Origins of Information Privacy Law

I. Common Law Privacy
   a. Warren & Brandeis
      i. Legal Protections of Privacy have roots in common law
         1. Copyright & Defamation, etc.
      ii. Exceptions to the Right of Privacy
         1. Matters of public or general interest
            a. Except flagrant breaches of decency
         2. Matters published in court or legislature
         3. Oral publication in the absence of special damages
         4. Privacy ends by publication by the individual with his consent
      iii. Defenses:
         1. Truth is not a defense
         2. Absence of malice is not a defense
      iv. Remedies
         1. An action of tort for damages in all cases
         2. An injunction in certain limited instances

II. Constitutional Privacy
   a. Substantive Due Process & The Constitutional Right to Privacy
      i. Roe v. Wade
         1. Zone of privacy is created by the penumbras of Amendments 1, 3, 4, 5, 9
      ii. Whalen v. Roe
         1. Upheld State record system that recorded the name of users of certain
            prescription drugs
         2. DICTA: The right to collect the data is accompanied by a duty to avoid
            unwarranted disclosures
   b. The Westinghouse Test
      i. Type of record requested
      ii. Information the record does or might contain
      iii. Potential for harm in any subsequent nonconsensual disclosure
      iv. Injury from Disclosure to the relationship in which the record was generated
      v. Adequacy of safeguards to prevent unauthorized disclosure
      vi. Degree of need for access
      vii. Whether there is an express statutory mandate, articulated public policy or other
           recognizable public interest militating toward access
   c. § 1983 Constitutional Torts
      i. Cause of action against state actors who violate federal law/Constitution
         1. “Bivens” action against federal actors
      ii. Carter v. Broadlawns Medical Center
         1. Patients must approve before hospital chaplains may access their medical
            information
      iii. Doe v. Borough of Barrington
         1. Once the government has confidential information it has a duty to avoid
            unwarranted disclosure
      iv. Doe v. SEPTA
         1. In the absence of actual harm, limited disclosure of Doe’s HIV status in
            review of medical insurance claims for fraud was not actionable
         2. Interest in containing costs outweighs minimal intrusion
d. Evidentiary Privileges
   i. Attorney-client, physician-patient, spousal, priest-penitent
   ii. Crime Fraud Exception – communications made in furtherance of a crime are not protected
e. Confidentiality Tort
   i. Liability for Disclosure
      1. McCormick v. England
         a. Fiduciaries have a duty to not disclose confidences UNLESS:
            i. Required by law
            ii. In client’s interest
         b. No requirement of “highly offensive” or “likely to cause serious mental injury”
      2. Hammonds v. Aetna
         a. A third party who induces a fiduciary to breach his duty of loyalty is liable directly to the aggrieved party
   ii. Liability for Non-Disclosure
      1. Tarasoff v. Regents of UC
         a. Generally there is no duty to warn others of the conduct of a third party
         b. EXCEPT: When the Δ has a “special relationship” to either the person in danger or the person whose conduct may cause harm
         c. Doctor must use professional standard of care
         d. Protective privilege ends where public peril begins

III. Statutory Privacy
      i. NY statute protecting privacy did not bar publication of an article about a former child prodigy – “involuntary public figure”

IV. Philosophical Perspectives
   a. Westin
      i. States of Privacy: Solitude, Intimacy, Anonymity, Reserve
   b. Schwartz
      i. Privacy protects autonomous decision making
   c. Cohen
      i. Information privacy is key to democracy, if people are watched they will make more mainstream choices
   d. Posner
      i. Privacy hides true things, allows fraud & deceit
   e. Murphy
      i. Privacy is efficient, it allows people to do things that make them happy that they wouldn’t otherwise
   f. Siegel
      i. Presumption of marital privacy has allowed men to beat/subordinate women
   g. Allen
      i. Women have more equality now, should embrace privacy so long as it is available to them on equal terms
   h. Etzioni
      i. Humanitarians – Lack of privacy increases community social pressure to treat others well

Privacy & The Media
I. Intrusion Upon Seclusion
   a. Restatement
      i. One who intentionally intrudes, physically or otherwise,
         ii. Upon the solitude or seclusion of another or his private affairs or concerns,
         iii. Is subject to liability to the other for invasion of his privacy, IF the intrusion
              would be highly offensive to a reasonable person
   b. *Nader v. GM*
      i. Holds that harassing phone calls are not an “intrusion”
         1. Other courts have held otherwise
      ii. “Overzealous” surveillance of person in public may be actionable
      i. Magazine did not have First Amendment defense when it lied to gain access to a
         private residence where a man offered “healing” services without charge
   d. *Desnick v. ABC*
      i. Undercover investigative report in doctor’s office did not invade any person’s
         private space
   e. *Food Lion*
      i. Press is subject to generally applicable rules
      ii. Press may get special treatment when it comes to damages, e.g. $1 fine
   f. *Shulman v. Group W*
      i. It is possible for one to have a reasonable expectation of privacy in an
         ambulance
      ii. It is possible that conversations with paramedics are confidential

II. Public Disclosure of Private Facts
   a. Restatement
      i. One who gives publicity
         1. Generally disclosure to the public at large, *but see Motorola*
      ii. To a matter concerning the private life of another
      iii. Is subject to liability to the other for invasion of his privacy if the matter
           publicized is of a kind that:
               1. Would be highly offensive to a reasonable person, AND
                  a. Objective reasonable person standard
                  b. Not moderate or minor annoyances, but serious grievances
               2. Is not a legitimate concern to the public
                  a. Non-newsworthy, not the same standard as 1st Amendment
                     protection
   b. Private Matters
      i. *Gill v. Hearst*
         1. Photograph of couple hugging in public market was not private
      ii. *Daily Times Democrat v. Graham*
         1. Although public events cannot generally be private, if an event exposes
            the person in an embarrassing way it may be private
      iii. *McNamara v. Freedom Newspapers*
         1. Photograph of soccer game exposed genitals of player inadvertently
         2. No liability – distinguishable from *Graham* because there the newspaper
            knew the photo was embarrassing
   c. Publicity
      i. *Miller v. Motorola, Inc.*
1. Public disclosure requirement may be satisfied by disclosure to a limited group of people with a “special relationship” to the victim
d. Newsworthiness Test
      1. Disclosure of sexuality was newsworthy because it had bearing on whether a public figure had bias against gays
   ii. Outing
      1. Exposes illogic of government discrimination
      2. Provides positive gay role models
      3. Breaks down stigma
   iii. Newsworthiness Tests
      1. Leave it to the Press
         a. Defers to editorial judgment
      2. Customs and Conventions of the Community
         a. Giving information – OK; Morbid & Sensational prying – NO
      3. Nexus Test
         a. Logical nexus to a matter of legitimate public interest
   iv. *Shulman v. Group W*
      1. Auto accidents are newsworthy
e. First Amendment Limitations
   i. *NYT v. Sullivan*
      1. The 1st Amendment requires that the media be protected from liability for even false information absent “actual malice”
      2. Gives media “breathing room”
   ii. *Cox Broadcasting v. Cohn*
      1. State cannot impose liability for publishing names of rape victims learned in court documents
   iii. *Daily Mail*
      1. First Amendment protects only lawfully obtained information
   iv. *Florida Star v. BJF*
      1. Court struck down punishment for publishing name of rape victim learned from police report despite posted signs that such names were not public records
      2. Less restrictive means available – redact the police reports
      3. Restrictions on lawfully obtained information are punishable absent the need to further a state interest of the “highest order”
f. Illegally Obtained Information
   i. *Bartnicki v. Vopper*
      1. Media cannot be barred from reporting details of conversation obtained illegally by an unsolicited third party
III. Defamation
   a. Restatement
      i. A false and defamatory statement concerning another
      ii. An unprivileged publication to a third party
      iii. Fault mounting at least to negligence on the apart of the publisher
      iv. Either actionability of the statement irrespective of special harm or the existence of special harm caused by publication
   b. Definitions:
i. Defamatory: tends to harm the reputation of another as to lower him in the estimate of the community or to deter third persons from associating or dealing with him

ii. Publication: communication to a third party

iii. Libel: written or printed defamation
    1. Broadcasting is considered libel
    2. No “special harm”

iv. Slander: spoken defamation
    1. “Requires proof of actual pecuniary harm, EXCEPT:
    2. Slander per se:
        a. Criminal offense
        b. Loathsome disease
        c. A matter incompatible with one’s business, trade, profession, or office
        d. Serious sexual misconduct

c. Liability for transmission
    i. Failure to remove defamatory statements under one’s control
    ii. One who repeats or publishes defamation is liable if they would have reason to know of its defamatory character

d. Defamation on the Internet
    i. Publishers vs. Distributors
        1. Law generally distinguishes between those who publish defamation (book publisher may be liable), and those who merely distribute it (bookstore may not be liable)
        2. No “conduit” liability for telephone companies, etc.
    ii. Cubby v. Compuserve
        1. Court found Compuserve to be a distributor
    iii. Stratton Oakmont v. Prodigy
        1. Court found Prodigy to be a publisher because screening program allowed them to exercise some control

iv. Communications Decency Act
    1. ISPs are not publishers

v. Zeran v. AOL
    1. Court found AOL not liable for third party postings, even when it received a notice or complaint

vi. Blumenthal v. Drudge
    1. Court refused to hold AOL a publisher of Drudge’s content despite its contract w/ him and editorial control
    2. Relied on express statutory language of CDA

vii. Barrett v. Rosenthal
    1. Found that liability in Drudge type situation would not have substantial chilling effect or be contrary to CDA

e. First Amendment Limitations
    i. NYT v. Sullivan
        1. Actual malice required before public figures can recover for defamation
           a. Made w/ knowledge that it was false or w/ reckless disregard for truth
    ii. Gertz v. Robert Welch, Inc.
        1. Actual malice is not required for private citizens
2. For “limited purpose public figures”
   a. Actual malice required only on subjects related to their notoriety

   iii. Silvester
       1. Three prong test for limited purpose public figure
           a. Isolate the public controversy
           b. Examine the plaintiff’s involvement in the controversy
           c. Determine whether the alleged defamation was germane to the
              plaintiff’s participation in the controversy

IV. False Light
   a. Restatement
      i. One who gives publicity to a matter concerning another that places
         the other before the public in a false light is subject to liability to the other
         for invasion of his privacy, IF:
         1. The false light in which the other was placed would be highly offensive
            to a reasonable person
         2. The actor had knowledge of or acted in a reckless disregard as to the
            falsity of the publicized matter and the false light in which the other
            would be placed
   b. Lake v. Wal-Mart
      i. Minnesota refused to recognize false light tort on grounds that it was too similar
         to defamation and in tension with the First Amendment
   c. First Amendment Limitations
      i. Time v. Hill
         1. Actual malice required for false light claim
         2. Possible that Gertz modified this standard

V. Infliction of Emotional Distress
   a. Restatement
      i. One who by extreme and outrageous conduct intentionally or recklessly causes
         severe emotional distress to another is subject to liability for such emotional
         distress, and if bodily harm to the other results from it, for such bodily harm
   b. Hustler Magazine v. Falwell
      i. Actual malice standard applies to public figures suing under IIED

VI. Appropriation of Name or Likeness
   a. Restatement (Torts)
      i. One who appropriates to his own use or benefit the name or likeness of another
         is subject to liability to the other for the invasion of his privacy
         1. Δ must have appropriated to his own use or benefit the reputation,
            prestige, social or commercial standing, public interest or other values of
            the Π’s name or likeness
   b. Restatement (Unfair Competition)
      i. One who appropriates the commercial value of a person’s identity by using
         without consent the person’s name, likeness, or other indicia of identify for
         purposes of trade is subject to liability for monetary and injunctive relief
   c. Appropriation vs. “Right of Publicity”
      i. Appropriation is for private figures (embarrassment)
      ii. Right of Publicity is for public figures (loss of revenue)
   d. Name or Likeness
      i. Carson v. Here’s Johnny Portable Toilets
         1. Court rejected invasion of privacy claim – Carson already a public figure
2. Court allowed publicity claim – protects pecuniary interest of Carson
   ii. What is name or likeness:
       1. Well-known nicknames (e.g. “The Greatest”)
       2. Identifying characteristics (e.g. distinctive race car w/ faceless driver)
       3. Impersonations
       4. Fictitious personas (e.g. Laurel & Hardy)
       5. NOT telling a person's life story

e. Public Interest
   i. The Real Relationship Test
       1. There must be a legitimate connection between the II’s name and
          photograph and the matter of public interest
       1. Article on in vitro fertilization & caffeine using picture of large family
          who never used either method to conceive met the test
          a. Link between family size and fertility
       2. Should be regulated only where the news article is really an
          advertisement in disguise

f. First Amendment Limits
   i. *Zacchini v. Scripps-Howard Broadcasting*
      1. First Amendment does not give press the right to broadcast performers
         entire act

Privacy & Law Enforcement
I. The Fourth Amendment
   a. The right of the people to be secure in their persons, houses, papers, and effects, against
      unreasonable searches and seizures, shall not be violated, and no warrants shall issue,
      but upon probable cause, supported by oath or affirmation, and particularly describing
      the place to be searched, and the persons or things to be seized.
      i. The courts can order a Δ to produce papers that incriminate the Δ – No Fifth
         Amendment privilege in papers
   b. Plain View exception
      i. Warrant requirement applies only to “searches”
   c. Reasonableness
      i. Warrant search generally reasonable
      ii. Warrantless search generally per se unreasonable
          1. EXCEPT: exigent circumstances
   d. “Special Needs”
      i. Allows warrantless searches when law enforcement is not the purpose
   e. “Checkpoints”
      i. No random stopping for license and registration, but sobriety checks are OK
      ii. “Information-seeking” stops are OK
   f. Terry Stops
      i. Officers with reasonable suspicion may briefly stop a person and frisk for
         weapons
   g. The Exclusionary Rule
      i. Evidence obtained in violation of the 4th Amendment (and its products) can be
         suppressed at trial
      1. Exception: Independent Source Rule & *Leon* good faith exception
II. Wiretapping & Bugging
   a. *Olmstead v. U.S.*
i. Court held that Fourth Amendment did not apply to wiretap installed outside the home
ii. Brandeis argued in dissent that Constitutional protections against abuses of power must have the capacity to adapt to a changing world

b. Federal Communications Act
i. In response to Olmstead, Congress made unauthorized wiretapping a crime
c. Hoffa & Lewis Cases
i. Assumption of Risk – when you talk with someone you assume the risk that they will divulge the information, or that the person is not who they say they are
d. Silverman
i. “Spike mike” which touched heating duct to hear conversation in next house was an unauthorized physical encroachment
e. Lopez v. U.S.
i. No violation in recording conversation with federal agent where agent could testify to the conversation in court
f. Katz v. U.S.
i. Fourth Amendment protects people not places
ii. Closed phone booth is protected
iii. Reasonable Expectation of Privacy Test (concurring opinion)
   1. Person must exhibit an actual expectation of privacy (subjective)
   2. The expectation must be one that society recognizes as reasonable (objective)
g. U.S. v. White
i. Recording by federal agent concealed in home of informant admissible

III. The Reasonable Expectation of Privacy Test
a. Smith v. Maryland
i. Allowed use of pen register without warrant b/c no objective expectation
   1. Numbers you dial are always relayed to the phone company
   2. Assumption of Risk
   3. Analogy to envelope information vs. content information
b. California v. Greenwood
i. Garbage searches are OK
ii. Assumption of Risk & Abandonment rationale
c. Plain View, Open Fields, & Curtilage
i. Plain View: If it is possible for something to be seen or heard from a public vantage point, there can be no reasonable expectation of privacy
   1. No reasonable expectation of privacy in open fields
   2. Parts of one’s property immediately outside one’s home do not fall within the open fields doctrine
   3. Curtilage
   1. Parts of one’s property immediately outside one’s home do not fall within the open fields doctrine
d. Florida v. Riley
i. No general right of privacy in curtilage which is visible from a helicopter
   1. Public has right to fly over and see what can be seen with the naked eye
ii. Sensory Enhancement Technology
   1. Sensory enhancement technology does not change the Riley rule
   2. Mere enhancement of what the naked eye can see is acceptable
   3. Camera used was available to the public
ii. *Kyllo v. U.S.*
   1. Obtaining, by sense-enhancing technology, any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area constitutes a search – at least where the technology is not in general public use

IV. **Constitutional Privacy in the Home**
   a. *Stanley v. Georgia*
      i. Private possession of obscene materials in the home cannot be a crime
      ii. State has no business telling a man in his home what he may read or watch
   b. *Osborne v. Ohio*
      i. Constitution does not protect possession of child pornography in the home
      ii. Court examines the State’s motives:
          1. Seeking to destroy the market for an activity that requires the exploitation of children
   c. *Wilson v. Layne*
      i. Police actions in execution of a warrant must be related to the objectives of the authorized intrusion
         1. Bringing reporters along is not related

V. **Federal Electronic Surveillance Law**
   a. § 605 of the Federal Communications Act (1934)
      i. Made all wiretapping a federal crime
      ii. Court implied an exclusionary rule in *Nardone*
   b. Title III of the Omnibus Crime Control Act (1968)
      i. Required federal agents to apply for a warrant before wiretapping
      ii. Standard was probable cause
      iii. National security exception applied only to external threats
   c. Electronic Communications Privacy Act (ECPA) (1986)
      i. Scope
         1. Applies to government agents and private parties
      ii. Types of Communications
         1. Wire
            a. Aural transfer that travels through a wire
            b. Aural transfer = communication containing the human voice
         2. Oral
            a. Communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such an expectation
         3. Electronic
            a. Any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photonic or photooptical system that affects interstate or foreign commerce
      iii. Title I: The Wiretap Act
         1. Prohibits intentional interception, use, or disclosure
         2. Warrants: Judge must find
            a. Probable Cause of crime
            b. That communications concerning the offense will be obtained
c. Alternatives to wiretapping were attempted and failed, or reasonably appear to be unlikely to succeed or to be too dangerous
d. Warrant can last for 30 days

3. Exclusionary Rule applies

iv. Title II: The Stored Communications Act
   1. Scope: Applies to
      a. Any temporary, intermediate storage of a wire or electronic communication incidental to the transmission thereof, or
      b. Any storage of such communication by an electronic communications service for purposes of backup protection of such communication
   2. Warrants
      a. < 180 days – probable cause
      b. > 180 days – notice to subscriber, subpoena/court order, specific and articulable facts showing that there are reasonable grounds of relevance
         i. Notice can be waived upon probable cause showing
   3. No exclusionary rule

v. Title III: The Pen Register Act
   1. Requires court order
      a. Less than probable cause standard: Gov. must certify information is likely to be relevant to ongoing investigation
   2. No exclusionary rule
   3. After the PATRIOT ACT
      a. Now applies to Internet address, the “to” and “from” lines on email, and other “routing” or envelope information

vi. Independence of the Fourth Amendment
   1. ECPA is applied independently of the Fourth Amendment

vii. Installation of Bugs
   1. Government can covertly enter a home to carry out an electronic surveillance warrant

viii. Enforcement
   1. Exclusionary rule for wire & oral communications under Title I ONLY
   2. Criminal and civil penalties for violations

d. Video Surveillance
   i. Silent video surveillance is not covered under federal law
   ii. Fourth Amendment still applies

e. Email Surveillance
   i. Steve Jackson Games, Inc. v. U.S. Secret Service
      1. Email stored on server after being sent but before being read is in electronic storage and therefore protected by Title II
   ii. What about email that has been read, but is still stored remotely on an ISP?
      1. DOJ Position: A remotely stored file, Title II does not apply
      2. 9th & 3rd Circuit Position: The storage is for backup, so Title II applies

f. CALEA – Communications Assistance for Law Enforcement Act
   i. Requires electronic communications providers to provide infrastructure to assist law enforcement

VI. Terrorism & National Security
a. Foreign Intelligence Surveillance Act (FISA)
   i. Applies when foreign intelligence gathering is a “significant purpose” of the investigation (no longer primary purpose)
   ii. Must have probable cause that the party to monitored is a “foreign power” or “an agent of a foreign power”
       1. If the target is a “US person” then must have probable cause that person may or are about to involve a criminal violation
       2. No warrant required if:
          a. Exclusive purpose is to obtain intelligence from foreign powers
          b. No substantial likelihood that the surveillance will acquire the contents of any communications to which a United States person is a party
          c. AG must approve
   iii. FISA does not violate the Fourth Amendment
   iv. Global Relief Foundation v. O’Neil
       1. FISA provision allowing Gov. to act and then seek warrant up to 72 hours later is Constitutional
v. U.S. v. Isa
   1. FISA requirement that communications not related to foreign intelligence be destroyed does not prohibit retention of communications that are evidence of other domestic crimes
b. National Security & The Fourth Amendment
   i. Keith: Different standards may be compatible with the 4th Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens
   c. FISA & The Wall
      i. In Re Sealed Case
         1. There must be a “realistic option” of dealing with the target in a way other than criminal prosecution to satisfy the “significant purpose” test
         2. Even if FISA doesn’t meet 4th Amendment standards, it “comes close”

Privacy of Associations & Anonymity
I. Privacy of Association
   a. First Amendment Origins
      i. “Congress shall make no law…abridging…the right of the people peacefully to assemble.”
      ii. Implied protection of all expressive activities.
   b. Compelled Disclosure of Membership Lists
      i. NAACP v. Alabama
         1. State action restriction expressive activities (like association) are subject to strict scrutiny
            a. Compelling government interest
            b. Narrowly tailored
            c. Least restrictive means
      ii. Buckley v. Valeo
         1. Interest in deterring corruption and in an informed electorate outweighs First Amendment interest in anonymous political donations
   c. Interrogation About Associations
      i. Barenblatt v. U.S.
1. Congress has power to investigate groups planning a violent overthrow of the government
2. Suspects must not be brought in by indiscriminate dragnet procedures
d. Surveillance of Group Activities
   i. *Laird v. Tatum*
   1. Army intelligence surveillance of meetings open to the general public created only a “subjective chill”, not a direct 1st Amendment injury
   ii. *Religious Society of Friends v. Tate*
   1. Information gathered at public meetings by law enforcement may not disclose the information for non-law enforcement purposes

II. Anonymity
   a. Anonymous Speech
      i. *Talley v. State of California*
      1. Court struck down prohibiting anonymous distribution of handbills
      2. Compelled content in the speech (the name)
      3. Chilling effect on the speaker
      ii. *McIntyre v. Ohio Elections Commission*
      1. Ohio could not ban anonymous communications regarding elections that were not false or misleading
      iii. *Watchtower Bible & Tract Society v. Village of Stratton*
      1. Court strikes down ordinance requiring solicitors to register with the town as overbroad – no limitation to commercial activities
   b. Anonymity in Cyberspace
      i. *ACLU v. Miller*
      1. GA statute criminalizing the use of a false name on the internet was overbroad b/c it did not limit its application to instances where the false name was used for fraud
      ii. *Columbia Insurance Co. v. Seescandy.com*
      1. Requirements for discovering the identity of a party internet user:
         a. Π must identify the missing party with sufficient specificity so the court knows it is a real person
         b. Π must identify all previous steps to locate the elusive Δ
         c. Π must establish that the suit could withstand a motion to dismiss
         d. Π must list persons who may have the identity and reasons why that information will reasonably lead to service
      iii. *Doe v. 2TheMart.com, Inc.*
      1. Discovery of a non-party’s identity:
         a. Good faith
         b. Must relate to a core claim or defense
         c. Identity is directly and materially relevant to the claim or defense
         d. Information is sufficient to establish or to disprove the claim or defense is unavailable from any other source
   c. Anonymous Reading and Receiving of Ideas
      i. *Tattered Cover v. City of Thornton*
      1. To get bookstore records, Gov. must establish more than probable cause:
         a. Must demonstrate a compelling need for the precise information
         b. Third-party bookstore must be given a hearing
      2. Court rejected rationale of Gov. that if Suspect bought book on meth, he must have been the one making meth in a multiple person dwelling
Anonymity & Copyright
  i. **RIAA v. Verizon**
     1. In order to issue a subpoena to identify internet users under the Copyright Act, the ISP must be storing the infringing material on its servers (test not met for P2P users)

Privacy & Public Sector Databases
  I. **FOIA**
    a. U.S. Government records are generally available to the public
       i. Nine exceptions: national security, personnel rules, exempt by statute, trade secrets, memos or letters that would not be available to a party in litigation, personnel and medical files, law enforcement purposes, regulation of financial institutions, geological and geophysical
       ii. These are permissive (may) exemptions not mandatory (shall withhold)
       iii. Exemptions 6 and 7(C) (personnel and medical files, law enforcement records which could reasonably be expected to constitute an unwarranted invasion of personal privacy) protect privacy interests
    b. **U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press**
       i. Although “rap sheet” information is publicly available in a scattered form, its compilation by the FBI meets the exemption 7(C) requirement
       ii. FOIA request does not depend on the requestor’s identity or purpose
    c. **National Archives v. Favish**
       i. Application of Exemption 7(C) requires the court to balance privacy/disclosure
       ii. This requires the applicant to give a reason for his request – must show reasonable belief of improper conduct by law enforcement

II. Constitutional Requirements of Access
  a. **Globe News Papers**
     i. The First Amendment requires access to a proceeding based on whether:
        1. The proceeding historically has been open to the press & public
        2. Access plays a particularly significant role in the functioning of the judicial process and the government as a whole
           a. This included criminal cases
  b. **LA Police Dept. v. United Reporting Publishing Corp.**
     i. Government may place restrictions on access to its information, so long as there are not restrictions on post access dissemination

III. Constitutional Limits on Access
  a. Public Records
     i. **Kallstrom v. City of Columbus**
        1. When disclosure of information could lead to a substantial risk of serious bodily harm, State’s interest must be compelling and the statute narrowly drawn
        2. Affected persons have a right to notice and hearing
  b. Police Records
     i. **Paul v. Davis**
        1. State may publish list of arrested, but not convicted shoplifters to stores
        2. 14th Amendment protects only rights “fundamental” or “implicit in the concept of ordered liberty”
     ii. **Cline v. Rogers**
        1. There is no Constitutionally protected privacy interest in one’s criminal record
iii. *Scheetz v. The Morning Call, Inc.*
   1. When a person makes a police report, they lose their right to privacy regarding the incident.

c. Megan’s Laws
   i. *Paul P. v. Verniero*
      1. The interest served by sex offender registries are compelling enough to justify the deprivation of even fundamental rights

IV. Fair Information Practices
   i. No secret databases
   ii. Individual must be able to find out what information about him there is and how it is used
   iii. Must be a way for an individual to prevent information about him obtained for one purpose from being used or made available for other purposes without his consent
   iv. There must be a way for an individual to correct or amend the record about him
   v. Organizations must assure the reliability of the data for their intended use and must take reasonable precautions to prevent misuse

V. The Privacy Act
a. Purpose of the Act is:
   i. Allow individual to know what records are kept
   ii. Allow him to prevent secondary use
   iii. Allow access to records by the individual
   iv. Assure that data collection is current, accurate, and for a necessary and lawful purpose

b. Exemptions
   i. Law Enforcement & CIA records are exempt
   ii. FOIA – If FOIA requires release, Privacy Act does not apply
   iii. Any Routine Use – if compatible with purpose of original collection
   iv. Information sharing for civil or criminal enforcement activity

b. Private Right of Action & Damages
   i. II must prove that the agency violated its obligations under the act
   ii. The information must be record, within a system of records, that is identifiable to an individual
   iii. Damages:
      1. II must show adverse impact from the violation
         a. Must show at least some actual damages to get $1k minimum
      2. After *Andrews*, gross negligence is not enough to prove a violation, II must show intentional, willful, or reckless act

d. The First Amendment
   i. Agency may not maintain a record of an individual’s First Amendment activities, UNLESS
      1. Pertinent to AND within the scope of a valid law enforcement activity

e. J. Roderick MacArthur Foundation v. FBI
   i. If the information was “pertinent” when collected, the agency may maintain the record indefinitely, even if the information is not of current interest or necessity

Privacy & Private Sector Databases
I. Non-Statutory Regulation
   a. Self-Regulation
Consumers have widely varying interests in privacy. Market is the most efficient method of determining the balance.

b. Property & Contract Law
i. Argues that privacy is property, individuals should have power of who gets their information and who can use it

c. Technological Solutions
i. Privacy Enhancing Technology – Technology that protects individual information from collection without consent

d. Tort Law
i. 
   Dwyer v. American Express
   1. AmEx could compile and sell lists based on consumer spending patterns
   2. Intrusion tort failed b/c cardholders voluntarily gave AmEx the information by using the card
   3. Appropriation tort failed b/c cardholder names had no “value” independently

ii. Shibley
   1. No public disclosure tort – no shame or humiliation b/c of magazine subscription
   2. Appropriation tort failed – available only where name or likeness is made available to the general public, not applicable in commercial transaction

iii. Remsburg v. Docusearch
   1. There is a general duty to avoid exposing another to an unreasonable risk of harm
   2. Generally no duty to prevent the criminal acts of third parties
   3. However, b/c stalking and ID theft are foreseeable consequences of selling personal information, data broker has a duty to use reasonable care
   4. Liability exists where the Δ should have realized that its conduct would have been offensive to persons of ordinary sensibilities
   5. No appropriation tort in private commercial transaction

II. Statutory Protections
a. Electronic Surveillance Law
i. In re Pharmatrak
   1. IT’s ECPA Title I claim failed b/c Medical Websites consented to Pharmatrak collecting the data about visitors
      a. EXCEPTION: Where the purpose of the interception is a criminal or tortious act
         i. ECPA violation itself cannot be the act
   2. Title II claim fails b/c personal computer is not a facility through which electronic communications are provided
ii. Dyer v. Northwest Airlines
   1. IT’s Title II claim against Northwest for disclosing data about passengers failed because Northwest is not a provider of “electronic communication service”
      a. That phrase does not include traditional business selling online

b. Computer Fraud and Abuse Act (CFAA)
   i. Applies to any computer used in interstate commerce or communication
   ii. Criminal penalties for intentional access of a computer without authorization
iii. Civil Remedy
   1. Damage must be at least $5k in a 1-year period, OR
   2. Modify or impair medical information
   3. Cause physical injury
   4. Threaten public health or safety
iv. Chance v. Avenue A
   1. Damage amounts can be aggregated across both time and individual
      computers, but it cannot be aggregated across separate acts

c. Video Privacy Protect Act
   i. Prohibits videotape service providers from knowingly disclosing personal
      information without written consent
   ii. Records must be destroyed as soon as practicable
   iii. Allows disclosure:
      1. Incident to ordinary business
      2. Of subject matter of rentals for marketing
iv. Enforcement
   1. Actual Damage
   2. Liquidated damages of $2.5k
   3. Exclusionary Rule
v. Limits: does not apply to library rentals or video on demand (Cable Act)
vi. Dirkes v. Borough of Runnemed
   1. Under VPPA, person who solicits the unlawful disclosure may also be
      liable
d. Cable Communications Policy Act (CCPA)
   i. Cable subscribers must opt-in to the collection of personal information
   ii. No Disclosure to private party without written consent, EXCEPT:
      1. Legitimate business activity
      2. Pursuant to court order w/ notice to customer
   iii. Government may access when:
      1. Clear and convincing evidence material evidence in criminal case
      2. Customer is given notice and opportunity for hearing
iv. Enforcement
   1. Actual Damages
   2. Liquidated Damages ($1k or $100/day; whichever is greater)
   3. Punitive Damages & Attorney’s fees
e. Telephone Consumer Protection Act (TCPA)
   i. Enforcement:
      1. Actual Damages or up to $500; whichever is greater
      2. Applies after consumer opts-out
f. Children’s Online Privacy Protection Act (COPPA)
   i. Websites must disclose how they collect/use/disclose children’s personal
      information
   ii. Must obtain parental consent for disclosure
   iii. Enforcement:
      1. FTC fines – No private right of action

III. First Amendment Limitations on Privacy Regulation
a. Commercial Speech
   i. Deserves constitutional protection, but to a lesser degree
ii. Commercial speech is speech that proposes a commercial transaction and is related solely to the economic interests of the speaker and its audience

b. **Central Hudson Test**
   i. Speech must be about a lawful activity and not be misleading
   ii. The asserted government interest must be substantial
   iii. The regulation must directly advance that interest
   iv. The regulation must not be more extensive than necessary
      1. *Fox*: revised fourth prong: There must be a fit between the legislature’s ends and means chosen to accomplish the ends, a fit that is not necessarily perfect, but reasonable

c. **Rowan v. U.S. Post Office**
   i. USPS may operate an opt-out system for junk mail – the right of the householder to bar access

d. **Mainstream Marketing services v. FTC**
   i. Do Not Call List serves substantial government interests
   ii. Opt-in feature makes it narrowly tailored

e. **U.S. West v. FCC**
   i. B/C FCC failed to explain when or why a company might transfer the personal information it holds to another it has not demonstrated that the regulation will advance the stated interests
   ii. Opt-out plan would also be less restrictive

f. **Trans Union v. FTC**
   i. FCRA limited the ability of credit reporting agencies to also sell marketing products
   ii. A rule can be struck for under-inclusiveness only if it cannot fairly be said to advance any genuinely substantial governmental interest because it proves only ineffective support for the asserted goal

g. “Freedom of Information” as “Freedom of Contract”
   i. Richards argues that much of this commercial “speech” is really not speech at all
   ii. Similarities between Freedom of Information in commercial context and *Lochner*: Legal regulation of problem cause by rapid technological change, power differential, both theories place the problem beyond the power of the legislature, elevating economic concerns to constitutional rights