

Information Privacy Law
Georgetown University Law Center

Prof. Marc Rotenberg
Spring 2011

DESCRIPTION

This course examines “information privacy,” an individual’s right to control his or her personal information held by others. The aim of the course is to understand how courts and Congress seek to protect information privacy as new technologies and new institutional practices emerge. The course traces the origins of the right to information privacy in American law, through Constitutional law, tort law, and modern statutory law. Case studies of landmark privacy legislation illustrate how expectations of privacy are translated into legal frameworks. It looks at recent controversies involving domestic surveillance, identification systems, social network sites, video surveillance, DNA databases, and airport body scanners. The course also considers the impact of the European privacy directive, the growth of the Internet, and the availability of cryptography and other Privacy Enhancing Technologies on the future of privacy law in the United States. See <http://www.epic.org/misc/gulc/>.

A NOTE ABOUT THE 2011 SEMINAR

Privacy will be a big topic in 2011. The Supreme Court is considering four important privacy cases: *NASA v. Nelson*, *FCC v. AT&T*, *Tolentino v. NY*, and *Sorrell v. IMS Health*. The United States and Europe are looking at the adoption of an international framework for data protection. And the Federal Trade Commission is investigating two important privacy complaints, one concerning Cloud Computing and the other about Facebook’s new privacy settings. The 2011 syllabus reflects these recent developments.

LOGISTICS

Information Privacy Law meets Tuesday evenings, 5:45 to 7:45 in Hotung 1000. Information Privacy Law is a two-credit seminar. The exam is scheduled for May 3, 2011. There is a paper option. I am happy to discuss topics and to review drafts. To contact me, send email to rotenberg@epic.org or call 202-483-1140x106.

A NOTE ABOUT FACEBOOK

I would like everyone in “Information Privacy Law 2011” to join the Facebook Group of the same name. (You do not need to friend me.) Assignments and updates will be posted to the Facebook account. Please be sure to read the Facebook privacy policy.

READING

There are two main texts for this class: Anita L. Allen, *Privacy Law and Society, Second Edition* and Marc Rotenberg, *Privacy Law Sourcebook 2011: United States Law, International Law and Recent Developments*. The casebook is available now in the bookstore. PLS will be distributed in class.

FIELD TRIPS

Law students are busy and a two-credit class offers just two credits. But going to school in Washington, DC gives you a unique insight into the development of privacy law. Take advantage. Here are a few possibilities for Spring 2011:

- Attend a Congressional hearing. Several hearings will be held this spring on topics relevant to this class. If you don't have time to go to Capitol Hill, watch on C-Span or the Committee web site.
- Attend the oral argument for *FCC v. AT&T*, No. 09-1279, in the US Supreme Court, on January 19, 2011. The case considers whether corporations have a right to "personal privacy" under the Freedom of Information Act.
- Attend the oral argument for *EPIC v. DHS*, No. 10-1157, in the DC Circuit Court of Appeals, on March 10, 2011. This is my case. I will be arguing that the airport body scanner program should be suspended.

WHAT'S IMPORTANT

Here are ten things you should understand well after taking this class:

- Privacy law - the major decisions, statutes, and international frameworks
- The role of Fair Information Practices in shaping modern privacy law
- The "reasonable expectation of privacy" test and its various applications
- How privacy concerns are translated into legal claims
- The significance of the Brandeis dissent in *Olmstead*
- The various institutional actors in the development of privacy law - judges, regulators, lawyers, legislators, advocates, technologists
- The basic elements of a privacy statute
- How to assess the privacy implications of new business practices and new government practices
- Technology as both a threat and an aid to modern privacy protection
- The many dimensions of privacy (physical privacy versus informational privacy) and the paradoxes of privacy (privacy and transparency, privacy and the First Amendment)

A NOTE ON READING ASSIGNMENTS - This is the current syllabus as of January 17, 2011. We may adjust the readings somewhat based on the availability of speakers and current developments. All pages refer to the casebook *Privacy Law and Society* unless otherwise indicated.

Week 1 (Jan 18) Introduction to Privacy Law

Administration

- Syllabus
- Exam/paper
- Attendance
- Facebook
- Guest speakers, Washington, DC
- Recent developments, Supreme Court cases

Reading

- An Introduction to Privacy Law [Casebook at 1-11]
- Brandeis and Warren, “The Right to Privacy” (1890) [Casebook at 21-25]
- Background [Casebook at 28-32]
- *Roberson v. Rochester Folding Box* (NY 1903) [Casebook at 34-35]
- *Pavesich v. New England Life* (Ga. 1905), [Casebook at 35-38]
- Prosser, ALI [Casebook 40-41]

Week 2 (Jan 25) Common Law: The Privacy Torts

Reading

- Intrusion [Casebook 43-47, 62-63, 89-92]
- Private Facts [Casebook 103,111-12,121-23]
- False Light [Casebook 129,138-39]
- Appropriation / Publicity [Casebook 148-55, 159, 165-66]
- Confidentiality [Casebook 197-98, 225-28]

Week 3 (Feb 1) Privacy, the First Amendment, Anonymity and Sensitive Data

Reading

- Anonymous Speech [Casebook 280-81]
- Freedom of Ideas [Casebook 290-95]
- *NAACP v. Alabama* (US 1958) [Casebook at 260-63]
- *Hibel v. Sixth Judicial District* (US 2005)
[Casebook, 397-400, 436-37]
- *Ostergren v. Cuccinelli* (4th Cir. 2010) [Casebook 227-278]
- *IMS Health v. Mills* (1st Cir. 2010) [Casebook 278-80] (Note that cert. was granted in *Sorrell v. IMS Health* (2nd Cir. 2010))

Week 4 (Feb 8) Privacy, the Fourth Amendment, and Airports

Reading

- *Olmstead v. US* (US 1928) [Casebook 323-24]
- *Katz v. US* (US 1967) [Casebook at 325-28]
- *Kyllo v. US.* (US 2001) [Casebook at 338-40]
- *Garcia* [Casebook at 1159-62]
- Airport searches [Casebook at 400-11]
- [EPIC v. DHS, No. 10-1157 \(D.C. Cir.\)](#)

Week 5 (Feb 15) Wiretap Law

Reading

- Communications Act of 1934, Section 605
- “Title III” of 1967
- Foreign Intelligence Surveillance Act of 1978 (FISA)
- Electronic Communications Privacy Act of 1986 (ECPA)
- Communications Assistance for Law Enforcement Act of 1994 (CALEA)
- PATRIOT Act of 2001
- NSLs and Other Issues

No classes (Feb 22) Faculty retreat

Week 6 (Mar 1) Privacy by Statute I: Government Databases

Reading

- Federal Privacy Statutes Intro [Casebook 645-49]
- Rotenberg, “What Larry Doesn’t Get” [Casebook 841-46]
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- The Privacy Act of 1974 [Casebook 649-58]
- The SSN [Casebook 664]
- FOIA [Casebook 670-71, 679-83] (Note that the Supreme Court has granted cert. in *Milner v. Navy*)
- Privacy Impact Assessments

No classes (Mar 8) Spring break

Week 7 (Mar 15) Privacy by Statute II: Private Sector Databases

Reading

- *U.S. v. Miller* (US 1976) [Casebook 777-79]
- *Burrows v. Superior Court* (Cal. 1974) [Casebook 412-14]
- Video Privacy Act (18 USC Â§2710) [Casebook 826-36]
- Cable Privacy Subscriber provisions (47 U.S.C. Â§551) [Casebook 901-03]
- Privacy law as dialogue [Casebook 885-88]

Week 8 (Mar 22) The Role of the Federal Trade Commission

Reading

- Section 5 of the FTC Act
- Toysmart Settlement (FTC 2000) [Casebook 856-58]
- Identity Theft [Casebook 810-13]

Week 9 (Mar 29) Do Not Call, Do Not Track

Reading

- *Mainstream Marketing v. FTC* (10th Cir. 2004) [Casebook at 889-96]
- [“FTC Staff Issues Privacy Report, Offers Framework for Consumers, Businesses, and Policymakers”](#) (December 2010)
- Congressional materials

Week 10 (Apr 5) Supreme Court: *Sorrell v. IMS Health*, No. 10-779 (Special assignment)

Reading

- Second circuit opinion
- Appellants brief
- Appellee’s brief
- Supreme Court web site
- Oyez web site
- Scotusblog

Week 11 (Apr 12) Int’l Privacy Law I

Reading

- Overview [Casebook at 909-22, 927, 936, 949]
- OECD Privacy Guidelines [Sourcebook]
- Council of Europe Convention [Sourcebook]
- EU Data Directive [Sourcebook]

Week 12 (Apr 19) Int’l Privacy Law II

Reading

- Article 29 Working Party [Sourcebook]
- Lisbon Treaty and Charter of Fundamental Rights [Sourcebook]
- Role of the Data Protection Agency [Sourcebook]
- Madrid Declaration [Sourcebook]

Week 13 (Apr 26) Locational Privacy (GPS, Cellphone Data, etc.)

Reading

- t/b/a