

ASPEN SELECT SERIES

CONSUMER PRIVACY AND DATA PROTECTION

Third Edition

Daniel J. Solove

John Marshall Harlan Research Professor of Law
George Washington University Law School

Paul M. Schwartz

Jefferson E. Peyser Professor of Law
U.C. Berkeley Law School
Faculty Director, Berkeley Center for Law & Technology



Copyright © 2021 CCH Incorporated. All Rights Reserved.

Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory U.S. serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or utilized by any information storage or retrieval system, without written permission from the publisher. For information about permissions or to request permissions online, visit us at www.WKLegaledu.com, or a written request may be faxed to our permissions department at 212-771-0803.

Cover image: Alexander/Adobe Stock

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-5438-3259-4

Library of Congress Cataloging-in-Publication Data

Names: Solove, Daniel J., 1972- author. | Schwartz, Paul M., 1959- author.
Title: Consumer privacy and data protection / Daniel J. Solove, John
Marshall Harlan Research Professor of Law, George Washington University
Law School; Paul M. Schwartz, Jefferson E. Peyser Professor of Law, U.C.
Berkeley Law School, Faculty Director, Berkeley Center for Law &
Technology.

Description: Third edition. | New York : Wolters Kluwer, [2021] | Series:
Aspen select series | Includes bibliographical references and index. |
Summary: "Cases, exposition, and materials for the law school course on
information privacy law or information and technology"-- Provided by
publisher.

Identifiers: LCCN 2020046023 | ISBN 9781543832594 (paperback) | ISBN
9781543832600 (ebook)

Subjects: LCSH: Privacy, Right of--United States. | Data protection--Law
and legislation--United States | Consumer protection--Law and
legislation--United States | Identity theft--United States--Prevention.
| LCGFT: Casebooks (Law)

Classification: LCC KF1262 .S65 2021 | DDC 342.7308/58--dc23

LC record available at <https://lcn.loc.gov/2020046023>

SUMMARY OF CONTENTS

<i>Contents</i>	<i>xi</i>
<i>Preface</i>	<i>xvii</i>
<i>Acknowledgments</i>	<i>xix</i>
1 INTRODUCTION	1
A. Information Privacy, Technology, and the Law	1
B. Information Privacy Law: Origins and Types	10
2 PERSPECTIVES ON PRIVACY	41
A. The Philosophical Discourse about Privacy	41
B. The Definition and the Value of Privacy	43
C. Critics of Privacy	60
D. The Feminist Perspective on Privacy	68
E. The Civil Rights Perspective on Privacy	77
F. Privacy, Property, and Social Class	83
3 FINANCIAL DATA	87
A. The Fair Credit Reporting Act	87
B. The Gramm-Leach-Bliley Act	124
C. Federal and State Financial Privacy Laws	128
4 CONSUMER DATA	141
A. The U.S. System of Consumer Data Privacy Regulation	142
B. Tort Law	175
C. Contract Law	184
D. Property Law	197
E. FTC Section 5 Enforcement	200
F. Statutory Regulation	239
G. State Statutory Regulation	302
H. First Amendment Limitations on Privacy Regulation	309
5 DATA SECURITY	343
A. Introduction	343
B. Data Security Breach Notification Statutes	345

x | SUMMARY OF CONTENTS

C. Civil Liability and Standing	350
D. FTC Regulation	375

<i>Index</i>	397
--------------	-----

CONTENTS

<i>Preface</i>	<i>xvii</i>
<i>Acknowledgments</i>	<i>xix</i>
1 INTRODUCTION	1
A. INFORMATION PRIVACY, TECHNOLOGY, AND THE LAW	1
• Sidis v. F-R Publishing Corp.	3
B. INFORMATION PRIVACY LAW: ORIGINS AND TYPES	10
1. Common Law	10
(a) The Warren and Brandeis Article	10
• Samuel D. Warren and Louis D. Brandeis, <i>The Right to Privacy</i>	13
(b) The Recognition of Warren and Brandeis's Privacy Torts	26
• William Prosser, <i>Privacy</i>	27
• Lake v. Wal-Mart Stores, Inc.	29
(c) Privacy Protection in Tort Law	32
(d) Privacy Protection in Evidence Law	33
(e) Privacy Protection via Property Rights	33
(f) Privacy Protection in Contract Law	34
(g) Privacy Protection in Criminal Law	34
2. Constitutional Law	34
3. Statutory Law	36
4. International Law	40
2 PERSPECTIVES ON PRIVACY	41
A. THE PHILOSOPHICAL DISCOURSE ABOUT PRIVACY	41
1. The Concept of Privacy and the Right to Privacy	41
2. The Public and Private Spheres	42

B. THE DEFINITION AND THE VALUE OF PRIVACY	43
• Daniel J. Solove, <i>Conceptualizing Privacy</i>	44
• Julie E. Cohen, <i>Examined Lives: Informational Privacy and the Subject as Object</i>	50
• Anita L. Allen, <i>Coercing Privacy</i>	53
• Paul M. Schwartz, <i>Privacy and Democracy in Cyberspace</i>	55
• Spiros Simitis, <i>Reviewing Privacy in an Information Society</i>	57
C. CRITICS OF PRIVACY	60
• Richard A. Posner, <i>The Right of Privacy</i>	60
• Fred H. Cate, <i>Principles of Internet Privacy</i>	65
D. THE FEMINIST PERSPECTIVE ON PRIVACY	68
• State v. Rhodes	68
• Reva B. Siegel, <i>The Rule of Love</i>	70
• Danielle Keats Citron, <i>Sexual Privacy</i>	74
E. THE CIVIL RIGHTS PERSPECTIVE ON PRIVACY	77
• Alvaro M. Bedoya, <i>Privacy as Civil Right</i>	77
F. PRIVACY, PROPERTY, AND SOCIAL CLASS	83
• Khiara M. Bridges, <i>Privacy Rights and Public Families</i>	83
3 FINANCIAL DATA	87
A. THE FAIR CREDIT REPORTING ACT	87
1. FCRA's Scope and Structure	89
• United States v. Spokeo, Inc.	91
2. Permissible Uses of Consumer Reports	96
• Smith v. Bob Smith Chevrolet, Inc.	99
3. Consumer Rights and Agency Responsibilities	105
4. Civil Liability and Qualified Immunity	106
• Sarver v. Experian Information Solutions	108
5. Identity Theft and Consumer Reporting	114
• Sloan v. Equifax Information Services, LLC	116
B. THE GRAMM-LEACH-BLIELY ACT	124
C. FEDERAL AND STATE FINANCIAL PRIVACY LAWS	128
1. State Financial Laws	128
2. Laws Regulating Government Access to Financial Data	130
• United States v. Gratkowski	131
3. Identity Theft Statutes	134
4. Tort Law	136

• Wolfe v. MBNA America Bank	136
4 CONSUMER DATA	141
A. THE U.S. SYSTEM OF CONSUMER DATA PRIVACY REGULATION	142
1. Structure	142
2. Types of Law	144
3. Personally Identifiable Information (PII)	152
• Pineda v. Williams-Sonoma Stores	153
• Apple v. Krescent	155
4. Injury and Standing	164
• Spokeo, Inc. v. Robins	166
• In re Vizio, Inc. Consumer Privacy Litigation	171
B. TORT LAW	175
• Dwyer v. American Express Co.	175
• Remsberg v. Docusearch, Inc.	181
C. CONTRACT LAW	184
1. Privacy Notices	184
• Jeff Sovern, <i>Opting In, Opting Out, or No Options at All</i>	184
• Michael E. Staten & Fred H. Cate, <i>The Impact of Opt-In Privacy Rules on Retail Markets</i>	185
2. Contract and Promissory Estoppel	188
• In re Northwest Airlines Privacy Litigation	188
D. PROPERTY LAW	197
E. FTC SECTION 5 ENFORCEMENT	200
• In the Matter of Snapchat, Inc.	202
• FTC v. Toysmart.com	210
• In the Matter of Sears Holdings Management Corp.	216
• In the Matter of Facebook, Inc. (2012)	222
• In the Matter of Facebook, Inc. (2019)	228
F. STATUTORY REGULATION	239
1. Entertainment Records	239
(a) The Video Privacy Protection Act	239
• In re: Nickelodeon Consumer Privacy Litigation	242
• In re Vizio, Inc., Consumer Privacy Litigation	247
(b) The Federal Communications Act	253
(c) The Cable Communications Policy Act	256
2. Internet Use and Electronic Communications	258

(a) The Children’s Online Privacy Protection Act	258
• United States v. Path, Inc.	261
• United States of America v. LAI Systems	265
• FTC and New York v. Google and YouTube	267
(b) The Electronic Communications Privacy Act	273
• In re Google, Inc. Gmail Litigation	273
• Dyer v. Northwest Airlines Corp.	281
(c) The Computer Fraud and Abuse Act	283
• Creative Computing v. Getloaded.com LLC	284
• United States v. Drew	287
3. Marketing	291
(a) The Telephone Consumer Protection Act	291
• Stoops v. Wells Fargo Bank	294
(b) The CAN-SPAM Act	299
G. STATE STATUTORY REGULATION	302
1. California Consumer Privacy Act	302
2. Biometric Privacy Laws	306
(a) Illinois Biometric Information Privacy Act	306
(b) Other State Biometric Laws	307
H. FIRST AMENDMENT LIMITATIONS ON PRIVACY REGULATION	309
• Rowan v. United States Post Office Department	310
• Mainstream Marketing Services, Inc. v. Federal Trade Commission	311
• U.S. West, Inc. v. Federal Communications Commission	314
• Trans Union Corp. v. Federal Trade Commission	322
• Sorrell v. IMS Health, Inc.	326
• Barr v. American Association of Political Consultants, Inc.	336
5 DATA SECURITY	343
A. INTRODUCTION	343
B. DATA SECURITY BREACH NOTIFICATION STATUTES	345
C. CIVIL LIABILITY AND STANDING	350
• Reilly v. Ceridian Corporation	351
• Resnick v. AvMed	353
• Remijas v. Neiman Marcus Corp.	362
• Beck v. McDonald	364
D. FTC REGULATION	375
• FTC v. Wyndham Worldwide Corporation	377

- In the Matter of Trendnet 383
- LabMD v. Federal Trade Commission 390

Index 397