



PRIVACY LAW AND THE FIRST-YEAR LAW SCHOOL CURRICULUM

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I AM NOT A REAL ACADEMIC. I teach privacy law very part-time as an adjunct professor. I am a full-time law firm partner, focusing on privacy and data security issues.

I have been teaching formal privacy and data security law classes for more than four years. My students – at the various of schools where I have taught – are very good at reading case law. They aren’t so great at reading statutes or regulations. They also aren’t taught that much about the more practical aspects of being a lawyer – making an argument for or against a specific business practice, interpreting or negotiating contracts, or making policy judgments on how a law should be read or written.

In addition, many of my students are having trouble finding jobs. They are trained to be a law firm associate or judicial clerk – but aren’t trained at some of the more practical aspects of being a lawyer, or exposed to the growing array of “non-legal” or “quasi-legal” jobs where legal training and

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expertise are helpful and often required by employers but where a law degree is not automatically necessary (e.g., privacy officer or compliance officer).

So, you should understand my biases and perspective.

With that background, my thesis is straightforward. Privacy law should become a standard part of the first-year law school curriculum. We can debate separately whether the current first-year curriculum still makes sense today, or whether there is in fact a “growing consensus that legal education is in ‘turmoil’ if not ‘crisis.’”¹ That’s not my topic. But I do think that the first-year curriculum should be modified to include privacy law as a core element. It is a perfect subject for future lawyers – it is broadly applicable, encompasses all aspects of legal practice (including a variety of issues and skills that often are not taught in law school at all), and provides opportunities to address the full range of legal issues that exist in our country today and will persist for the foreseeable future. It also is a topic that requires more of what lawyers in practice do today – rather than treating law as an academic pursuit (although privacy law can do that as well²), privacy law requires a mixture of legal knowledge, practical skills, business strategy, policymaking, and a set of business-related skills that are critical to building effective lawyers.

¹ Cassidy, “Reforming the Law School Curriculum from the Top Down,” 64 *J. Legal Educ.* 428 (2015). This article presents interesting and useful suggestions focusing on the third-year law school curriculum, and privacy law could easily be incorporated into his “Advanced Legal Problem Solving Workshops.” Privacy law is becoming a more common course at many law schools, but there is still a long way to go.

² See key articles by some of my favorite privacy academics, including Solove and Hartzog, “The FTC and the New Common Law of Privacy,” 114 *Colum. L. Rev.* 583 (2014); Citron, “The Privacy Policymaking of State Attorneys General,” 92 *Notre Dame L. Rev.* 747 (2016); McGeeveran, “The Duty of Data Security,” 103 *Minn. L. Rev.* 1135 (2019); Solove and Citron, “Risk and Anxiety: A Theory of Data-Breach Harms,” 96 *Tex. L. Rev.* 737 (2018); Richards and Hartzog, “Privacy’s Trust Gap,” 126 *Yale L.J.* 1180 (2017); Waldman, “Privacy Law’s False Promise,” 97 *Wash. U. L. Rev.* 773 (2019); Hoofnagle and Whittington, “Free: Accounting for the Costs of the Internet’s Most Popular Price,” 61 *UCLA L. Rev.* 606 (2014); Solove, “A Taxonomy of Privacy,” 154 *U. Penn. L. Rev.* 477 (2006). The Privacy Law Scholars Conference is now an enormous annual event. www.law.berkeley.edu/research/bclt/bcltvents/2019annual-privacy-law-scholars-conference/.

WHAT IS PRIVACY LAW?

When I was in law school, before we had computers and the internet, privacy law barely existed. You might hear the term “privacy” in one or two constitutional law classes, discussing abortion rights or birth control, or might address common law invasion of privacy in torts class. You would probably hear a reference to the famous Warren/Brandeis article.³ But that was about it.

And it wasn’t just in law school. There was no meaningful practice of law on a regular basis concerning privacy issues. When my students ask me if I always knew that I wanted to be a privacy lawyer, I have to explain to them that this would have been an entirely unknown concept when I graduated from law school, as if a student wanted to focus today on Martian law.

I’ve lived these issues for about 20 years now. Today, privacy law means the Gramm-Leach-Bliley Act for financial institutions and the regulations issued under the Health Insurance Portability and Accountability Act for the health care industry. It is law governing email marketing, telemarketing, children’s data, privacy in colleges, tax privacy, video rental privacy, and a host of other new laws. It means the General Data Protection Regulation in Europe and similar kinds of laws in most other countries around the world. It means data breach laws in every state, and even newer laws like the California Consumer Privacy Act (and we will see many more of these in the years ahead). It covers monitoring of employees and evaluation of algorithms that will assess whether you are likely to buy new jeans or become a serial killer. It involves behavioral advertising across the internet.

Privacy law (and its kissing cousin, data security law) is now a relevant issue for virtually every company in the world, in every industry. These laws address how a company can use and disclose data about employees, business contacts, related professionals, and consumers. The issues arise in mergers and acquisitions activity, in most contracting relationships, and routinely in litigation. Personal data is now a major corporate asset for many companies. We are seeing a host of new issues – even in this infant

³ Warren and Brandeis, “The Right to Privacy,” 4 Harv. L. Rev. 193 (1890). Shapiro and Pearce have identified this article as the second most cited law review article of all time. See “The Most-Cited Law Review Articles of All Time,” 110 Mich. L. Rev. 1483 (2012).

field – related to artificial intelligence, big data, biometrics, and facial recognition. The explosion of the Internet of Things (which has turned your car and your refrigerator into personal data collection devices) and a wide range of similar technology issues ensure that legal issues surrounding how personal data is collected, used, analyzed, and disclosed will remain a first-tier issue for the foreseeable future.

*Since privacy law affects lawyers as people,
it is a particularly useful learning device*

One of the most interesting aspects of teaching privacy law is that every issue that arises can be addressed as a legal issue, but also affects everyone as an individual. I understand that we might all have a contract, or be in an accident, or own property (or, sadly, face criminal charges). But privacy issues affect every person every day, usually multiple times. It impacts our family, our friends, our parents, our children, and our work. The ability to “humanize” these legal issues – to understand how they matter and impact people – is critical (and can, frankly, be missing in some of our academic studies of law).

What does the law student think about behavioral advertising? Are they concerned about facial recognition? Do they worry when their personal data is subject to a security breach? Do they understand any of the privacy notices that are put in front of them? Would they want their medical information to be used for medical research? Should employers have the ability to monitor employee behavior, even outside the workplace? I’ve been surprised how hard it is for some students to step outside the role of “lawyer” and think as people about these issues – but that is a critical lesson in empathy that should be relevant for any lawyer.

Privacy law isn’t just case law

In my humble opinion, as both a practicing attorney and a professor, law schools (or, more accurately, law students) suffer from too heavy a focus on reading cases. Cases certainly are relevant in privacy law. But most privacy law is not about case law. Instead, privacy law requires students to read, understand, and analyze an enormous range of statutes and regulations (often not initially written in English or by legislators who fully understood

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the topic or the implications of their statute). It requires an understanding of contract language. It involves evaluating best practices, industry standards, and various codes of conduct. It involves thinking about strategy and public relations. It forces students to go beyond reading cases – which is what most law students will need to do as actual lawyers, wherever they end up. The ability to read a statute or a regulation, interpret it, understand the options, evaluate risks, and present choices to clients is a critical skill that becomes particularly important in an emerging area where so much is unknown. At the same time, in the evolving world of privacy case law, we also are struggling with key issues common to the more traditional first-year dilemmas, such as what is “harm” in a privacy setting.⁴ I am not saying that learning how to read cases isn’t important – and privacy law is developing its share of cases that have a real world impact every day (when was the last time you used information from your first year property law class on a regular basis?). But privacy law – including its developing case law – is so much more.

Dealing with uncertainty

Privacy law also focuses attention on how lawyers (and their clients) need to deal with uncertainty. In law school, you read cases and debate them – there isn’t necessarily an automatic answer. But attention is focused on what those cases say, and there is little discussion about the next step, or applying those issues in the normal course of day to day business activities. My work – and the work of most lawyers dealing with privacy issues in law firms, as in-house counsel, or in government – involves uncertainty, gaps, and ambiguities. There aren’t answers to most of the challenging issues – you need to read the law, understand the landscape, evaluate what else has happened, consider the enforcement and other risks, and give your advice. You aren’t going to know if you are right, perhaps ever. And giving advice related to this uncertainty is part of the challenge. How would a regulator evaluate the decision you made? Who will complain? Who will be affected? Which customer will object? How will your choices impact the ability of your clients to run their businesses?

⁴ See, e.g., Solove and Citron, “Risk and Anxiety: A Theory of Data-Breach Harms,” 96 Tex. L. Rev. 737 (2018); Calo, “Privacy Harm Exceptionalism,” 12 Col. Tech. L.J. 361 (2014).

Integration with other practice areas

Privacy law also is becoming a critical knowledge base for a broad variety of other practice areas – at least as an issue-spotting skill. Privacy law issues are of increasing relevance to a range of legal practices – including litigation, mergers and acquisitions, business transactions and relationships of all kinds, big data, business partnerships, ethics, marketing, and product design. A failure to recognize the implications of privacy law is creating concerns across the legal system.

It's all about public policy

Because these issues apply to us as people – and address so much of the world around us on a day-to-day basis – privacy law inherently focuses attention on public policy. What should the law be? It is being developed in real time – in Europe, in California, in legislatures around the country, and in Congress. Teaching students how these choices matter is critical – who will be hurt by a law? Who will be helped? Is there a competitive issue? What tradeoffs are we making?

And these choices vary, depending on context, data, and situation. The trade-offs in a retail environment – whether a jeans store can also do email or behavioral marketing – involve a very different set of policy goals than the questions about whether the health care privacy rules are affecting our ability to use personal data in medical research to cure disease (where you must factor in not only the interests of individuals and the health care industry, but also employers, patients in general, the government as a health care provider, payer, and regulator, all taxpayers, etc.).

The current debate on national privacy legislation is forcing a broader discussion of these issues. Stakeholders of all kinds are emerging in the national privacy law debate, along with draft legislative proposals, white papers, and virtually every other kind of activity to influence public policy. Students need to be able to think about how the law is made and the policy choices that influence (and follow from) these choices.⁵

⁵ Any collection of materials on national privacy legislation would need to change in real time. I encourage reviewing some of the following: Kerry, “Breaking down proposals for privacy legislation: How do they regulate?” (Mar. 8, 2019), available at www.brookings.edu/research/breaking-down-proposals-for-privacy-legislation-how-do-they-regulate/;

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Enforcement

For lawyers thinking about enforcement, privacy law provides as broad a range of issues as can be found. There is regulatory enforcement, from the HHS Office for Civil Rights, the Federal Trade Commission, and a host of other federal agencies. Every state attorney general has both statutory authority that is specific to privacy and data breaches, and broader consumer protection authority. There are criminal cases brought by the Department of Justice. The plaintiffs' bar has emerged to lead much of the effort to expand consumer rights. Internationally, many countries now have specific data protection authorities. Each of these avenues for enforcement presents its own risks and challenges – and forces attorneys to think forward and backward about how decisions about privacy law affect day to day operations. Students should understand how to think about these issues and how to guide decision-making for their clients.

A case study in our constitutional structure

Privacy law also affects the core elements of our constitutional and judicial structure. What rights does the government have? What are our rights as citizens? Is this a national issue? What role can the states play? How does preemption affect these issues? What is the impact of a structure where differing state laws apply? All of that exists before we go global – how does a global business deal with the GDPR, the Chinese and Russian laws, evolving U.S. principles, and every other privacy law that exists? We can expect to see enforcement activity taken under GDPR by a regulatory agency in Europe against an American company with no obvious European presence. We will see California take action against companies operating only in other states. We are seeing an ongoing tug of war in California

Intel, Model Privacy Legislation, available at [usprivacybill.intel.com/legislation/](https://www.usprivacybill.intel.com/legislation/); Center for Democracy and Technology, “Federal Baseline Privacy Legislation Discussion Draft,” available at cdt.org/files/2018/12/2018-12-12-CDT-Privacy-Discussion-Draft-Final.pdf; Gelman, “The long and difficult road to a U.S. privacy law,” IAPP Privacy Perspectives. iapp.org/news/a/the-long-and-difficult-road-to-a-u-s-privacy-law-part-1/; iapp.org/news/a/the-long-and-difficult-road-to-a-u-s-privacy-law-part-2/; iapp.org/news/a/the-long-and-difficult-road-to-a-u-s-privacy-law-part-3/ (Aug. 2018).

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involving the referendum process as well.⁶ The critical issue in the current debate over a national privacy law involves the question of federal preemption.

Business advice

Privacy law also forces students to think about their legal advice in a more practical context. Sometime the questions clients ask are straightforward – how many days do I have to respond to an access request by a consumer? But that’s very little of my work. Lawyers need to learn how to work with clients – to be able to explain their advice, assess the strengths and weaknesses, explain the choices, explore alternatives, etc. An enormous part of my work involves the gaps between laws – and force me and my clients to think about where the law applies, where it doesn’t, what to do in those gaps, and how the client’s business goals will be impacted by an evolving legal structure. I need to give advice on actual issues. Can we sign this contract? How can this product work? Can we make this decision about a customer based on this category of information? Privacy law requires this breadth of thinking – not only about legal requirements but also about the full range of business issues that emerge every day. That’s really fun and interesting – and hard.

Contracts

We don’t usually write contracts in law school. But contracts are critical in privacy law. Parts of them are required by law. Other parts are driven by business strategy. We have to learn how to negotiate these contracts – not just to take the hardest core adversarial position, but to understand how a vendor relationship matters to a customer, and how the choices in a contract can impact a business – and where you don’t have to win on every point.

⁶ Romm, “Privacy activist in California launches new ballot initiative for 2020 election,” *Washington Post* (Sept. 24, 2019); Carson, “On keynote stage, Mactaggart addresses his ‘new’ CCPA,” available at iapp.org/news/a/on-keynote-stage-mactaggart-addresses-his-new-ccpa/ (Sept. 26, 2019).

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Evolving technology

Privacy law also is a shining example of one of the biggest challenges in the legal system – how to develop laws and regulations that deal with new and evolving technology. The internet didn't really exist when the HIPAA statute was passed. The Internet of Things – which now turns everything from our car and refrigerator to our thermostat, bed, and sex toys into privacy-related devices – is expanding daily. We are concerned about artificial intelligence and big data. We don't yet understand the impact of facial recognition or biometrics. Genetic information promises important medical breakthroughs – with critical privacy risks. Even for a field that is barely 20 years old, it is clear that the privacy legal structure isn't keeping pace with these developments. What should the law be in these areas? How do we address these future (and largely unknown) technological developments? And how do we give legal advice to clients who are innovating in a legal vacuum?

It is forward thinking

The first year of law school often is about the past. We learn about several hundred years of case law, with a focus on the 19th and 20th centuries. The classic first year curriculum is really a kind of legal history.

While privacy law has some of this history, particularly from the constitutional and tort perspective, modern privacy law – mainly law from the mid-1990s until today – is a dynamic, evolving, complicated, and rapidly changing field. I was able to learn privacy law in its infancy, when there were only a handful of things to learn. Now, privacy law encompasses dozens (hundreds?) of subcategories and specialties, with the volume and complexity changing every day. These laws include not only prominent laws like HIPAA and the Gramm-Leach-Bliley Act, but also much less known provisions such as the Video Privacy Protection Act, the Drivers Privacy Protection Act, and IRS Code section 7216. We see laws like the Part 2 substance abuse rules – passed in 1970 for a specific purpose – and now in real time are addressing issues as to whether this provision is contributing to the opioid crisis. For the foreseeable future, law students could watch this area evolve in real time – and could learn along with it, examining all aspects of this transformation. This constant evolution

makes teaching privacy law challenging – I need to change a large percentage of my curriculum every semester. But it is interesting and fun and complicated and thought provoking.

Professional opportunities

There is also an exploding range of professional opportunities related to privacy and data security. Obviously, a law student interested in privacy law could go to a law firm (we always need good young associates). But the opportunities are so much more than that – and most of these opportunities aren't brought to a student's attention during the on-campus interview season. Companies all over the world are hiring privacy lawyers – including companies that, even a few years ago, weren't thinking about privacy law (e.g., car companies now concerned about “connected cars” or city planners and “smart cities”).

There's also an enormous range of “lawyer-like” jobs, where legal skills will be useful but may not be essential and where the job itself isn't necessarily a legal job. Being a privacy officer at a major company is one of the most interesting and challenging jobs you can imagine. Want to be a legislative aide? A regulator? Want to work in city planning? Want to help HHS determine the rules for precision medicine and medical research? Want to work for a new Internet of Things start-up? The International Association of Privacy Professionals (the leading privacy professional organization) – which numbered about 200 members at its founding – now has more than 50,000 members around the world.⁷ Thousands of companies are represented. IAPP estimated that 75,000 new privacy jobs would be created as a result of GDPR. A U.S. national privacy law would explode that number. This mix of law and other areas is where the law and legal careers are going – a blend of law and business and counseling and compliance mixed with a variety of other skills.

Ethics

Every law student takes a professional responsibility class. But privacy law is a critical area for actual ethics in practice. Because the law is both incomplete and often permissive, the question of “should” we do some-

⁷ iapp.org/.

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thing is critical daily. Privacy lawyers constantly must evaluate the “creepiness” factor in privacy choices.⁸

The question of how the law should regulate technology also has implications for the field of legal ethics. For example, the American Bar Association is addressing these issues as part of its ethical framework. ABA Model Rules of Professional Conduct Rule 1.1 and Comments provide that: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.” The ABA also is adding obligations for lawyers to ensure appropriate data security protections for client information (driven by security breach notice law and a wide range of data security legal standards).

Pro bono opportunities

My work tends to involve companies. They are my clients. But privacy laws are designed to define the rights between companies and individuals – which means that the individuals have their rights as well. Our legal system needs a wide range of lawyers who can help these individuals – whether in direct advocacy, or in the larger public policy debate.

Moreover, an enormous range of non-profits are gathering data for their activities and also need to navigate these privacy and data security challenges.

The evolution of law school in general

There has been significant discussion in the recent past about the evolution of the law school curriculum in general. A Harvard Law School analysis notes that:

For more than 130 years, Harvard Law School’s curriculum has been modeled on the plans drawn by Dean Christopher Columbus Langdell in the late 1800s: intense immersion in property, contracts,

⁸ Singer, “Creepy or Not? Your Privacy Concerns Probably Reflect Your Politics,” available at www.nytimes.com/2018/04/30/technology/privacy-concerns-politics.html; Tene and Polonetsky, “A Theory of Creepy: Technology, Privacy, and Shifting Social Norms,” 16 Yale J.L. & Tech. (2014).

torts, civil procedure and criminal law during the first year, followed by two more years – less structured than the first – in which students have been free to choose most of their courses from an increasingly extensive catalogue of specialized offerings.

Much of the teaching has employed the case method, born of a belief that law students can best gain the ability to “think like lawyers” by learning to make subtle distinctions between the facts and language of cases and judicial opinions.

But over the last several decades, with the rise of specialization, globalization and an increasingly regulatory environment both at home and abroad, the practice of law has become more international in scope and has come to require a systematic grasp of statutory and regulatory institutions and practices as much as an ability to glean principles from appellate decisions.⁹

As discussed above, privacy law can be both consistent with the history of the curriculum as well as part of this ongoing evolution. While the case method can be made relevant for privacy law (at least for some elements of the core field), privacy law reflects all of these newer concepts. As one commentator notes, “Law schools have made some strides during the past few years – experiential learning, legal technology, entrepreneurship, legal innovation, and project management courses, are becoming standard fare.”¹⁰ Privacy law – as it has evolved primarily in the past twenty years and continues to do so today and into the foreseeable future – requires this “new” legal knowledge.

Legal knowledge was long the sole requisite for a legal career; now it is a baseline. “Thinking like a lawyer” today means focusing on client objectives, thinking holistically – not simply “like a lawyer,” understanding business, melding legal knowledge with process/project management skills, and having a working knowledge of how technology and data impact the delivery of legal services. Lawyers no longer func-

⁹ See, e.g., Blum, “Harvard Law School proposes new answers to the question ‘What do future lawyers need to know?’”, available at today.law.harvard.edu/feature/a-curriculum-of-new-realities/. See also R. Michael Cassidy, “Reforming the Law School Curriculum from the Top Down,” 64 *J. Legal Educ.* 428 (2015).

¹⁰ Cohen, “What Are Law Schools Training Students For?”, available at www.forbes.com/sites/markcohen1/2018/11/19/what-are-law-schools-training-students-for/#26ed506d64f2 (Nov. 19, 2018).

tion in a lawyer-centric environment – now, they routinely collaborate with other legal professionals, paraprofessionals, and machines. Thinking like a lawyer means understanding the client’s business – not simply its “legal” risks. It also means collaborating with others in the legal supply chain, ensuring that the “right” resources are deployed to drive client value, working efficiently, capturing intellectual capital, using data, and advancing client objectives.¹¹

CONCLUSIONS

Privacy law is now everywhere. It affects our daily lives, virtually everywhere in the world. The legal structure for protecting privacy in appropriate ways is one of the defining debates of our society today, with no signs of slowing down in the foreseeable future. For law students, this area requires an understanding of not only every relevant concept of “the law,” but also a broad variety of additional topics and considerations that will train young lawyers to be good lawyers. We have an opportunity to use this new area as a means for improving legal education, for the benefit of our students, our public policy, and these students’ future clients, whoever they may be. We should take this opportunity now, to ensure that all law students can engage in this debate and provide legal advice relevant to the full range of privacy law issues.



¹¹ Id.