

Privacy and Information Security Law

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CLASS 2

**Information Privacy Law Introduction pt. 2;
Perspectives on Privacy;
Education Privacy**

Information Privacy Law
Introduction pt. 2

2

A. Information Privacy,
Technology, and the Law

3

Information Privacy Law

- **Information privacy** concerns the collection, use, and disclosure of personal information.

4

Why Study Information Privacy Law?

- Paramount significance for freedom, democracy, and security
- Issue of growing public concern
- New laws and legal developments
- Engaging and fascinating topic (claims the authors)

5

B. Information Privacy Law: Origins and Types

6

Common Law Development

- 1890 Publication of Warren and Brandeis's law review article "The Right to Privacy"
- Late 19th century developments lead to a great need for privacy

7

Warren and Brandeis Article

- Right to enjoy life → Right to be let alone
- “Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”

8

Warren and Brandeis Article

- “Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. **Triviality destroys at once robustness of thought and delicacy of feeling.** No enthusiasm can flourish, no generous impulse can survive under its blighting influence.”

9

Warren and Brandeis Article

- Why not only slander and libel?
 - Damage to reputation requirement
- “[O]ur law recognizes no principle upon which compensation can be granted for mere injury to the feelings.”

10

Warren and Brandeis Article

- Why not only copyright law?
- “The statutory right is of no value, *unless* there is a publication; the common-law right is lost *as soon as* there is a publication.”

11

Warren and Brandeis Article

- General right of the individual to be let alone
- “[T]he existing law affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds.”

12

Warren and Brandeis Article

- “If the invasion of privacy constitutes a legal *injuria*, the elements for demanding redress exist, since already the value of **mental suffering**, caused by an act wrongful in itself, is recognized as a **basis for compensation**. The right of one who has remained a **private individual**, to prevent his public portraiture, presents the simplest case for such extension [”

13

Warren and Brandeis Article

- 1. The right to privacy does not prohibit any publication of matter which is of public or general interest.
- When does the public have legitimate concern?

14

Warren and Brandeis Article

- “[T]he matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity.”

15

Warren and Brandeis Article

- 2. The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.
- What kind of disclosures qualify?

16

Warren and Brandeis Article

- 3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.

17

Warren and Brandeis Article

- 4. The right to privacy ceases upon the publication of the facts by the individual, or with his consent.
- Once the information is disclosed by or with the authorization of the person...

18

Warren and Brandeis Article

- 5. The truth of the matter published does not afford a [defense].
- Not an injury to the individual's character, but rather injury to the individual's right to privacy

19

Warren and Brandeis Article

- 6. The absence of “malice” in the publisher does not afford a [defense].

20

Warren and Brandeis Article

- Remedies
 - Tort
 - Injunction
- Possibility of criminal law sanctions?

21

Results of the Article?

- Courts and legislatures created privacy torts

22

Prosser Article

- Four distinct types of invasion of privacy
 1. Intrusion upon seclusion
 2. Public disclosure of private facts
 3. False light
 4. Appropriation

23

Prosser Article

- "Taking them in order — intrusion, disclosure, false light, and appropriation — the first and second require the invasion of something secret, secluded or private pertaining to the plaintiff; the third and fourth do not. The second and third depend upon publicity, while the first does not, nor does the fourth, although it usually involves it. The third requires falsity or fiction; the other three do not. The fourth involves a use for the defendant's advantage, which is not true of the rest."

24

Lake v. Wal-Mart Stores, Inc.

- Issue
 - Does MN have a tort action for invasion of privacy?
- Case history
 - D.C. – no tort
 - Court of Appeals – no tort
 - Supreme Court – yes for seclusion, appropriation, and publication of private facts; no for false light publicity

25

Lake v. Wal-Mart Stores, Inc.

- Background
 - Naked photo of persons was not printed by Walmart
 - Wal-Mart employee circulated the photo in the community
 - Lake and Weber sue Wal-Mart

26

Lake v. Wal-Mart Stores, Inc.

- “Today, the vast majority of jurisdictions now recognize some form of the right to privacy. Only Minnesota, North Dakota, and Wyoming have not yet recognized any of the four privacy torts. . . . we reject the proposition that only the legislature may establish new causes of action. The right to privacy is inherent in the English protections of individual property and contract rights and the ‘right to be let alone’ is recognized as part of the common law across this country. Thus, **it is within the province of the judiciary to establish privacy torts in this jurisdiction.**”

27

Lake v. Wal-Mart Stores, Inc.

- “Today we join the majority of jurisdictions and **recognize the tort of invasion of privacy**. The right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close...”

28

Privacy Protection in Tort Law

- 1) Public Disclosure of Private Facts.
- 2) Intrusion upon Seclusion.
- 3) False Light.
- 4) Appropriation.

29

Public Disclosure of Private Facts

- "This tort creates a cause of action for one who publicly discloses a private matter that is 'highly offensive to a reasonable person' and 'is not of legitimate concern to the public.'"
- Restatement (Second) of Torts §652D (1977).

30

Intrusion upon Seclusion

- "This tort provides a remedy when one intrudes 'upon the solitude or seclusion of another or his private affairs or concerns' if the intrusion is 'highly offensive to a reasonable person.'"
- Restatement (Second) of Torts §652B (1977).

31

False Light

- “This tort creates a cause of action when one publicly discloses a matter that places a person ‘in a false light’ that is ‘highly offensive to a reasonable person.’”
- Restatement (Second) of Torts §652E (1977).

32

Appropriation

- “Under this tort, a plaintiff has a remedy against one ‘who appropriates to his own use or benefit the name or likeness’ of the plaintiff.”
- Restatement (Second) of Torts §652C (1977).

33

Additional Privacy Related Torts

- Breach of Confidentiality
- Defamation
- Infliction of Emotional Distress

34

Privacy Protection in Evidence Law

- “[C]ertain communications are privileged, and hence cannot be inquired into during a legal proceeding.”

35

Privacy Protection in Contract Law

- Breach of implied contracts
- Implicit duties based torts
- Privacy policy violations

36

Perspectives on Privacy

37

A. The Philosophical Discourse About Privacy

38

The Concept

- “In order to determine what the law should protect, we cannot merely look to what the law does protect.”

39

Public and Private Spheres

- “[T]he **public sphere** is the realm of life experienced in the open, in the community, and in the world of politics. The **private sphere** is the realm of life where one retreats to isolation or to one’s family. At its core is the world of the home.”

40

B. The Definition and the Value of Privacy

41

Privacy and Freedom

- "Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."

42

Four States of Privacy

- Solitude
- Small Unit
- Anonymity
- Reserve

43

Functions of Privacy

- Personal Autonomy
- Emotional Release
- Self-Evaluation
- Limited and Protected Communication

44

Control Over Information

- “Privacy is not simply an absence of information about what is in the minds of others; rather it is the *control* we have over information about ourselves.”

45

Examined Lives

- “The point is not that people will not learn under conditions of no-privacy, but that they **will learn differently**, and that the experience of being watched will constrain, ex ante, the acceptable spectrum of belief and behavior. Pervasive monitoring of every first move or false start will, at the margin, **incline choices toward the bland and the mainstream**. The result will be a subtle yet fundamental shift in the content of our character, a blunting and blurring of rough edges and sharp lines. ... The condition of no-privacy threatens not only to **chill the expression of eccentric individuality**, but also, gradually, to dampen the force of our aspirations to it. ...”

46

Privacy Conceptualized

- 1) the right to be let alone
- 2) limited access to the self
- 3) secrecy
- 4) control over personal information
- 5) personhood
- 6) intimacy

47

Revised Taxonomy

- Information Collection
- Information Processing
- Dissemination of Information
- Invasion into Private Affairs

48

Information Collection

- **Surveillance** is the watching, listening to, or recording of an individual's activities.
- **Interrogation** consists of various forms of questioning or probing for information.

49

Information Processing

- **Aggregation** involves the combination of various pieces of data about a person.
- **Identification** is linking information to particular individuals.
- **Insecurity** involves carelessness in protecting stored information from being leaked or improperly accessed.
- **Secondary use** is the use of information collected for one purpose for a different purpose without a person's consent.
- **Exclusion** concerns the failure to allow people to know about the data that others have about them and participate in its handling and use.

50

Dissemination of Information

- **Breach of confidentiality** is breaking the promise to keep a person's information confidential.
- **Disclosure** involves the revelation of truthful information about a person which impacts the way others judge that person's character.
- **Exposure** involves revealing another's nudity, grief, or bodily functions.
- **Increased accessibility** is amplifying the accessibility of information.
- **Blackmail** is the threat to disclose personal information.
- **Appropriation** involves the use of another's identity to serve the aims and interests of another.
- **Distortion** consists of the dissemination of false or misleading information about individuals.

51

Invasion into Private Affairs

- **Intrusion** concerns invasive acts that disturb one's tranquility or solitude.
- **Decisional interference** involves the government's incursion into people's decisions regarding their private affairs.

52

Self-Development

- Privacy is essential for self-development (according to a number of theorists)

53

C. Critics of Privacy

54

Selective Disclosure through Privacy

- “Very few people want to be let alone. They want to manipulate the world around them by **selective disclosure of facts about themselves**. Why should others be asked to take their self-serving claims at face value and be prevented from obtaining the information necessary to verify or disprove these claims?”

55

Education Privacy

56

A. SCHOOL SEARCHES AND SURVEILLANCE

57

New Jersey v. T.L.O.

- Issue
 - School caught student smoking in the bathroom
 - School searched the student's purse and found marijuana and evidence of drug dealing
 - School turns over evidence to police
 - Student confesses
 - Delinquency charges filed against student's mother

58

New Jersey v. T.L.O.

- Mother argues search violates 4th amendment and wants all evidence suppressed
- Preliminary issue – Does the 4th Amendment apply to searches conducted by school officials?
 - Answer - Yes

59

New Jersey v. T.L.O.

- 4th Amendment governs activities of **sovereign authorities**
 - “We have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities: building inspectors, Occupational Safety and Health Act inspectors, and even firemen entering privately owned premises to battle a fire, are all subject to the restraints imposed by the Fourth Amendment.”

60

New Jersey v. T.L.O.

- “Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, **what is reasonable depends on the context** within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires ‘balancing the need to search against the invasion which the search entails.’ On one side of the balance are arrayed the individual’s legitimate expectations of privacy and personal security; on the other, the government’s need for effective methods to deal with breaches of public order.”

61

New Jersey v. T.L.O.

- “We have also recognized that searches of closed items of personal luggage are intrusions on protected privacy interests, for ‘the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view.’ A search of a child’s person or of a **closed purse or other bag carried on her person**, no less than a similar search carried out on an adult, **is undoubtedly a severe violation of subjective expectations of privacy.**”

62

New Jersey v. T.L.O.

- “[S]choolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is **no reason to conclude that they have necessarily waived all rights to privacy** in such items merely by bringing them onto school grounds.”

63

New Jersey v. T.L.O.

- “[S]chool officials **need not obtain a warrant** before searching a student who is under their authority. . . . [T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider **‘whether the . . . action was justified at its inception’**; second, one must determine **‘whether the search as actually conducted ‘was reasonably related in scope’** to the circumstances which justified the interference in the first place.”

64

Strip Searching

- Student suspected of having contraband was made to pull out bra and underwear
- Search violated 4th amendment
- “[B]arring clear and direct evidence that a student is hiding contraband in her undergarments or barring any need to search to promote immediate safety, a strip search is improper.”

65

B. DRUG TESTING

66

For Discussion

- Under what circumstances should students at an educational institution be subject to drug testing?

67

Student Athletes

- “Somewhat like adults who choose to participate in a “closely regulated industry,” students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy. ...”
- Vernonia School District v. Acton, 515 U.S. 646 (1995)

68

Board of Education v. Earls

- Issue
 - All middle and high school students consent to drug testing to participate in any extracurricular activity
 - Before, random, and upon suspicion
 - “The urinalysis tests are designed to detect **only the use of illegal drugs**, including amphetamines, marijuana, cocaine, opiates, and barbiturates, not medical conditions or the presence of authorized prescription medications...”

69

Board of Education v. Earls

- “In Vernonia, this Court held that the suspicionless drug testing of athletes was constitutional. The Court, however, did not simply authorize all school **drug testing**, but rather conducted a **fact-specific balancing of the intrusion on the children’s Fourth Amendment rights against the promotion of legitimate governmental interests**. Applying the principles of Vernonia to the somewhat different facts of this case, we conclude that Tecumseh’s Policy is also constitutional...”

70

Board of Education v. Earls

- How are the test results used?
- “Given the **minimally intrusive** nature of the sample collection and the **limited uses** to which the test results are put, we conclude that the **invasion of students’ privacy is not significant.**”

71

C. SCHOOL RECORDS

72

For Discussion

- How sensitive are you school grades to you?
- Should your parents, spouse, employer, potential employer, etc. be able to access them with or without your consent?

73

What is FERPA?

- The Family Education Rights and Privacy Act (FERPA)
- Federal statute
- Provides for certain privacy principles including notice, consent, access and correction, security, and accountability.

74

FERPA

- “The Family Educational Rights and Privacy Act ... generally prohibits schools from releasing student **‘education records’** without the authorization of the student and/or parent. Schools may release such **‘directory information’** as names, addresses, dates of attendance, degrees earned, and activities unless the student and/or parent expressly indicates in writing that he or she wants it to remain confidential.”

75

Applying FERPA

- All educational institutions that receive federal funding are subject to FERPA
 - All public schools
 - Most private schools

76

Records

- “[A]ny information recorded in any way, including but not limited to , handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.”
- Computer media includes electronic records and emails

77

Education Records

- Directly related to a student and maintained by an education agency/institution (or by a party on behalf of the agency/institution)
- Does not cover information per se
- Grades and academic records only?
 - No, also financial aid records and disciplinary records

78

Not Education Records

- Campus police records
- Employment records
- Treatment records
- Applicant records
- Alumni records
- Grades or peer-graded papers

79

Directory Information

- Information in an education records that a student would not generally consider an invasion of privacy or harmful if disclosed
- No otherwise defined
- Likely includes name, date of birth, address, email address, phone number, and field of study
- Education institutions must provide students the ability to opt out or block release

80

Whose Right?

- Right belongs to parent until the student is 18 and then the right belongs to the student
- In college, the right always belongs to the student

81

What Rights?

- 1) to review the student's education records;
- 2) to correct any inaccuracies or misleading information in those records;
- 3) to control certain disclosures of the information in those records to others;
- 4) to file a complaint with the U.S. Department of Education in the event of a violation of the above rights

82

Private Right of Action

- Can I sue and recover damages if my school violates my rights?
 - No private right of action

83

What is PPRA?

- Protection of Pupil Rights Amendment (PPRA)
- 1978 amendment to FERPA
- Rights to parents of minors with regarding to collection of sensitive information from students through surveys

84

Areas Under PPRA

- Political affiliations
- Embarrassing mental and psychological programs
- Sex behaviors and attitudes
- Illegal, antisocial, self-incriminating and demeaning behavior
- Critical appraisals of certain others
- Religious practices
- Income

85

***Program
Completed***

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86
