SUMMARY OF CONTENTS

Contents xi

Preface xxv

Acknowledgments xxix

1 INTRODUCTION 1
   A. Information Privacy, Technology, and the Law 1
   B. Information Privacy Law: Origins and Types 10
   C. Perspectives on Privacy 40

2 PRIVACY AND THE MEDIA 79
   A. Information Gathering 80
   B. Disclosure of Truthful Information 108
   C. Dissemination of False or Misleading Information 181
   D. Appropriation of Name or Likeness 220

3 PRIVACY AND LAW ENFORCEMENT 247
   A. The Fourth Amendment and Emerging Technology 247
   B. Federal Electronic Surveillance Law 313
   C. Digital Searches and Seizures 333
   D. National Security and Foreign Intelligence 377

4 HEALTH AND GENETIC PRIVACY 429
   A. Confidentiality of Medical Information 430
   B. Constitutional Protection of Medical Information 480
   C. Genetic Information 526

5 PRIVACY OF ASSOCIATION AND IDENTITY 561
   A. Privacy of Group Associations 563
   B. Anonymity 582
   C. Identification 614
### 6 PRIVACY AND GOVERNMENT RECORDS AND DATABASES 635
- A. Public Access to Government Records 636
- B. Government Records of Personal Information 698

### 7 PRIVACY OF FINANCIAL AND COMMERCIAL DATA 757
- A. The Financial Services Industry and Personal Data 757
- B. Commercial Entities and Personal Data 799
- C. Data Security 880
- D. First Amendment Limitations on Privacy Regulation 900
- E. Government Access to Private Sector Records 926

### 8 PRIVACY AND PLACE 947
- A. Privacy at Home 947
- B. Privacy at School 964
- C. Privacy at Work 986

### 9 INTERNATIONAL PRIVACY LAW 1061
- A. The OECD Privacy Guidelines 1063
- B. Privacy Protection in Europe 1065
- C. Privacy Protection in North America 1127
- D. Privacy Protection in South America 1134
- E. Privacy Protection in Africa and the Middle East 1135
- F. Privacy Protection in Asia-Pacific 1136
- G. International Transfers of Data 1141

*Table of Cases* 1165

*Table of Authorities* 1175

*Index* 1199
CONTENTS

Preface xxv

Acknowledgments xxix

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 13
         • Samuel D. Warren and Louis D. Brandeis, The Right to Privacy
      (b) The Recognition of Warren and Brandeis’s Privacy Torts 25
         • William Prosser, Privacy 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 33
      (g) Privacy Protection in Criminal Law 34
   2. Constitutional Law 34
   3. Statutory Law 36
   4. International Law 39

C. PERSPECTIVES ON PRIVACY 40
   1. The Philosophical Discourse About Privacy 40
      (a) The Concept of Privacy and the Right to Privacy 40
      (b) The Public and Private Spheres 40
   2. The Definition and the Value of Privacy 42
      • Alan Westin, Privacy and Freedom 42
2 PRIVACY AND THE MEDIA

A. INFORMATION GATHERING

1. Intrusion upon Seclusion
   - Restatement (Second) of Torts § 652B: Intrusion upon Seclusion
   - Nader v. General Motors Corp.
   - Dietemann v. Time, Inc.
   - Desnick v. American Broadcasting Co., Inc.
   - Shulman v. Group W Productions, Inc.

2. Paparazzi
   - Galella v. Onassis
   - California Anti-Paparazzi Act

3. Video Voyeurism
   - Video Voyeurism Prevention Act

B. DISCLOSURE OF TRUTHFUL INFORMATION

1. Public Disclosure of Private Facts
   (a) Introduction
      - Restatement (Second) of Torts § 652D: Publicity Given to Private Life
   (b) Private Matters
      - Gill v. Hearst Publishing Co.
      - Daily Times Democrat v. Graham
   (c) Publicity
      - Miller v. Motorola, Inc.
   (d) The Newsworthiness Test
C. DISSEMINATION OF FALSE OR MISLEADING INFORMATION 181

1. Defamation 181
   (a) Introduction 181
   (b) Defamation and the Internet 183
      • Zeran v. America Online, Inc. 185
      • Blumenthal v. Drudge 188
   (c) First Amendment Limitations 194
      • New York Times Co. v. Sullivan 194
      • Gertz v. Robert Welch, Inc. 198

2. False Light 205
   (a) Introduction 205
      • Restatement (Second) of Torts § 652E: Publicity Placing Person in False Light 205
   (b) First Amendment Limitations 208
      • Time, Inc. v. Hill 208

3. Infliction of Emotional Distress 210
   • Hustler Magazine v. Falwell 211
   • Snyder v. Phelps 214

D. APPROPRIATION OF NAME OR LIKENESS 220

1. Introduction 220
   • Restatement (Second) of Torts § 652C: Appropriation of Name or Likeness 220

2. Name or Likeness 223
   • Carson v. Here’s Johnny Portable Toilets, Inc. 223

3. For One’s Own Use or Benefit 229
   • Raymen v. United Senior Association, Inc. 230

4. Connection to Matters of Public Interest 233
   • Finger v. Omni Publications International, Ltd. 234

5. First Amendment Limitations 239
   • Zacchini v. Scripps-Howard Broadcasting Co. 239
   • Estate of Presley v. Russen 241
3 PRIVACY AND LAW ENFORCEMENT 247

A. THE FOURTH AMENDMENT AND EMERGING TECHNOLOGY 247

1. Introduction 247
   (a) Privacy and Security 247
   (b) The Fourth and Fifth Amendments 248
   (c) Privacy of the Mail 249
   (d) Privacy of Papers and Documents 249
   (e) The Applicability of the Fourth Amendment 250
   (f) Reasonable Searches and Seizures 251
   (g) The “Special Needs” Doctrine 251
   (h) Administrative Searches 252
   (i) Checkpoints 252
   (j) Terry Stops 254
   (k) The Enforcement of the Fourth Amendment 254

2. Wiretapping, Bugging, and Beyond 255
   ● Olmstead v. United States 256
   ● Lopez v. United States 263
   ● Katz v. United States 265
   ● United States v. White 272

3. The Reasonable Expectation of Privacy Test and Emerging Technology 276
   (a) Applying the Reasonable Expectation of Privacy Test 276
      ● Smith v. Maryland 276
      ● United States v. Place 285
      ● Illinois v. Caballes 286
      ● California v. Greenwood 290
      ● Plain View, Open Fields, and Curtilage 292
      ● Florida v. Riley 293
   (b) Sensory Enhancement Technology 301
      ● Dow Chemical Co. v. United States 301
      ● Kyllo v. United States 306

B. FEDERAL ELECTRONIC SURVEILLANCE LAW 313

1. Section 605 of the Federal Communications Act 313
2. Title III 315
3. The Electronic Communications Privacy Act 315
   (a) Statutory Structure 315
      ● Types of Communications 316
      ● The Wiretap Act 317
      ● The Stored Communications Act 319
• The Pen Register Act 321
• Video Surveillance 322
• Electronic Surveillance Law and the Fourth Amendment 322
• Electronic Surveillance Orders 323
• State Electronic Surveillance Law 325

4. The Communications Assistance for Law Enforcement Act 328
5. The USA PATRIOT Act 331

C. DIGITAL SEARCHES AND SEIZURES 333
1. Searching the Contents of Computers 333
   • United States v. Andrus 336
2. Encryption 342
3. E-mail 345
   • Steve Jackson Games, Inc. v. United States Secret Service 345
   • United States v. Warshak 351
4. ISP Records 357
   • United States v. Hambrick 357
   • McVeigh v. Cohen 360
5. IP Addresses and URLs 366
   • United States v. Forrester 366
6. Key Logging Devices 373
   • United States v. Scarfo 373

D. NATIONAL SECURITY AND FOREIGN INTELLIGENCE 377
1. Is National Security Different? 377
   • United States v. United States District Court (The Keith Case) 378
2. The Foreign Intelligence Surveillance Act 384
   • Global Relief Foundation, Inc. v. O’Neil 388
   • United States v. Isa 390
   • The 9/11 Commission Report 392
   • In re Sealed Case 397
3. The Attorney General’s FBI Guidelines 404
4. The Homeland Security Act 406
5. The Intelligence Reform and Terrorism Prevention Act 406
6. The NSA Surveillance Program 407
   • Al-Haramain Islamic Foundation v. Bush 409
   • In re National Security Agency Telecommunications Records Litigation [I] 415
   • In re National Security Agency Telecommunications Records Litigation [II] 416
4 HEALTH AND GENETIC PRIVACY 429

A. CONFIDENTIALITY OF MEDICAL INFORMATION 430

1. Professional Ethics and Evidentiary Privileges 430
   (a) Ethical Rules 430
      • Oath and Law of Hippocrates 430
      • Current Opinions of the Judicial Council of the American Medical Association Canon 5.05 431
   (b) Evidentiary Privileges 431
      • Jaffe v. Redmond 432

2. Tort Liability for Disclosure of Patient Information 437
   • McCormick v. England 437
   • Hammonds v. Aetna Casualty & Surety Co. 439

3. Tort Liability for Failure to Disclose Patient Information 446
   • Tarasoff v. Regents of University of California 446
   • McIntosh v. Milano 453

4. Statutory Reporting Requirements 458
5. State Law Privacy Protections for Medical Information 460
6. Health Insurance Portability and Accountability Act 463
   • Applicability of the Regulations 464
   • The Privacy Rule 465
   • Exceptions to the Privacy Rule 467
   • The Security Rule 468
   • Effect on Existing Law 469
      • Northwestern Memorial Hospital v. Ashcroft 475

B. CONSTITUTIONAL PROTECTION OF MEDICAL INFORMATION 480

1. The Constitutional Right to Privacy 480
   • Griswold v. Connecticut 481
   • Planned Parenthood of Southeastern Pennsylvania v. Casey 488
   • Lawrence v. Texas 496

2. The Constitutional Right to Information Privacy 503
   • Whalen v. Roe 503
   • 42 U.S.C. § 1983 and “Constitutional Torts” 510
   • Carter v. Broadlawns Medical Center 512
   • Doe v. Borough of Barrington 513
## CONTENTS

- Doe v. Southeastern Pennsylvania Transportation Authority 516
- 2. The Fourth Amendment 522
  - Ferguson v. City of Charleston 522

### C. GENETIC INFORMATION 526
1. Background: Genetic Privacy 526
2. Property Rights in Body Parts and DNA 527
  - Moore v. Regents of the University of California 527
3. Genetic Testing and Discrimination 540
  - Richard A. Epstein, *The Legal Regulation of Genetic Discrimination: Old Responses to New Technology* 541
  - Paul M. Schwartz, *Privacy and the Economics of Health Care Information* 542
4. DNA Databases and Identification 546
  - United States v. Kincade 547

### 5 PRIVACY OF ASSOCIATION AND IDENTITY 561

#### A. PRIVACY OF GROUP ASSOCIATIONS 563
1. Compelled Disclosure of Group Membership Lists 563
  - National Association for the Advancement of Colored People v. State of Alabama 563
2. Interrogation About Group Associations 567
  - Barenblatt v. United States 567
3. Surveillance of Group Activities 572
  - Laird v. Tatum 572
  - Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate 579

#### B. ANONYMITY 582
1. Anonymous Speech 582
  - Talley v. State of California 582
  - McIntyre v. Ohio Elections Commission 583
2. Anonymity in Cyberspace 590
  - ACLU v. Miller 591
  - Doe v. Cahill 595
3. Anonymous Reading and Receiving of Ideas 602
  - Tattered Cover, Inc. v. City of Thornton 602
4. Anonymity and Copyright 611

#### C. IDENTIFICATION 614
1. Identification Devices and Techniques 614
2. Identification and the Constitution 616
  - Hiibel v. Sixth Judicial District Court 618
6 PRIVACY AND GOVERNMENT RECORDS AND DATABASES 635

A. PUBLIC ACCESS TO GOVERNMENT RECORDS 636
1. Public Records and Court Records 636
   ● Doe v. Shakur 637
2. The Freedom of Information Act 641
   ● United States Dep’t of Justice v. Reporters Committee for Freedom of the Press 644
   ● National Archives and Records Administration v. Favish 651
3. Constitutional Requirements of Public Access 660
   ● Los Angeles Police Department v. United Reporting Publishing Corp. 662
4. Constitutional Limitations on Public Access 668
   (a) Public Records 668
      ● Kallstrom v. City of Columbus [Kallstrom I] 668
      ● Kallstrom v. City of Columbus [Kallstrom II] 671
   (b) Police Records 678
      ● Paul v. Davis 678
      ● Cline v. Rogers 681
      ● Scheetz v. The Morning Call, Inc. 682
   (c) Megan’s Laws 686
      ● Paul P. v. Verniero 687

B. GOVERNMENT RECORDS OF PERSONAL INFORMATION 698
1. Fair Information Practices 698
   ● Marc Rotenberg, Fair Information Practices and the Architecture of Privacy (What Larry Doesn’t Get) 700
2. The Privacy Act 701
   ● Quinn v. Stone 704
   ● Doe v. Chao 713
   ● J. Roderick MacArthur Foundation v. Federal Bureau of Investigation 723
3. The Use of Government Databases 728
   (a) The Computer Matching and Privacy Protection Act 728
   (b) Airline Passenger Screening 729
      ● The 9/11 Commission Report 729
7 PRIVACY OF FINANCIAL AND COMMERCIAL DATA 757

A. THE FINANCIAL SERVICES INDUSTRY AND PERSONAL DATA 757

1. The Fair Credit Reporting Act 757
   - Smith v. Bob Smith Chevrolet, Inc. 765
   - Sarver v. Experian Information Solutions 772
2. The Use and Disclosure of Financial Information 779
   - The Breach of Confidentiality Tort and Financial Institutions 779
   - The Gramm-Leach-Bliley Act 780
   - State Financial Regulation 783
3. Identity Theft 785
   - Identity Theft Statutes 786
   - Tort Law 788
     - Wolfe v. MBNA America Bank 788
   - The Fair Credit Reporting Act 791
     - Sloane v. Equifax Information Services, LLC 792

B. COMMERCIAL ENTITIES AND PERSONAL DATA 799

1. Governance by Tort 799
   - Dwyer v. American Express Co. 799
   - Remsburg v. Docusearch, Inc. 804
2. Governance by Contract and Promises 807
   - Privacy Policies 807
     - Jeff Sovern, Opting In, Opting Out, or No Options at All 808
     - Michael E. Staten & Fred H. Cate, The Impact of Opt-In Privacy Rules on Retail Markets 810
   - Contract Law 813
     - In re Northwest Airlines Privacy Litigation 814
   - FTC Enforcement 820
     - In the Matter of Google Inc. 821
3. Governance by Self-Regulation 832
4. Governance by Property 836
5. Governance by Statutory Regulation 839
   (a) Entertainment Records 840
      ● The Video Privacy Protection Act 840
      ● Dirkes v. Borough of Runnemede 841
      ● Daniel v. Cantell 843
      ● The Cable Communications Policy Act 846
   (b) Internet Use and Electronic Communications 847
      ● Children’s Online Privacy Protection Act 847
      ● Electronic Communications Privacy Act 850
      ● In re Pharmatrak, Inc. Privacy Litigation 850
      ● Dyer v. Northwest Airlines Corp. 857
      ● Computer Fraud and Abuse Act 859
      ● Creative Computing v. Getloaded.com LLC 860
      ● United States v. Drew 863
   (c) Marketing 867
      ● Telephone Consumer Protections Act 867
      ● CAN-SPAM Act 869
   (d) State Statutory Regulation 871
   (e) The Concept of Personally Identifiable Information (PII) 872
      ● Pineda v. Williams-Sonoma Stores 873

C. DATA SECURITY 880
   1. Introduction 880
   2. Data Security Breach Notification Statutes 881
   3. Civil Liability 883
      ● Pisciotta v. Old National Bancorp 883
   4. FTC Regulation 893
      ● In the Matter of Reed Elsevier, Inc. and Seisint 894

D. FIRST AMENDMENT LIMITATIONS ON PRIVACY REGULATION 900
   ● Rowan v. United States Post Office Department 901
   ● Mainstream Marketing Services, Inc. v. Federal Trade Commission 902
   ● U.S. West, Inc. v. Federal Communications Commission 905
   ● Trans Union Corp. v. Federal Trade Commission 913
   ● Sorell v. IMS Health, Inc. 917
E. GOVERNMENT ACCESS TO PRIVATE SECTOR RECORDS 926

1. Information Gathering Without Search Warrants 926
   (a) Subpoenas 926
      ● Gonzales v. Google 928
   (b) Financial Information and the Third Party Doctrine 932
      ● The Bank Secrecy Act 932
      ● California Bankers Association v. Shultz 932
      ● United States v. Miller 934
   (c) The USA PATRIOT Act § 215 939
   (d) National Security Letters 940

2. Information Gathering with Search Warrants 943
   ● Zurcher v. The Stanford Daily 943
   ● Privacy Protection Act 946

8 PRIVACY AND PLACE 947

A. PRIVACY AT HOME 947
   ● Stanley v. Georgia 948
   ● Wilson v. Layne 952
   ● Georgia v. Randolph 959

B. PRIVACY AT SCHOOL 964
   1. School Searches and Surveillance 964
      ● New Jersey v. T.L.O. 964
   2. Drug Testing 970
      ● Vernonia School District v. Acton 970
      ● Board of Education v. Earls 976
   3. School Records 981
      ● The Family Education Rights and Privacy Act 981
      ● Owasso Independent School District v. Falvo 982

C. PRIVACY AT WORK 986
   1. Introduction 986
   2. Workplace Searches 989
      ● O’Connor v. Ortega 989
      ● K-Mart Corp. v. Trotti 996
   3. Workplace Surveillance 997
      ● Thompson v. Johnson County Community College 997
4. Drug Testing  
   ● National Treasury Employees Union v. Von Raab 1000  
   ● Chandler v. Miller 1006  
   ● Borse v. Piece Goods Shop 1008  
5. The Issue of Consent  
   ● Baggs v. Eagle-Picher Industries, Inc. 1012  
6. Testing, Questionnaires, and Polygraphs 1018  
   (a) Testing and Questionnaires 1018  
      ● Greenawalt v. Indiana Department of Corrections 1018  
      ● National Aeronautics and Space Administration v. Nelson 1021  
   (b) Polygraph Testing 1027  
      ● The Employee Polygraph Protection Act 1030  
7. Telephone Monitoring 1031  
   ● Watkins v. L.M. Berry & Co. 1032  
   ● Deal v. Spears 1036  
8. Computer Monitoring and Searches 1039  
   (a) E-mail 1039  
      ● Smyth v. Pillsbury Co. 1040  
   (b) Internet Use 1048  
      ● Leventhal v. Knapec 1048  
      ● United States v. Ziegler 1055  
9 INTERNATIONAL PRIVACY LAW 1061  
A. THE OECD PRIVACY GUIDELINES 1063  
B. PRIVACY PROTECTION IN EUROPE 1065  
   1. Divergence or Convergence? 1065  
      ● James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty* 1065  
   2. European Convention on Human Rights Article 8 1070  
      (a) Introduction 1070  
         ● ECHR Article 8 1072  
      (b) Privacy and the Media 1073  
         ● Von Hannover v. Germany 1073  
         ● Mosley v. The United Kingdom 1083  
      (c) Privacy and Law Enforcement 1094  
         ● P.G. & J.H. v. United Kingdom 1094  
      (d) Privacy and Identification 1100  
         ● B. v. France 1100  
      (e) Privacy and Government Records and Databases 1105  
         ● Rotaru v. Romania 1105
3. The European Union Data Protection Directive
   (a) Introduction
      ● Criminal Proceedings Against Bodil Lindqvist
   (b) Article 8 and Harmonization
   (c) Supervisory Authority and Individual Remedies

C. PRIVACY PROTECTION IN NORTH AMERICA
   1. Canada
      ● Blood Tribe Department of Health v. Canada
   2. Mexico

D. PRIVACY PROTECTION IN SOUTH AMERICA
   1. Argentina
   2. Brazil

E. PRIVACY PROTECTION IN AFRICA AND THE MIDDLE EAST
   1. Africa
   2. The Middle East

F. PRIVACY PROTECTION IN ASIA-PACIFIC
   1. The APEC Privacy Framework
   2. Australia
   3. Japan
   4. China and Hong Kong
   5. India

G. INTERNATIONAL TRANSFERS OF DATA
   1. International Data Transfers in Litigation
      ● Volkswagen, A.G. v. Valdez
   2. Adequate Level of Protection Under the EU Directive
   3. The Safe Harbor Arrangement
      (a) Conflicting Privacy Approaches in the EU and United States
      (b) The Safe Harbor Arrangement
         ● Safe Harbor Privacy Principles
         ● The Commission Decision on Safe Harbor
         ● European Parliament Resolution on the Draft Commission Decision on the Adequacy of the Protection Provided by the Safe Harbour Privacy Principles
         ● Joel R. Reidenberg, *E-Commerce and Trans-Atlantic Privacy*
   4. Outsourcing Data Processing
CONTENTS

Table of Cases 1165

Table of Authorities 1175

Index 1199