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## The Right of Privacy: What's left of it? Part 2

Last month I discussed both the Federal and State constitutional right to privacy. I pointed out that the Federal constitutional right to privacy is not explicitly stated in the constitution. The California State constitution however, does specifically provide for a right of privacy. This is a good thing. But good old Justice Lucas (may he rest in peace) in *Hill v. NCAA* (1994) 7 C.4th 1 came to the rescue of corporate interests and diluted our right to privacy.

Now I want to provide some practical insight. How do you show a constitutional privacy right violation? What about common law privacy rights? What are they anyway?

Think your constitutional right to privacy has been violated? Well, you have to prove all three of the following: (1) you possess a **legally protected privacy interest**; (2) your **expectation of privacy** is objectively reasonable; and (3) the invasion of privacy complained of must be serious in both its nature and scope as **to constitute an egregious breach of the social norms underlying the privacy right.**<sup>[1]</sup>

You're asking yourself, "What's a legally protected privacy interest and expectation of privacy anyway?" Well, you look to social norms in the particular situation to answer these questions. For instance, say you're at the Oakland A's game, you drop a foul ball and you look stupid. Next thing you know your face is on TV and in the newspaper showing how stupid you look dropping the foul ball. You're embarrassed, upset and claim your right of privacy was violated by the publication of your picture and the TV broadcast. You are not likely to prevail. You are at a public event that is known to be broadcast and covered by the press. You do not have a reasonable expectation of privacy that your likeness will not be published.

On the other hand, say a foul ball hits you in the mouth and gets stuck, you go to the hospital in an ambulance, a reporter sneaks into the ambulance and takes your picture, sneaks into the emergency room and takes your picture again as doctors attempt to extract the baseball from your mouth. In such situations you are likely to have an expectation of privacy in both the ambulance and ER. But it's not enough to show that your privacy rights have been breached. You now have

to show that the breach was "egregious." And that's what a jury would have to decide.

Say someone puts a hidden camera in public bathroom or your neighbor surreptitiously places a microphone in your bedroom and listens to your conversations. Both are likely privacy rights violations. But what about when Google scans your email messages and uses data to determine what ads you should get? Well, you probably consented to such data mining when you signed up for email. Consent can negate a privacy right.

Common law privacy rights include intrusion and public disclosure of private facts. Intrusion has two elements that must be proved: (1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person.<sup>[2]</sup> To prove actionable intrusion, a plaintiff must show the defendant penetrated someone of physical or sensory privacy surrounding, or obtained unwanted access to data about the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source.<sup>[3]</sup>

To prove public disclosure of private facts a plaintiff must show: (1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern.<sup>[4]</sup> Both intrusion and public disclosure of private facts require that you have a reasonable expectation of privacy for a particular situation or facts and this expectation of privacy was violated.

Say you and your lover together write a story about the intimate details of your love affair. You both vow to never disclose this story to anyone. You password protect the story. But you discover your lover is cheating on you. You're upset (to say the least). You get access to the story on her cloud server. You download it and publish it on the Website, "Cheating Lovers." She's upset and claims intrusion and public disclosure of private facts. Your ex-lover may have a good case.

But say after you discovered that your lover cheated on you she goes around town telling friends about her affair with you and discloses some but not all the details contained in the story you both wrote. You download the story and get it published on the "Cheating Lovers" website. Your ex-lover is now upset. Does she have a claim for intrusion and public disclosure of private facts? Probably not. For by disclosing some of the story's details to others she may no longer have an expectation of privacy.

Well, there you have it. The very basics of the constitutional and common law right to privacy. Some people commented that my articles are long and too legally detailed. "Make it simpler" I'm told. Sorry, but I believe the public should be educated as to how the really law works and I presume that people have intelligence.

<sup>[1]</sup> (See *County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013), 56 Cal. 4th 905, 926 quoting *Hill v. National Collegiate Athletic Assn.* *supra*, 7 Cal. 4th at pp. 39-40) <sup>[2]</sup> *Shulman v. Group W Productions, Inc.* (1998) 18 Cal. 4th 200, 231. <sup>[3]</sup> *Shulman v. Group W Productions, Inc.* *supra*, 18 Cal. 4th at p. 232. <sup>[4]</sup> *Shulman vs. Group W Productions, Inc.* (1998) 18 Cal. 4th 200, 214.

PERSONAL  
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In the next issue of *A Difference of Opinion*: I don't know yet. I'll see what legal issue to complain about and let you know.

You got questions? Got an idea for a topic? Let me know. I will see if I can write an article about it.



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Quote of the Month: "Why a four year old child could understand this. Run out and get me a four year old child, I can't make head or tail out of it." Groucho in *Duck Soup* (movie)

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