

# **PRIVACY AND THE MEDIA**

## **EDITORIAL ADVISORS**

### **Rachel E. Barkow**

Vice Dean and Charles Seligson Professor of Law  
Faculty Director, Zimroth Center on the Administration of Criminal Law  
New York University School of Law

### **Erwin Chemerinsky**

Dean and Jesse H. Choper Distinguished Professor of Law  
University of California, Berkeley School of Law

### **Richard A. Epstein**

Laurence A. Tisch Professor of Law  
New York University School of Law  
Peter and Kirsten Bedford Senior Fellow  
The Hoover Institution  
Senior Lecturer in Law  
The University of Chicago

### **Ronald J. Gilson**

Charles J. Meyers Professor of Law and Business  
Stanford University  
Marc and Eva Stern Professor of Law and Business  
Columbia Law School

### **James E. Krier**

Earl Warren DeLano Professor of Law Emeritus  
The University of Michigan Law School

### **Tracy L. Meares**

Walton Hale Hamilton Professor of Law  
Director, The Justice Collaboratory  
Yale Law School

### **Richard K. Neumann, Jr.**

Alexander Bickel Professor of Law  
Maurice A. Deane School of Law at Hofstra University

### **Robert H. Sitkoff**

Austin Wakeman Scott Professor of Law  
John L. Gray Professor of Law  
Harvard Law School

### **David Alan Sklansky**

Stanley Morrison Professor of Law  
Faculty Co-Director, Stanford Criminal Justice Center  
Stanford Law School

ASPEN SELECT SERIES

# PRIVACY AND THE MEDIA

**Fifth Edition**

**Daniel J. Solove**

Eugene L. and Barbara A. Bernard Professor  
of Intellectual Property and Technology Law  
George Washington University Law School

**Paul M. Schwartz**

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



Copyright © 2024 Aspen Publishing. All Rights Reserved.

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.AspenPublishing.com](http://www.AspenPublishing.com).

Cover image: Cocoon

To contact Customer Service, e-mail [customer.service@aspenpublishing.com](mailto:customer.service@aspenpublishing.com), call 1-800-950-5259, or mail correspondence to:

Aspen Publishing  
Attn: Order Department  
1 Wall Street  
Burlington, MA 01803

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 979-8-8861-4339-3

**Library of Congress Cataloging-in-Publication Data**

## About Aspen Publishing

Aspen Publishing is a leading provider of educational content and digital learning solutions to law schools in the U.S. and around the world. Aspen provides best-in-class solutions for legal education through authoritative textbooks, written by renowned authors, and breakthrough products such as Connected eBooks, Connected Quizzing, and PracticePerfect.

The Aspen Casebook Series (famously known among law faculty and students as the "red and black" casebooks) encompasses hundreds of highly regarded textbooks in more than eighty disciplines, from large enrollment courses, such as Torts and Contracts, to emerging electives, such as Sustainability and the Law of Policing. Study aids such as the *Examples & Explanations* and the *Emanuel Law Outlines* series, both highly popular collections, help law students master complex subject matter.

### Major products, programs, and initiatives include:

- **Connected eBooks** are enhanced digital textbooks and study aids that come with a suite of online content and learning tools designed to maximize student success. Designed in collaboration with hundreds of faculty and students, the Connected eBook is a significant leap forward in the legal education learning tools available to students.
- **Connected Quizzing** is an easy-to-use formative assessment tool that tests law students' understanding and provides timely feedback to improve learning outcomes. Delivered through CasebookConnect.com, the learning platform already used by students to access their Aspen casebooks, Connected Quizzing is simple to implement and integrates seamlessly with law school course curricula.
- **PracticePerfect** is a visually engaging, interactive study aid to explain commonly encountered legal doctrines through easy-to-understand animated videos, illustrative examples, and numerous practice questions. Developed by a team of experts, PracticePerfect is the ideal study companion for today's law students.
- The **Aspen Learning Library** enables law schools to provide their students with access to the most popular study aids on the market across all of their courses. Available through an annual subscription, the online library consists of study aids in e-book, audio, and video formats with full text search, note-taking, and highlighting capabilities.
- Aspen's **Digital Bookshelf** is an institutional-level online education bookshelf, consolidating everything students and professors need to ensure success. This program ensures that every student has access to affordable course materials from day one.
- **Leading Edge** is a community centered on thinking differently about legal education and putting those thoughts into actionable strategies. At the core of the program is the Leading Edge Conference, an annual gathering of legal education thought leaders looking to pool ideas and identify promising directions of exploration.



*To my parents and grandparents—DJS*

*To Steffie, Clara, and Leo—PMS*





# SUMMARY OF CONTENTS

<i>Contents</i>	<i>xi</i>
<i>Preface</i>	<i>xv</i>
<i>Acknowledgments</i>	<i>xvii</i>
<b>1 INTRODUCTION</b>	<b>1</b>
A. Information Privacy, Technology, and the Law	1
B. Information Privacy Law: Origins and Types	9
<b>2 PERSPECTIVES ON PRIVACY</b>	<b>39</b>
A. The Philosophical Discourse about Privacy	39
B. The Definition and the Value of Privacy	41
C. Critics of Privacy	53
D. The Feminist Perspective on Privacy	59
E. The Civil Rights Perspective on Privacy	65
F. Privacy, Poverty, and Social Class	73
<b>3 PRIVACY AND THE MEDIA</b>	<b>79</b>
A. Information Gathering	81
B. Disclosure of Truthful Information	102
C. Dissemination of False Information	165
D. Appropriation of Name or Likeness	192
E. Privacy Protections for Anonymity and Receipt of Ideas	216
<i>Index</i>	<i>233</i>



# CONTENTS

<i>Preface</i>	<i>xv</i>
<i>Acknowledgments</i>	<i>xvii</i>
<b>1 INTRODUCTION</b>	<b>1</b>
<b>A. INFORMATION PRIVACY, TECHNOLOGY, AND THE LAW</b>	<b>1</b>
• Sidis v. F-R Publishing Corp.	3
<b>B. INFORMATION PRIVACY LAW: ORIGINS AND TYPES</b>	<b>9</b>
1. Common Law	10
(a) The Warren and Brandeis Article	10
• Samuel D. Warren and Louis D. Brandeis, <i>The Right to Privacy</i>	12
(b) The Recognition of Warren and Brandeis's Privacy Torts	23
• William Prosser, <i>Privacy</i>	25
• Lake v. Wal-Mart Stores, Inc.	27
(c) Privacy Protection in Tort Law	30
(d) Privacy Protection in Evidence Law	31
(e) Privacy Protection via Property Rights	31
(f) Privacy Protection in Contract Law	31
(g) Privacy Protection in Criminal Law	32
2. Constitutional Law	32
3. Statutory Law	34
4. International Law	37
<b>2 PERSPECTIVES ON PRIVACY</b>	<b>39</b>
<b>A. THE PHILOSOPHICAL DISCOURSE ABOUT PRIVACY</b>	<b>39</b>
1. The Concept of Privacy and the Right to Privacy	39
2. The Public and Private Spheres	40

<b>B. THE DEFINITION AND THE VALUE OF PRIVACY</b>	<b>41</b>
• Daniel J. Solove, <i>Conceptualizing Privacy</i>	42
• Julie E. Cohen, <i>Examined Lives: Informational Privacy and the Subject as Object</i>	48
• Paul M. Schwartz, <i>Privacy and Democracy in Cyberspace</i>	51
<b>C. CRITICS OF PRIVACY</b>	<b>53</b>
• Richard A. Posner, <i>The Right of Privacy</i>	53
• Fred H. Cate, <i>Principles of Internet Privacy</i>	57
<b>D. THE FEMINIST PERSPECTIVE ON PRIVACY</b>	<b>59</b>
• Reva B. Siegel, “ <i>The Rule of Love</i> ”: <i>Wife Beating as Prerogative and Privacy</i>	59
• Danielle Keats Citron, <i>Sexual Privacy</i>	62
<b>E. THE CIVIL RIGHTS PERSPECTIVE ON PRIVACY</b>	<b>65</b>
• Alvaro M. Bedoya, <i>Privacy as Civil Right</i>	66
• Anita L. Allen, <i>Dismantling the “Black Opticon”</i>	69
<b>F. PRIVACY, POVERTY, AND SOCIAL CLASS</b>	<b>73</b>
• Khiara M. Bridges, <i>Privacy Rights and Public Families</i>	73
<b>3 PRIVACY AND THE MEDIA</b>	<b>79</b>
<b>A. INFORMATION GATHERING</b>	<b>81</b>
1. Intrusion upon Seclusion	81
• Restatement (Second) of Torts § 652B: Intrusion upon Seclusion	81
• <i>Nader v. General Motors Corp.</i>	81
• <i>Dietemann v. Time, Inc.</i>	86
• <i>Desnick v. American Broadcasting Co., Inc.</i>	88
• <i>Shulman v. Group W Productions, Inc.</i>	93
2. Anti-Paparazzi and Video Voyeurism Statutes	97
<b>B. DISCLOSURE OF TRUTHFUL INFORMATION</b>	<b>102</b>
1. Public Disclosure of Private Facts	102
(a) Introduction	102
• Restatement (Second) of Torts § 652D: Publicity Given to Private Life	102
(b) Private Matters	105
• <i>Gill v. Hearst Publishing Co.</i>	105
• <i>Daily Times Democrat v. Graham</i>	109
(c) The Newsworthiness Test	115
• <i>Sipple v. Chronicle Publishing Co.</i>	115
• <i>Shulman v. Group W Productions, Inc.</i>	125

• Bonome v. Kaysen	128
2. First Amendment Limitations	133
(a) Speech Based on Lawfully Obtained Information	136
• Cox Broadcasting Corp. v. Cohn	136
• The Florida Star v. B.J.F.	142
(b) Speech Based on Unlawfully Obtained Information	152
• Bartnicki v. Vopper	152
(c) Harassment, Threats, and Abusive Speech	158
<b>C. DISSEMINATION OF FALSE INFORMATION</b>	<b>165</b>
1. Defamation	165
(a) Introduction	165
(b) Defamation, the Internet, and the CDA Section 230	167
• Zeran v. America Online, Inc.	169
(c) First Amendment Limitations	176
• New York Times Co. v. Sullivan	176
• Gertz v. Robert Welch, Inc.	179
2. False Light	185
(a) Introduction	185
• Restatement (Second) of Torts § 652E: Publicity Placing Person in False Light	185
(b) First Amendment Limitations	187
• Time, Inc. v. Hill	187
3. Infliction of Emotional Distress	189
<b>D. APPROPRIATION OF NAME OR LIKENESS</b>	<b>192</b>
1. Introduction	192
• Restatement (Second) of Torts § 652C: Appropriation of Name or Likeness	192
2. Name or Likeness	195
• Carson v. Here's Johnny Portable Toilets, Inc.	195
3. For One's Own Use or Benefit	201
• Raymen v. United Senior Association, Inc.	202
4. Connection to Matters of Public Interest	204
• Finger v. Omni Publications International, Ltd.	205
5. First Amendment Limitations	207
• Zacchini v. Scripps-Howard Broadcasting Co.	207
• De Havilland v. FX Networks, LLC	210
<b>E. PRIVACY PROTECTIONS FOR ANONYMITY AND RECEIPT OF IDEAS</b>	<b>216</b>
1. Anonymity	216
(a) Anonymous Speech	216

xiv | CONTENTS

• Talley v. State of California	216
• McIntyre v. Ohio Elections Commission	217
• Doe v. Cahill	221
(b) Reporter's Privilege	227
2. Privacy of Reading and Intellectual Exploration	228
• Stanley v. Georgia	228
<i>Index</i>	233