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# ON THE UTILITY OF CONSTITUTIONAL RIGHTS TO PRIVACY AND DATA PROTECTION

*David H. Flaherty\**

**P**RVACY IS LIKE freedom: we do not recognize its importance until it is taken away. In that sense, it is a personal right that we assume we have yet take for granted—until something or someone infringes on it. Privacy, like freedom, is difficult to define except in the negative: the right not to be unnecessarily intruded upon is a basic starting point. However, privacy is more than that. I prefer the classic, century old formulation of Louis Brandeis and Samuel Warren, “‘the right to be let alone,’” since it encapsulates the essence of most people’s understanding, what might be called the core content of privacy.<sup>1</sup> But even to quote this seminal phrase is to remind ourselves of how quaint such an expectation is

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\* Professor of History and Law, University of Western Ontario. This is a revised version of an essay delivered to a Symposium on “The Right to Privacy One Hundred Years Later,” held at Case Western Reserve University School of Law on November 16-17, 1990. I presented an earlier version at a Conference on “Canadian Reflections on the American Constitution,” University of Calgary, September 24-26, 1987.

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1. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (quoting T. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d. ed. 1888)). Brandeis also wrote:

The makers of our constitution . . . recognized the significance of man’s spiritual nature, of his feelings and of his intellect . . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.

They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

*Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled in Katz v. United States*, 389 U.S. 347 (1967).

in the late twentieth century, when privacy as a human value is under greater attack in the public and private sectors than ever before.<sup>2</sup>

Alan Westin has provided the most useful identification of the interests at stake in the "data protection" component of personal privacy or informational privacy. Westin defines concern for privacy as the desire of persons to choose freely under what circumstances and to what extent they will expose themselves, their attitudes, and their behavior to others.<sup>3</sup> In essence, we all seek what the German Federal Constitutional Court, the *Bundeserfassungsgericht*, characterized in 1983 as the right of informational self-determination, which can be defined in practice as the desire of individuals for assurances that custodians of their personal data will comply with fair information practices.<sup>4</sup>

Historically, privacy has been largely a nonlegal concept in the sense that individuals have asserted both broad and narrow claims to individual privacy and could largely defend themselves against any challengers.<sup>5</sup> At best, only marginal legal intervention

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2. Warren and Brandeis also initiated the tort of invasion of privacy, which mainly seeks to cope with false or unauthorized publicity and intrusions upon seclusion. See Warren & Brandeis, *supra* note 1, at 195. Whatever assistance this tort may offer to individuals in their problems with other persons over time, it covers only a small part of the overall privacy problem, since such actions lie against other persons and are not effective against governments. See generally Zimmerman, *Requiem for a Heavyweight: a Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983) (pointing out the many deficiencies in the Warren and Brandeis privacy tort as applied to modern society).

3. See A. WESTIN, *PRIVACY AND FREEDOM* 7 (1967) ("Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."). Definitions of the amorphous concept of privacy are problematic, but Westin's definition is functionally adequate for present purposes, not least because privacy, as a fundamental value, is no easier to define than freedom or liberty. It is useful to distinguish, as Westin does, four separate states of privacy for analytical purposes: solitude, intimacy, anonymity, and reserve. See D. FLAHERTY, *PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES* 7-9, 377-78 (1989). See generally *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* (F. Schoeman ed. 1984) (containing various essays on the meaning of privacy); Rubinfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 805 (1989) (noting that "the right to privacy exists because democracy must impose limits on the extent of control and direction that the state exercises over the day-to-day conduct of individual lives.").

4. The concept of fair information practices originated in the early 1970s in both the United Kingdom and the United States. Such rules serve as the groundwork for all national and state laws on data protection. The basic principles include collection limitation, data quality, purpose specification, use limitation, security safeguards, openness, individual participation, and accountability. ORG. ECON. CO-OPERATION AND DEV., *GUIDELINES ON THE PROTECTION OF PRIVACY AND TRANSBORDER FLOWS OF PERSONAL DATA* (1981).

5. Referring to privacy claims as nonlegal simply acknowledges that the search for privacy is influenced by factors that are often perceived as being nonlegal, such as the

to protect privacy interests occurred, as in common law prosecutions for eavesdropping.<sup>6</sup> This has changed dramatically since the early phases of industrialization in the nineteenth century. Despite one's best-intentioned efforts to maintain privacy, the operation of external laws and authorities has become essential for its preservation. Successive phases of mechanization and automation, from the telegraph and the telephone to computers and telecommunications devices, have challenged privacy in ways that few individuals can overcome alone.<sup>7</sup>

Despite the acknowledged leading role of American commentators in inventing the legal "right to privacy" in the late nineteenth century and the extraordinary expansion of the scope of the right, it is important not to view problems of privacy protection solely in terms of the framework of American constitutionalism, since challenges to a human value that are endemic in advanced industrial societies are also at issue. Although the legal and constitutional right to privacy is very well developed in the United States, certain aspects of systemic and systematic data protection are much more advanced in other countries.<sup>8</sup> At the very least, it is instructive to review the means by which other jurisdictions seek to protect privacy interests.

It is also useful to recognize at the outset that the legal protection of privacy takes many forms. Constitutional modes of privacy protection are either explicit in a constitutional document or implicit: that is, judge-made or, more neutrally, judicially recognized. These rights, then, evolve on a case-by-case basis, normally involving the application of a balancing test that some in the United States would argue is customarily loaded in favor of values that compete with privacy, such as the goals of reducing fraud or creating a drug free society.<sup>9</sup> In recent years there has also been a

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architecture of homes, town planning, the character of family, neighborhood, and community life, communications and correspondence, institutional life affecting individuals, and the entire role of governments, law enforcers, and courts in human existence.

6. For an example of the law imposing penalties for eavesdropping in 17th century New England, see D. FLAHERTY, *PRIVACY IN COLONIAL NEW ENGLAND* 89 (1972).

7. See D. SEIPP, *THE RIGHT TO PRIVACY IN AMERICAN HISTORY* 102-13 (1978) (calling for new public policy measures to protect the individual's right to privacy in the face of twentieth century technologies); see also Note, *The Right to Privacy in Nineteenth Century America*, 94 *HARV. L. REV.* 1892 (1981).

8. See *infra* notes 48-59 (discussing the right to data protection in Germany) and notes 60-109 (discussing the right to privacy in Canada).

9. See Benner, *Diminishing Expectations of Privacy in the Rehnquist Court*, 22 *J. MARSHALL L. REV.* 825, 826-27 (1989).

remarkable proliferation of claims for "privacy," as individuals with various perceived problems seek a protective umbrella. Thus, recent American privacy debates and cases have touched on many sensitive issues: abortion, AIDS, drug testing, workplace surveillance, electronic surveillance of public washrooms, employment privacy rights, medical privacy, privacy and the press, communications privacy, library records, caller identification telephone systems, sexual privacy, and residential privacy.<sup>10</sup>

The essential distinction between privacy protection and data protection, or informational privacy, is not commonly understood, especially in North America. Data protection is especially concerned with controlling the collection, use, and dissemination of personal information. Since 1970 legislatures in Europe and North America have responded to widespread fears about the impact of computers on data collection, linkage, and use by enacting protective laws. These laws primarily seek to control the government's collection, use, and dissemination of personal information by means of codes of fair information practices.

The United States' Privacy Act of 1974<sup>11</sup> is a leading and influential example of a data protection law. England's Data Protection Act of 1984 has the advantage, in the English-speaking world, of being properly titled.<sup>12</sup> Although the goal of the act is to protect privacy, the word never appears in it. This is an improvement on using the word privacy in a law without any attempt at definition. In addition to such general laws, most countries, and

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10. See V. SCHACTER & T. GEIDT, *DRUGS AND ALCOHOL IN THE WORKPLACE: LEGAL DEVELOPMENTS AND MANAGEMENT STRATEGIES* (2d ed. 1989) (analyzing recent substance abuse legislation and key legal issues concerning privacy and drugs in the workplace); DeBenedictis, *E-Mail Snoops*, A.B.A. J., Sept. 1980, at 26, 27 (concerning privacy issues and electronic mail); Doss, *Police Management: Sexual Misconduct and the Right to Privacy*, 17 J. POLICE SCI. ADMIN. 194 (1990) (examining the right to privacy for police officers); Ezzard, *State Constitutional Privacy Rights Past Webster—Broader Protection Against Abortion Restrictions?*, 67 DEN. U.L. REV. 401 (1990) (analysis of how the Supreme Court's ruling in *Webster* has shifted privacy issues concerning restrictions on the right to have an abortion to state law); Schulman, *AIDS Workplace Law and Policy: A Systematic Analysis*, 9 ST. LOUIS U. PUB. L. REV. 543 (1990) (offering an indepth examination of how the AIDS epidemic has effected privacy issues in the workplace); Note, *State Prohibition of Fetal Experimentation and the Fundamental Right of Privacy*, 88 COLUM. L. REV. 1073 (1988) (discussing how privacy issues have developed in the context of fetal experimentation).

11. 5 U.S.C. § 552a (1988).

12. Data Protection Act 1984, c. 35, reprinted in HALSBURY'S STATS. OF ENGLAND AND WALES 6:831 (4th ed. 1985); see D. FLAHERTY, *supra* note 3, at 377-78 (criticizing the failure to distinguish between the broad need for protection of personal privacy and the need for data protection).

especially the United States, have fashioned specific sectoral legislation that applies general fair information practices to precise data protection issues.<sup>13</sup> Such general and specific statutes are making the most significant contribution to the protection of all forms of individual privacy in advanced industrial societies today.<sup>14</sup>

Thus, this paper addresses two questions. First, what kinds of constitutional rights to privacy are necessary, desirable, and beneficial? Second, are systemic and sectoral modes of statutory data protection also essential?

It is advantageous for Americans and Canadians, who are the focus of my concern, to enjoy as many forms of protection for personal privacy as possible, including full-fledged constitutional rights to personal privacy, general and special data protection laws, and common law rights to privacy sounding in tort. Unhappily, few western countries have reached that potentially auspicious state.<sup>15</sup> The United States' deficiency is in failing to create independent agencies to ensure that privacy acts in the public sector are actually enforced. When explicit constitutional and statutory protection for privacy exists in common law countries, individuals are in a much better position to assert their human rights in the public and private arenas and in the court system.

## I. THE EMERGENCE OF SURVEILLANCE SOCIETIES

While this article cannot fully explore the emergence of surveillance societies, it can provide a glimpse of what is happening. Information societies are becoming surveillance societies.<sup>16</sup> We are increasingly subject to surveillance by all kinds of personal information banks in both the public and private sectors. The various automated data bases now in existence make possible fairly integrated monitoring and profiling of the lives of most individuals. The proliferation of such information banks poses the most fundamental challenge to privacy interests, because of their

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13. See Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (1988); Computer Matching and Privacy Protection Act of 1988, 5 U.S.C. § 552a (1988).

14. See D. FLAHERTY, *supra* note 3, at 371-77 (discussing the importance of legislation and its role in protecting privacy).

15. *But see* HAW. REV. STAT. § 92F (1988) (creating the Office of Information Practices within the Department of the Attorney General as a center for access and privacy policies); D. FLAHERTY, *supra* note 3, at 305-06, 359, 361-67 (discussing successful and significant legislation that has been enacted).

16. See D. FLAHERTY, *supra* note 3, at 1-11.

mind-boggling ability to collect, store, and disseminate data.<sup>17</sup> The United States government is the custodian of more personal information than any other institution in the world. The three largest American credit information companies each maintain identifiable data on 150 million individuals. Computer systems routinely monitor the activities of employees.<sup>18</sup> In North America, the application of information technology is galloping ahead of regulation and control, especially in the private sector, resulting in significant privacy anxieties among the general public.<sup>19</sup>

Citizens of various totalitarian regimes, such as China and the Soviet Union before Gorbachev, have been fortunate that the surveillance aspirations of their leaderships have not been matched by technological capacity, although the *Stasi* in the German Democratic Republic made a considerable effort in that direction.<sup>20</sup> But it was only a matter of time before some wealthier country consciously chose to create a true surveillance society. Thailand, a constitutional monarchy dominated by the military, is the first out of the blocks in the 1990s. It has inaugurated a centralized database system to monitor vital information on each of its 55 million citizens. "[T]he system includes a Population Identification Number (PIN) with a required computer-readable ID card with photo, thumbprint, and imbedded personal data."<sup>21</sup> Such Personal Identification Numbers are the key to creating a surveillance society. The Thai system will store date of birth, ancestral history, and family composition and is designed to track voting patterns, domestic and foreign travel, and social welfare.<sup>22</sup> Networked terminals will eventually permit 12,000 users to have access to this relational database. Forebodingly, the Smithsonian Institution subsequently chose the Thai Ministry of the Interior as the recipient of the second annual Computerworld Smithsonian

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17. See *Data Protection, Computers, and Changing Information Practices: Hearings Before the House Subcomm. on Government Information, Justice, and Agriculture of the Committee on Government Operations*, 101st Cong., 2d Sess. (1991).

18. Kilborn, *Workers Using Computers Find "Big Brother" Inside*, N.Y. Times, Dec. 23, 1990, at 1, col. 1.

19. See L. HARRIS & ASSOCS., *THE EQUIFAX REPORT ON CONSUMERS IN THE INFORMATION AGE* (1990).

20. See *East Germany's Stasi: Where Have All the Files Gone?*, THE ECONOMIST, Sept. 22, 1990, at 55. The existing *Stasi* files pose fundamental challenges for data protection in the Federal Republic of Germany. Keeping the files secret is not popular with East Germans, believing that access to their files is a fair information right. *Id.*

21. Smith, *True Colors*, PRIVACY JOURNAL, July 1990, at 1, 1.

22. *Id.*

Award for innovative information technology.<sup>23</sup>

Since automated information systems are so pervasive, it is important to think about the implications of the use of these systems for the protection of our human rights. Despite the advent of privacy and data protection laws and agencies, there is some evidence that data protection is to date only an illusion.

## II. THE RIGHT TO PRIVACY IN THE UNITED STATES

As a Canadian, I especially admire the role of the Supreme Court of the United States in slowly developing a judicially recognized constitutional right to privacy. The important qualification, however, is that the Supreme Court has never made a broad general finding of a constitutional right to privacy, as some commentators had expected it to do in the 1960s, nor has the Constitution been explicitly amended to this effect, nor is it on anyone's agenda, nor has it even been contemplated. Thus, Americans do not have an explicit federal constitutional right to privacy, in contrast to the situation in some states.<sup>24</sup> The California Constitution, as amended in 1972, provides that residents of the state have a right to privacy: "All people are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety, happiness, and privacy."<sup>25</sup> On the basis of such constitutional language, individuals can use the courts to assert claims for privacy against either state or private entities. Despite the difficulties and, especially, the costs of successfully asserting privacy claims in any court, these claims should be encouraged in Canada and other

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23. *Id.*; see Elmer-Dewitt, *Peddling Big Brother*, TIME, June 24, 1991, at 62.

24. See, e.g., FLA. CONST. art. I, § 23 (stating that "[e]very natural person has the right to be let alone and free from governmental intrusion into his previous life . . ."). Privacy is also protected under descriptive state laws. See Arzt, *Privacy Law in Massachusetts: Territorial, Informational and Decisional Rights*, 70 MASS. L. REV. 173 (1985) (drawing interesting distinctions among territorial privacy [homes, cars, bodies, telephones], informational privacy [criminal, medical, employment records], and decisional privacy [lifestyle, procreation]).

25. CAL. CONST. art. I, § 1; cf. *Wilkinson v. Times Mirror Corp.*, 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194 (1989) (recognizing that privacy interests guaranteed by the state constitution may be affected by private actions; but holding that a preemployment drug testing policy does not infringe upon those privacy interests). See generally Gerstein, *California's Constitutional Right to Privacy: The Development of the Protection of Private Life*, 9 HASTINGS CONST. L.Q. 385 (1981-82) (explaining the relatively advanced development of the right to privacy in California).



common law countries as an ultimate guarantor of individual privacy rights.<sup>26</sup>

The history of the judicial recognition of the right to privacy under the United States Constitution is important because it indicates the context in which courts are more likely to acknowledge privacy claims. Claims to privacy rights have been recognized in federal litigation at least since the late nineteenth century,<sup>27</sup> but it was only in *Griswold v. Connecticut* that Justice Douglas, writing the opinion for the court, asserted the existence of a right of privacy against the state predating the Bill of Rights.<sup>28</sup> Douglas argued that several amendments to the Constitution explicitly and implicitly embodied a series of protections for privacy interests.<sup>29</sup>

The factual setting for the *Griswold* decision, as is so often the case in major Supreme Court privacy opinions, was appropriately ludicrous: the state of Connecticut had made it a crime for any person, even married couples, to use contraceptives. Physicians and family planning centers were liable under the statute and vulnerable to criminal prosecution as aiders, abettors, and co-conspirators for providing their patients with information concerning birth control.<sup>30</sup> In its decision striking down the criminal statute, the Court essentially created a right to "marital" privacy, which has evolved into a significant right of intimate association.<sup>31</sup> Of course, *Griswold* is often assailed as a classic case of judicial activism, certainly something that Robert Bork would have liked

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26. Since Warren and Brandeis used English cases to make claims for a legal right to privacy, it is ironic that there is neither a constitutional nor judicially recognized right to privacy in Britain. See generally W. PRATT, *PRIVACY IN BRITAIN* (1979) (discussing the historical basis of the right to privacy in Britain); Seipp, *English Judicial Recognition of a Right of Privacy*, 3 OXFORD J. LEGAL STUD. 325 (1983) (discussing the lack of judicial recognition of the right to privacy).

27. See Beane, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 215-18 (discussing the early fourth amendment right to privacy cases).

28. 381 U.S. 479 (1965). Although the decision was seven to two, there were six opinions written for the majority. Douglas's first draft was based on a right of association, even though he had been advocating a constitutional right of privacy for some years; Justice Brennan suggested the switch to privacy grounds. See B. SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE WARREN COURT* 227-39 (1985).

29. See *Griswold*, 381 U.S. at 482-86.

30. *Id.* at 479-80.

31. See R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 95-100, 110-26 (1990) (arguing that the real issue in *Griswold* is the Court's desire to create a new privacy right); Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 626-52 (1980) (discussing Supreme Court's development of intimate association as a privacy right).

to reverse.<sup>32</sup> Once Justice Douglas let the horse out of the barn, so to speak, litigants have been able to assert privacy claims in other settings with mixed success.<sup>33</sup> Privacy claims should not always prevail, but a climate should be encouraged where they can be advanced and considered in the judicial and legislative process.

The Supreme Court took its most significant step in developing the constitutional right to privacy in *Roe v. Wade* in 1973.<sup>34</sup> In that instance it was a woman's right to choose an abortion that became the vehicle for enunciating a right to privacy. Justice Blackmun wrote for the majority that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>35</sup> In *Roe* the Court emphasized that the woman's right to privacy in reproductive choice is not absolute or unqualified as against state interests in regulation of abortion;<sup>36</sup> this is the standard balancing test that courts apply in cases in which claims to privacy are asserted.<sup>37</sup> It is also true that the right to privacy is most often given primacy by the courts in situations where the interests of intimate association are at stake rather than when a person is attempting to assert a right to privacy against the state or as a shield for alleged wrong-doing.<sup>38</sup>

The Supreme Court's recent unanimous decision in *United States Department of Justice v. Reporters Committee for Free-*

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32. See Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7-11 (1971) (characterizing the *Griswold* opinion as failing to justify the creation of a right of privacy).

33. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (rejecting a privacy claim regarding sexual relations between homosexuals); *United States v. Miller*, 425 U.S. 438 (1976) (rejecting a privacy claim regarding banking records).

34. 410 U.S. 113 (1973). This again was a 7 to 2 decision. The holding was reaffirmed in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

35. *Roe*, 410 U.S. at 153. Again the ostensible context of the case encouraged judicial intervention: an unmarried twenty-one year old waitress was gang raped but could not have an abortion under state law. The victim has recently denied that she was in fact raped; she was so frustrated and bitter at being denied an abortion that she invented a compelling circumstance, which was not mentioned in her suit. *Changing Stories*, N.Y. Times, Sept. 13, 1987, § 4, at 6, col. 5.

36. *Roe*, 410 U.S. at 152-65.

37. Reliance on the right to privacy to achieve the goal of a woman's right to choose may create more political pressures on this admittedly amorphous concept than it can bear in its current state. Anti-abortionists are forced into an attack on privacy as a value. In this sense, it is advantageous that the equivalent Canadian decision on abortion grounded freedom of choice in section seven of the Charter of Rights and Freedoms, especially the woman's right to "security of the person." *Regina v. Morgentaler*, 1 S.C.R. 30, 34 (1988).

38. See *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) (effectively denying prisoners a right to privacy).

*dom of the Press*<sup>39</sup> furnishes grounds for optimism with respect to informational privacy. The case arose when a CBS news reporter and a media rights advocacy group filed a Freedom of Information Act ("FOIA") request for criminal identification records, also called "rap sheets," from the Federal Bureau of Investigation ("FBI") concerning Charles Medico, who was alleged to have criminal connections.<sup>40</sup> The issue was "whether the disclosure of the contents of such a file to a third party 'could reasonably be expected to constitute an unwarranted invasion of personal privacy' " within the meaning of the exemptions to the FOIA.<sup>41</sup> Although the FBI treats rap sheets as confidential, much of the contents are a matter of public record. In fact, the request in this case was for "matters of public record."<sup>42</sup>

In his opinion for the Court, Justice Stevens first noted the Court's previous holding that privacy cases " 'in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.' "<sup>43</sup> The former was at stake in this case. Stevens came close to reliance on informational self-determination in his statement that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person."<sup>44</sup> The Court determined that "a strong privacy interest inheres in the non-disclosure of compiled computerized information . . . ."<sup>45</sup> Furthermore:

we hold as a categorical matter that a third party's request for law-enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted."<sup>46</sup>

Although *Reporters Committee* deals specifically with the interpretation of an exemption to the FOIA, it has the direct effect of

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39. 489 U.S. 749 (1989).

40. *Id.* at 757.

41. *Id.* at 754 (quoting 5 U.S.C. § 552(b)(7)(e) (1988)).

42. *Id.* at 757.

43. *Id.* at 762 (quoting *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977)).

44. *Id.* at 763.

45. *Id.* at 766.

46. *Id.* at 780.

identifying and confirming the individual's interest in informational privacy. Washington attorney Robert Belair made a key point about the importance of this decision:

Previously, the court had resisted finding a privacy interest in records unless the records contained intimate, personal information, such as health or family information, and unless the records had been held in more or less strict confidence. . . . What the court found in *Reporters Committee* is that there is an expectation of privacy in a computerized, comprehensive record of all of an individual's activities—but not necessarily an expectation of privacy in a single criminal event.<sup>47</sup>

### III. THE RIGHT TO DATA PROTECTION AND INFORMATIONAL SELF-DETERMINATION IN GERMANY

The approach advocated in this essay for assuring constitutional and legal protection for privacy has been very much influenced by my understanding of developments in the Federal Republic of Germany. Germany has a scheme of integrated privacy and data protection laws at the federal and state levels, based on constitutional language<sup>48</sup> and judicial decisions,<sup>49</sup> that is a model for federal systems offering protection for personal privacy.<sup>50</sup> Article 1(1) of the German Constitution provides that “[t]he dignity of man is inviolable. To respect and protect it is the duty of all state authority.”<sup>51</sup> Article 2 further states: “Everyone has the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.”<sup>52</sup>

In 1983 the German Federal Constitutional Court interpreted these articles as creating a general right of private personality, which can include a right to privacy.<sup>53</sup> It did so in the context of an enormous debate over the constitutionality of the population

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47. Belair, *Redefining Information Privacy*, *PRIVACY JOURNAL*, July 1989, at 7, 7 (emphasis in original).

48. See *supra* notes 51-52 and accompanying text.

49. See *infra* notes 53-60 and accompanying text.

50. See, e.g., C. CIV. art. 9 (France) This article, adding to the French Civil Code a statutory recognition of the right to personal privacy in the sense that everyone has a right to respect for his private life, parallels the German scheme. See A. VITALIS, *INFORMATIQUE, POUVOIR ET LIBERTÉS* 145-58 (2d ed. 1988).

51. GRUNDGESETZ [GG] art. I (W. Ger.).

52. *Id.* art. II.

53. See D. FLAHERTY, *supra* note 3, at 86-90.

census originally scheduled for that year.<sup>54</sup> The Court unanimously held that Germans have a right of informational self-determination. As Professor Spiros Simitis has written, "Since this ruling . . . it has been an established fact in this country that the Constitution gives the individual the right to decide when and under what circumstances his personal data may be processed."<sup>55</sup>

However, even under the German court's decision an individual is not free to decide whether to give information to the government: "Rather than giving exclusive control or a property interest to the data subject, the right of informational self-determination compels the State to organize data processing so that personal autonomy will be respected."<sup>56</sup> In a highly legalistic society, this will require that all data protection activities be regulated by specific legislation. Another possible result is that individuals will have a demonstrable right to protection against infringement of privacy occasioned by such activities as the population census.

The German Federal Constitutional Court has also effectively given constitutional standing to data protection agencies by insisting that their existence is essential for data collection to occur. According to Dr. Reinhold Baumann, then the Federal Data Protection Commissioner, "the Court said that the institution of an independent data protection commission is an indispensable requirement for the effective protection of the individual's right to determine the use of his personal data, the so-called 'fundamental right of informational self-determination.'"<sup>57</sup>

The most important impact of the Court's decision on the Census Act is that, for the first time anywhere, data protection now has a clear constitutional basis, and a right to informational self-determination has been created. The constitutionality of any law can be challenged on the basis of the Constitutional Court's decision. It will still require a number of years for the implications of this decision for sectoral legislation at the federal and state

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54. See *id.* at 79-83, 86-90 (discussing the public controversies and the eventual postponement of the census on grounds of potential invasion of privacy).

55. Hoffmann, *Controversy Over Banks' Role as Suppliers of Customer Information*, German Tribune, Jan. 29, 1984, at 8, col. 1, 9, at col. 3 (quoting Professor Simitis).

56. Schwartz, *The Computer in German and American Constitutional Law: Towards an American Right of Informational Self-Determination*, 37 AM. J. COMP. L. 675, 690 (1989). For a discussion of the meaning of this right, see *id.* at 689-94.

57. Press Statement of Dr. Reinhold Baumann on the occasion of the submission of the Sixth Report on the Activities of the Federal Data Protection Commissioner (Jan. 24, 1984) (on file with the Office of the Federal Data Protection Commissioner, Bonn).

levels to be realized.<sup>58</sup> The revision of the German Data Protection Act, completed in September 1990, was a major step forward in implementing the principles of the 1983 census case.<sup>59</sup>

#### IV. THE RIGHT TO PRIVACY IN CANADA

With respect to protection of personal privacy in Canada, it must be emphasized that Canadians do not have an explicit constitutional right to privacy under the Canadian Charter of Rights and Freedoms of 1982.<sup>60</sup> In this condition, Canada is true to its British constitutional heritage of often avoiding the entrenchment of basic rights. In the Special Joint Senate-House of Commons Committee on the Constitution in 1981, David Crombie, then a Progressive-Conservative Member of Parliament, proposed the inclusion of a constitutional right of privacy in the Charter, but this poorly worded amendment was defeated by a vote of fourteen to ten.<sup>61</sup>

The only Canadian province offering some degree of explicit constitutional protection for privacy is Quebec. Article 5 of the Quebec Charter of Human Rights and Freedoms, an ordinary statute enacted in 1975, guarantees that "[e]very person has a right to respect for his private life."<sup>62</sup> Unfortunately, in the words of Patrick Glenn, "the effect of the Charter is not such that courts will be obliged to test the validity of legislation for consistency with the right to privacy."<sup>63</sup> In 1987, however, Quebec amended its Civil Code to include basic principles related to respect for individual privacy. The code now specifies that "every person has a right to the respect of his reputation and privacy. No one may invade the privacy of another person except with the consent of

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58. Candor requires me to add that the process is not moving as quickly as data protectors would like. For helpful descriptions of recent developments, see Schwartz, *supra* note 56, at 698-701.

59. The most important change guarantees the independence of the Federal Data Protection Commissioner by requiring that the Bundestag elect him or her on the nomination of the government as rather than simply allowing the government to appoint the commissioner. See D. FLAHERTY, *supra* note 3, at 40-43, 391-94.

60. Constitution Act, 1982, R.S.C. app. II, No. 44, Schedule B. (Can. 1985).

61. See COMMITTEE ON JUSTICE, OPEN AND SHUT: ENHANCING THE RIGHT TO KNOW AND THE RIGHT TO PRIVACY 91 (1987) (discussing the history of Crombie's amendment).

62. QUE. REV. STAT. C-12, ch. 6, 5.5 (1975).

63. Glenn, *The Right to Privacy in Quebec Law*, in ASPECTS OF PRIVACY LAW 63, 63 (D. Gibson ed. 1980).

the person or his heirs or unless it is permitted by law."<sup>64</sup> Invasion of the "privacy of a person" is defined very broadly to include the interception of private communications, unauthorized publicity, and "[o]bserving a person in his private life by any means."<sup>65</sup> Finally, the revised code specifically incorporates a series of fair information practices for the maintenance of personal files.<sup>66</sup> Thus, residents of Quebec will soon have the strongest legal protections for privacy of any Canadian province. Unlike other jurisdictions in North America, Quebec is also considering general data protection regulations for the private sector.<sup>67</sup>

Several Canadian provinces have "privacy acts" that are analogous to the American invasion of privacy torts. Enacted in the 1960s, the Canadian privacy acts have been seldom used, although they could be useful because of their broad language, for individuals who want to press claims against the private sector.<sup>68</sup> Thus, the Manitoba Privacy Act generally states that "a person who substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against another person."<sup>69</sup> Examples of invasion of privacy cited in this law include surveillance of a person, residence, or a vehicle by any means.<sup>70</sup> Moreover, an action may be brought without proof of damage.

Although the federal Charter of Rights and Freedoms is not explicit about privacy, certain sections have been used by the Supreme Court of Canada to recognize a right to privacy. Most notable is section eight (the Canadian version of the fourth amendment): "Everyone has the right to be secure against unreasonable search or seizure."<sup>71</sup> Privacy issues have also been recognized in respect of section seven, the right not to be deprived of security of

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64. Respect of Reputation and Privacy, 18 QUE. REV. STAT. ch. 3 (1985).

65. *Id.*

66. *Id.*

67. See generally Laperrière, Lemasson, Péladeau, Bureau & Martin, *The Legal Control of Personal Data in the Private Sectors of Quebec and Canada*, 3 CAN. J.L. & SOC'Y 247 (1988) (discussing the need for a legislative response to the personal databank situation).

68. See Osborne, *The Privacy Acts of British Columbia, Manitoba and Saskatchewan*, in ASPECTS OF PRIVACY LAW 110 (D. Gibson ed. 1980).

69. R.S.M. 1987, ch. P-125.

70. *Id.* Inserting examples in the act itself helps to make up for the fact that none of the "privacy" legislation considered in this essay defines the concept of privacy. See D. FLAHERTY, *supra* note 3, at 377-78.

71. CHARTER OF RIGHTS AND FREEDOMS vol. II, § 8 (Can.).

the person, except in accordance with the principles of fundamental justice;<sup>72</sup> section 10(b),<sup>73</sup> the right to retain and instruct counsel; and section 11(b),<sup>74</sup> the right to be tried within a reasonable time. In the future, privacy may emerge as an issue regarding the "fundamental freedoms" set out in section two: "a) freedom of conscience and religion; b) freedom of thought, belief, opinion and expression . . . ."<sup>75</sup>

Privacy has emerged as an important concept at several levels in constitutional litigation, and Canadian high court judges, like their American counterparts, are using privacy language in their holdings and dicta under the Charter regime. First, the court must recognize the privacy component of a specific right or freedom. Once the court determines that a privacy right has been infringed, the court must ask under section one of the Charter whether the limits imposed on privacy are "reasonable" and can be "demonstrably justified in a free and democratic society."<sup>76</sup> Such a qualification on a human right can serve as a significant barrier to successful litigation. However, the court has set a high standard for section one analysis.<sup>77</sup> The final question before the court is what remedy is available to enforce the right.

The Supreme Court of Canada initially recognized an individual's reasonable expectation of privacy against governmental encroachment in *Hunter v. Southam, Inc.*<sup>78</sup> In fact, it is clear after this seminal decision that section eight of the Charter is 'all

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72. *Id.* § 7.

73. *Id.* § 10(b).

74. *Id.* § 11(b).

75. *Id.* § 2.

76. *Regina v. Oakes*, 1 S.C.R. 103, 104 (1986).

77. In *Oakes*, the Supreme Court of Canada enunciated the test for any section one inquiry under the Charter. To establish that a limit is reasonable and "demonstrably justified in a free and democratic society," two criteria must be satisfied. *Id.* at 104. First, the objective of the law in question must be pressing and substantial. Second, the party relying on section one must also prove, on a balance of probabilities, that the means chosen are reasonable and demonstrably justified. To decide this, the court has devised a "form of proportionality test," which consists of three components. *Id.* at 106. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality between the effects of the measures and the objective. *Id.*; see *Regina v. Big M. Drug Mart Ltd.*, 1 S.C.R. 295 (1985) (setting forth the test discussed in *Oakes*).

78. 2 S.C.R. 145, 159-60 (1984); see also *James Richardson & Sons v. Ministry of Nat'l Revenue*, 1 S.C.R. 614 (1984) (analyzing the extent to which inquiries can be made into the trading activities of brokers).



about privacy.<sup>79</sup> In *Hunter*, government investigators searched the premises and files (excluding files in the newsroom) of the *Edmonton Journal* in the course of an inquiry under the Combines Investigation Act. The Southam newspaper chain successfully challenged the constitutionality of section ten of this federal statute, which by its terms purported to permit very wide-ranging searches and seizures.<sup>80</sup>

Speaking for the Supreme Court, Chief Justice Brian Dickson stated that the function of a constitution, as opposed to a statute, "is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties."<sup>81</sup> The court determined that section eight "guarantees a broad and general right to be secure from unreasonable search and seizure";<sup>82</sup> its purpose is "to protect individuals from unjustified state intrusions upon their privacy."<sup>83</sup>

The Canadian Supreme Court adopted the approach of its American counterpart in interpreting the fourth amendment to the United States Constitution, emphasizing the right to privacy in *Katz v. United States*.<sup>84</sup>

This limitation on the right guaranteed by § 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.<sup>85</sup>

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79. See Stone, *The Inadequacy of Privacy: Hunter v. Southam and the Meaning of "unreasonable" in Section 8 of the Charter*, 34 MCGILL L.J. 685 (1989) (discussing *Hunter* and the privacy law surrounding the decision).

80. The Charter only protects individuals against "government" action. It does not offer a remedy against private sector abuses, unless a claim can be advanced indirectly, for instance by attacking the government bodies that regulate various companies.

81. *Hunter*, 2 S.C.R. at 155.

82. *Id.* at 158.

83. *Id.* at 160.

84. 389 U.S. 347 (1967). The Canadian court nevertheless cautioned that "American decisions can be transplanted to the Canadian context only with the greatest caution." *Hunter*, 2 S.C.R. at 161. Equally relevant is an understanding of how the Supreme Court of the United States has eroded the *Katz* standard in its subsequent decisions. See Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 IND. L.J. 549 (1990) (discussing the dilution of fourth amendment protection in America).

85. *Hunter*, 2 S.C.R. at 159-60.

Chief Justice Dickson further wrote that "the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior."<sup>86</sup> The government must make a showing, based on an objective standard, that the invasion of privacy rights is warranted:

The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion. History has confirmed the appropriateness of this requirement as the threshold for subordinating the expectation of privacy to the needs of law enforcement. Where the state's interest is not simply law enforcement as, for instance, where state security is involved, or where the individual's interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one.<sup>87</sup>

The reference to "bodily integrity" seems particularly propitious for defenses against such invasive practices as drug testing through urinalysis.

In general, the *Hunter* decision gives constitutional recognition to an individual's right to assert a reasonable expectation of privacy vis-à-vis the government. Justice G. V. La Forest asserts that, after *Hunter*, the onus shifts to the government upon the showing of a reasonable expectation of privacy.<sup>88</sup> As documented below, courts have begun to apply this standard in a wide variety of cases as a foundation for further definition of the right to privacy. *Hunter* is thus directly comparable in importance to *Griswold v. Connecticut*.<sup>89</sup>

In *The Queen v. Dymont*,<sup>90</sup> a blood sample was taken from an emergency patient without his consent or knowledge. Justice La Forest, writing for himself and the Chief Justice,<sup>91</sup> identified three areas where privacy claims could be affirmed against governmental encroachments on the basis of section eight: those involving

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86. *Id.* at 161-62.

87. *Id.* at 167-68.

88. G.V. La Forest, *Privacy*, 7 (July 17, 1990) (unpublished manuscript of a speech to the Canadian Human Rights Foundation Summer School, University of Prince Edward Island).

89. 381 U.S. 479 (1965).

90. 2 S.C.R. 417 (1988).

91. Although the majority in this case was five to one, Justices Beetz, Lamer, and Wilson simply decided that because the seizure was unlawful, the evidence should be excluded. *Id.* at 440-41.

territorial or spatial aspects, those related to the person, and those that arise in the informational context.<sup>92</sup> In *Dyment*, La Forest wrote:

[T]he restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state. . . . Invasions of privacy must be prevented, and where privacy is outweighed by other societal claims, there must be clear rules setting forth the conditions in which it can be violated. This is especially true of law enforcement, which involves the freedom of the subject.<sup>93</sup>

La Forest stated that privacy claims were based on the need to protect the sanctity of human dignity and the dignity and integrity of the individual.<sup>94</sup> Moreover, La Forest argued that the privacy of the individual,

like other *Charter* rights, must be interpreted in a broad and liberal manner so as to secure the citizen's right to a reasonable expectation of privacy against governmental encroachments. Its spirit must not be constrained by narrow legalistic classifications based on notions of property and the like which served to protect this fundamental human value in earlier times.<sup>95</sup>

The La Forest opinion in *Dyment* emphasized that section eight not only prohibits unreasonable searches and seizures but further guarantees the right to be secure against unreasonable searches and seizures.

*Regina v. Duarte*,<sup>96</sup> a Supreme Court decision in a drug case, addressed the issue of whether surreptitious electronic surveillance of an individual by the state, without a judicial warrant but with the agreement of one of the participants, constitutes an unreasonable search or seizure under section eight of the Charter. Writing for the majority, Justice La Forest noted that *Hunter* "instructs us that the primary value served by section 8 is privacy" and that

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92. *Id.* at 428-30. La Forest's 1990 speech usefully reviews how the Supreme Court has tried to balance privacy and law enforcement interests with respect to private dwellings, random stopping of motor vehicles, bodily searches (fingerprinting and blood samples), and searches at the border. See G.V. La Forest, *supra* note 88, at 9-16.

93. *Dyment*, 2 S.C.R. at 427-28, 430.

94. See *id.* at 429 (underlining the "seriousness of a violation of the sanctity of a person's body" as constituting an "affront to human dignity"); see also G.V. La Forest, *supra* note 88, at 8 (discussing his opinion in *Dyment*).

95. *Dyment*, 2 S.C.R. at 426.

96. 65 D.L.R.4th 240 (1990). In *Duarte*, the police rented an apartment for a police informer and equipped it with audio-visual equipment, which was used to record a cocaine transaction involving the accused, an undercover officer, and the informer.

its spirit "must not be constrained by narrow legalistic classifications. . . . If one is to give § 8 the purposive meaning attributed to it by *Hunter v. Southam Inc.*, one can scarcely imagine a state activity more dangerous to individual privacy than electronic surveillance. . . ."97 La Forest interpreted section eight as establishing "our right to be free from unreasonable invasions of our right to privacy."<sup>98</sup>

La Forest viewed the problem of participant surveillance as follows:

[I]f the state were free, at its sole discretion, to make permanent electronic recordings of our private communications, there would be no meaningful residuum to our right to live our lives free from surveillance. . . . A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meaning. . . .

It thus becomes necessary to strike a reasonable balance between the right of individuals to be left alone and the right of the state to intrude on privacy in the furtherance of its responsibilities for law enforcement.

In a dramatic reversal of contemporary police practices, the court then determined that a reasonable expectation of privacy requires prior judicial authorization of surveillance by an agency of the state.<sup>99</sup>

Even though the Supreme Court of Canada uses privacy language with considerable positive effect in its interpretation of the Charter, the idea of amending the Charter to create an explicit constitutional right to privacy has much to recommend it. The Justice Committee of the House of Commons, in its 1987 report on the revision of the federal Privacy Act, suggested that serious consideration should be given to creating a simple constitutional right to personal privacy.<sup>100</sup> The present political climate makes

97. *Id.* at 249.

98. In an extended discussion of *Duarte*, La Forest declared: "If the State were free to record at its whim all of our private conversations, then the concept of privacy would have no meaning." G.V. LaForest, *supra* note 88, at 18. La Forest regards *Duarte* as being concerned with informational privacy. He further expounded on the risks of unauthorized electronic surveillance, without advance judicial authorization, in his majority opinion in *Wong v. The Queen* (judgment rendered Nov. 22, 1990).

99. See Making, *Wiring of officers curbed by rulings*, *Globe & Mail*, Nov. 12, 1990, at A8, col. 1.

100. COMMITTEE ON JUSTICE, *supra* note 61, at 91.

such a specialized amendment unlikely for the foreseeable future, since, as in the United States, it is hard to imagine the issue becoming such a societal priority.

However, there are some disadvantages to developing a constitutional right to privacy in Canada. Clearly, it would contribute to the increase of litigiousness and legal costs that are already significant under the Charter, as more and more citizens attempt to assert their rights in the courts.<sup>101</sup> Moreover, the concept of privacy is so amorphous, ill-defined, and diverse that its use could further stimulate peculiar and time-consuming claims. The public is also likely to lack enthusiasm for the privacy claims of such unsympathetic individuals as alleged drug offenders. Nevertheless, promoting a constitutional right appears to be the best way to let individuals seek to protect their privacy in the face of novel challenges.

Such an explicit amendment to the Charter is preferable to depending entirely on the judiciary to breathe life into the Charter through decisions like *Hunter*. Politicians, having stumbled into such innovative reforms as the Charter and laws allowing access to government information, are unlikely to think that it is in the government's interest to allow the people to enjoy a constitutionally recognized right to privacy, since it can be so easily used against the government itself. Even if politicians can be persuaded of the value of privacy, their advisors are likely to be much less enchanted. This simply completes a circle in which the public requires entrenched, preferably explicit, rights of which they cannot be deprived.

The experience with the judicial recognition and application of a right to privacy in American federal and state constitutional law justifies some optimism about the utility and desirability of such a constitutional right in Canada. At present, the future of Canada's constitutional privacy is in the hands of sensitive judges and skilled advocates.

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101. Such developments are desirable, since, by American standards, rights consciousness is underdeveloped in Canada, as are civil liberties litigation and private human rights organizations. For example, the Toronto-based Canadian Civil Liberties Association and Quebec's Ligue des Droits et Libertés, because of very limited human and financial resources, are not in a position to match the efforts of an organization like the American Civil Liberties Union and its local offshoots.

## V. DATA PROTECTION IN CANADA

Since the absence of an explicit common law or Charter-based right to personal privacy in Canada remains an impediment to the protection of individual human rights, the specific kinds of protections incorporated in such legislation as the federal Privacy Act are increasingly important and, furthermore, distinguish Canada from the United States.

At present, the federal government,<sup>102</sup> Quebec,<sup>103</sup> and Ontario<sup>104</sup> have enacted "privacy laws" that are, in effect, data protection statutes for controlling the collection and use of personal information by the public sector. They incorporate the fair information practices that are standard in all such laws in Western countries.<sup>105</sup> Moreover, these data protection acts do not explicitly address the evolving challenges to privacy posed by such technologies as electronic surveillance in the workplace and drug testing, except to the extent that these practices require the collection and storage of personal data, but they are capable of expansion in that direction. In 1987 the Justice Committee of the House of Commons supported movement in that direction under the Privacy Act.<sup>106</sup> However, it appears the current Progressive-Conservative government will not support the development of the Privacy Act into all-encompassing privacy legislation.<sup>107</sup> Given the burdens of making data protection effective, it is doubtful that the Privacy Commissioner of Canada has the capacity to become responsible for all types of privacy issues and claims.<sup>108</sup>

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102. Privacy Act, R.S.C. ch. P-21 (1983).

103. An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information, Que. Stat. ch. 30 (1982).

104. Freedom of Information and Protection of Privacy Act, ONT. REV. STAT. ch. 25 (1987).

105. See generally D. FLAHERTY, *supra* note 3, at 30-39, 104-11, 175-81, 253-58, 321-24 (analysis of the goals of data protection in West Germany, Sweden, France, Canada, and the United States).

106. See COMMITTEE ON JUSTICE, *supra* note 61, at 72 (recommending that the definition of "personal information" in the Privacy Act be broadened to include all types of electronic surveillance and that the Privacy Commissioner be empowered to monitor recent developments in surveillance practices).

107. See DEPARTMENT OF JUSTICE, ACCESS AND PRIVACY: THE STEPS AHEAD 3-4 (1987) ("The government believes that the *Privacy Act*, like similar legislation in other countries, should concentrate on data protection matters and only regulate the collection, use and disclosure of information about individuals produced by such surveillance and tests [as polygraph and urinalysis].").

108. See D. FLAHERTY, *supra* note 3, at 397-400. I have further developed this argument in Flaherty, *Data Protection and National Information Policy*, in FROM DATA PRO-

The Canadian practice of formulating privacy rules as data protection laws with accompanying ombudsmen to promote implementation is an admirable activity and should not be discouraged by a process of allowing recourse to the courts. Although individuals need assistance in protecting their privacy rights against the government, the private sector and other individuals should rely on the courts for this protection only as a last resort, since they are expensive and move slowly. The Privacy Commissioner of Canada, for example, not only assists and advises persons seeking data protection but also monitors relevant technological and administrative developments and conducts audits and investigations of personal information practices.<sup>109</sup> There is no comparable independent data protection office in Washington, D.C., or any state capital. Additionally, the Privacy Commissioner resolves most data protection problems before they reach the Federal Court of Canada.<sup>110</sup> Given the costs of all litigation and the difficulties of recovering legal costs in Canada,<sup>111</sup> ombudsmen-style solutions are generally preferable for the resolution of privacy problems.

## VI. CONCLUSIONS

The ultimate protection for the individual must lie in the constitutional entrenchment of rights to privacy, data protection, and informational self-determination. One can make a strong argument, even in the context of primarily seeking to promote data protection, that having an explicit constitutional right to personal privacy is a desirable goal in any society that has a meaningful written constitution and a bill of rights. The purpose of creating a constitutional right to privacy is not to leave data protection solely

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TECTION TO KNOWLEDGE MACHINES: THE STUDY OF LAW AND INFORMATICS 29, 29-48 (P. Seipel ed. 1990).

109. For a complete analysis of the Canadian Privacy Commissioner's powers, see D. FLAHERTY, *supra* note 3, at 259-62.

110. In his seven year term as the Canadian Privacy Commissioner, John Grace did not bring a single case against a government institution before the Federal Court. This means that "no recommendation of the Privacy Commissioner has been defied." PRIVACY COMM'R OF CANADA, ANNUAL REP. PRIVACY COMMISSIONER 1989-90, at 9 (1990).

111. In the United States, plaintiffs can obtain attorney fees under certain state and federal civil rights acts. *See, e.g.*, 42 U.S.C. § 1988 (1988). Attorneys can, in some instances, also take cases on the basis of contingent fees. Neither avenue is generally available in Canada. In fact, a losing party in Canada may have to pay the costs of the winner, although this is rare in constitutional litigation. Moreover, recoveries for compensatory damages in Canada are exceptionally low. Although one can argue for punitive damages in charter litigation, it is relatively easy to avoid a jury trial in civil cases.

to the courts, except for the interpretation of the necessary statutes in cases of conflict but to allow individuals to assert privacy claims in various arenas that extend beyond general and specific data protection laws.

In Sweden, a government appointed committee recommended the inclusion of protection against undue infringement on privacy by means of electronic data processing in the constitutional catalogue of "fundamental freedoms and rights." Thereafter, the Instrument of Government, the main constitutional document, was amended to contain a provision on privacy, effective January 1, 1989.<sup>112</sup> The Portuguese Constitution has recently been revised to include a new provision, article 35, on data protection. This article lists data protection rights in the form of a series of fair information practices.<sup>113</sup>

These European precedents pose the question for common law countries of why a constitutional right to both informational self-determination and data protection is needed. The idea seems a strange one in North America. In Canada, data protection officials are officers of Parliament or the legislature, to which they report directly. The Privacy Commissioner of Canada is appointed for a fixed term and at a high salary to protect his or her independence.<sup>114</sup> But Parliament could also amend the Privacy Act at the behest of a majority government and even abolish the office. It seems unlikely that there is a way to avoid this possibility in a parliamentary democracy, absent constitutional entrenchment of a right to data protection. However, even constitutional rights and privileges are not useful in the face of efforts to subvert the goals of legislation, such as those of Prime Minister Mulroney in appointing his former press attaché to the office of Privacy Commissioner.<sup>115</sup>

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112. According to article three, "[e]very citizen shall to the extent more precisely laid down by law be protected against infringements of his personal privacy by recording information about him by automatic data processing." See *Constitutional Provision on Privacy*, TRANSNAT'L DATA AND COMM. REP., Feb. 1990, at 26, 26.

113. These include rights of access to personal information and prohibitions on the storage of sensitive data and the assignment of all-purpose national identification numbers. A translation appears in TRANSNAT'L DATA AND COMM. REP., June/July 1989, at 28.

114. Privacy Act, R.S.C. ch. P-21, §§ 53-54 (1983).

115. Bruce Phillips, formerly a leading journalist, played a partisan role on behalf of the Prime Minister's office during the 1988 election campaign. Normally such an appointment would be cleared in advance by the three main political parties. In June 1990 the opposition parties voted overwhelmingly against Phillips after an extended debate. See HOUSE OF COMMONS DEBATES, June 6, 1990, at 12341-12355; *Id.* June 7, 1990, at 12424-



Of course, having a constitutional right to privacy is not a panacea for all privacy problems, since courts are then put in a position of balancing competing interests. As a California Court of Appeals said in ruling that the preemployment drug testing program of the Times-Mirror Corp. did not violate the state constitution's right to privacy, "[A] court should not play the trump card of unconstitutionality to protect absolutely every assertion of individual privacy."<sup>116</sup> Commentators have frequently noted that United States federal courts are more than capable of drawing fine lines that end up being hostile to privacy.<sup>117</sup> Canadian courts have a similar capacity, as the Supreme Court's holding that individuals have lessened expectations of privacy at border crossings demonstrates.<sup>118</sup> Yet privacy advocates can hardly expect more than an informed consideration of competing interests, which may result in a determination that privacy interests must occasionally be sacrificed.<sup>119</sup> Moreover, as American experience again demonstrates, Congress has not been reluctant to act in recent years to overcome high court decisions that were, in its view, unnecessarily restrictive of informational privacy rights.<sup>120</sup> There can be no better resolution of significant privacy problems in democratic socie-

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44. The government majority in the Senate subsequently approved the appointment in 1991, again with significant opposition.

116. *Wilkinson v. Times-Mirror Corp.*, 215 Cal. App. 3d 1034, 1046, 264 Cal. Rptr. 194, 202 (1989).

117. Reading American cases as a Canadian, one has to ask why one should trust Canadian judges not to whittle away our legitimate expectations of privacy, as has happened in the United States. The positive response is that Canadian judges are moving in an essential direction at the moment in establishing and explicating the basic right, which is a necessary precondition to further application of this right in specific cases. The existence of data protection laws and agencies facilitates reliance on the legislature and the privacy ombudsmen to protect privacy, as opposed to litigation.

118. See *Regina v. Simmons*, 2 S.C.R. 495 (1988). The context was a strip search of a woman at the border. The court stated that "[t]he degree of personal privacy reasonably expected at customs is lower than in most other situations." However, the strip was still found to have been conducted unreasonably. *Id.* at 497; see G.V. La Forest, *supra* note 88, at 15-16.

119. In *Edmonton Journal v. Alberta*, 2 S.C.R. 1326 (1989), the Supreme Court weighed the right of the press under the freedom of expression doctrine to publish details of matrimonial cases more highly than the right to privacy. Yet Justice La Forest, writing for three dissenters, was willing to extend privacy protection under the Charter to nongovernmental intrusions, including placing restrictions on the press.

120. Congress enacted the Right to Financial Privacy Act of 1978 to create a protectable privacy interest in personal records held by banks. See 12 U.S.C. § 3401 (1988). In enacting the Electronic Communications Privacy Act in 1986, Congress rejected the Supreme Court's conclusion in *Smith v. Maryland*, 442 U.S. 735 (1979), that telephone toll records are not entitled to privacy protection. See 18 U.S.C. § 3127 (1988).

ties than for legislators to draw the line on the meaning of "reasonable expectations" of privacy in specific sectors.

Finally, there is a pressing need for additional empirical research on the impact of various privacy protection mechanisms, since it seems evident that there are considerable problems in actually demonstrating the benefits of either a constitutional right to privacy or a tort right, given the lack of appropriate research at present.<sup>121</sup> Privacy advocates need to do a better job of evaluating the privacy protections that are already in place, just as we try to fashion and promote new solutions for pressing problems.

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121. See generally D. FLAHERTY, *supra* note 3 (demonstrating the benefits to individuals of statutory data protection rights).

