

INFORMATION PRIVACY LAW

Georgetown Law
Spring 2018

Prof. Marc Rotenberg
Prof. Alan Butler

DESCRIPTION

This course examines the law of 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 cell phone tracking, drones, social media monitoring, and "always on" devices. 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 2018 CLASS

We recently published a new casebook, ALLEN & ROTENBERG, PRIVACY, LAW AND SOCIETY (West 2016), and we have also published a comprehensive PRIVACY LAW SOURCEBOOK (EPIC 2016). Most of the assignments will be found in the Casebook and the Sourcebook. The current syllabus and additional course materials (including past exams) can be found at www.privacylawandsociety.org.

We will also discuss articles from PRIVACY IN THE MODERN AGE: THE SEARCH FOR SOLUTIONS (THE NEW PRESS 2015). You may also find interesting, though it is not required, CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION (2016).

The Supreme Court has provided several interesting cases for us to study this semester: [Carpenter v. United States](#), No. 16-402, [Byrd v. United States](#), No. 16-1371, [Dahda v. United States](#), 17-43, and [United States v. Microsoft](#), No. 17-2. Oral argument in *Dahda* will be held on Wednesday, February 21st, and oral argument will be held in *United States v. Microsoft* on Tuesday, February 27th. There will also be an oral argument (presented by Professor Butler) in EPIC's case against the [Federal Aviation Administration](#) on Thursday, January 25th. More 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 Hotung 1000. There is no class Wednesday, February 21st (faculty retreat) or Wednesday, March 14th (spring break). The last class is Wednesday, April 25th. Information Privacy Law is a two-credit seminar. The final will be a take-home exam. There is no paper option. To contact Professor Rotenberg, send email to rotenberg@epic.org or call 202-483-1140 x106. To contact Professor Butler, send email to butler@epic.org or call 202-483-1140 x103.

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. Students may not withdraw from this class after the add/drop period ends without the permission of the professor.

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 17th)

Topics

- Administration –
 - Class objectives
 - Meeting time and place
 - Final exam
 - 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 24th)

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

(optional additions: [two posts](#) on *Bollea v. Gawker* . . . and a [third](#))

Week 3: Privacy and the Fourth Amendment (January 31th)

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. United States* (U.S. 1928), 396–403
- *Katz v. United States* (U.S. 1967), 406–9
- *Note: Berger v. New York* (U.S. 1967), 409–10
- *Smith v. Maryland*, 442 U.S. 735 (1979)
 - <https://law.resource.org/pub/us/case/reporter/US/442/442.US.735.78-5374.html>
 - Note dissents by Justices Stewart and Marshall
- *Kyllo v. United States* (U.S. 2001), 427–29
- *United States v. Jones* (U.S. 2012), 435–43
 - Note concurring opinions by Justices Sotomayor and Alito
- *Florida v. Jardines* (U.S. 2013), 429–35
 - Note concurring opinion by Justice Kagan

- *Riley v. California* (U.S. 2014), 443–51

Week 4: *Carpenter v. United States* (February 7th)

Topics

- Emerging privacy issues
- Cell phones and location tracking
- Death of the Third Party doctrine?
- Supreme Court litigation
- Role of amicus

Assignment:

- Visit Supreme Court website – No. 16-402 – What is the “Question Presented”?
- Read opinions below (all)
- Read *Carpenter* briefs (A-M)
- Read *United States* brief (N-Z)
- Visit EPIC Web Site – “Carpenter v. United States” – What is EPIC’s interest?
- Consider — If you were clerking for the Chief Justice, what rule would you propose the Court adopt in this case?

PRIVACY IN THE MODERN AGE

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

Week 5: Privacy, the First Amendment, Anonymity, and Sensitive Data (February 14th)

Topics

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

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
- *Hiibel 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
- *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017)
 - https://www.supremecourt.gov/opinions/16pdf/15-1194_08l1.pdf

PRIVACY IN THE MODERN AGE: THE SEARCH FOR SOLUTIONS

Lewis, “Anonymity and Reason,” 104–11

No classes (Feb 22nd) Faculty retreat

Week 6 Federal Wiretap Law (February 28th)

Topics

- Communications Act of 1934, Section 605
- The Wiretap Act (Title III of the 1968 Omnibus Crime Act)
 - Prohibitions on interception, disclosure, and use
 - Rules for government access
- Electronic Communications Privacy Act of 1986 (“ECPA”)
 - Prohibitions on access and disclosure
 - Rules for government access (“(d) orders”, subscriber info, PR/TT, NSLs)
- Foreign Intelligence Surveillance Act of 1978 (“FISA”)
 - Scope of the rules (inside vs. outside the U.S.)
 - Traditional FISA vs. new provisions (215, 702, and PR/TT)
- Emerging issues (always on, e-mail scanning, and Stingrays)

Assignment

PRIVACY LAW AND SOCIETY

- *Surveillance Limiting Statutes*, 1101–4
- *Bartnicki v. Vopper* (2001), 1142–49
- *Joffe v. Google* (9th Cir. 2013), 1163–71
- *Wiretap Reports*, 1171–72, 1240–41
- *In re U.S.* (W.D. Tex 2010), 1108–12
- Note: FISA, 1238–39
- The FISA and the FISC, 1239
- DOJ, Contrasting the Wiretap Act (Title III/ECPS Title I) with FISA, 1239–40
- *In re Sealed Case*, 310 F.3d 717 (FISC 2002), 1242–53

- Challenges to Section 215 (*ACLU v. Clapper* (2nd Cir. 2015), *In re EPIC* (2013), *Klayman v. Obama* (D.D.C. 2013)), 1265–75
- Note: NSA Acquisition of Telephone Call and Subscriber Information (*In re NSL* (N.D. Cal. 2013)), 1193

THE PRIVACY LAW SOURCEBOOK 2016

- Communications Act 47 U.S.C. § 605 – pp 36–40
- Wiretap Act (Title III)
 - Congressional findings – pg 259
 - 18 U.S.C. § 2511 – pp 262–268
- ECPA
 - Unlawful access 18 U.S.C. § 2701 – pp 285–86
 - Voluntary disclosure 18 U.S.C. § 2702 – pp 286–88
 - Required disclosure 18 U.S.C. § 2703 – pp 288–92
 - Pen register definition 18 U.S.C. § 3127 – 304–5
- FISA
 - Summary – pg 164
 - Definitions 50 U.S.C. § 1801 – pp 165–69
 - Section 215 (50 U.S.C. § 1861) – pp 212–21

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

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, 779–80
- *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

No class (Mar 14th) Spring break

Week 8 Privacy by Statute II: Private Sector Databases (March 21st)

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

- *United States 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* (10th Cir. 2001), 976–78
- *Dirkes v. Borough of Runnemede* (N.J. 1996), 978–84
- *Daniel v. Cantrell* (6th Cir. 2004), 984–85
- *Rodriguez v. Sony* (9th Cir. 2015), 985–91
- Cable Privacy Subscriber provisions (47 U.S.C. § 551), 1082–83
- *In re Netflix*, 996–1004

Week 9 The Role of the Federal Trade Commission (March 28th)

Topics

- Establishment of FTC
- FTC Statutory Authority
- FTC Section 5 UDTP Authority
- FTC investigation process
- *FTC v. Wyndham, LabMD*
- The FCC and other relevant agencies

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), 895–97
- “FTC Charges Deceptive Privacy Practices in Google’s Rollout of Its Buzz Social Network” (Mar. 30, 2011), 897–99
- *FTC v. Wyndham* (3rd Cir. 2015), 903–14
- Note: The FTC’S Authority to Enforce Fair Information Practices, 914–16
- Telecommunications Act of 1996 (CPNI), 1084

- U.S. West v. FCC (10th Cir. 1999), 1084–89
- NCTA v. FCC (D.C. Cir. 2011), 1089–95

Week 10 Int'l Privacy Law I: Classic Frameworks (April 4th)

Topics

- Development of privacy as a fundamental human right
- Privacy frameworks
- Convergence and divergence among national laws
- Guidelines and law
- (Note that the complete texts of many of many of the legal instruments assigned for this week and next will be found in The Privacy Law Sourcebook.)

Assignment

PRIVACY LAW AND SOCIETY

- Introduction, 1297-1300
- UDHR, Article 12, 1300–02
- 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 11th)

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

THE PRIVACY LAW SOURCEBOOK 2016

- GDPR overview, xxii-xxiv, 666-675

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 19th)

Topics

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

Assignment

PRIVACY LAW AND SOCIETY

- *California v. Ciraolo* (1986), 418–21
- *State v. Davis* (N.M. 2015), 421–26
- 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)
 - FAA final rule on small drone operations
http://www.faa.gov/uas/media/RIN_2120-AJ60_Clean_Signed.pdf

PRIVACY IN THE MODERN AGE

Ryan Calo, “Robot-Sized Gaps in Surveillance Law,” 41–5

Week 13: Emerging Issues: IoT and Always On Devices (April 20)

Topics

- Internet of Things
- Regulation of surreptitious recording (bugging)
- The problem of “always on” devices
- Cybersecurity risks associated with connected devices

Assignment

THE PRIVACY LAW SOURCEBOOK 2016

- Communications Act 47 U.S.C. § 605 – pp 36–40
- Wiretap Act (Title III)
 - 18 U.S.C. § 2511 – pp 262–268
- ECPA
 - Unlawful access 18 U.S.C. § 2701 – pp 285–86
 - Voluntary disclosure 18 U.S.C. § 2702 – pp 286–88
- CalECPA (Cal. Sen. Bill No. 178)
 - https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB178

PRIVACY LAW AND SOCIETY

- Internet of Things, 1291–95
- In re Genesis Toys,
 - <https://epic.org/privacy/kids/EPIC-IPR-FTC-Genesis-Complaint.pdf>
- EPIC, Samsung “SmartTV” Complaint,
 - <https://epic.org/privacy/internet/ftc/samsung/>
- Alan Butler, “Strict Products Liability and the Internet of (Insecure) Things: Should Manufacturers Be Liable to for Harm Caused by Connected Devices?” Mich. J. L. & Reform (2017)
- Bruce Schneier, “Your WiFi-connected thermostat can take down the whole Internet. We need new regulations,” Wash. Post. (Nov. 3, 2016),
 - https://www.washingtonpost.com/posteverything/wp/2016/11/03/your-wifi-connected-thermostat-can-take-down-the-whole-internet-we-need-new-regulations/?utm_term=.7a6889988012

(Version: December 8, 2017)