

# Surveillance, Privacy, and Police Powers

Fall 2013

T/R 4:00 – 5:15 PM

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## I. Course Objectives

Government agencies have broad police power to act for the public good. This includes the ability to conduct extensive surveillance and gather substantial information about individuals and organizations. But the ability to conduct surveillance is delimited by various laws that protect privacy. Further, many people argue that we have moral claims to privacy, regardless of legal protections. As a result, the interface between surveillance and privacy is deeply contested. That interface is the subject of this course. In examining it, we will pursue a number of lines of inquiry. These include: What is privacy? Do we have moral rights or claims to privacy, and if so on what basis? For what reasons can we override privacy rights? What evidence do we have about the efficacy of privacy protections and surveillance initiatives? How do laws fostering surveillance and protecting privacy function in theory and in practice? Are our surveillance practices fair (and how might we make such a determination)?

Keeping in mind those lines of inquiry, the goals of this course are to:

1. Introduce some of the major issues in state surveillance and privacy;
2. Critically examine a number of different approaches to the above issues; and,
3. Develop students' abilities to articulate and discuss complex issues and arguments surrounding important social, political, legal, and moral questions.

## II. Required Texts

As of September 2013, surveillance and privacy law and practice are unstable. Several recent court decisions have raised questions about the constitutionality of various practices. New technologies make greater information collection possible. And most importantly, this past summer a former employee of a security contractor began revealing information about the surveillance practices of the U.S. government. More of this information is coming out each week, and it is having a ripple effect. That is, it is leading others to explain, provide context, reveal more information, provide legal justifications for, and examine closely such practices. Many of these documents are in "raw" form—unedited, long, and difficult to read. For these reasons, a great deal of the readings for this class will be posted on Learn@UW, often with relatively short notice. You will be responsible for keeping up with these.

In addition, the following texts are required:

- *Top Secret America: The Rise of the New American Security State*, by Dana Priest and William M. Arkin (Little, Brown and Company, 2011)
- *Surveillance, Privacy, and Police Powers Course Reader* (CR) available at Bob's Copy Shop, 616 University Ave. (across from the Fluno Center—NOT the one at 1401 University Ave.)

### **III. Assignments, Evaluation, and Grading**

Your final grade will be based on two examinations, a final paper, and a couple of short presentations. In addition, your active and thoughtful participation in class can positively affect your grade, up to half a letter grade. Attendance is not part of your grade.

#### ***Surveillance and Privacy in the News (SPiNs) – 10%***

Two times during the semester you will be required to find a recent news story about a surveillance and privacy issue, trend, case, technology, law, practice, or related matter, prepare a summary of the story and its relation to course content, and present that summary to the class. The news story must have been published no more than 7 days before the presentation. You will have 60 seconds for your presentation, timed strictly. In addition, you will hand to me a printout of the story and a short memo (less than 200 words) describing the story and its relevance. I will pass around a sign-up sheet for SPiN dates.

SPiNs will be graded on:

- Creativity and novelty (does it replicate lots of what other students have done? Is it merely a front-page story in national newspapers?)
- Terse, accurate representation of the story.
- Clear articulation of how the story is related to the course content (do you pick out a conceptual framework, law, case, technology, or issue that directly relates to your story?)

You get full credit for (1) creative, novel stories that you (2) clearly, tersely, and accurately represent, and (3) neatly and plausibly relate to course content.

Avoid social media stories unless they involve state-oriented surveillance.

#### ***Exams – 30% each***

The exams will be a combination of short-answer and essay questions. They will be designed to test your understanding of the material from the readings and class. I will provide a study guide about a week before each test, and the test questions will be based on the study guides. You will not be asked to provide novel or creative insights on the exams, but you will be asked to synthesize / make connections between materials from class. Note that we will NOT cover all of the readings and other materials during class time, but you will be responsible for understanding the material and incorporating it into exams. This is especially true of the less demanding material (e.g., Priest and Arkin book, the factual background in the FBI Inspector General's report).

The midterm is on **October 22** during class. The final is on **December 16** from 5:05pm to 7:05pm.

## ***Paper (30%)***

You will be required to write a research paper of 8-10 pages on one of the topics I will provide in a separate document. I will allow you to choose a different topic only in exceptional cases, and only if you articulate the topic to me clearly, in writing, and I think it is worthwhile and well thought-out. I will hand out additional materials pertaining to the paper during week 2.

The paper is due on November 19, in class.

### ***Grade Scale***

A	94 and above
AB	89-93
B	84-88
BC	79-83
C	70-78
D	60-69
F	59 and below

I round to the nearest whole point (hence, 93.5 is rounded to 94 and 93.49 is rounded to 93).

## **IV. Course Management**

### ***Schedule and Due Dates***

The exam, paper, and SPiN due dates are fixed; I only allow for paper extensions and exam rescheduling for extraordinary and university-approved excuses. The reading schedule, however, is subject to change, depending upon on how quickly we move through the readings and how much things continue develop with respect to the Snowden leaks over the semester I will announce changes in class and on the course webpage.

The penalty for late work is 5% of assignment points per day late.

### ***Grading***

I will use blind grading on the exams; students must put *only* their student ID numbers on tests. Other assignments will be identifiable; put your name on those.

I do not give extra credit, though excellent participation can count in one's favor up to half a letter grade. (Poor participation does not count against one's grade.)

### ***Web Materials***

The course web page is located on Learn@UW. I will post a number of documents relevant to the course there. Specifically, I will post this syllabus, links useful for paper topics, study questions, and instructions for papers. These documents should help you figure out what is most salient and remain aware of what material you are responsible for on the exams. Note, however, that the documents on the page will **not** be lecture notes. You are responsible for lecture and reading notes; if you miss lecture, it is your responsibility to get the notes from another class member.

## ***Accommodations***

Any student who requires special arrangements for attending class, participating in discussion, or doing assignments should let me know within the first two weeks of class, otherwise such arrangements may be difficult to accommodate. I encourage any student who has a learning disability or physical disability that affects learning to come speak to me and to visit the university's McBurney Center, and we will see what we can do to meet your needs.

Any student for whom religious observances conflict with class attendances or mandatory academic requirements should let me know within the first two weeks of class in order that we can make appropriate arrangements for make-up work.

## ***Disruptions***

Please avoid disruptions (arriving late, talking in class, texting, reading non-course materials, or packing to leave before the period ends), and please turn off cell phones. I don't grade attendance. Thus, if you'd rather be doing something other than coming to class, you're free to do so.

## ***Complaints***

Anyone who has a complaint about the course should speak to the instructor, or if the complaint is about the instructor, they should see Michael Massoglia (mmassoglia@ssc.wisc.edu) chair of the Legal Studies program.

# **V. Academic Integrity**

## ***Contacting the Instructor***

I will be in my office during office hours (unless I post a note in advance on Learn@UW) and you can just drop by. Otherwise, email is the best way to communicate with me. Allow me a day to respond, though I'll generally respond more quickly than that. Please put "Legal Studies 400" and a brief description in the subject line. I get a lot of email, and that will make it easier to see.

## ***Quizzes and Examinations: Read this Closely***

Food and beverages are prohibited in the classroom during the tests. Students must remove caps, hats, and sunglasses. The examinations will begin promptly at the beginning of the period and end when the proctor calls time. Students must cease writing the moment the proctor calls time. After the proctor calls time, students receive no extra time to finish writing. Students who arrive late receive no extra time.

## ***Academic Misconduct: Read this Closely***

The overwhelming majority of students are hard working and honest about their schoolwork. The instructor has great respect for the effort students put into preparing for this course.

Unfortunately, there are occasional instances of academic misconduct ("cheating").

Part of the value of a degree from the University of Wisconsin-Madison lies in the standards of academic honesty and integrity maintained by the campus. To avoid academic misconduct, it is important that students understand how academic misconduct is defined in this course and the expectations the instructor has of each student.

Students have the right to expect that they and other students will be graded fairly, and students have rights of due process should they be accused of misconduct. Students also have an obligation to conduct their academic work with honesty and integrity according to University standards. Therefore, it is important that students:

- become familiar with the rules of academic misconduct;
- ask the instructor if you are unsure what behaviors constitute academic misconduct in a specific class or assignment;
- let your instructors know if you think you see incidents of misconduct;
- be aware that helping someone else to cheat is a violation of the rules and may result in misconduct charges against you.

The examinations are closed book. Students must remove and stow away everything from the desk, seat, floor, and area around them. Students must turn off and store cell phones and other electronic devices. If anyone sees papers, notes, readings (or any other materials), a cell phone, or any electronic/communicative device within a student's reach or area during the examination, then the instructor will assume that the student is cheating, and she will engage the academic misconduct process. Put another way: papers, notes, readings (or any other materials), a cell phone, or any electronic or communicative device within a student's reach or area during the examination is *prima facie* evidence of academic misconduct.

Before the examination, students will be required to certify that they have not engaged in academic misconduct while preparing for or during the course of a graded exercise.

### ***Academic Misconduct: What to Do if You See Someone Cheating***

Honest students are rightfully distressed when they see cheating occur. Students may sometimes see behaviors that the instructor does not notice. Cheating threatens the integrity of the classroom, and cheating can affect the grade distribution scale.

Students should feel free to discuss their concerns and observations with the instructor. He will want to know about these concerns or observations, and he will decide whether or not to take action in or to take steps to prevent cheating in the future. The instructor may ask you if you would be willing to testify at a hearing (although you will not be forced to do so). If you still have concerns after talking with the instructor, you may consult with your Academic Dean or with staff in Student Advocacy and Judicial Affairs.

Students may help other students by warning them that cheating is a violation of the UW System Administrative Code and may result in severe consequences. The instructor and the University do impose disciplinary sanctions upon students that commit academic misconduct. The instructor vigorously pursues all academic misconduct cases.

The rules about academic misconduct are located here:

<http://students.wisc.edu/saja/misconduct/UWS14.html>.

## **VI. Course Agenda and Readings**

**NOTE:** Schedule is subject to change. There will be up to three guest lectures this semester, and schedule will change to accommodate guests.

### **Part I: Introduction and Basics**

#### **Week 1: September 3**

##### ***Introduction; Some basics***

- Syllabus
- Federal Bureau of Investigation, Office of the Inspector General, "A Review of the FBI's Investigation of Certain Domestic Advocacy Groups," pp. 1-28, 93-158, 173-191 (Learn@UW)
- Waldron, "The Image of Balance" (Learn@UW)

#### **Week 2: September 10**

##### ***What is privacy? What is it good for?***

- Rachels, "Why Privacy Is Important," (CR)
- Posner, "An Economic Theory of Privacy" (CR)

#### **Week 3: September 17**

##### ***Cont'd***

- Gavison, "Privacy and the Limits of Law" (excerpt) (CR)
- Etzioni, "The Limits of Privacy" (excerpt) (CR)
- Cate, "The Privacy Problem: A Broader View of Information Privacy and the Costs and Consequences of Protecting It" (excerpt) (CR)
- Stalder, "Privacy Is Not the Antidote to Surveillance" (CR)

### **Part II: Legal Foundations: Fourth Amendment and Physical Searches**

#### **Week 4: September 24**

##### ***Police Powers, Fourth and Fifth Amendments***

- Solove, Rotenberg, Schwartz, "Law Enforcement, Technology, and Surveillance" pp. 57-64 (CR).
- Watch: Don't Talk to Cops parts I and II (Learn@UW)

#### **Week 5: October 1**

##### ***Pretexts and Profiling***

- *Whren v. U.S.* (CR)
- Schauer, *Profiles, Probabilities, and Stereotypes* (excerpts) (CR)

## **Week 6: October 8**

### ***Profiling: Some history and recent cases***

- Harris, *Profiles in Injustice* (excerpts) (CR)
- Rivera et al “A Few Blocks, 4 Years, 52,000 Police Stops,” *New York Times* July 11, 2010 (CR)
- *Floyd v. New York*, opinion and order (U.S. District Court for S.D.N.Y., August 12, 2013)

## **Week 7: October 15**

### ***Profiling and fairness; Catch-up***

- Stuntz, “Fourth Amendment and Distributions” (CR)
- Review Stats on Drug Use, Crime (Learn@UW)

Catch up.

## **Week 8: October 22**

### ***Exam one; Surveillance and technology***

- Solove, Rotenberg, Schwartz, pp. 64-83 (CR)

Exam one: October 22, in class.

## **Week 9: October 29**

### ***Surveillance and technologies, cont’d***

- *Florida v. Jardines* (CR)
- *U.S. v. Jones* (CR)
- *U.S. v. Wurie* (petition and court of appeals opinion) (CR)

## **Part III: National Security Surveillance**

## **Week 10: November 5**

- Begin reading Priest and Arkin, *Top Secret America*
- Smith, Ben Franklin’s Website (excerpt) (CR)
- Chandler, “Privacy versus Security” (CR)

Optional:

- Watch: Frontline, “Spying on the Home Front” (link at Learn@UW)

## **Week 11: November 12**

### ***Surveillance and technologies; National security***

- FISA §§1802 and 1804 (CR) and excerpts from §1881 (Learn@UW)
- McAdams (FLETC), Foreign Intelligence Surveillance Act: An Overview (CR)
- Priest and Arkin, through page 173

- Readings on recent revelations: Prism, XKeyscore, NSA rule-breaking, DEA and NSA cooperation, FISC oversight, etc. TBA. (Learn@UW)

## **Week 12: November 19**

- Sulmasy and Yoo, "Katz and the War on Terrorism," 41 U.C. Davis L. Rev. 1219 (2008) (CR)
- Priest and Arkin, finish.

**Papers due November 19 in class.**

## **Week 13: November 26**

### ***Stepping back: Knowledge of surveillance***

- *Clapper v. Amnesty International* (CR)
- Rubel, "Privacy and the USA Patriot Act: Rights, the Value of Rights, and Autonomy" (CR)
- Maass, "How Laura Poitras Helped Snowden Spill His Secrets" (Learn@UW)
- More readings TBA

## **Part IV: Public Health Surveillance**

### **Week 14: December 3**

#### ***Overview of public health surveillance***

- Gostin, "Surveillance and Public Health Research" 287-330 (CR)
- Review: Centers for Disease Control, "HIV Surveillance and Statistics," <http://www.cdc.gov/hiv/topics/surveillance/basic.htm>
- Fairchild and Bayer, "Ethics and the Conduct of Public Health Surveillance" *Science* 2004 (CR)
- Middaugh, Hodge, and Cartter, Reply to Fairchild and Bayer *Science* 2004 (CR)
- Fairchild and Bayer, Response (CR)

### **Week 15: December 10**

#### ***Diabetes surveillance in New York City***

- Fairchild, Diabetes and Disease Surveillance (CR)
- Chamany et al: "Tracking Diabetes: New York City's A1C Registry" (CR)
- Rubel, "Justifying Public Health Surveillance" (CR)

Cont'd, catch up

### **Final Exam: December 16**