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MASSACHUSETTS SCHOOL OF LAW at ANDOVER **Issues in Internet Privacy & Security - Syllabus**

**Spring 2020 – Professors Olson & Mick Coyne**

**Mon., Jan. 13th – Sat., Jan. 18th, 2020**

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| **TOPIC & ASSIGNMENT** | **CLASS HOURS** | **NOTES** |
| 1. **Introduction**
	1. Information Privacy, Technology, and the Law
	2. Information Privacy Law: Origins and Types
 | 3-4 hours**Mon., Jan. 13th** | This class provides a basic overview of information privacy and the law that has developed to protect it. |
| **2. Philosophical Perspectives** | **Mon., Jan. 13th** | The readings in this part can be covered with a general discussion about the meaning of “privacy” or with a more specific discussion of each excerpt. This material adds different perspectives regarding information privacy, including those from economics, feminism, philosophy, and sociology. There are a lot of ideas in this section, so coverage time will vary depending upon instructor preference. |
| **3. Financial Data** | 3-4 hours**Tues., Jan. 14th**  | This material can be dense, but when the material is delved into, students should find it interesting and accessible. The most important and most complex material in the chapter is in the FCRA section. |
| 1. **Consumer Data**
	1. The U.S. System of Consumer Data Privacy Regulation
 | **Tues., Jan. 14th**  | The material on PII and standing is quite important and worth spending time discussing. |
| 1. Tort Law
2. Contract Law
 | 3-4 hours**Wed., Jan. 15th**  | The cases on tort law and commercial databases can lead to significant discussion, especially Remsburg which is a very interesting case. |

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| D. Property Law | **Wed., Jan. 15th**  | The issue of whether privacy policies should be enforceable as contracts (the Northwest Airlines case) can lead to considerable discussion. The other materials in this section can be discussed or used as background for lecture.The property law section raises some interesting issues to discuss. |
| E. FTC Section 5 Enforcement | 3-4 hours**Thurs., Jan. 16th**  | The FTC plays a very significant role in regulating privacy and there is plenty of material now here to spend a fair bit of time discussing the FTC. |
| F. Statutory Regulation | **Thurs., Jan. 16th**  | Some cases here can lead to considerable discussion, especially *Hulu*, *Google Gmail Litigation*, and *Drew*. |
| G. First Amendment Limitations on Privacy Regulation | 3-4 hours**Sat., Jan. 18th**  | *Rowan* can be covered quickly. Mainstream Marketing provides a very clear example of how First Amendment doctrine applies to privacy regulation. These other cases are just different ways of applying Central Hudson. U.S. West is an interesting and provocative case, and it can lead to some great discussions. Trans Union is a bit more dry, and it comes to an opposite conclusion than U.S. West. Sorrell warrants significant attention. |
| **5. Data Security** | **Sat., Jan. 18th**  | The cases on standing present fundamental issues for discussion – the nature of the harm from a breach. The Wyndham case is a very important one as it goes to the FTC’s authority to regulate.  |

**Cases, Other Readings, &**

**Questions to Ponder**

### First Class – Monday, Jan. 13th, 2020

### *SIDIS V. F-R PUBLISHING CORP.*, 113 F.2d 806 (2ND Cir. 1940).

### Material on [William Sidis](file:///Users/kolson/Dropbox/Issues%20in%20Internet%20Law%20Jan.%202020/Sidis%20Material/The%20Prodigy%20is%20Amy%20Wallace.pdf)

### [Joyce Maynard, JD Salinger and the letters: Predator or Prey?](https://www.theguardian.com/books/2018/sep/06/jd-salinger-teenage-lover-challenges-her-predator-reputation-joyce-maynard)

### [Girls Gone Wild – Fair Game or Foul?](https://slate.com/human-interest/2013/05/girls-gone-wild-founder-joe-francis-will-go-to-prison-and-he-deserves-it.html)

### [Google-Ization](https://www.salon.com/2011/04/12/the_googlization_of_everything_siva_vaidhyanathan/)

### [Star Wars Kid](https://www.youtube.com/watch?v=3GJOVPjhXMY) & [Numa Numa Dancer](https://www.youtube.com/watch?v=KmtzQCSh6xk)

### SAMUEL D. WARREN & LOUIS D. BRANDEIS, *THE RIGHT TO PRIVACY*, 4 HVLR 193 (1890).

### *Roberson v. Rochester Folding Box Co*., 64 N.E. 442 (1902).

## *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (1905).

### The Prosser Privacy Torts In A Digital Age, 251-APR NJLAW 9 (2008).

## *Lake v. Wal-Mart Stores, Inc*., 582 N.W.2d 231 (1998).

[Charles Fried – “Our Collective Privacy Panic.”](https://www.lawfareblog.com/our-collective-privacy-panic)

[Ruth Gavison – The Philosophy of Privacy (Section 2 of *Privacy: Building Block or Barrier on the Internet* only)](https://web.archive.org/web/20160103054221/http%3A/www.isoc.org/inet96/proceedings/h3/h3_1.htm)

[Inness and Intimacy](file:///Users/kurtolson/Dropbox/Issues%20in%20Internet%20Law%20Jan.%202020/Farber%20on%20Inness.pdf)

### [Rosen, *Indecent Exposure*](https://www.nytimes.com/2012/09/09/books/review/privacy-by-garret-keizer.html)

### [Julie Cohen – *Examined Lives: Informational Privacy and the Subject as Object*](https://scholarship.law.georgetown.edu/facpub/810/)

### [Stanley Benn, *Political Participation* (Benn’s Rejoinder)](file:///Users/kurtolson/Dropbox/Issues%20in%20Internet%20Law%20Jan.%202020/Benn%27s%20Political%20Participation.pdf)

### Priscilla Regan argues that the interest in privacy is improperly framed as focusing on the protection of the individual rather than in terms of the societal interests it furthers.

### Daniel Solove argues that privacy cannot be reduced to a unified conception. Attempts to isolate a common denominator of privacy often end up too narrow or too broad. If there is no singular essence of privacy, how are we to define privacy? Solove turns to Ludwig Wittgenstein’s notion of family resemblances, in which related things draw from a common pool of characteristics even if no one characteristic is manifested in all of them.

### Solove invites readers to propose a common characteristic underpinning privacy. Existing theories define privacy as “control over information” or “limited access to self” or “intimacy.” Are these definitions adequate?

# **Does abandoning the quest for a common denominator make it impossible to create a theory of privacy?** If privacy is understood too contextually, then it becomes difficult to make any meaningful generalizations about it. **Does privacy become anything people would like it to be? What limits the concept of privacy?**

Helen Nissenbaumargues that privacy should be understood with a theory of “contextual integrity.” Contextual Integrity comprises four essential descriptive claims:

* Privacy is provided by appropriate flows of information.
* Appropriate information flows are those that conform with contextual information norms
* Contextual informational norms refer to five independent parameters: data subject, sender, recipient, information type, and transmission principle
* Conceptions of privacy are based on ethical concerns that evolve over time

Contextual Integrity can be seen as a reaction to theories that define privacy as control over information about oneself, as secrecy, or as regulation of personal information that is private, or sensitive.

This places contextual integrity at odds with privacy regulation based on [Fair Information Practice Principles](https://en.wikipedia.org/wiki/Fair_Information_Practice_Principles); it also does not line up with the 1990s [Cypherpunk](https://en.wikipedia.org/wiki/Cypherpunk) view that newly discovered [cryptographic](https://en.wikipedia.org/wiki/Cryptographic) techniques would assure privacy in the digital age because preserving privacy is not a matter of stopping any data collection, or blocking all flows of information, minimizing data flow, or by stopping information leakage.

The fourth essential claim comprising Contextual Integrity gives privacy its ethical standing and allows for the evolution and alteration of informational norms, often due to novel sociotechnical systems. It holds that practices and norms can be evaluated in terms of:

* Effects on the interests and preferences of affected parties
* How well they sustain ethical and political (societal) principles and values
* How well they promote contextual functions, purposes, and values.

The most distinctive of these considerations is the third. As such, Contextual Integrity highlights the importance of privacy not only for individuals, but for society and respective social domains.

**Anita Allen** asks when we should “coerce” privacy – in other words, when the law should force people to be private. **What if a person wants to go on a reality TV show, set up webcams throughout her home, or write a blog full of personal secrets? Should the law override these choices?**

**Can the desire for publicity and for privacy coexist?** If a person exposes intimate details about her private life on national television, that doesn’t mean that the person lacks a desire for privacy in all contexts. For example, the person might want her phone calls to be private.

**Are expectations of privacy eroding? Do people still expect privacy? Should we protect privacy even if people don’t expect it?** In *Understanding Privacy,* **Daniel Solove** argues that we shouldn’t look to expectations of privacy – instead we should look to what society desires to be private. According to Solove, we want the law to protect privacy in instances where we don’t expect it but desire it. In **Allen’s *Uncovering Privacy*** (2011), she revisits the possibility of “paternalistic” privacy laws.

**Paul Schwartz** discusses the relationship between privacy and autonomy. His focus is on the connection between democracy and individual self-determination. He is also concerned about the extent to which privacy is seen as a personal right to control the use of one’s personal data. The difficulty is first that autonomy is not a preexisting quality but one that is shaped by the kind of choices that are, in fact, available. Attention is therefore needed to the actual conditions of choice, and, in particular, to the kinds of choices that individuals are given about their personal information.

### Think about the relationship between privacy and democracy. Some examples of how privacy protects democracy are: (1) privacy protects people’s right to engage in political association, especially in unpopular groups; (2) privacy protects people’s right to vote (our vote is secret); and (3) privacy safeguards our ability to read and discuss certain political viewpoints which may be seen as unpopular by members of our social circle or by society writ large.

Examine Schwartz’s critique of the “control over information” conception of privacy. He argues that people can be caught in the “autonomy trap” in which they appear to be exercising control over their information, but in reality they are not. He provides the example of how people appear to choose to accept the terms of various website privacy policies. But he notes that this is often to accent the terms of various website privacy policies. But he notes that this is often not really a consensual choice. **But what is the alternative? To what extent should privacy protections override people’s choices?**

In 2004, Schwartz discussed the idea of how data trade might affect a “privacy commons” where privacy is viewed as “a social and not merely an individual good.”

### Spiros Simitis views the automated processing of personal data as having the tendency to inhibit and standardize behavior. Instead of improving “the individual’s capacity to act and to decide,” the processing of personal data often is carried out to make people confirm to “predetermined, standardized behavior.”

### Dennis Bailey focuses on the dangers of not knowing each other very well. We live in a “giant masquerade ball” and have lost the benefits of living in the small villages of yesteryear. The impersonality of everyday life allows terrorists to hide among us. Steven Nock observes that information about people is essential for social control. Why do we need information, and what price are we willing to pay for personal privacy?

### Is it correct that people don’t value privacy very much because they frequently sacrifice it for very small rewards. Alessandro Acquisti and Jens Grossklags argue that several reasons explain people’s behavior in this regard and demonstrate that such behavior doesn’t indicate a low value of privacy. In particular, Acquisti and Grossklags offer three reasons: (1) people have incomplete information about the risks to their privacy and often only realize them after privacy violations have occurred; (2) people’s “bounded rationality” limits their ability to fully process information about the risks to their privacy; and (3) people wrongly assess their future preferences and tend to favor immediate gratification.

### Jerry Kang & Benedikt Buchner, *Privacy in Atlantis: A Dialogue of Form and Substance*, 18 Harv. J. L. & Tech. 1 (2004).

### What should the baseline be in measuring costs of new privacy enactments? Cate’s view seems to be that any privacy law that affects businesses creates a “cost” for them. But numerous business practices (such as telemarketing, the sending of unsolicited credit applications, or the sharing of personal data with other companies) creates a “cost” for consumers. Why should consumers be expected to internalize the “costs” of junk mail or privacy invasions?

### Feminist Perspectives on Privacy

### *State v. Rhodes*, 61 N.C. 453 (1868).

### Does privacy as defined as non-interference with family affairs really protect men and women equally as the court contends? The problem is, of course, that the vast majority of cases involve men abusing their wives rather than vice versa.

Many feminist scholars have been critical of privacy because of the use of privacy in the past to promote patriarchal structures and to remove abusive family relations from the sphere of public discourse.

### Reva Siegel discusses the problematic history of privacy in this regard. Courts refused to become involved in marital violence because of the asserted interest in protecting the “privacy” of marital relations. Others have argued that privacy shields the private sphere from public discourse, which is problematic because historically women have been relegated to the private sphere. As a result, privacy becomes a justification to avoid discussing issues pertaining to women.

### Second Class – Tues., Jan. 14th, 2020

1. Fair Credit Reporting Act (FCRA)
2. FTC and CFPB Enforcement
3. **FACTA** amended the FCRA in 2003
4. [*U.S. v. Spokeo*](file:///Users/kolson/Dropbox/Issues%20in%20Internet%20Law%20Jan.%202020/spokeo%20complaint.pdf): Complaint for Civil Penalties, Injunction, and Other Relief

## *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

### *Smith v. Bob Smith Chevrolet, Inc*., 275 F. Supp. 2d 808 (2003).

### *Phillips v. Grandahl*,

### *Lema v. Citibank (South Dakota), N.A.*, 935 F. Supp. 695 (1996).

### *Sarver v. Experian Information Solutions*, 390 F.3d 969 (7th Cir. 2004)

1. *Dennis v. BEH-1, LLC*, 520 F.3d 1066 (9th Cir. 2008).

### *Sloane v. Equifax Information Services, LLC*, 510 F.3d 495 (4th Cir. 2007).

1. *California Bankers Association v. Shultz*,94 S. Ct. 1494 (1974).

### *United States v. Miller*, 96 S. Ct. 1619 (1976).

### *Wolfe v. MBNA America Bank*, 485 F. Supp. 2d 874 (W.D. Tenn. 2007).

1. *Huggins v. Citibank, N.A*., 585 S.E.2d 275 (S.C. 2003).
2. Jeffrey Rachlinksi, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. Chi. L. Rev. 571, 574 (1998).
3. Paul M. Schwartz & Daniel J. Solove, *Reconciling Personal Information in the United States and European Union*, 102 Cal. L. Rev. 877 (2014).

### *Pineda v. Williams-Sonoma Stores*, 246 P.3d 612 (Ca. 2011).

### *Apple v. Krescent*, 292 P. 3d 883 (Ca. 2013).

### *In Re Google, Inc. Privacy Policy Litigation*, 2013 WL 6248499 (N.D. Cal. December 3, 2013).

### *In re Hannaford Bros. Co. Customer Data Security Breach Litigation*, 4 A.3d 492 (Me. 2010).

### Third Class – Wed., Jan. 15th, 2020

### *Dwyer v. American Express*, 652 N.E.2d 1351 (Ill. 1995).

Is it voluntary to disclose data without being informed about how it will be used? Or when data is used in ways people don’t consent to?

### On the appropriation claim, the elements are “an appropriation, without consent, of one’s name or likeness for another’s use or benefit.” Why does renting a person’s name and interests constitute the use of a person’s name or likeness for a company’s own benefit? Is the use of information about a person an appropriation if it generates a profit?

The paradigmatic appropriation case involves the use of a person’s identity on an advertisement. Example: John’s picture on a billboard saying that John likes Five Guys hamburgers. Is telling another company that John likes Five Guys hamburgers the same thing?

The court reasons that American Express creates the value of the names, not the plaintiffs. A person’s name has value only when it is associated with the American Express lists.

But is this true? Each name probably has some value, as the value of the list is the aggregated value of all the names. Of course, the list would not sell if it hardly had any names on it. So the court is right to some extent – the list is marketable because it is a collection of names and interests. Nevertheless, there might be value in one name. If a company gets a lead that a billionaire loves a particular product, the knowledge of this fact could be valuable for companies making such a product.

One other question to explore is whether there must be an actual market for the plaintiff’s identity or just whether or not it has a value that is greater than zero.

### Another issue worth exploring is whether the appropriation tort should require that a person’s name have value. The appropriation tort involves using a person’s identity for one’s own benefit. Must this benefit be financial? The court also argues that “defendants’ practices do not deprive any of the cardholders of any value that their individual names may possess.” Deprivation of value, though, isn’t required in appropriation. One could use a person’s name or likeness on an advertisement and, in fact, increase the value of that person’s identity by making the person more famous. This would not nullify an appropriation claim.

### *Shibley v. Time, Inc.*, 341 N.E.2d 337 (Oh. App. 1975).

Although not mentioned in the case or in the text, there is another reason why the public disclosure tort will often fail in cases like *Shibley* where one company shares personal data about its customers with another company. Why is that?

As *Dwyer*and *Shibley*demonstrate, the privacy torts as currently constituted don’t seem to be particularly well-designed to address the problems involving consumer privacy. Indeed, there are few cases involving the application of these privacy torts to consumer privacy issues, and hardly any privacy tort cases that are successful in this context – with the notable exception of *Fraley v. Facebook,* which is discussed later on in the notes.

### Suppose that the privacy torts were modified somewhat to apply. Would tort law be the best way to grapple with the problem of the increasing collection, use, and transfer of personal information? Are statutes preferable? What about self-regulation?

### Sarah Ludington calls for development of tort law to include a fair information practices torts. The common law should expand to include this tort. In Ludington’s view, industry lobbying will prevent this tort from being created through legislation.

### Conceptual difficulties are present for some in defining the harm in commercial entities collecting and using personal data. Most of this information is not especially sensitive or intimate, and sometimes concerns trivial consumer choices (Pampers and not Huggies, Coke and not Pepsi). Various scholars (Stan Karas, Jerry Kang, Daniel Solove, Joel Reidenberg, and Paul Schwartz) argue that information about personal consumption patterns does reveal something meaningful about one’s identity, and that the law of privacy should pay attention, indeed regulate, the collection of this information into marketing databases. What might such information reveal about one’s identity?

### For more background about how people’s consumption habits reveals detailed information about their personalities, see SAM GOSLING, SNOOP: WHAT YOUR STUFF SAYS ABOUT YOU (2008) and ROB WALKER, BUYING IN: THE SECRET DIALOGUE BETWEEN WHAT WE BUY AND WHO WE ARE (2008). (Students will not be expected to read these two books for this class, but this could be a very interesting topic for a paper.)

1. *Fraley v. Facebook, Inc*., 830 F. Supp. 2d 785 (N.D. Cal. 2011).

### This holding diverges from *Dwyer.* According to the court’s view of appropriation in *Fraley,* the harm is the non-consensual commercial use of one’s identity in and of itself, not in the deprivation of commercial value of one’s identity or in the exploitation of any value in one’s identity. Is this the right way to define the injury of appropriation?

1. *Remsburg v. Docusearch, Inc*., 816 A.2d 1001 (N.H. 2003).

How was the defendant to know Youens’ purpose?

### Hypo: Jill tells Jack the address of Roe, and Jack murders Roe at her home. Would Jill be liable?

Suppose Jill knew that Jack wanted to murder Roe. Does she have a duty to avoid giving Roe’s address to Jack? When possessing another person’s information, does one owe that person a duty of care in how one shares it?

Now suppose Jill had no idea what Jack’s purpose was. Would she still be liable? Her duty in this situation under *Remsburg*would encompass doing a reasonable investigation of Jack or an inquiry into his purposes. But is this too great a duty to impose?

### To what extent is the First Amendment implicated by a finding of liability for Docusearch? Does the finding chill Docusearch’s speech in a cognizable fashion? Or just increase the costs of its communication?

### Contract Law

### Privacy Policies

### What’s the difference between an “opt-out” and “opt-in” provision in a privacy policy?

### Federal statutes with opt-in provisions include the Children’s Online Privacy Protection Act (COPPA), Drivers Privacy Protection Act (DPPA), Family Educational Rights and Privacy Act (FERPA), Fair Credit Reporting Act (FCRA), and the Video Privacy Protection Act (VPPA) among others.

### Federal statutes with opt-out provisions include the Gramm-Leach-Bliley Act (GLBA), Family Educational Rights and Privacy Act (FERPA) (for directory information), Telephone Consumer Protection Act (TCPA), and the CAN-SPAM Act, among others.

### Does an opt-in system always minimize transaction costs?

### Various scholars argue that an “explicit-consent” system would impose a large drag on “economic efficiency.” Less than 10% of the U.S. population ever opts out of a mailing list – the figure can be as low as 3%. “Indeed, the difficulty (and cost) of obtaining a response of any sort from consumers is the primary drawback of an opt-in approach.

### Should the costs of sorting through unsolicited mail be placed on consumers? Where does an opt-out system place these costs? To what extent do consumers know about the opt-out option?

“Privacy Self-Management.”

The idea behind privacy self-management is that a privacy notice inform people about how their data will be collected and used and then people can decide whether to consent to these practices. People thus manage their own privacy.

People have difficulties making informed rational judgments about the costs and benefits of consenting to the collection, use, and disclosure of their information. Additionally, knowledge of potential downstream uses of data and how data will be combined with other data in the future and aggregated is necessary to understand the costs and benefits, and this isn’t known at the time the information is collected, which is when a person is asked to consent.

### If people cannot meaningfully weigh the costs and benefits of sharing their data, then what should be done? Should regulators make the choices for people? Should people be able to change their minds later on?

Notice can be improved to make people more aware of it and understand it better. Is this a potential solution? Perhaps more “just in time” notice can be provided.

### How about the example of requiring a camera to make a shutter sound to inform people that their photo is being taken. One of the concerns with Google Glass, the glasses that Google produced that could record what a person was seeing, was that the glasses could violate other people’s privacy by secretly recording them. But a recording light could indicate when this device or similar devices is recording.

### Should such a light be required? Is it too paternalistic of the law to make such a requirement? The shutter sound or recording light is just a form of notice – it doesn’t do anything to restrict the photo or videotaping. Is notice enough?

**To what extent are privacy policies contracts? For example, privacy policies on websites often say that by visiting the website, the visitor agrees to the terms in the privacy policy. Is this really so? If the website violates its policy, can it be sued for breach of contract? What is the consideration from the visitor for the privacy promises made by the website?**

### Does promissory estoppel apply? Or are privacy policies really just notices instead of contracts?

1. *In re Nw. Airlines Privacy Litig.*, No. CIV.04-126 (PAM/JSM), 2004 WL 1278459 (D. Minn. June 6, 2004).

**Is a privacy policy really just a statement of policy and not a contract? Other terms in the terms of service are contractual, so why not terms about privacy? Should the placement of the privacy policy in a separate place from the terms of service matter? Should the labeling of it as a “statement” or a “policy” or a “notice” matter?**

**Can a website’s failure to honor its privacy policy be enforced under the Restatement’s definition of promissory estoppel?**

There might be a possible use of a breach of confidentiality tort in this setting. The breach of confidentiality tort protects against the nonconsensual disclosures of confidential information. To establish liability under the tort, a plaintiff must prove that the defendant owed the plaintiff a duty of confidentiality and that the defendant breached this duty. **Neil Richards** and **Daniel Solove** see this tort as based on “norms of relationships, trust, and reliance on promises.” Neil M. Richards & Daniel J. Solove, *Privacy’s Other Path: Recovering the Law of Confidentiality,* 96 Geo. L.J. 123 (2007). (Students needn’t read this whole article for the class – try to get the gist by scanning.) **Are such norms present in this case?**

1. *In re iPhone Application Litig.,* 6 F. Supp. 3d 1004 (N.D. Cal. 2013).

**Does this holding represent a significant bar to future class actions? What is to stop people from simply lying and pleading that they read the privacy policies? Should proof of reading them be required? Is such proof meaningful?**

**Apple’s iTunes store has an agreement that occasionally pops up on one’s iPhone that has 50+ pages. People can read through the entire thing or just click “I Agree” on the first page. Does anyone read each and every page? Is it reasonable to require this?**

### On the other hand, if people do not read the policies, can they rely upon them? Do the policies even matter to people?

### Does this holding open a significant window to permit future class actions? Are lessened resources really the main harm here? What is the real harm in this case?

### Should courts enforce expectations even if they diverge from the assertions of a company? Should Apple have had a duty to make it more apparent and salient that users installed apps at their own risk? Should there be requirements that certain kinds of terms be pointed out or highlighted to people when they are likely to assume that things are contrary to those terms?

### [*Saffold v. Plain Dealer Publishing Co*](https://teachprivacy.com/unmasking-a-judges-anonymity-shirley-strickland-saffold-v-plain-dealer-publishing-co/)*.*:

### Suppose a person is promised the ability to speak anonymously but then that promise is violated. Can that be enforceable for breach of contract or promissory estoppel?

### Does the nature of the kind of promise made in *Saffold* differ from the kinds of promises made in other privacy cases such as *Northwest Airlines*?

### Offline, confidentiality in certain groups is widely accepted, such as AA. Why not in an online group? In Facebook, people designate how they want their data shared. Should these settings be enforceable against other people? One way to view the settings is between the website and the user. But another way is to view them is as between the user and other users that access that user’s data.

Interestingly, people probably spend more time with the privacy settings of a site than in reading a privacy policy. Consider the privacy settings on Facebook. **Suppose Facebook were not to honor those settings. Should this be a violation of contract?**

**What is the “contract” when a person interacts with a website?** When a user interacts with a site, all sorts of things are communicated back and forth between the user and the site. These things often involve settings, which can be seen as promises to treat certain information in certain kinds of ways. Having privacy settings is a way that Facebook entices people to share. People might not share personal data if they couldn’t restrict that sharing to their friends only.

### What about statements made beyond the privacy policy? Suppose a website has a box that pops up that says: “We value your privacy and will protect it by never sharing your data with others.” Is this part of the contract? What about statements made by a company’s founder? Suppose Mark Zuckerberg makes claims in an interview about how Facebook protects privacy. Are these part of the agreement? Where does the contract begin or end?

### Some scholars argue that online services that appear to be “free” to the consumer are not free at all. Rather, the consumer exchanges her personal information for a useful service like email. Should “free” online services have to disclose to users that they are, in effect, paying for the service with access to their personal information? What are the implications of mandatory publicity for the hidden costs of “free” services?

### Property Law

Several scholars suggest that some of the problems regarding privacy can be solved by affording people property rights in their information. They claim that the market will achieve the optimal amount of privacy by balancing the value of personal information to a company against the value of the information to the individual.

**Whom does personal information belong to?** At first blush, one might assume it belongs to the consumer. **But if Jack sells Jill the book *War and Peace*, is it Jill’s information that she bought *War and Peace* from Jack? Or can Jack say that it is his information that he sold *War and Peace* to Jill? Why is Jill’s claim better than Jack’s?**

Suppose Jill is a celebrity. It is the highlight of Jack’s life that he sold *War and Peace* to a famous celebrity. **Why does this information belong to Jill?** Maybe information produced in a mutual interaction belongs to both parties.

**Would property rights in information protect consumers?** One might argue that consumers already relinquish their property rights in their data by using a particular website or service. So by using Amazon.com or reading the website of the New York Times, people are voluntarily trading their data in exchange for the benefits, information, and services these sites provide.

If companies were to view personal data as property, then they might view it as something that the consumer has “sold” to them which they now own in fee simple – and they might think they have more freedom in how they use the information as opposed to when its ownership is more ambiguous.

### The property metaphor might be probed to explore other concepts in property such as easements or various rights or requirements that run with the land. Perhaps even when “owning” personal data, a company doesn’t own it totally but certain rights are retained by the consumer. Another analogy might be to historical property where owners cannot do anything they want to the property but must follow certain rules about preservation and maintaining historical character.

###