

The Changing Right to Privacy

Facilitators: Sasha Dudding, Maily Fidler, Tiffany Li
Fall 2018 – Thursdays, 4:30-6:20 p.m.

Course Description

As the world becomes increasingly digitized, privacy has become an issue of vital importance for lawyers, judges, scholars, and policymakers. Recent privacy controversies include the Facebook and Cambridge Analytica data privacy scandal, reports of government surveillance using (possibly faulty) facial recognition technologies, and DNA testing companies selling consumer genetic data to the pharmaceutical industry.

This reading group will pursue advanced study of the changing right to privacy, exploring high-level privacy theories and cutting-edge, topical problems in privacy law. Materials and discussions will incorporate a diverse, interdisciplinary array of privacy perspectives and approaches, with a focus on how conceptions of privacy and identity have changed over time. The goal of this reading group is to encourage students to develop their own nuanced perspectives on privacy law and to provide an opportunity to engage in dialogue on the most pressing privacy issues of today and the future.

This reading group will be offered for one unit of credit (C/F). According to YLS guidelines, members must attend 750 minutes (12.5 hours) to obtain the credit. The reading group will meet for ten sessions, of 110 minutes each, to allow each member to miss up to three meetings if needed. The last session will take place over an informal dinner, location TBA.

To facilitate discussion, participants will be assigned the role of Respondent for one or more class sessions, depending on class size. Each session's Respondent/s will prepare 2-3 points of contention in response to one or more of that session's readings.

Reading List

8/29 The Right to Privacy (78 pgs.)

Julie Cohen, *What Privacy Is For*, 126 Harv. L. Rev. 1904 (2013). (30 pgs.)
<https://harvardlawreview.org/2013/05/what-privacy-is-for/>

Daniel J. Solove, *'I've Got Nothing to Hide' and Other Misunderstandings of Privacy*, San Diego Law Review, Vol. 44 (2007). (28 pgs.) <https://ssrn.com/abstract=998565>

Judith Jarvis Thomson, *The Right to Privacy*, 4 Philosophy & Public Affairs 4 (1975). (20 pgs.)
<https://www.jstor.org/stable/2265075>

Optional:

Alan Moore, *Defining Privacy*, 39 Journal of Social Philosophy 3 (2008). (18 pgs.)
<https://pdfs.semanticscholar.org/490d/55b9f4b806eb6b905272590414d57e4c3975.pdf>

Wade L. Robison, *Privacy and Personal Identity*, Ethics & Behavior 7(3), p. 195-205 (1997). (11 pgs.)
<https://people.rit.edu/wlrgsh/PrivacyandPersonalIdentity.pdf>

9/6 Philosophy of Identity (78 pgs.)

Eric T. Olson, *Personal Identity*, The Stanford Encyclopedia of Philosophy (Summer 2017). (21 pgs.)

<https://plato.stanford.edu/archives/sum2017/entries/identity-personal/>

Derek Parfit, *Personal Identity*, (25 pgs.)

<http://home.sandiego.edu/~babber/metaphysics/readings/Parfit.PersonalIdentity.pdf>

Christine Korsgaard, *Personal identity and the unity of agency: A Kantian response to Parfit*, *Philosophy and Public Affairs* 18 (1989). (32 pgs.)

https://dash.harvard.edu/bitstream/handle/1/3219881/korsgaard_unityofagency.pdf?sequence=2

Optional:

David Shoemaker, *Personal Identity and Ethics*, The Stanford Encyclopedia of Philosophy (Winter 2016).

<https://plato.stanford.edu/archives/win2016/entries/identity-ethics/>

9/13 Legal Origins of Privacy (78 pgs.)

Olmstead v. U.S. (U.S. 1928) – Brandeis dissent (8 pgs.)

<https://www.law.cornell.edu/supremecourt/text/277/438>

Anita L. Allen and Erin Mack, *How Privacy Got Its Gender*, 10 N. Ill. U. L. Rev. 441 (1991). (39 pgs.) http://scholarship.law.upenn.edu/faculty_scholarship/1309

Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harvard Law Review 5 (1890). (28 pgs.)

<http://www.cs.cornell.edu/~shmat/courses/cs5436/warren-brandeis.pdf>

Jeffrey Rosen, *What would privacy expert Louis Brandeis make of the digital age?*, Washington Post, March 20, 2015. (3 pgs.)

<http://wapo.st/1x9GXH7>

Optional:

Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 Arizona Law Review 1 (1979).

<http://law.scu.edu/wp-content/uploads/Privacy.pdf> (39 pgs.)

9/20 Privacy Torts (91 pgs.)

Restatement of the Law, Second, Torts, section 652 (1 pg.)

https://cyber.harvard.edu/privacy/Privacy_R2d_Torts_Sections.htm

Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 Cal. L. Rev. 1805 (2011). (49 pgs.)

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1582949

William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 388-89 (1960) (41 pgs.)

<https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3157>

Optional:

Neil M. Richards, *The Limits of Tort Privacy*, *Journal of Telecommunications and High Technology Law* (2011). (29 pgs.)

<https://pdfs.semanticscholar.org/598f/0ad37d6c30375b32d82e31d46307c011ba6f.pdf>

9/27 Personality Rights (116 pgs.)

Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 *Cal. L. Rev.* 125 (1993), p. 127-227. (101 pgs.)

<https://scholarship.law.berkeley.edu/californialawreview/vol81/iss1/3>

Jennifer E. Rothman, *The Right of Publicity*, p. 30-44 (2018). (15 pgs.)

Optional:

Frank Pasquale, *Reforming the Law of Reputation*, 47 *Loyola U. Chi. L.J.* 515 (2015),

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2727955

Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 *California Law Review* 957 (1989). (54 pgs.)

http://digitalcommons.law.yale.edu/fss_papers/211/

10/4 Fall Recess – No Meeting

10/11 The Penumbra (94 pgs.)

The First & Fourth Amendments (1 pg.)

U.S. v. Jones (U.S. 2012) – Sotomayor concurrence (6 pgs.)

<https://www.law.cornell.edu/supremecourt/text/10-1259>

Carpenter v. U.S. (U.S. 2018) – majority opinion (23 pgs.) and Gorsuch dissent (21 pgs.)

https://www.supremecourt.gov/opinions/17pdf/16-402_h315.pdf

Alex Abdo, *Why Rely on the Fourth Amendment To Do the Work of the First?*, *Yale Law Journal Forum* (2017). (6 pgs.) <https://www.yalelawjournal.org/forum/why-rely-on-the-fourth-amendment-to-do-the-work-of-the-first>

Margot E. Kaminski, *Regulating Real-World Surveillance*, 90 *Wash. L. Rev.* 1113 (2015). (54 pgs.)

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2681128

Matthew Noah Smith, *An iPhone Is an Extension of the Mind*, *Slate*, February 29, 2016. (5 pgs.)

http://www.slate.com/articles/technology/technology/2016/02/apple_and_the_fbi_think_iph_ones_are_safes_a_philosopher_explains_what_they.single.html

Bruce Schneier, *Security vs. Privacy*, Schneier on Security (2008). (1 pg.)
https://www.schneier.com/blog/archives/2008/01/security_vs_pri.html

Optional:

David C. Gray and Danielle Keats Citron, *The Right to Quantitative Privacy*, 98 Minnesota Law Review 62 (2013). (83 pgs.)
https://digitalcommons.law.umaryland.edu/fac_pubs/1396/

Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 Harvard Law Review 476 (2011). (68 pgs.)
https://harvardlawreview.org/wp-content/uploads/pdfs/vol125_kerr.pdf

Relevant Cases – Optional:

Griswold v. Connecticut, 381 U.S. 479 (1965)
Katz v. U.S. (U.S. 1967)
Smith v. Maryland, 442 U.S. 735 (1979)
Kyllo v. U.S. (U.S. 2001)
Florida v. Jardines (U.S. 2013)
Riley v. California (U.S. 2014)

10/18 Comparative Perspectives (83 pgs.)

Maggie Fick and Alexis Akwagyiram, *In Africa, scant data protection leaves internet users exposed*, Reuters, April 4, 2018. (5 pgs.) <https://www.reuters.com/article/us-facebook-africa/in-africa-scant-data-protection-leaves-internet-users-exposed-idUSKCN1HB1SZ>

Mailyn Fidler, *Cyber Diplomacy with Africa: Lessons From the African Cybersecurity Convention*, Council on Foreign Relations, July 7, 2016. (4 pgs.)
<https://www.cfr.org/blog/cyber-diplomacy-africa-lessons-african-cybersecurity-convention>

Tiffany Li, *China's influence on digital privacy could be global*, Washington Post, August 7, 2018. (3 pgs.)
https://www.washingtonpost.com/news/theworldpost/wp/2018/08/07/china-privacy/?utm_term=.fdf3b10b0f8f

James Q. Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 Y.L.J. 1151 (2004). (71 pgs.)
https://www.yalelawjournal.org/pdf/246_ftn7jo8w.pdf

Optional:

Graham Greenleaf, *Privacy Laws in Asia – Context and History*, Asian Data Privacy Laws – Trade and Human Rights Perspectives, Cambridge University Press (2014) (36 pgs.)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2514972

Marc Rotenberg, *On International Privacy: A Path Forward for the US and Europe*, Harvard International Review (2014)
<http://hir.harvard.edu/article/?a=5815>

Laws & “Laws” – Optional:

Council of Europe Convention 108
European Charter on Fundamental Rights, Article 7 and 8
UDHR, Article 12
OECD Privacy Guidelines
E.U. General Data Protection Regulation

10/25 Privacy in Public (78 pgs.)

Julie Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 University of Chicago Law Review 1 (2008). (19 pgs.)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1012068

Luciano Floridi, *Four challenges for a theory of information privacy*, 8 Ethics and Information Technology 3 (2006). (4 pgs.) <https://philpapers.org/rec/FLOFCF>

April Glaser, *The Next Frontier of Police Surveillance Is Drones*, Slate, June 7, 2018. (6 pgs.) <https://slate.com/technology/2018/06/axon-and-dji-are-teaming-up-to-make-surveillance-drones-and-the-possibilities-are-frightening.html>

Sapna Maheshwari, *Hey, Alexa, What Can You Hear? And What Will You Do With It?*, New York Times, March 31, 2018. (6 pgs.)

<https://www.nytimes.com/2018/03/31/business/media/amazon-google-privacy-digital-assistants.html>

Helen Nissenbaum, *Privacy as Contextual Integrity*, Washington Law Review (2004). (39 pgs.)

<https://crypto.stanford.edu/portia/papers/RevnissenbaumDTP31.pdf>

Mariarosaria Taddeo, *Data Philanthropy and Individual Rights*, 27 Minds and Machines 1 (2017) (5 pgs.)

<https://link.springer.com/article/10.1007%2Fs11023-017-9429-2>

Optional:

David Brin, *The Transparent Society*, Wired (1996). (17 pgs.)

<https://www.wired.com/1996/12/fftransparent/>

Scott Skinner-Thompson, *Performative Privacy*, 50 UC Davis Law Review 4 (2017). (69 pgs.)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929030

Sherry Turkle, *Who Am We?*, Wired, January 1, 1996. (20 pgs.)

<https://www.wired.com/1996/01/turkle-2/>

11/1 The Digital Self (95 pgs.)

Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 Colum. J. Gender & L. 224 (2011). (38 pgs.)

https://repository.law.miami.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1304&context=fac_articles

Jonathon W. Penney, *Privacy and the New Virtualism*, 10 Yale Journal of Law and Technology 1 (2008). (57 pgs.)

<http://digitalcommons.law.yale.edu/yjolt/vol10/iss1/6>

Optional:

James Grimmelman, *First-Class Objects*, 9 J. Telecomm. & High-Tech. L. 421 (2011). (15 pgs.)

<https://james.grimmelman.net/files/articles/first-class-objects.pdf>

Mark A. Lemley and Eugene Volokh, *Law, Virtual Reality, and Augmented Reality*, 166 University of Pennsylvania Law Review (Forthcoming 2018), p. 1-46, 63-74. (57 pgs.)

<http://www2.law.ucla.edu/volokh/vr.pdf>

Marya Schechtman, *The Story of My (Second) Life: Virtual Worlds and Narrative Identity*, 25 Philosophy & Technology 3 (2012). (15 pgs.)

<https://link.springer.com/article/10.1007%2Fs13347-012-0062-y>

11/8 Consumer Privacy (99 pgs.)

Jack Balkin, *Information Fiduciaries and the First Amendment*, 49 UC Davis Law Review 4 (2016). (52 pgs.) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2675270

Cecilia Kang, *Tech Industry Pursues a Federal Privacy Law, on Its Own Terms Image*, New York Times, August 26, 2018. (8 pgs.)

<https://www.nytimes.com/2018/08/26/technology/tech-industry-federal-privacy-law.html>

Mason Marks and Tiffany Li, *DNA Donors Must Demand Stronger Privacy Protection*, Harvard Law Bill of Health, June 14, 2018. (3 pgs.)

<http://blogs.harvard.edu/billofhealth/2018/06/14/dna-donors-must-demand-stronger-privacy-protection/>

Maureen K. Ohlhausen and Alexander Okuliar, *Competition, Consumer Protection, and the Right (Approach) to Privacy*, 80 Antitrust Law Journal 1 (2015). (36 pgs.)

<https://www.ftc.gov/public-statements/2015/07/competition-consumer-protection-right-approach-privacy>

Optional:

Daisuke Wakabayashi, *California Passes Sweeping Law to Protect Online Privacy*, New York Times, June 28, 2018. (5 pgs.)

<https://www.nytimes.com/2018/06/28/technology/california-online-privacy-law.html>

Tiffany Li, *Who Is to Blame for the Cambridge Analytica – Facebook Scandal?*, Slate, March 19, 2018. (5 pgs.) <https://slate.com/technology/2018/03/who-is-to-blame-for-the-cambridge-analytica-facebook-scandal.html>