

PRIVACY TORTS AND STATUTORY REMEDIES

CARLOS R. SOLTERO, *Austin*
ABBEY CHIODO GRAY
Soltero Sapire Murrell, P.L.L.C.

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Carlos R. Soltero
carlos@ssmlawyers.com
512-422-1559

Carlos represents plaintiffs and defendants in civil litigation matters including commercial disputes, trade secrets/non-competes, malpractice, constitutional litigation, personal injury, and wrongful death cases.

Carlos is Board-Certified in Personal Injury Trial Law and has tried, as either first chair or in a supporting role, a variety of cases to juries, the bench, and arbitrators. He has published and lectured in several areas of trial practice.

Activities

Robert Calvert Chapter, Inns of Court, Member (2001-2007, 2019-present)

State Bar of Texas; Rules Committee (2007 to 2016)

State Bar of Texas; Business, Consumer & Employment Pattern Jury Charges (Vol. 4) Committee (2001-2007, 2016-present)

ABOTA (2017-present)

The University of Texas, Lecturer (Spring 2001)

Advisory Board Member to Center for U.S. and Mexican Law (2012-present)

Professional Background

Yale Law School, J.D. 1994

Yale University, B.A. 1991

Admitted to Practice: Texas; Colorado; Supreme Court of the United States of America, United States Court of Appeals for the Fifth Circuit, United States District Courts for the Eastern, Northern, Southern, and Western Districts of Texas

I. PRIVACY

What is privacy? There are various definitions, but the bottom line is that people believe they want it and have a right to it. We want to be free from improper governmental interference, but we also expect to have a degree of privacy from the prying eyes of our fellow citizens. These two dimensions of privacy—government and civil invasions of privacy—help frame some of our most cherished interests, and the contours continue to be defined as technology changes both how we compile and share private information, and how easy it is to obtain and disseminate it.

II. GOVERNMENT PRIVACY VIOLATIONS

Privacy has constitutional dimensions and implications—that is to say, protection from improper governmental invasions. Some view privacy primarily from an Orwellian “Big Brother is watching you” perspective. In American constitutional law, the idea of “privacy” is often tied to the Bill of Rights and the idea of being left alone by government actors.¹ Typically, people in public spaces (or that can be seen in “plain view”) have little or no expectations of privacy from governmental inspection or view.² But of course, one need not be in the public square to be confronted with potential governmental intrusions. News headlines appear almost daily regarding “privacy” rights issues in a myriad of ways, including cyber privacy issues.³

Historically, one’s privacy was reasonably well protected by the physical and logistical hurdles the government would need to undertake to invade it. But technology has repeatedly eliminated these protections. A Texas Court of Criminals Appeal opinion succinctly expresses some of these concerns in the 21st Century:

The Fourth Amendment states that ‘[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated.’ The term ‘papers and effects’ obviously carried a different connotation in the late eighteenth century than it does today. **No longer are they stored only in desks, cabinets, satchels, and folders. Our most private information is now frequently stored in electronic devices such as computers, laptops, iPads, and cell phones, or in “the cloud” and accessible by those electronic devices.** But the “central concern underlying the Fourth Amendment” has remained the same throughout the centuries; it is “the concern about giving police officers unbridled discretion to rummage at will among a person’s private effects.”

State v. Granville, 423 S.W.3d 399, 405 (Tex. Ct. Crim. App. 2014) (finding unconstitutional the “rummaging through a citizen’s electronic private effects—cell phone data—without a warrant”) (emphasis added); *see also Riley v. California*, 573 U.S. 373, 387-91 (2014) (search of cell phone data requires a warrant, noting the qualitative and quantitative difference between private information contained on a cell phone compared to a purse or wallet).

In 2018, the United States Supreme Court heard a case in which the FBI obtained past cell-site location data of a suspect. Noting the exceptionally intrusive nature of this type of search, the Court held that law enforcement must generally obtain a warrant to collect cell-site location data. *Carpenter v. U.S.*, 138 S.Ct. 2206, 2217 (2018). In 2019, the Texas Court of Criminal Appeals wrote that while the analysis must be conducted on a case-by-case basis, they found no violation of a person’s Fourth Amendment rights when authorities “pinged his cellphone less than five times over less than three hours without a warrant to locate and arrest him for murder.” Pierre Grosdidier, *Cellphone Tracking in Texas: A Look at real time records and what they mean*, Tex. B.J. 680 (Oct. 2019), citing *Sims v. State*, 569 S.W.3d 634, 646 (Tex. Crim. App. 2019); *see also Dixon v. State*, 566 S.W.3d 348, 363-64 (Tex. App.—Amarillo 2018, pet. granted) (harmful error to deny motion to suppress CSLI obtained with court order rather than warrant); *U.S. v. Gallegos-Espinal*, H-17-678, 2019 WL 2225025, *19 (S.D. Tex. May 23, 2019) (granting motion to suppress materials found on the iPhone because the scope of consent did not encompass the forensic search conducted at a later date);

¹ *See e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. ‘It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.’”).

² *See e.g., California v. Ciraolo*, 478 U.S. 1014 (1986).

³ *See e.g.,* <https://www.reuters.com/article/us-usa-cyber-surveillance/nsa-collected-500-million-u-s-call-records-in-2017-a-sharp-rise-official-report-idUSKBN1I52FR>; <https://www.law.com/texaslawyer/2018/02/28/south-texas-lawyer-rancher-duels-with-government-over-surveillance-camera-on-his-property/>; <https://www.nbcnews.com/news/us-news/golden-state-killer-suspect-joseph-deangelo-fights-dna-collection-effort-n870981>.

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