

LAW OFFICE OF

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The Right of Privacy. What's left of it? Part 1.

I remember when the red light cameras first came to the city of Fremont in 2000. I found the very idea of my city government setting up surveillance cameras to catch ordinary citizens for an infraction violation offensive to me and I successfully defended many people who received such tickets. To me these intrusive cameras were one more way in which government and the private sector whittled away at our privacy rights. As George Orwell in his famous novel, *1984* termed it, Big Brother was watching. In *1984*, Orwell describes a society where government is watching your every move: "On each landing, opposite the lift shaft the poster with the enormous face gazed from the wall. It was one of those pictures which are so contrived that the eyes follow you about when you move. BIG BROTHER IS WATCHING YOU, the caption beneath it ran."^[1] Does Orwell's tale at all resemble how the private sector and government surveil us now through the use of "Big Data" and other highly sophisticated analytical methods? Well, let's read a little from *1984*:

- "There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to. You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and except, in darkness, every movement scrutinized."^[2]

Some would think it an exaggeration to compare *1984* to the present day. Well, keep in mind Orwell wrote *1984* in 1949. Now come that's scary. And that is why I use *1984* as a backdrop to my discussion on the constitutional right to privacy. We must keep in mind what's at stake here.

You may be surprised to learn that there is no explicit right of privacy contained in the United States Constitution. The Federal constitutional right of privacy however, was first recognized in 1965 in *Griswald v. Connecticut* 381 U.S. 479, 484. There the Connecticut legislature passed a law prohibiting the use of birth control and prohibiting doctors from counseling patients about birth control. (Sound ridiculous?) While not explicitly stated in the constitution, the court recognized the right of privacy emanated from the First Amendment right of association, the Third Amendment prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner, the Fourth Amendment "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures", and the Fifth Amendment right against self-incrimination. In overturning this rather stupid Connecticut law the court recognized that "We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system."

But since *Griswald*, the United States Supreme Court has struggled and in some

instances refused to put the Constitutional right of privacy on firm ground. In California however, thanks to a statewide initiative adopted by the voters in 1972, the California constitution (Article 1, Section 1 to be exact) specifically affords Californians a constitutional right of privacy enforceable against both government and the private sector.

But what is the right of privacy anyway? Well, according to the text of the 1972 initiative, and as actually noted by the California Supreme Court in *Hill v. NCAA* (1994) 7 C.4th 1, the right of privacy includes the “right to be left alone”. It is a “fundamental and compelling interest” that protects us in our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communication, and our freedom to associate with people we choose.” (*Hill*, pp.20-21) Soundgood, doesn't it?

Well, once again, Justice Malcom Lucas is the villain here. (See last month's issue for the discussion on Justice Lucas) Now I just finished saying that the ballot initiative itself (and as Justice Lucas even recognized) defines the right of privacy as “fundamental and compelling interest.” Yet, in *Hill*, (p.22) Justice Lucas complains that if we were to require business to establish a “compelling interest” in justifying a privacy intrusion they would fail every time and placing such a burden on business is simply unacceptable. Never mind that every other constitutional right is considered a fundamental and compelling interest. When it comes business interests Justice Lucas carves out an exception at the expense of individual rights. Never mind the very wording of the initiative. Justice Lucas all but ignores it. As a result, the California state Constitutional right of privacy the people approved was diluted by the court. No wonder government and the private sector have succeeded in eroding our right of privacy. It simply has not been held in high enough esteem by the courts. And by our own acclimation we have permitted this erosion to take place. If you value your right of privacy then assert it. Do not use email services that collect data on you as a condition of use. Do not give permission to websites and applications to collect data from your computer or cell phone. Demand that government and the private sector respect your right to privacy. I know. It doesn't sound like there is a lot that you can do. But unless and until we all actively assert our privacy rights they will continue to be eroded by both government and the private sector.

As this article is already too long, in my next issue I will discuss the test for establishing a violation of the constitutional and common law right to privacy and talk about it in more practical terms.

[1] 1984, George Orwell, 1949, Harcourt Brace Jovanovich, Inc. p. 5. [2] *Ibid*, at pp.6-7.

PERSONAL
INJURY



AREAS OF PRACTICE

ADMINISTRATIVE
LAW



AREAS OF PRACTICE

LAND USE
& ZONING



AREAS OF PRACTICE

CRIMINAL
DEFENSE



AREAS OF PRACTICE

In the next issue of *A Difference of Opinion: Part 2: The Right to Privacy*. What's left of it? In Part 2 I will discuss the various types of common law privacy rights we have as well as how the California state constitutional right to privacy works.

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:

**"In all my years of public life I've never obstructed justice"
"I'm not a crook."**

Former President Richard M. Nixon, at a press conference, November 17, 1973.

Of course, the nation would later learn that President Nixon lied, obstructed justice, and indeed was a crook.

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