

# CONTENTS

<i>Preface</i>	xxv
----------------	-----

<i>Acknowledgments</i>	xxix
------------------------	------

<b>1 INTRODUCTION</b>	<b>1</b>
<b>A. INFORMATION PRIVACY, TECHNOLOGY, AND THE LAW</b>	<b>1</b>
• Sidis v. F-R Publishing Corp.	3
<b>B. INFORMATION PRIVACY LAW: ORIGINS AND TYPES</b>	<b>10</b>
1. Common Law	10
(a) The Warren and Brandeis Article	10
• Samuel D. Warren and Louis D. Brandeis, <i>The Right to Privacy</i>	13
(b) The Recognition of Warren and Brandeis's Privacy Torts	25
• William Prosser, <i>Privacy</i>	27
• Lake v. Wal-Mart Stores, Inc.	29
(c) Privacy Protection in Tort Law	32
(d) Privacy Protection in Evidence Law	33
(e) Privacy Protection via Property Rights	33
(f) Privacy Protection in Contract Law	33
(g) Privacy Protection in Criminal Law	34
2. Constitutional Law	34
3. Statutory Law	36
4. International Law	39
<b>C. PERSPECTIVES ON PRIVACY</b>	<b>40</b>
1. The Philosophical Discourse About Privacy	40
(a) The Concept of Privacy and the Right to Privacy	40
(b) The Public and Private Spheres	40
2. The Definition and the Value of Privacy	42
• Alan Westin, <i>Privacy and Freedom</i>	42



• Julie E. Cohen, <i>Examined Lives: Informational Privacy and the Subject as Object</i>	48
• Daniel J. Solove, <i>Conceptualizing Privacy</i>	51
• Anita L. Allen, <i>Coercing Privacy</i>	54
• Paul M. Schwartz, <i>Privacy and Democracy in Cyberspace</i>	57
• Spiros Simitis, <i>Reviewing Privacy in an Information Society</i>	59
3. Critics of Privacy	62
• Richard A. Posner, <i>The Right of Privacy</i>	62
• Fred H. Cate, <i>Principles of Internet Privacy</i>	66
4. The Feminist Perspective on Privacy	70
• State v. Rhodes	69
• Reva B. Siegel, “ <i>The Rule of Love</i> ”: <i>Wife Beating as Prerogative and Privacy</i>	72
• Catharine A. MacKinnon, <i>Toward a Feminist Theory of the State</i>	76
• Anita L. Allen, <i>Uneasy Access: Privacy for Women in a Free Society</i>	75

**2 PRIVACY AND THE MEDIA** 79

**A. INFORMATION GATHERING** 80

1. Intrusion upon Seclusion	80
• Restatement (Second) of Torts § 652B: Intrusion upon Seclusion	80
• Nader v. General Motors Corp.	81
• Dietemann v. Time, Inc.	86
• Desnick v. American Broadcasting Co., Inc.	88
• Shulman v. Group W Productions, Inc.	94
2. Paparazzi	98
• Galella v. Onassis	99
• California Anti-Paparazzi Act	100
3. Video Voyeurism	106
• Video Voyeurism Prevention Act	107

**B. DISCLOSURE OF TRUTHFUL INFORMATION** 108

1. Public Disclosure of Private Facts	109
(a) Introduction	109
• Restatement (Second) of Torts § 652D: Publicity Given to Private Life	109
(b) Private Matters	110
• Gill v. Hearst Publishing Co.	110
• Daily Times Democrat v. Graham	115
(c) Publicity	120
• Miller v. Motorola, Inc.	120
(d) The Newsworthiness Test	123



• Sipple v. Chronicle Publishing Co.	123
• Shulman v. Group W Productions, Inc.	136
• Bonome v. Kaysen	139
2. First Amendment Limitations	146
• Cox Broadcasting Corp. v. Cohn	148
• The Florida Star v. B.J.F.	155
• Bartnicki v. Vopper	169
<b>C. DISSEMINATION OF FALSE OR MISLEADING INFORMATION</b>	<b>181</b>
1. Defamation	181
(a) Introduction	181
(b) Defamation and the Internet	183
• Zeran v. America Online, Inc.	185
• Blumenthal v. Drudge	188
(c) First Amendment Limitations	194
• New York Times Co. v. Sullivan	194
• Gertz v. Robert Welch, Inc.	198
2. False Light	205
(a) Introduction	205
• Restatement (Second) of Torts § 652E: Publicity Placing Person in False Light	205
(b) First Amendment Limitations	208
• Time, Inc. v. Hill	208
3. Infliction of Emotional Distress	210
• Hustler Magazine v. Falwell	211
• Snyder v. Phelps	214
<b>D. APPROPRIATION OF NAME OR LIKENESS</b>	<b>220</b>
1. Introduction	220
• Restatement (Second) of Torts § 652C: Appropriation of Name or Likeness	220
2. Name or Likeness	223
• Carson v. Here's Johnny Portable Toilets, Inc.	223
3. For One's Own Use or Benefit	229
• Raymen v. United Senior Association, Inc.	230
4. Connection to Matters of Public Interest	233
• Finger v. Omni Publications International, Ltd.	234
5. First Amendment Limitations	239
• Zacchini v. Scripps-Howard Broadcasting Co.	239
• Estate of Presley v. Russen	241



<b>3</b>	<b>PRIVACY AND LAW ENFORCEMENT</b>	<b>247</b>
<b>A.</b>	<b>THE FOURTH AMENDMENT AND EMERGING TECHNOLOGY</b>	<b>247</b>
1.	Introduction	247
(a)	Privacy and Security	247
(b)	The Fourth and Fifth Amendments	248
(c)	Privacy of the Mail	249
(d)	Privacy of Papers and Documents	249
(e)	The Applicability of the Fourth Amendment	250
(f)	Reasonable Searches and Seizures	251
(g)	The “Special Needs” Doctrine	251
(h)	Administrative Searches	252
(i)	Checkpoints	252
(j)	<i>Terry</i> Stops	254
(k)	The Enforcement of the Fourth Amendment	254
2.	Wiretapping, Bugging, and Beyond	255
●	Olmstead v. United States	256
●	Lopez v. United States	263
●	Katz v. United States	265
●	United States v. White	272
3.	The Reasonable Expectation of Privacy Test and Emerging Technology	276
(a)	Applying the Reasonable Expectation of Privacy Test	276
●	Smith v. Maryland	276
●	United States v. Place	285
●	Illinois v. Caballes	286
●	California v. Greenwood	290
●	Plain View, Open Fields, and Curtilage	292
●	Florida v. Riley	293
(b)	Sensory Enhancement Technology	301
●	Dow Chemical Co. v. United States	301
●	Kyllo v. United States	306
<b>B.</b>	<b>FEDERAL ELECTRONIC SURVEILLANCE LAW</b>	<b>313</b>
1.	Section 605 of the Federal Communications Act	313
2.	Title III	315
3.	The Electronic Communications Privacy Act	315
(a)	Statutory Structure	315
●	Types of Communications	316
●	The Wiretap Act	317
●	The Stored Communications Act	319



• The Pen Register Act	321
• Video Surveillance	322
• Electronic Surveillance Law and the Fourth Amendment	322
• Electronic Surveillance Orders	323
• State Electronic Surveillance Law	325
4. The Communications Assistance for Law Enforcement Act	328
5. The USA PATRIOT Act	331
<b>C. DIGITAL SEARCHES AND SEIZURES</b>	<b>333</b>
1. Searching the Contents of Computers	333
• United States v. Andrus	336
2. Encryption	342
3. E-mail	345
• Steve Jackson Games, Inc. v. United States Secret Service	345
• United States v. Warshak	351
4. ISP Records	357
• United States v. Hambrick	357
• McVeigh v. Cohen	360
5. IP Addresses and URLs	366
• United States v. Forrester	366
6. Key Logging Devices	373
• United States v. Scarfo	373
<b>D. NATIONAL SECURITY AND FOREIGN INTELLIGENCE</b>	<b>377</b>
1. Is National Security Different?	377
• United States v. United States District Court (The <i>Keith</i> Case)	378
2. The Foreign Intelligence Surveillance Act	384
• Global Relief Foundation, Inc. v. O'Neil	388
• United States v. Isa	390
• The 9/11 Commission Report	392
• In re Sealed Case	397
3. The Attorney General's FBI Guidelines	404
4. The Homeland Security Act	406
5. The Intelligence Reform and Terrorism Prevention Act	406
6. The NSA Surveillance Program	407
• Al-Haramain Islamic Foundation v. Bush	409
• In re National Security Agency Telecommunications Records Litigation [I]	415
• In re National Security Agency Telecommunications Records Litigation [II]	416



• Hepting v. AT&T Corp.	420
• In re National Security Agency Telecommunications Records Litigation [III]	424

## 4 HEALTH AND GENETIC PRIVACY 429

### A. CONFIDENTIALITY OF MEDICAL INFORMATION 430

1. Professional Ethics and Evidentiary Privileges	430
(a) Ethical Rules	430
• Oath and Law of Hippocrates	430
• Current Opinions of the Judicial Council of the American Medical Association Canon 5.05	431
(b) Evidentiary Privileges	431
• Jaffee v. Redmond	432
2. Tort Liability for Disclosure of Patient Information	437
• McCormick v. England	437
• Hammonds v. Aetna Casualty & Surety Co.	439
3. Tort Liability for Failure to Disclose Patient Information	446
• Tarasoff v. Regents of University of California	446
• McIntosh v. Milano	453
4. Statutory Reporting Requirements	458
5. State Law Privacy Protections for Medical Information	460
6. Health Insurance Portability and Accountability Act	463
• Applicability of the Regulations	464
• The Privacy Rule	465
• Exceptions to the Privacy Rule	467
• The Security Rule	468
• Effect on Existing Law	469
• Northwestern Memorial Hospital v. Ashcroft	475

### B. CONSTITUTIONAL PROTECTION OF MEDICAL INFORMATION 480

1. The Constitutional Right to Pivacy	480
• Griswold v. Connecticut	481
• Planned Parenthood of Southeastern Pennsylvania v. Casey	488
• Lawrence v. Texas	496
2. The Constitutional Right to Information Privacy	503
• Whalen v. Roe	503
• 42 U.S.C. § 1983 and “Constitutional Torts”	510
• Carter v. Broadlawns Medical Center	512
• Doe v. Borough of Barrington	513



• Doe v. Southeastern Pennsylvania Transportation Authority	516
2. The Fourth Amendment	522
• Ferguson v. City of Charleston	522
<b>C. GENETIC INFORMATION</b>	<b>526</b>
1. Background: Genetic Privacy	526
2. Property Rights in Body Parts and DNA	527
• Moore v. Regents of the University of California	527
3. Genetic Testing and Discrimination	540
• Richard A. Epstein, <i>The Legal Regulation of Genetic Discrimination: Old Responses to New Technology</i>	541
• Paul M. Schwartz, <i>Privacy and the Economics of Health Care Information</i>	542
4. DNA Databases and Identification	546
• United States v. Kincade	547

**5 PRIVACY OF ASSOCIATION AND IDENTITY 561**

<b>A. PRIVACY OF GROUP ASSOCIATIONS</b>	<b>563</b>
1. Compelled Disclosure of Group Membership Lists	563
• National Association for the Advancement of Colored People v. State of Alabama	563
2. Interrogation About Group Associations	567
• Barenblatt v. United States	567
3. Surveillance of Group Activities	572
• Laird v. Tatum	572
• Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate	579

<b>B. ANONYMITY</b>	<b>582</b>
1. Anonymous Speech	582
• Talley v. State of California	582
• McIntyre v. Ohio Elections Commission	583
2. Anonymity in Cyberspace	590
• ACLU v. Miller	591
• Doe v. Cahill	595
3. Anonymous Reading and Receiving of Ideas	602
• Tattered Cover, Inc. v. City of Thornton	602
4. Anonymity and Copyright	611

<b>C. IDENTIFICATION</b>	<b>614</b>
1. Identification Devices and Techniques	614
2. Identification and the Constitution	616
• Hiibel v. Sixth Judicial District Court	618



3. Social Security Numbers	623
• Greidinger v. Davis	625
4. National Identification Systems	629
• Richard Sobel, <i>The Degradation of Political Identity Under a National Identification System</i>	629

6

PRIVACY AND GOVERNMENT RECORDS  
AND DATABASES

635

A. PUBLIC ACCESS TO GOVERNMENT RECORDS

636

1. Public Records and Court Records	636
• Doe v. Shakur	637
2. The Freedom of Information Act	641
• United States Dep't of Justice v. Reporters Committee for Freedom of the Press	644
• National Archives and Records Administration v. Favish	651
3. Constitutional Requirements of Public Access	660
• Los Angeles Police Department v. United Reporting Publishing Corp.	662
4. Constitutional Limitations on Public Access	668
(a) Public Records	668
• Kallstrom v. City of Columbus [ <i>Kallstrom I</i> ]	668
• Kallstrom v. City of Columbus [ <i>Kallstrom II</i> ]	671
(b) Police Records	678
• Paul v. Davis	678
• Cline v. Rogers	681
• Scheetz v. The Morning Call, Inc.	682
(c) Megan's Laws	686
• Paul P. v. Verniero	687

B. GOVERNMENT RECORDS OF PERSONAL INFORMATION

698

1. Fair Information Practices	698
• Marc Rotenberg, <i>Fair Information Practices and the Architecture of Privacy (What Larry Doesn't Get)</i>	700
2. The Privacy Act	701
• Quinn v. Stone	704
• Doe v. Chao	713
• J. Roderick MacArthur Foundation v. Federal Bureau of Investigation	723
3. The Use of Government Databases	728
(a) The Computer Matching and Privacy Protection Act	728
(b) Airline Passenger Screening	729
• The 9/11 Commission Report	729



(c) Government Data Mining	732
• U.S. GAO, <i>Data Mining: Federal Efforts Cover a Wide Range of Uses</i>	734
• Mary DeRosa, <i>Data Mining and Data Analysis for Counterterrorism</i>	734
• United States v. Sokolow	739
• Arizona v. Evans	746
• United States v. Ellison	751
4. The Driver's Privacy Protection Act	754

## 7 PRIVACY OF FINANCIAL AND COMMERCIAL DATA 757

### A. THE FINANCIAL SERVICES INDUSTRY AND PERSONAL DATA 757

1. The Fair Credit Reporting Act	757
• Smith v. Bob Smith Chevrolet, Inc.	765
• Sarver v. Experian Information Solutions	772
2. The Use and Disclosure of Financial Information	779
(a) The Breach of Confidentiality Tort and Financial Institutions	779
(b) The Gramm-Leach-Bliley Act	780
(c) State Financial Regulation	783
3. Identity Theft	785
(a) Identity Theft Statutes	786
(b) Tort Law	788
• Wolfe v. MBNA America Bank	788
(c) The Fair Credit Reporting Act	791
• Sloane v. Equifax Information Services, LLC	792

### B. COMMERCIAL ENTITIES AND PERSONAL DATA 799

1. Governance by Tort	799
• Dwyer v. American Express Co.	799
• Remsburg v. Docusearch, Inc.	804
2. Governance by Contract and Promises	807
(a) Privacy Policies	807
• Jeff Sovern, <i>Opting In, Opting Out, or No Options at All</i>	808
• Michael E. Staten & Fred H. Cate, <i>The Impact of Opt-In Privacy Rules on Retail Markets</i>	810
(b) Contract Law	813
• In re Northwest Airlines Privacy Litigation	814
(c) FTC Enforcement	820
• In the Matter of Google Inc.	821



3. Governance by Self-Regulation	832
4. Governance by Property	836
5. Governance by Statutory Regulation	839
(a) Entertainment Records	840
• The Video Privacy Protection Act	840
• Dirkes v. Borough of Runnemede	841
• Daniel v. Cantell	843
• The Cable Communications Policy Act	846
(b) Internet Use and Electronic Communications	847
• Children's Online Privacy Protection Act	847
• Electronic Communications Privacy Act	850
• In re Pharmatrak, Inc. Privacy Litigation	850
• Dyer v. Northwest Airlines Corp.	857
• Computer Fraud and Abuse Act	859
• Creative Computing v. Getloaded.com LLC	860
• United States v. Drew	863
(c) Marketing	867
• Telephone Consumer Protections Act	867
• CAN-SPAM Act	869
(d) State Statutory Regulation	871
(e) The Concept of Personally Identifiable Information (PII)	872
• Pineda v. Williams-Sonoma Stores	873
<b>C. DATA SECURITY</b>	<b>880</b>
1. Introduction	880
2. Data Security Breach Notification Statutes	881
3. Civil Liability	883
• Pisciotta v. Old National Bancorp	883
4. FTC Regulation	893
• In the Matter of Reed Elsevier, Inc. and Seisint	894
<b>D. FIRST AMENDMENT LIMITATIONS ON PRIVACY REGULATION</b>	<b>900</b>
• Rowan v. United States Post Office Department	901
• Mainstream Marketing Services, Inc. v. Federal Trade Commission	902
• U.S. West, Inc. v. Federal Communications Commission	905
• Trans Union Corp. v. Federal Trade Commission	913
• Sorell v. IMS Health, Inc.	917



## **E. GOVERNMENT ACCESS TO PRIVATE SECTOR RECORDS 926**

1. Information Gathering Without Search Warrants 926
  - (a) Subpoenas 926
    - Gonzales v. Google 928
  - (b) Financial Information and the Third Party Doctrine 932
    - The Bank Secrecy Act 932
    - California Bankers Association v. Shultz 932
    - United States v. Miller 934
  - (c) The USA PATRIOT Act § 215 939
  - (d) National Security Letters 940
2. Information Gathering with Search Warrants 943
  - Zurcher v. The Stanford Daily 943
  - Privacy Protection Act 946

## **8 PRIVACY AND PLACE 947**

### **A. PRIVACY AT HOME 947**

- Stanley v. Georgia 948
- Wilson v. Layne 952
- Georgia v. Randolph 959

### **B. PRIVACY AT SCHOOL 964**

1. School Searches and Surveillance 964
  - New Jersey v. T.L.O. 964
2. Drug Testing 970
  - Vernonia School District v. Acton 970
  - Board of Education v. Earls 976
3. School Records 981
  - The Family Education Rights and Privacy Act 981
  - Owasso Independent School District v. Falvo 982

### **C. PRIVACY AT WORK 986**

1. Introduction 986
2. Workplace Searches 989
  - O'Connor v. Ortega 989
  - K-Mart Corp. v. Trott 996
3. Workplace Surveillance 997
  - Thompson v. Johnson County Community College 997



4. Drug Testing	1000
• National Treasury Employees Union v. Von Raab	1000
• Chandler v. Miller	1006
• Borse v. Piece Goods Shop	1008
5. The Issue of Consent	1012
• Baggs v. Eagle-Picher Industries, Inc.	1012
6. Testing, Questionnaires, and Polygraphs	1018
(a) Testing and Questionnaires	1018
• Greenawalt v. Indiana Department of Corrections	1018
• National Aeronautics and Space Administration v. Nelson	1021
(b) Polygraph Testing	1027
• The Employee Polygraph Protection Act	1030
7. Telephone Monitoring	1031
• Watkins v. L.M. Berry & Co.	1032
• Deal v. Spears	1036
8. Computer Monitoring and Searches	1039
(a) E-mail	1039
• Smyth v. Pillsbury Co.	1040
(b) Internet Use	1048
• Leventhal v. Knapek	1048
• United States v. Ziegler	1055

**9 INTERNATIONAL PRIVACY LAW 1061**

**A. THE OECD PRIVACY GUIDELINES 1063**

**B. PRIVACY PROTECTION IN EUROPE 1065**

1. Divergence or Convergence?	1065
• James Q. Whitman, <i>The Two Western Cultures of Privacy: Dignity Versus Liberty</i>	1065
2. European Convention on Human Rights Article 8	1070
(a) Introduction	1070
• ECHR Article 8	1072
(b) Privacy and the Media	1073
• Von Hannover v. Germany	1073
• Mosley v. The United Kingdom	1083
(c) Privacy and Law Enforcement	1094
• P.G. & J.H. v. United Kingdom	1094
(d) Privacy and Identification	1100
• B. v. France	1100
(e) Privacy and Government Records and Databases	1105
• Rotaru v. Romania	1105



3. The European Union Data Protection Directive	1109
(a) Introduction	1109
• Criminal Proceedings Against Bodil Lindqvist	1118
(b) Article 8 and Harmonization	1123
(c) Supervisory Authority and Individual Remedies	1124
<b>C. PRIVACY PROTECTION IN NORTH AMERICA</b>	<b>1127</b>
1. Canada	1127
• Blood Tribe Department of Health v. Canada	1129
2. Mexico	1133
<b>D. PRIVACY PROTECTION IN SOUTH AMERICA</b>	<b>1134</b>
1. Argentina	1134
2. Brazil	1134
<b>E. PRIVACY PROTECTION IN AFRICA AND THE MIDDLE EAST</b>	<b>1135</b>
1. Africa	1135
2. The Middle East	1135
<b>F. PRIVACY PROTECTION IN ASIA-PACIFIC</b>	<b>1136</b>
1. The APEC Privacy Framework	1136
2. Australia	1137
3. Japan	1138
4. China and Hong Kong	1139
5. India	1140
<b>G. INTERNATIONAL TRANSFERS OF DATA</b>	<b>1141</b>
1. International Data Transfers in Litigation	1141
• Volkswagen, A.G. v. Valdez	1141
2. Adequate Level of Protection Under the EU Directive	1145
3. The Safe Harbor Arrangement	1148
(a) Conflicting Privacy Approaches in the EU and United States	1148
(b) The Safe Harbor Arrangement	1150
• Safe Harbor Privacy Principles	1151
• The Commission Decision on Safe Harbor	1153
• European Parliament Resolution on the Draft Commission Decision on the Adequacy of the Protection Provided by the Safe Harbour Privacy Principles	1156
• Joel R. Reidenberg, <i>E-Commerce and Trans-Atlantic Privacy</i>	1158
4. Outsourcing Data Processing	1161



<i>Table of Cases</i>	1165
<i>Table of Authorities</i>	1175
<i>Index</i>	1199