



**PAI**

**PRIVACY ASSOCIATES INTERNATIONAL LLC**

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# **Privacy Overview**

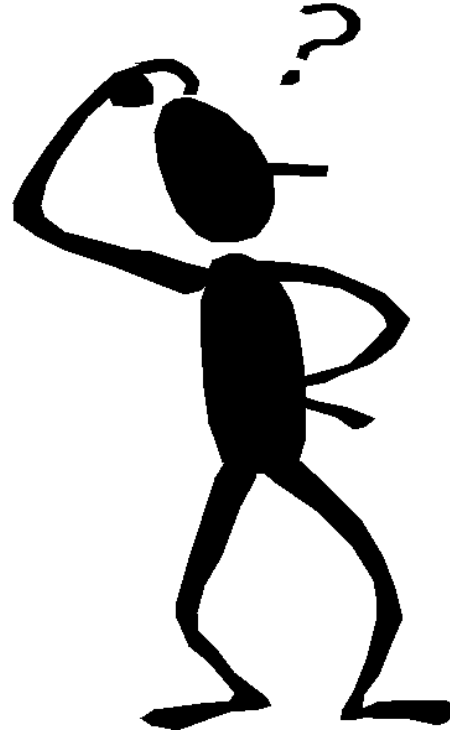
WMU Cooley Journal Of Practical and Clinical Law  
*Legal Conference*  
***January 30, 2015***

Robert L. Rothman  
Principal, Privacy Associates International LLC

# Purpose

- What is Privacy?
- Historical Development

# What is privacy?



# What is Privacy?

- Different meanings to different people
- Large element cultural
- Hundreds of definitions

# Privacy

“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.”

- *Alan Westin*

# Privacy

“Privacy is a mix of the following general ideas:

- (1) The right to be let alone — Samuel Warren and Louis Brandeis’s famous formulation for the right to privacy;
- (2) Limited access to the self — the ability to shield oneself from unwanted access by others;
- (3) Secrecy — the concealment of certain matters from others;
- (4) Control over personal information — the ability to exercise control over information about oneself;
- (5) Personhood — the protection of one’s personality, individuality, and dignity; and
- (6) Intimacy — control over, or limited access to, one’s intimate relationships or aspects of life.”

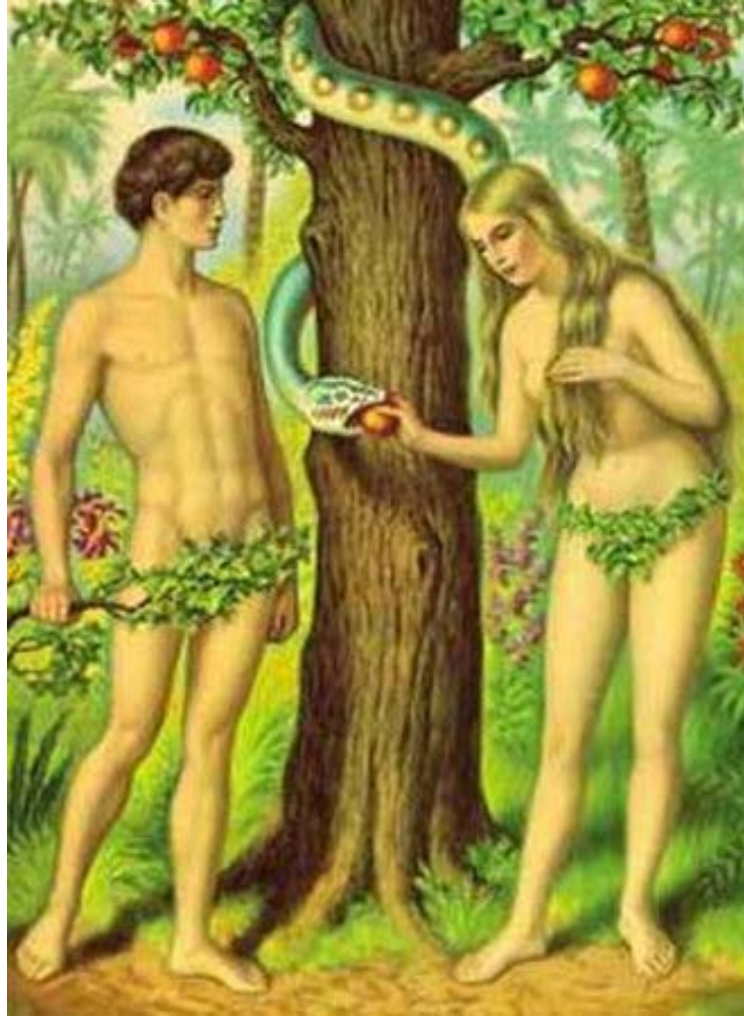
*-Daniel Solove*



# Where Did Privacy Concerns Come From?

Privacy concerns and legal responses to address those concerns have existed for  
**LONG** time

# Adam & Eve





# The Epic of Gilgamesh



# Code of Hammurabi



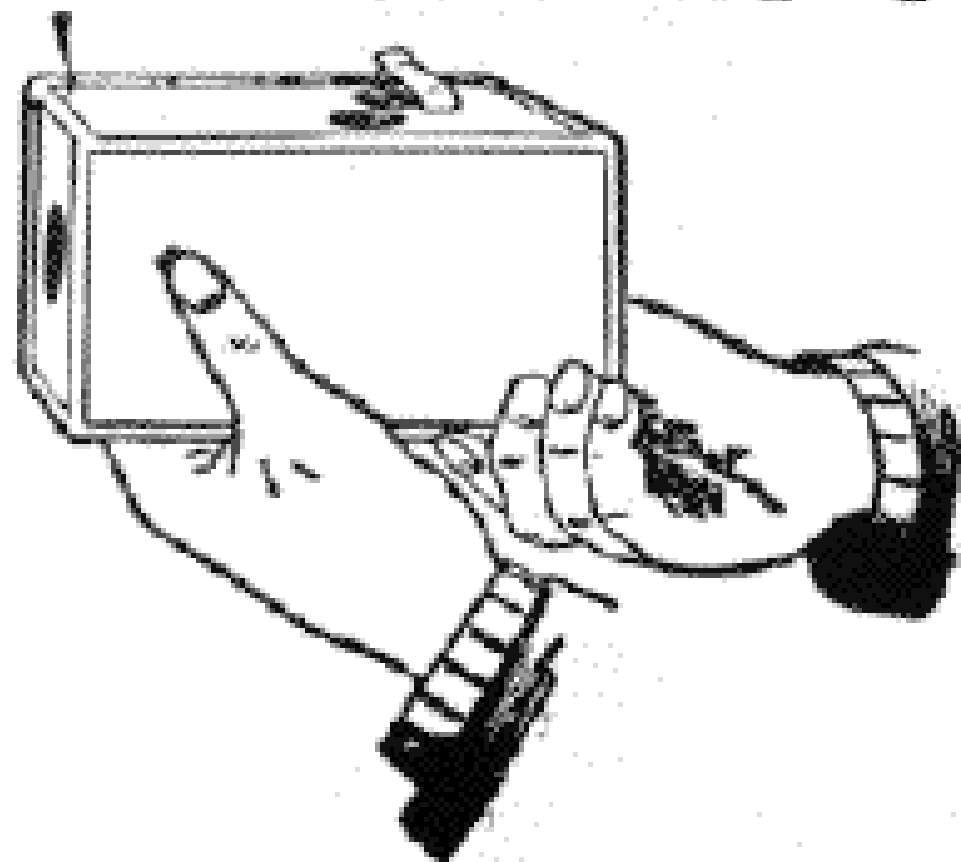
# Justices of the Peace Act, England 1361



# American Privacy

Has its roots in disruptive new  
technology

# **THE KODAK CAMERA**



**Price \$25.00.**

**The Eastman Dry Plate & Film Co.**  
**ROCHESTER, N. Y.**

**100**

**Instantaneous  
Pictures!**

Anybody can use it.

No knowledge of  
photography is  
necessary.

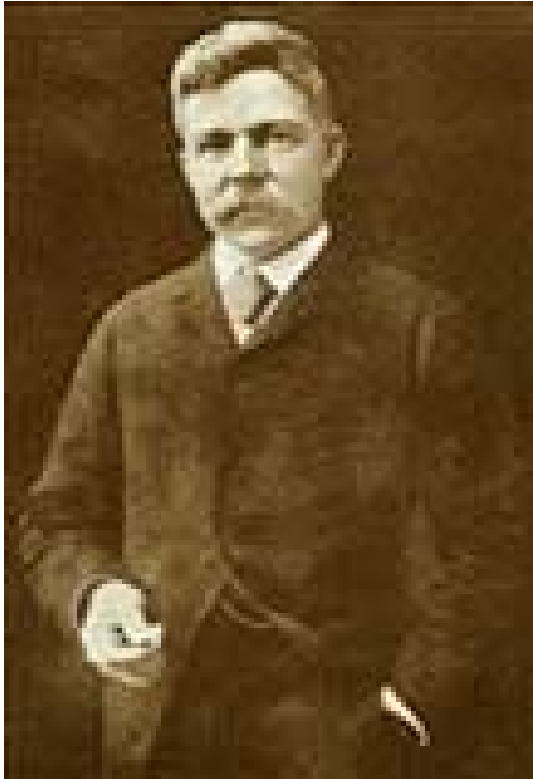
The latest and  
best outfit for ama-  
teurs.

Send for descrip-  
tive circulars.

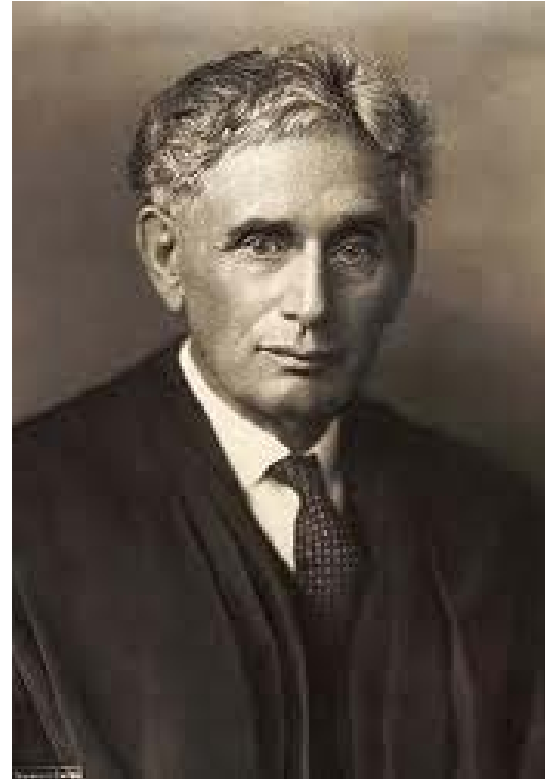
# The “Yellow Press”

- Gossip and hearsay articles pervasive
- Provided publication to private facts
- Particularly disturbing to “society” families
- The Kodak camera exacerbating the situation

# *The Right to Privacy* 4 Harv. L. Rev. 193 (1890)



**Samuel Warren**



**Louis Brandeis**

# The Right to Privacy

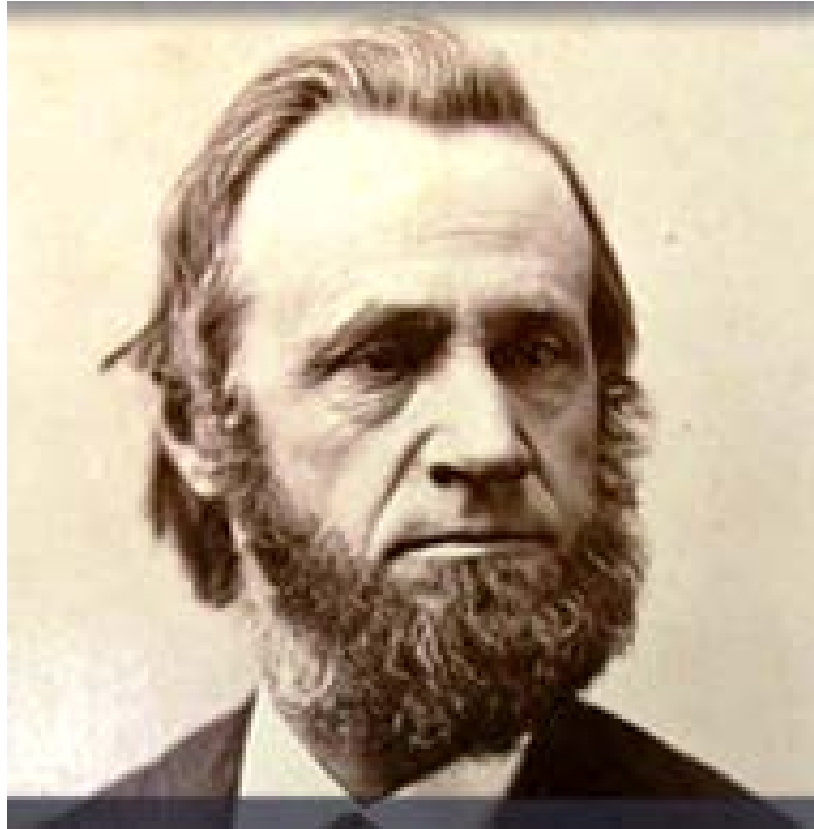
- Authors were seeking to find a legal remedy in the common law for the perceived problem
  - No federal constitutional right to privacy
  - No applicable statutory provisions
- Pointed out that the law had long recognized physical rights and injuries but was beginning to mental rights and injuries as well
  - Intellectual property vs. physical property
  - Assault (threat of harm) vs. Battery
- Asserted privacy invasion a mental injury which should be protected as part of the “natural evolution toward civilized life”



# “The Right To Be Let Alone”

- Authors pointed to other protections the common law provides for:
  - The right to determine the extent to which our thoughts are communicated to others
  - The protection of letters, diaries, etchings and art
  - The protection of a catalogue of one’s etchings
  - The right not to be assaulted or beaten
  - The right not to be imprisoned
  - The right not to be maliciously prosecuted
  - The right not to be defamed
- Authors then argued that all of these rights derive from a more general common law principle: the right to be let alone, now one of the most well-recognized phrases in American privacy law
- Where did Warren & Brandeis get the phrase?

***A Treatise on the Law of Torts or the Wrongs  
Which Arise Independently of Contract (1878)***



**Thomas M. Cooley**

# Privacy Not an Absolute Right

- Warren & Brandeis recognized privacy not an absolute right
- Issues with First Amendment free speech rights
- Issues with Fourth Amendment search and seizure rights
- For instance:
  - Can an ex-lover write a tell-all biography revealing intimate details about your physical relationship?
  - Is a statute prohibiting a newspaper from publishing the name of a child rape victim constitutional?
  - Can the police use thermal imaging on your home or a GPS tracker on your vehicle without a warrant?

# Prosser's Torts

- Identified (in 1960) four distinct torts that developed since the 1890 Warren & Brandeis article
  - Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs
  - Public disclosure of embarrassing private facts about plaintiff
  - Publicity which places the plaintiff in a false light
  - Appropriation, for the defendant's advantage, of the plaintiff's name or likeness
- Collectively known as Invasion of Privacy
- Adopted by the Restatement of Torts

# 1977 Organisation for Economic Co-operation and Development (OECD) Guidelines

- An influential international economic organization of 34 countries founded in 1961 to stimulate economic progress and world trade
- Developed privacy guidelines that have become the fundamental basis for information privacy laws

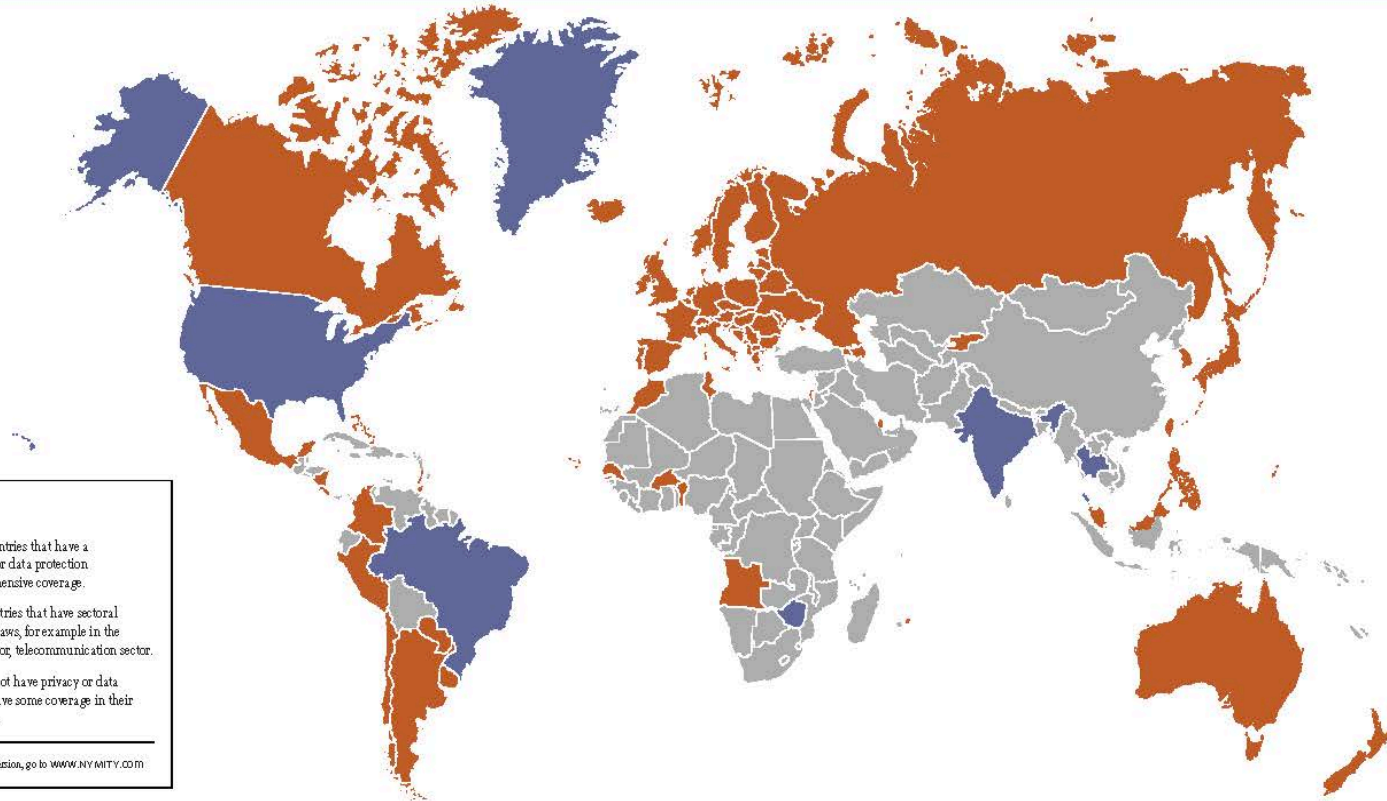
# The Eight OECD Guidelines

1. Collection Limitation
2. Data Quality
3. Purpose Specification
4. Use Limitation
5. Security Safeguards
6. Openness
7. Individual Participation
8. Accountability

# Statutory Approach to Privacy

- Most countries with privacy legislation have adapted the OECD Guidelines in omnibus privacy laws
- U.S. has a sectoral approach to privacy legislation
- As a result, we now have a hodge-podge of hundreds of federal and state privacy laws that deal with privacy in different contexts
- Each statute is aimed at different problems and has different definitions of what constitutes personal information
- Incomprehensible system for those outside the US (and many of us inside the US)

# Sectoral and Omnibus Privacy and Data Protection Laws



## Legend

- **Omnibus Coverage** - Countries that have a single or multiple privacy or data protection laws that result in comprehensive coverage.
- **Sectoral Coverage** - Countries that have sectoral privacy or data protection laws, for example in the public sector, financial sector, telecommunication sector.
- **None** - Countries that do not have privacy or data protection laws but may have some coverage in their constitution or other laws.

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## Omnibus Law Countries

Albania	Benin	Czech Republic	Hong Kong	Latvia	Monaco	Portugal	Sweden
Andorra	Bosnia & Herzegovina	Denmark	Hungary	Liechtenstein	Montenegro	Qatar	Switzerland
Angola	Bulgaria	Estonia	Iceland	Lithuania	Morocco	Romania	Taiwan
Argentina	Burkina Faso	Faroe Islands	Ireland	Luxembourg	Netherlands	Russia	Trinidad & Tobago
Armenia	Canada	Finland	Isle of Man	Macao SAR	New Zealand	San Marino	Tunisia
Australia	Cape Verde	France	Israel	Macedonia	Nicaragua	Senegal	Ukraine
Austria	Chile	Germany	Italy	Malaysia	Norway	Serbia	United Kingdom
Azerbaijan	Colombia	Gibraltar	Japan	Malta	Paraguay	Slovakia	Uruguay
Bahamas	Costa Rica	Greece	Jersey	Mauritius	Peru	Slovenia	
Belarus	Croatia	Guam	Kosovo	Mexico	Philippines	South Korea	
Belgium	Cyprus	Guernsey	Kyrgyz Republic	Moldova	Poland	Spain	

## Sectoral Law Countries

Brazil  
Dubai  
Greenland  
India  
Singapore  
Thailand  
United States  
Zimbabwe

Regional Privacy and Data Protection

maps available at:  
[WWW.NYMITY.COM](http://WWW.NYMITY.COM)





# Conclusion

- Privacy is a broad, complicated and increasingly critical area of the law
- Even though privacy concerns may have started with Adam and Eve, the law in this area is still in its infancy
- As technology continues to explode the law will have to struggle to keep up