The Changing Nature of the Right to Privacy in Modern America

Restrictions on handguns? Warrantless wiretapping and GPS tracking? A woman’s right to choose? A right to choose the manner and time of your passing? A person’s right to engage in private sexual relations? Each and every one of these issues, and far many more, have arisen before the United States Supreme Court in recent years, expanding and contracting the breadth and scope of our right to privacy. Even in a new era of government, the scope of the right to privacy remains at the forefront of the collective American conscience. This course will explore how Constitutional law has shaped the nature of the right to privacy and how the right may be evolving in modern America. We will concentrate on three particular areas: (1) privacy rights specifically enumerated in the Constitution, (2) privacy rights that have been read into the Constitution, and (3) emerging areas that may necessitate the extension or expansion of historically established concepts of privacy.

For each particular area, the course will focus on the historical, political and sociological factors underlying the seminal right to privacy cases, with students being challenged to explain how these factors defined, formed, and changed constitutional law. Students will then critically analyze how these cases impacted individual freedoms and consider how present sociological and economic factors will affect future litigation and decisions.

Course Readings

There is no book or course packet that needs to be purchased for this course. The readings in this course largely derive from appellate cases, and in particular, the decisions of the Supreme Court of the United States. Accordingly, we have provided these cases to you through the class’s TRUNK site, via a Rich text format (RTF) or an Adobe Acrobat® download. Any other documents required for reading will be provided by the lecturers.

Course Requirements

Each student’s grade is comprised of four components: classroom participation, two short introspective papers, a final presentation and a final paper. Each makes up a significant, although not equivalent, portion of the grade.

Classroom Participation:
This is a seminar course that values classroom discussion as a means to enhancing the learning process and challenging rote norms. As such, classroom participation is key---but please note that successful participation is not necessarily tied to frequency. We also consider the quality of contributions the student makes to each class.

It is our intention to foster an open and collegial environment to allow for a creative dialogue contemplating many of the concepts we will discuss in class. Students should be open to critically analyzing multiple viewpoints and, at times, will be asked to advance alternative viewpoints to facilitate a fuller classroom discussion.
Although we understand that occasionally other obligations may intervene, please do not take this course if you do not intend to attend each and every class (other than an occasional class that you must unavoidably miss). In the event you must unavoidably miss class, please contact us in advance so that we can plan accordingly.

**Short Papers:**
Your grade will also be based on two short introspective papers. These papers, each 6-8 pages (double spaced, 1 ¼ inch side margins) in length, will provide you with an opportunity to delve deeper into topic areas addressed during the course. We will provide you with possible paper topics, but you are also free to offer up new topic areas as well.

In evaluating these papers, we are looking for writing that demonstrates insight into the subject matter. You are encouraged to pursue the topics creatively, introspectively and with a mind towards further comprehension of the historical, sociological or analytical materials discussed in class. In the past, students have chosen, among the myriad of papers we have read, to criticize or support analytically a judge’s viewpoint in a particular case; to offer an alternative view to a controversial legal concept; or to present new areas of law that are consistent with the subjects discussed in class. **You are not limited to these types of papers, however**—your exploration, and the manner in which you seek that exploration, is a critical aspect of these papers. Additional research for the papers, while optional, may be of critical use for advancing your point and we highly encourage it.

Papers are to be submitted by email to the course email address (tuftscl@gmail.com) and are due BY 11:59 pm on the following dates:

**Paper #1** February 19, 2016  
**Paper #2** March 31, 2016

Absent extenuating circumstances, papers will not be accepted thereafter. We anticipate evaluating your papers and returning them with comments and a grade within two weeks of your submission.

REWİTE: You have the option of rewriting either paper after you receive comments and grades. You must inform the lecturers that you will do so within one (1) week of receiving the paper comments and grades. If you choose to rewrite the paper, you will have one (1) week to rewrite the paper.

**ALTERNATIVES TO WRITING A PAPER:** In addition, throughout the course of the semester, students may have the option of participating in various class hypotheticals and scenarios which may require a prepared presentation or delivery to the class. If you choose this option, your participation will operate in lieu of writing a short paper. Students are selected on a first-come-first-serve basis.

**Final Presentation & Paper:**
Over the final two classes, students will engage in a mock argument of an ongoing or soon-to-be heard Supreme Court or federal case regarding the right to privacy. Students will have the
option of being advocates or Justices, with their final presentation and paper responsibilities differing slightly based on their role.

**Advocates:** For their presentation, student advocates/litigants will act as attorneys before our "Supreme Court," taking questions and making points in support of their clients’ positions. They will review the briefing already filed in the case, craft a 15 minute oral argument and then respond to questions made by the justices. Advocates will also draft a brief (8-10 pages double spaced, 1 ¼ inch side margins) to the Supreme Court that will serve as their final paper, arguing why their side should succeed on the matter.

**Justices:** The student justices will hear oral argument from the advocates, ask questions of the litigants as if they were the particular justice in question, and then deliberate as a panel (deciding how the Supreme Court Justice they are representing will vote and why). Student justices will give a 15-20 minute presentation providing background on the justice they are emulating and how the justice would likely vote on matters in this area of privacy and why.

As their final paper, student justices will write an opinion from the perspective of their assigned Justice. If the Justice is in the majority, they will write the majority opinion with their Justice as the lead author. If the justice is in the minority, they will write the minority's opinion with their Justice as the lead author. If the judge agrees with a side--but for different reasons---they can write a separate concurrence.

This paper should be 8-10 pages (double spaced, 1 ¼ inch side margins) in length.

All final papers are due by 11:59 pm and submitted by email to the course email address (tuftsel@gmail.com) on **Wednesday May 4, 2016.**

**Weekly Syllabus**

**Week 1:** Course Overview

1. Introductions, Course Descriptions and Administrative Details.

2. Discussion and application of the methodology to be utilized in the course.

3. Overview and classroom discussion regarding the legal concepts underlying a right to privacy.

**Week 2:** The Origins of the Right to Privacy.

We begin Week 2 with a discussion of how the right to privacy originated as a Constitutional construct. In particular, we will discuss *Griswold v. Connecticut*, the case by which the Supreme Court introduced and memorialized the concept into legal and social lexicon. As this right is not expressly enumerated in the Constitution, we will look closely at the underpinnings of the majority, concurring and dissenting opinions in order to understand how the right was derived, to
what end, and will consider whether the holding can support the broader right to privacy issues dominating the news today.

Readings:

- Right to Privacy Primer

**Weeks 3-5: The Bill of Rights and the Legal Underpinnings for the Right to Privacy.**

Over the next three weeks, we will delve into the Constitutional underpinnings for the right to privacy generally outlined in Griswold. We begin with an examination of the Fourth Amendment, which recognizes a realm of privacy around an individual’s person and home by protecting them from unreasonable searches and seizures. Thereafter, we will transition into a discussion regarding an individual’s First Amendment rights, which includes the contours on their ability to enter into private associations and to speak freely in private and public settings. We will also consider how the Supreme Court’s rulings are impacted in the face of historical national and international emergencies including the war on terror in the aftermath of 9/11.

**Weeks 3-5: Privacy and Your Home, Your Vehicle, Your Workplace and Your Person**

Is it now permissible to spy on Americans, to practice racial profiling, or to hold American citizens in prison indefinitely? In examining the recent jurisprudence in these areas, we will discuss how our rights under the Fourth Amendment to be free from unreasonable government searches and seizures of our homes, vehicles, bodies, and conversations are evolving in a post-9/11 world. We will further discuss how the contextual nature of these rights impacts our understanding of the right to privacy.

Readings:

**Week 3:**

- Fourth Amendment Primer
- Maryland v. King, ___ U.S. ___ (2013) (holding Fourth Amendment does not protect the taking of a DNA swab for identification purposes from person arrested for a serious criminal offense).
- Florida v. Jardines, ___ U.S. ___ (2013) (holding dog sniff at front door of house where police suspected drugs were being grown is a search under the Fourth Amendment and thus requires a warrant).

**Week 4:**

- Emerging Technologies Primer
- United States v. Jones, 565 U.S. ____ (2012) (holding that attaching a GPS device to a vehicle to track its whereabouts constitutes a search under the 4th Amendment).
• Riley v. California, 573 U.S. ____ (2014) (holding police cannot conduct a search of a cellphone without a warrant).
• United States v. Davis Class Hypothetical (discussion of recent 11th Cir. Decision regarding privacy of cell phone location data).

Week 5:
• Exigency Primer

Week 6: An Individual’s Right to Speech and Association

During Week 6, we will address the scope of an individual’s right to speak freely and to associate with others, addressing whether the government can limit the content of a person’s speech, interfere with an individual’s right to meet and speak with members of the community.

Readings:
• Free Speech Primer
• J.S. v. Blue Mountain Sch. Dist., 593 F.3d 286 (3rd Cir. 2010) (Middle school student’s suspension for making Facebook page mocking principal did not deprive student of free speech rights).
• Reid Sagehorn Class Hypothetical (discussion of pending lawsuit concerning student’s suspension for tweeting).
• United States v. Elonis, ____ U.S. ____ (2015) (whether statements made by an individual regarding his ex-wife and others in Facebook posts constitute “true threats” to justify a criminal conviction and fall within an exception to the First Amendment).

Week 7: An Individual’s Right to Exercise Religion

During Week 7, we will address the delicate interaction between the free exercise of religion under the First Amendment and the scope of the right to privacy for religious exercise.

• Freedom of Religion Primer
• Burwell v. Hobby Lobby Stores, Inc., ____ U.S. ____ , 134 S.Ct. 2751 (2014) (Health and Human Services mandate for entities to provide contraception to female employees substantially burdens the exercise of religion under the First Amendment)
• Little Sisters of the Poor v. Burwell, ____ U.S. ____ (2016) (review of oral argument regarding challenge by religious non-profits to Affordable Care Act requirement to make contraception available to women as part of any offered health plan)
Week 8: An Individual’s Right to Bear Arms.

During Week 8, we will consider the implications of the Supreme Court’s 2008 and 2010 rulings on the Second Amendment and the right to keep a firearm in the home. We will discuss whether this jurisprudence adds another layer of legal support to the notion of an individual’s right to privacy relating to activities in the home.

Readings:

- Open Gun Carry Class Hypothetical: Privacy rights in ownership of a gun versus ensuring gun safety.

Weeks 9-10: Rights Flowing From the Concept of Privacy

Having now established the legal underpinnings for the right to privacy, we will now begin our transition into a discussion of legal issues arising under the concept of the right to privacy. We will closely examine contemporary sociological factors to understand why many of the legal issues arising under the umbrella of the right to privacy remain so controversial. We will also examine why the courts are often left to be the ultimate arbiters of these rights.

Week 9: Reproductive Rights

Since the Supreme Court rendered the decision of **Roe v. Wade**, its jurisprudence has continued to confine and refine a woman’s right to choose. Students are asked to consider whether this confinement is in response to a societal interest, a legal necessity, and/or a politically sensitive effort? What, if any, sociological pressures are contributing to this trend? Is there any middle ground or should the right to privacy, within each particular field, be an all or nothing right?

Readings:

- Reproductive Rights Primer
- **Planned Parenthood v. Abbott**, 748 F.3d 583 (5th Cir. 2014)

Week 10: Same-Sex Rights

In one of the fastest turnabouts in its history, the Supreme Court overturned its previous decision to uphold state law bans on same-sex consensual relations in **Bowers v. Hardwick**, to strike down such laws in **Lawrence v. Texas** eighteen years later. We ask students to consider what would lead the Court to change its jurisprudence so quickly? Had the concept of the protections accorded to private sexual relations become so ingrained in society that **Lawrence** had become the only natural determination?
Recently, the Supreme Court has affirmed the right to marry for persons of the same sex. However, legal experts believe the battle is far from over as some states will seek to evade enforcement and backlashes begin in earnest. Students will be asked to consider whether contemporary social factors, if any, are the basis for the backlash, to analyze how these retractions will impact the future of the right to privacy, and to discuss whether a constitutional amendment should be a permissible avenue for overruling a constitutional right. We will also discuss the broader topic of whether morals should be legislated.

Readings:

- Same-Sex Rights Primer

Week 13: The Right to Die

With the baby-boomers rapidly approaching the retirement age, society and the court systems are facing a very interesting conundrum: how to respond to a generation of individuals that have requested a right to die with dignity. Will the boomers, a generation that presided over a rapid and unprecedented expansion of Constitutional rights, stand for the current legal limitations on the right to die? As the case of Terry Schiavo demonstrated, this controversy is far from over.

Readings:


Weeks 11-12: Supreme Court Presentations and Mock-Argument (see description above)

Week 13: Future Implications of the Right to Privacy

Having examined the trajectories of the varying rights encompassed under the concept of privacy, we return to the questions that began the course: what is the right to privacy and what are its legal underpinnings in the modern age? Are the notions and scope of privacy generational? As we continue to base various rights on the concept of privacy, are we building a house of cards that may collapse at the first change in our social mores? Have our social mores already changed?

Contacting Us

In the event you need to contact us outside of normal class hours, the best way to reach us is email. We have a universal address for the course and intend to monitor it regularly. The address is tuftscl@gmail.com.
We will also use this address, as well as TRUNK, to communicate any class announcements. In addition, during the course of the semester, there may be legal proceedings in the Massachusetts courts which are relevant to our class. If such scenarios arise, we encourage you to attend and will try to coordinate optional class outings.

We will not maintain regularly scheduled office hours during the course of the semester. We will, however, generally be available for conferences before and after class. If necessary, we will also be happy to schedule a meeting with you or a group of students at a mutually convenient time.

We are always available via e-mail, to meet before or after class, or by phone. So if any questions or concerns arise, NEVER HESITATE!