

No Place to Hide:

Technology, Social Media, Surveillance & Privacy Law in Democratic Society

Government 367

Skidmore College

Fall Term 2011

Time: Tuesday & Thursday, 6:30 PM–7:50 PM

Room: Tisch Learning Center, Room 205

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Office: PMH 208

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Office Hours: 2:00–4:00 PM Tue. & Thu.,
or by appointment.

“Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.” —*Justice Louis Brandeis*

Tentative Syllabus

Course Description:

This seminar considers the historical foundation and current status of information privacy law and policy in the United States and international contexts. We will explore a variety of issues concerning information privacy (*i.e.*, the gathering, use and protection of information about individuals, groups and organizations) as well as other subjects related to the influence, impact and interrelationship between technology, the law and modern society. Topics will include the right of access to information, the free flow and use of information, the value of personal information, commercial uses of personal information (such as data mining and other marketing techniques), citizens' access to government, and the roles of individuals, government and the private sector in protecting information privacy in the modern, post-9/11 information age. Specific topics and materials may be adjusted according to current events and students' experience with and interests in information privacy law.

The course will trace the origins information privacy in American law, through Constitutional law, tort law, and modern statutory law. Case studies of landmark information privacy decisions, legislation and regulations illustrate how expectations of privacy are translated into legal frameworks. The course examines recent controversies involving workplace surveillance, health care records, direct marketing, and the use (and misuse) of the Social Security number. The course also considers the impact of the European privacy directive, the growth of the Internet, access to governmental information (FOIA), the recommendations of the 9/11 Commission (and the response of Congress), and the availability of cryptography on the future of privacy law.

As new technologies are constantly developed, they increasingly raise privacy and other legal concerns—the Internet, GPS wireless location-based services, and RFID chips are just a few examples. In addition, the post-9/11 focus on national security and fighting terrorism has brought with it new concerns about governmental intrusions on personal privacy. This course provides an in-depth look into privacy, information law, and related technologies as well as self-regulatory efforts. Students will study information and privacy law from philosophical, historical, legal, policy, and technical perspectives.

Class reading assignments will include analysis of statutes, regulations and cases as well as current articles and other materials involving technology and information privacy issues. Students will learn to read and analyze court decisions and some administrative regulations concerning these topics. In this discussion-based seminar, students will develop advocacy skills in classroom debate, while individual in-class presentations and final research papers will allow students to explore particular related topics in greater depth.

Texts & Materials:

Three books are required for all students:

- Daniel J. Solove & Paul M. Schwartz, *Information Privacy Law* (Third Edition, Wolters Kluwer Law & Business, 2009, ISBN# 9780735576414),
- Robert O’Harrow, *No Place to Hide* (Free Press, 2006, ISBN# 9780743287050)
- No Place to Hide *2011 Supplement* (this will be handed out in class or posted on Blackboard)

Additional required reading materials will consist of newspaper articles, essays, law review articles, book chapters, statutes, regulations, cases and other excerpted materials which will be assigned and made available to the class in advance of their discussion, either by handout and/or on Blackboard 9.1 (in Adobe PDF format) at <http://learn.skidmore.edu> (NOT blackboard.skidmore.edu).

Other highly recommended, but not required, titles (many on open reserve in the Library) for this course:

Katherine Albrecht & Liz McIntyre, *Spychips* (Thomas Nelson, 2006)
Ellen Alderman & Caroline Kennedy, *The Right to Privacy* (Knopf, 1995)
Philip E. Agre & Marc Rotenberg, eds., *Technology and Privacy: The New Landscape* (MIT Press, 1997)
John Bennett, *Digital Umbrella* (Brown Walker Press, 2004)
David Brin, *The Transparent Society* (Addison-Wesley, 1998)
Matthew Brzeziuski, *Fortress America* (Bantam, 2004)
Fred H. Cate, *Privacy in the Information Age* (Brookings Institution, 1997)
Clay Calvert, *Voyeur Nation* (Westview Press, 2000)
Whitfield Diffie & Susan Landau, *Privacy on the Line* (MIT Press, 1998)
Amitai Etzioni, *The Limits of Privacy* (Basic Books, 1999)
Simson Garfinkel, *Database Nation* (O’Reilly & Associates, 2000)
Simson Garfinkel & Beth Rosenberg, eds., *RFID* (Addison-Wesley, 2006)
Eric J. Gertler, *Prying Eyes* (Random House, 2004)
John Gilliom, *Overseers of the Poor* (U. of Chicago Press, 2001)
Harry Henderson, *Privacy in the Information Age* (2nd Edition, Facts On File, 2006)
Derrick Jensen & George Drafan, *Welcome to the Machine* (Chelsea Green, 2004)
Frederick Lane, *The Naked Employee* (Amacom, 2003)
Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books, 1999)
J.J. Luna, *How To Be Invisible* (St. Martins Press, 2004)
Philip H. Melanson, *Secrecy Wars* (Potomac Books, 2002)
Mark Monmonier, *Spying with Maps* (U. of Chicago Press, 2002)
Christian Parenti, *The Soft Cage* (Basic Books, 2003)
Jeffrey Rosen, *The Naked Crowd* (Random House, 2004)
Mark A. Rothstein, ed., *Genetic Secrets* (Yale University Press, 1997)
Robert Ellis Smith, *Ben Franklin’s Web Site* (Privacy Journal, 2000)
Daniel J. Solove, *Nothing to Hide* (Yale University Press, 2011)
Daniel J. Solove & Paul M. Schwartz, *Privacy Law Fundamentals* (IAPP, 2011)

Course Requirements, Evaluation and Grading:

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| Participation (active participation in class discussions)..... | 20% | NOTE: <u>All</u> elements of the course must be completed in a satisfactory and academically honest manner; failure to do so may result in a failing grade for the course. |
| Response Essays | 20% | |
| Current Event Presentation (in-class) | 10% | |
| Midterm Exam | 20% | |
| Final Paper | 30% | |

Class Participation:

The participation grade in this course will consist of evaluation in these areas: regular & punctual attendance as well as active and informed student participation in classroom discussions. A 300-level, seminar-style course requires the active, informed and regular participation of every student to achieve the seminar objectives. That is, a fundamental requirement of this course is that students will read each assignment fully, *before* coming to class, and will take responsibility to advance each class discussion. Consequently, it is essential that every student have regular, punctual attendance and actively participate in every classroom discussion. Quality and succinctness are valued more highly than quantity. That said, no student should feel hesitant to share an idea, question or comment with the rest of the class. **There are no “wrong” answers in this course (or indeed, this subject), only poorly-supported or incompletely-argued ones.** However, simply voicing an opinion, unsupported by evidence, should be avoided. Instead, tell us *why* you are arguing a particular position, and point us to the sources in our readings and other materials that back your claims. Saying “I would argue...” instead of “I feel that...” adds further strength to your position, one based on debatable ideas, rather than mere personal opinion.

You cannot participate if you are not in class. Being absent on a particular day will result in a “0” participation grade that day. However, merely showing up is insufficient—it is just a prerequisite, as active participation is required. Sports-related absences must be requested, in writing, in advance, and all work must be made up. Some invalid excuses for missing class include: doctor’s appointments (I don’t schedule other appointments during class, neither should you), missing flights or trains, vague “family emergencies” (those family emergencies that are acute enough to involve the Dean’s Office may be valid). In general, documentation is useful, but not always sufficient, for absolution of absences.

I expect you to contact me in advance if you will be unable to attend a particular class.

More than two absences will result in a lower grade.

Response Essays:

Students will write short response essays, as assigned by the instructor, as we complete each course segment/chapter (generally, these are due the Tuesday after a course section’s completion on the Tuesday or Thursday before). Essays will analyze and reflect on the assigned material in light of related issues presented in that and other segments. Essays will not merely summarize the assigned texts.

Current Event Presentations (given in class):

Each student will make an in-class oral presentation (no more than about 15 minutes in length, including Q&A) on a news article related to the course and approved by the instructor at least one week before the presentation. The assignment is comprised of: selecting a unique news article, making it available for classmates (as a paper or electronic document or other resource) in advance, contextualizing the topic in a 7-10 minute presentation, leading a class discussion/Q&A of the article and the subject, and handing in a 1000-word paper on the day of the presentation (no extensions will be granted whatsoever). Creativity in the presentation (e.g. PowerPoint, relevant videos, audience participation, etc.) is greatly appreciated, strongly encouraged and if used appropriately, often the hallmark of a good presentation. Potential topics and the schedule for in-class presentations will be discussed and established during our first week.

Throughout the term, you will need to follow the national news and pay close attention to any and all information privacy issues that are mentioned in the news media. Articles may be found in national newspapers, magazines, television news programs, and reputable Internet-based sources (approved by me in advance); a suggested list of sources will be provided in the first week of class. Your chosen topic,

and its issues, must also be a “current” event (occurred/publicized/published within the 6-week window prior to your presentation date) and must be one on which another student has not already presented.

The presentation will explain to the rest of the class the significance of a specific current concern, controversy, or issue involving information privacy law, technology & society and will connect to the overall themes of the seminar. Each presentation should offer information or raise issues not covered in the assigned readings or general classroom discussion. However, a mere recitation of the article/the event will not suffice. After very briefly presenting an overview of the news event or problem, focus the majority of your time on analyzing the subject so that the class can understand the issues involved. You will have an opportunity to raise questions for the group that you think are worth exploring, and may wish to e-mail a few questions to the class in advance of your presentation.

Like the oral presentation, the 1000-word paper will provide a critical analysis of the topic. That is, the paper will not simply summarize the news story or other source on which the report is based. Rather, it will analyze and discuss the topic as it relates to a broader discussion of a course theme.

Final Paper Project:

Each seminar participant shall write an original research paper. The paper should address a narrow topic approved by the instructor and within the scope of the seminar. The research paper may (but need not) address the same (or related) topic as a student’s in-class presentation; if so, the paper should expand greatly on that subject. You may choose any topic that relates to one of the basic questions posed by the seminar. Alternatively, you may choose another intellectual property law or international IP law problem, yet one which remains within the scope of the course. However, the topic may not be one on which you have previously written another paper for academic credit or professional remuneration, even if unpaid.

Final Paper Project Timeline:

Week Three – Submit one-page abstract (due no later than due Thursday, September 22)

You should submit an abstract that identifies your issue/topic, explains the questions & issues you will explore, the scope of your research paper, the main arguments you expect to make, and the intended relevance/impact of your research paper. The abstract should be double-spaced, with one-inch margins and blank lines between title, name, and main content paragraph(s) and be not more than 350 words.

Week Six – Submit proposed bibliography (due Thursday, October 13)

You should submit a list of sources you have found thus far in your research (8 minimum). The citations should be in either *Chicago Manual of Style* format (15th Edition, U. of Chicago Press, 2003) or law school “blue book” format (*The Bluebook: A Uniform System of Citation*, 17th Edition, Harvard & Yale Law Reviews, 2000). No limits on quantity; it is not necessary to have read all sources at this time.

Week Nine – Submit annotated bibliography and thesis statement (due Thursday, November 3)

You should submit an annotated list of sources, limited to those sources that will be used in the final paper; there must be at least *six* sources (peer-reviewed, journal/law review article-length, or longer) in addition to class-assigned readings. The citations should retain the format used for the proposed bibliography (above). An annotated bibliography provides a concise paragraph for each source, explaining what each source offers the reader and how it is relevant to your research paper. In other words, an annotated bibliography includes only sources that you have already read and identified as relevant; you will likely need to read many more than just six sources to find the ones that will produce a successful paper. In addition, this annotated bibliography will also include a draft opening paragraph for the paper, containing the thesis statement (containing the primary, overall argument for the paper).

Week Eleven – Submit paper outline

(due Thursday, November 17)

You should submit a detailed outline of your final paper, including a revised thesis statement. The outline should include topic sentences for each argument/idea/paragraph, demonstrate an understanding of the subject(s) to be covered, and establish the organization of the arguments and evidence to be presented. For each included idea, argument or quotation, provide appropriate source attribution (author & page # at minimum) for later formal, full citation in the final paper.

Exam Week – Submit final paper

(due Wednesday, December 14—LATE PAPERS NOT ACCEPTED)

Most satisfactory papers will fall within the range of 3,750 to 4,500 words, not including citations (preferably using footnotes; do not use in-line citations) or the required Works Cited/Bibliography. Papers must be submitted electronically AND in hard-copy not later than 12:00 p.m., noon, EST on Wednesday, December 14, 2011 (you may submit it earlier). The hard-copy version should be printed on standard letter paper, with a cover/title page, using one-inch margins, double-spaced Times Roman 12-pt. type, and with all pages numbered. Hard copy versions should be turned into me at my MB Office or put in my department mailbox. Corresponding electronic versions should be emailed to me not later than the deadline (in MS-Word format; please see the Technical Note at the end). Turning in either version after the deadline, or without the other version, will result in a lower grade.

Grading for the paper will be on the basis of clarity of analysis and expression, persuasiveness of argument, originality of thought and authorship, proper and sufficient citation format, sufficiency and quality of research source materials, familiarity with those sources and with other course materials, and the quality with which the sources and materials are integrated into the paper.

General Classroom/Course Guidelines:

- Do not arrive late to class—you will be counted as “absent” after attendance is taken and class begins
- Do not bring food to class—class time is not mealtime; properly contained beverages are acceptable
- Do not talk or pass messages during class (this includes sending paper, text, IM or email messages)
- Do not use laptops or other electronic devices for note-taking or otherwise, as they are prohibited, unless you have an documented accommodation (see below); all cell phones must be OFF (not on “vibe”)
- Do not sleep in this class—if you are so tired that you cannot actively participate, please stay home
- Do not get up and leave during class—If it is a biological necessity that you leave class for some reason, please communicate that to me in some way. Otherwise, please respect the integrity of the classroom and respect your peers by not disrupting the class. If you will need to leave a particular class early, please let me know about your departure beforehand.
- Do not commit academic dishonesty; plagiarism, cheating & other violations will be dealt with harshly
- DO bring your enthusiasm and insights to each class, share them with others, and be sure to have fun!

Disability Accommodations:

Students with special needs requiring accommodation must provide an official memo of the necessary accommodation in a timely manner, *i.e.*, well before any tests or other due dates. The Coordinator for Students with Disabilities, Meg Hegeuer, is in the Office of Student Academic Services at 580-8150.

Reading Assignments & Schedule (Note: assignments, and page numbers, are subject to change):

Please note that most weeks we will discuss at least one topic (or more), but that topics are not assigned to specific days. I will inform you which readings need to be done for each class as we cover the material. You need to check your Skidmore e-mail at least once a day to ensure that you are notified of any changes in reading assignments. Every reading may not be covered during class time, but may be tested and/or be related to questions on the Response Essays and/or the Midterm exam.

All “textbook” page references below are to Solove & Schwartz, *Information Privacy Law*, 3d.

All “NPTII” references are to O’Harrow, *No Place to Hide*

All “supp” references are to the No Place to Hide, 2011 Supplement

All “handouts” may be found on Blackboard 9.1 (at learn.skidmore.edu), in their respective folders

Weeks 1 & 2:

Introduction & The Origins of Privacy I: Foundations of U.S. Privacy & Information Law

textbook: 1-27, 31-38;

No Place to Hide, Introduction;

The Soft Cage, Chapter 1, “Life in the Glass Box” (handout—available on Blackboard);

Watch the short introductory video (QuickTime format—available on Blackboard)

The Origins of Privacy II: Defining/Critiquing Privacy; Philosophical Perspectives

textbook: 39-49, (skip Solove 49-51), 51-69, (skip *State v. Rhodes*, 69-72), 72-76;

Nothing to Hide: The False Tradeoff Between Privacy and Security, Chapter 2,

“The Nothing-to-Hide Argument” (handout—available on Blackboard);

Information Ethics, Introduction (p. 11-21 only; handout—available on Blackboard);

On Liberty, by John Stuart Mill (handout—available on Bboard, skim p.193-205 material)

Weeks 2 & 3:

Privacy and the Media I: Information Gathering and the Press

textbook: 77-78, 81-83, 86-105;

Privacy, Photography and the Press, by T. Allen (handout)

Privacy and the Media II: Disclosure of Truthful Information

textbook: 105-134, 137-140

Week 3 & 4:

Privacy and the Media III: Privacy vs. First Amendment Values

textbook: 141-157, 157-161 (skim), 161-173; handout;

supp.: *In re the People of Colorado v. Bryant*

Privacy and the Media IV: Defamation and the Internet

textbook: 173-196, 196-202; handouts

Week 4 & 5:

Healthcare & Genetic Privacy I: Confidentiality of Medical Information

textbook: 399-402, 407-409, 411-421, 427-440 (skim), 441-446; handouts;

supp.: *Alpha Medical Clinic v. Anderson*, *Sorrell v. IMS Health*; optional HIPAA handouts;

The Social Life of Genes, by Margaret Everett (handout)

Healthcare & Genetic Privacy II: Constitutional Protections, Genetic Information and Biometrics
textbook: 447, 451-454, 469-478, 479-482, 491-523; handouts
No Place to Hide, Chapter 6, “The Inmutable Me”

Week 5 & 6:

Privacy and Law Enforcement I: Government Surveillance and the Fourth Amendment
supp.: “The Fourth Amendment” (1 pg. summary); optional handouts
textbook: 233-257, 261-294; supp.: *Herring v. US*

Privacy and Law Enforcement II: Statutory Privacy Law; Digital Searches & Seizures
textbook: 294-313 (skim), 314-337; supp.: ECPA Summary Charts

Week 6 & 7:

Privacy and Law Enforcement III: Digital Searches & Seizures (cont’d.) & ISP Records
textbook: 338-348; *US v. Kennedy* (h.o.); supp.: *US v. Ickes*, *US v. Arnold*, *In re Boucher*

Privacy and Law Enforcement IV: Intelligence, Terrorism and National Security
textbook: 348-397; supp.: *Mayfield v. US*, FISA Summary Charts; handouts
optional: *State of War*, *In re: Directives & Protect America Act*, handouts (articles)

Week 7:

Privacy of Identity and the Constitution: Anonymity in Cyberspace and Identification
textbook: 536-543, 553-558, 564-577, 577-596; handouts
supp.: *Gilmore v. Gonzales*

Midterm Exam: Thursday, October 20 – This is the only date on which the exam will be given (*i.e.* there will be no make-up exam). **Students missing the exam will receive a “0” grade for the exam.**

Week 8:

Privacy, Records, and Government Databases I: Access to Public Records & Government Data
textbook: 597-599, 603-620, 625-635, 638-639, 644-655; handouts
supp.: *FCC v. AT&T*

Privacy, Records, and Government Databases II: Government Databases of Personal Information
textbook: 655-660, 667-703, 706-712; handouts: *Andrews v. VA*, *Reno v. Condon*; handouts
No Place to Hide, Chapter 7, “Total Information Awareness”

Week 9:

Privacy, Records, and Private Computer Databases I: Commercial Entities & Personal Data
textbook: 757-800; handouts
No Place to Hide, Chapter 3, “Who Am I?”

Privacy, Records, and Private Computer Databases II: Spam, Data Breaches & Security; Limitations
textbook: 800-842, 842-860; handouts
No Place to Hide, Chapter 4, “The Matrix”

Week 10:

Privacy, Records, and Private Computer Databases III: Financial Information & Identity Theft
textbook: 715-722 (skim), 723-738, 738-742 (skim), 742-756; handouts
No Place to Hide, Chapter 5, “Look Me Up Sometime”

Privacy, Records, and Private Computer Databases IV: Government Access to Private Records
textbook: 861-880; supp.: *NJ v. Reid*; handouts
No Place to Hide, Chapter 9, "Good Guys, Bad Guys"

Week 11:

Privacy and Place I: Privacy at School
textbook: 897-921

Privacy and Place II: Privacy at Work
textbook: 922-924, 931-936, 941, 943-947, 950-966, 970-993; handouts
Employee Monitoring, by Adam Moore (handout)
supp.: *City of Ontario v. Quon*, *NASA v. Nelson*

Week 12:

International Privacy I: Data Protection In Europe: European Convention on Human Rights
textbook: 995-1043; supp.: *Peck v. UK*, *S. & Marper v. UK*

Weeks 13 & 14:

International Privacy II: Data Protection In Other Countries
textbook: 1043-1049, 1055-1059, 1059-1071 (skim), 1074-1079, 1079-1090 (skim);
handouts: Case Study, Passenger Name Record (PNR) Data Transfers; handouts

Is There Privacy After 9/11?

No Place to Hide, Chapter 8, "The Government's Eyes and Ears"
GAO Secure Flight Report (handout)
The 9/11 Commission Report, p. 383-95 (skim 215-78) (handout)

New Developments and Review

No Place to Hide, Chapter 10, "No Place To Hide"
RFID (handout)
Global Positioning System, E-911 and OnStar (handouts)
Event Data Recorders
Facebook Update

FINAL PAPERS DUE (no later than) 12:00 PM (noon) EST, Wednesday December 14, 2011
LATE PAPERS ARE NOT ACCEPTED FOR ANY REASON

TECHNICAL NOTE:

If you are using the brand new MS-Word/Office 2007 for Windows (e.g. if you bought a new computer with Windows Vista/Office 2007) or a new Macintosh with the new MS-Word/Office 2008: The default font and file formats of these programs are NOT compatible with older Word for Windows and Word for Macintosh versions. If you are using the newer versions, before you print your paper or submit it electronically to me, you MUST change the default font (Calibri-11) to the format specified above (Times New Roman-12) and save your file in the older Word file format (".doc"), not the new format (".docx") to allow me to open your file (use "Save As..." and select "Word 97-2003 Document", or use PDF or RTF format). If I cannot open and/or read your electronic copy, it will not count as having been submitted. After receiving your paper electronically, I will open it, skim through it, and then send you a confirmation email.