

# THE RIGHT TO PRIVACY: WHAT'S LEFT?

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## THE UNITED STATES SUPREME COURT



"In future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."

Clarence Thomas, concurring opinion,

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## CONGRESS



- "States have many legitimate grounds to proscribe same-sex deviate sexual intercourse," Johnson [wrote](#) in a July 2003 op-ed, calling it a public health concern.
- Homosexual relationships are inherently unnatural and, the studies clearly show, are ultimately harmful and costly for everyone," he wrote. "Society cannot give its stamp of approval to such a dangerous lifestyle. If we change marriage for this tiny, modern minority, we will have to do it for every deviant group. Polygamists, polyamorists, pedophiles, and others will be next in line to claim equal protection. They already are. There will be no legal basis to deny a bisexual the right to marry a partner of each sex, or a person to marry his pet."

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## SUMMARY OF PROGRAM

- STIGMA OF HIV/AIDS
- CONSTITUTIONAL RIGHTS
  - United States
    - Origin of Right to Privacy
    - Scope of Right
  - State Constitutions
    - Broad Right or,
    - Limited to Searches
  - State Laws
- COMMON LAW
  - Remedies

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## RESOURCES

- Center for HIV Law and Policy - <https://www.hivlawandpolicy.org>
- Legal Action Center - <https://www.lac.org>
- Lambda Legal - <https://www.lambdalegal.org/>
- Los Angeles HIV Law and Policy Project - <https://www.chprc.org>
- Transgender Law and Policy Institute - <http://www.transgenderlaw.org>
- GLAD - <https://www.glad.org>

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## STIGMA OF HIV/AIDS

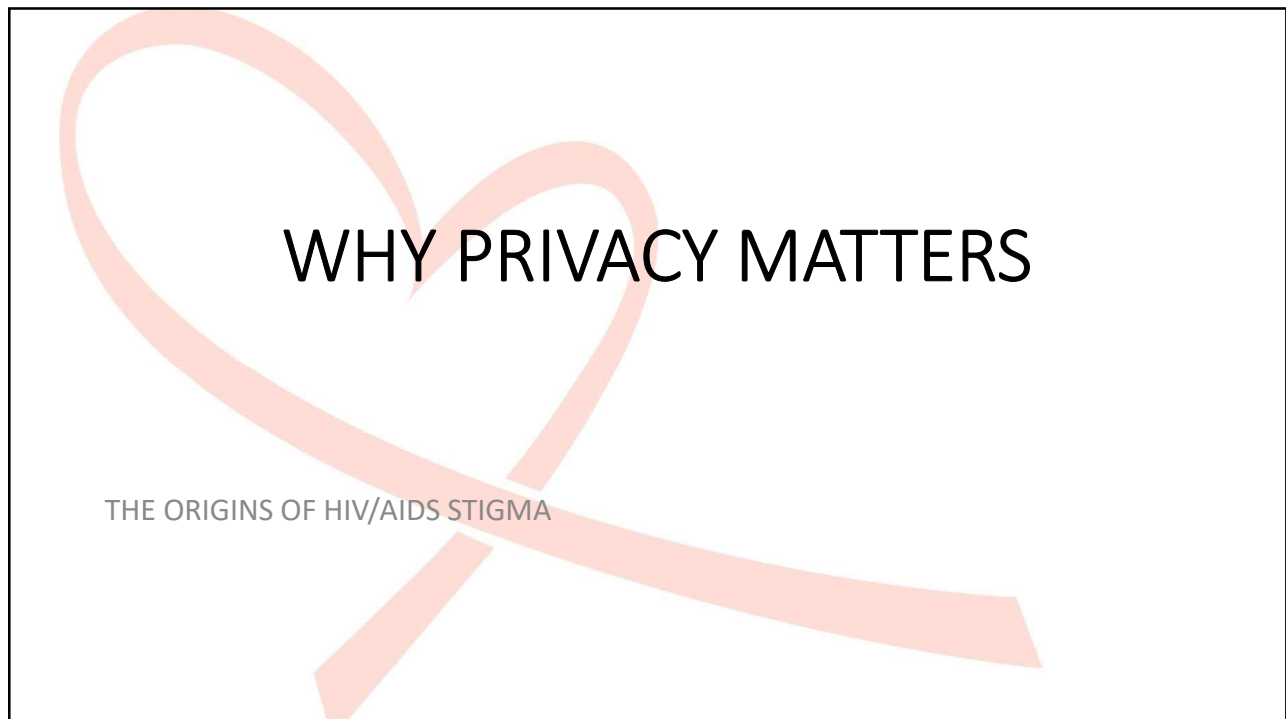
“Clearly, an individual’s **choice to inform others** that she has contracted what is at this point invariably and sadly a fatal, incurable disease is one that she should normally be **allowed to make for herself**. This would be true for any serious medical condition, but is especially true with regard to those infected with HIV or living with AIDS, considering the unfortunately unfeeling attitude among many in this society toward those coping with the disease. An individual revealing that she is HIV seropositive potentially exposes herself not to understanding or compassion but to **discrimination and intolerance**, further **necessitating the extension of the right to confidentiality over such information.**”

*Doe v. City of New York*, 15 F.3d 264 (2d Cir. 1994)

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## DEFINITIONS OF PRIVACY

- The right of privacy is the right to be free from unwarranted publicity, to live a life of seclusion, and to live without unwarranted interference by the public in the matters with which the public is not necessarily concerned. *Strutner v. Dispatch Printing Co.*, 2 Ohio App.3d 377 (1982)
- "The makers of the Constitution conferred the most comprehensive of rights and the right most valued by all civilized men—the right to be let alone." Justice Lewis Brandeis quoting from *Boyd v. United States*, 116 U.S. 616, 630 (1886)
- There can be no doubt that disclosure of HIV positive status may under appropriate circumstances be entitled to protection. . . The condition is ordinarily associated either with sexual preference or intravenous drug uses. It ought not to be, but quite commonly is, viewed with mistrust or opprobrium. Under the test of tortious invasion of privacy, it is clearly a "private fact" of which the disclosure may "be offensive and objectionable to a reasonable [person] of ordinary sensibilities."

*Urbaniak v. Newton* (1991) 226 Cal. App. 3d 1128, 1133-1134

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## EXAMPLES OF PRIVACY VIOLATIONS

- Disclosure by Government
- Disclosure by Healthcare Provider
- Theft by Healthcare Provider
- Disclosure by Pharmacist
- Disclosure by Employer
- Disclosure by Friend
- Disclosure by Insurance Carrier
- Failure to protect records

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# CONSTITUTIONAL RIGHT TO PRIVACY

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## UNITED STATES CONSTITUTION

No express right to privacy

Origins of implied right:

First, Fourth, Fifth, Ninth  
and 14<sup>th</sup> Amendments



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## THE SUPREME COURT ON PRIVACY 1986 – A PRECURSOR

"Proscriptions against [consensual sodomy] have ancient roots. . . . Sodomy was a criminal offense at common law, and was forbidden by the laws of the original 13 States . . . . In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. . . . [U]ntil 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. . . .

"Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious."

**Bowers v. Hardwick, 478 U.S. 186 (1986)**

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## STATE CONSTITUTIONAL RIGHTS TO PRIVACY

### BROAD

- California – Article 1, sec 1
- Alaska, Amendment 3

### SEARCH AND SEIZURE

- Florida, Article 1, sec. 23
- Hawaii, art. 1,
- Illinois [art. I, § 6.](#)
- Louisiana [art. I, § 5](#)
- Montana [art. II, § 10](#)
- New Hampshire [art. 2-b](#)
- South Carolina [art. I, § 10](#)
- Washington, art. 1, sec. 7

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## CALIFORNIA CONSTITUTION ARTICLE 1, SECTION 1

All people are by nature free and independent and have inalienable rights.

Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.




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## HIV AND THE COMMON LAW RIGHT TO PRIVACY

The "right to confidentiality"

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WHAT WE DO
RIGHTS & RESOURCES
DONATE

## The National Resource Center on HIV, Infectious Disease, Sexual Health and Identity

A collection of more than 1,000 legal substantive resources to support and increase the advocacy power and expertise of attorneys, community members, service providers, and all people living with HIV.

This comprehensive database of materials on topics of importance to people living with HIV and their advocates includes quality memoranda, research, reports, legal and medical guides, court and agency decisions, pleadings and briefs, policy analyses, and recommendations. CHLP summarizes and analyzes every document we post so that you can quickly determine whether that resource is relevant to your needs.

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## CLAIMS/CAUSES OF ACTION

Violation of Right to Privacy


- 14<sup>th</sup> Amendment
- State Constitution

42 USC 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage. . . subjects, or causes to be subjected, any citizen of the United States . . . thereof to the deprivation of any rights. . . secured by the Constitution . . . shall be liable to the party injured in an action at law. . .

Infliction of Emotional Distress

- Negligent
- Intentional



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## REPRESENTATIVE CASES

- The Foundation
  - Whalen v. Roe
  - Circuit Courts
- Sample Representative Cases
  - Doe v. City of New York
  - Behringer v. Princeton
  - Jeffrey H. v. Imai, Tadlock
  - Logan v. City of Evanston

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### JEFFREY H. V. IMAI, TADLOCK (2000)

Cause of Action based on California Constitution, article 1, section 1.

Other claims:

Cal H&S 120980

Negligent Infliction of Emotional Distress

Intentional Infliction of Emotional Distress



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# STATUTORY PROTECTIONS TO HIV/AIDS PRIVACY

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## TWO FEDERAL LAWS

### HIPAA

- The Privacy Rule standards address the use and disclosure of individuals' health information
- Has standards for individuals' rights to understand and control how their health information is used.
- Goal: to ensure that individuals' health information is properly protected while allowing the flow of health information needed to provide . . . high quality health care and to protect the public's health and well-being.
- No personal cause of action.
- <https://www.cdc.gov/phlp/publications/topic/hipaa.html>

### PRIVACY ACT - 5 U.S.C. § 552a

- Establishes Code of Fair Information that governs the collection, maintenance, use, and dissemination of personally identifiable information in federal records about individuals
- Act requires that agencies give the public notice of their systems of records by publication in the Federal Register.
- Act prohibits the disclosure of information from a system of records absent of the written consent of the subject individual, unless the disclosure is pursuant to one of twelve statutory exceptions.
- Provides for recovery of "actual damages"

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# STATE LAW

## CONFIDENTIALITY OF HIV TEST RESULTS

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*CHLP fights stigma and discrimination at the intersection of HIV, race, health status, disability, class, sexuality and gender identity and expression, with a focus on criminal and public health systems. As part of this work, we support movement building that amplifies the power of individuals and communities to mobilize for change rooted in racial, gender and economic justice. We do this through legal advocacy, high-impact policy initiatives, and creation of cross-issue partnerships, networks, and resources.*

DONATE

FULL SITE SEARCH

Search

FIND LAWS IN YOUR STATE

HIV POLICY RESOURCE BANK

FEATURED ISSUES

Confidentiality and Disclosure

Criminal Law

### Confidentiality and Disclosure

Disclosing one's HIV status is still widely perceived as socially dangerous. Similarly, another great risk people living with HIV face is the inadvertent or improper disclosure of their status which can result in denial of employment, violence, and many other collateral consequences.

This HIV Policy Resource Bank category covers state and federal laws that protect the confidentiality of HIV-related information, the rights and obligations of people with HIV with respect to disclosure of their HIV status in various settings, the importance of privacy and confidentiality guarantees to health care and prevention programs, and possible legal actions when unauthorized disclosure of HIV-related information occurs. This category also includes resources for people with HIV on disclosing their status and state non-disclosure laws.

135 results in Confidentiality and Disclosure

Search

User's Guide for Searching the HIV Policy Resource Bank

The HIV Policy Resource Bank (RB) has more than 1,000 resources and can be accessed several ways from the CHLP homepage. For more information, see the User's Guide for Searching the HIV Policy Resource Bank.

### Related Content

Resource Bank Only   News & Blogs Only

Resources, News & Blogs

Letter to Governor Hochul with recommended actions in response to the COVID-19 pandemic, COVID-19 Working Group

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## CALIFORNIA PENALTIES FOR DISCLOSURE

**CMIA - California Civil Code §§ 56-56.37.**

- Prohibits disclosure of health care information without consent
- Governs how information is stored
- Damages
  - Nominal and **actual** damages
  - Administrative fine

**H&S §§ 120975, 120980**

- Prohibits disclosure of HIV test results
  - What does that mean?
- Penalties
- Bases for Negligence per se

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## REMEDIES FOR VIOLATIONS

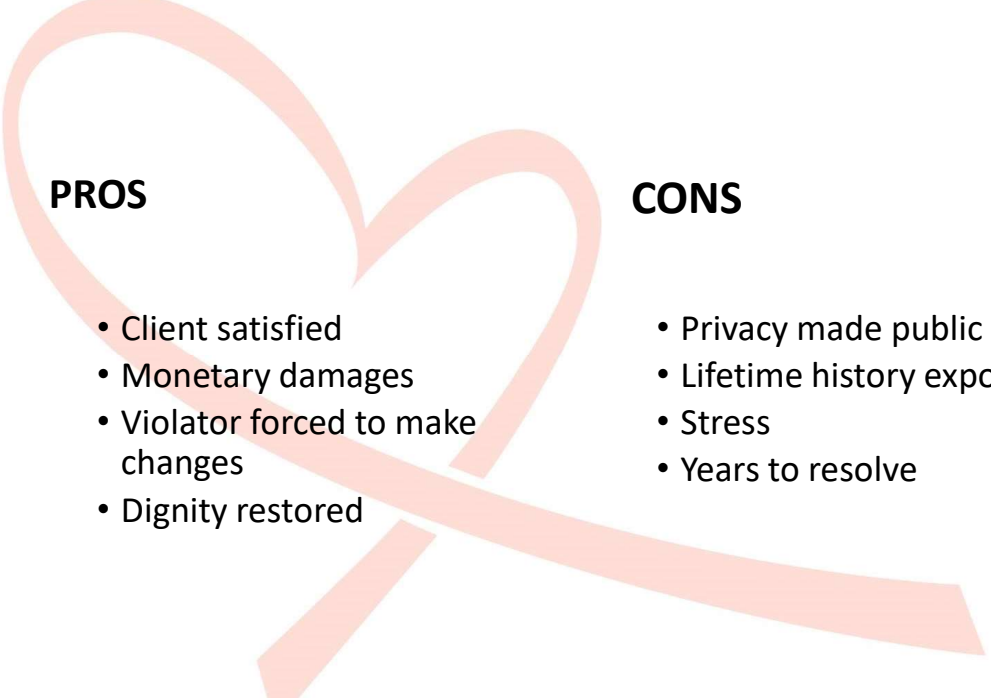
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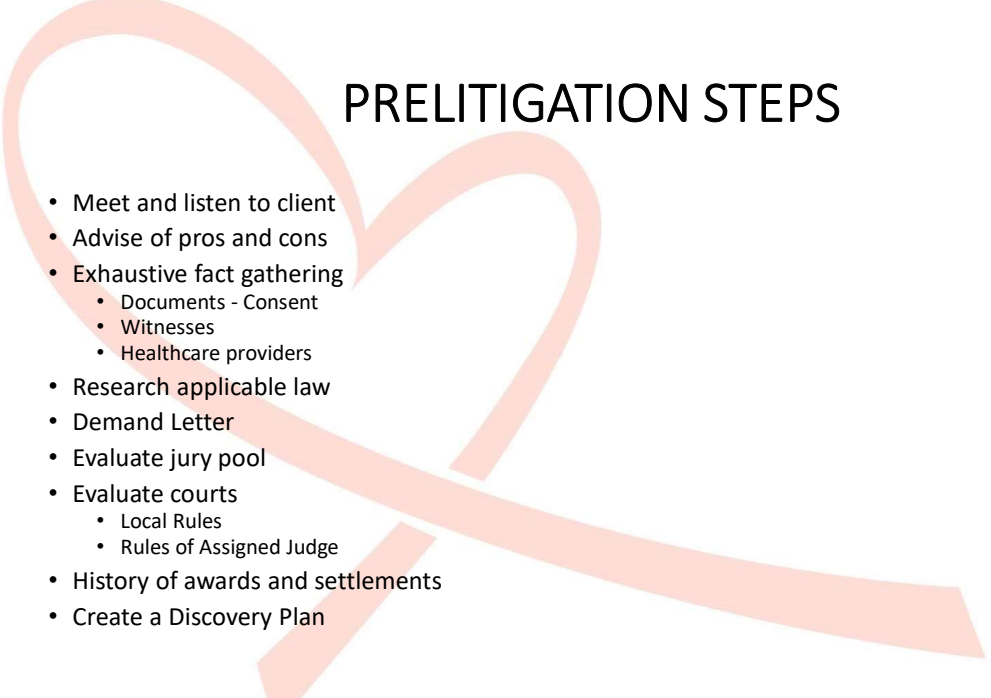






<b>PROS</b>	<b>CONS</b>
<ul style="list-style-type: none"> <li>• Client satisfied</li> <li>• Monetary damages</li> <li>• Violator forced to make changes</li> <li>• Dignity restored</li> </ul>	<ul style="list-style-type: none"> <li>• Privacy made public</li> <li>• Lifetime history exposed</li> <li>• Stress</li> <li>• Years to resolve</li> </ul>

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## PRELITIGATION STEPS

- Meet and listen to client
- Advise of pros and cons
- Exhaustive fact gathering
  - Documents - Consent
  - Witnesses
  - Healthcare providers
- Research applicable law
- Demand Letter
- Evaluate jury pool
- Evaluate courts
  - Local Rules
  - Rules of Assigned Judge
- History of awards and settlements
- Create a Discovery Plan

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# PRELITIGATION REMEDIES

## THE DEMAND LETTER

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## FILING THE COMPLAINT

- Prenotice to Defendant?
  - Claims against the State
- Claim filed Against Defendant?
- Jurisdiction and Venue
- Identification of Defendants
  - Does?
- Identification of Plaintiff
- Causes of Action/Claims

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## CAUSES OF ACTION

- ✓ Unwanted Disclosure of HIV/AIDS Status
- ✓ Invasion of Privacy
- ✓ Negligence
- ✓ Negligence Per Se
- ✓ Defamation
- ✓ Emotional Distress
  - HIPAA?

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## CONCLUSION



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