

# Privacy 101

## *A Brief History of Privacy*

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# A Brief History of Privacy

- What is “Privacy”?
- The History of Privacy
- The Legal Terrain
- Privacy for Industry
- Building a Compliance Program



# Many Things to Many People

- Anthropologists

- Birds, bees, and privacy

- Sociologists

- Creation of community, management of intimacy

- Political Scientists/Legal Scholars

- “expression of personality”
- “zone of prima facie autonomy”
- “ability to regulate information” (secrecy, anonymity, and solitude)

# Multiple Legal Dimensions

- **Tort Privacy**
- **Freedom from search and seizure (4<sup>th</sup>)**
- **Free speech (1<sup>st</sup>)**
- **Fundamental decision (14<sup>th</sup>)**
- **Informational Privacy (largely legislative)**



# The Courts and Privacy

- 1890 – ***right to privacy***
  - promoted in article by Warren and Brandeis (tort-based privacy)
- 1928 -- “***the right to be let alone***”
  - (Brandeis dissent in Olmstead -- search and seizure)
- 1958 – nexus of ***anonymity*** and speech
  - (NAACP v. Alabama) (disclosure of member list)
- 1967 – “***reasonable expectation***”
  - (Katz v. US -- search and seizure)
- 1977 – no “***zone of privacy***” where data is protected and used within broad police powers of state
  - (Whalen v. Roe -- disclosure of prescription data)



# Informational Privacy

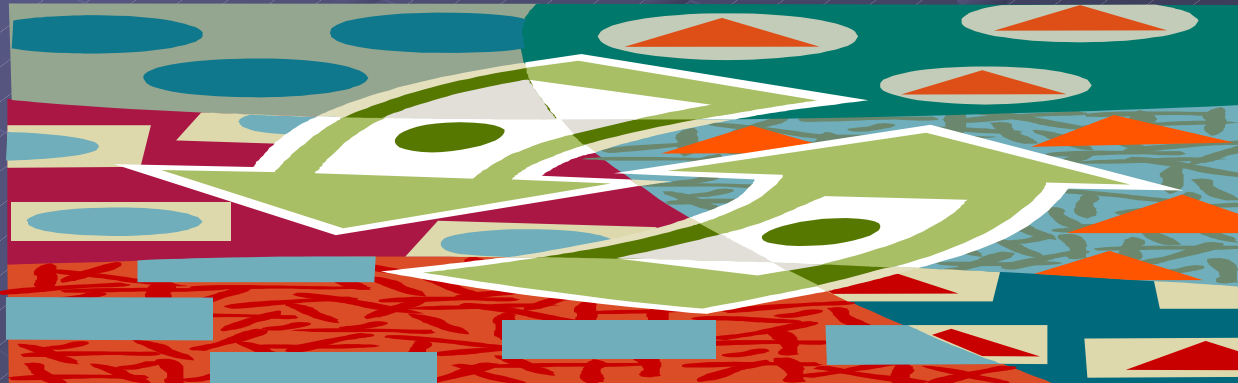
## ● Why is it needed?

- Avoiding embarrassment
- Avoiding misuse
- Avoiding harm
- Creation of intimacy

## ● At what cost?

- Commerce
- Truthfulness
- Community

## ● PRIVACY BALANCE



# Scrooge?



or  
George Bailey?

# Fundamental Right, or Sectoral Protection?

## ● Fundamental Right

- Europe
- Canada
- Australia
- New Zealand

## ● Sectoral Protection

- US





# The Law – A Road Map

Technology Standards

Self Regulatory Standards

US Government

COPPA

GLB

HIPAA

The States

(Legislatures, DOIs and AGs)

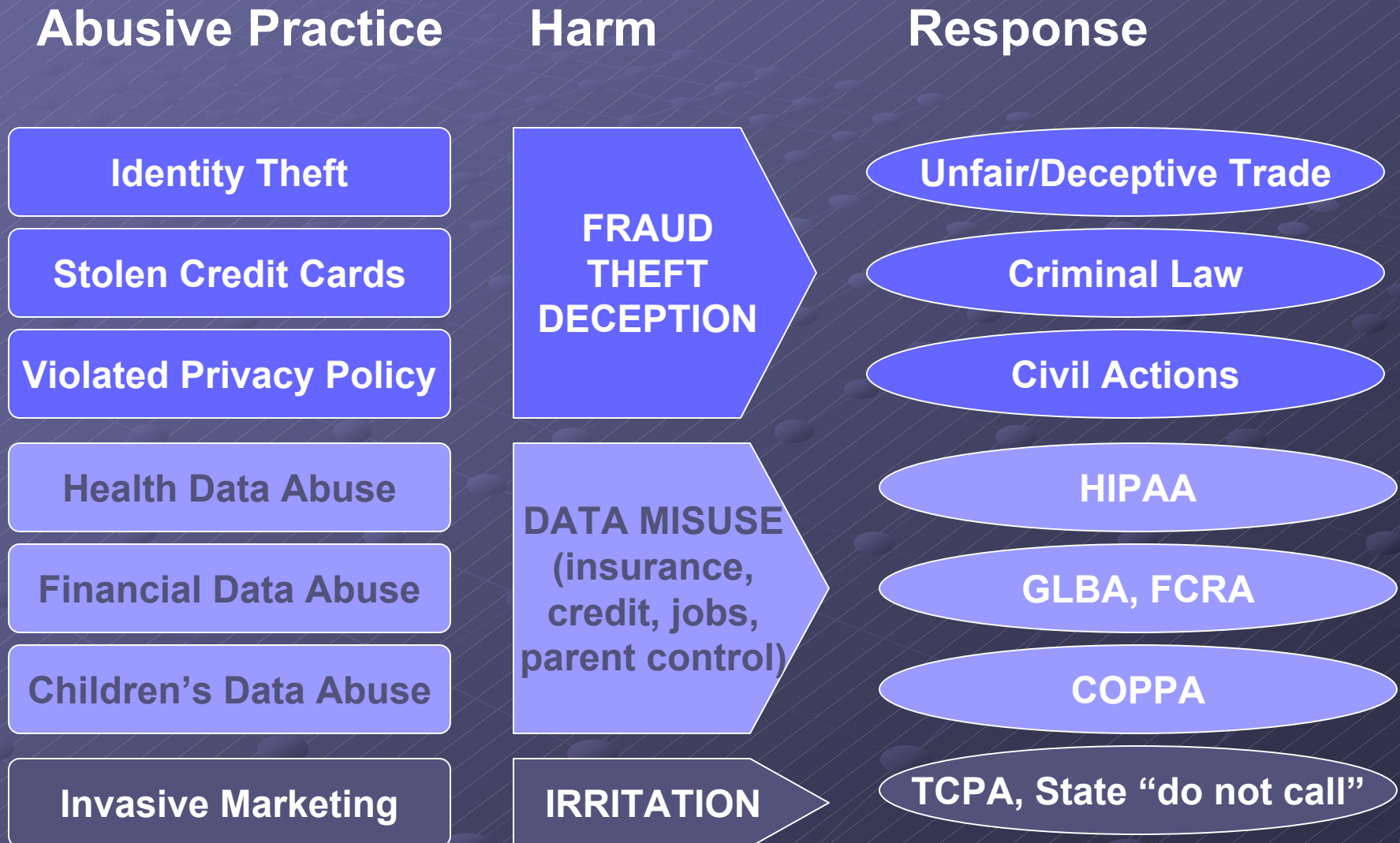
The  
Rest of the  
World

**EUROPE!**

# US Privacy Law – Alphabet Soup

- HIPAA – health data
- GLBA – financial data
- COPPA – kids online
- VRPA – video rentals
- TCPA – telemktg
- FCRA – credit
- Patriot Act
- Privacy Act –  
governmental use of  
data
- State laws:
  - Insurance
  - Genetic privacy
  - GLBA add-ons
  - SPAM

# Where's the Harm?



# Deconstructing Privacy

Fair Information Practices

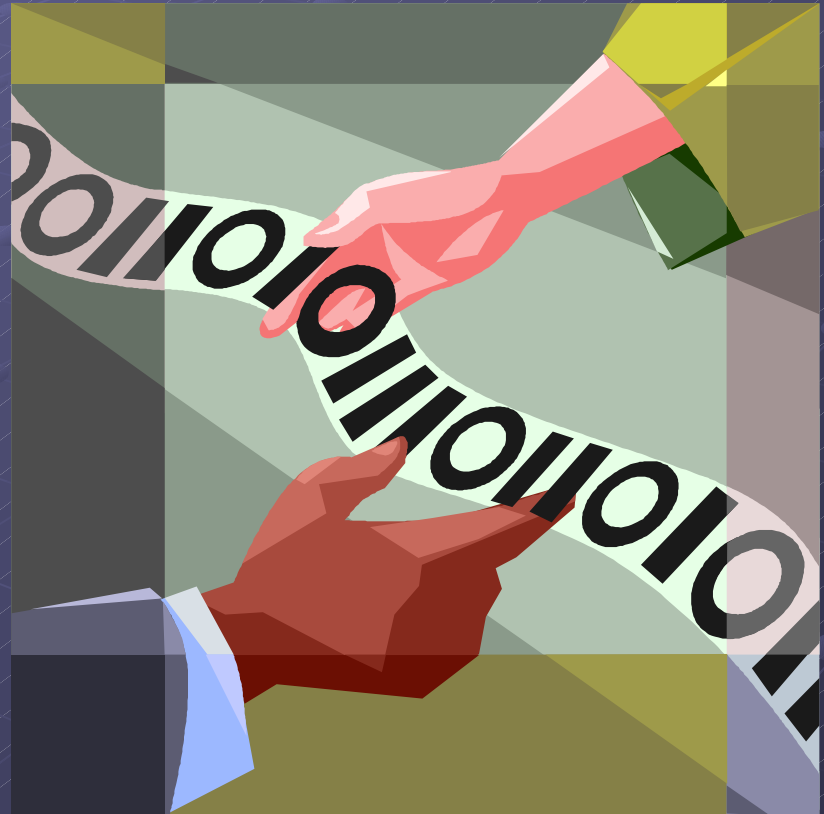
# What are we protecting?

- Personal information

- Data that can identify an individual
  - Name
  - Address
  - SSN
  - Phone number
  - Triangulated data?

- Sensitive information

- Health info
- Financial info
- Political info



# Fair Information Practices

**NOTICE**

**CHOICE**

**ACCESS**

**SECURITY**

**ENFORCEMENT**

**MINIMALIZATION**

**LIMITED USE**



# NOTICE

- The most fundamental of privacy protections
- Describes:
  - Data being gathered
  - Purpose
  - Secondary uses
  - Length for which it is held
  - Access/Security
- Transparency!



# CHOICE

- Do your data subjects agree to the use of their data?
- The great debate:
  - Opt-in
  - Opt-out



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# MonsterHut on Choice

- Deceptive trade practice action by NY AG
- MonsterHut claimed their lists were “permission based” (opt-in)
- Complaint levels and lack of controls over list acquisition led judge to find violation
- Definition of opt-in:
  - Look to the default result of non-action:
    - If data is collected or used = opt out
    - If data is not collected or used = opt in



# ACCESS

- The ability to review, edit or challenge data being held about you
- (Think: credit reports)

# SECURITY

- The ugly stepchild of privacy
- Protections placed around data
- (more on this later today...)



# ENFORCEMENT

- Governmental
- Self Regulatory
  - TRUSTe
  - BBBOnline



TRUSTe

# Gramm Leach Bliley

# Gramm Leach-Bliley Act (GLB)

- Protects privacy of consumer information held by “financial institutions”
- Requires companies to give consumers privacy notices that explain information sharing practices
- Consumers have the right to limit some sharing of info
- Financial institutions may not disclose to a nonaffiliated third party any nonpublic personal information unless:
  - Provides notice to consumer of company’s privacy policy, and
  - Provides opportunity to “opt out”
  - Under FCRA, Consumers have right to “opt out” of sharing credit info even if only shared with affiliates.

# GLB – Applicability

## ● “Financial Institutions”

-- companies that offer financial products or services:

- Loans
- Investment advice
- Insurance
- Banking services

## ● As a result, GLBA applies to:

- Banks
- Brokerages
- Insurance Companies
- Credit Companies
- Mortgage Companies
- Tax Preparers
- Debt Collectors



# GLB Notice Requirements

- Must be clear, conspicuous, accurate statement of privacy policy
- Must include:
  - what info company collects about consumers and customers
  - With whom company shares info
  - How it protects or safeguards info
- Applies to all non-public info company gathers about consumers
- Must be mailed or delivered in person
- Initial notice - earlier of 7/1/01 or at 1<sup>st</sup> transaction
- Annually thereafter as long as customer relationship continues





# What is Nonpublic Personal Information?

- Personally identifiable financial information
- Any listing derived from using personally identifiable information
- Does not include public info including:
  - Government records
  - Widely distributed media
  - Disclosures required to be made by the government



# What is Personally Identifiable Financial Information?

- Provided by the consumer
- Derived from a transaction
- Otherwise obtained in connection with product or service

# Exceptions for disclosure

- Service Providers
- Joint Marketing
- Processing and Servicing Transactions
- Consent of the customer
- Protect confidentiality or security
- Lawyers, auditors and examiners
- Right to Financial Privacy
- Reporting to credit bureau
- Sale, merger or transfer of assets
- Comply with federal, state or local law

# What is the Opt-Out Provision?

- The right of the consumer to instruct the financial institution not to disclose nonpublic personal information.
  - Must be explained in the Privacy Notices

# GLB 2.0

- Consumer advocates attack notices as dense and unreadable
- “The biggest waste of paper in human history” (Ralph Nader)
- Consumers demand non-existent rights
- FTC Workshop, Dec. 2001 – Examines problems with GLBA notices
- Expect future modifications to GLBA
- Beware of state action (CA!)

*Thanks!*

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