

Information Privacy Law

Prof. Marc Rotenberg

Spring 2010

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 medical privacy, domestic surveillance, identification systems, social network sites, video surveillance, DNA databases, and the use (and misuse) of the Social Security number. 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 2010 SEMINAR

The Supreme Court has recently granted cert in two important privacy cases. The United States and Europe are heading toward an interesting battle over new surveillance technology. 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 2010 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 17, 2010. There is a paper option. To contact me, send email to rotenberg@epic.org or call 202-483-1140x106. I am available to meet. Contact me to set up an appointment.

A NOTE ABOUT FACEBOOK

I would like everyone in "Information Privacy Law 2010" 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.

READING

There are two main texts for this class: Anita Allen, *Privacy Law and Society* and Marc Rotenberg, *Privacy Law Sourcebook 2009: United States Law, International Law and Recent Developments*. The casebook is available now in the bookstore. PLS should be available in a few weeks.

I will also distribute copies of the *Twelfth Annual Report of the Article 29 Working Party on Data Protection* and ask you to read opinions and briefs for one of two Supreme Court cases we will study, and occasional news items.

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 2010:

- Attend a Supreme Court oral argument. The Court will hear arguments in two cases this spring that we will explore.
- 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.
- Attend the International Association of Privacy Professionals panel on March 16 at the National Press Club. There are also scholarships available if you are interested in attending the IAPP conference.

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 and the many ways in which a legal right to privacy is established
- 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 19, 2009>, but 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 19) Intro

Topics

- Class logistics
 - Syllabus
 - Exam/paper
 - Attendance
 - Facebook
 - Guest speakers, Washington, DC
- Major themes in privacy law
- What is “privacy”? Google it.

Reading (not assigned)

- Brandeis and Warren, “The Right to Privacy” (1890)
- *Roberson v. Rochester Folding Box* (NY 1903)
- *Pavesich v. New England Life* (Ga. 1905)

Week 2 (Jan 26) Privacy Torts

Reading

- Prosser, ALI (32-33, 35)
- Intrusion (47-54, 75-78)
- Private Facts (80-87)
- False Light (99-106)
- Appropriation / Publicity (112, 119-25, 147-50)

- Confidentiality (162-65, 174-76)

Week 3 (Feb 2) Privacy and the First Amendment

Reading

- Cox Broadcasting (89-94)
- Liberty (183-96, 203-04, 236-38)
- Anonymity / Identity (205-09)
- *Hiibel v. Sixth Judicial District* (2005)
- Intellectual Freedom (220-22)

Week 4 (Feb 9) Privacy and the Fourth Amendment

Reading

- Identification (312-15)
- Expectation of privacy (248-53, 258-64)
- Surveillance (255-58)
- Travel (315-24)
- “Special needs” (288-96)

No classes (Feb 16) Faculty retreat

Week 5 (Feb 23) Wiretap Law

- Sect 605 of the 1934 Comm. Act (228)
- “Title III” and ECPA (229-36)
- Video surveillance (240-43)
- Pen registers, etc. (254-60)
- State laws (298-300)
- Remedies (302-04)
- Minimization (307-10)

Week 6 (Mar 2) Privacy by Statute I

- Federal Privacy Statutes Intro (491-95, 638-43)
- Privacy Act and FOIA (500-01, 506-08, 514-15)
- Federal regulation of state systems (549-55)
- Privacy Impact Assessments

No classes (Mar 9) Spring break

Week 7 (Mar 16) Privacy by Statute II

- U.S. v. Miller (592-94)
- Video Privacy Act (628, 18 U.S.C. §2710)
- Cable Privacy Subscriber provisions
- Identity Theft Act
- Privacy law as dialogue (669-672)

Week 8 (Mar 23) The Role of the Federal Trade Commission

- Section 5 of the FTC Act
- FTC Opinions
- FTC Analysis

Week 9 (Mar 30) Supreme Court: Doe No. 1 v. Reed (Special assignment)

- Ninth circuit opinion
- Appellants brief
- Appellee's brief
- Supreme Court web site
- Oyez web site
- Scotusblog

Week 10 (Apr 6) Supreme Court: Ontario v. Quon, 08-1332 (Special assignment)

- Ninth circuit opinion
- Appellants brief
- Appellee's brief
- Supreme Court web site
- Oyez web site
- Scotusblog

Week 11 (Apr 13) Int'l Privacy I

- OECD Privacy Guidelines
- Council of Europe Convention
- EU Data Directive

Week 12 (Apr 20) Int'l Privacy II

- Article 29 Working Party
- Lisbon Treaty and Charter of Fundamental Rights
- The technology of body scanners

Week 13 (Apr 27) Smart Grid and Privacy

- t/b/a