

Surveillance, Privacy and the Law

Undergraduate Legal Studies Program, UC Berkeley

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Fall 2017

Syllabus

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 back centuries.

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 individual autonomy and the claims of larger social interests—for example: families, communities, religious authorities, business or government. 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, and denial of access, to personal information? What values, principles or policies can be invoked in defense of privacy?" **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 the role of law and policy in upholding privacy values, with attention to some of the many novel forms taken by personal information and the striking new possibilities for their use.

Classes will mix lecture, round-table discussion, and oral presentations (with commentary) from members of the class. In keeping with our status as a seminar, everyone will be expected to come to class having read the assigned material and ready to participate in all discussions, including discussions following the student class presentations.

Evaluation in the seminar will be based on four graded exercises. The first three will each account for about 20% of total credit, and the final exam will account for about 40%.

1. At least one oral class presentation as presenter and one as commentator, required of everyone.
2. The midterm exam, around the second or third week of October
3. A term paper, due Wednesday, November 22.
4. The final exam, given during exam period.

For the written exercises (numbers 2, 3 and 4 above), a particular form of writing will be required: short, concise essays on closely-defined topics. Both the examination essays and the term paper will have low word limits—perhaps five hundred words for exam questions and two thousand words for the mid-term. Topics for these exercises will be announced well in advance and discussed in class. These writing assignments will require much concerted reflection and planning, and relatively little time in the execution. In short, quality and precision will be emphasized over quantity.

The following pages list the readings, in the order in which they will be assigned. There are two texts, David Eggers's novel *The Circle* and Amitai Etzioni's *The Limits of Privacy*, both of which can be purchased in hard copy or as e-books. Inexpensive used copies of the Etzioni work are readily available. Other readings listed below are to be found in the course book for the seminar available from Copy Central or on-line via bCourses. The bCourses selections are flagged in the reading list with the notation ***.

UNIT ONE: BASIC CONCEPTS

WEEK 1 Introductions

WEEK 2

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

James Rule, *Privacy in Peril* (2007), pp. 1-6.

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

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

WEEK 3

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

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

Thomas Gregor (1980), "Exposure and Seclusion: A Study of Institutionalized Isolation among the Mehinaku Indians of Brazil" from Stanton K Tefft, ed., *Secrecy; A Cross-Cultural Perspective*, pp. 81-90.

WEEK 4

*** Lawrence M. Hinman (1998), Chapter 5 from *Ethics; A Pluralistic Approach to Moral Theory* (on utilitarianism) (pp. 162-204)

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

David Eggers pp. 39-105 from *The Circle* (2013)

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

WEEK 5

*** Lawrence M. Hinman (1998) Chapter 6 from *Ethics* (on Kant) (pp. 208-238)

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

Helen Nissenbaum, *Privacy in Context*, Chapter 8, pp. 158-185.

David Eggers pp. 105-146 from *The Circle* (2013)

WEEK 6

E.U. 2016 Privacy Regulation at
<http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:31995L0046>

*** Paul Schwartz and Karl-Nikolaus Peifer, “Prosser’s *Privacy* and the German Right of Personality ...”, *California Law Review* 2010, pp. 1926-1986

David Eggers *The Circle* (2013) pp. 146-192

WEEK 7

*** 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.

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

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

MIDTERM EXAM ABOUT NOW

UNIT TWO – LEGAL AND POLICY DOCTRINES

WEEK 8

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), p. 291-365.

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

WEEK 9

*** Roe v. Wade

*** Bowers v. Hardwick

*** Lawrence v. Texas,

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

Amitai Etzioni, *The Limits of Privacy*, pp. 183-188.

David Eggers pp. 192- 248 from *The Circle* (2013)

WEEK 10

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

Elizabeth Joh *****

Pam Dixon [on ID and surveillance in India]

Simon Denyer, “China’s Plan to Organize its Society Relies on ‘Big Data’ to Rate Everyone”, *The Washington Post*, 22 October 2016.

Amitai Etzioni, *The Limits of Privacy*, Chapter Four (on ID cards and biometric identifiers), pp. 103-138.

WEEK 11

*** Glenn Greenwald, [*No Place to Hide: Edward Snowden, the NSA, and the U.S. Surveillance State*](#) (2014), Chapter 3 (40 pp.)

Morton Halperin et al., pp. 118-132 from *The Lawless State* (1976)

E.U. Court of Justice Decision: Data Retention Directive Ruled Invalid, 8 April 2014

E.U. Court of Justice, JUDGMENT OF THE COURT 13 May 2014 [on the “Right to be Forgotten”]

David Eggers, *The Circle* (2013) pp. 248-306.

Week 12

*** Colin Bennett and Charles Raab, *The Governance of Privacy*, pp. 13-31

Daniel Solove, "Privacy Self-Management and the Consent Dilemma", *Harvard Law Review* Vol. 126, pp. 1880-1905.

James Rule, *L.A. Times* Op Ed, 3 pp.

David Eggers, *The Circle* (2013), pp. 306-395.

TERM PAPER DUE NOVEMBER 22

Week 13

Amitai Etzioni, *The Limits of Privacy*, Chapter 6, pp.183-215.

James B. Rule, "Privacy: The Longue Durée" in Beate Roessler and Dorota Mokrosinska, eds., *Social Dimensions of Privacy*, PP. 11-32.

David Eggers, *The Circle* (2013) pp. 395-497

REVIEW SESSION (to be scheduled)

FINAL EXAM DECEMBER 11