

# INFORMATION PRIVACY LAW

Georgetown University Law Center  
Spring 2016

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## DESCRIPTION

This course examines information privacy, an individual's right to control his or her personal information held by others. The aim of the course is to understand how courts and Congress seek to protect information privacy as new technologies and institutional practices emerge. The course traces the origins of the right to information privacy in American law through Constitutional law, tort law, and modern statutory law. Case studies of landmark privacy legislation illustrate how expectations of privacy are translated into legal frameworks. The course looks at recent controversies involving domestic surveillance, identification systems, social networking sites, video surveillance, DNA databases, and airport body scanners. The course also considers the impact of the European privacy directive, the growth of the Internet, and the availability of cryptography and other Privacy Enhancing Technologies on the future of privacy law in the United States.

## A NOTE ABOUT THE 2016 CLASS

This year we are launching a new casebook, ALLEN & ROTENBERG, PRIVACY, LAW AND SOCIETY (West 2016). Most of the assignments will be found in the casebook. The current syllabus and additional course materials (including past exams) will be found at [www.privacylawandsociety.org](http://www.privacylawandsociety.org).

We also discuss articles from PRIVACY IN THE MODERN AGE: THE SEARCH FOR SOLUTIONS (THE NEW PRESS 2015). And you may find interesting, though it is not required, BRUCE SCHNEIER, DAVID AND GOLIATH (2015).

The Supreme Court has provided an excellent case for us to study this semester. *Utah v. Streiff*, No. 14-1373. The oral argument will be held February 22, 2016. Details to follow.

And if you are at Georgetown University Law Center taking a class on Information Privacy Law, you should learn more about the [Georgetown Law Center on Privacy and Technology](#). Finally, real privacy experts say “Fair Information Practices” not “Fair Information Practice Principles.” These things matter.

## LOGISTICS

Information Privacy Law meets Wednesday evenings, 5:45 p.m. to 7:45 p.m. in Hotung1000. There is no class Wednesday, February 17 (faculty retreat) or Wednesday, March 9 (spring break). The last class is Wednesday, April 27. Information Privacy Law is a two-credit seminar. The exam is scheduled for May 11, 2016. There is no paper

option. To contact Professor Rotenberg, send email to [rotenberg@epic.org](mailto:rotenberg@epic.org) or call 202-483-1140 x106. To contact Professor Barnes, send email to [barnes@epic.org](mailto:barnes@epic.org) or call 202-483-1140 x107.

Grading is based on the final exam, class attendance, and class participation. If you are unable to attend a class, please let us know in advance. There is no writing assignment this year.

## WHAT'S IMPORTANT

Here are ten concepts you should understand after taking this class:

- Privacy law - the major decisions, statutes, and international frameworks
- The role of Fair Information Practices in shaping modern privacy law
- The “reasonable expectation of privacy” test and its various applications
- How privacy concerns are translated into legal claims
- The significance of the Brandeis dissent in *Olmstead*
- The various institutional actors in the development of privacy law - judges, regulators, lawyers, legislators, advocates, technologists
- The basic elements of a privacy statute
- How to assess the privacy implications of new business practices and new government practices
- Technology as both a threat and an aid to modern privacy protection
- The many dimensions of privacy (physical privacy versus informational privacy) and the paradoxes of privacy (privacy and transparency, privacy and the First Amendment)

## Week 1: Introduction to Privacy Law (January 20)

### *Topics*

- Administration –
  - Class objectives
  - Meeting time and place
  - Final exam
  - [PrivacyLawandSociety.org](http://PrivacyLawandSociety.org) website
- Defining privacy
- The structure and significance of the Brandeis Warren article
- The response in the states
- The role of the courts and the legislature in defining the scope of the right to privacy

### *Assignment*

#### PRIVACY LAW AND SOCIETY

- An Introduction to Privacy Law, 1-15

- Before the Four “Right to Privacy” Torts, 15-17
- *Manola v. Stevens* – Modesty and Autonomy, 23-24
- Godkin, The Right of the Citizen to His Reputation, 24-25
- Brandeis and Warren, “The Right to Privacy” (1890), 25-32
- Why Then? Privacy and History, 35-37
- Cameras, Telegrams and Post Cards, 37-38
- *Roberson v. Rochester Folding Box*, 41-42
- A Legislative Reply to Roberson: N.Y. Civil Rights Law Sections 50 and 51, 42
- *Pavesich v. New England Life*, 42-45
- The Rhetoric of Freedom and Slavery, 45-46
- Four Privacy Torts, 48
- Allen, Privacy Torts, 48-49
- Prosser, ALI, 49-50

#### PRIVACY IN THE MODERN AGE: THE SEARCH FOR SOLUTIONS

Pasquale, “Privacy, Autonomy, and Internet Platforms,” 165-67

Citron, “Protecting Sexual Privacy in the Information Age,” 46-54

#### Week 2: Common Law: The Privacy Torts (January 27)

##### *Topics*

- The impact of the Prosser Restatement
- The Intrusion Tort
- The Publication of Private Facts Tort
- The False Light Tort
- The Appropriations / Right to Publicity Tort
- The significance of “black letter” privacy law

##### *Assignment*

#### PRIVACY LAW AND SOCIETY

- Mastering the Doctrine, 51-52
- Intrusion Upon Seclusion, § 652B, 52
- *Hamberger v. Eastman*, 52-54
- *Boring v. Google*, 54-56
- *Boring v. Google* on Appeal, 56-57
- Publicity Given to Private Life, § 652D, 125
- *Melvin v. Reid*, 125-27
- *Sidis v. F.R.* 127-28
- False Light Tort, §652E, 160
- *Lake v. Walmart*, 169-70
- The Appropriation Tort, §652C, 179

- *Castro v. NYT TV*, 180-81
- NY Privacy Statute, 190-91
- *Time v. Hill*, 191-92
- California Right to Publicity, 220-21
- *Midler v. Ford Motor Co.*, 221-22

Week 3: Privacy, the First Amendment, Anonymity, and Sensitive Data (February 3)

*Topics*

- Anonymous speech
- Freedom of express and privacy revisited
- Compelled disclosure of identity as a privacy claim
- Publication of SSNs as Political speech

*Assignment*

PRIVACY LAW AND SOCIETY

- *NAACP v. Alabama*, 314-16
- Legacy of NAACP, 316-17
- *IMS v. Sorrell*, 335-36
- *Doe v. Reed*, 337-41
- *McIntyre v. Ohio*, 342-48
- *Watchtower Bible*, 348-54
- *Hibel v. Sixth Judicial District*, 530-35, 573-74
- *Ostergren v. Cuccinelli*, 333-34
- Richards, Intellectual Property, 361-63
- *Stanley v. Georgia*, 363-66
- “Intellectual Privacy,” 366-67

PRIVACY IN THE MODERN AGE: THE SEARCH FOR SOLUTIONS

Lewis, “Anonymity and Reason,” 104-11

Week 4: Privacy and the Fourth Amendment (February 10)

*Topics*

- The text of the Fourth Amendment
- The significance of the Brandeis dissent in *Olmstead*
- The Reasonable Expectation of Privacy (“REOP”) Test
- The application of REOP to new investigative techniques
- The Grand Synthesis: Reconciling property-based and REOP-based views of the Fourth Amendment

*Assignment*

PRIVACY LAW AND SOCIETY

- The Fourth Amendment, 396
- *Olmstead v. US* (U.S. 1928), 396-403
- *Katz v. US* (U.S. 1967), 406-9
- *Note: Berger v. New York* (U.S. 1967), 409-10
- *Smith v. Maryland*, 442 U.S. 735 (1979)
  - (See Sotomayor concurrence in *Jones*)
- *Kyllo v. US* (U.S. 2001), 427-29
- *US v. Jones* (U.S. 2012), 435-43
- *Florida v. Jardines* (U.S. 2013), 429-35
- *Riley v. California* (U.S. 2014), 443-51

No classes (Feb 17) Faculty retreat

Feb 22 – Supreme Court argument in *Utah v. Strieff*

Week 5 *Utah v. Strieff* (February 24)

*Topics*

- Emerging privacy issues
- Fourth Amendment
- Supreme Court litigation
- Role of amicus

*Assignment:*

- Visit Supreme Court website – No. 14-1373 – What is the “Question Presented”?
- Read opinion below (all)
- Read *Utah* brief (A-M)
- Read *Strieff* brief (N-Z)
- Visit EPIC Web Site – “*Utah v. Strieff*” – What is EPIC’s main concern?

PRIVACY IN THE MODERN AGE

Rotenberg, “EPIC: The First Twenty Years,” 9-10

Week 6 Federal Wiretap Law (March 2)

*Topics*

- Communications Act of 1934, Section 605
- "Title III" of 1968
- Foreign Intelligence Surveillance Act of 1978 ("FISA")
- Electronic Communications Privacy Act of 1986 ("ECPA")
- NSLs, Video Surveillance, Crypto

*Assignment*

PRIVACY LAW AND SOCIETY

- *Surveillance Limiting Statutes, 1101-04*
- *Wiretap Reports, 1171-72, 1240-41*
- *Clapper v. Amnesty International* (U.S. 2013), 1256-65
- Note: Challenges to Section 215 (*In re EPIC* (U.S. 2013) and
- *Klayman v. Obama* (D.D.C. 2013), 1274-75
- *ACLU v. Clapper* (S.D.N.Y. 2013), 1265-74
- Note: NSA Acquisition of Telephone Call and Subscriber Information (*In re NSL* (N.D. Cal. 2013)), 1193
- *Joffe v. Google* (9th Cir. 2013), 1163 -71

No class (Mar 9) Spring break

Week 7 Privacy by Statute I: Government Databases (March 16)

*Topics*

- Fair Information Practices
- The Privacy Act of 1974
- The Drivers Privacy Protection Act
- Statutory damages

*Assignment*

PRIVACY LAW AND SOCIETY

- Regulation by Statute, 753-59
- Fair Information Practices, 759-64
- Privacy Act, 766-69
- SSN, 779-780
- *FAA v. Cooper* (U.S. 2012) (Privacy Act damages), 781-85
- *NASA v. Nelson*, 787-89
- Note: Epilogue: Data Security in Government Agencies, 789-90
- *Maracich v. Spears* (U.S. 2013), 840-46

Week 8 Privacy by Statute II: Private Sector Databases (March 23)

### *Topics*

- Third party doctrine
- States reaching different results
- Statutes as solution
- Privacy law as dialogue between the courts and the legislature

### *Assignment*

#### PRIVACY LAW AND SOCIETY

- *U.S. v. Miller* (U.S. 1976), 919-21
- *Burrows v. Superior Court of San Bernadino* (Cal. 1974), 553-54
- Video Privacy Protection Act (18 USC § 2710), 972-73
- *Camfield v. City of Oklahoma* (10<sup>th</sup> Cir. 2001), 976-78
- *Dirkes v. Borough of Runnemede* (N.J. 1996), 978-84
- *Daniel v. Cantrell* (6<sup>th</sup> Cir. 2004), 984-85
- *Rodriguez v. Sony* (9<sup>th</sup> Cir. 2015), 985-91
- Cable Privacy Subscriber provisions (47 U.S.C. § 551), 1082-83
- *In re Netflix*, 996

### Week 9 The Role of the Federal Trade Commission (March 30)

### *Topics*

- Establishment of FTC
- FTC Statutory Authority
- FTC Section 5 UDTP Authority
- FTC investigation process
- FTC v. Wyndham
- Significance of Consumer Privacy Bill of Rights

### *Assignment*

#### PRIVACY LAW AND SOCIETY

- Overview of FTC's Investigative and Law Enforcement Authority, 892-95
- "Facebook Settles FTC Charges That it Deceived Consumers by Failing to Keep Privacy Promises" (Nov. 29, 2011), 895-897
- "FTC Charges Deceptive Privacy Practices in Google's Rollout of Its Buzz Social Network" (Mar. 30, 2011), 897-899
- *FTC v. Wyndham* (3<sup>rd</sup> Cir. 2015), 903-914
- FTC and Fair Information Practice, 914-16

## Week 10 Int'l Privacy Law I: Classic Frameworks (April 6)

### *Topics*

- Development of privacy as a fundamental human right
- Privacy frameworks
- Convergence and divergence among national laws
- Guidelines and law

### *Assignment*

#### PRIVACY LAW AND SOCIETY

- Introduction, 1297-1300
- UDHR, Article 12, 1300
- ICCPR, Article 17, 1302
- ECHR, Article 8, 1312
- International Privacy Frameworks 1387-88
- OECD Privacy Guidelines, 1388 -91
- Council of Europe Convention, 1391-95
- UN Guidelines (1990), 1395-97
- EU Data Directive, 1397-1400
- Note: Rotenberg, "On International Privacy: A Path Forward for the US and Europe," 1560-61

#### PRIVACY IN THE MODERN AGE

Anderson, "What Goes Around Comes Around," 27-31  
Davies, "Privacy Opportunities and Challenges with Europe's New  
Data Protection Regime," 55-60

## Week 11 Int'l Privacy Law II: Emerging Law and Institutions / Technology and Privacy (April 13)

### *Topics*

- Impact on global practices
- Data Protection Agencies
- Recent caselaw of the CJEU
- GDPR

### *Assignment*

#### PRIVACY LAW AND SOCIETY



- European Charter on Fundamental Rights, Article 7 and 8, 1386-87
- *Google v. Spain* (CJEU 2014), 1520-50
- Application of *Google v. Spain*, 1550-54
- *Schrems v. Data Protection Commissioner* (CJEU 2015), 1449-85
- General Data Protection Regulation, 1561-62
- Rotenberg & Jacobs, “Updating the Law of Information Privacy: The New Framework of the European Union,” *Harvard Journal of Law and Public Policy* (Spring 2013), 1557-60
- Visit website of Article 29 Working Party
- Madrid Declaration, 1575-77

#### PRIVACY IN THE MODERN AGE

Irion, “Accountability Unchained: Bulk Data Retention, Preemptive Surveillance, and Transatlantic Data Protection,” 78-92

#### Week 12 Aerial Surveillance, Drones, and the Future of Privacy (April 20)

##### *Topics*

- Describing challenges
- Defining privacy
- Examining role of institutions
- Translating concerns into legal outcomes

##### *Assignment*

#### PRIVACY LAW AND SOCIETY

- Obama Executive Order on Drones (Feb. 15, 2015), 1285-90
- Privacy Petition to FAA (Feb. 12, 2012), 1290-91
- Note: *EPIC v. FAA*, Drones and Privacy Rules, 1291
- *EPIC v. FAA* (D.C. Cir 2016) (maybe)

#### Week 13: Student Privacy (April 20)

##### *Topics*

- Family Educational Rights and Privacy Act of 1974
- Student Privacy Bill of Rights
- Future of Student Data

##### *Assignment*

#### PRIVACY LAW AND SOCIETY

- School Records -- FERPA (1974), 850
- Family Educational Rights and Privacy Act (FERPA), 850-51
- *Owasso Indep. Sch. Dist. No. I-011 v. Falvo* (U.S. 2002), 852-55
- Note: The Student Privacy Bill of Rights, 856
- *Gonzaga Univ. v. Doe* (U.S. 2002), 857-59

#### PRIVACY IN THE MODERN AGE

Borgman, "New Models of Privacy for the University," 32-40

Molina, "Protecting Data Privacy in Education," 138-45

(Version: February 10, 2016)