the right, and 11 others that probably would have, had partially, or had legislatively, recognized it. *Id.* at 386–88. He cited only four states that still rejected it. *Id.* at 388.

9. *See* Michael S. Raum, Comment, *Torts—Invasion of Privacy: North Dakota Declines to Recognize a Cause of Action for Invasion of Privacy*, 75 N.D. L. REV. 155, 162–64 nn.73–84 (1999).

10. *Id.*

11. 277 U.S. 439 (1928).

12. *Id.* at 478–79 (Brandeis, J. dissenting).

Almost four decades later, the Supreme Court recognized a constitutional right to privacy in *Griswold v. Connecticut*.[13] The Court struck down a Connecticut law banning the use of contraceptives, holding that the law violated the constitutional right to marital privacy. It found that the Constitution protects "zones of privacy" emanating from the "penumbras" of the First, Third, Fourth, Fifth, and Ninth Amendments.[14]

On the heels of *Griswold*, the Supreme Court overruled *Olmstead*. In *Katz v. United States*,[15] the Court found that an electronic listening device attached to a telephone booth violated the Fourth Amendment. In a concurring opinion,[16] Justice Harlan proposed the "reasonable" expectation of privacy rule that would later be adopted by the Court.[17]

In 1977, the Supreme Court considered the privacy of personal information in *Whalen v. Roe*.[18] A group of patients and physicians challenged a New York statute that required the reporting of all prescriptions of certain categories of drugs to state police. The information, including the names of the patient, the physician, and the pharmacy, were stored in a computerized database.[19] The Court discerned at least two "privacy" interests: the interest in avoiding disclosure of personal matters, and the interest in independence in making certain kinds of important decisions.[20] The Court held that the statute violated neither interest. It described various security measures required by the statute, but noted the potential for abuse:

> A final word about issues we have not decided. We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. . . . The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. . . . We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data—whether intentional or unintentional—or by a system that did not contain comparable security provisions. We simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment.[21]

13. 381 U.S. 479 (1965).
14. *Id.* at 484.
15. 389 U.S. 347 (1967).
16. *Id.* at 360 (Harlan, J., concurring).
17. Terry v. Ohio, 392 U.S. 1 (1968).
18. 429 U.S. 589 (1977).
19. *Id.* at 593.
20. *Id.* at 599.
21. *Id.* at 605–06.

The Supreme Court has not decided any cases on the basis of this possible right of informational privacy, and the lower courts are divided on whether the Constitution protects against government disclosure of personal information.[22]

C. State Constitutions

While the constitutions of at least ten states include the word "privacy,"[23] only a few provide protection outside the area of criminal search and seizure.[24] By far, the greatest privacy protection is afforded by the constitution of California,[25] which provides that privacy is an inalienable right.[26] Cases have held that this right is broader than the federal constitutional right;[27] creates a right of action against private as well as government entities;[28] applies to minors as well as adults;[29] prevents government and business interests from collecting and stockpiling unnecessary personal information, from improperly using information collected for one purpose for another, from disclosing information to a third party, and from not checking on the accuracy of the information;[30] and encompasses both "informational privacy" (precluding the dissemination and misuse of sensitive and confidential information) and "autonomy privacy" (protecting the making of intimate personal decisions and conducting personal activities without observation, intrusion, or interference).[31]

The Alaska constitution also provides that: "the right of the people to privacy is recognized and shall not be infringed."[32] This right is broader than that

22. For a discussion of these cases, see FRED H. CATE, PRIVACY IN THE INFORMATION AGE 60–62 (1997).
23. ALASKA CONST. art. I, § 22; ARIZ. CONST. art. 2, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. I, §§ 6 & 7; ILL. CONST. art. 1, § 6; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7.
24. Provisions in the Arizona, Illinois, Louisiana, South Carolina and Washington constitutions pertain generally to invasions of privacy with respect to criminal searches and seizures. *Id.*
25. *See* PAUL M. SCHWARTZ & JOEL R. REIDENBERG, DATA PRIVACY LAW 132–35 (1996).
26. CAL. CONST. art. I, § 1.
27. People v. Wiener, 35 Cal. Rptr. 2d 321 (Ct. App. 1994); Am. Acad. of Pediatrics v. Van de Kamp, 263 Cal. Rptr. 46 (Ct. App. 1989).
28. Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633 (Cal. 1994); Kraslawsky v. Upper Deck Co., 65 Cal. Rptr. 2d 297 (Ct. App. 1997); Cutter v. Brownbridge, 228 Cal. Rptr. 545 (Ct. App. 1986).
29. Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997); Am. Acad. of Pediatrics v. Van de Kamp, 263 Cal. Rptr. 46 (Ct. App. 1989).
30. Cent. Valley Chapter Seventh Step Found., Inc. v. Younger, 262 Cal. Rptr. 496 (Ct. App. 1989); Pitman v. City of Oakland, 243 Cal. Rptr. (Ct. App. 1988); Betchart v. Dep't of Fish & Game, 205 Cal. Rptr. 135 (Ct. App. 1984); Stackler v. Dep't of Motor Vehicles, 164 Cal. Rptr. 203 (Ct. App. 1980); Mullaney v. Woods, 158 Cal. Rptr. 902 (Ct. App. 1979).
31. Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997); Loder v City of Glendale, 927 P.2d 1200 (Cal. 1997); Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633 (Cal. 1994); Nahrstedt v. Lakeside Vill. Cond. Ass'n, 878 P.2d 1275 (Cal. 1994).
32. ALASKA CONST. art. 1, § 22.

guaranteed by the federal constitution[33] with its "emanations"[34] and "penumbras."[35]

Hawaii's constitution provides for a right to privacy.[36] The Hawaii Supreme Court has stated that its constitution "affords much greater privacy rights than the federal right to privacy"[37] and that:

> The right-to-privacy provision of article I, section 6 relates to privacy in the informational and personal autonomy sense, encompassing the common law right to privacy or tort privacy, and the ability of a person to control the privacy of information about himself, such as unauthorized public disclosure of embarrassing or personal facts about himself. ... It concerns the possible abuses in the use of highly personal and intimate information in the hands of government or private parties.[38]

The Montana constitution provides that the "right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."[39] The Montana Supreme Court has stated that the guarantee applies to state action in conducting a search or seizure, to "autonomy privacy," and to confidential "informational privacy."[40] Thus, the court refused to issue an investigative subpoena for medical records absent a sufficient showing of probable cause that an offense had been committed.[41]

Florida's constitution provides that "every natural person has the right to be let alone and free from governmental intrusion into the person's private life."[42] The Florida Supreme Court discussed the history of this provision:

> The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.[43]

Florida has applied its right of privacy in grandparent visitation cases, addressing the "right of decisional autonomy" or "childrearing autonomy," and holding that, absent a showing that denial of visitation would harm the child, the parents' right to privacy would be adversely affected by a visitation order.[44]

33. *See* Messerli v. State, 626 P.2d 81 (Alaska 1980); State v. Daniel, 589 P.2d 408 (Alaska 1979); Woods & Rohde, Inc. v. State Dep't of Labor, 565 P.2d 138 (Alaska 1977).

34. Falcon v. Alaska Pub. Offices Comm'n, 570 P.2d 469 (Alaska 1977).

35. State v. Glass, 583 P.2d 872 (Alaska 1978).

36. HAW. CONST. art. I, § 6. Section 7 deals with searches and seizures.

37. State v. Kam, 748 P.2d 372, 377 (Haw. 1988).

38. State v. Lester, 649 P.2d 346, 353 (Haw. 1982).

39. MONT. CONST. art. II, § 10. This provision applies only to state action. *See* State v. Long, 700 P.2d 153 (Mont. 1985).

40. State v. Nelson, 941 P.2d 441, 448 (Mont. 1999); *see also* Hulse v. State, 961 P.2d 75 (Mont. 1998); Gryczan v. State, 942 P.2d 112 (Mont. 1997); State v. Dolan, 940 P.2d 436 (Mont. 1997).

41. *Nelson*, 941 P.2d at 450; *cf.* United States v. Miller, 425 U.S. 435 (1976) (holding that the Fourth Amendment offers no protection against a subpoena to a bank for a customer's financial records).

42. FLA. CONST. art. I, § 23.

43. Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985).

44. Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998); Beagle v. Beagle, 678 So. 2d 1271 (Fla 1996); S.G v. C.S.G., 726 So. 2d 806 (Fla. Ct. App. 1999).

45. ARIZ. REV. STAT. ANN. §§ 13-2301(E), 13-2316 (2000).

46. FLA. STAT. ch. 815.01–815.07 (1999).

47. ALA. CODE §§ 13A-8-100 to 13A-8-103 (2000); ALASKA STAT. §§ 11.46.200(a)(3) 11.46.484(a)(5), 11.46.740, 11.46.985, 11.46.990 (2000); ARIZ. REV. STAT. ANN. §§ 13-2301(E), 13-2316 (2000); ARK. CODE ANN. §§ 5-41-101 to 5-41-108 (1999); CAL. PENAL CODE § 502 (2000); COLO. REV. STAT. §§ 18-5.5-101 to 18-5.5-102 (1999); CONN. GEN. STAT. §§ 53a-250 to 53a-261 (1999); DEL. CODE ANN. tit. 11, §§ 931-939 (1999); FLA. STAT. ch. 815.01 to 815.07 (1999); GA CODE ANN. §§ 16-9-90 to 16-9-94 (1999); HAW. REV. STAT. §§ 708-890 to 708-893 (1999); IDAHO CODE §§ 18-2201 to 18-2202, 26-1220 (1999); 720 ILL. COMP. STAT. 5/16D-1 to 5/16D-7 (2000); IND. CODE §§ 35-43-1-4, 35-43-2-3 (2000); IOWA CODE §§ 716A.1 to 716A.16 (1999); KAN. STAT ANN. § 21-3755 (1999); KY. REV. STAT. ANN. §§ 434.840 to 434.860 (1998); LA. REV. STAT. ANN §§ 14:73.1 to 14:73.5 (2000); ME. REV. STAT. ANN. tit. 17-A, §§ 431 to 433 (1999); MD. ANN. CODE art. 27, § 146 (1999); MASS. GEN. LAWS ANN. ch. 266, §§ 30, 33A, 120F (2000); MICH. COMP. LAWS ANN. §§ 752.791 to 752.797 (1999); MINN. STAT. §§ 609.87 TO 609.894 (1999); MISS. CODE ANN §§ 97-45-1 TO 97-45-13 (2000); MO. ANN. STAT. §§ 569.093 to 569.099 (1999); MONT. CODE ANN. §§ 45-2-101, 45-6-310 TO 45-6-311 (1999); NEB. REV. STAT. §§ 28-1343 TO 28-1348 (2000); NEV. REV. STAT. §§ 205.473 TO 205.513 (2000); N.H. REV. STAT. ANN. §§ 638:16 TO 638:19 (1999); N.J. REV. STAT. §§ 2C:20-23 TO 2C:20-34 (2000); N.M. STAT. ANN. §§ 30-45-1 TO 30-45-7 (2000); N.Y. PENAL LAW §§ 156.00 TO 156.50 (1999); N.C. GEN. STAT. §§ 14-453 TO 14-457 (1999); N.D. CENT CODE §§ 12.1-06.1-01, 12.1-06.1-08 (2000); OHIO REV. CODE ANN. §§ 2913.01, 2913.03(C), 2913.04 (Anderson 2000); OKLA. STAT. tit. 21, §§ 1951-1958 (1999); OR. REV. STAT. § 164.377 (1997); 18 PA. CONS. STAT. § 3933 (1999); R.I. GEN. LAWS §§ 11-52-1 TO 11-52-8 (2000); S.C. CODE ANN. §§ 16-16-10 to 16-16-40 (1999); S.D. CODIFIED LAWS §§ 43-43B-1 to 43-43B-8 (2000); TENN CODE ANN. §§ 39-14-601 to 39-14-603 (1999); TEX. PENAL CODE ANN. §§ 33.01 to 33.04 (2000) UTAH CODE ANN. §§ 76-6-701 to 76-6-705 (1999); VT. STAT. ANN. tit. 13, §§ 4101 to 4107 (2000) VA. CODE ANN. §§ 18.2-152.2 to 18.2-152.14 (2000); WASH. REV. CODE §§ 9.26A.100, 9A.52.010 9A.52.110 to 9A.52.130 (2000); W. VA. CODE §§ 61-3C-1 to 61-3C-21 (2000); WIS. STAT. § 943.70 (1999); WYO. STAT. ANN. §§ 6-3-501 to 6-3-505 (2000).

48. *See* statutes cited, *supra* note 47.

II. COMPUTER CRIME LEGISLATION

In 1978, Arizona[45] and Florida[46] passed the first "computer crime" bills. Since then, every state has enacted criminal legislation addressing computers.[47] Most states have modified existing definitions to close loopholes and have created new crimes, such as computer trespass, computer tampering, misuse of computer system information, and computer invasion of privacy.[48] The crime of computer invasion of privacy may be generally described as the use of a computer to view information without authority. For example, a person may use a computer