

## Law 497: EMERGING LAW OF INTERNET PRIVACY SEMINAR

George Mason University Antonin Scalia Law School

Summer 2023

Monday and Wednesday at 6 p.m.

Syllabus (version 1.0)

### Instructor:

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### Learning Outcomes

Students will develop skills to advocate on issues related to internet privacy and its interaction on the national and world stages.

Students will engage in deep research and analysis of topical issues related to privacy and internet security.

Students will engage in mock situations such as presentations to Congress or Federal agencies that demand students not only understand their own arguments but also the arguments of the opposition.

### Schedule and Readings

#### **1<sup>st</sup> Amendment and Civil and Constitutional Concepts of Information Privacy (Class 1)**

- Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890) *available at*, <https://www.cs.cornell.edu/~shmat/courses/cs5436/warren-brandeis.pdf>.
- How the Internet Works: <http://ibiblio.org/team/intro/what/index.html> (please read the introduction and all six parts).
- Review compare and contrast the following bills:
  - Rep. Cathy McMorris Rodgers, Control Our Data Act, *available at* <https://republicans-energycommerce.house.gov/wp-content/uploads/2021/11/2021.11.02-Republican-CODA-Draft-.pdf>
  - Sen. Wicker Privacy Bill, United States Consumer Data Privacy Act of 2019, *available at* <https://www.congress.gov/bill/116th-congress/senate-bill/583/text>
  - Sen. Cantwell Privacy Bill, Consumer Online Privacy Rights Act of 2019, *available at* <https://www.cantwell.senate.gov/imo/media/doc/COPRA%20Bill%20Text.pdf>
- FIPPS, *available at* <https://iapp.org/resources/article/fair-information-practices/>

- The Failure of Fair Information Practice Principles, Fred H. Cate, *available at* [https://www.ftc.gov/system/files/documents/public\\_comments/2018/12/ftc-2018-0098-d-0036-163372.pdf](https://www.ftc.gov/system/files/documents/public_comments/2018/12/ftc-2018-0098-d-0036-163372.pdf)
- Section 230 of the Communications Decency Act, 47 USC 230, more information at: <https://protectonlinevoices.org/about/>

### **Fourth Amendment, Government Access, and Third Party Doctrine (Class 2)**

- Laws
  - Electronic Communications Privacy Act (ECPA)
  - Including:
    - 18 U.S.C. § 2702-13 (Electronic Communications Privacy Act (“ECPA”))
    - 18 U.S.C. § 3121-27 (Pen Register/Trap and Trace)
    - 18 U.S.C. § 2510-11 (Wiretap Act)
  - Communications Assistance for Law Enforcement Act of 1994, Pub. L. No. 103-414
  - USA Patriot Act of 2001, Pub. L. No. 107-56
- 4th Amendment
  - *Katz v. United States*, 389 U.S. 347 (1967)
  - *Smith v. Maryland*, 442 U.S. 735 (1979)
  - *Riley v. California*, 573 U.S. 373 (2014)
  - *Kyllo v. United States*, 533 U.S. 21 (2001)
  - *United States v. Jones*, 132 S. Ct. 945 (2012)
  - *Berger v. New York*, 388 U.S. 41 (1967)
  - *Carpenter v. United States*, 138 S. Ct. 2206 (2018)

### **Federal Consumer Privacy (Class 3)**

- *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)
- *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 988 F. Supp. 2d 434 (D. Del. 2013), *aff’d in part and vacated in part*, 806 F.3d 125 (3d Cir. 2015), petition for cert filed, (U.S. Mar. 14, 2016)
- *Dwyer v. Am. Express Co.*, 652 N.E.2d 1351 (Ill. App. Ct. 1995)
- *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011)
- *In re Google Inc.*, FTC No. C-4336 (Oct. 13, 2011)
- *In re MySpace LLC*, FTC No. C-4369 (Aug. 30, 2012)
- *In re Snapchat, Inc.*, FTC No. C-450 (Dec. 23, 2014)
- 15 U.S.C. § 45

#### **Government and Law Enforcement (Class 4)**

- *Florida v. Riley*, 488 U.S. 445 (1989)
- *US v. Warshak*, 631 F.3d 266 (6th Cir. 2010)
- *Monitoring and Surveillance: Federal Electronic Surveillance Law*
  - *Carpenter v. United States*, 138 S. Ct. 2206 (2018)
  - [http://www.cdt.org/files/pdfs/Dempsey\\_testimony\\_May\\_5\\_2010.pdf](http://www.cdt.org/files/pdfs/Dempsey_testimony_May_5_2010.pdf)
  - [http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=328150](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=328150) (optional)
  - [http://www.stanfordlawreview.org/sites/default/files/articles/Kerr\\_0.pdf](http://www.stanfordlawreview.org/sites/default/files/articles/Kerr_0.pdf)
  - Electronic Communications Privacy Act, 18 USC 2701, *et seq*
- *Homeland Security, Databases and Profiles*
  - Safeguarding Privacy in the Fight Against Terrorism, *available at* <http://www.cdt.org/security/usapatriot/20040300tapac.pdf>

#### **Cambridge Analytica discussion and Social Media Privacy (Class 5)**

- In re Google Inc., FTC No. C-4336 (Oct. 13, 2011)
- In re Facebook, Inc., FTC No. C-4365 (July 27, 2012)
- In re MySpace LLC, FTC No. C-4369 (Aug. 30, 2012)
- *United States v. Google Inc.*, No. CV 12-04177 SI, 2012 WL 5833994 (N.D. Cal. Nov. 16, 2012)
- In re Epic Marketplace, Inc., FTC No. C-4389 (Mar. 13, 2013)
- *FTC v. T-Mobile USA, Inc.*, No. 2:14-cv-00967-JLR (W.D. Wash. Dec. 19, 2014)
- In re Snapchat, Inc., FTC No. C-450 (Dec. 23, 2014)
- Cambridge Analytica
  - <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election>
  - Testimony of Mark Zuckerberg Before The United States House Of Representatives Committee On Energy And Commerce  
<https://docs.house.gov/meetings/IF/IF00/20180411/108090/HHRG-115-IF00-Wstate-ZuckerbergM-20180411.pdf>
- Social Media Privacy Laws
  - Ex: Montana HB 343, *available at* <http://leg.mt.gov/bills/2015/billpdf/HB0343.pdf>

#### **Computer Crime Law and Privacy (Class 6)**

- 18 U.S.C. § 1028 (Identity Theft)
- 18 U.S.C. § 1028A (Aggravated Identity Theft)
- *U.S. v. Salazar-Montero*, 520 F. Supp. 2d 1079 (N.D. Iowa 2007)
- *U.S. v. Contreras-Macedas*, 437 F. Supp. 2d 69 (D.D.C. 2006)

- 18 U.S.C. §§ 2510-2514 (Wiretap Act)
- 18 U.S.C. § 1029 (Access Device Fraud)
- 18 U.S.C. § 2261A (Stalking)
- 18 U.S.C. § 1030 (Hacking)
- *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012)
- *WEC Carolina Energy Solutions LLC v. Miller*, 687 F.3d 199 (4th Cir. 2012)
- *United States v. Valle*, 807 F.3d 508 (2nd Cir. 2015)
- *United States v. John*, 597 F.3d 263 (5th Cir. 2010)
- *United States v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010)
- *United States v. Van Buren*, 940 F.3d 1192 (11th Cir. 2019)

### **State and Federal Powers for Regulation of Content and Content Moderation (Class 7)**

- *NetChoice v Paxton*, *NetChoice v Moody*, available at NetChoice.org
- *Miami Herald Publishing Company v. Tornillo*, 418 US 241 (1974)
- *PruneYard Shopping Center v. Robins*, 447 US 74 (1980)
- *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 US 557 (1995)
- *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* 547 US 47 (2006)

### **State Privacy Laws (Class 8)**

- CCPA/CPRA
  - Read the California Consumer Privacy Act, available at [http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180AB375&search\\_keywords=consumer+privacy](http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB375&search_keywords=consumer+privacy)
  - CCPA regulations available at <https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-nopa.pdf>
  - Eric Goldman on CCPA
    - California Amends the Consumer Privacy Act (CCPA); Fixes About 0.01% of its Problems, available at <https://blog.ericgoldman.org/archives/2018/10/california-amends-the-consumer-privacy-act-ccpa-fixes-about-0-01-of-its-problems.htm>
    - The California Consumer Privacy Act should be condemned, not celebrated, available at <https://iapp.org/news/a/the-california-consumer-privacy-act-should-be-condemned-not-celebrated/>
  - Supporters of CCPA
    - <https://www.caprivacy.org/about>

- Virginia's Consumer Data Protection Act (CDPA)
  - <https://lis.virginia.gov/cgi-bin/legp604.exe?211+sum+SB1392>
- California “Eraser Button” California, Calif. Bus. & Prof. Code §§ 22580-22582
- Biometric Privacy
  - Illinois Biometric Information Privacy Act (BIPA), 740 Ill. Comp. Stat. 14/1 et seq. (2008)
  - *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186 (Ill. 2019)
  - *Patel v. Facebook Inc.*, 290 F. Supp. 3d 948 (N.D. Cal. 2018)

### **Data Breach Legislation (Class 9)**

- California Data Breach Law, Cal. Civ. Code §§ [1798.29](#), [1798.80 et seq.](#)
- Massachusetts Data Breach Law, Mass. Gen. Laws § [93H-1 et seq.](#)
- *FTC v. Wyndham Hotels & Resorts, LLC* (3d Cir.), Supplemental Brief of FTC, 14-3514 (115.52 KB)
- *LabMD, Inc. v. FTC*, 891 F.3d 1286 (11th Cir. 2018)
- *In re Microsoft Corp.*, FTC No. C-4049 (Dec. 20, 2002)
- *In re Twitter, Inc.*, FTC No. C-4316 (Mar. 2, 2011)
- *In re Snapchat, Inc.*, FTC No. C-4501 (Dec. 23, 2014)
- *Cybersecurity: A Practical Guide to the Law of Cyber Risk* (Edward R. McNicholas & Vivek K. Mohan eds., 2016)

### **European Regulation and Right to Be Forgotten (Class 10)**

- Universal Declaration of Human Rights (1948), <https://www.un.org/en/about-us/universal-declaration-of-human-rights>
- UN Guidelines for the Regulation of Computerized Personal Files (1990), <https://digitallibrary.un.org/record/43365?ln=en>
- The U.S.–EU Safe Harbor Arrangement (2000-2015), [https://iapp.org/media/pdf/resource\\_center/brief\\_history\\_of\\_safe\\_harbor\\_2000\\_to\\_2016.pdf](https://iapp.org/media/pdf/resource_center/brief_history_of_safe_harbor_2000_to_2016.pdf)
- *Copland v. United Kingdom*, 62617/00 Eur. Ct. H.R. (2007), <https://www.5rb.com/wp-content/uploads/2013/10/Copland-v-UK-ECHR-3-Apr-2007.pdf>
- Case C-362/14, *Maximillian Schrems v. Data Prot. Comm’r* 2015 E.C.R. (Sept. 23, 2015), <https://curia.europa.eu/juris/document/document.jsf?docid=168421&mode=req&pageInd ex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=744403>

- GDPR
  - <https://iapp.org/resources/gdpr-in-20-minutes/>
  - <https://www.eugdpr.org>
- EU cookie directive
  - [http://ec.europa.eu/ipg/basics/legal/cookies/index\\_en.htm](http://ec.europa.eu/ipg/basics/legal/cookies/index_en.htm)
- Safe Harbor Data Transfers
  - [http://www.export.gov/safeharbor/eu/eg\\_main\\_018476.asp](http://www.export.gov/safeharbor/eu/eg_main_018476.asp)
- Mark Began, *What to Expect From the EU's Move to Regulate U.S. Tech Companies*, Recode (May 5, 2015), available at <http://recode.net/2015/05/05/what-to-expect-from-the-eus-move-to-regulate-u-s-tech-companies/>
- *Google Inc. v Agencia Española de Protección de Datos (AEPD)*, EU Court of Justice (May 13, 2014), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=305802>
- European Commission, *Factsheet on the "Right to be Forgotten" ruling*, available at [http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet\\_data\\_protection\\_en.pdf](http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf)
- Mark Scott, *Right to Be Forgotten' Should Apply Worldwide, E.U. Panel Says*, New York Times (Nov. 26, 2014), available at [http://www.nytimes.com/2014/11/27/technology/right-to-be-forgotten-should-be-extended-beyond-europe-eu-panel-says.html?\\_r=0](http://www.nytimes.com/2014/11/27/technology/right-to-be-forgotten-should-be-extended-beyond-europe-eu-panel-says.html?_r=0)
- Chris Green, *Law firms exploiting EU 'right to be forgotten' ruling to help individuals remove awkward newspaper articles from Google*, The Independent (Apr. 17, 2015), available at <http://www.independent.co.uk/news/world/europe/law-firms-exploiting-eu-right-to-be-forgotten-ruling-to-help-individuals-remove-awkward-newspaper-articles-from-google-10185164.html>

### **Children's Privacy (Class 11)**

- Children's Online Privacy Protection Act
  - Children's Online Privacy Protection Act of 1998, 15 U.S.C. 6501–6505
  - Children's Online Privacy Protection Rule: Final Rule Amendments -- 16 C.F.R. Part 312, available at <http://www.gpo.gov/fdsys/pkg/FR-2013-01-17/pdf/2012-31341.pdf>
  - *In re Apple Inc.*, FTC No. C-4444 (Mar. 25, 2014)
  - *United States v. VTech Elec. Ltd. Inc.*, No. 1:18-cv-114 (N.D. Ill. Jan. 8, 2018)
  - *United States v. Playdom, Inc.*, No. 8:11-cv-00724-AG (ANx) (C.D. Cal. May 24, 2011)
  - *FTC v Youtube*
    - Complaint: [https://www.ftc.gov/system/files/documents/cases/youtube\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/youtube_complaint.pdf)

- Settlement:
    - [https://www.ftc.gov/system/files/documents/cases/172\\_3083\\_youtube\\_copa\\_consent\\_order.pdf](https://www.ftc.gov/system/files/documents/cases/172_3083_youtube_copa_consent_order.pdf)
- Family Educational Rights and Privacy Act (FERPA)
  - (20 U.S.C. § 1232g; 34 CFR Part 99)
  - *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)
  - *United States v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002)
- Student Privacy Bills
  - Eduard Godman, *Privacy in the Classroom: What You Need To Know About Educational Software*, IAPP (April 28, 2015), available at <https://privacyassociation.org/news/a/privacy-in-the-classroom-what-you-need-to-know-about-educational-software/>
  - California, Student Online Personal Information Protection Act of 2014 (SOPIPA) - [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201520160AB2799](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB2799)
  - Future of Privacy Forum, Student Data Privacy Pledge, <https://studentprivacypledge.org/privacy-pledge-2-0/>

### **Internet Of Things & Health and Genetic Privacy (Class 12)**

- FTC Staff Report, <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/150127iotrpt.pdf>
- The Guardian, *The internet of things - the next big challenge to our privacy*, available at <http://www.theguardian.com/technology/2014/jul/28/internet-of-things-privacy>
- Existing privacy protections
  - *Hammonds v. Aetna Cas. & Sur. Co.*, 243 F. Supp. 793 (N.D. Ohio 1965).
  - *Urbaniak v. Newton*, 277 Cal. Rptr. 354 (Ct. App. 1991)
- Laws
  - Health Insurance Portability and Accountability Act of 1996, *Pub. L. No. 104-191*
  - Texas Medical Privacy Act, Tex. Health & Safety Code Ann §§ 181.001 et seq.
  - Genetic Information Nondiscrimination Act of 2008 (GINA), *Pub. L. No. 110-223*
- *Moore v. Regents of the Univ. of California*, 51 Cal.3d 120 (Cal. 1990).

**Directed Research analysis and work (Class 13)**

**Directed Research analysis and work (Class 14)**



## **Course Policies:**

Course attendance is required. Participation and preparation for our course meetings will be a critical part of your performance in this course. In the unusual event that you cannot attend a particular session, please inform us by e-mail before class. Excessive absences will affect your grade.

## **Readings:**

Unless otherwise specified, all readings are mandatory, and you should be prepared to discuss them in class. Because the law and policies related to Internet privacy are constantly changing, and because sometimes I change my mind, we may change the reading assignments, sometimes drastically, from time to time. We will announce such changes in class. If you cannot attend class you should consult a colleague to ensure you have the correct assignments and are appropriately prepared.

If there is something that you think would be useful for the class to read, please suggest it.

## **Assignments:**

There will be one short writing assignment and a longer research paper. All written assignments should conform to BlueBook citations.

### **Short paper:**

This paper may be no longer than one-thousand words.

For one class meeting you will summarize and analyze a recent or proposed statute, regulation or law review article related to privacy. The goal of the papers is to demonstrate your ability to synthesize a significant piece of material and add some thoughts and observations that will help guide and drive our discussions.

Alternative assignments/options may be provided by the instructor as discussed in class. Please submit your short papers by email to the instructor by 5pm on the day of class via email.

### **Directed Research paper:**

For this semester, and the majority of your final grade, we are engaging in a directed research project designed to place you in the position of an advocate.

Students will rank their top 2 topics from a list provided by the Professor on which they would like to work. The Professor will then, taking into account ranking choices, assign to students. Note that you may still be assigned a topic area that you did not choose.

For most of the topics, there will be one student arguing each side of the issue. This means that students should take into account opposing arguments and address them in their advocacy document.

Each pair of students will concurrently present their initial work and arguments to the Professor. This will last for a total of one-hour for each issue and performance will be incorporated into final grades on directed research.

All papers should take into account the issue of “unintended consequences” and should address them -- are there any and if so do they outweigh benefits?

The longer writing assignment also requires you, in about 20, thoughtful, concise, well-researched pages, to research this problem or controversy related to privacy and emerging technologies and identify and argue for a solution.

The directed research paper will be due by 11:59 p.m., EST, on the last day of exams for the semester.

Your paper must conform to the Blue Book (law review style). Students are strongly encouraged to retrieve a hard copy of the George Mason Law Review from the library and review a student note or comment to help familiarize themselves with legal academic writing and the expected content and format of the papers.

Ultimately, this paper should be of such quality that you can submit for publication.

### **Notices:**

We will post notices about the course, new readings, items of interest, and relevant material via email.

Please check your email regularly and supply me with an email address that you can regularly access. Some notices may be posted or distributed to students via the registrar’s office.

### **Office Hours:**

We are happy to talk with you outside class, preferably by appointment.

### **Grading:**

15%	Class Participation
10%	Short Paper
75%	Directed Research Paper