

Freedom, Privacy and Technology
Spring 2014 Midterm

Although all questions are based on assigned readings and class discussion you may use print and passive internet sources. This is not intended as a research project but questions should be addressed using full sentences & paragraphs which demonstrate understanding and refer to appropriate sources from class. If you incorporate factual information in your answers from sources outside of our reading list, please provide me with references. Your answers must be your own; consultation with others is not permitted. I will not grade answers on the basis of style or grammar, but clarity and complete sentences are always valued. I will look for critical reasoning, logical argument and specific reference to the readings. Answers will be due Tuesday May 20th in class. There are three pairs of questions and one quadruple below. **Choose one question from each set. You'll have I, II, III and IV answers. When a question (e.g. I-2) has multiple parts (2a, 2b) you must answer each part unless otherwise instructed. For IV you will choose two options to answer**

- I. In many cases where there is an infringement of privacy we hear the argument that "If you've nothing to hide then you've nothing to fear." "Transparency" can be seen as a virtue.
 1. a. Compare and contrast the arguments made by Malamud Smith and by Warren and Brandeis for the inherent value of privacy.
 - b. Rights often exist in tension with other rights and societal needs. Advancing a "Right to Privacy", as envisioned by Warren and Brandeis specifically, would /could weaken or compromise what other right(s) guaranteed in the Bill of Rights and what other needs of the community? Explain.
 - c. What remedies do Warren and Brandeis propose to address violations of privacy (throw the bums in jail)?
 - d. What limits do they suggest to their 'Right to Privacy' (under what circumstances should privacy not be protected)?
2. a. Janna Malamud Smith analyzes and categorizes privacy. Consider, using specific examples from the Norris and Allison readings, the role of reserve in preserving a degree of privacy when other forms are not available.
- b. How might Winner's categorization of technologies and their political impacts be applied to new and anticipated breakthroughs in neural imaging, as described in Jeffrey Rosen's article *Neurawl: the Brain on the Stand*. (there isn't one right answer here, but your discussion should reflect an understanding of Winner's analysis).
- c. If the neuro-imaging technology and genetic screening eventually allow us to predict which individuals will have a high likelihood of future delinquency such as violence or substance abuse, would proactive interventions be justified if undertaken from a medical treatment standpoint rather than a criminal prosecution perspective? How does this issue fit into Berlin's discussion of two kinds of freedom

II.1.a. Foucault has described the historical shift of power from the spectacle of the ruler displaying his power to the multitude to the internalized discipline of the panoptic society. Marx describes the growth of 'soft surveillance'. Describe the ways in which this soft surveillance both resembles and differs from Bentham's Panopticon (beyond the literal, one's a prison and one is not).

b. Explain the importance in the spread of 'soft surveillance' in the private sector in determining the level of protection citizens have against 'unreasonable search and seizure' by their government. You should include reference to the appropriate court case

2. a. Much has been made of the role of social media such as Twitter and Facebook in the events in the Arab Spring uprisings in Tunisia, Egypt, and Bahrain and the current civil war in Syria. Consider what characteristics make these technologies democratic or not according to Mumford's categorization and what the nature of their political qualities might be according to Winner. (Winner goes a few steps beyond Mumford.)

b. Ellul sees the advantages of *Technique* in freeing us from historical determinisms, but he warns of new, more subtle determinisms arising from 'progress'. Discuss the 'Soft Surveillance' technologies as an example of *Technique* and how Ellul's vision of freedom applies.

III.1.a. Describe the reasoning that led Taft to not consider wiretapping a search in *Olmstead* and why Stewart did in *Katz*.

b. Explain the significance of *Weeks v. U.S.* concerning gathering and considering evidence in trials involving the 4th Amendment.

c. A question central to this course is how law written in the 18th century should be interpreted by the courts to deal with the technology of the 21st century.

Contrast the minority (dissenting) opinions of Brandeis in *Olmstead v. U.S.* and Black in *Katz v. U.S.*

2. Answer two of the following questions:

a. In *Kyllo*, Justice Scalia attempted to craft a "bright line" distinction that would establish a lasting precedent to determine whether or not a 4th amendment search had occurred when surveillance technology is employed. Explain Scalia's distinction. Stevens claimed that Scalia's 'bright line' was at once both too broad and too narrow and that it would provide decreasing rather than rather than lasting protection of the home as technology advanced. Explain.

b. In *U.S. v. Jones* the court was unanimous in deciding for the defendant, but split in its reasoning for the decision. Explain the main differences in the reasoning of Justices Scalia and Alito, with particular reference to pre and post *Katz* understandings of 4th Amendment protections. How does each reconcile their decision in the face of the court's decision in *Knotts* that "(a) person traveling in an automobile on a public thoroughfare has no reasonable expectation of privacy in his movements from one place to another"?

c. The majority in *Hiibel* found that 'strong government interest' justified allowing states to require individuals to identify themselves during a 'Terry Stop'. Explain what a 'Terry Stop' is and what are its limitations. What made the Nevada law 'reasonable' where others had been struck down?

d. Describe the difference in Views between Douglas and White in their concurring opinions in Katz. How were those differences addressed In U.S. vs. U.S. District and what was the basis for the majority decision in that case?

IV Choose and answer 2 of the following 4 options.

- A. What are metadata and how are they used by the NSA? Why do they receive a lower degree of privacy protection? How does Michael Hayden say their use is limited?
- B. Describe structures that are in place to provide oversight for the activities of the National Security Agency and the difficulties in making that oversight effective.
- C. In the Snowden debate, the con side makes an argument that the methods used by the NSA to gain access to communications actually weaken our national security. What are they referring to?
- D. In Katz v. U.S. Stewart discusses the importance of "antecedent justification". In the Snowden debate the Pro side makes the argument that technological change has made antecedent justification for warrants no longer feasible. What is antecedent justification and what is the argument by Hayden and Dershowitz?

Note: You may answer an additional 3rd question in either III2 or IV for extra credit.