

An Argument for the Coherence of Privacy Law

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William McGeeveran, [Privacy and Data Protection Law](#) (2016).

[William McGeeveran](#)'s new casebook on [Privacy and Data Protection Law](#) announces the death of the “death march” that anyone who has ever taught or taken a course in Information Privacy Law has encountered. The death march is the slog in the second half of the semester through a series of similar-but-not-identical federal sectoral statutory regimes, each given just one day of instruction, such as the Privacy Act, FCRA, HIPAA, Gramm Leach Bliley, and FERPA. Professors asked to cover so much substantive law beyond their area of scholarly focus (nobody can focus on all of these) usually resort to choosing only two or three. Even then, the coverage tends to be cursory and unsatisfying.

The death march points to a larger problem: information privacy law doesn't really exist. At best, privacy law is an assemblage of barely related bits and pieces. The typical privacy course covers constitutional law, a little European Union data protection, a tiny bit of tort, some state law, and the death march of federal statutes. The styles of legal practice covered run the gamut from criminal prosecution and defense, to civil litigation, regulatory practice, corporate governance, and beyond. To justify placing so much in one course, we try futilely to bind together these bits and pieces through broad themes such as harm, social norms, expectations of privacy, and technological change.

My long-held doubt about the coherence of privacy law has led me to teach the course a bit apologetically, feeling like a fraud for pretending to find connections where there are almost none. I'm pleased to report that my belief isn't universally held: McGeeveran's compelling new casebook is built on the idea that privacy law can be rationalized into a coherent area of practice and pedagogy, one it presents in an organized and tightly woven structure.

I don't think I'm alone in the belief that privacy law lacks coherence. [Daniel Solove](#), in his magisterial summary of privacy law, [Understanding Privacy](#), argues that rather than give privacy a single, unified definition, the best we can do is identify a Wittgensteinian set of family resemblances of related concerns. Solove's very good casebook on [Information Privacy Law](#), co-authored with [Paul Schwartz](#), reflects this pragmatic resignation. Their book starts with a long chapter quoting many scholars who cast privacy in different lights and philosophical orientations. Solove and Schwartz don't do much to try to reconcile these inconsistent voices, suggesting that we ought not try to find any unified theory or consistent coherence in this casebook or this field. Having given up on coherence in chapter one, the rest of the book reads like a series of barely related silos. It's no wonder that the authors also offer their [book sliced into four smaller volumes](#), which to my mind work better standing on their own.

The other leading, also excellent, casebook, [Privacy Law and Society](#), by [Anita Allen](#) and [Marc Rotenberg](#), follows a similar organization, but without the introductory philosophical debate. It too presents privacy law as silos of substance and practice, dividing the field into five broad, but largely disconnected areas: tort, constitutional law, federal statutes, communications privacy, and international law.

McGeeveran takes a very different approach. He divides his casebook into three parts, the first two advancing the coherence thesis, both representing refreshingly creative syntheses of privacy law. In Part One, McGeeveran provides “Foundations”, which gives a relatively short chapter each on constitutional law, tort law, consumer protection law, and data protection. McGeeveran wisely resists the urge to tell any of these four stories at this point in their full depth, delaying parts of each for later in the book. This survey method gives the student a better appreciation for the most important tools in the privacy lawyer's toolkit; encourages more explicit comparisons between the four categories; and allows for learning through repetition and reinforcement when the topics are revisited later.

The other major innovation is McGeveran's decision to single out consumer protection law as a distinct area of practice. This builds on work from Solove and [Woodrow Hartzog](#), who have [argued](#) that we should treat the jurisprudence of the FTC as a form of common law, and from [Danielle Citron](#), who has [pointed to state attorneys general](#) as unheralded great protectors of privacy. McGeveran's book embraces both arguments, elevating the work of the FTC and state AGs to their due places as primary pillars of U.S. privacy law. This modernizes teaching of the subject, by reflecting what privacy practice has become in the 21st century, with many privacy lawyers advising clients about the FTC far more frequently than they think about tort or constitutional law.

Part Two is even more innovative. It consists of four chapters that follow stages in the "Life Cycle of Data": "collection", "processing and use", "storage and security", and "disclosures and transfers." Solove's influence is again felt here, as these stages echo the major parts of the privacy taxonomy he introduced in [Understanding Privacy](#). Each stage of Part Two introduces new substantive law, but organized around the types of data flows they govern. This prepares students for the issue spotting they will encounter in practice, centering on the data rather than on the artificial boundaries between areas of law. The techie in me appreciates the way this focuses student attention on the broad theme of the impact of technology on privacy.

Because these two parts are so innovative and successful, they serve as the spoonfuls of sugar that help the death march of Part Three go down (although admittedly even this part was still a bit of a slog when I taught from the book this past fall). Students are primed by this point to place statutes like [FERPA](#) or [HIPAA](#) into the legal framework of Part One and the data lifecycle of Part Two, making them reinforcing examples of the coherent whole rather than disconnected silos. This also reduces the costs (and the guilt) for instructors of cutting sections of the death march. They understand that, thanks to the foundational structures of Part One and Two, their students will be better equipped to encounter, say, educational privacy for the first time on the job.

Finally, as a work of scholarship, not merely pedagogy, McGeveran's argument for the coherence of privacy law might be an important marker in the evolution of our still relatively young field. Roscoe Pound said that Warren & Brandeis did "nothing less than add a chapter to our law," a quote well-loved by privacy law scholars. William Prosser has been credited for taking the next step, turning Warren and Brandeis's concerns into concrete legal doctrine, in the form of the four privacy torts.

This book is positively Prosserian in its aspirations. McGeveran attempts to organize, rationalize, and lend coherence to a messy, incoherent set of fields that we've adopted the habit of placing under one label, even if they do not deserve it. I'm not entirely convinced that he has succeeded, that there is something singular and coherent called privacy law, but this book is the best argument for the proposition I have seen. And as a teacher, it is refreshing to leaven my skepticism with this well-designed, compelling new classroom tool.

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