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Privacy Regulation and Enforcement in the US

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Structure of Privacy Law

- Litigation
 - Tort Law – three Restatement torts
 - Consumer Law (TCPA, FCRA)
 - Law Enforcement (exclusionary rule, 4th Amendment)
 - State attorney generals
- Administrative Law
 - Consumer Law
 - Data Protection
 - Sector specific laws



Common Law Origins

- *The Right to Privacy*, Louis Brandeis and Samuel Warren, 1890.
- Defines privacy as “the right to be let alone,” defending the individual’s “inviolable personality” derived from common law cases in the 1800s



Common Law

- Intrusion upon Seclusion
 - One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.



Common Law

- Appropriation of likeness
 - One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.



Common Law

- Publicity Given to Private Life
- One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
 - (a) would be highly offensive to a reasonable person, and
 - (b) is not of legitimate concern to the public.



Examples of Statutorily Created Rights

- TCPA
- FCRA



Barriers for Civil Litigation Plaintiffs

- Showing of harm
- Measurement of relief
- Class action standards (*Twombly/Iqbal*)



Constitutional Foundations

- Fourth Amendment of the Constitution protects
 - “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”
- Exclusionary rule



When is there a search?

- *Jones* – property-based approach OR
- *Katz* – “reasonable expectations”
- Third party doctrine – no reasonable expectation of privacy in information disclosed to third parties (*Smith*), scope limited by *Carpenter*