

Surveillance, Privacy and the Law

Undergraduate Legal Studies Program, UC Berkeley

Fall 2014

Controversies over surveillance and privacy, and the role of law in these matters, are much in the news these days. Media coverage of these issues often frames them as manifestations of recent technological innovation, marketing strategies and government security measures. These characterizations are adequate for starters, but in fact issues of privacy and surveillance have roots in legal and ethical thinking that go well beyond recent decades.

This seminar will accordingly examine current surveillance issues as part of the long history of debate and reflection on the proper boundaries between the rightful sphere of individuality and the claims of larger social interests—for example: families, communities, religious authorities, business interests or government institutions. Tensions over these boundaries are not just phenomena of the computer age, but rather a ubiquitous element of the human condition, from today's most "advanced" societies to those most different from our own.

Throughout the seminar we will be asking, "Where and how do privacy expectations and demands arise? What kinds of claims and counter-claims are advanced concerning access to, and denial of access, to personal information?"

What principles or programs might lead to better protection for privacy values?" Unit One will introduce some key analytical concepts for these inquiries—ideas from the study of ethics, ethnography, psychology, sociology, philosophy, the law and other disciplines. Unit Two will focus on implications of the legal status of personal information—above all, what forms of personal data are and are not legally available to government authorities or interested private parties? Unit Three will deal with efforts in law and policy to correct perceived losses to privacy—to create legal barriers to access to personal data, to limit accumulation of such data or to create countervailing institutions or rights that uphold privacy interests.

Most of the seminar meetings will be devoted to round-table discussion. All members are expected to prepare for and participate in all of these exchanges. In all of our discussions, everyone should feel free to "think out loud" about ideas under consideration—even to the extent of articulating views and positions that the speaker may not ultimately espouse. Privacy questions are often highly charged, and it is desirable to have as many sides of these questions as possible receive exposition in the seminar. We will avoid any effort to come up with a "party line" on any of these matters.

Evaluation will be based on three very short papers, probably about twelve to sixteen hundred words. The topics for these papers will be challenging. The guiding assumption is that arguing a persuasive position on a subtle question in relatively few words is harder work than doing so at length. The topic for each paper will be announced at least a week before the paper is due, and about half of the seminar meeting before each due date will be devoted to discussion of the paper. These latter discussions should give everyone a chance to try out ideas for the impending paper.

The great majority of readings consist of articles and excerpts from books and other printed sources. They will be included in a course volume available from Copy Central. One or two readings will be longer book excerpts available through bCourses and for purchase as new or used volumes. Two books will be read in their entirety. Both are available on Kindle, as well as in hard copy. They are:

The Circle by David Eggers, a novel (2013); and

Dragnet Nation: A Quest for Privacy, Security and Freedom in a World of Relentless Surveillance (2014), by Julia Angwin

UNIT ONE: BASIC CONCEPTS

WEEK 1: Introductions

Readings:

Judith De Cew, Chapter One, pp. 9-25 of her *In Pursuit of Privacy* (1997)

W.B. Gallie, “Essentially Contested Concepts” pp. 167-198 in *Proceedings of the Aristotelian Society*, Vol. 56 (1956)

Arif Ahmed on “family resemblances” and “vagueness”, pp. 42-47 in his *Wittgenstein’s Philosophical Investigations* (2010 [1945])

David Eggers, pp. 1-39 from *The Circle* (2013)

Some Topics and Questions:

Does the term “privacy” have any single, core meaning?

What does it mean to say that different senses of a concept bear “family resemblances” to one another?

How do we distinguish between empirical and normative statements? How might these two types of statements depend on one another?

WEEK 2 – Origins of Privacy and Surveillance

Readings:

Alan Westin, “The Origins of Modern Claims to Privacy” from his *Privacy and Freedom* (1967) pp. 56-71.

Erving Goffman (1959) pp. 106-140 “Regions and Region Behavior” from The Presentation of Self in Everyday Life

Erving Goffman (1963) pp. 151-190 “Communication Boundaries” from Behavior in Public Places

Thomas Gregor (1980), “Exposure and Seclusion: A Study of Institutionalized Isolation among the Mehinaku Indians of Brazil” pp. 81-99 in Stanton K Tefft, ed., *Secrecy; A Cross-Cultural Perspective*

David Eggers pp. 39-70 from *The Circle* (2013)

Some Topics and Questions for Discussion:

Are human beings in some way “hard-wired” to require a certain modicum of privacy—in any sense of that term?

Do Goffman’s observations warrant any conclusions whatever about the psychological states of the actors whose actions he describes?

Does Gregor’s account warrant any conclusions about the *causes* of the special measures that the Mehinaku from time to time take to isolate themselves from their neighbors?

Do Foucault’s accounts give any basis for conclusions about either the *causes* or the *effects* of the disciplinary practices that he describes?

WEEK 3 – Forms and Dimensions of Privacy

Readings:

James Rule, *Private Lives and Public Surveillance* (1973), pp. 19-31.

James Rule et al. (1980) ,“Dimensions of Privacy,” pp. 21-24 in *The Politics of Privacy* (1980)

Neil M. Richards, “Intellectual Privacy”, *Texas Law Review* 87 (2008)

Priscilla Regan, “*****”, in Beate Roessler and Dorota Mokrosinska, eds., *Social Dimensions of Privacy*, forthcoming.

Annabelle Lever, “Oliver Sipple and the Ethics of Outing” from her *On Privacy* (2012), pp. 31-45

Judith DeCew. “The Feminist Critique”, pp. 81-94 in her *In Pursuit of Privacy* (1997)

David Eggers pp. 70-104 from *The Circle* (2013)

Questions and Topics for Discussion:

Where should we place privacy concerns on a spectrum between strictly divisible and completely holistic values or interests?

What sorts of privacy concerns are strictly instrumental? Which ones are strictly consummatory?

How do privacy values strictly speaking differ from those having to do with *autonomy*?

How should one characterize the values or interests engaged in Oliver Sipple's "outing"?

WEEK 4 – Ethical Bases for Privacy Claims

Readings

Lawrence M. Hinman, on utilitarianism, pp. 162-202 from *Ethics: A Pluralistic Approach to Moral Theory* (1968)

Lawrence M. Hinman, on Kant, pp. 208-238, from *Ethics*

Lawrence M. Hinman, on rights, pp. 234-268, *Ethics*

Charles Fried, "Privacy, A moral Analysis", *Yale Law Journal* 77 (pp. 475-93) (1968).

Jerry Kang, "Information Privacy in Cyberspace Transactions", *Stanford Law Review* 50 (1998), pp. 1193-1294.

David Eggers pp. 180-210 from *The Circle* (2013)

Questions and Topics for Discussion:

In what sorts of situations do utilitarian theories of privacy and Kantian theories lead to the most disparate conclusions?

Can one imagine any program of ethical decision-making based exclusively on utilitarian or Kantian principles? Would such a program be acceptable in any society you can think of?

Are Fried's justifications for privacy strictures ultimately utilitarian, or Kantian?

What about Kang's justifications?

WEEK 5 – Utilitarian and Communitarian Visions of Privacy

Readings:

Richard A. Posner, “An Economic Theory of Privacy”, *Regulation* (May-June 1978) pp. 333-345

Eugene Volokh, “Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking about You”, *Stanford Law Review* 2000, vol. 52, no. 5, pp. 1049-1125.

Amitai Etzioni, *The Limits of Privacy* (1999), pp. 1-17 and 103-139.

Discussion of paper 1

Questions and Topics for Discussion:

Would it be fair to say that, for Posner, personal information has no special ethical status not possessed by just *any* information? In other words, personal data is no more inherently confidential than any other form of data?

What over-arching political philosophy does Eugene Volokh appear to subscribe to?

How do the goods that Etzioni seeks to uphold differ from those upheld by Posner and Volokh?

Paper One due Friday Oct. 3

UNIT TWO THE LEGAL STATUS OF PERSONAL INFORMATION

WEEK 6 -- Surveillance in Tort Law and Criminal Law

Samuel D. Warren and Louis D. Brandeis, “The Right to Privacy”, *Harvard Law Review*, Vol. 4, No. 5 (1890), pp. 193-220

Diane L. Zimmerman, “Requiem for a Heavyweight: Farewell to Warren and Brandeis’s Privacy Tort”, *Cornell Law Review* 68 (1983), pp. 291-365.

Erwin Chemerinsky, “Rediscovering Brandeis’s Right to Privacy” (2007) pp. 643-657

Julia Angwin, chapters 1-3, *Dragnet Nation: A Quest for Privacy, Security, and Freedom in a World of Relentless Surveillance* (2014)

David Eggers, pp 148-189 *The Circle* (2013)

Questions and Topics for Discussion:

In what ways do Warren , Brandeis and Chemerinsky all hold that personal information *must* be treated differently from any other sort of information?

What results in her readers does Julia Angwin seem to intend in writing *Dragnet Nation*? Should we read it mainly as a “how-to” book, for instance—as in how to lose weight, how to manage your money, etc.?

WEEK 7 – Surveillance and the Legal Reach of the State

Roe v. Wade

Bowers v. Hardwick

Lawrence v. Texas,

Arthur L. Stinchcombe, “Institutions of Privacy in the Determination of Police Administrative Practice”, *American Journal of Sociology* (69) 2 (1963) pp. 150-160

Daniel Solove, Marc Rotenberg and Paul Schwartz, “The Fourth Amendment and Emerging Technology” in their Information Privacy Law (2006), pp. 207-262.

David J. Phillips, “Cell Phones, Surveillance and the State” pp. 53-58 in *Dissent* (Spring 2004)

Julia Angwyn, chapters 4 to 6, *Dragnet Nation* (2014)

David Eggers, pp. 210-233 *The Circle* (2013)

Questions and Topics for Discussion:

In Eggers’s novel, what is the significance of the rush of public figures to “go transparent”?

Is it possible to apply to the standard of “reasonable expectations of privacy” to information transmitted by technologies and in social settings that are totally new?

What changes would you support, if any, to the CALEA legislation described in David Phillips’s article, in the interest of better protecting privacy values?

WEEK 8 – Surveillance and Policing

Michel Foucault, “The Meaning of Correct Training” (pp. 170-194) and “Panopticism” (pp. 195-228) in his *Discipline and Punish* (1977)

John Giliom and Torin Monahan, chapter 3 in *SuperVision; an Introduction to the Surveillance Society* [[location 919 to 1397 in Kindle version]]

Torin Monahan, “’ War Rooms’ of the Street: Surveillance Practices in Transportation Control Centers” pp. 367-389 in *The Communication Review* 10 (2007).

Torin Monahan, “The Future of Security? Surveillance Operations at Homeland Security Fusion Centers”, pp. 84-98 in *Social Justice* Vol. 17, (2010-2011).

William G. Staples and Stephanie K. Decker, “Technologies of the Body, Technologies of the Self: House Arrest as Neo-Liberal Governance”, pp. 131-149 in *Surveillance and Governance*, Vol. 10

Morton Halperin et al., pp. 119-132 from *The Lawless State* (1976)

Julia Angwyn chapters 7-10 *The Dragnet State* (2014)

Questions and Topics for Discussion:

Do you believe that conditions that led to the abuses described by Halperin et al. could recur in this country? If so, how could this come about?

Does the material presented in Angwyn's work make any difference in your judgments on the previous question?

WEEK 9 – The Snowden Revelations and their Repercussions

Glenn Greenwald, pp. ***** from his [*No Place to Hide: Edward Snowden, the NSA, and the U.S. Surveillance State*](#) (2014)

President's Review Group on Intelligence and Communications Technologies, *Report and Recommendations*, pp. 1-42, "Executive Summary and Recommendations" (2013) (about 42 pp.).

Privacy and Civil Liberties Oversight Board, *Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court*, January 23, 2014, pp. i-iii and 1-20.

Question for Discussion:

Would it be desirable to establish an independent, outside agency to review domestic surveillance for national security purposes in the United States?

Under what circumstances should U.S. intelligence agencies be permitted to carry out such surveillance without assent or review from such a panel?

Discussion of paper 2

Paper 2 due Friday October 31

UNIT 3 PROGRAMS IN LAW AND POLICY TO PROTECT PRIVACY

Week 10 -- The Movement for Personal Data Protection

Lee Bygrave, "International Agreements to Protect Personal Data", pp. 15-50 in James Rule and Graham Greenleaf, eds., *Global Privacy Protection; the First Generation* (2008)

James Rule, "The Idea of Privacy Protection", pp. 22-32 in his *Privacy in Peril* (2007)

Peter Swire, “The Second Wave of Global Privacy Protection: Symposium Introduction”, pp. 841-852 in the *Ohio State Law Journal* (2014)

James Rule, “Toward Strong Privacy” pp. 183-225 in *University of Toronto Law Journal* (54) (2004)

Viktor Mayer-Schonberger, pp. 168-195 in his *Delete* (2009)

Julia Angwyn chapters 11-15 in *The Dragnet State* (2014)

David Eggers pp. 233-307 in *The Circle* (2013)

Questions and Topics for Discussion

In *The Circle*, what do you make of the subplot involving the aquarium? What does it have to do with the message of the rest of the work?

What positive social values or interests would stand to be hurt, if Mayer-Schonberger’s deletion policies were widely enacted?

Week 11 – Social Media: How to Protect Privacy

Danier Trottier, “Policing Social Media”, in his *Social Media as Surveillance* (2012), pp. 135-154.

Peter Swire, “Social Networks, Privacy and Freedom of Association: Data Protection vs. Data Empowerment”, *North Carolina Law Review* 90, (2012) pp. 101-143.

H. Nissenbaum ***** chapter for Roessler and Mokrosinska, eds.

David Eggers pp. 308-350 *The Circle* (2013)

Questions and Topics for Discussion

Is Nissenbaum’s proposal for “privacy in context” a workable practical guide for law and policy?

Should there be any restriction on law-enforcement access to personal data carried on social media?

Week 12 – Formulas to Block Over-Sharing of Personal Information

Daniel Solove, “Free Speech, Anonymity and Accountability” pp. 125-160 from his *The Future of Reputation* (2007)

Danielle Keats Citron, “Criminalizing Revenge Porn” pp 101-139

Jeff Jarvis, pp. 1-65 and 293-218 from his *Public Parts: How Sharing in the Digital Age Improves the Way We Work and Live* (2011)

Amitai Etzioni, “A Contemporary Conception of Privacy”, pp. 183-215 from his *The Limits of Privacy* (1999)

David Eggers pp. 351-398 of *The Circle* (2013)

Questions and Topics for Discussion

How do the values upheld by The Circle (Eggers's fictional company) parallel or differ from those underlying Etzioni's position?

If "revenge porn" warrants criminalization, as Citron proposes, aren't there other vengeful ways of sharing true information that are just as appropriate for criminalization?

WEEK 13 – Conclusion

David Eggers, pp. 399-491 of *The Circle* (2013)

James B. Rule, "Privacy: the Longue Durée" in Beate Roessler and Dorota Mokrosinska, eds., *Social Dimensions of Privacy*, forthcoming.

Discussion of Paper 3

Paper 3 due Friday Dec. 5