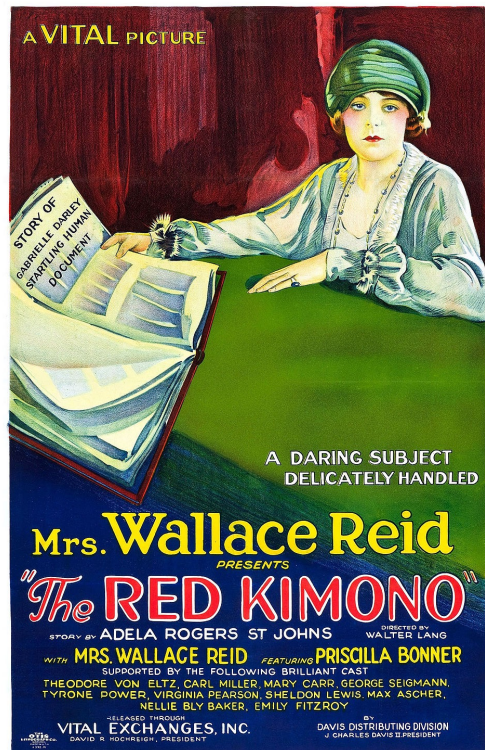




Virginia Governors School

Digital media & communications law



UNIT 4 Privacy

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Comparing privacy law to libel law

	Public Figure	Private Person
Defamatory falsehood	Plaintiff must prove actual malice (as in NYT v. Sullivan)	Plaintiff must only prove negligence under state laws guided by federal court decisions.
Defamatory truth	False light, publication of private facts, intrusion, misappropriation suits are possible. Plaintiff must prove “highly offensive” disclosure (eg, Bollea v Gawker). Defenses: Public interest, official record, consent.	False light, publication of private facts, intrusion, misappropriation suits are possible. Defenses: Public interest, official record, consent. Even private people have a high barrier (eg, Sipple, Smith, Cox, Howard cases)

Privacy torts

- False light (similar to libel)
 - Personal right to reputation
- Publication of Private Facts (true, outrageous, and not newsworthy)
 - Personal right to privacy
- Intrusion (like trespassing)
 - Personal right to privacy
- Misappropriation of NIL (Use of person's name image likeness without permission)
 - Property right to image
- Intentional infliction of emotional distress
 - (some states - eg: Flynt v Falwell)

Defenses in privacy lawsuits

- **Newsworthiness**, or public interest (for editorial content, mostly in misappropriation and false light cases)
- **Public record**, a Constitutional defense similar to privilege (especially in regard to revealing names of private people in court cases)
- **Consent** of private individual involved (eg, signed release of a model to appear in an advertisement)

Ethical issues re privacy & media

- Learn professional ethical standards
 - Society of Professional Journalists code
 - or American Advertising Federation code
- Victims, minors and witnesses to crime are not usually ID'd in news articles.
- Informed consent is important dealing with minors and private people
- Seek the truth and report it, Minimize harm, Act independently, be transparent

I. False light



In 2010 Shirley Sherrod spoke to a regional NAACP chapter about her experiences working for the USDA in rural development.

A [video clip](#) of the speech became the subject of a national controversy because it seemed to show racism by African Americans against European Americans. In the video, Sherrod talked about a moment when she was tempted to exclude a few white farmers from USDA benefits. That is the only part of the video clip that was distributed by Andrew Brietbart.

Breitbart apologized and settled in October, 2015 for an undisclosed amount.



False light

Similar to Defamation but ...

- Often involves photos & captions
- Not false but still misleading
- Highly offensive
- Not recognized in some states
- Violation of a Constitutional right of privacy, so there may be no statute of limitations

2 Publication of private facts



• **Publication of Private Facts** or unreasonable revelation of private facts that may be true but nevertheless embarrassing to private people.

Bolea v Gawker, 2017 When Gawker magazine posted sex videos of Hulk Hogan (Bollea) with a friend's wife, Bollea filed suit in a Florida state court for invasion of privacy (intrusion, publication of private facts and misappropriation) along with intentional infliction of emotional distress. To win, Bollea had to show that this was truthful information, that a reasonable person would find it highly offensive, and that it did not involve a legitimate public concern.



Going 'too far' – PPF

- Public disclosure of private and embarrassing facts
- Details about sexual conduct, physical or mental condition, educational records
- Private, intimate, highly offensive to a reasonable person
- Truth is not a defense; newsworthiness and consent are main defenses

Elements of PPF suits

- 1. Public Disclosure:** Published, broadcast, or disseminated in some way.
- 2. Private Fact:** The facts disclosed must be private and not generally known. It usually can't involve facts that have already been made public.
- 3. Offensive to a Reasonable Person:** The facts must be offensive to a reasonable person of ordinary sensibilities. A photo of a person slipping on a banana peel might be a little embarrassing, but it is not offensive.
- 4. Not Newsworthy:** “As relating to any matter of political, social, or other concern to the community.”
 - Crimes, accidents, deaths, fires, police activity, entertainment events, and activities of public officials are typically considered newsworthy.

What is newsworthy?

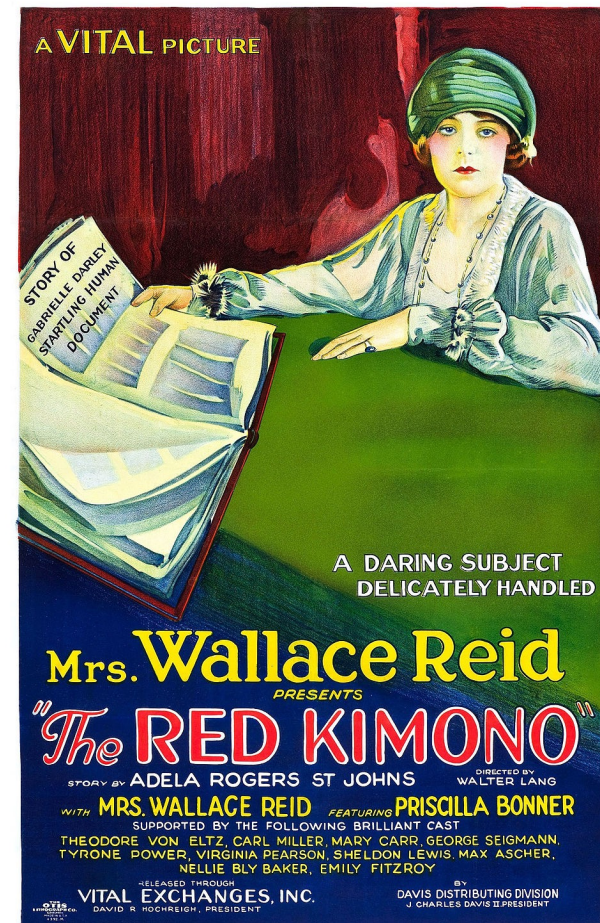
- A topic is newsworthy when it can be “fairly considered as relating to any matter of political, social, or other concern to the community” or when it “is a subject of general interest and of value and concern to the public.” (*Snyder v Phelps*)
- In a video of a victim at an accident scene and inside an emergency helicopter, the California Supreme Court considered three main factors in ultimately concluding the broadcast was newsworthy: the social value of the facts published, the extent to which the article intruded into ostensibly private affairs, and whether the person voluntarily assumed a position of public notoriety. (*Shulman v. Group W*)

Publication of private facts

- Melvin v Reid, 1931 (“Red Kimono” case)
 - Prostitute reformed, won state lawsuit
- Cox v Cohn, 1975
 - Sexual assault victim ID’d on cable news
- Smith v. Daily Mail, 1979
 - Minor ID’d in W.Va. newspaper
- Howard v Des Moines Register, 1979
 - Sterilized woman ID’d in newspaper
- Sipple v. Chronicle Publishing, 1984
 - Gay hero ID’d in newspaper

Red Kimono case

- 1925 Silent film about prostitution
- Melvin real name and story used; she sued in California
- The state court sided with Melvin
- *Melvin v Reid* has been cited recently in the emerging "right to be forgotten" cases around the world as an early example of a private right to rehabilitation.
- Not a US Supreme Court precedent.
- Most cases have protected the media, not the private individual



Cox v Cohn, 1975

- Cox Broadcasting sued by Melvin Cohn (father of dead sexual assault victim)
- Georgia state supreme court rules that identifying victim violates common law privacy
- US Supreme Court reverses. "Freedom of the press [is] of critical importance to our type of government in which the citizenry is the final judge of the **proper conduct** of public business. In preserving that form of government, the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection."
- *Proper conduct / professional ethics: Crime victims should not be identified without their own approval.*



Smith v Daily Mail, Howard v Des Moines Register

- Two 1979 cases reinforced Cox v Cohn
- In Smith, the name of a minor charged with murder was printed in a newspaper, contrary to a state law
- In Howard, the name of a woman sterilized involuntarily was printed in the Des Moines Register.
- Since the identities were obtained legally in both cases, there was no violation of privacy.
- Both cases raise ethical questions

Sipple v Chronicle, 1984

- On September 23, 1975, Oliver Sipple happened to be in the right place at the right time and stopped an assassination attempt on President Gerald Ford (not in the photo).
- The next day, the Los Angeles Times reported: “A husky ex-marine who was a hero in the attempted assassination of President Ford emerged Wednesday as a prominent figure in the gay community.
- Sipple sued the San Francisco Chronicle, the LA Times and other newspapers for revealing his secret life, but lost because he had become a public figure, and questions about his character were deemed newsworthy.



“Right to be forgotten”

- European laws allow search engine links for some criminal charges to be removed from public view in order to encourage rehabilitation.
- US laws do not require removal on demand
- About half of states forbid charging money for removal of arrest photos on internet / web sites

3 Intrusion

- **Intrusion** on a person's right to seclusion and personal privacy; Media cases usually involve physical intrusion by news media, often with cameras or recording devices, into the lives of celebrities and private people.
- **Galella v. Onassis**, 1973 — Jackie Kennedy Onassis obtained a court injunction against New York photographer Ron Galella, forcing him to stay 25 feet away from her and even further away from the children

Intrusion

- Wilson v Layne, 1999 – Case that banned ride-alongs and videos of home searches
- Dietman v Time, 1971 – “Quackery” case
 - *“The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office,*
- *News International hacking scandal, 2011*
 - *News of the World (UK) hacked royal family phones. Results in closure of News, but Rupert Murdoch lives on ...*

Intrusion

- Especially newsgathering, even if not published or broadcast
- **Trespass** – entering private property without consent or getting too close with cameras
- **Secret surveillance** – bugging, hidden cameras, hacking
- **Misrepresentation** and undercover reporting – ABC v Food Lion, 1997
Reporters got jobs from Food Lion & reported on meat department



4 Misappropriation / Right of publicity

- Loss caused by appropriation of personal likeness for commercial exploitation
- A person's exclusive rights to control his or her name and likeness to prevent others from exploiting without permission is protected in similar manner to a trademark

Misappropriation

Misappropriation starts with a 1902 case, *Roberson v. Rochester Folding Box Co.* Printing photographs had only recently become possible with the new halftone process, and the box company used a picture of Abigail Roberson on a box of baking flour without her permission.



In a lawsuit the family claimed the incident caused Ms. Roberson severe embarrassment and humiliation, but according to the N.Y. Court of Appeals, there was no law against the use of her likeness in advertising. Outrage over the case led to the passage of new privacy laws in many states,

Misappropriation / Right of publicity



YouTube.com

- Polydoros v 20th Century Fox – “Squints” character in The Sandlot was originally a friend of the book author. Courts said it was not misappropriation since all fiction is based to some extent on an author’s life.

Velvet Elvis

- Elvis Presley Enterprises sued owners of the Velvet Elvis bar in Houston in 1996. The bar owners said it was parody, but Presley Enterprises won in the end. The parody was not of Elvis himself, the court said.





Media Center | 6/30/2021 4:20:00 PM | Michelle Brutlag Hosick

NCAA adopts interim name, image and likeness policy

Interim policy goes into effect Thursday



NCAA college athletes will have the opportunity to benefit from their name, image and likeness beginning Thursday. Governance bodies in all three divisions today adopted a uniform interim policy suspending NCAA name, image and likeness rules for all incoming and current student-athletes in all sports.

"This is an important day for college athletes since they all are now able to take advantage of name, image and likeness opportunities," NCAA President Mark Emmert said. "With the variety of state laws adopted across the country, we will continue to work with Congress to develop a solution that will provide clarity on a national level. The current environment – both legal and legislative – prevents us from providing a more permanent solution and the level of detail student-athletes deserve."

The policy provides the following guidance to college athletes, recruits, their families and member schools:

- Individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities may be a resource for state law questions.
- College athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image and likeness.
- Individuals can use a professional services provider for NIL activities.
- Student-athletes should report NIL activities consistent with state law or school and conference requirements to their school.

"Today, NCAA members voted to allow college athletes to benefit from name, image and likeness opportunities, no matter where their school is located," said Division I Board of Directors chair Denise Trauth, president at Texas State. "With this interim solution in place, we will continue to work with Congress to adopt federal legislation to support student-athletes."

While opening name, image and likeness opportunities to student-athletes, the policy in all three divisions preserves the commitment to avoid pay-for-play and improper inducements tied to choosing to attend a particular school. Those rules remain in effect.

"The new policy preserves the fact college sports are not pay-for-play," said Division II Presidents Council chair Sandra Jordan, chancellor at the University of South Carolina Aiken. "It also reinforces key principles of fairness and integrity across the NCAA and maintains rules prohibiting improper recruiting inducements. It's important any new rules maintain these principles."

Division III Presidents Council chair Fayneese Miller, president at Hamline, said the Association will continue to work with Congress to develop a national law that will help colleges and universities, student-athletes and their families better navigate the name, image and likeness landscape.

Misappropriation / Virginia law

- § 8.01-40. Unauthorized use of name or picture of any person; punitive damages; statute of limitations.
- A. Any person whose name, portrait, or picture is **used without having first obtained the written consent** of such person, or if dead, of the surviving consort and if none, of the next of kin, or if a minor, the written consent of his or her parent or guardian, **for advertising purposes or for the purposes of trade**, such persons may maintain a **suit in equity** against the person, firm, or corporation so using such person's name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. And if the defendant shall have **knowingly used** such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by this chapter, the **jury, in its discretion, may award punitive damages**.
- B. No action shall be commenced under this section more than 20 years after the death of such person.



Athletes Name Image Likeness

- In the past, college athletes were not allowed to make money by selling or licensing their names, images and likenesses. Endorsing a product made an athlete a “professional” according to the NCAA, which meant they couldn’t play college sports.
- In 2020, states started changing their laws, and in 2021, the US Supreme Court endorsed college sales of NILs.



Athletes & Name Image Likeness

- The problem with “third-party NILs” (payments to athletes from entities not affiliated with the university) is that the new system funnels money to star athletes in ways that used to be illegal.
- It is also unfair to women and the idea of equality in sports under Title IX.

Intentional Infliction of Emotional Distress

- In some states, such as Virginia “intentional infliction of emotional distress,” is used in place of false light, intrusion and publication of private facts. (Virginia still has a misappropriate statute) As the courts noted in [Flynt v Falwell](#), IIED is not a substitute for defamation.

5 Intentional Infliction of Emotional Distress

Jerry Falwell talks about his first time.*



FALWELL: My first time was in an outhouse outside Lynchburg, Virginia.

INTERVIEWER: Wasn't it a little cramped?

FALWELL: Not after I kicked the goat out.

INTERVIEWER: I see. You must tell me all about it.

FALWELL: I never *really* expected to make it with Mom, but then after she showed all the other guys in town such a good time, I figured, "What the hell!"

Campari, like all liquor, was made to mix you up. It's a light, 48-proof, refreshing spirit, just mild enough to make you drink too much before you know you're schnookered. For your first time, mix it with orange juice. Or maybe some white wine. Then you won't remember anything the next morning. *Campari. The mixable that smarts.*

INTERVIEWER: But your mom? Isn't that a bit odd?

FALWELL: I don't think so. Looks don't mean that much to me in a woman.

INTERVIEWER: Go on.

FALWELL: Well, we were drunk off our God-fearing asses on Campari, ginger ale and soda—that's called a Fire and Brimstone—at the time. And Mom looked better than a Baptist whore with a

\$100 donation.

INTERVIEWER: Campari in the crapper with Mom... how interesting. Well, how was it?

FALWELL: The Campari was great, but Mom passed out before I could come.

INTERVIEWER: Did you ever try it again?

FALWELL: Sure...

lots of times. But not in the outhouse. Between Mom and the shit, the flies were too much to bear.

INTERVIEWER: We meant the Campari.

FALWELL: Oh, yeah. I always get sloshed before I go out to the pulpit. You don't think I could lay down all that bullshit sober, do you?

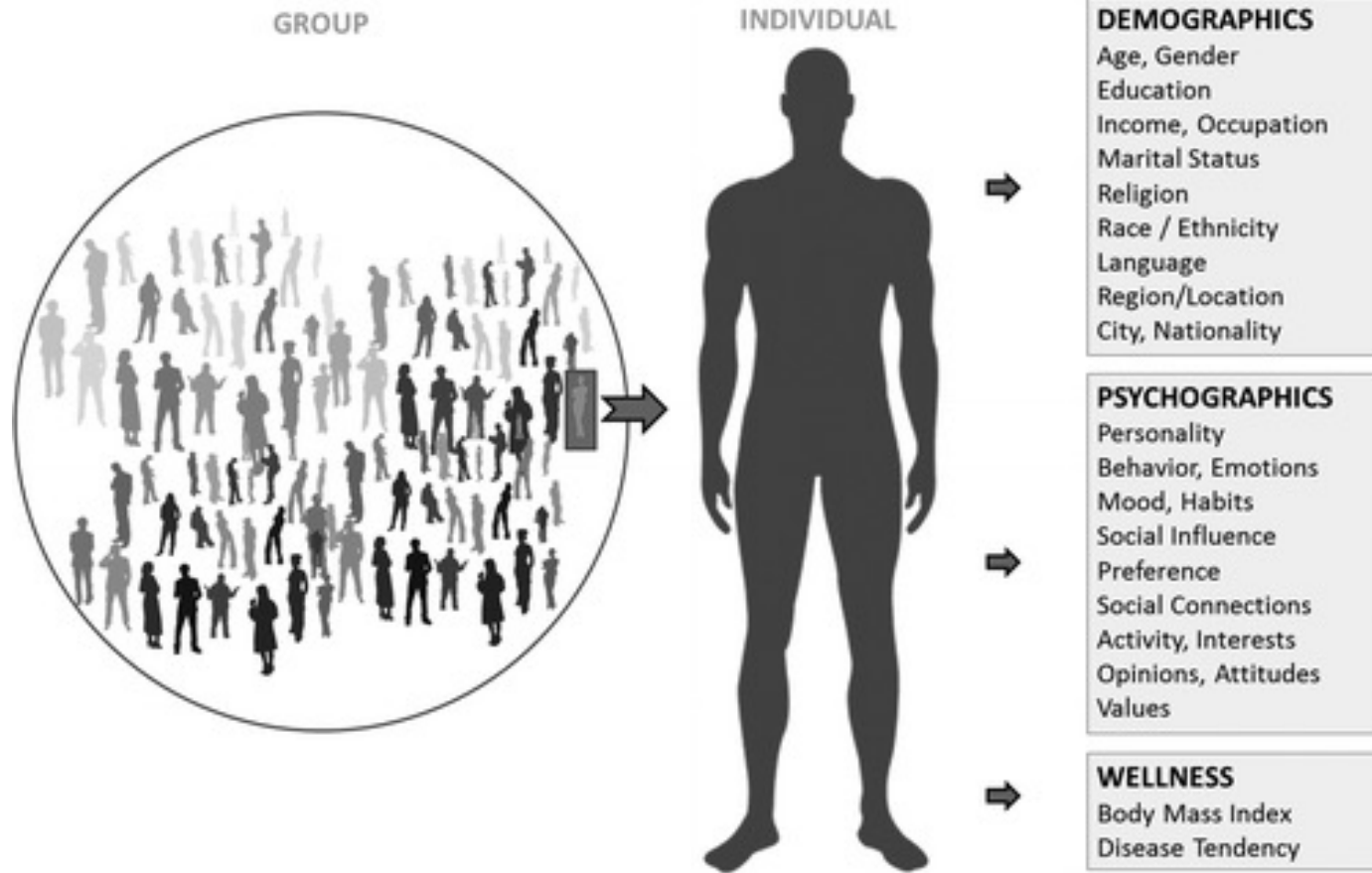
© 1983—Imported by Campari U.S.A., New York, NY 48° Proof Spirit Agent (Liquor)



CAMPARI You'll never forget your first time.

*AD PARODY—NOT TO BE TAKEN SERIOUSLY

Digital privacy, US & EU laws



Digital privacy

- Do people have a privacy right to control personal information gathered by social media?
- Yes, according to new laws in California, Virginia and Colorado that allow:
 - Access to data held by large social media profiling companies
 - Ability to review and edit
 - Option to withdraw from profiling

Virginia data privacy Act

- **VCDPA** -- passed in 2021, has provisions like Europe's GDPR
- **“Sensitive personal information”** **protected**, social security number, driver license number, and financial account number, also racial or ethnic origin, religious beliefs, union membership, the contents of a consumer's email and text messages (unless the business is an intended recipient), genetic and sexual orientation.
- Consumers have the right to request limitations on the use and disclosure of that information

VCDPA passed in 2021

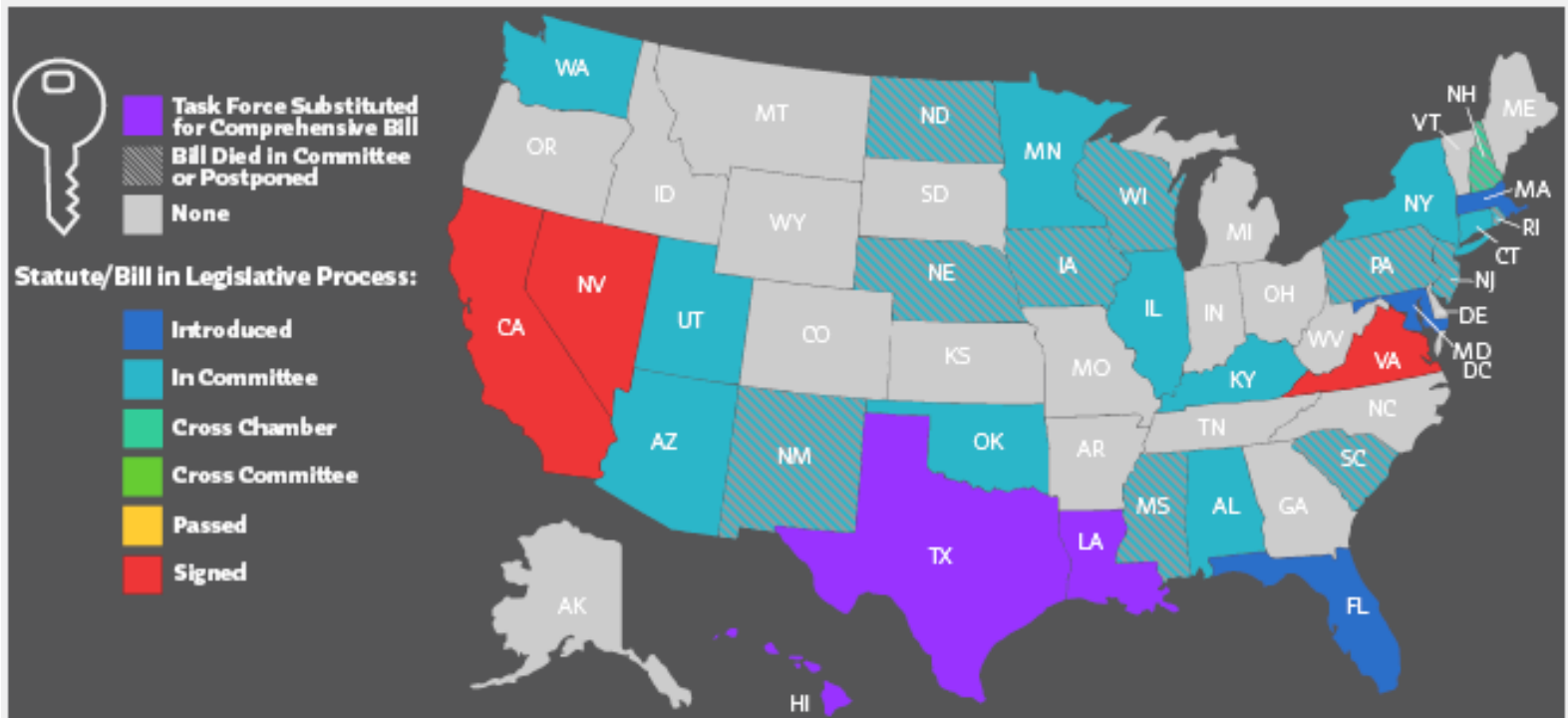
- Any consumer can access, correct and delete personal data.
- The Virginia law is enforced through the AG office. It does not provide for a private right of action following a data breach; California's 2018 law does.
- Doesn't enforce disclosure of third party data collection sources
- Tech company responses are evasive

California data privacy

- **California** – CPRA -- provides a private right to bring lawsuits against creators of nonconsensual deepfake pornography and outlaws manipulated video of politicians within 60 days of an election.

Patchwork of digital privacy law

State comprehensive privacy law comparison



As of March 3, 2021.

Source: International Association of Privacy Professionals

Privacy Badger

Install-and-forget browser add-on that stops advertisers and trackers from secretly tracking where you go and what pages you look at on the web. Since 2014, all browsers.



Ghostery

Browse the web safer, faster & with fewer ads; Also free, also 10 years old, easier to monitor, open source software



Privacy in European law

- **EU General Data Protection Regulation**
- Systematic legal approach in March 2014 with the GDPR.
- Primary aim is to enhance individuals' control and rights over their personal data and to simplify the regulatory environment for international business.
- It establishes lawful ways to collect information, data protection and security guidelines, and an individual right of informed consent, access and correction.

EU protects digital privacy

● What is the General Data Protection Regulation?

Protecting **your personal data rights** in the European Union


What are
my rights?

THE RIGHT TO

- ▶ information
- ▶ access
- ▶ rectification
- ▶ restrict processing
- ▶ erasure
- ▶ object
- ▶ an explanation
- ▶ data portability

How can I
exercise
my rights?



What to do if my rights are
violated and my data **misused**?

file a **complaint**

file a **case in court**

get **NGO representation**



● Conclusion

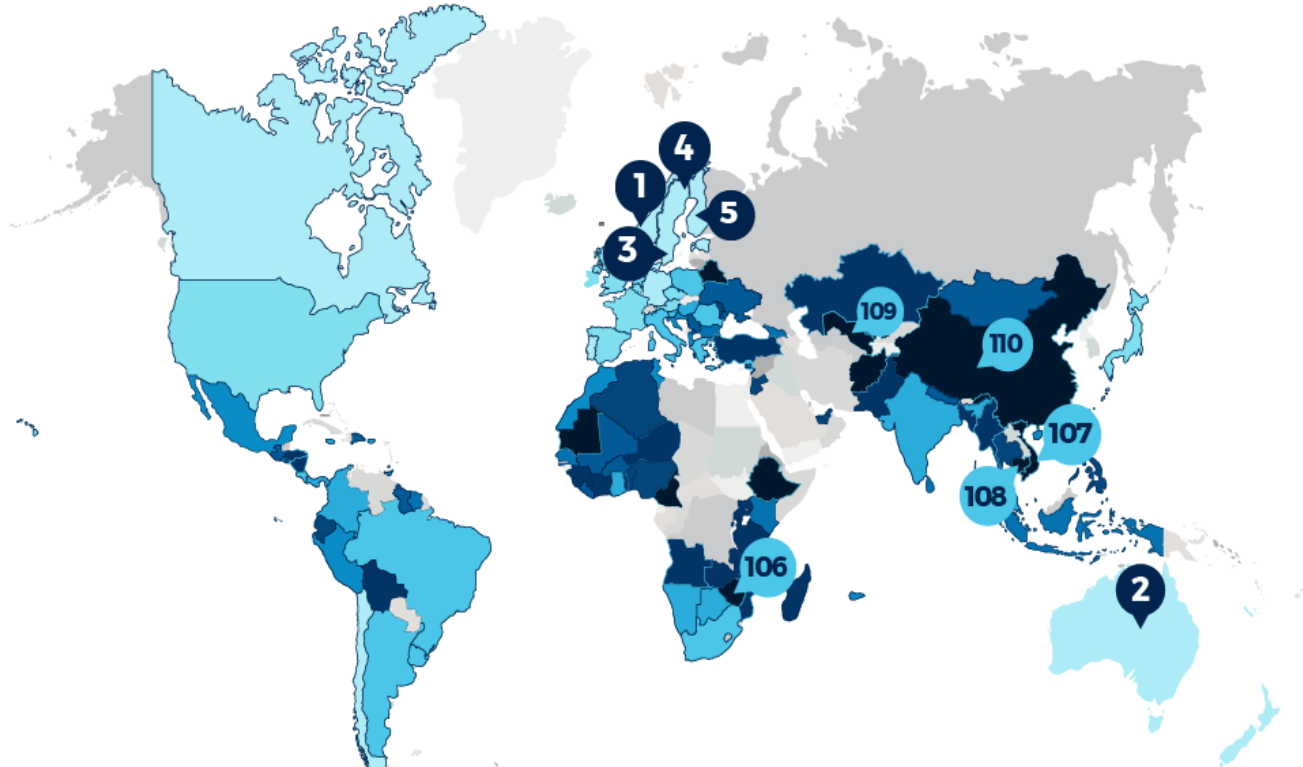
Take control, exercise your rights!

Why does EU protect privacy

- Long and tragic history
- Nazis used personal information to target Jewish populations
- Stasi (east German communist police) kept biased records; after the fall of the Berlin Wall, many became public.
- Less concern with individual and corporate freedom, more concern with rights

Internet privacy rankings

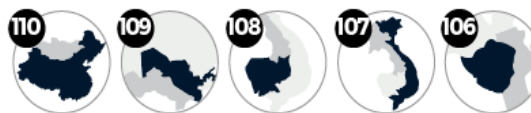
INTERNET PRIVACY BY COUNTRY



BEST COUNTRIES FOR INTERNET PRIVACY



WORST COUNTRIES FOR INTERNET PRIVACY



US law overrules GDPR

- Shortly after the GDPR became settled law, the U.S. Congress enacted the Clarifying Lawful Overseas Use of Data (CLOUD) Act in 2018.
- Federal law requires U.S.-based software companies and IT service providers to ensure that authorities can have access to all stored data, including data stored on foreign servers.
- U.S. service providers don't have to tell customers when authorities request their data.

Right to be forgotten

- EU case: Mario Costeja González v. Google Spain.
- Established right to “de-link” private information from search engines
- “Red Kimono” US case, Melvin v Reid, 1931, idea was rehabilitation





Thank you