

Fall 1977

Toward a Right of Privacy as a Matter of State Constitutional Law

Gerald B. Cope, Jr.

Follow this and additional works at: <http://ir.law.fsu.edu/lr>

 Part of the [Constitutional Law Commons](#), [Privacy Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Gerald B. Cope, Jr., *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 Fla. St. U. L. Rev. 631 (2014) .
<http://ir.law.fsu.edu/lr/vol5/iss4/4>

This Note is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

NOTES

TOWARD A RIGHT OF PRIVACY AS A MATTER OF STATE CONSTITUTIONAL LAW

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	633
II. PRIVACY AND TECHNOLOGY	639
III. THE INVASION OF PRIVACY TORT	646
IV. PRIVACY INTERESTS IN UNITED STATES CONSTITUTIONAL LAW	651
V. THE RIGHT OF PRIVACY IN THE UNITED STATES CONSTITUTION	659
VI. THE QUEST FOR A DEFINITION OF PRIVACY	682
VII. THE RIGHT OF PRIVACY IN STATE CONSTITUTIONS	690
A. <i>States Having a Free-standing Right of Privacy</i>	692
1. <i>Alaska</i>	692
2. <i>Montana</i>	697
3. <i>California</i>	701
B. <i>States Integrating the Privacy Right with the Prohibition against Unreasonable Searches and Seizures</i>	710
1. <i>Hawaii</i>	710
2. <i>Illinois</i>	713
3. <i>South Carolina</i>	717
4. <i>Louisiana</i>	718
5. <i>Florida</i>	721
C. <i>States in which the Privacy Section is the Equivalent of the Prohibition against Unreasonable Searches and Seizures</i>	725
1. <i>Washington</i>	725
2. <i>Arizona</i>	728
VIII. ANALYSIS AND RECOMMENDATIONS	730
A. <i>The Right of Privacy</i>	730
B. <i>Privacy in the States</i>	731
1. <i>Protection of Private Communications from Interception by Government</i>	732
2. <i>Protection of Private Communications from Interception by Private Persons</i>	736
3. <i>Protection of the Right of Privacy from Government Intrusion</i>	736

4. <i>Protection of the Right of Privacy from Private Intrusion</i>	740
C. <i>Conclusion</i>	742
APPENDIX	744

TOWARD A RIGHT OF PRIVACY AS A MATTER OF STATE CONSTITUTIONAL LAW*

I. INTRODUCTION

The year 1890 marked the official closing of the American frontier.¹ For the first time there was no longer a clearly defined boundary of unsettled land in the West. True, there remained isolated empty areas. But the day of an ever-available frontier of vacant land had come to a close. Henceforth, the United States could look forward to denser settlement, scarcer resources, and, contemporary historians believed, definite changes in the American character.²

It was also in 1890 that the *Harvard Law Review* published an article by Samuel Warren and Louis Brandeis which proposed that the courts recognize a right to privacy.³ Warren and Brandeis were motivated by very personal concerns: they were outraged at the treatment the Warren family had received in the social columns of the Boston press. They proposed the recognition of what is now the tort, "invasion of privacy."

The closing of the frontier in 1890 was a moment of symbolic importance, marking a transition into an era of increasing population, decreasing space, and diminishing resources. That era had already seen significant changes in technology which foreshadowed privacy-threatening developments of our own time. The telephone, the micro-

* EDITOR'S NOTE: An earlier version of this note won the *Chesterfield Smith Award* for the best student paper on Florida's 1977-78 constitutional revision. The award was established in honor of Chesterfield Smith, Past President of the American Bar Association and Chairman of the 1968 Florida Constitution Revision Commission. It was created by a gift from the law firm of Steel, Hector & Davis, of Miami.

AUTHOR'S NOTE: The writer wishes to express deep appreciation to Professor Patricia Dore, Professor H.P. Southerland, Bradford Swing, Esq., and Judith Anne Bass for their advice, insight, and aid in the preparation of this note for publication.

1. In a . . . bulletin of the Superintendent of the Census for 1890 appear these significant words:

Up to and including 1880 the country had a frontier of settlement, but at present the unsettled area has been so broken into isolated bodies of settlement that there can hardly be said to be a frontier line. In the discussion of its extent, its westward movement, etc., it can not, therefore, any longer have a place in the census reports.

This brief official statement marks the closing of a great historic movement. Turner, *The Significance of the Frontier in American History*, in *THE TURNER THESIS I* (G. Taylor ed. 1956).

2. See *id.* at 1, 18. Turner's thesis that the "existence of an area of free land, its continuous recession, and the advance of American settlement westward, explain American development," *id.* at 1, held widespread acceptance at one time, but has been severely criticized. See essays collected in *THE TURNER THESIS*, *supra* note 1.

3. Warren and Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193 (1890).

phone, and the Kodak camera were all invented during this period.⁴ With remarkable prescience, Warren and Brandeis wrote that

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops."⁵

Present-day concerns over threats to privacy run remarkably parallel to those of Warren and Brandeis. For example, at the opening session of Florida's 1977-78 Constitution Revision Commission, Chief Justice Ben Overton said:

Our technological advancements continue to surpass our imagination, but political and economic problems are also increased with this advancement.

. . . .

. . . [W]ho, ten years ago, really understood that personal and financial data on a substantial portion of our population could be collected by government or business and held for easy distribution by computer operated information systems? There is a public concern about how personal information concerning an individual citizen is used, whether it be collected by government or by business. The subject of individual privacy and privacy law is in a developing stage. . . . [M]any appellate courts in this nation now have substantial . . . privacy issues before them for consideration. It is a new problem that should be addressed.⁶

Beyond this vexing issue lies the equally perplexing question how much autonomy the individual citizen should have for making important decisions about his life and future, free from government intrusion.

The purpose of this paper is to consider whether Florida—or any other state—should adopt a right of privacy section in its constitution. At first glance, this inquiry may seem idle or unnecessary, for privacy rights are already protected in certain ways. Perhaps best known is the 1965 declaration of the United States Supreme Court that there exists a right of privacy, guaranteed by the federal constitution, which assures

4. A. WESTIN, *PRIVACY AND FREEDOM* 338-39 (1967).

5. Warren and Brandeis, *supra* note 3, at 195 (footnote omitted).

6. Address by Chief Justice Ben F. Overton to the Constitution Revision Commission (July 6, 1977).

the right to obtain birth control information.⁷ In addition, privacy interests have been implicated in such diverse matters as the right to be free from electronic surveillance in a public telephone booth;⁸ the right to obtain birth control devices;⁹ the right to private possession of obscene materials;¹⁰ the right to private possession of marijuana in the home;¹¹ the right to obtain an abortion;¹² the right to be free from being secretly recorded and photographed in one's own home by disguised reporters who then publish the results;¹³ the right of a student to choose his hairstyle;¹⁴ the right of a guardian to order that life support systems be disconnected from a comatose person;¹⁵ the right to privacy in one's associations;¹⁶ the right to be free from being overzealously shadowed by private detectives;¹⁷ the right to be free from offensive intrusions by an aggressive photographer;¹⁸ the right not to be placed in a false light in the public eye;¹⁹ the right not to have one's name or likeness appropriated for commercial purposes without one's permission;²⁰ and the right to be free from certain central data collection schemes.²¹ Rights of privacy have been asserted, but not recognized, in an even broader variety of contexts.²²

7. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

8. *Katz v. United States*, 389 U.S. 347 (1967). *See also* Omnibus Crime Control & Safe Streets Act, Title III, 18 U.S.C. §§ 2510-2520 (1970 & Supp. V 1975) (federal wiretapping statutes).

9. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

10. *Stanley v. Georgia*, 394 U.S. 557 (1969).

11. *Ravin v. State*, 537 P.2d 494 (Alas. 1975). *Contra, e.g., State v. Baker*, 535 P.2d 1394 (Hawaii 1975). *See also Laird v. State*, 342 So. 2d 962 (Fla. 1977).

12. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

13. *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971).

14. *Breese v. Smith*, 501 P.2d 159 (Alas. 1972).

15. *In re Quinlan*, 355 A.2d 647 (N.J. 1976).

16. *NAACP v. Alabama*, 357 U.S. 449 (1958).

17. *Nader v. General Motors Corp.*, 255 N.E.2d 765 (N.Y. 1970).

18. *Galella v. Onassis*, 353 F. Supp. 196 (S.D.N.Y. 1972), *affirmed and modified*, 487 F.2d 986 (2d Cir. 1973).

19. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 812-14 (4th ed. 1971) [hereinafter PROSSER, TORTS].

20. *Id.* at 804-07.

21. *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974); *Merriken v. Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973). Both decisions are reviewed in detail in Section II.

22. *E.g., Paul v. Davis*, 424 U.S. 693 (1976) (circulation of inaccurate report that plaintiff was active shoplifter not actionable as a violation of constitutional right of privacy); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (privacy of passers-by not invaded by observing nude scenes on screen of drive-in theater); *Belle Terre v. Boraas*, 416 U.S. 1 (1974) (right to choose one's living companions does not override zoning limitation of number of unrelated individuals who may live in household); *Cohen v. California*, 403 U.S. 15 (1971) (privacy not invaded by "Fuck the Draft" insignia worn on jacket in public courthouse halls); *Pollak v. Public Utilities Comm'n*, 343 U.S. 451 (1952) (privacy of passengers not infringed by FM radio played on bus). *But see Moore v. City of East Cleveland*, 97 S. Ct. 1932 (1977) (zoning regulation restricting occupancy of

Privacy has been described as a fundamental right—for certain purposes—by the Supreme Court and by Congress.²³ Legal recognition of privacy rights has received acclaim and advocacy.²⁴ The intense American interest in privacy is paralleled by similarly vigorous discussion in other countries.²⁵

Despite these developments, the legal protection afforded privacy remains limited, inconsistent, and fragmentary. Some important privacy interests are protected, but they are narrow in scope. Simply put, there is no *general* constitutional or statutory right of privacy as a matter of federal or state law. Instead, there are certain *specific* privacy rights, or *privacy interests*, in certain very carefully defined areas. Indeed, the United States Supreme Court has stated:

[T]he protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual states.²⁶

Ten states now have provisions in their constitutions which expressly protect privacy.²⁷ Alaska and Montana have adopted what might be called a "free-standing" declaration of the right of privacy: that is, a separate section of the constitution which deals only with the right of privacy. Similarly, California has declared privacy an "inalienable right."²⁸

Seven other states confer more limited recognition on the privacy right by tying it closely to another constitutional provision, the prohibition against unreasonable searches and seizures. Florida, for example, extends protection "against the unreasonable interception of

single-family dwellings to members of the nuclear family violates due process clause of fourteenth amendment).

23. *Griswold v. Connecticut*, 381 U.S. at 485 (by implication); Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(4), 88 Stat. 1896 (reproduced in comment to 5 U.S.C. § 552a (Supp. V 1975)): "[T]he right to privacy is a personal and fundamental right protected by the Constitution of the United States."

24. PROSSER, TORTS, *supra* note 19, at 802: "Although there was at first some hesitation, a host of other legal writers have taken up the theme, and no other tort has received such an outpouring of advocacy of its bare existence." (footnote omitted).

25. *E.g.*, D. MADGWICK & T. SMYTHE, *THE INVASION OF PRIVACY* (1974) (Great Britain); DEPARTMENT OF COMMUNICATIONS AND DEPARTMENT OF JUSTICE, *PRIVACY & COMPUTERS* (1972) (Canada).

26. *Katz v. United States*, 389 U.S. at 350-51 (footnotes omitted).

27. ALAS. CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, 1; FLA. CONST. art. I, § 12; HAWAII CONST. art. I, § 5; ILL. CONST. art. I, §§6, 12; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7. See Appendix for full text of each. The Florida Constitution protects "private communications." The Arizona and Washington Constitutions protect "private affairs." The remaining states protect "privacy."

28. CAL. CONST. art. I, § 1.

private communications by any means.”²⁹ The Illinois, Hawaii, Louisiana, and South Carolina privacy provisions are somewhat broader, protecting against “invasions of privacy”; the Washington and Arizona privacy sections are narrower, serving as the functional equivalent of the prohibition against illegal searches and seizures.

States have also responded by protecting privacy through judicial interpretation. As a result, some state courts have, like the federal judiciary, imported a constitutional right of privacy into some more general provision of the state constitution.³⁰ The privacy rights so created have often been very limited; indeed, some of the states which extended recognition to a state right of privacy through court decision have later inserted an express privacy provision into the state constitution.³¹

A decade ago, in the revision effort that created Florida's 1968 constitution, attention was given to the privacy rights of Florida citizens. The result was the provision protecting private communications against unreasonable interception. Today, as the current revision process proceeds, it is both fitting and essential to reopen consideration of the right of privacy.

It is a commonplace to observe that with the abrupt transition from the Warren Court to the Burger Court, the federal judicial attitude toward the protection of individual liberties has drastically altered. The states have not been slow to fill the void. Justice Brennan has eloquently argued that the states now occupy a crucial role in deciding precisely the character and extent of rights to be enjoyed by their citizens.³² Justice Brennan points out that “when during the 1960's our rights and liberties were in the process of becoming increasingly federalized, state courts saw no reason to consider what protections, if any, were secured by state constitutions.”³³ He surmises that dissatisfaction with the trend of recent Supreme Court decisions has led state courts to be much more solicitous of their own citizens' rights, resting their decisions on their own state constitutions. Many state courts have now “independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme

29. FLA. CONST. art. I, § 12.

30. See, e.g., *Breese v. Smith*, 501 P.2d 159 (Alas. 1972) (right to be let alone—hair length); *Melvin v. Reid*, 297 P. 97 (Cal. Dist. Ct. App. 1931) (invasion of privacy tort); *Cason v. Baskin*, 20 So. 2d 243 (Fla. 1944) (invasion of privacy tort).

31. The states listed in note 30 *supra* all adopted privacy provisions subsequent to the dates of the indicated court decisions. See Appendix.

32. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

33. *Id.* at 495.

Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased."³⁴

Despite their crucial role, the majority of states have not responded forcefully. The Privacy Protection Study Commission commented, in its just-completed two-year national study,

The States have been active in privacy protection, and in many cases innovative, but neither they nor the Federal government have taken full advantage of each other's experimentation. Altogether, the Commission's inquiry into State record-keeping practices forces it to conclude that an individual cannot rely on State government to protect his interest in the records and recordkeeping practices of either State agencies or private entities.³⁵

Moreover, relying on *National League of Cities v. Usery*,³⁶ the Commission concluded that the Federal Constitution stands as an absolute barrier to congressional legislation to regulate state government record-keeping, except as a condition of federal funding.³⁷

There are, of course, exceptions to the general pattern of state inaction, and the Commission cited some of the constitutional provisions mentioned above. Nonetheless, the Commission's general indictment underlines the point made in *Katz*: the protection of a person's general right to privacy is left largely to the law of the individual states. The question is squarely before the states—and, in Florida, before the 1977-78 Constitution Revision Commission—to decide exactly what protection, if any, should be conferred on the people's right of privacy.

This note will begin by suggesting that the existing protection of privacy under federal and state court decisions is inadequate. To this

34. *Id.* at 500 (footnote omitted).

35. PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 489 (1977). The Privacy Protection Study Commission was created by the Privacy Act of 1974, Pub. L. No. 93-579, § 5, 88 Stat. 1896 (reproduced in comment to 5 U.S.C. § 522a (Supp. V. 1975)). The Commission filed its final report in July, 1977.

36. 426 U.S. 833, 852 (1976).

37. The Commission reasoned:

[N]either the Fourteenth Amendment nor the commerce clause would seem to enable the Federal government to regulate State activities that are essential to the performance of *internal* governmental functions, such as record-keeping. As recently as 1976, the U.S. Supreme Court ruled in *National League of Cities v. Usery*, that the Federal government may not legislate in ways that "operate to directly displace the States' freedom to structure integral operations in areas of traditional government functions." The national government, in other words, may not use *coercion* to influence, for example, State government record-keeping practices, but the *National League of Cities* decision does not preclude the use of *inducements*, such as making certain record-keeping practices a condition of Federal funding.

PRIVACY PROTECTION STUDY COMMISSION, *supra* note 35, at 488-89.

end, there is first a brief consideration of technology and privacy, followed by a review of the evolution of the privacy idea. This includes the development of the "invasion of privacy" tort, which evolved from Warren and Brandeis' 1890 law review article; the gradual recognition by the United States Supreme Court that privacy is an interest protected by the Bill of Rights; and the establishment of a limited right of privacy by the Supreme Court in 1965. These lines of legal development have not culminated in a general privacy right. Indeed, as the succeeding sections of this note indicate, commentators have been unable to agree on a general definition of privacy—or even to agree that the term "privacy" has an ascertainable meaning at all.

The focus of this paper then shifts to the express privacy provisions of state constitutions. With two exceptions, the right of privacy has been included in state constitutions for ten years or less. While state constitutional privacy is, therefore, a recent phenomenon, enough case law and constitutional convention proceedings are available to indicate what privacy interests the states have sought to protect and how well—or poorly—they have succeeded in doing so. The privacy sections of each of the ten states are subjected to individual examination.

The note concludes with an analysis of the strengths and weaknesses of the state privacy provisions. The experiences of the states to date reveal some very promising avenues for success, as well as some pitfalls to be avoided. These considerations would be applicable to any state that is contemplating the addition of a right of privacy to its constitution. The analysis culminates in a recommendation that the 1977-78 Constitution Revision Commission propose a right of privacy for the Florida Constitution. The suggested language, adapted from the Montana and Alaska Constitutions, is

The right of the people to privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

II. PRIVACY AND TECHNOLOGY

Chief Justice Overton's opening remarks before the 1977-78 Constitution Revision Commission are representative of one widespread contemporary concern about privacy.³⁸ As Chief Justice Overton indicated, much discussion centers on technological advancements which have made possible the collection, storage, and dissemination of enormous amounts of information about individual citizens.³⁹

38. See text accompanying note 6 *supra*.

39. While Justice Overton did not say so, in the opinion of this writer the national Watergate scandal has had a galvanizing effect in the privacy area, as in other areas of

The numerous ways in which technology threatens privacy have been thoroughly examined elsewhere,⁴⁰ and it is unnecessary to engage in a comprehensive survey here. Rather this section will consider as examples two court decisions which illustrate the potential for abuse in current information systems.⁴¹

In *Merriken v. Cressman*,⁴² a parent and child successfully sought

American life. Who among the general public would ever have imagined the existence of the elaborate White House taping system which secretly recorded individual meetings and telephone conversations with the President? Yet few today are unaware that such a system did exist. Few are unaware of the Watergate and Ellsberg burglaries, or the improper uses of the Federal Bureau of Investigation and the Central Intelligence Agency for domestic information-gathering purposes. See generally THE RIGHT TO PRIVACY (G. McClellan ed. 1976); WAR ON PRIVACY (L. SOBEL ed. 1976); Towe, *A Growing Awareness of Privacy in America*, 37 MONT. L. REV. 39 (1976).

Significantly, Watergate did not involve new privacy-threatening technological developments. Rather, it involved tape recording, wiretapping, and old-fashioned burglary. The significant feature of the Watergate scandal was the clear demonstration that one cannot always rely on the self-restraint of public officials or private organizations in order to protect the privacy of the citizenry. The potential for abuse, then, arises not from technological development alone, but rather from the decisions made by those who have technological tools at their disposal.

40. See, e.g., CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES, PRIVACY IN A FREE SOCIETY (1974); COUNCIL OF STATE GOVERNMENTS, PRIVACY (1975); DEPARTMENT OF COMMUNICATIONS & DEPARTMENT OF JUSTICE, *supra* note 25; A. HARRISON, THE PROBLEM OF PRIVACY IN THE COMPUTER AGE: AN ANNOTATED BIBLIOGRAPHY (vol. 1, 1967; vol. 2, 1969); E. LONG, THE INTRUDERS (1966); D. MADGWICK & T. SMYTHE, *supra* note 25; M. MAYER, RIGHTS OF PRIVACY (1972); A. MILLER, THE ASSAULT ON PRIVACY (1971); NATIONAL ACADEMY OF SCIENCES, DATABANKS IN A FREE SOCIETY (1972); NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, PRIVACY: PERSONAL DATA AND THE LAW (1976); ON RECORD: FILES AND DOSSIERS IN AMERICAN LIFE (S. Wheeler ed. 1976); PRIVACY, COMPUTERS AND YOU (B. Rowe ed. 1972); PRIVACY PROTECTION STUDY COMMISSION, *supra* note 35; PRIVACY PROTECTION STUDY COMMISSION, TECHNOLOGY AND PRIVACY (1977) (Appendix 5 to the Commission's final report, printed separately); J. RAINES, ATTACK ON PRIVACY (1974); THE RIGHT TO PRIVACY, *supra* note 39; SURVEILLANCE, DATAVEILLANCE AND PERSONAL FREEDOMS: USE AND ABUSE OF INFORMATION TECHNOLOGY (Columbia Human Rights Law Review ed. 1973) (original version 4 COLUM. HUMAN RIGHTS L. REV. 1 (1972)); UNITED STATES DEPARTMENT OF HEALTH, EDUCATION & WELFARE, RECORDS, COMPUTERS AND THE RIGHTS OF CITIZENS (1973); WAR ON PRIVACY, *supra* note 39; A. WESTIN, *supra* note 4; Towe, *supra* note 39; Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003 (1966) (Part I); Project, *The Computerization of Government Files: What Impact on the Individual?*, 15 U.C.L.A. L. REV. 1371 (1968).

41. For a similar approach, see PRIVACY PROTECTION STUDY COMMISSION, *supra* note 35, at 6-8. To illustrate the privacy problems posed by governmental and private record-keeping, the Privacy Protection Study Commission chose *State ex rel. Tarver v. Smith*, 470 P.2d 172 (Wash. 1970) (en banc), *cert. denied*, 402 U.S. 1000 (1971), and *United States v. Miller*, 425 U.S. 435 (1976). *Tarver* involved the unsuccessful quest of a welfare mother to have removed from her case file a derogatory report by a caseworker which Ms. Tarver asserted was false and could be prejudicial if made available to other state social agencies. *Miller* sustained government access to a bank's records regarding individual depositors, on the theory that they are business records of the bank rather than property of the individual accountholder. The latter case is discussed more fully in note 228 *infra*.

42. 364 F. Supp. 913 (E.D. Pa. 1973).

to enjoin the Norristown, Pennsylvania, School Board from implementing a special program, called Critical Period of Intervention, designed to identify potential drug abusers among eighth grade students. As the program was formulated by the school district, all children were to answer questionnaires exploring details of their family composition and relationships, including such questions as whether the parents "make me feel unloved."⁴³ In addition, students and teachers were "to identify other students . . . who make unusual or odd remarks, get into fights or quarrels with other students, make unusual or inappropriate responses during normal school activities, or have to be coaxed or forced to work with other pupils."⁴⁴ No guidance was given to explain what was an "odd or unusual remark" or "inappropriate response."

Affirmative consent of parents was not, at first, required for participation of the child in this program. Acquiescence would be deemed consent. The disclosure to parents about the program, however, was "far from candid";⁴⁵ it was "a 'selling device', 'an attempt to convince the parent to allow the child to participate.'"⁴⁶ The affirmative consent of the child was not required, though the questionnaire could be returned blank. Refusal of the plaintiff child to participate—which fact became known to his classmates—led to accusations by other students that he was a drug abuser.⁴⁷

The school district planned to enter the questionnaire data into a "massive data bank."⁴⁸ The information was to be available to a wide variety of personnel throughout the school system. There was no certainty that the information might not also find its way to sources outside the school system, such as, in the judge's words, "an enterprising district attorney."⁴⁹ The data were to be used to identify potential drug abusers, though the program had not formulated a very specific definition of "abuse." Students so identified were to be referred to compulsory guided group interaction sessions or to community agencies. Psychiatrists testified about the possibility of a "self-fulfilling prophecy," whereby the process of labeling a child a potential drug abuser could convince the child that he was one, thus causing the child to begin to behave according to the expectation.

The federal district court concluded that the proposed program im-

43. *Id.* at 916.

44. *Id.*

45. *Id.* at 920.

46. *Id.* at 915.

47. *Id.*

48. *Id.* at 916.

49. *Id.*

permissibly interfered with fundamental family relationships and child-rearing, thereby violating the right of privacy under the United States Constitution. The district court entered a permanent injunction forbidding the school system to implement the Critical Period of Intervention project.⁵⁰

A second example illustrating the impact of current technology is *Menard v. Saxbe*.⁵¹ The plaintiff in that case was arrested and detained for a crime he denied all knowledge of.⁵² Although he was held in custody for over two days, no information was adduced linking him with any crime, and he was released without being charged.⁵³ Even so, the Los Angeles Police Department routinely forwarded his fingerprints to the Federal Bureau of Investigation with the notation "Released—Unable to connect with any felony or misdemeanor at this time."⁵⁴ The FBI entered the record into its criminal files.

At the time of the arrest, plaintiff was a 19-year-old college student who, during the pendency of the litigation, became an officer in the Marine Corps.⁵⁵ Plaintiff and his family tried for over a year to obtain expungement of the arrest record; "the FBI, the Los Angeles police, and the California Department of Justice each [took] the position that it was powerless to effect the removal of the record from the FBI's

50. *Id.* at 922.

51. 498 F.2d 1017 (D.C. Cir. 1974). Earlier opinions in the same case are reported in *Menard v. Mitchell*, 328 F. Supp. 718 (D.D.C. 1971), *on remand from* 430 F.2d 486 (D.C. Cir. 1970).

52. The United States Court of Appeals for the District of Columbia Circuit summarized the facts as follows:

At the time of his arrest, Dale Menard was a 19-year-old college student spending the summer working in Los Angeles. On the evening of August 9, 1965, he visited with friends in the vicinity of Sunland Park, a recreational area in Los Angeles. At approximately 11:30 p.m., Menard walked to the park to wait for a friend who had arranged to pick Menard up and drive him to his room in a Los Angeles suburb. . . . The friend failed to arrive at the agreed time, and in the early hours of August 10th, after dozing on a park bench and then walking across the street to look through the window of a rest home in search of a clock, Menard returned to the bench to wait once more. . . .

At approximately 3:00 a.m., Menard was approached by two Los Angeles police officers . . . , who questioned him about a prowler report from the rest home. They also confronted him with a wallet they evidently had found on the ground near the park bench. . . . The wallet contained \$10 and bore the name and address of an individual who lived about three miles from Sunland Park. . . . Despite Menard's insistence that he knew nothing of the wallet, and despite the subsequent arrival of Menard's friend, who corroborated his account, Menard was placed under arrest, booked and fingerprinted at the stationhouse, and held in police custody for over two days.

498 F.2d at 1019.

53. *Id.*

54. *Id.*

55. 328 F. Supp. at 720.

files.”⁵⁶ The Los Angeles Police Department advised, and the FBI confirmed, that “removal of the record would be possible ‘only upon order of a court of competent jurisdiction.’ ”⁵⁷ The FBI did, however, have a special agent review the Los Angeles Police file. The FBI then changed its record to read, “Released—Unable to connect with any felony or misdemeanor—. . . not deemed an arrest but a detention only.”⁵⁸

The FBI continued to refuse to expunge the record; by policy, expungement would be granted only by request of the local police. No individual request for expungement would be honored, regardless of circumstances. Indeed, the FBI would not reveal to an individual whether or not any information about him or her existed in its files.⁵⁹ At the time of the litigation, the FBI had some two hundred million sets of fingerprints in its criminal and applicant files; the criminal file alone contained information on “some sixty million arrests of approximately nineteen million people.”⁶⁰

The United States Court of Appeals for the District of Columbia Circuit made the chilling comment that “[w]hat began modestly in 1924 is now . . . ‘out of effective control.’ ”⁶¹ The court continued:

Due primarily to the Bureau's limited resources, there is no followup to assure that records of arrest frequently are amended to show an ultimate non-criminal disposition. There are no controls on the accuracy of information submitted by the contributing agencies. The Bureau exercises little supervision and control over contributing agency uses of the records the FBI disseminates. . . . The FBI cannot take the position that it is a mere passive recipient of records received from others, when it in fact energizes those records by maintaining a system of criminal files and disseminating the criminal records widely [and thus creating] . . . a capacity for both good and harm.

. . . .
 . . . It would be monstrous to suppose that all persons questioned by the police, many of them “cooperative and law abiding citizens[.]” could properly be enshrined, for reasons of bureaucratic practice, in the FBI's criminal records.⁶²

56. 498 F.2d at 1020.

57. 328 F. Supp. at 723.

58. 498 F.2d at 1020 (footnotes omitted).

59. *Id.* at 1002.

60. 328 F. Supp. at 721. The applicant file contained fingerprint cards submitted by state and federal agencies and certain others who sought information about prior criminal activity in connection with employment, license, or permit applications.

61. 498 F.2d at 1026, *citing* the opinion of the district court, 328 F. Supp. at 727.

62. 498 F.2d at 1026, 1029 (footnotes omitted).

The plaintiff's concern centered on the use of FBI records by employers. State and local agencies could obtain criminal record data for employment purposes "whenever authorized by *local enactment*";⁶³ such enactments called for FBI data as a prerequisite for all sorts of jobs, ranging from any applicant for a driver's license in Denver, Colorado, to all nonresidents seeking employment in Provincetown, Massachusetts.⁶⁴ The FBI had no ability to verify that the information disseminated would be used for proper purposes; "[i]t is apparent that local agencies may on occasion pass on arrest information to private employers."⁶⁵

The court of appeals focused on the adverse consequences of an arrest. In a careful analysis, the court documented from empirical studies and court decisions the numerous ways in which arrest records may adversely affect the arrestee. Studies of employment agencies and employers, for example, indicated that over half would reject an applicant who had an arrest record "even if followed by acquittal or complete exoneration"⁶⁶ Arrest records are used in law enforcement decisions whether or not to make a subsequent arrest or to bring formal charges; they play an important role in the grant or denial of bail, in impeachment at trial, and in sentencing.⁶⁷ Opportunities for schooling as well as professional and occupational licensing are likewise affected by arrest records.⁶⁸

The court of appeals recognized, given the uses to which the information was put, that serious constitutional issues were raised:

[I]t is clear that the government may not, wittingly or unwittingly, engage in wanton defamation of individuals and groups, and there is [a] limit beyond which the government may not tread in devising classifications that lump the innocent with the guilty.⁶⁹

The court chose to avoid the issue "whether or to what extent the Constitution forbids the Government from contributing to the harm to the individual that may attend maintenance of a criminal file showing, as an arrest, what was only a chance encounter."⁷⁰ Instead, the court ordered expungement of Menard's arrest record from the criminal files

63. 328 F. Supp. at 726-27 (emphasis added).

64. *Id.* at 728. The court's Appendix A contains a sampling from throughout the United States.

65. *Id.* at 722.

66. 430 F.2d at 490 & n.17.

67. *Id.* at 491 (footnotes omitted).

68. *Id.* at 490 (footnote omitted).

69. *Id.* at 492 (footnotes omitted).

70. 498 F.2d at 1029 (footnote omitted).

on the theory that the agency had exceeded its statutory authority. The court reasoned that a showing had been made that plaintiff's encounter with the police should not be deemed an arrest; therefore, the FBI had exceeded its statutory authority by maintaining in its arrest files a record shown conclusively not to be an arrest.⁷¹

While the court of appeals consciously sought statutory grounds on which to avoid the constitutional issue,⁷² the district court had perceived that *Menard's* case was simply a manifestation of more fundamental changes in society:

The increasing complexity of our society and technological advances which facilitate massive accumulation and ready regurgitation of far-flung data have presented . . . problems not contemplated by the framers of the Constitution. These developments emphasize a pressing need to preserve and to redefine aspects of the right of privacy to insure the basic freedoms guaranteed by this democracy.⁷³

Societal complexity and interdependence have created the demand for background information about individuals; technology has created the means to capture and produce it.

Systematic recordation and dissemination of information about individual citizens is a form of surveillance and control which may easily inhibit freedom to speak, to work, and to move about in this land. If information available to Government is misused to publicize past incidents in the lives of its citizens the pressures for conformity will be irresistible. Initiative and individuality can be suffocated and a resulting dullness of mind and conduct will become the norm. We are far from having reached this condition today, but surely history teaches that inroads are most likely to occur during unsettled times like these where fear or the passions of the moment can lead to excesses. The present controversy, limited as it is, must be viewed in this broadest context.⁷⁴

Menard was decided in the spring of 1974. On the last day of the same year, the Federal Privacy Act of 1974 became law.⁷⁵ This significant legislation imposed restrictions on the scope and operation of manual and computer information systems maintained by federal agencies. Though law enforcement agencies are permitted to exempt

71. *Id.* at 1029-30.

72. *Id.*

73. 328 F. Supp. at 725 (footnote omitted).

74. *Id.* at 726.

75. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified at 5 U.S.C. § 552a (Supp. V 1975)).

themselves from certain of the Act's requirements,⁷⁶ to its credit, the FBI has not utilized the full scope of the available exemptions.⁷⁷ *Menard's* significance, however,—and that of *Merriken*—lies in the illustration of the dynamics of data systems.

It is important to note that in the *Menard* case, as in *Merriken*, there was no showing of malicious or intentional abuse of power by the governmental agencies involved. Rather, the agencies openly pursued objectives they considered permissible or even laudable. Indeed, the federal district court in *Menard* said, "Given the very general nature of its purported authority the Bureau has proceeded cautiously. . . . The Division has carried out its work in a responsible, meticulous manner."⁷⁸ Despite good intentions, then, the agency had succeeded in creating a national system of far-reaching scope which was "out of effective control,"⁷⁹ just as the school district in *Merriken*, pursuing what it considered to be a highly meritorious purpose, created extensive infringements on privacy. Societal complexity, together with technological advance, create conditions ripe for negligent or inadvertent abuse—perhaps a more substantial danger than intentional privacy invasion.

Examples could be multiplied, but *Merriken* and *Menard* illustrate the fundamental point. In the former case, the abuse grew out of a locally originated, locally governed program; in the latter, the privacy problem was national in scale. While there has always been a concern in our system for the rights of the individual in relation to the demands of the society, technological advance has posed the issue in new and unexpected ways.

Although the computer is the topic of much contemporary debate about privacy, the privacy idea originated in a pre-computer era. The next sections explore the early development of the idea that privacy is an interest deserving of legal protection.

III. THE INVASION OF PRIVACY TORT

It is obligatory for anyone writing about privacy to consider the contribution made by two works published during the nineteenth century. The first of these is *A Treatise of the Law of Torts* by Judge

76. See 5 U.S.C. § 552a(j), (k) (Supp. V 1975); NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, *supra* note 40, at 52-55.

77. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, *supra* note 40, at 54, citing 28 C.F.R. § 20.34 (1976). The court of appeals made note that the Department of Justice had proposed several regulations relating to criminal record data, which were pending at the time *Menard* was decided. 498 F.2d at 1030 n.53.

78. 328 F. Supp. at 722.

79. *Id.* at 727.

Thomas M. Cooley.⁸⁰ It was Cooley who coined the phrase "the right to be let alone."⁸¹ For all that appears in his treatise, Cooley had a rather limited meaning in mind. He discussed the right to be let alone in a chapter dealing generally with personal rights; the only specific torts included in the discussion were those of assault and battery.

Regardless of what Cooley originally intended the phrase to mean, it was repeated in Warren and Brandeis' 1890 *Harvard Law Review* article, entitled *The Right to Privacy*.⁸² It may be that these two happy turns of phrase—"the right to be let alone" and "the right to privacy"—were in and of themselves responsible for the instant popularity of the privacy idea, because they crystallized a concept that until then had been expressed in terms of property and contract.

It is now legendary that the Warren-Brandeis article was written in a fit of exasperation over stories written about the Warren family in the society pages of the Boston papers.⁸³ It was to that sort of in-

80. T. COOLEY, *A TREATISE OF THE LAW OF TORTS* 29 (1st ed. 1880).

81. Cooley's exact statement was: "The right to one's person may be said to be a right of complete immunity: to be let alone." *Id.*

82. Warren & Brandeis, *supra* note 3.

83. Prosser, *Privacy*, 48 CAL. L. REV. 383, 383 (1960). Warren and Brandeis had been classmates in the Harvard Law School class of 1877, where they had stood second and first, respectively. *Id.* at 383-84. From 1879 to 1889, they practiced law together. Warren gave up the practice in order to manage an inherited business. A. MASON, *BRANDEIS: A FREE MAN'S LIFE* 56, 68 (1946). Prosser reported that:

It was the era of "yellow journalism," when the press had begun to resort to excesses in the way of prying that have become more or less commonplace today; and Boston was perhaps, of all the cities in the country, the one in which a lady and a gentleman kept their names and their personal affairs out of the papers.

Prosser, *Privacy*, *supra* at 383 (footnote omitted).

A minor mystery surrounds the precise event which motivated Warren and Brandeis to write the article. Prosser stated:

In the year 1890 Mrs. Samuel D. Warren, a young matron of Boston, which is a large city in Massachusetts, held at her home a series of social entertainments on an elaborate scale. . . . [T]he newspapers of Boston . . . covered her parties in highly personal and embarrassing detail. . . . The matter came to a head when the newspapers had a field day on the occasion of the wedding of a daughter, and Mr. Warren became annoyed.

Id. at 383, citing A. MASON, *supra* at 70.

Prosser must almost certainly be wrong about the "wedding of a daughter." Mason, Brandeis' biographer and Prosser's cited source, recounted:

Though no longer partners in practice, Warren and Brandeis, in 1890, collaborated on an article published in December of that year in the *Harvard Law Review* as "The Right to Privacy." Quite characteristically, for Brandeis, this study grew out of a specific situation. On January 25, 1883, Warren had married Miss Mabel Bayard, daughter of Senator Thomas Francis Bayard, Sr. They set up house-keeping in Boston's exclusive Back Bay section and began to entertain elaborately. The *Saturday Evening Gazette*, which specialized in "blue blood items," naturally reported their activities in lurid detail. This annoyed Warren, who took the matter up with Brandeis. The article was the result.

A. MASON, *supra* at 70. Presumably there was no 1890 wedding of a child of the 1883

trusion that the law review article was directed, and certain portions of it—particularly those dealing with the press and the prevailing social norms—strike the modern reader as quaint.⁸⁴

The singular contribution of Warren and Brandeis was to reconceptualize certain then-existing legal rules by suggesting that they rested on an underlying right of privacy. Warren and Brandeis carefully analyzed a series of English and American common-law decisions, chiefly from the nineteenth century, dealing with the publication of information about a person (or a person's writings, belongings, or photographs) without that person's consent. The cases showed a consistent pattern of protection of privacy, but the courts had rested their decisions on theories of invasion of a property interest or a breach of contract or trust. Warren and Brandeis argued that the interest really being protected was privacy. That principle, they asserted, better explained the line of cases; the courts had simply stretched the property

marriage. As Mason's account implies, the 1883 event was Warren's only marriage. See I MARQUIS—WHO'S WHO, WHO WAS WHO IN AMERICA 1303 (1968) (Vol. I 1897-1942).

Regardless of the precise event which stimulated Warren and Brandeis to write, it was, as Prosser observed, "an annoyance for which the press, the advertisers and the entertainment industry of America were to pay dearly over the next seventy years." Prosser, *Privacy*, *supra* at 383.

84.

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.

Warren & Brandeis, *supra* note 3, at 196.

and contract rules in order to reach that result. Thus, argued the authors, there should be explicit recognition that the common law had already conferred protection on privacy interests:

The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.⁸⁵

The authors went on to suggest limitations on this proposed right to privacy⁸⁶ and remedies for its breach.⁸⁷

In its inception, therefore, the proposed right to privacy was intended to be a new branch of tort law. The right to privacy bore a relationship to constitutional law only insofar as the first amendment might prove to be a barrier to recovery in some cases. While the Bill of Rights has been the touchstone for the constitutional right to privacy in the sixties and seventies,⁸⁸ it is not mentioned by Warren and Brandeis: theirs is a common-law rule.⁸⁹

The invasion of privacy tort has now been adopted through court decision or legislation in virtually all American jurisdictions.⁹⁰ Prosser asserted that "[t]o date, the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing

85. *Id.* at 213 (footnote omitted). "The cases referred to above show that the common law has for a century and a half protected privacy in certain cases, and to grant the further protection now suggested would be merely another application of an existing rule." *Id.* n.1.

86. *Id.* at 214-19.

87. *Id.* at 219-20.

88. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) and section V *infra*.

89. Warren and Brandeis' silence about the first amendment may surprise present-day readers. The proposed action for invasion of privacy was aimed directly at newspapers, which Warren and Brandeis held in low esteem. See note 84 *supra*. They proposed a strong set of remedies, including an action in tort for injury to feelings and, in some cases, injunctive relief; they suggested legislative consideration of possible criminal penalties and included a proposed statute in a footnote. Warren & Brandeis, *supra* note 3, at 219 & n.3. While public-interest exceptions were provided for, *id.* at 214-19, nonetheless the potential for conflict with the first amendment seems clear. By contrast, the Restatement (Second) of Torts devotes attention to first amendment limitations to the action for invasion of privacy. See RESTATEMENT (SECOND) OF TORTS § 652D, Special Note on Relation of § 652D to the First Amendment to the Constitution; § 652E, Comment d; § 652H, Comment c. Warren and Brandeis' position is not surprising, however, in view of the state of first amendment law in that period. A constitutional privilege in defamation and invasion of privacy cases is a very recent development. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); Note, *Media Liability for Libel of Newsworthy Persons: Before and After Time, Inc. v. Firestone*, 5 FLA. ST. U.L. REV. 446 (1977).

90. PROSSER, TORTS, *supra* note 19, at 804.

in common except that each represents an interference with the right of the plaintiff 'to be let alone.'"⁹¹ Prosser's formulation, which has gained general acceptance,⁹² consists of the following categories:

(1) *Appropriation*: the unauthorized use of a person's name or likeness for some advantage, usually pecuniary.⁹³

(2) *Intrusion*: invading one's solitude by intruding in one's home or business quarters, physically or by electronic eavesdropping.⁹⁴

(3) *Public Disclosure of Private Facts*: private information about a person which is true, and therefore not defamatory, but which a reasonable person would find highly objectionable if given wide publicity. Examples have included posting a sign that a person owed money and would not pay; disclosure of the present identity and past history of a reformed criminal; medical pictures of intimate anatomy; and highly personal portrayal of intimate private characteristics.⁹⁵

(4) *False Light in the Public Eye*: widespread publicity to facts which will show the person in a false light even though the facts themselves may or may not be defamatory. Examples include falsely attributing an opinion or statement to a person, or the use of a plaintiff's picture with an article to which it bears no relationship, for example, using an honest taxi drivers's face to illustrate an article about dishonest taxi drivers.⁹⁶

Each of the above tort actions is designed to vindicate a privacy interest. In some instances the invasion of privacy tort will overlap other torts. Intrusion may in some circumstances also be actionable as trespass to property or assault, and false light invasion of privacy will often be actionable as defamation. The underlying privacy interest, however, differs from the property interest vindicated in a trespass action, or the interest in being free from apprehension of harm which is rectified by an action for assault, or the interest in unsullied reputation which is protected by a defamation action.

91. *Id.*

92. Bloustein described Prosser as "by far the most influential contemporary exponent of the tort," supporting the assertion by reference to the number of reported decisions relying on Prosser and to the reflection of Prosser's views in the drafting of the Restatement (Second) of Torts. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 964 (1964); see RESTATEMENT (SECOND) OF TORTS ch. 28A (1976). Prosser served as Reporter for the Restatement (Second) until his resignation in 1970.

93. PROSSER, TORTS, *supra* note 19, at 804-07; see RESTATEMENT (SECOND) OF TORTS § 652C (1976).

94. PROSSER, TORTS, *supra* note 19, at 807-09; see RESTATEMENT (SECOND) OF TORTS § 652B (1976).

95. PROSSER, TORTS, *supra* note 19, at 809-12; see RESTATEMENT (SECOND) OF TORTS § 652D (1976).

96. PROSSER, TORTS, *supra* note 19, at 812-14; see RESTATEMENT (SECOND) OF TORTS § 652E (1976).

Confusion may be avoided if a bright line is drawn between the foregoing common-law invasion of privacy tort on the one hand, and the federal constitutional right of privacy on the other. Despite the popularity of the invasion of privacy tort, it is not the source from which the United States constitutional right of privacy evolved. Instead, the Supreme Court's 1965 decision in *Griswold v. Connecticut*⁹⁷ rested on the Bill of Rights and the fourteenth amendment. As the next sections make clear, there is no linkage between the invasion of privacy tort and the constitutional right of privacy.

IV. PRIVACY INTERESTS IN UNITED STATES CONSTITUTIONAL LAW

The word "privacy" does not appear in the United States Constitution or the Bill of Rights. Not until the late nineteenth century did the United States Supreme Court begin to discuss privacy as an interest protected by the fourth and fifth amendments, and not until 1965 did it confer on privacy the status of a constitutional right.

This development followed two separate, but related, lines. The earlier was the gradual recognition by the Court that existing provisions of the Bill of Rights protect privacy interests. The later involved actual recognition of a constitutional right of privacy in *Griswold v. Connecticut*.⁹⁸ Oddly enough, the constitutional privacy right did not follow automatically from an earlier line of decisions. Nor did *Griswold* produce a unified, general privacy right, but rather one of limited scope.

To the modern reader, it may appear obvious that the Bill of Rights protects privacy interests. Professor Westin has argued, on admittedly slender evidence, that contemporaries of the Framers expressly recognized that privacy was the interest being protected.

The technological realities of eighteenth- and early nineteenth-century America limited communication to direct speech or letter. Eyes and ears were the only instruments for physical surveillance; penetration of the mind was possible only by torture or compelled testimony; and there was little extensive record keeping about individuals. Given this setting, American constitutional, statutory, and common law concentrated on establishing shields of privacy to protect individual and organizational autonomy, ensure personal and family privacy in the home, and safeguard confidentiality in the basic modes of communication.⁹⁹

97. 381 U.S. 479 (1965).

98. *Id.*

99. A. WESTIN, *supra* note 4, at 330.

According to Westin, the Framers defined privacy in modes of thought heavily influenced by John Locke: belief in individualism, the principle of limited government, and the "central importance of private property and its linkage with the individual's exercise of liberty."¹⁰⁰

As Westin explains, there are no significant cases interpreting the free speech and free press provisions of the first amendment prior to the Civil War, and no important federal cases on the fourth amendment until the 1880's.¹⁰¹ Consequently, there is no authoritative statement by the Supreme Court from the period of time in which the intent of the Framers would have been common knowledge. Westin has relied in part on inference and in part on the writings of figures like Justice Story, who wrote of the rights of "private sentiment" and "private judgment,"¹⁰² and Francis Lieber, who wrote of "freedom of communion" and "liberty of silence."¹⁰³

Whatever may have been the degree of express recognition that privacy was an important interest protected by the Bill of Rights, the Lockean conceptual framework was controlling. Individualism and private property were themselves values to be protected. One student has also suggested that the prevailing modes of legal thought have had a significant influence in the interpretation of the Bill of Rights, given the shift from the legal formalism of the nineteenth century to legal realism in the twentieth.¹⁰⁴

The Supreme Court's early handling of privacy interests may be illustrated by reference to several decisions. One leading case was *Boyd v. United States*,¹⁰⁵ decided in 1886, which Brandeis once described as "a case that will be remembered as long as civil liberty lives in the United States."¹⁰⁶ The Supreme Court held that production of private papers could never be compelled in a criminal prosecution; to do so would violate the fourth and fifth amendments.

The crucial point in *Boyd* was the method of analysis: the focus was on the nature of the object seized, rather than on the process by which it was obtained. The Court noted that "the act of 1863 was the first act in this country . . . which authorized the search and seizure of a man's private papers, or the compulsory production of them . . .

100. *Id.*; see Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 949-51 (1977) [hereinafter cited as *Formalism*].

101. A. WESTIN, *supra* note 4, at 331, 333.

102. *Id.* at 331.

103. *Id.*

104. See Note, *Formalism, supra* note 100, for an excellent treatment of this topic.

105. 116 U.S. 616 (1886).

106. *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (dissenting opinion).

in a criminal case."¹⁰⁷ The court then distinguished between the seizure of stolen or forfeited goods, in which the possessor had no property interest, and the seizure of one's books and papers—one's rightful property—in order to obtain information or evidence. "In the one case, the government is entitled to the possession of the property; in the other it is not."¹⁰⁸ Even with the assistance of court process, the compulsory production of private papers was per se an unreasonable search and seizure:

The principles . . . affect the very essence of constitutional liberty and security. . . . [T]hey apply to all invasions on the part of the government . . . of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.¹⁰⁹

Two justices concurred in the Court's view of the fifth amendment but did not believe the fourth amendment to be applicable.¹¹⁰ Foreshadowing the modern view, they argued that searches—even of private papers—"founded on affidavits, and made under warrants which described the thing to be searched for, the person and place to be searched, are still permitted."¹¹¹

Decisions in subsequent decades eroded *Boyd*, bringing the Court ever closer to the position of the dissent.¹¹² Finally, in *Warden v. Hayden*,¹¹³ the Court discarded fourth amendment classifications based on the character of the property seized. Rejecting distinctions between "mere evidence" on the one hand, and "instrumentalities, fruits of crime, or contraband"¹¹⁴ on the other, Justice Brennan wrote:

107. 116 U.S. at 622-23.

108. *Id.* at 623. "'Papers are the owner's goods and chattels; they are his dearest property . . .'" *Id.* at 627-28 (citation omitted).

109. *Id.* at 630.

110. *Id.* at 638-41 (Miller, J., and Waite, C.J., concurring).

111. *Id.* at 641.

112. See *Warden v. Hayden*, 387 U.S. 294, 300-10 (1967) for a detailed analysis of the property and privacy interests involved in the line of decisions after *Boyd*.

113. 387 U.S. 294 (1967).

114. *Id.* at 301.

The premise that property interests control the right of the Government to search and seize has been discredited We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.¹¹⁵

The *Hayden* majority was at pains to point out that a privacy analysis permits motions to suppress to be made by persons who do not have a sufficient possessory interest to maintain trespass or replevin, the historic methods of obtaining exclusion of illegally seized evidence.¹¹⁶ But the shift to a privacy analysis was double-edged, for it enlarged the area of permissible searches, subject only to the fourth amendment procedural requirements of probable cause, particularity, and approval by a neutral and detached magistrate.¹¹⁷ Arguably the express recognition that privacy was the interest protected by the fourth amendment occurred at the expense of that same interest, since a previously shielded, albeit ill-defined, zone of privacy was removed by the decision.¹¹⁸

The Court's early method of analysis may also be illustrated by the decision in *Union Pacific Railway v. Botsford*.¹¹⁹ There plaintiff sued in federal court for physical injuries sustained while traveling on one of the defendant's trains. Defendant's motion for a physical examination of the plaintiff was denied. The Supreme Court affirmed, reasoning that

115. *Id.* at 304 (citations omitted).

116. *Id.* at 303-04.

117. *Id.* at 309-10 (by implication), 306-07, 310-12 (Fortas, J., and Warren, C.J., concurring); 312-25 (Douglas, J., dissenting).

118. *Id.* at 312-25 (Douglas, J., dissenting). *But cf. id.* at 309 (questioning whether the "mere evidence" rule afforded any meaningful protection of privacy).

While the Court has not directly overruled *Boyd*, it has questioned its continuing authority:

It would appear that . . . the precise claim sustained in *Boyd* would now be rejected for reasons not there considered.

The pronouncement in *Boyd* that a person may not be forced to produce his private papers has nonetheless often appeared as dictum in later opinions of this Court. . . . To the extent, however, that the rule against compelling production of private papers rested on the proposition that seizures of or subpoenas for "mere evidence," including documents, violated the Fourth Amendment and therefore also transgressed the Fifth, . . . the foundations for the rule have been washed away.

Fisher v. United States, 425 U.S. 391, 408-09 (1976) (citations omitted); *accord*, *United States v. Miller*, 425 U.S. 435, 440 n.1 (1976); *Andreson v. Maryland*, 427 U.S. 463, 472 & n.6 (1976); *see* *Stone v. Powell*, 428 U.S. 465, 483 n.19 (1976). Justice Brennan, in his concurring opinion in *Fisher*, vigorously disagreed with the majority's privacy analysis and asserted that *Fisher* is "but another step in the denigration of privacy principles settled nearly 100 years ago in *Boyd v. United States* . . ." *Id.* at 414 (citation omitted).

For an excellent analysis of this line of decisions and the implications for privacy, see Note, *Formalism*, *supra* note 100.

119. 141 U.S. 250 (1891).

No right is held more sacred . . . by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . . "The right to one's person may be said to be a right of complete immunity: to be let alone."

. . . .

The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. . . . [It is] an indignity, an assault and a trespass; and no order or process . . . was ever known to the common law . . . except in a very small number of cases . . . coming down from ruder ages . . . and never . . . introduced into this country.¹²⁰

The decision rested, it should be noted, on common-law, rather than constitutional, principles.

A half-century later, in *Sibbach v. Wilson & Co.*,¹²¹ the Court distinguished *Botsford* on technical grounds, thus sustaining the validity of the Federal Rules of Civil Procedure which provided for precisely the sort of physical examination found so objectionable in *Botsford*.¹²² The *Sibbach* majority scarcely mentioned the privacy issue, stating "The suggestion that the rule offends the important right to freedom of invasion of the person ignores the fact that, as we hold, no invasion of freedom from personal restraint attaches to refusal so to comply with its provisions."¹²³ Four dissenting justices conceded that the rules did not allow a contempt citation for the plaintiff's refusal submit to a physical examination, but argued that available sanctions were compulsive nonetheless.¹²⁴ Justice Frankfurter wrote

The problem seems to me to be controlled by the policy underlying the *Botsford* decision. . . .

. . . [A] drastic change in public policy in a matter deeply

120. *Id.* at 251-52, quoting Judge Cooley. See notes 80-81 *supra* and accompanying text.

121. 312 U.S. 1 (1941).

122. The majority reasoned that *Botsford* had been decided at a time when no federal or state statute was controlling with regard to the validity of a physical examination; thus the issue was decided in federal court on common-law principles. In 1934, however, Congress had legislated, granting the Court the authority to adopt rules of civil procedure. The remaining question, therefore, was whether the rules were substantive or procedural; they were found to be procedural.

Sibbach dealt with the validity of the Federal Rules as applied to a plaintiff; the Rules were sustained as applied to a defendant in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964).

123. 312 U.S. at 14.

124. 312 U.S. at 17-18 (Frankfurter, J., dissenting).

touching the sensibilities of people or even their prejudices as to privacy, ought not to be inferred from a general authorization to formulate rules for the more uniform and effective dispatch of business on the civil side of the federal courts.¹²⁵

While *Boyd* dealt with the sanctity of papers and personal effects, and *Botsford* with the sanctity of one's person, the wiretap cases indicate the Court's position on yet another privacy issue. In *Olmstead v. United States*,¹²⁶ the Court affirmed, 5-4, convictions for bootlegging which were based on information gathered by wiretapping. Taking a literal reading of the fourth amendment, the Court first reasoned that conversations are not tangible, and therefore are not "*things* to be seized" within the meaning of the fourth amendment.¹²⁷ Since the conversations were not protected, the only remaining inquiry was whether there had been a physical intrusion into the defendants' houses or offices which would constitute an "unreasonable search." The Court answered in the negative, because the taps had been made "without trespass upon any property of the defendants."¹²⁸ Since the telephone wire stretched beyond the defendants' houses, reasoned the Court, the wires were not protected, nor could defendants have any reasonable expectation that the telephone messages would be protected.¹²⁹

Justice Brandeis, already spiritual father of a common-law right of privacy by virtue of the 1890 law review article, dissented.¹³⁰ He argued that the Constitution should be flexibly construed to meet changed conditions of society. In his view, wiretapping made eavesdropping possible on a scale which made the former writs of assistance and general warrants "puny" by comparison:¹³¹

125. *Id.*

We are left to wonder in what direction lies progress. While (as will be explored below) the law presently affords protection to certain expectations of privacy apart from one's home, person, or property, the shift in focus to the reasonableness of the process by which one's privacy is invaded has left us subject to a variety of poking and probing: blood tests to determine intoxication, *Schmerber v. California*, 384 U.S. 757 (1966); stop and frisk, *Terry v. Ohio*, 392 U.S. 1 (1968); body cavity searches, e.g., *United States v. Mastberg*, 503 F.2d 465 (9th Cir. 1974); and physical examinations of the type disallowed in *Botsford*. All with due process of law, of course.

126. 277 U.S. 438 (1928).

127. *Id.* at 464. Italics in original.

128. *Id.* at 457, 464, 466.

129. *Id.* at 465-66. The Court stated that there was "no room in the present case for applying the Fifth Amendment unless the Fourth Amendment was first violated. There was no evidence of compulsion to induce the defendants to talk over their many telephones." *Id.* at 462.

130. *Id.* at 471.

131. *Id.* at 475-76.

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They 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. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.¹³²

The Brandeis view was ultimately to prevail, but several decades intervened before the Court changed its position. Until the Court reversed itself, the legitimacy of wiretapping continued to depend on the law of trespass. Thus, in *Goldman v. United States*,¹³³ a detectaphone placed against the wall of an adjoining office did not constitute a trespass and therefore did not violate the fourth amendment,¹³⁴ but in *Silverman v. United States*,¹³⁵ a "spike mike" which penetrated the defendant's wall by "a fraction of an inch"¹³⁶ did constitute an intrusion sufficient to violate the Constitution.

Finally, in *Katz v. United States*,¹³⁷ the Court abandoned the notion of constitutionally protected places and reaffirmed the view of *Warden v. Hayden* that the fourth amendment protects privacy interests. In so doing, it overruled *Olmstead* and *Goldman*.¹³⁸

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.¹³⁹

132. *Id.* at 478.

133. 316 U.S. 129 (1942).

134. *Id.* at 134.

135. 365 U.S. 505 (1961).

136. *Id.* at 512.

A distinction between the detectaphone employed in *Goldman* and the spike mike utilized here seemed to the Court of Appeals too fine a one to draw. The Court was "unwilling to believe that the respective rights are to be measured in fractions of inches." But the decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area. . . . We find no occasion to re-examine *Goldman* here, but we decline to go beyond it, by even a fraction of an inch.

Id.

137. 389 U.S. 347 (1967).

138. *Id.* at 353.

139. *Id.* at 351-52 (citation omitted).

In *Katz*, the petitioner's telephone call from a public telephone booth had been wiretapped without a physical intrusion. In reversing the conviction, the Court ruled that a warrant should have been obtained. The expectation of privacy, rather than the character of the place, became controlling; the rules of property law were specifically disavowed.¹⁴⁰ While the shift away from the Court's early method of fourth amendment analysis arguably resulted in a diminution of privacy in *Warden v. Hayden* and *Sibbach*, in *Katz* the protection of fourth amendment privacy interests resulted in an enhanced privacy safeguard: telephone conversations were brought into the zone of protection.

Katz illustrates one other important aspect of the Supreme Court's treatment of privacy. *Warden v. Hayden* and *Katz* were both decided in 1967, two years after the Court had announced the limited constitutional right to privacy in *Griswold v. Connecticut*.¹⁴¹ While it is significant that the Court in *Warden v. Hayden* and *Katz* ruled that the fourth amendment protected privacy interests, thereby making a full transition away from nineteenth century analysis, it is equally significant that the *Katz* Court emphatically refused to blend the fourth amendment privacy interest into the *Griswold* constitutional right of privacy:

[T]he Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion.¹⁴² But the protection of a person's *general* right to privacy—his right to be let alone by other people¹⁴³—is, like the protection of his property and of his very life, left largely to the law of the individual States.¹⁴⁴

140. *Id.* at 352-53, citing *Warden v. Hayden*, 387 U.S. 294 (1967).

We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. 389 U.S. at 353.

The phrase "expectation of privacy" appears in Justice Harlan's concurring opinion, *id.* at 360.

141. 381 U.S. 479 (1965).

142. Citing *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (first amendment associational privacy); *Tehan v. Shott*, 382 U.S. 406, 416 (1966) (fifth amendment; prohibiting comment on refusal to testify—retroactive application).

143. Citing *Warren & Brandeis*, *supra* note 3.

144. 389 U.S. at 350-51 (footnotes omitted). As examples of matters left to the states, the Court cited three cases involving conflict between privacy rights and the first amend-

The line between *Griswold's* right of privacy and other privacy interests is thus drawn very clearly by the Court.

Other cases may be briefly mentioned, for privacy interests have been implicated in connection with several amendments. In *NAACP v. Alabama*,¹⁴⁵ for example, the first amendment was held to protect "freedom to associate and privacy in one's associations."¹⁴⁶ In *Stanley v. Georgia*,¹⁴⁷ the Court ruled that the first and fourteenth amendments protect private possession of printed or filmed matter—in that case, obscene materials—in one's home.¹⁴⁸ The third amendment "prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion."¹⁴⁹ A contemporary statement of the policies underlying the fifth amendment, in some ways reminiscent of *Boyd*, reasoned, "[the fifth amendment] reflects many of our fundamental values and most noble aspirations: . . . our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life' . . ." ¹⁵⁰ To similar effect, the Court has said, "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."¹⁵¹

The foregoing cases are illustrative of the gradual process by which the Court has shifted away from the Lockean values—a formal protection of person, place, and property—and has substituted instead an examination of underlying privacy interests. Privacy has gradually become part of the federal constitutional lexicon, and privacy interests have been recognized in connection with several important provisions of the Bill of Rights. Remaining to be considered is the related but distinct development of the federal constitutional right of privacy itself.

V. THE RIGHT OF PRIVACY IN THE UNITED STATES CONSTITUTION

Though the opinion nowhere mentions a "right of privacy," *Skinner v. Oklahoma*,¹⁵² decided in 1942, is generally regarded as having "pro-

ment. *Id.* at 351 n.7; see *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (state invasion of privacy action can be maintained against publisher if misstatements in article were made with knowledge of their falsity or in reckless disregard of the truth); *Beard v. Alexandria*, 341 U.S. 622 (1951) (municipality may protect householders' desire for privacy by prohibiting door-to-door magazine sales by publisher); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (municipality may protect privacy of citizens by prohibition of "loud and raucous" sound trucks).

145. 357 U.S. 449 (1958).

146. *Id.* at 462; see *id.* at 466.

147. 394 U.S. 557 (1969).

148. *Id.* at 564-68.

149. *Katz v. United States*, 389 U.S. at 350 n.5.

150. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

151. *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

152. 316 U.S. 535 (1942).

vided the modern genesis for its constitutional status."¹⁵³ In *Skinner*, the United States Supreme Court invalidated an Oklahoma statute which allowed the sterilization of "habitual criminals"—persons who, having been twice convicted of "felonies involving moral turpitude," were again convicted of such a felony and sentenced to prison.¹⁵⁴ Proceedings could be instituted by the state attorney general against such an offender, who then had a right to jury trial on the sole issue of whether or not he or she could undergo the necessary sterilization operation without impairment of his or her general health.¹⁵⁵

While the petitioner argued for invalidation of the law on a variety of theories, the Court chose to rely on the equal protection clause. Under the peculiarities of the Oklahoma scheme, a person thrice guilty of larceny of \$20 was liable to be sterilized; a person convicted three times for embezzlement of the same amount was not.¹⁵⁶

Skinner foreshadowed the *Griswold* decision, however, in its treatment of the right of procreation. Justice Douglas, writing for the majority, was emphatic that such fundamental interests called for the strictest scrutiny of the Oklahoma statute:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. . . . There is no redemption for the individual whom the law touches. . . . He is forever deprived of a basic liberty.¹⁵⁷

It was in *Griswold v. Connecticut*¹⁵⁸ that the Supreme Court provided express recognition of a constitutional right of privacy. *Griswold* involved a criminal prosecution. The defendants were the Executive Director of the Planned Parenthood League of Connecticut and the Medical Director for the League's center in New Haven. Connecticut law at that time prohibited the use of contraceptives; violation was a misdemeanor. In addition, Connecticut law provided that one who assists, abets, or counsels another "to commit any offense may be prosecuted and punished as if he were the principal offender."¹⁵⁹ The defendants were convicted as accessories and fined. The Supreme Court reversed the convictions, holding that the statute forbidding the use of contraceptives violated the right of privacy.

153. W. LOCKHARDT, Y. KAMISAR, & J. CHOPER, *CONSTITUTIONAL LAW* 1491 (1975).

154. 316 U.S. at 536.

155. *Id.* at 536-37.

156. *Id.* at 538-39.

157. *Id.* at 541.

158. 381 U.S. 479 (1965).

159. *Id.* at 480.

Justice Douglas delivered the opinion of the Court. He emphasized the "intimate relation of husband and wife and their physician's role in one aspect of that relation."¹⁶⁰ Douglas then reviewed a variety of rights which, although not expressly mentioned in the Bill of Rights, had been found to exist by necessary implication. These included "the right to educate one's children as one chooses";¹⁶¹ freedom of inquiry and thought;¹⁶² "freedom to associate and privacy in one's associations"¹⁶³ and "the right of belief."¹⁶⁴

"The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras," Douglas said, "formed by emanations from those guarantees that help give them life and substance."¹⁶⁵ He cited the first, third, fourth, fifth, and ninth amendments as the source of this penumbral right, quoting the language from *Boyd* about "the sanctity of a man's home and the privacies of life,"¹⁶⁶ and citing several other cases, including *Skinner*.¹⁶⁷

Douglas concluded: "The present case . . . concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."¹⁶⁸ The Connecticut law was particularly obnoxious because it prohibited use of contraceptives:

Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights . . .¹⁶⁹

The members of the Court took divergent views regarding the existence, dimensions, and source of the right of privacy. Only Justice Clark was content to join Justice Douglas's opinion without further elaboration. Justices Goldberg, Brennan, and Chief Justice Warren joined in the opinion of the Court, but the three also joined in Justice Goldberg's lengthy concurring opinion. Justices Harlan and White concurred only in the judgment, each writing separately. Justices Black and Stewart dissented vigorously.

160. *Id.* at 482.

161. *Id.*, citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

162. *Id.*

163. *Id.* at 483, quoting *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

164. *Id.*

165. *Id.* at 484 (citation omitted).

166. *Id.*

167. *Id.* at 485.

168. *Id.*

169. *Id.* at 485-86.

In his concurring opinion, Justice Goldberg agreed that the right of marital privacy was embraced in the concept of liberty.¹⁷⁰ He placed particular emphasis on the ninth amendment; that amendment, he contended, clearly indicated that not all fundamental rights were enumerated in the Bill of Rights.¹⁷¹ Thus it was unnecessary to find a specific privacy guaranty in the Bill of Rights. The ninth and fourteenth amendments in combination, he argued, prohibited the states from abridging rights that were fundamental.¹⁷²

Justice Harlan, concurring in the judgment only, preferred to anchor a fundamental right of privacy to the due process clause of the fourteenth amendment "because the enactment violates basic values 'implicit in the concept of ordered liberty.'" ¹⁷³ Justice White likewise concurred in the judgment only. He argued that the justification for the statute—a state policy of prevention of illicit relationships—was "purely fanciful." The law swept unnecessarily broadly into the marriage relationship, and therefore deprived "persons of liberty without due process of law."¹⁷⁴

Justices Black and Stewart dissented strenuously. Black argued that there is no express constitutional right of privacy, and he objected to any effort to import such a right into other constitutional guarantees. "One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words . . . another word or words, more or less flexible and more or less restricted in meaning."¹⁷⁵ Conceding that he liked his "privacy as well as the next one," he said, "I am . . . compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."¹⁷⁶ Justice Stewart, while suggesting the Connecticut law was

170. *Id.* at 486.

171. *Id.* at 487-93.

172. *Id.* at 493.

173. *Id.* at 500, citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

Justice Harlan did not explicitly use the word "privacy" in his concurrence. But in reaching the conclusion that the Connecticut statute infringed the due process clause of the fourteenth amendment, Harlan referred to the "reasons stated at length in my dissenting opinion in *Poe v. Ullman* [367 U.S. 497, 522 (1961)] . . ." 381 U.S. at 500. *Poe* was a declaratory judgment action brought to challenge the same Connecticut statutes found unconstitutional in *Griswold*. The appeal in *Poe* was dismissed on ripeness grounds by the Supreme Court. Harlan's dissent thoroughly explored the privacy issue, 367 U.S. at 539-45, and characterized the Connecticut statute as "an intolerable and unjustifiable invasion of privacy . . ." *Id.* at 539. Thomas Emerson, counsel for appellants in *Griswold*, regarded Harlan as the sixth justice supporting the existence of the right of privacy. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 229 (1965).

174. 381 U.S. at 506-07.

175. *Id.* at 509.

176. *Id.* at 510.

“asinine,”¹⁷⁷ likewise found no constitutional source for a right of privacy.

Thus a clear majority of six justices agreed on the existence of the right of privacy.¹⁷⁸ It is interesting, though perhaps not very fruitful, to speculate why the Court chose to recognize a separate “right of privacy.” Clearly, an alternative was available. Justice White argued persuasively in his concurrence that the Connecticut statute deprived married couples of liberty without due process of law, in violation of the due process clause of the fourteenth amendment. In so doing, he cited many of the same cases relied on by the majority to support the existence of the privacy right. If one’s historic entitlements under the United States Constitution include rights to life, liberty, and

177. *Id.* at 527.

178. Two underlying issues divided the Court. The first revolved around the “incorporationist,” “selective incorporationist,” and “non-incorporationist” views taken of the fourteenth amendment. Justice Douglas’ majority opinion was believed by the other members of the Court to indicate that the first eight amendments are completely incorporated in the due process clause of the fourteenth amendment, thus making them directly applicable in their entirety to the states. *See* 381 U.S. at 486 (Goldberg, J., Warren, C.J., and Brennan, J., concurring); *id.* at 499, 500 (Harlan, J., concurring); *id.* at 528 & n.1 (Stewart, J., dissenting). Justice Goldberg might be characterized as a “selective incorporationist”: “Although I have not accepted the view that ‘due process’ as used in the Fourteenth Amendment incorporates *all* of the first eight Amendments . . . , I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights.” *Id.* at 486 (emphasis added; citations omitted). *Cf. id.* at 528 n.1 (“But the Court has held that many of the provisions of the first eight amendments are fully embraced by the Fourteenth Amendment as limitations upon state action” (Stewart, J., dissenting; citations omitted)). Justice Harlan, the “non-incorporationist,” argued that the relevant inquiry was whether the enactment violated “basic values ‘implicit in the concept of ordered liberty’ While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations.” *Id.* at 500 (citations omitted).

The other basic dimension of conflict involved the content of the Bill of Rights. Justice Douglas found the source of the privacy right in “emanations” and “penumbras” of the Bill of Rights. *Id.* at 484 (citation omitted). Although Justice Black was, like Justice Douglas, an “incorporationist,” Black vehemently disagreed with Douglas’ view of the content of the Bill of Rights. For Black, the guarantees of the Bill of Rights must be found in the specific constitutional language. *See id.* at 508; *accord, id.* at 527–29 (Stewart, J., dissenting) (by implication).

While the debate is of considerable interest from the standpoint of constitutional theory, its relevance is now academic. As indicated later in this section, the Court has concluded that the constitutional source of the right to privacy is the liberty protected by the fourteenth amendment.

For the view that the privacy decisions rest on the same theoretical basis as the economic due process decisions beginning with *Lochner v. New York*, 198 U.S. 45 (1905), see Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973). But compare Professor Kurland’s thoughtful analysis, summarized in note 182 *infra*, arguing that it is essential to distinguish the doctrine of substantive due process from the related doctrine of economic due process.

property,¹⁷⁹ why was it necessary to create a new right to privacy? Would not the notion of liberty include the idea of a zone of individual privacy which could not be invaded, absent a showing of a compelling state interest? If the Court had adopted Justice White's approach, one's liberty would be protected; privacy would be an interest embraced in the concept of liberty, although not a separate right.¹⁸⁰ Such an analysis could have proceeded by developing the concept of liberty along the lines explored by John Stuart Mill in his classic essay, *On Liberty*, reviewed in more detail in section VI below.¹⁸¹ The majority's reasons for rejecting this approach were not explained and Justice White's opinion was not criticized or commented on by the majority.¹⁸²

Too, it is not clear why the Court chose to utilize the phrase, "right to privacy." As Justice Black pointed out in a caustic footnote, it has

179. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV.

180. Justice Harlan's approach would yield the same result. However, Justice Harlan's concurrence focused on his objections to the "incorporationist" approach to the interpretation of the fourteenth amendment. Justice White's concurring opinion, by contrast, was devoted to a demonstration that earlier cases directly supported invalidation of the Connecticut statute on a conventional due process theory.

181. J.S. MILL, *ON LIBERTY* (Bobbs-Merrill ed. 1956).

182. Professor Emerson has suggested that the Court was reluctant to rest its decision on substantive due process grounds, because it would involve dealing with two significant unresolved issues:

The first was whether the Court would undertake to elaborate a distinction between the application of substantive due process to cases involving personal rights and its application to cases concerning economic rights. The second involved the question as to what standards of due process are to be employed in considering legislation based not on objective facts related to the public welfare, but rather on grounds of purely moral principle.

Emerson, *supra* note 173, at 223. Only Justice White rested his opinion directly on substantive due process grounds. He did so without, as Emerson put it, entering "into more subtle analysis of the due process clause." *Id.* at 225.

While recognition of a constitutional right of privacy allowed the majority to avoid the analytical difficulties of the due process issue, this created theoretical issues that appear to be equally difficult. Moreover, to the extent that the majority's privacy analysis rested on the fourteenth amendment, it appears that the substantive due process dilemma was not avoided at all.

Professor Kurland has argued that the privacy cases can only be understood as substantive due process decisions. Kurland, *The Private I*, *THE UNIVERSITY OF CHICAGO MAGAZINE*, Autumn, 1976, at 11. See also notes 223-24 and text accompanying notes 197, 230, and 257 *infra*. Kurland is careful to distinguish substantive due process from the related doctrine of economic due process.

In the nineteenth century and well into the twentieth, the concept of individuals and individual freedom was perverted into a form of constitutional protection against the regulation of corporate and organizational economic activities. It should be clear that privacy is an individual's right and not that of a corporation, or a class, or an association. When the affairs regulated are not those of individuals but those of groups, the concern is not privacy. This is not, of course, to suggest that corporations, classes, organizations, and associations are not entitled to constitutional protections, including certainly those of due process of law and freedom of

little in common with Warren and Brandeis' tort except for the name.¹⁸³ It must have been predictable that use of the phrase to describe the tort, as well as an unrelated constitutional right, would cause confusion. The new right could have been defined more narrowly—as a right of intimate decision-making, for example¹⁸⁴—or it could have been connected to fundamental decisions regarding marriage and procreation, without being given a general description like “privacy.”

On the other hand, by the time of the *Griswold* decision in 1965, privacy had been part of the lexicon of constitutional interpretation for nearly eighty years. The *Boyd* decision had spoken of “the privacies of life”¹⁸⁵ in 1886, four years before the appearance of Warren and Brandeis' famous *Harvard Law Review* article. Indeed, Brandeis, advocate for a common-law right of privacy, also championed the constitutional protection of privacy in his eloquent *Olmstead* dissent.¹⁸⁶ As illustrated above, a long line of cases had come increasingly to treat privacy as the interest protected by a number of constitutional guarantees. If one adopts the view that privacy is the basic interest protected by key provisions of the Bill of Rights, then explicit recognition of a “right of privacy” makes a great deal of sense.

It is even more intriguing to inquire what the individual members of the Court had in mind when they recognized a constitutional privacy right. The opinions of the justices give no clue to what the majority believed the scope of the right to privacy would be. Having extracted an abstract privacy concept from the concrete provisions of the Bill of Rights, the Court was free to apply the privacy idea to situations not reached by the specific prohibitions of the Bill of Rights, precisely as Justice Black feared.¹⁸⁷ But the *Griswold* opinions do not reveal how far the members of the 1965 Court believed this new right of privacy ultimately would reach. The majority did cite two law review articles; in addition, Justice Douglas had published a series of lectures on privacy, though his book was not cited in any of the opinions.¹⁸⁸

speech and press and political activities. It is simply to say that the right of privacy is essentially the right of a person, an individual, a human being.

The right of privacy cannot bear the burden of including freedom of corporations and unions from regulation. To broaden it so is to destroy it.

Kurland, *supra* at 34.

183. 381 U.S. at 510 n.1.

184. See Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CAL. L. REV. 1447, 1450 (1976) [hereinafter *Taxonomy*].

185. 116 U.S. at 630, quoted in section IV *supra*.

186. 277 U.S. at 438, quoted in section IV *supra*.

187. See 381 U.S. at 509.

188. Douglas cited Beaney, *The Constitutional Right to Privacy*, 1962 SUP. CT. REV. 212; *Griswold*, *The Right to be Let Alone*, 55 NW. U.L. REV. 216 (1960). Douglas did not cite his own book, *THE RIGHT OF THE PEOPLE* (1958).

Neither the articles nor Justice Douglas' book, however, described the scope of a constitutional privacy right in other than very broad terms.¹⁸⁹

189. Beane's article, *supra* note 188, contains a careful review of the protection of privacy by the fourth and fifth amendments, and to some extent, the fourteenth. He concluded that, as of 1962, the Court's "niggardly" construction of the fourth amendment, even combined with the protection of the fifth amendment, furnished "only modest protection of the right to privacy." Beane, *supra* note 188, at 250-51. He concluded that a broader right to privacy was needed, "based on the 'liberty' concept in the Fifth and Fourteenth Amendments." *Id.* at 250. He added, "[P]erhaps the immediate objective should be to define the right, without so much initial concern for the remedy." *Id.*

Griswold's article, *supra* note 188, was a much narrower inquiry, reviewing the role of the fifth amendment privilege against self-incrimination—then under considerable attack—in the protection of liberty. He focused on the function of the fifth amendment as a restraint on governmental power against the individual, with particular reference to Congressional investigations of the 1950's.

Douglas' book, *THE RIGHT OF THE PEOPLE*, was "in substantial part" a series of lectures delivered at Franklin and Marshall College in 1957. Organized into three major subdivisions, Lecture II is entitled "The Right to be Let Alone" and treats the topic of privacy. (Lecture I deals with the related topic of "Freedom of Expression"; Lecture III, entitled "The Civilian Authority," deals with the relationship between civilian and military courts.)

About the right of privacy Justice Douglas said,

The individual needs protection from government itself The Framers of the Constitution realized this and undertook to establish safeguards and guarantees. Some of these concern the procedure that must be followed if government undertakes to move against the citizen. Others concern substantive rights such as freedom of religion and freedom of assembly.

There is, indeed, a congeries of these rights that may conveniently be called the right to be let alone. They concern the right of privacy—sometimes explicit and sometimes implicit in the Constitution. This right of privacy protects freedom of religion and freedom of conscience. It protects the privacy of the home and the dignity of the individual. Under modern conditions, it involves wire-tapping and the use of electronic devices to pick up the confidences of private conversations. It also concerns the problem of the captive audience presented in *Public Utilities Commission v. Pollak*, 343 U.S. 451 I should also mention the right to travel This right to be let alone is a guarantee that draws substance from several provisions of the Constitution, including the First, the Fourth, and the Fifth Amendments.

Id. at 57-58. After quoting Brandeis' famous passage from his dissent in *Olmstead* (set forth in section IV *supra*), Douglas continued,

The natural rights of which I speak . . . have a broad base in morality and religion to protect man, his individuality, and his conscience against direct and indirect interference by government. Some are written explicitly into the Constitution. Others are to be implied. The penumbra of the Bill of Rights reflects human rights

Much of this liberty of which we boast comes down to the right of privacy. *Id.* at 58-59.

Saying that "[t]his right—the right to be let alone—has suffered greatly in recent years," *id.* at 59, Douglas proceeded to examine the events of the 1950's which he believed posed the greatest threats to individual privacy. Major topics included legislative investigations, loyalty investigations, religious freedom, the sanctity of the home, and the right to defy an unconstitutional statute.

Douglas' view of privacy and its relationship to individual liberty was an expansive one.

Events since *Griswold* have done little to bear out Justice Black's fears. Though the decision triggered much debate and criticism,¹⁹⁰ and left great uncertainty over the future course of the right of privacy,¹⁹¹ delineation of scope and boundaries has proceeded by the familiar common-law process of case-by-case explication. Through its subsequent cases, the Court has for the most part confined the right of privacy to carefully drawn boundaries rather than undertaking sweeping constitutional initiatives. In *Eisenstadt v. Baird*,¹⁹² the Court extended the privacy right to unmarried persons, invalidating a Massachusetts statute prohibiting the distribution of contraceptives (for purposes of contraception, rather than disease prevention) to anyone other than a married person. "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."¹⁹³

In *Roe v. Wade*¹⁹⁴ and *Doe v. Bolton*,¹⁹⁵ the right of privacy was extended to another aspect of "the decision whether to bear or beget a child": the right to an abortion. These companion cases invalidated the Texas and Georgia abortion statutes, respectively. *Roe*

As his book was not cited by the Court, it is impossible to know whether other members of the Court held similar views or had developed any clear theory of the scope of the constitutional privacy right.

190. See, e.g., the symposia in *PRIVACY* (J. Pennock & J. Chapman eds. 1971) [hereinafter cited as *PRIVACY*] and in 64 *MICH. L. REV.* 197-288 (1965). One writer, in raising questions about the implications of *Griswold*, characterized the decision as "well-meaning sloppiness of thought." Freund, *Privacy: One Concept or Many*, in *PRIVACY*, *supra* at 182, 192-93. Another wrote:

[D]ifferent senses of the word "privacy" were punned upon, and the legal concept generally mismanaged in ways too various to recount here. . . . The opinion was not illuminating on the question of what are proper bounds for the exercise of legislative power, which was the crucial matter before the court. It is precisely the issue of what rights to autonomous determination of his affairs are enjoyed by a citizen. . . . If the confusion in the court's argument was inadvertent, one may sympathize with the deep conceptual difficulties which produced it, and if it was deliberately contrived, admire its ingenuity.

Gross, *Privacy and Autonomy*, in *PRIVACY*, *supra* at 169, 180-81.

191. Included among those uncertain of the future dimensions of a constitutional right to privacy was Professor Emerson, counsel in *Griswold*, who had argued the privacy theory before the Court. The appellants' case had dealt with "a relatively narrow area." Emerson, *supra* note 173, at 251. The privacy argument had centered on the privacy of the home and the privacy of the marital relationship. See Brief for Appellants at 85; Emerson, *supra* note 173, at 231. While Emerson characterized the recognition of the right of privacy as "a bold innovation" and "a step with enormous consequences," *id.* at 229, he was left to speculate over its future scope. See *id.* at 228-34.

192. 405 U.S. 438 (1972).

193. *Id.* at 453 (citation omitted).

194. 410 U.S. 113 (1973).

195. 410 U.S. 179 (1973).

articulated the nature of the state interest in the abortion decision and defined the point at which the state's interest becomes compelling; at that point regulation of the abortion decision might occur. *Roe* further expounded the dimensions of the privacy right, indicating that it is founded upon a person's protected liberty:

[The Court's] decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" . . . are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, . . . procreation, . . . contraception, . . . family relationships, . . . and child rearing and education¹⁹⁶

The Court went on to settle the heated *Griswold* debate about the source of the right to privacy by adopting, in effect, Justice White's view:

This right of privacy, whether it be found in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.¹⁹⁷

196. *Id.* at 152-53. As to education, the Court has ruled that the privacy right is not absolute. In *Runyon v. McCrary*, 427 U.S. 160 (1976), the Supreme Court held that the Civil Rights Act of 1866, 42 U.S.C. § 1981, prohibited racial exclusion in private schools, since such exclusion abridged the § 1981 guaranty of "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens" 427 U.S. at 170. The proprietors of the private school contended unsuccessfully that § 1981, as applied, violated the right of privacy. *Id.* at 175. The Court said:

But it does not follow that because government is largely or even entirely precluded from regulating the child-bearing decision, it is similarly restricted by the Constitution from regulating the implementation of parental decisions concerning a child's education.

. . . [W]hile parents have a constitutional right to send their children to private schools . . . , they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.

Id. at 178.

197. 410 U.S. at 153. The quoted language is subject to the interpretation that the Court had not decisively resolved the issue. However, in *Whalen v. Roe*, 97 S. Ct. 869 (1977), any possible doubts were dispelled. The Court repeated the quoted language, adding emphasis to the phrase, "as we feel it is." *Id.* at 876 n.23. It explained:

Language in prior opinions of the Court or its individual Justices provides support for the view that some personal rights "implicit in the concept of ordered liberty" . . . are so "fundamental" that an undefined penumbra may provide them with an independent source of constitutional protection. In *Roe v. Wade*, . . . however, after carefully reviewing those cases, the Court expressed the opinion that the "right of privacy" is founded in the Fourteenth Amendment's concept of personal liberty.

Id. (citations omitted).

In *Planned Parenthood v. Danforth*,¹⁹⁸ the Court ruled that the right of consent to an abortion belonged to the mother. The Court invalidated a Missouri statute requiring consent by the spouse, or by the parent of a minor child.¹⁹⁹ As in *Eisenstadt*, the right of privacy is personal to the individual and is not restricted to the marital unit only.

Last Term, in *Carey v. Population Services International*,²⁰⁰ the Court invalidated a New York statute which forbade any sale or distribution of contraceptives to minors under the age of 16, authorized distribution of contraceptives to minors 16 and older only by licensed pharmacists, and forbade the advertising or display of contraceptives.²⁰¹ The key word here was "decision." The Court noted that "[t]his right of personal privacy includes 'the interest in independence in making certain kinds of decisions,'" and added that "the outer limits of this aspect of privacy have not been marked"²⁰² After reviewing *Griswold* and related cases, the Court said,

These decisions put *Griswold* in proper perspective. *Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.²⁰³

Since availability of contraceptives was an integral part of the ability to make a meaningful choice, the state could not impose such dramatic limitations on access to contraceptives absent a showing of a compelling state interest. The Court ruled that the state had not made the necessary showing.²⁰⁴

The outer limit of the *Griswold-Roe* constellation of procreation, family relationships, child rearing, and education may be represented

198. 428 U.S. 52 (1976).

199. *Id.* at 67-75. An examination of the opinions suggests that a less sweeping requirement for parental consent might be sustained, if it provided an alternative, such as judicial review, in case of serious conflict between child and parent. *See id.* at 74-75 (majority opinion), *citing* *Bellotti v. Baird*, 428 U.S. 132 (1976); 428 U.S. at 90-91 (Stewart, J., concurring); *id.* at 94-95 (White, J., Burger, C.J., and Rehnquist, J., concurring in part and dissenting in part).

200. 97 S. Ct. 2010 (1977).

201. As in *Planned Parenthood v. Danforth*, there was substantial disagreement regarding the permissible scope of state regulation of the activities of minors. Justice Brennan, author of the majority opinion, spoke only for a plurality on this issue. *Id.* at 2020 n.12; *see* the concurring opinions of Justices White, Powell, and Stevens and the dissenting opinion of Justice Rehnquist. Chief Justice Burger dissented without opinion.

202. *Id.* at 2016.

203. *Id.* at 2018.

204. *Id.* at 2019-20.

by *Moore v. City of East Cleveland*.²⁰⁵ There, a zoning ordinance of East Cleveland contained a restrictive definition of "family" to be followed in areas zoned for single-family dwellings. The definition of "family" specified close degrees of relationship, essentially requiring a "nuclear" family of parents and children. Appellant, a 63-year-old grandmother, had living in her home two of her grandsons. One was the child of her son Dale; the other was the child of her son John. Thus the grandsons were cousins, not brothers. The relationship was too distant to satisfy the Cleveland ordinance. Incredibly, the City chose to prosecute, asserting that one of the grandsons must move out.²⁰⁶ Distinguishing its earlier decision in *Village of Belle Terre v. Boraas*,²⁰⁷ a five-justice majority ruled that the ordinance violated the due process clause of the fourteenth amendment. Four of the five justices concluded that the ordinance infringed a "private realm of family life which the state cannot enter."²⁰⁸

These post-*Griswold* decisions, then, have refined and clarified the nature of the privacy right. As *Roe* indicates, the right centers rather closely around the categories of marriage, procreation, contraception, family relationships, child rearing, and education. While the foregoing cases were all found to fall within the protection of the constitutional right of privacy,²⁰⁹ another line of cases illustrates the Court's consistent refusal to expand the right of privacy beyond existing boundaries. In *Paul v. Davis*²¹⁰ the Court refused to expand the constitutional right of privacy to an area traditionally covered, at least in part, by the tort actions of defamation and invasion of privacy. Respondent

205. 97 S. Ct. 1932 (1977).

206. As Justice Brennan viewed the matter,

I agree that the Constitution is not powerless to prevent East Cleveland from prosecuting as a criminal and jailing a 63-year-old grandmother for refusing to expel from her home her now 10-year-old grandson who has lived with her and been brought up by her since his mother's death when he was less than a year old.

Id. at 1939 (Brennan, J., concurring). Ms. Moore had in fact been convicted of violating the ordinance, fined \$25, and sentenced to five days in jail.

207. 416 U.S. 1 (1974). *Belle Terre* had sustained, in the face of a privacy challenge, a zoning ordinance which prohibited more than two unrelated persons living together. The ordinance, however, defined "family" to include any degree of relationship by blood, adoption, or marriage.

208. Justice Stevens reasoned that the ordinance was an impermissible restriction on appellant's right to use her own property as she saw fit. 97 S. Ct. at 1943 (Stevens, J., concurring). Chief Justice Burger objected that the appellant had not exhausted local remedies. *Id.* at 1947 (Burger, J., dissenting). Justices Stewart, Rehnquist, and White argued that the ordinance did not offend due process or the right to privacy. *Id.* at 1952 (Stewart and Rehnquist, JJ., dissenting); *id.* at 1957 (White, J., dissenting).

209. The possible exception is *Moore v. City of East Cleveland*, where only a plurality of four justices agreed that there was a constitutional privacy right. Three justices disagreed, and two justices rested their respective positions on other grounds.

210. 424 U.S. 693 (1976).

Davis had been listed, and his photograph included, in a brochure of "active shoplifters" distributed widely to merchants in the Louisville, Kentucky, area. At the time the brochure was distributed he had been charged with shoplifting and had pled not guilty, but the charge had not been disposed of. Davis brought an action in federal court under 42 U.S.C. § 1983, alleging a violation of his civil rights, including a violation of his constitutional right of privacy.

The Court responded by enumerating briefly the constitutional rights of privacy previously recognized and noted that Davis' cause of action was not among them.²¹¹ His interest in reputation was "simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions."²¹² To provide relief, said the Court, "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."²¹³

In *Kelley v. Johnson*,²¹⁴ another action brought under section 1983, a county regulation limiting hair length of county policemen was challenged. Insofar as a constitutional privacy claim was made, the Court dismissed it in two sentences, again saying that there was no infringement with regard to "basic matters of procreation, marriage, and family life."²¹⁵ In *Doe v. Commonwealth's Attorney*,²¹⁶ the Court was confronted with a direct appeal from a three-judge district court, which had sustained the validity of the Virginia sodomy statute as applied to consenting sexual behavior between adult males in private. The three-judge district court had divided 2-1 over the validity of the statute; the majority and dissenting opinions devoted the bulk of their attention to the interpretation of *Griswold*.²¹⁷ The Supreme Court

211. *Id.* at 712-13.

212. *Id.* at 712.

213. *Id.* at 701. While the latter two quotations are taken from the Court's discussion of Davis' claim that there was an infringement of a protected liberty interest, the considerations are equally applicable to an expansion of a constitutional privacy right, and suggest the reasons why the Court has chosen not to expand it.

214. 425 U.S. 238 (1976).

215. *Id.* at 244.

216. 425 U.S. 901 (1976), *aff'd* 403 F. Supp. 1199 (1975).

217. The majority relied on Justice Goldberg's concurring opinion in *Griswold*, an opinion that had been joined by Chief Justice Warren and Justice Brennan. Goldberg wrote:

Finally, it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct. As my Brother Harlan so well stated in his dissenting opinion in *Poe v. Ullman* . . .

"Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution

summarily affirmed, though three justices would have noted probable jurisdiction and set the case for argument.²¹⁸ The summary affirmance provided no guidance to the Court's views, though the action was a ruling on the merits.²¹⁹

The precise significance of *Doe v. Commonwealth's Attorney* remains unclear. In its 1977 opinion in *Carey v. Population Services International*, the majority stated in a footnote, "'the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults,' . . . and we do not purport to answer that question now."²²⁰

To date, then, the Court has maintained the general trend of post-*Griswold* decisions by confining the right of privacy within previously existing constitutional boundaries. Case like *Paul v. Davis, Kelley v. Johnson*, and *Doe v. Commonwealth's Attorney* reflect continuing adherence to the *Katz* view that the protection of one's general right to privacy must be left largely to the states. To this general pattern, however, two recent decisions may constitute exceptions. In neither of the two did the Court actually recognize any extension of the right of privacy, but some of the dicta suggested the possibility.

Perhaps the most intriguing of these privacy decisions was *Whalen*

which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy."

381 U.S. at 498-99 (citation omitted). The second paragraph was quoted in full in the majority opinion of the district court. 403 F. Supp. at 1201.

The dissenting district court judge reasoned:

I view [*Griswold, Roe v. Wade, and Doe v. Bolton*] as standing for the principle that every individual has a right to be free from unwarranted governmental intrusion into one's decisions on private matters of intimate concern. A mature individual's choice of an adult sexual partner, in the privacy of his or her own home, would appear to me to be a decision of the utmost private and intimate concern. Private consensual sex acts between adults are matters, absent evidence that they are harmful, in which the state has no legitimate interest.

403 F. Supp. at 1203 (footnote omitted). The dissenting judge pointed out that the marital-nonmarital distinction articulated by Goldberg and Harlan was repudiated in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), which extended the right of privacy to individuals who were married or single. Thus the continuing validity of that portion of Goldberg's concurrence was open to serious doubt. 403 F. Supp. at 1204.

218. They were Justices Brennan, Marshall, and Stevens. 425 U.S. at 901.

219. For an analysis of the precedential value, see Comment, *The Constitutionality of Sodomy Statutes*, 45 *FORD. L. REV.* 553-56 (1976). *Doe* was a declaratory judgment action; appellants were not defendants in a criminal prosecution.

220. 97 S. Ct. at 2018 n.5 (citation omitted) (brackets in original).

v. Roe.²²¹ *Whalen* involved a challenge to a New York statute for the control of dangerous prescription drugs. Under the New York scheme, the most dangerous category of prescription drugs could only be prescribed by use of an official form. The form required identification of the patient, drug, prescribing physician, pharmacy, and dosage. One copy of the form was sent to the state health department to be entered into a computer system. The purpose of this elaborate reporting procedure was to prevent the diversion of dangerous prescription drugs to unlawful purposes. A three-judge district court had enjoined enforcement of these provisions of the law.

In a unanimous decision, the Supreme Court reversed, holding the New York law valid. The Court reviewed the extensive legislative studies leading to enactment of the New York law, as well as the privacy safeguards included in the reporting system. The privacy safeguards included secure vault storage; mandatory destruction of records after five years; operation of the computer "off-line," so that no terminal outside the records room could obtain access to the information; limitation on the number of persons having physical access to the records room; and criminal penalties for unauthorized disclosure of the records.²²² The Court concluded that the statute was rationally related to a vital state interest in controlling dangerous drugs and did not unreasonably infringe privacy interests.²²³

In its approach to the privacy issue, the Court categorized its privacy decisions in a new way:

The cases sometimes characterized as protecting "privacy" have 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.²²⁴

221. 97 S. Ct. 869 (1977).

222. *Id.* at 873-74.

223. *Id.* at 875-76, 877.

In part of its opinion, the Court addressed the doctrine of substantive due process. According to the Supreme Court, the district court had "found that the State had been unable to demonstrate the necessity" for the statute. *Id.* at 875. The Court ruled that failure to show "necessity" for a statute was not a proper ground for its invalidation; such a standard of review was, in essence, the discredited standard of *Lochner v. New York*, 198 U.S. 45 (1905). The states should "have broad latitude in experimenting with possible solutions to problems of vital local concern." 97 S. Ct. at 875-76.

224. *Id.* at 876 (footnotes omitted). In a footnote the Court added:

Professor Kurland has written:

"The concept of a constitutional right of privacy still remains largely undefined. There are at least three facets that have been partially revealed, but their form and shape remain to be fully ascertained. The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion. The

While the Court did not attach shorthand labels to these two basic types of privacy interests, another writer developed a virtually identical categorization several years ago.²²⁵ Professor Beardsley's schema is explored in section VI below, but at this point it may be helpful to introduce her terminology. The "individual interest in avoiding disclosure of personal matters" Beardsley would call the "right to selective disclosure," while the "interest in independence in making certain kinds of important decisions" she would call the principle of "autonomy."²²⁶

Under the heading of "selective disclosure," or "the individual interest in avoiding disclosure of personal matters," the Court cited portions of *Olmstead* and *Griswold*, as well as with lesser weight, *Stanley v. Georgia*²²⁷ and portions of *California Bankers Association v. Shultz*.²²⁸

second is the right of an individual not to have his private affairs made public by the government. The third is the right of an individual to be free in action, thought, experience, and belief from governmental compulsion." Kurland, *The Private I*, *The University of Chicago Magazine* 7, 8 (Autumn, 1976).

Id. at 876 n.24. The Court continued, "The first of the facets which he describes is directly protected by the Fourth Amendment; the second and third correspond to the two kinds of interests referred to in the text." *Id.*

225. Beardsley, *Privacy: Autonomy and Selective Disclosure*, in *PRIVACY*, *supra* note 190, at 56.

226. *Id.*

227. 97 S. Ct. at 876 n.25, *citing Stanley v. Georgia*, 394 U.S. 557 (1969).

228. 97 S. Ct. at 876 n.25. *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974), presented a challenge to the Bank Secrecy Act of 1970 and regulations promulgated thereunder. These require that banks engage in large-scale recordkeeping and reporting on banking activity of depositors which exceeded certain relatively low dollar amounts. (For example, copies must be retained of personal checks exceeding \$100.) The challenge was brought principally under the first, fourth, and fifth amendments. Relief was denied plaintiff banks; the individual depositors were held not to have standing.

Subsequently, when an individual depositor with standing brought the individual disclosure issue to the Court, the Court ruled that an individual has *no* fourth amendment interest in his banking records, such as checks and deposit slips, that are in possession of his bank. Rather those are business records of the *bank*. *United States v. Miller*, 425 U.S. 435 (1976). The Privacy Protection Study Commission subjected the *Miller* case to vigorous criticism. Calling the Supreme Court's decision "a fateful day for personal privacy," the Commission said,

[I]nstitutional policies and the legal system failed individuals in their efforts to limit the impact of records on their lives. . . . [The *Miller* decision] warns that . . . anyone, public or private, can gain access to an individual's bank records if the bank agrees to disclose them.

. . . [I]f Americans still value personal privacy, they must make certain changes in the way records about individuals are made, used, and disclosed.

PRIVACY PROTECTION STUDY COMMISSION, supra note 35, at 8.

The *Whalen* Court's citation of *California Bankers Association* is remarkable, for the *Whalen* Court cited Justice Douglas' dissenting opinion, 416 U.S. at 79, as well as Justice Powell's concurring opinion, 416 U.S. at 78, but not the opinion of the Court. The Douglas opinion asserts, and the Powell opinion suggests, that there is a protected privacy interest in avoiding disclosure of personal matters. Since the *Whalen* Court's citation appears behind the weak "see also" signal, it is impossible to know whether there has been any change of viewpoint in the Court on matters of disclosure, or whether

In the latter category, that of "autonomy" or "independence in making certain kinds of important decisions," the Court cited *Griswold*, *Roe v. Wade*, *Doe v. Bolton*, and several other cases.²²⁹ With regard to the latter group, the Court reiterated its standard formulation:

In *Paul v. Davis* the Court characterized these decisions as dealing with "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas, it has been held that there are limitations on the States' power to substantively regulate conduct."²³⁰

The *Whalen* plaintiffs—patients who utilized dangerous drugs and doctors who prescribed them—complained of both kinds of privacy intrusion. With regard to disclosure, they argued that creation of a central data system carried with it risks of unauthorized disclosure and possible stigmatization of patients who take dangerous drugs. With regard to autonomy, they contended that some patients would decline needed medication because of a desire to avoid being memorialized in the data system. Indeed, the record indicated that there had been some decline in utilization of dangerous drugs.²³¹

The Court ruled that the New York statute did not on its face "pose a sufficiently grievous threat to either interest to establish a constitutional violation."²³² After reviewing the confidentiality arrangements, the Court pointed out that the disclosure of private medical information to physicians, insurance companies, or state authorities is often required. Statutory schemes commonly mandate reporting of venereal disease, child abuse, deadly weapons, and fetal death;²³³ additionally, recordkeeping requirements in abortion laws—an area definitely within the zone of constitutional privacy—had been sustained in *Planned Parenthood v. Danforth*.²³⁴ With regard to the autonomy argument, the Court responded that the New York statute—unlike the elaborate

there was merely an intention to cite the Douglas and Powell opinions for illustrative purposes. Further discussion of this issue is found below in this section.

229. The other cases were *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidation of Virginia anti-miscegenation statute); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (invalidation of Oregon statute compelling attendance at public schools and prohibiting attendance at private or parochial schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidation of Nebraska statute forbidding the teaching of any modern foreign language to students below the eighth grade level); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (right of citizens to enter contracts) (scope of fourteenth amendment "liberty" described, *id.* at 589-90). 97 S. Ct. at 876 n.26.

230. 97 S. Ct. at 876-77 n.26.

231. *Id.* at 878.

232. *Id.* at 877.

233. *Id.* at 878 & n.29.

234. *Id.* at 878 n.29, citing *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

direct restraints on abortion decisions imposed by the state laws invalidated in *Doe v. Bolton*—posed no direct interference with the physician's decision to prescribe, or the patient's decision to use, a medication.²³⁵

Having denied relief to the New York plaintiffs, the Court concluded its opinion with these intriguing words:

We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our armed forces and the enforcement of the criminal laws, all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably [has] its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data—whether intentional or unintentional—or by a system that did not contain comparable security provisions. We simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment.²³⁶

Until *Whalen*, the Supreme Court's decisions reflected an adamant refusal to expand the scope of the right of privacy beyond the categories

235. 97 S. Ct. at 878 & n.31, citing *Doe v. Bolton*, 410 U.S. 179 (1973).

236. 97 S. Ct. at 879–80 (footnote omitted).

Justices Brennan and Stewart each filed a concurring opinion which dealt generally with the disclosure issue and particularly with the final paragraph. Justice Brennan said, Broad dissemination by state officials of such information, however, would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests. . . .

. . . I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology.

Id. at 880 (citations omitted).

Justice Stewart sharply disagreed with Justice Brennan's view that "broad dissemination" would implicate constitutionally protected rights. Reviewing the authorities relied on by Brennan, Stewart asserted that they in no way supported Brennan's position. He reiterated the view he had stated in *Katz* that "a person's general right to privacy . . . is . . . left largely to the law of the individual States." *Id.* at 881 (citation omitted). He added that he had joined the Court's opinion on the understanding that the Court asserted nothing contrary to those views. *Id.*

developed in the *Griswold* line of cases. *Whalen* represents an unexpected two-fold departure. First, while its categorization of privacy cases into "disclosure" and "autonomy" groupings accurately reflects major subdivisions in the cases, "disclosure" has not been an item of substantial constitutional privacy protection apart from associational privacy cases under the first amendment and wiretap or search and seizure cases under the fourth amendment. Otherwise, the most substantial legal protection of disclosure interests has developed as part of the invasion of privacy tort. Indeed, the Court refused to afford protection in the disclosure area when the Bank Secrecy Act of 1970 was challenged in *California Bankers Association v. Shultz*²³⁷ and *United States v. Miller*.²³⁸ In order for the *Whalen* Court to illustrate protection of disclosure interests, it was forced to cite Justice Douglas' stinging dissent and Justice Powell's cautious concurrence in *California Bankers*.²³⁹

The second unexpected development is the Court's apparent openness to considering the constitutional implications of computerized or other large data systems. The Court's treatment of the subject may simply represent recognition that consideration of the issue is inevitable. Lower federal courts have already concluded that data systems abuses can in some circumstances be of constitutional dimension; two such cases, involving a school district drug project and the FBI arrest record systems, were discussed in section II of this note.

Nonetheless, *Whalen's* treatment of data systems could have been left on much narrower ground. The *Whalen* plaintiffs fell into two of the traditional *Griswold* groupings. First, they were participants in doctor-patient relationships involving important decisions about medical treatment; they argued that the statute interfered with that relationship. Second, the protected sector of child-rearing and family relationships was involved, as parents testified that they were concerned their children would be stigmatized by inclusion in the state data bank.²⁴⁰ Just as the district court in *Merriken v. Cressman*²⁴¹ had based its disapproval of the school district data bank on the theory that it unduly interfered with protected family relationships, so also the Supreme Court could have restricted its attention to the traditional categorical relationships. Absent the final paragraph, *Whalen* would rest almost entirely within the traditional *Griswold* pattern.

There appear to be at least two possible explanations for the Court's

237. 416 U.S. 21 (1974). See note 228 *supra*.

238. 425 U.S. 435 (1976). See note 228 *supra*.

239. 97 S. Ct. at 876 n.25.

240. *Id.* at 874 n.16.

241. *Merriken* is reviewed in detail in section II *supra*.

opinion in *Whalen*. The first is that the Court's apparent shift of position is just that: apparent, not real. One can read the Court's language about "disclosure" and "decision" as being purely descriptive. The Court may have used this terminology solely to systematize the multitude of ways in which the term "privacy" is used in constitutional adjudication. There may have been no intention to elevate the "disclosure" interest to any greater dignity than it already had, even though there is a natural tendency to read "disclosure" in conjunction with the Court's final paragraph on data systems. Moreover, the final paragraph is carefully qualified. The Court merely recognizes that "in some circumstances [the duty to avoid unwarranted disclosures] arguably [has] roots in the Constitution We therefore need not, and do not, decide any question which *might* be presented by the unwarranted disclosure of accumulated private data" ²⁴² It is no very substantial concession to say that in some circumstances there is *arguably* a duty and that a constitutional issue *might* be presented. Even so, the full final paragraph intimates more than passing concern about data systems, and it is surprising that the Court's opinion evoked nothing more substantial by way of disagreement than a small skirmish between Justices Brennan and Stewart. ²⁴³

The other possible explanation is the pendency, during the same term, of *Nixon v. Administrator of General Services*. ²⁴⁴ Decided four months after *Whalen*, *Nixon* involved the former President's challenge to the Presidential Recordings and Materials Preservation Act. That Act provided for the Administrator of General Services to screen Nixon's presidential papers and tapes. Nixon's personal and private papers were to be returned to him; the balance were to be retained in the public domain. Nixon challenged the legislation as a violation of separation of powers, presidential privilege, privacy, first amendment associational rights, and the bill of attainder clause. By a 7-2 vote, the Court sustained the validity of the Act.

Section V of the Court's opinion dealt with Nixon's privacy claim. ²⁴⁵ Citing *Whalen*, the Court said, "One element of privacy has been characterized as 'the individual interest in avoiding disclosure of personal matters. . . .'" ²⁴⁶ Citing *Katz*, the Court concluded that Nixon had a legitimate expectation of privacy in his presidential materials. ²⁴⁷ For

242. 97 S. Ct. at 879-80 (emphasis added).

243. See note 236 *supra*.

244. 97 S. Ct. 2777 (1977).

245. Since the privacy theory was offered against the federal government, the argument was made under the first, fourth and fifth amendments only, the fourteenth being inapplicable.

246. 97 S. Ct. at 2797, citing *Whalen v. Roe*, 97 S. Ct. at 876.

247. 97 S. Ct. at 2797, 2801.

the majority, however, the crucial fact was that Nixon's private papers composed an extremely small proportion of the 42 million pages of documents and 880 tape recordings. Thus the problem was one of conflict between a legitimate public interest in the vast majority of the materials and a legitimate privacy interest in some of the documents, including personal correspondence and diary dictabelts. The regulations promulgated under the Act contemplated screening of the documents by professional archivists, with personal items to be returned to the Nixons. The district court had adopted a balancing approach. It concluded that the Act was a "reasonable response" to the intermingling of public and private documents and that the regulations constituted the "least intrusive" means for protecting the public interest.²⁴⁸ The Court took much the same view. The Court reasoned that the privacy claim could not be considered in the abstract; rather the specific provisions of the Act must be examined, and "any intrusion must be weighed against the public interest in . . . archival screening."²⁴⁹ The Court concluded, "Under this test, the privacy interest asserted by appellant is weaker than that found wanting in the recent decision of *Whalen v. Roe* . . ." ²⁵⁰ The regulations would protect Nixon's privacy interests, much as the New York statute and regulations protected the *Whalen* plaintiffs. Moreover, the federal law contemplated that private papers would be turned over to Nixon, whereas in *Whalen* the prescription reports would be retained by the state health department for five years. With regard to Nixon's associational privacy under the first amendment, the majority concluded that "a compelling public need that cannot be met in a less restrictive way will override those interests . . ." ²⁵¹

Chief Justice Burger and Justice Rehnquist each dissented vigorously.²⁵² Chief Justice Burger explored Nixon's privacy claim at

248. *Id.* at 2797.

249. *Id.* at 2798 (citations omitted).

250. *Id.*

251. *Id.* at 2802 (citations omitted).

252. Both justices had consistently resisted the expansion of the constitutional right to privacy beyond established boundaries. Justice Rehnquist wrote the opinion of the Court, in which Chief Justice Burger joined, in *Kelley v. Johnson*, 425 U.S. 238 (1976); *Paul v. Davis*, 424 U.S. 693 (1976); and *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974). Both dissented in *Moore v. City of East Cleveland*, 97 S. Ct. 1932 (1977), Justice Rehnquist on the merits and Chief Justice Burger on exhaustion of administrative remedies.

Justice Rehnquist has been antagonistic toward the "disclosure" aspects of privacy. In a law review article he inveighed against any expansion of the privacy concept—in part because any expansion of the right to privacy would be at the expense of reducing the latitude available to the legislative branch of government, and in part because of a fear that constitutional restrictions on information systems would impair the effectiveness of law enforcement. Rehnquist, *Is an Expanded Right of Privacy, Consistent with*

length. In his view, *Whalen* should be distinguished on the ground that "the public interest in regulating *dangerous drugs* outweighed any privacy interest in reporting to the State all prescriptions, those reports being made confidential by statute. No personal, private business, or political confidences were involved."²⁵³ Justice Rehnquist concentrated on executive privilege. In his view, "the Act is a serious intrusion upon the type of 'privacy' that is protected by the principle of executive privilege."²⁵⁴

In sum, the pendency of the *Nixon* case may have had an impact on the privacy analysis in *Whalen*. Disclosure was at issue in *Nixon*; this, coupled with the *Whalen* factual setting, may have prompted the Court to be specific about "the individual interest in avoiding disclosure of personal matters,"²⁵⁵ even though the constitutional case law (aside from traditional fourth amendment issues) could hardly be described as well-developed.

Where, then, can the right of privacy be said to rest as a matter of United States constitutional law, after the Supreme Court's 1976 Term? With regard to matters of disclosure, one must leave a large question mark. When read in isolation, *Whalen* and *Nixon* appear to state an unequivocal recognition that the right to privacy extends protection in some circumstances against disclosure of personal matters. While neither decision actually sustains the privacy interest that was asserted, both decisions treat at some length the particular privacy safeguards provided for in the statutes and regulations there challenged.

But when one reviews the Court's privacy decisions, *Whalen* and *Nixon* stand out more clearly as aberrations than as the logical conclusion of a trend. The really substantial earlier disclosure cases were *California Bankers Association*, in which the Court's aggressive use of the standing rules prevented any consideration of individual depositor contentions that the Bank Secrecy Act violated disclosural privacy interests, and *United States v. Miller*, which did reach the merits and held that there was no legitimate individual expectation of privacy in one's banking records. *Paul v. Davis* reflected a disclosure issue of a related type, yet the Court flatly refused to entertain the privacy claim. Thus, although the Court reached agreement on *Whalen's* well-hedged dicta about disclosure and data systems, it remains to be seen whether the Justices will in fact extend the constitutional right of privacy beyond its present boundaries.

Fair and Effective Law Enforcement? or: Privacy, You've Come a Long Way, Baby, 23 KAN. L. REV. 1 (1974). Both justices had, however, joined the majority in *Whalen*.

253. 97 S. Ct. at 2835 (emphasis in original).

254. *Id.* at 2841-42 n.1.

255. *Id.* at 2797.

In the area of autonomy, the right to privacy has persisted without substantial change. *Carey v. Population Services International*, like *Danforth*, continued the focus on individual decisionmaking in matters of contraception and abortion. The Court continues to experience internal disagreement on the degree of permissible regulation of the activities of minors. While refusing to allow the states to diminish the sector of individual decisionmaking, the Court has consistently refused to expand it, declining to include hair length regulations or private consensual sexual conduct within the right of privacy. *Moore v. City of East Cleveland* may well represent the Court's outer limit in this area. In short, the *Whalen* identification of "the interest in independence in making certain kinds of important decisions"²⁵⁶ represents no substantial change in the *Griswold* line of cases.

The Supreme Court's privacy cases lead inexorably to a single conclusion: the protection of privacy is now primarily the responsibility of the states. As if to underline the point, the *Whalen* Court chose to quote Justice Brandeis:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.²⁵⁷

The inference seems inescapable that the overall policy continues to be that stated in *Katz*: "[T]he protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States."²⁵⁸

256. *Id.*

257. *Id.* at 875 n.20, citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (dissenting opinion) (footnote omitted).

258. 389 U.S. at 350-51 (footnotes omitted).

VI. THE QUEST FOR A DEFINITION OF PRIVACY

The previous sections have traced the development of the privacy idea. After its origin in Warren and Brandeis' law review article, the right of privacy gradually achieved recognition in tort law. The term "privacy" began to be used in connection with constitutional adjudication and in 1965 the process culminated in the recognition of a constitutional right of privacy.

Despite growing acceptance of the privacy idea, there have been persistent currents of criticism. For example, some social scientists assert that courts and legislatures make sweeping assertions about privacy while having virtually no empirical information with which to assure themselves that their generalizations are correct.²⁵⁹ They have also argued that "privacy directs our attention away from the real problem which is loneliness, serves as a rationale for anti-social behavior, raises a false consciousness that impedes social instincts, and acts as a shield for exploitive behavior by a propertied elite."²⁶⁰

While the trend of legislation and court decision is clearly in the direction of an expanded right of privacy, there has also been strong criticism from several legal writers. The most consistent objection is that the term "privacy" or "the right to be let alone" covers entirely too much. As one student put it, the phrase "the right to be let alone" "is not rich enough in content to be useful as an analytical tool. The concept of the zone of privacy within which one is said to have a right to be let alone, without more clarity of definition, lacks discriminatory, descriptive, and predictive power."²⁶¹

William Prosser asserted that the term "invasion of privacy" had no conceptual unity at all,²⁶² rather,

the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff "to be let alone."²⁶³

Prosser argued, therefore, that the right of privacy should be broken

259. H. LATIN, *PRIVACY* i (1976) (selected bibliography). This criticism is directed as much at social scientists for failure to develop and collate the information in a meaningful way as it is at courts and legislatures for failure to use the information.

260. P. DIONISOPOULOS & C. DUCAT, *THE RIGHT TO PRIVACY* 3 (1976) (footnotes omitted) (citations omitted).

261. *Taxonomy*, *supra* note 184.

262. PROSSER, *TORTS*, *supra* note 19, at 804.

263. *Id.*

down into four component torts.²⁶⁴ At least one advocate of the right of privacy agrees, suggesting an analogy to free speech analysis under the first amendment.²⁶⁵

Much ink has been spilled in an effort to develop a satisfactory definition of privacy. "Few values so fundamental to society have been the subject of such vague and confused writing by social scientists," Westin states.²⁶⁶ Writes another: "There is something more appealing than clarifying in the phrase 'the right to be let alone.'" ²⁶⁷ Like Justice Stewart, stating his position on obscenity in *Jacobellis v. Ohio*,²⁶⁸ no one can satisfactorily define privacy but everyone seems to "know it when [he] see[s] it."²⁶⁹ While political scientists, sociologists, and moral philosophers have attempted to describe privacy and its role in our society, lawyers have attempted the more modest task of categorizing the plethora of cases into manageable and logical categories.²⁷⁰ The success of both enterprises has been limited.

The commentators, including those who do not favor a common-law or constitutional right of privacy, seem to agree that privacy is a value of fundamental importance to our society.²⁷¹ "Why is privacy of the person important?" asks one writer. "This calls mainly for consideration

264. *Id.* at 804; see section III *supra*.

Even though his fourfold division of the invasion of privacy into appropriation, intrusion, public disclosure of private facts, and false light in the public eye gained general acceptance, Prosser still fretted. He regarded as unanswered the question whether "false light" invasion of privacy was capable of "swallowing up and engulfing the whole law of defamation": any false libel would also be actionable on privacy grounds, and an action for invasion of privacy would have some procedural advantages over a libel action. PROSSER, TORTS, *supra* note 19, at 813.

265. P. DIONOSPOULOS & C. DUCAT, *supra* note 260, at 13, suggesting the approach used in Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

266. A. WESTIN, *supra* note 4, at 7.

267. Beardsley, *supra* note 225, at 57-58. Compare: "This paper is an inquiry into the formulation and possible disintegration of a legal concept, right of privacy, inviting comparison with the life history of a scientific concept like 'ether' or 'atom.'" Freund, *supra* note 190, at 182.

268. 378 U.S. 184 (1964).

269. *Id.* at 197 (Stewart, J., concurring):

I shall not today attempt further to define the kinds of material I understand to be embraced within that short-hand description [hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

270. See, e.g., the symposia in PRIVACY, *supra* note 190, and *Privacy*, 31 LAW AND CONTEMP. PROBS. 251-435 (1966); Prosser, *Privacy*, *supra* note 83; Bloustein, *supra* note 92.

271. E.g., Professor Kalven, certainly one of the most outspoken critics of the very existence of the "right to privacy" tort, began his attack by reviewing some of the societal implications of privacy: "Privacy is one of the truly profound values for a civilized society, . . . deeply linked to individual dignity and the needs of human existence." Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW AND CONTEMP. PROBS. 326 (1966).

of what is necessary to maintain an integrated personality in a social setting."²⁷²

Professor Westin has formulated the functions of individual privacy under four headings:

Personal Autonomy: "The autonomy that privacy protects is . . . vital to the development of individuality and consciousness of individual choice in life . . . 'Privacy is a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns, if necessary in defiance of all the pressures of modern society.'"²⁷³

Emotional Release: "[P]hysical and psychological health demand periods of privacy for various types of emotional release," including "relaxation . . . from the pressure of playing social roles," "respite from the emotional stimulation of daily life," "protection . . . [for] minor non-compliance with social norms," giving "vent to . . . anger at 'the system,'" performing "bodily and sexual functions," and restoration from "loss, shock, or sorrow."²⁷⁴

Self-Evaluation: "[I]ndividuals need to process the information that is constantly bombarding them," to assess it, to have time to be creative, and to engage in reflection for the exercise of conscience.²⁷⁵

Limited and Protected Communication: "Privacy for limited and protected communication . . . provides the individual with the opportunities he needs for sharing confidences and intimacies with those he trusts . . . [and] serves to set necessary boundaries for mental distance in interpersonal situations ranging from the most intimate to the most formal and public."²⁷⁶

One writer has proposed a "general theory of individual privacy."²⁷⁷ His formulation, while ambitious, sheds little additional light: he argues that the right of privacy protects against "an intrusion on personality, an attack on human dignity."²⁷⁸

If there is no generally accepted definition of privacy, and one is forced to beg that particular question, at least one can beg it elegantly, as did Professor Freund:²⁷⁹

272. Gross, *supra* note 190, at 172-73. Consider also this formulation: "It is my thesis that privacy is not just one possible means among others to insure some value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust." Fried, *Privacy*, 77 YALE L.J. 475, 477 (1968).

273. A. WESTIN, *supra* note 4, at 33-34 (footnote omitted).

274. *Id.* at 34-36.

275. *Id.* at 36-37.

276. *Id.* at 37-39.

277. Bloustein, *supra* note 92, at 963.

278. *Id.* at 995.

279. PROSSER, TORTS, *supra* note 19, at 816.

The choice need not be limited to simple adoption or rejection of the legal concept. There are levels or orders of statement in law as in science. There are principles and there are rules. A higher order of generality is not only tolerable in the statement of principles; it is to be encouraged . . . [as] . . . a more plastic formulation, useful for predicting and shaping the course of legal development. It is in the latter context that the right of privacy is of cardinal worth.²⁸⁰

It was left to a professor of philosophy to formulate a description which is more specific and hence more useful for our purposes:

Alleged violations [of privacy] seem to fall into two main categories: conduct by which one person Y restricts the power of another person X to determine for himself whether or not he will perform an act A or undergo an experience E, and conduct by which one person Y acquires or discloses information about X which X does not wish to have known or disclosed. I shall say that conduct of the first sort is a "violation of autonomy," and of the second sort, a "violation of the right to selective disclosure."²⁸¹

As indicated in section V, the Supreme Court adopted a similar classification last Term in *Whalen v. Roe*.

The foregoing discussion illustrates that no consensus has yet emerged on a useful general definition or general theory which will integrate the various interests that fall under the rubric of privacy. It may be observed that privacy is not the only constitutional or common-law concept which does not readily lend itself to precise definition;²⁸²

280. Freund, *supra* note 190, at 197.

281. Beardsley, *supra* note 225, at 56. Beardsley argued that of the two, autonomy is the more general norm. *Id.* at 65, 70. "I see no alternative to justifying the norm of selective disclosure directly in terms of the norm of autonomy, and to recognizing the latter as an ultimate moral principle, standing on its own feet." *Id.* at 70. However, Beardsley reasoned that confusion is caused by using "privacy" in conjunction with issues of autonomy as well as issues of selective disclosure. "[C]larity of thought would be promoted if we restricted the concept of privacy-violating conduct to violations of the right of selective disclosure. . . . [S]elective disclosure constitutes the conceptual core of the norm of privacy." *Id.* Unfortunately, in the legal system the usage of "privacy" for issues of autonomy and for issues of selective disclosure is so well-established that one must simply abide the confusion. Although Beardsley's classification scheme was not designed for the purpose, it is a useful tool for grouping the cases.

282. With reference to constitutional concepts, see note 182 *supra*, in which Professor Emerson delineated two basic, but unanswered, questions about substantive due process. With reference to common-law concepts, compare Prosser's view of defamation:

It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer ever has had a kind word, and it is a curious compound of a strict liability imposed upon innocent defendants, as rigid and extreme as anything found

indeed, some lack of conceptual clarity may be inherent in the development of any set of legal rights through case-by-case adjudication.

One further possibility may be suggested. Although he did not use the term "privacy," John Stuart Mill may have come closest to articulating the set of relationships that is meant by the word. Mill's classic effort at delineating the respective spheres of individual and society was his 1859 essay, *On Liberty*.²⁸³ "[T]he practical question," said Mill, "where to place the limit—how to make the fitting adjustment between individual independence and social control—is a subject on which nearly everything remains to be done. . . . No two ages, and scarcely any two countries, have decided it alike; and the decision of one age or country is a wonder to another."²⁸⁴ Mill then proposed "one very simple principle":

That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. . . . Over himself, over his own body and mind, the individual is sovereign.²⁸⁵

Mill believed that each person who lives in society receives the benefits of its protection; thus each person owes the society the affirmative duty not to injure others as well as the social responsibility to bear certain burdens, such as assisting in its defense and well-being.²⁸⁶ The society, on the other hand, should not subject the individual to social control unless the individual's actions are directly harmful to others or, in some cases, his failure to act likewise causes direct harm, as where he fails to assist with the common defense. The society is healthier and more creative, argued Mill, when governed by this principle. "No society in which these liberties are not, on the whole, respected, is free"²⁸⁷

Mill's formulation of the elements of human liberty bears a striking resemblance to the idea of privacy. Mill's realm of human liberty comprised "first, the inward domain of consciousness," including liberty of

in the law, with a blind and almost perverse refusal to compensate the plaintiff for real and very serious harm.

PROSSER, TORTS, *supra* note 19, at 737 (footnote omitted).

283. J.S. MILL, *supra* note 181.

284. *Id.* at 8.

285. *Id.* at 13.

286. *Id.* at 14-15.

287. *Id.* at 16.

conscience, thought, feeling, opinion, and expression; “[s]econdly, . . . liberty of tastes and pursuits,” including planning one’s own life and “doing as we like, subject to such consequences as may follow”; and “[t]hirdly, . . . the liberty of combination among individuals.”²⁸⁸

The essential feature of Mill’s formulation is his emphasis on the freedom of the individual. The burden is on the society to demonstrate that it will be affirmatively injured in order to justify the placement of restraints on the individual. As H.L.A. Hart has stated, “it is a question of *justification*. . . . [W]e are committed at least to the general critical principle that the use of legal coercion by any society calls for justification as something *prima facie* objectionable to be tolerated only for the sake of some countervailing good.”²⁸⁹

288. *Id.*

289. H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 20 (1969). The most prominent contemporary antagonist to Mill and Hart is Lord Devlin, whose position is set forth in P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1970). Devlin argued that a society should legislate on the basis of the common morality, *i.e.*, the set of moral values held by a majority or the society, without regard to the process of justification suggested by Hart or Mill. Enforcement of the common morality is needed, according to Devlin, for the cohesiveness of the society. *Id.* at 114–15. Devlin’s test for the propriety of legislation is the strength of popular feeling.

Nothing should be punished by law that does not lie beyond the limits of tolerance. It is not nearly enough to say that a majority dislike a practice; there must be a real feeling of reprobation [B]efore a society can put a practice beyond the limits of tolerance there must be deliberate judgment that the practice is injurious to society. . . . We should ask ourselves . . . whether . . . we regard it as a vice so abominable that its mere presence is an offense. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it.

Id. at 16–17. It is difficult for this writer to see how Devlin’s reasoning would prevent the majority from adopting the most extreme measures at will, such as the segregation of even eradication of minority groups on the theory that their very presence was morally offensive and therefore injurious to society. Devlin’s answer would probably be that right-thinking people would not make such a judgment:

Can then the judgment of society sanction every invasion of a man’s privacy, however extreme? Theoretically that must be so Society must be the judge of what is necessary to its own integrity In a free society men must trust each other and each man must put his trust in his fellows that they will not interfere with him unless in their honest judgment it is necessary to do so. . . . [C]hecks are usually put upon the government [*e.g.*, through the constitution or trial by jury] . . . so that it is difficult for them to enact and enforce a law that takes away another’s freedom unless in the honest judgment of society it is necessary to do so. . . . But the only certain security is the understanding in the heart of every man that he must not condemn what another does unless he honestly considers that it is a threat to the integrity or good government of their society.

Id. at 118.

Since Britain does not have a constitutionally entrenched Bill of Rights, protection of individual liberty depends substantially upon the observance of tradition. The traditional documents relating to British liberty do not have constitutional status in the American sense and can be overridden at any time by a parliamentary majority. Thus

Mill dealt not only with governmental intrusions on the liberty of the individual, but with private intrusions as well. Mill fully recognized that social pressure is as effective a means of social control as is the enactment of laws.²⁹⁰ Mill did not deal with invasions of privacy in the same way that Warren and Brandeis did; Mill was concerned with the coercive power of public opinion to enforce conformity to values and behavior patterns prescribed by the majority. But the Warren and Brandeis view would be consistent with Mill's way of thinking. Mill argued, in essence, for a realm of individuality—a zone of privacy, if you will—to be respected by the government and by the society at large.

The phrase "right of privacy" is attractive because it expresses something very much akin to Mill's idea. At its most general level, privacy embraces the idea of a zone of autonomy, a protected sector for individual decisionmaking, which can only be infringed to protect vital societal interests. That protected zone bears a substantial resemblance to Mill's realm of human liberty.

But if there is a striking parallel between contemporary ideas about privacy and Mill's concept of liberty, is there a need for the privacy idea at all? Presumably liberty is the more general principle, and the protection of liberty is an objective of the existing federal and state con-

Devlin may be accurate in describing the British reliance on the self-restraint of the majority for the protection of rights.

The United States Constitution rests on a different set of assumptions:

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

THE FEDERALIST No. 51 (A. Hamilton or J. Madison), in 43 GREAT BOOKS OF THE WESTERN WORLD 162, 163 (R. Hutchins ed. 1952). From this follows the doctrine of separation of powers. "[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition." *Id.* Unlike the British system, the American Constitution was specifically designed to include provision for judicial review of the constitutionality of legislative enactments. THE FEDERALIST No. 78 (A. Hamilton).

The overriding difficulty with Devlin's argument is that it provides very little guidance about the proper sectors for individual privacy and governmental control. Indeed, Devlin is driven to concede, as quoted above, that his theory sanctions any invasion of privacy felt socially necessary. Devlin provides a theoretical justification for any action the society might choose to take; Mill and Hart, by contrast, attempt to locate a dividing line between the individual and the society.

290. J.S. Mill, *supra* note 181, at 13.

stitutions. Is a constitutional *privacy* right needed to protect interests which could be protected under the rubric of liberty?

Perhaps, in theory, Mill's concept of liberty should inform the constitutional analysis engaged in by federal and state courts. Mill's essay may, in general terms, reflect the notion of liberty held by the general public. But there are practical difficulties with the application of the Mill and Hart approach to constitutional litigation.

The constitutional term "liberty" is potentially one of unlimited elasticity. The content of constitutional "liberty" continues to change with changing times and conditions; as indicated above, it was fourteenth amendment liberty that served as the source for the recent development of the federal constitutional right of privacy. At the same time, however, the term "liberty" has come to possess a rather specific meaning in state and federal case law. It has been the subject of extensive constitutional exegesis and the object of exhaustive doctrinal dispute. While in theory constitutional "liberty" is infinitely elastic, in fact its elasticity is limited by long lines of state and federal constitutional cases.

Privacy has been recognized as an attribute of the liberty guaranteed by the United States Constitution, but the scope of the privacy right has been strictly limited. "Liberty," and the privacy guaranteed thereby, have not been given the expansive reading that Mill's analysis calls for. The United States Supreme Court's caution in the liberty-privacy area is a necessary result more of a federal constitutional system than of the ideological viewpoint of the Burger Court; it was the Warren Court in *Katz* that pointed out the primary role of the states in protection of privacy, property, and life itself.²⁹¹ Given the restricted charter of the federal courts, and the primary responsibility of the states for the protection of individual rights, Mill's concept of liberty is susceptible of only the most limited application in federal constitutional cases.

When one turns to the state judicial systems, one encounters difficulties as well. While there are notable exceptions,²⁹² many state courts do not take care to make clear whether their decisions rest on the state constitution, the federal constitution, or both. Federal cases are frequently used as the beginning points for analysis.²⁹³ Constitutional litigation in state courts has not always resulted in a coherent body of state constitutional law, nor an expansive view of personal rights protected

291. See *Katz v. United States*, 389 U.S. at 350-51, quoted in text accompanying note 26 *supra*.

292. See Brennan, *supra* note 32, at 498-502.

293. See Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 933-34 (1976).

by the state constitution. Thus the state-court conditions for Mill's concept of liberty are not necessarily favorable; cautiousness, deference to the legislature, and reliance on federal analysis are likely to yield a limited view of "liberty," even under a state constitution.²⁹⁴

The case for a state constitutional right of privacy begins to emerge. A state court may be reluctant to innovate by taking an expansive view of existing constitutional terminology, especially a frequently interpreted concept like "liberty." But the same courts will almost certainly respond to a constitutional mandate. Addition of an express right of privacy to a state constitution may therefore serve as a clear directive for judicial action to protect what Mill would have called liberty and what in privacy parlance would be rights of autonomy and selective disclosure.²⁹⁵

One may persuasively argue that any reasonable definition of liberty must include the concepts Mill expressed. The practical problem, however, is enforcement—judicial recognition and action, as well as legislative and executive deference, to a zone of individual privacy. Express constitutional language is a direct method to secure recognition of individual privacy, whether or not privacy is considered to be inherent in the concept of liberty.

If the foregoing analysis is correct, the privacy idea takes its continuing vitality from its close relationship to our ideas of individual freedom. That close relationship accounts for the favorable reception of privacy language in the constitutions of ten states. Thus, when Montana decided in 1972 to say in its constitution that "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest,"²⁹⁶ citizens as well as lawyers have an intuitive grasp of the idea being communicated. It is an idea that Mill would have called "liberty."

VII. THE RIGHT OF PRIVACY IN STATE CONSTITUTIONS

The constitutions of ten states expressly protect privacy.²⁹⁷ Most of the state constitutional rights of privacy are of recent vintage: eight of the ten have been adopted since 1968. Two, however, are considerably older: Washington's measure was adopted in 1889, and Arizona's in 1910. All of these states have placed the privacy section in the declara-

294. *See id.* at 933.

295. *See id.* at 935-36.

296. MONT. CONST. art. II, § 10.

297. The privacy provisions of the ten states are reproduced in the Appendix. Seven of the ten protect "privacy." Florida protects "private communications," while Arizona and Washington protect "private affairs."

tion of rights, but there is great variety in the nature of the privacy interest being protected and the precise formulation within the constitution.

The approaches taken by the states fall into three main groups. In the first group are the states that have created a "free-standing" right of privacy. Three states have given privacy separate status that highlights it as an independent right. Alaska provides that "[t]he right of the people to privacy is recognized and shall not be infringed."²⁹⁸ The Montana Constitution states that "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."²⁹⁹ California lists privacy among the inalienable rights: "enjoying . . . life and liberty, . . . possessing . . . property, and pursuing . . . safety, happiness, and privacy."³⁰⁰

In the second group are the states that have integrated the privacy right with the section prohibiting unreasonable searches and seizures. Five states have done so, thus affording an intermediate level of protection to their citizens. The narrowest provision is Florida's, protecting only against "unreasonable interception of private communications."³⁰¹ The constitutions of Hawaii, Illinois, Louisiana, and South Carolina are more expansive, protecting against "unreasonable invasions of privacy."³⁰² All five differ from those in the first group by being anchored within the search and seizure section of the state constitution.

The privacy provisions of the states comprising the third group are the equivalent of the classic prohibition against unreasonable searches and seizures. The Washington and Arizona constitutions are identically worded: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."³⁰³

The Alaska Constitution directs the legislature to implement the privacy section, although, as explored below, its privacy section has been construed to be self-executing. The Montana Constitution specifies the standard of review: privacy is not to be infringed except upon the showing of a compelling state interest. The Illinois Constitution not only creates a privacy right, but also includes privacy in the right-to-remedy section. Louisiana expressly confers standing to challenge an illegal search on anyone wronged by such a search. Wiretapping is an

298. ALAS. CONST. art. I, § 22.

299. MONT. CONST. art. II, § 10.

300. CAL. CONST. art. I, § 1.

301. FLA. CONST. art. I, § 12.

302. HAWAII CONST. art. I, § 5; ILL. CONST. art. I, §§ 6, 12; LA. CONST. art. I, § 5; S.C. CONST. art. I, § 10.

303. ARIZ. CONST. art. II, § 8; WASH. CONST. art. I, § 7.

evident concern: the constitutions protect communications in Florida, Hawaii, Illinois, and Louisiana.

With that brief overview, there follows an examination of the constitutional provisions of the ten states. The Appendix may be consulted as needed for the full text of state privacy sections or for comparison among the states. Quotations will be from the relevant constitutional provision unless otherwise indicated.

A. States Having a Free-standing Right of Privacy

Alaska, Montana, and California are the states affording the most extensive protection to privacy. Each has adopted a constitutional provision giving privacy the status of a separate right. Each state will be considered individually.

1. *Alaska*.—Alaska developed a state constitutional right of privacy by judicial interpretation prior to the addition of article I, section 22, to the state constitution in 1972. In *Breese v. Smith*,³⁰⁴ the Alaska Supreme Court considered the appeal of a junior high school student who had been expelled from school for refusal to cut his hair in conformity with the school dress code. In an extremely thorough opinion, the court declined to enter “the federal thicket,”³⁰⁵ preferring instead to decide the case as a matter of state constitutional law.

After reviewing the positions of the various state and lower federal courts, the Alaska court held “that under article I, section 1 of the Alaska constitution’s affirmative grant to all persons of the natural right to ‘liberty,’ students attending public educational institutions in Alaska possess a constitutional right to wear their hair in accordance with their personal tastes.”³⁰⁶ The court went on to mention Judge Cooley’s right “to be let alone,” as reiterated by the United States Supreme Court in *Botsford*,³⁰⁷ and continued, “The spectre of governmental control of the physical appearance of private citizens, young and old, is antithetical to a free society”³⁰⁸

Having established that privacy is a protected aspect of a citizen’s liberty under the Alaska Constitution, the court then considered the appropriate standard of review. Looking to *Griswold* as persuasive

304. 501 P.2d 159 (Alas. 1972).

305. *Id.* at 166.

306. *Id.* at 168.

307. *Id.* *Botsford* is reviewed in section IV *supra*.

308. 501 P.2d at 169. The court also quoted Judge Mann in *Conyers v. Glenn*, 243 So. 2d 204 (Fla. 2d Dist. Ct. App. 1971): “‘We would surmise that many who are not offended in the slightest by the imposition of the collective will on the long-haired boy of today would be early advocates of the short-haired individual’s right to be different in a long-haired society.’” 501 P.2d at 175 (footnote omitted).

authority, the court adopted the compelling interest standard, to be applied "where a person's individual liberty, as guaranteed by the Alaska constitution, allegedly has been encroached upon."³⁰⁹ Reviewing the record as a whole, the court concluded that the school system had not demonstrated a compelling state interest in its hair regulation.

In 1972, the privacy amendment to the Alaska Constitution was adopted. Article I, section 22 provides:

The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

There was "no available recorded history of this amendment" for guidance to its exact scope and meaning.³¹⁰ While the language of the amendment is susceptible to an interpretation that the provision does not take effect without being implemented by the legislature, from the outset the Alaska courts have treated the provision as self-executing.³¹¹

309. 501 P.2d at 170 (footnote omitted).

310. *Gray v. State*, 525 P.2d 524, 528 (Alas. 1974).

311. The point is not discussed in the Alaska privacy decisions; the cases simply assume that the privacy section is directly applicable. *Breese* had already established a self-executing privacy right under the Alaska Constitution, independent of the privacy amendment. Had the amendment been construed to be non-self-executing, it would have had the paradoxical effect of reducing, rather than extending, the Alaska right of privacy.

A general review of state statutes relating to privacy is beyond the scope of this paper, as is a particular review of Alaska's response to the constitutional mandate that the legislature implement the privacy amendment. However, Alaska is one of several states that have enacted legislation based on a model state act for criminal offender record information. The model act was drafted in 1971 by a task force of the Law Enforcement Assistance Administration (LEAA) of the United States Department of Justice. The intent of the model act was to protect the security and privacy of criminal justice records. *See, Towe, supra* note 39, at 70-73.

The Alaska statute is patterned after the model act. It lists those crimes (identified by statute) for which the police agencies may collect criminal justice information. The Governor's Commission on the Administration of Justice is directed to adopt rules and regulations under the administrative procedure act for the "security and privacy" of that information, taking into account the interests of law enforcement and each individual's right to privacy. There are more stringent standards for "intelligence information"—investigative information not directly connected with the commission of a particular crime. Each state or municipal law enforcement agency must file an annual report with the Commission, certifying compliance with the confidentiality requirements. Specific rights are conferred to inspect criminal justice information relating to oneself. In case of violation of the chapter, the injured party has a civil cause of action for actual damages plus costs and attorney's fees; a fine and one-year criminal penalty are available also. ALAS. STAT. tit. 12, ch. 62 (1962 & Supp. 1977). The statute was enacted in 1972 at the same session that proposed the privacy amendment to the Alaska Constitution. *See Act of July 3, 1972, ch. 161, 1972 Alaska Sess. Laws* (microfilm edition not consecutively paginated); Alas. S.J. Res. 68 (1972), *id.* Thus the statute cannot strictly be regarded as a response to the constitutional mandate that "[t]he legislature shall implement [the privacy amendment]."

For an extensive, though not necessarily exhaustive, listing of state statutes and cases

Alaska's leading case under the new privacy section is *Ravin v. State*.³¹² There, a defendant challenged the validity of the state marijuana possession law on the theory that it violated the right of privacy. Ravin argued that the compelling state interest test was the proper standard³¹³ and that the state could not demonstrate a compelling interest in prohibiting possession or use of marijuana by adults.

The court began by reconsidering its position on the standard of review to be applied where a fundamental right is involved. Recognizing "considerable dissatisfaction with the fundamental right-compelling state interest test,"³¹⁴ the court adopted a new approach. The court decided the appropriate test to be

whether there is a proper governmental interest in imposing restrictions on marijuana use and whether the means chosen bear a substantial relationship to the legislative purpose. If governmental restrictions interfere with the individual's right to privacy, we will require that the relationship between means and ends be not merely reasonable but close and substantial.³¹⁵

Rather than continue the traditional two tiers of rational basis and strict scrutiny, Alaska opted, in effect, for a middle tier. Its "close and substantial means" or "means-ends" test amounted to a "less speculative, less deferential, more intensified . . . inquiry when . . . applying the traditional rational basis test" ³¹⁶

In considering Ravin's privacy claims, the court carefully reviewed, as persuasive authority, the United States Supreme Court's privacy decisions, finding therein "a right of personal autonomy in relation to choices affecting an individual's personal life."³¹⁷ The court concluded that there was no fundamental constitutional right to possess or ingest marijuana since marijuana possession involved no substantial issue of personal autonomy. However, the court did determine that privacy in the home is a fundamental right. Reasoning by analogy to *Stanley v. Georgia*,³¹⁸ the court concluded that one's basic right of privacy in the

relating to recordkeeping and information management in the public and private sectors, see PRIVACY PROTECTION STUDY COMMISSION, *PRIVACY LAW IN THE STATES* (1977) (Appendix 1 to the Commission's final report, printed separately).

312. 537 P.2d 494 (Alas. 1975). For an excellent treatment of this decision, see 1976 WIS. L. REV. 305.

313. The Alaska Supreme Court had expressly so stated in an earlier case, *Gray v. State*, 525 P.2d 524, 527-28 (Alas. 1974), but was unable to reach the merits of the constitutional issue for want of a properly developed record.

314. 537 P.2d at 498.

315. *Id.*

316. *Id.* (citations omitted).

317. *Id.* at 500.

318. 394 U.S. 557 (1969).

home encompasses "the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context . . . unless the state can meet its substantial burden and show that proscription of . . . marijuana in the home is supportable by achievement of a legitimate state interest."³¹⁹ After a detailed review of the scientific evidence relating to marijuana, the court held that the state had not met its burden. The magnitude of the danger did not outweigh the intrusion into the home. The court conceded that use of a strongly debilitating drug on a massive scale could conceivably be so damaging to the society that even private usage could be prohibited; in such circumstances the state's burden would be met. Private marijuana possession, however, did not constitute such a menace.

The court was careful to limit its holding. It noted legitimate state interests in prevention of marijuana use by drivers and adolescents. There was no constitutional protection for purchase or sale, nor any "absolute" protection for possession or use in public. Possession, even in the home, of amounts that indicated an intent to sell would also be unprotected.³²⁰

In reaching its decision, the court expressed its view of the proper relationship between government and the individual:

[A] state cannot simply decide what is in a person's best interest and compel it.

. . . [T]he authority of the state to exert control over the individual extends only to activities of the individual which affect others or the public at large as it relates to matters of public health or safety, or to provide for the general welfare. We believe this tenet to be basic to a free society.³²¹

Concurring, two justices emphasized that, while the home was the focus of discussion in *Ravin*, there should be no implication that the right of privacy protected only that physical zone.³²²

Subsequent decisions have further defined the Alaska privacy right. The court has held that the right of privacy applies only when there is state action; it does not operate directly with reference to any actions by the private sector which infringe privacy.³²³ Dictum in another case clearly suggests that the right of privacy protects consenting sexual behavior between adults, at least within the home.³²⁴ The court

319. 537 P.2d at 504.

320. *Id.* at 511.

321. *Id.* at 509 (footnotes omitted). Compare John Stuart Mill's formulation, text accompanying notes 285-87 *supra*.

322. *Id.* at 513-16.

323. *Allred v. State*, 554 P.2d 411, 416 (Alas. 1976).

324. *Anderson v. State*, 562 P.2d 351, 358-59 (Alas. 1977).

reaffirmed that juveniles have a right to privacy and autonomy, but noted that somewhat greater restraints may be justified than for adults.³²⁵ The right of privacy was considered in search and seizure cases, but the cases were decided on standard search and seizure grounds; the privacy issue did not add materially to the decisionmaking process.³²⁶ And, true to its word in *Ravin*, the court sustained the marijuana prescription against a defendant engaged in sale.³²⁷

In *Falcon v. Alaska Public Offices Commission*,³²⁸ the supreme court considered the constitutionality of Alaska's conflict of interest law, as applied to a physician-officeholder. The law required disclosure of the sources of all income in excess of \$100. This was construed to require disclosure of the names of patients who had paid the requisite amount.

Dr. Falcon was found to have standing to assert the privacy rights of his patients. He successfully argued that at least in some circumstances, disclosure of patients' names would violate their rights of privacy. These circumstances would include disclosure of consultation with a psychiatrist, psychologist, or a physician specializing in abortion, contraception, sexual problems, or venereal disease. Privacy rights would also be implicated where a married person visits a general practitioner without the spouse's knowledge or a minor child does so without the parents' knowledge. The opinion emphasized, however, that such situations are the exception, rather than the rule. The court held that the conflict of interest law could not be enforced to require reporting of patients' names by physicians—until the Alaska Public Offices Commission promulgates rules to prevent invasion of patients' rights of privacy.

In summary, the significant features of the Alaska experience are the development of a free-standing right of privacy; the beginning of a conceptual framework for privacy—that is, an explicit philosophy about the individual's relationship to the government; the development of an appropriate standard of review, the "means-ends" standard; and the actual demonstration that the provision operates independently of the federal constitutional right of privacy. Despite a constitutional directive for implementation of the privacy provision by the legislature, the privacy right has been construed to be self-executing. While the results reached in some of the cases have been striking, the most impressive

325. *Id.* In another case, the right of privacy was held not to prohibit the commitment to a juvenile facility of a child in need of supervision. *L.A.M. v. State*, 547 P.2d 827 (Alas. 1976).

326. *Anderson v. State*, 555 P.2d 251 (Alas. 1976); *Smith v. State*, 510 P.2d 793 (Alas. 1973). *But see* dissenting opinion, 510 P.2d at 799.

327. *Belgarde v. State*, 543 P.2d 206 (Alas. 1975).

328. 570 P.2d 469 (Alas. 1977).

feature is the craftsmanship of the Alaska opinions, which have laid a solid foundation for its state constitutional law.

2. *Montana*.—Like Alaska, Montana has a free-standing right of privacy. Montana's right of privacy was proposed by its 1971–72 Constitutional Convention and was approved when the revised constitution was ratified in 1972.³²⁹ Article II, section 10, now provides:

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

A closely related provision, article II, section 9, establishes the "right to know":

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

The deliberations of the Constitutional Convention have been transcribed and provide insight into the intent of the framers.³³⁰ The Convention's Bill of Rights Committee proposed the privacy section, which initially read, "The right of privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."³³¹ The committee's goal was to expand the rights of the individual at a time when technological development and the growing complexity of society threaten "the right to be let alone."³³² The proposal was amended by the Convention to say, "the right of individual privacy," rather than "the right of privacy," to make it clear that the right of privacy extended only to individuals, and not to

329. Montana had previously recognized the invasion of privacy tort, *Welsh v. Pritchard*, 241 P.2d 816 (Mont. 1952), and a right of privacy against electronic eavesdropping, *State v. Brecht*, 485 P.2d 47 (Mont. 1971). Both were based on one's constitutional right to liberty and pursuit of happiness. 241 P.2d at 819; 485 P.2d at 51.

330. The Convention had the benefit of a background study on the right of privacy and the right to know: MONTANA CONSTITUTIONAL CONVENTION COMMISSION, BILL OF RIGHTS 111–17, 215–48 (1972) (Constitutional Convention Study No. 10). The study reproduced a proposal by Professor Westin which bears a distant resemblance to the provision finally adopted. Westin proposed: "The right of privacy of persons, communication, and association shall not be abridged." *Id.* at 241, citing Westin, *supra* note 40, at 1231 (Part II).

331. MONTANA CONSTITUTIONAL CONVENTION 1971–72, TRANSCRIPT OF PROCEEDINGS 5179 (1972) [hereinafter MONTANA PROCEEDINGS].

332. *Id.* at 5180–83.

governments or corporations.³³³ The committee reasoned that a corporation could be considered a person for some purposes, but could not be included within the term "individual."³³⁴

The committee recommendation that privacy "not be infringed without the showing of a compelling state interest" was explained as creating a "semi-permeable wall of separation between individual and state" ³³⁵ The barrier between the individual and society was not to be absolute; it could be penetrated, but only upon the requisite showing.³³⁶ The Convention voted to delete the compelling state interest standard, thereby leaving the unequivocal statement that the right of privacy "shall not be infringed." The movant of the amendment argued that the compelling state interest test could weaken the privacy right; he reasoned that the decision about what constitutes a compelling state interest "may be interpreted by whatever state agency happens to have an interest in invading my privacy at that particular time."³³⁷ The Bill of Rights Committee acquiesced in the amendment, believing that case-by-case definition of the scope of the privacy right would be sufficient.³³⁸ Opposition to the amended version soon developed. Objection was made that "we have now made [privacy] an absolute right."³³⁹ The majority evidently took the view that litigation and confusion could be avoided if a specific standard of review

333. *Id.* at 5179-80. In adding the modifier "individual," the Convention did not consider whether by implication it had excluded associational privacy from the protection of the Montana provision. Presumably a court would take the view that freedom to associate and privacy of association are fundamental attributes of the autonomy protected by the right of individual privacy. The formulation by Professor Westin, quoted in note 330 *supra*, expressly includes "privacy of association."

334. *Id.* at 5183. Despite this construction of the word "individual," the Montana Attorney General "stated that the exception from the right to know which reads, 'except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure,' protects corporations as well as natural persons." Towe, *supra* note 39, at 85 (footnote omitted). The Montana right to know is considered in greater detail below.

335. MONTANA PROCEEDINGS, *supra* note 331, at 5181.

336. *Id.* One question never directly discussed was whether the right of privacy was intended to protect consenting sexual behavior between adults in private. The Convention did consider an individual member proposal to add a new section to the declaration of rights providing that "[p]rivate sexual acts between consenting adults do not constitute a crime." *Id.* at 5703. The movant asserted that the provision was to deal with the "problems of homosexuality." *Id.* at 5704. While the proposal was defeated, the total absence of debate gives no clue to the views of the Convention. The delegates' action was consistent with a number of hypotheses, including the view that the matter was already embraced in the basic right of privacy adopted by the Convention; the view that it was not; and the view that the issue was politically too volatile to deal with expressly.

337. *Id.* at 5183-84.

338. *Id.* at 5184, 5711-12.

339. *Id.* at 5710.

were articulated for the courts. The compelling state interest standard was restored.³⁴⁰

Hotly debated was the question how to strike the balance between the individual right to privacy and the public "right to know." The Bill of Rights Committee proposed the new article II, section 9, as quoted above, with the intention of establishing a strong "open government" policy. The panel expressed its approval of existing Montana statutes regarding open meetings and public documents. A constitutional measure, it believed, would establish a stronger and more lasting policy. Thus the inclusion of the privacy language was motivated by a desire to strike a balance between the right of privacy and right to know; it was not motivated by an intention to increase the sector of privacy at the expense of existing open meeting and public documents laws.³⁴¹

The committee expected the right of privacy to be "fully respected."³⁴² However, the right of privacy was to prevail only when it "clearly exceeds the merits of public disclosure."³⁴³ The committee "added the word, clearly, with the intention of tipping the balance in favor of the right to know."³⁴⁴ State income tax records would remain confidential, but state personnel records, which are normally closed, could be opened in cases of great public interest, such as a dismissal of a department head for cause.³⁴⁵

The committee proposal had originally been drafted with the participation and approval of representatives of the press. The press changed its position, however, and vigorously opposed the proposal.³⁴⁶ The basic concern was that government agencies might use the new language to increase government secrecy, since they would have an opportunity to weigh the "demand of individual privacy" and the

340. *Id.* at 5716; *see id.* at 5713.

341. *Id.* at 5145-50.

342. *Id.* at 5148.

343. *Id.* at 5146 (emphasis added).

344. *Id.* at 5149.

345. *Id.* at 5149-50. One delegate inquired whether the state's interest in secrecy was included within the term "individual privacy." The chairman of the Bill of Rights Committee asserted that it was. *Id.* at 5172-73.

That answer seems unsatisfactory. The state has an interest in the confidentiality of certain matters where there may be no individual privacy interest at all. For example, the state clearly has an interest in maintaining the secrecy of competitive bids until time for the bid opening. Clearly there is a state interest in maintaining the secrecy of answers to civil service examination questions. In neither instance does the state interest in secrecy operate primarily to vindicate an individual privacy interest. Rather, secrecy in both instances is essential for carrying out a vital governmental function. It would seem preferable for a right-to-know provision to recognize expressly that there is occasionally a *public* interest in nondisclosure, even though individual privacy interests are absent.

346. *See id.* at 5153-57, 7577, 7614.

“merits of public disclosure.” Opponents of the measure preferred to leave such decisions to the legislature and the courts.³⁴⁷ As the Convention neared the completion of its work, press opposition to section 9 seemed to threaten the entire constitution.³⁴⁸ The Bill of Rights Committee proposed a modified version that would have left the delineation of exceptions in the hands of the legislature and the courts.³⁴⁹ The Convention chose instead to stand by its original language, apparently persuaded by the view that the scope of constitutional principles should not be left for definition by the legislature and that the original proposal had struck the proper balance.³⁵⁰

Smaller tempests surrounded two other privacy-related issues. With regard to wiretapping, the position of the Bill of Rights Committee was unusual. The committee’s rough draft of the declaration of rights had included language to address the problem of electronic surveillance.³⁵¹ Public reaction, however, was hostile to electronic surveillance of any sort. Law enforcement felt that such eavesdropping was not needed and maintained that it was not being used in Montana.³⁵² Moreover, while the matter was not entirely clear, wiretapping was believed to be illegal under Montana law.³⁵³

The committee concluded that the addition of constitutional language about electronic eavesdropping would “make something constitutional that we may someday want to regulate or even abolish.”³⁵⁴ The item was deleted from the committee recommendation, with the intention of leaving the matter to the legislature.³⁵⁵ Indeed, the committee indicated it would be receptive to an amendment to prohibit electronic surveillance entirely.³⁵⁶ After an unsuccessful effort to develop more stringent language short of outright prohibition, the Convention accepted the committee recommendation to delete the item.³⁵⁷

Closely related was the general issue of the treatment of privacy in the search and seizure section. The committee’s original formulation of article II, section 11, read in part: “The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures and *invasions of privacy*, and no warrant . . . shall issue . . .

347. See *id.* at 5168–76, 7575–7619.

348. *Id.* at 7591–92.

349. *Id.* at 7575–77, 7591–92.

350. See *id.* at 7575–7619.

351. *Id.* at 5186.

352. *Id.*

353. *Id.* at 5188; see note 329 *supra*.

354. *Id.* at 5186.

355. *Id.* at 5187.

356. *Id.* at 5200.

357. *Id.* at 5189–5201.

without probable cause"³⁵⁸ It soon became apparent that this language was in conflict with the right of privacy established in article II, section 10. The Convention had been at pains to establish a strong privacy right in section 10, with a very high standard to be met before any infringement would be permitted. In section 11, however, invasions of privacy were permitted under a less stringent standard of "reasonableness": only "unreasonable" invasions of privacy would be forbidden. Having recognized the conflict, the Convention struck the "invasion of privacy" language from section 11, leaving the right of privacy for coverage in section 10.³⁵⁹

With the indicated modifications and minor stylistic changes, the Bill of Rights Committee's proposals were adopted by the Convention and approved by the electorate. Despite the sound and fury over the potential reach of the right of privacy, it has played a part in only one reported Montana decision.³⁶⁰ While that case involved a search and seizure issue, the right of privacy was one of the considerations cited in support of a strong exclusionary rule. The right to know has been the subject of two reported decisions, but neither involved the assertion of a claim of individual privacy.³⁶¹ The Montana Constitutional Convention's thoughtful analysis of the right of privacy awaits application in future cases.

3. *California.*—Like Alaska and Montana, California has a right of privacy that can be described as free-standing. The California privacy right does not stand alone in a separate section of the constitution; rather it is included in an enumeration of inalienable rights. Article I, section 1, provides:

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.

Privacy was added by amendment in 1972.³⁶² The "legislative history" of the amendment is found in a statement by proponents in-

358. *Id.* at 5185 (emphasis added).

359. *Id.* at 5203-05.

360. *State v. Coburn*, 530 P.2d 442 (Mont. 1974). The case involved the applicability of the exclusionary rule to evidence acquired in a search by a private individual, where the private individual had consulted with the police before making the search.

361. *See State ex rel. Judge v. Legislative Finance Comm.*, 543 P.2d 1317 (Mont. 1975); *Montana Consumer Counsel v. Public Serv. Comm'n*, 541 P.2d 770 (Mont. 1975).

362. California had previously recognized the invasion of privacy tort, *Melvin v. Reid*, 297 P. 91 (Cal. Dist. Ct. App. 1931), as well as privacy rights in other contexts. *See White v. Davis*, 533 P.2d 222, 233 n.10 (Cal. 1975).

cluded in the state election brochure.³⁶³ The election brochure arguments are set out in the margin.³⁶⁴ The thrust of the privacy amend-

363. See *White v. Davis*, 533 P.2d at 233-34.

364. The privacy amendment was Proposition 11 on California's general election ballot of November 7, 1972. The election brochure stated, in relevant part:

RIGHT OF PRIVACY. Legislative Constitutional Amendment.

Adds right of privacy to inalienable rights of people.

Financial impact: None.

....

Detailed Analysis by the Legislative Counsel

The Constitution now provides that all men 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 and happiness.

This measure, if adopted, would revise the language of this section to list the right of privacy as one of the inalienable rights. It would also make a technical nonsubstantive change in that the reference to "men" in the section would be changed to "people."

Argument in Favor of Proposition 11

The proliferation of government snooping and data collecting is threatening to destroy our traditional freedoms. Government agencies seem to be competing to compile the most extensive sets of dossiers of American citizens. Computerization of records makes it possible to create "cradle-to-grave" profiles on every American.

At present there are no effective restraints on the information activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian.

The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose. It prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us.

Fundamental to our privacy is the ability to control circulation of personal information. This is essential to social relationships and personal freedom. The proliferation of government and business records over which we have no control limits our ability to control our personal lives. Often we do not know that these records even exist and we are certainly unable to determine who has access to them.

Even more dangerous is the loss of control over the accuracy of government and business records on individuals. Obviously, if the person is unaware of the record, he or she cannot review the file and correct inevitable mistakes. Even if the existence of this information is known, few government agencies or private businesses permit individuals to review their files and correct errors.

The average citizen also does not have control over what information is collected about him. Much is secretly collected. We are required to report some information, regardless of our wishes for privacy or our belief that there is no public need for the information. Each time we apply for a credit card or a life insurance policy, file a tax return, interview for a job, or get a drivers' license, a dossier is opened and an informational profile is sketched. Modern technology is capable of monitoring, centralizing and computerizing this information which eliminates any possibility of individual privacy.

The right of privacy is an important American heritage and essential to the fundamental rights guaranteed by the First, Third, Fourth, Fifth and Ninth Amendments to the U.S. Constitution. This right should be abridged only when there is compelling public need. Some information may remain as designated public records but only when the availability of such information is clearly in the public interest.

Proposition 11 also guarantees that the right of privacy and our other constitutional freedoms extend to all persons by amending Article I and substituting the term "people" for "men." There should be no ambiguity about whether our constitutional freedoms are for every man, woman and child in this state.

KENNETH CORY
 Assemblyman, 69th District
 GEORGE R. MOSCONE
 State Senator, 10th District

Rebuttal to Argument in Favor of Proposition 11

To say that there are at present no effective restraints on the information activities of government and business is simply untrue. In addition to literally hundreds of laws restricting what use can be made of information, every law student knows that the courts have long protected privacy as one of the rights of our citizens.

Certainly, when we apply for credit cards, life insurance policies, drivers' licenses, file tax returns or give business interviews, it is absolutely essential that we furnish certain personal information. Proposition 11 does not mean that we will no longer have to furnish it and provides no protection as to the use of the information that the Legislature cannot give if it so desires.

What Proposition 11 can and will do is to make far more difficult what is already difficult enough under present law, investigating and finding out whether persons receiving aid from various government programs are truly needy or merely using welfare to augment their income.

Proposition 11 can only be an open invitation to welfare fraud and tax evasion and for this reason should be defeated.

JAMES E. WHETMORE
 State Senator, 35th District

Argument Against Proposition 11

Proposition 11, which adds the word "privacy" to a list of "inalienable rights" already enumerated in the Constitution, should be defeated for several reasons.

To begin with, the present Constitution states that there are certain inalienable rights "among which are those" that it lists. Thus, our Constitution does not attempt to list all of the inalienable rights nor as a practical matter, could it do so. It has always been recognized by the law and the courts that privacy is one of the rights we have, particularly in the enjoyment of home and personal activities. So, in the first place, the amendment is completely unnecessary.

For many years it has been agreed by scholars and attorneys that it would be advantageous to remove much unnecessary wordage from the Constitution, and at present we are spending a great deal of money to finance a Constitution Revision Commission which is working to do this. Its work presently is incomplete and we should not begin to lengthen our Constitution and to amend it piecemeal until at least the Commission has had a chance to finish its work.

The most important reason why this amendment should be defeated, however, lies in an area where possibly privacy should not be completely guaranteed. Most government welfare programs are an attempt by California's more fortunate citizens to assist those who are less fortunate; thus, today, millions of persons are the bene-

ment was to combat the "proliferation of government snooping and data collecting," which was "threatening to destroy our traditional freedoms."³⁶⁵ Compilation of dossiers and computerization of records were seen as particular evils. The privacy right embraced the protection of "our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose,"³⁶⁶ as well as "the ability to

ficiaries of government programs, based on the need of the recipient, which in turn can only be judged by his revealing his income, assets and general ability to provide for himself.

If a person on welfare has his privacy protected to the point where he need not reveal his assets and outside income, for example, how could it be determined whether he should be given welfare at all?

Suppose a person owned a house worth \$100,000 and earned \$50,000 a year from the operation of a business, but had his privacy protected to the point that he did not have to reveal any of this, and thus qualified for and received welfare payments. Would this be fair either to the taxpayers who pay for welfare or the truly needy who would be deprived of part of their grant because of what the wealthy person was receiving?

Our government is helping many people who really need and deserve the help. Making privacy an inalienable right could only bring chaos to all government benefit programs, thus depriving all of us, including those who need the help most.

And so because it is unnecessary, interferes with the work presently being done by the Constitution Revision Commission and would emasculate all government programs based on recipient need, I urge a "no" vote on Proposition 11.

JAMES E. WHETMORE
State Senator, 35th District

Rebuttal to Argument Against Proposition 11

The right to privacy is much more than "unnecessary wordage". It is fundamental in any free society. Privacy is not now guaranteed by our State Constitution. This simple amendment will extend various court decisions on privacy to insure protection of our basic rights.

The work of the Constitution Revision Commission cannot be destroyed by adding two words to the State Constitution. The Legislature actually followed the Commission's guidelines in drafting Proposition 11 by keeping the change simple and to the point. Of all the proposed constitutional amendments before you, this is the simplest, the most understandable, and one of the most important.

The right to privacy will not destroy welfare nor undermine any important government program. It is limited by "compelling public necessity" and the public's need to know. Proposition 11 will not prevent the government from collecting any information it legitimately needs. It will only prevent misuse of this information for unauthorized purposes and preclude the collection of extraneous or frivolous information.

KENNETH CORY
Assemblyman, 69th District

Proposed Amendments to Constitution, General Election, November 7, 1972, at 26-28 (compiled by California Legislative Counsel; distributed by California Secretary of State).

365. *Id.* at 26.

366. *Id.* at 27.

control circulation of personal information."³⁶⁷ The privacy right would prevent the collection of unnecessary information and the misuse of information. It would assist citizens in determining the existence of records, controlling access to them, and assuring the accuracy of the contents.³⁶⁸

The right of privacy was intended to be self-executing; moreover, it was to operate directly not only against government action but also against the private sector. The brochure said: "*At present there are no effective restraints on the information activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian.*"³⁶⁹ The brochure concluded with an assertion of the "fundamental" nature of the right, saying that it "should be abridged only when there is compelling public need."³⁷⁰

Several cases involving the privacy amendment have reached the California Supreme Court. In *White v. Davis*,³⁷¹ a professor at U.C.L.A. brought suit to enjoin intelligence-gathering activities by the Los Angeles Police Department. He alleged that police officers had posed as university students, enrolled in classes, and compiled dossiers and intelligence reports about class discussions, which documents were then turned over to the police department. Because the trial court dismissed the complaint, actual findings of fact were not made. The California Supreme Court reversed, ruling that the allegations stated a prima facie violation of the recently enacted right of privacy.

The court noted that "the full contours of the new constitutional provision have . . . not even tentatively been sketched."³⁷² It then quoted at length from the election brochure on the 1972 constitutional amendment, pointing out that it was "in essence, the only 'legislative history' . . . available to us"³⁷³ and that the propriety of using election brochure arguments to construe constitutional amendments was well-settled.³⁷⁴ Since the thrust of the brochure was to condemn "government snooping and data collecting," the right of privacy was clearly applicable.

The court noted the intended application of the amendment to "government and business interests"³⁷⁵ and ruled that intrusions on

367. *Id.* (emphasis omitted).

368. *See id.* at 26-27.

369. *Id.* at 26 (emphasis in original).

370. *Id.* at 27.

371. 533 P.2d 222 (Cal. 1975). *See generally* Note, *Privacy: The New Constitutional Language and the Old Right*, 64 CAL. L. REV. 347 (1976).

372. 533 P.2d at 233.

373. *Id.* at 234 (footnote omitted).

374. *Id.* n.11.

375. *Id.* at 234.

privacy could be justified only by a "compelling interest."³⁷⁶ The court's treatment suggested a willingness to inquire not only into the necessity for information-gathering, but also into "improper use [or disclosure] of information properly obtained for a specific purpose" and "the lack of a reasonable check on the accuracy of an existing record."³⁷⁷

In *Valley Bank v. Superior Court*,³⁷⁸ the California Supreme Court held that the right of privacy under Article I, section 1, protects an individual's banking records. The court ruled that "the right of privacy extends to one's confidential financial affairs as well as to the details of one's personal life."³⁷⁹ In balancing the civil litigant's need for discovery against the individual right of privacy, the court established disclosure rules for banks. Before disclosing confidential customer information sought during discovery, "the bank must take reasonable steps to notify its customer . . . and to afford the customer a fair opportunity to assert his interests"³⁸⁰ Protective orders are to be fashioned, where necessary, to protect privacy rights.³⁸¹

Financial disclosure requirements for public officers and candidates have been considered by the California courts in the context of privacy. Prior to the adoption of the privacy amendment to the California Constitution, the California Supreme Court invalidated a 1969 law requiring disclosure of the existence and amount of any investment in excess of \$10,000. Any such investment of spouse or minor child was also to be disclosed. In that case, *City of Carmel-by-the-Sea v. Young*,³⁸² the court relied primarily on federal privacy and first amendment cases to hold that the measure swept overbroadly into the privacy of personal financial affairs. The court objected that the statute covered all public officers and all investments, regardless whether such investments bore a reasonable relationship to the duties and scope of

376. *Id.* In this particular case, the standard was a "compelling governmental interest."

377. *See id.*

378. 542 P.2d 977 (Cal. 1975).

379. *Id.* at 979.

380. *Id.* at 980.

381. *Valley Bank* followed logically from the court's 1974 decision in *Burrows v. Superior Court*, 529 P.2d 590 (Cal. 1974), a criminal proceeding. The court held that the state search and seizure clause protects an individual's banking records. Thus the court did not need to reach the question whether the fourth amendment would protect such records. The court reasoned that one's expectation of privacy in banking records is reasonable; that the financial disclosures one makes to a bank are not always entirely voluntary; and that the transformation of banking records by a bank for business purposes does not render the records any less private. *Burrows* rested solely on the search and seizure provision of the California Constitution; it did not treat the right of privacy of article I, section 1.

382. *City of Carmel-by-the-Sea v. Young*, 466 P.2d 225 (Cal. 1970).

the office. The court noted that the 1969 statute might be defensible as applied to the legislature itself and a narrower class of public officers, and clearly indicated that a more narrowly drawn statute would pass constitutional muster. Where privacy was involved, a two-pronged test must be met: the statute must serve a compelling state purpose and must be drafted with narrow specificity.³⁸³

In 1973 the California Legislature enacted a new, more narrowly drawn disclosure law, which the court sustained in *County of Nevada v. MacMillen*.³⁸⁴ The 1973 law, as amended in 1974, appears to have been tailored to meet the court's objections in *Carmel*. The class of officials required to report had been narrowed. The law aimed at "substantial" conflicts of interest and required disclosure only if an official's interests could be materially affected by public service. Disclosure was limited to sources of income and investments, but not amounts. The identity of clients or customers need not be disclosed, but only the business entity that produced the income.

The court found that its two-pronged *Carmel* test had been met. In so doing, the court approved requirements for disclosure of investments by spouse and minor children, finding that this was "reasonably necessary" to the act's purpose. Likewise the court sustained the requirement of disclosure by officials who resigned, indicating that such disclosure might reveal past conflicts of interest. Left unclear was the extent to which the court would approve a statute which required disclosure of exact amounts of income or investments. While the court in *Carmel* had indicated the law might be constitutional as applied to a smaller class of officials, the *MacMillen* court suggested in a footnote that disclosure of the "extent" of investments had been one of the primary objections.³⁸⁵ Curiously, although *MacMillen* arose after the 1972 privacy amendment and was clearly a constitutional privacy case, the court nowhere in its opinion made express reference to the California Constitution.

While the California Supreme Court has shown itself amenable to privacy issues relating to academic freedom and financial matters, a different pattern emerges with regard to arrest records. *Loder v. Municipal Court*³⁸⁶ was an action for expungement similar in many ways to *Menard v. Saxbe*,³⁸⁷ the FBI arrest records case reviewed earlier in this note. In *Loder*, the curtain rose on a police officer beating plaintiff's wife with a nightstick. Plaintiff attacked the police officer

383. *Id.* at 229.

384. 522 P.2d 1345 (Cal. 1974).

385. *See id.* at 1353 n.10.

386. 553 P.2d 624 (Cal. 1976).

387. 498 F.2d 1017 (D.C. Cir. 1974). *Menard* was reviewed in section II *supra*.

and was arrested for battery, obstructing a police officer, and disturbing the peace. Apparently the officer's attack on the plaintiff's wife was wrongful, for the officer was suspended and charges against the plaintiff were dismissed in return for plaintiff's covenant not to sue. Plaintiff then sought to have the record of the arrest expunged. Unlike fellow Californian Menard, plaintiff Loder failed.

Observing that the right of privacy "is not absolute," the California Supreme Court reviewed the numerous ways in which arrest records are used by law enforcement and correctional authorities, concluding that maintenance of such records constitutes "a substantial government interest" sufficient to overcome the right of individual privacy.³⁸⁸ The court acknowledged the detrimental effects of arrest records in employment and professional licensing, but then reviewed California's statutes limiting access to arrest information. The statutory provisions include provisions for individual access to one's own arrest records; measures for expungement or sealing of records in certain cases; a requirement for recording the final disposition in each case; penalties for unauthorized disclosure; limitations on use of arrest records in licensing; and a prohibition against any inquiry by a public or private employer seeking information about an arrest or detention that did not result in conviction. The legislative history of the statutory scheme suggested that there had been an intention not to allow expungement beyond the listed categories—for which plaintiff could not qualify. In denying relief, the court unanimously held that "limited retention and dissemination of arrest records does not violate the right of privacy."³⁸⁹

The *Loder* decision is unsettling. While the court's position, taken in the abstract, is a rational statement of policy, virtually no attention was given the extraordinary situation in which Loder found himself. The California Constitution confers the right of privacy on individuals, yet Loder was left without a remedy. It is unreasonable to expect the legislature to anticipate and provide in advance for the class of persons attacked by policemen. The granting of equitable relief to Loder would certainly have been distinguishable on its facts in any later arrest records litigation, and would not have undercut the constitutional foundations of the arrest records system. The court's lengthy catalog of socially desirable uses for arrest records were inapplicable to Loder's case, a point the court simply ignored.

More unsettling is the court's enthusiasm for the use of arrest records by courts and law enforcement and correctional agencies. While the court's list of permissible uses is too long to repeat here, the

388. 553 P.2d at 628, 630.

389. *Id.* at 637 (footnote omitted).

court betrayed no concern that arrest records may be given more weight than they deserve. In a lengthy and unconvincing digression, for example, the court discoursed on the utility of refusing to seal juvenile detention records, despite the fact that similar detention records would have been sealed had the juveniles been adults. After observing that such records allow juvenile authorities to look for patterns of behavior, the court remarked, "the retention of the records of *even the innocent* juvenile serves certain salutary purposes."³⁹⁰ One can only wonder what happened to the right of privacy.

The attitude reflected in *Loder* stands in curious contrast to the approach taken in the court's other privacy cases. The court that was willing to subject financial disclosure statutes to the most exacting scrutiny, fashion protection for banking records, and prevent surveillance in universities does not seem to be the same court that decided *Loder*. One is prompted to observe that although judges can identify with measures for financial disclosure, banking records secrecy, and academic freedom, they rarely find themselves in the position of arrestees. California's privacy cases have a distinctly "white collar" character.

Aside from the blind spot for arrest records, the California Supreme Court has undertaken active enforcement of the new privacy right. Its position on banking records is particularly important in filling the void created by the United States Supreme Court's ruling that the federal right of privacy does not protect banking records.³⁹¹ In this regard, it is noteworthy that California has adopted an express state constitutional "declaration of independence" in article I, section 24. Added in 1974, it reads:

Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.

While this provision is merely declaratory of the existing relationship between the federal and state governments, its inclusion in the state constitution underlines the primacy of the states in the creation and protection of the rights of citizens. It virtually mandates the creation of a body of state constitutional decisions distinct from federal precedent.

The most intriguing feature of California's right of privacy is the clear intention to reach private action, unlike Alaska and Montana, where state action is a prerequisite.³⁹² Since the California right is self-

390. *Id.* at 629-30 n.12 (emphasis supplied by court).

391. *See* note 228 *supra*.

392. While the Alaska courts have so held, *see* note 323 and accompanying text

executing, it could be used to remedy intrusions by private individuals or groups. There are, as yet, no cases decided by the California Supreme Court on this point. The banking records case involved state action: discovery in civil litigation under the rules of procedure. Insofar as the California Constitution provides a self-executing right of privacy against government and private intrusion, it is the most far-reaching of the state constitutional measures.

*B. States Integrating the Privacy Right with the Prohibition
Against Unreasonable Searches and Seizures*

Five constitutions include the right of privacy in some form as part of the traditional prohibition against unreasonable searches and seizures. Despite the similarity of approach, the five states vary in the scope of the privacy protection conferred. The proponents of the privacy provisions of Hawaii, Illinois, Louisiana, and South Carolina have expressed the intention to confer protection on privacy beyond the context of search and seizure, though the courts have not always effectuated that intent. Florida stands at variance: its main objective was to strengthen the search and seizure section by limiting the interception of private communications.

1. *Hawaii*.—In 1968 Hawaii revised its constitution. Article I, section 5, provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures, and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

Read in its entirety, the constitutional language suggests that the primary concern was protection against wiretapping. The proceedings of the Hawaii Constitutional Convention confirm that wiretapping was one of several concerns; the intent of the Convention was to permit electronic surveillance if a warrant was obtained.³⁹³ However, the draft-

supra, the Montana Constitutional Convention proceedings are silent on the point. State action is implicit, however, since the standard to be satisfied is "a compelling state interest."

393. I HAWAII, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, at 233-34 (1973) (Journal and Documents); II HAWAII, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, at 5-9 (1973) (Committee of the Whole Debates). While the delegates differed in their views of Hawaii wiretapping law, *id.* at 5-6, the Convention's background study reported that wire interception and eavesdropping were pro-

ing committee felt that "a specific protection against communications interception . . . may be somewhat narrow and limiting and therefore recommends a broader protection in terms of a right of privacy."³⁹⁴ It continued:

[I]nclusion of the term "invasions of privacy" will effectively protect the individual's wishes for privacy as a legitimate social interest. The proposed amendment is intended to include protection against indiscriminate wiretapping as well as undue government inquiry into and regulation of those areas of a person's life which are defined as necessary to insure "man's individuality and human dignity."³⁹⁵

Since adoption of the privacy provision, the Hawaii Supreme Court has construed it on several occasions. In *State v. Baker*,³⁹⁶ the court considered a challenge to the Hawaii statute prohibiting possession of marijuana. The defendants articulated a private possession theory like that of *Ravin*, but the court reached a contrary result. Applying a presumption of constitutionality to the statute, the court concluded that invalidating the marijuana proscription would have similar implications for health regulations directed at the consumption of other substances. Unlike the Alaska court, the Hawaii Supreme Court also concluded that prohibition of private possession was a reasonable incident to prohibition of sale and trafficking. The court commented that, while the Hawaii Constitution did have a privacy right, "we do not find in that provision any intent to elevate the right of privacy to the equivalent of a first amendment right."³⁹⁷ Unreasonable invasions of privacy were prohibited; the marijuana possession law was not, in the court's judgment, unreasonable.

In other cases, the court has ruled that there is no invasion of privacy when a defendant unknowingly invites an informer to his home to purchase marijuana;³⁹⁸ and that it is no defense to a charge of in-

hibited by Hawaii statute in the absence of consent by the sender and receiver of a communication. HAWAII LEGISLATIVE REFERENCE BUREAU, HAWAII CONSTITUTIONAL CONVENTION STUDIES, ARTICLE I: BILL OF RIGHTS 75-76 (1968); *accord*, I HAWAII, *supra* at 233.

The question was debated whether a photograph taken by a law enforcement agency from a public place could be deemed a communication and thus be forbidden if taken without a warrant. The question was answered in the negative, under a "plain view" theory that the photograph could not capture any information which a law enforcement officer could not legally observe anyway; the photo merely recorded the officer's observations. II HAWAII, *supra* at 7-8.

394. I HAWAII, *supra* note 393, at 233.

395. *Id.* at 233-34. See also Christensen, *Suppression of Evidence Without the Aid of the Fourth, Fifth and Sixth Amendments*, 8 HAWAII B.J. 109, 109 (1972).

396. 535 P.2d 1394 (Hawaii 1975).

397. *Id.* at 1399.

398. *State v. Roy*, 510 P.2d 1066 (Hawaii 1973).

decent exposure for nude sunbathing on a public beach to assert that one had an expectation of privacy.³⁹⁹ The court rejected an effort to halt a school sex education program on privacy grounds, primarily because the school system had arranged to excuse from attendance those students whose parents objected. Since the program was thus non-compulsory, there was no basis for the objecting parents to argue that the school system interfered impermissibly with parental decision-making about child-rearing and education.⁴⁰⁰

As one might expect, the largest single category of reported cases has involved search and seizure questions. The Hawaii Supreme Court has expressly decided to confer greater privacy protection in search and seizure cases than that required by the Federal Constitution, but the Hawaii court has, curiously, declined to base this pro-privacy view on the "invasions of privacy" language of article I, section 5. Instead, the court has chosen to construe Hawaii's prohibition against "unreasonable searches [and] seizures" more broadly than the identical phrase in the United States Constitution.⁴⁰¹

It is not yet clear whether the Hawaii right of privacy will have any impact on laws regulating sexual behavior. In a 1971 case, a dissenting justice suggested that the right of privacy invalidates laws proscribing sexual intercourse between unmarried persons.⁴⁰² The majority failed to address the privacy issue at all, perhaps because they felt a statutory rape case was an inappropriate one for exploring the boundaries of sexual behavior and privacy. The majority did, however, provide some clue to its views in saying the defendant's act was " 'unlawful and highly immoral even under the facts as the offender supposed them to be,' "⁴⁰³ an apparent rejection of the dissenting argument that "morality" was not a proper concern of the legislature.

To date the addition of a right of privacy to the Hawaii Constitution has made little apparent difference in its judicial decisions, though

399. *State v. Rocker*, 475 P.2d 684 (Hawaii 1970).

400. *Medeiros v. Kiyosaki*, 478 P.2d 314 (Hawaii 1970).

401. *State v. Kaluna*, 520 P.2d 51, 58 (Hawaii 1974). "We have not hesitated in the past to extend the protections of the Hawaii Bill of Rights beyond those of textually parallel provisions in the Federal Bill of Rights when logic and a sound regard for the purposes of those protections have so warranted." *Id.* With regard to the right of privacy, the court continued:

In addition to the right to be free of unreasonable searches and seizures, the Hawaii Constitution guarantees the right to be free of unreasonable invasions of privacy. We need not decide the exact meaning or scope of this latter protection here, however, . . . since we are of the opinion that *as a search and seizure*, the conduct of the police in this case was unreasonable.

Id. n.6 (citation omitted) (emphasis in original).

402. *State v. Silva*, 491 P.2d 1216, 1222 (Hawaii 1971) (Levinson, J., dissenting).

403. *Id.* at 1217 (citation omitted).

one is tempted to speculate that it may have indirectly influenced the construction of the search and seizure clause by causing the justices to be more "privacy conscious." The minimal impact of the privacy right is not surprising. The submersion of the right of privacy in the search and seizure section has led to the inference that there was no intention to afford privacy the same status as has been afforded major constitutional provisions like the first amendment. Moreover, the prohibition against "unreasonable . . . invasions of privacy" has anchored the privacy section firmly to the rational basis test. The efficacy of Hawaii's right of privacy provision remains to be demonstrated.

2. *Illinois*.—The Illinois Constitution of 1970 contains two provisions which treat the right of privacy. The first, article I, section 6, provides:

The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

The prohibition against unreasonable "interceptions of their communications by eavesdropping devices or other means" was intended "to create a right in respect to interception . . . that is akin to the prohibition against 'unreasonable searches and seizures.'"⁴⁰⁴ The Bill of Rights Committee had originally proposed a complete ban on all interception of communications by eavesdropping devices, even though an Illinois statute permitted wiretapping done with the consent of one party.⁴⁰⁵ Upon further reflection a majority of the committee concluded that wiretapping would be essential in some cases and opted for "a more flexible provision" tied to the standard of reasonableness.⁴⁰⁶

The omission of "interceptions" from the warrant requirement in the second sentence was intentional. The Committee reasoned that it would be impossible to describe with sufficient particularity the communication sought to be intercepted, at least not with the particularity required for the issuance of a warrant for the seizure of "persons or things." Instead, all interceptions would be judged by the standard of reasonableness. At the time of the Convention, Illinois law did not provide for judicial authorization in the absence of consent by one of

404. VI SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, RECORD OF PROCEEDINGS 30 (1972).

405. *Id.*

406. *Id.*

the parties to the communication. If the legislature chose to amend the law to allow wiretapping with prior judicial authorization, the statutory procedure would have to meet the reasonableness standard—if the Illinois Supreme Court could be persuaded that the concept of unconsented-to wire-tapping was itself reasonable. Clearly the framers contemplated that a writ, though not a warrant, would need to be obtained before an unconsented-to interception could be undertaken.⁴⁰⁷

The phrase “or other means” could conceivably be read to extend the prohibition against “interceptions” to other contemporary surveillance techniques. The debates, however, indicated an intent to anticipate future technological developments.⁴⁰⁸ Visual surveillance would not be forbidden, unless performed in an unreasonable manner.⁴⁰⁹ Interception of letters or other written communications was already forbidden by the right to be secure in one’s “papers.”⁴¹⁰

The insertion of the phrase “invasions of privacy” was intended to establish a privacy right against governmental intrusion. The Bill of Rights Committee stated:

It is doubtless inevitable that any person who chooses to enjoy the benefits of living in an organized society cannot also claim the privacy he would enjoy if he were to live away from the institutions of government and the multitudes of his fellow men. It is probably also inevitable that infringements on individual privacy will increase as our society becomes more complex, as government institutions are expected to assume larger responsibilities, and as technological developments offer additional or more effective means by which privacy can be invaded. In the face of these conditions the Committee concluded that it was essential to the dignity and well being of the individual that every person be guaranteed a zone of privacy in which his thoughts and highly personal behavior were not subject to disclosure or review. The new provision creates a direct right to freedom from such invasions of privacy by government or public officials.⁴¹¹

As in Hawaii, only “unreasonable” invasions of privacy are prohibited.⁴¹²

The Convention considered, but by narrow votes rejected, amendments to proscribe invasions of privacy by private entities. One amendment would have added, after “privacy,” the phrase “by the state or

407. See *id.* at 32; III *id.* at 1526–39; V *id.* at 4276–78.

408. III *id.* at 1526–27.

409. *Id.* at 1529. See also *id.* at 1541 (infra-red photography).

410. *Id.* at 1531–32.

411. VII *id.* at 31–32.

412. III *id.* at 1525, 1528.

any person."⁴¹³ The other amendment would have created a free-standing right of privacy in a separate section, reading: "All persons shall be free from any unreasonable invasion of privacy by any other person, group, firm or corporation."⁴¹⁴ The movant of both amendments was concerned with the growth of data banks, the sharing of credit information, the increasing use of the computer, and the growing practice of subcontracting government investigations to private organizations.⁴¹⁵ The amendments were intended to provide a self-executing constitutional basis for legal or injunctive relief for private invasions of privacy. Additionally they would provide a constitutional foundation for the developing decisional law of privacy and possibly spur legislative action. Another objective was to guarantee individual access to records maintained about oneself by the private sector, such as credit files.⁴¹⁶

The primary objection to both proposals was that they were unnecessary. Illinois courts had developed a body of privacy law by court decision, and the legislature was free to act if it chose to do so.⁴¹⁷ Although the amendments failed on 41-49 and 35-40 votes,⁴¹⁸ the Convention did agree to amend its "Right to Remedy and Justice" section to include privacy. Article I, section 12, now reads:

Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.

The change was intended to make completely clear the power of the courts to continue to develop privacy law; it was designed to counteract any possible argument that an invasion of privacy was not an injury to "person," "property," or (with some exceptions) "reputation."⁴¹⁹

The Illinois Supreme Court's subsequent interpretation of the article I, section 6, right of privacy must have been a rude shock to the drafters. The court's behavior illustrates the serious hazard in the placement of an independent privacy right in a section dealing primarily with searches and seizures. In 1972, in *Stein v. Howlett*,⁴²⁰ the court

413. *Id.* at 1539.

414. *Id.* at 1733.

415. *Id.* at 1539, 1735.

416. *Id.* at 1541, 1736-37, 1739.

417. *Id.* at 1540, 1542, 1733-39.

418. *Id.* at 1543, 1739.

419. IV *id.* at 3652.

420. 289 N.E.2d 409 (Ill. 1972), *app. dismissed*, 412 U.S. 925 (1973).

upheld the Illinois Governmental Ethics Act, which required disclosure of sources of income and identity of assets in excess of specific amounts. In that case the court took an expansive view of the new right of privacy, but concluded that there was a "compelling governmental interest" in the financial disclosure statute which was sufficient to overcome individual privacy interests.⁴²¹ Two years later, in *Illinois State Employees Association v. Walker*,⁴²² the court took a different view. Illinois Governor Daniel Walker had, by executive order, created a Board of Ethics and an extensive financial disclosure system. Each gubernatorial appointee, each person who received more than \$20,000 per year from the state, and certain designated individuals were required to file a Statement of Economic Interest and copies of their most recent federal and state income tax returns. The tax returns were to be kept confidential, but the Statements of Economic Interest, containing sources and amounts of all income as well as a statement of net worth, were to be public.

The simplest avenue by which to sustain the executive order would have been to find a compelling governmental interest in financial disclosure, thus following *Stein*. Instead, the court chose to disavow its earlier construction of the right of privacy. In a clearly erroneous reading of the constitutional convention proceedings, the court concluded that the rephrasing of section 6 by the Convention's style and drafting committee reflected an intention to restrict its substantive scope.

As the section was initially reported to the Constitutional Convention by its Bill of Rights Committee, an argument could have been made that it established an independent right of privacy rooted in the State Constitution During its progress through the Constitutional Convention, however, the provision was altered so that as submitted to and approved by the people it was restricted Not all members of the court are convinced that this provision should be interpreted as asserting anything beyond protection from invasions of privacy by eavesdropping devices or other means of interception.⁴²³

Two justices dissented vigorously, correctly pointing out that the style and drafting changes were nonsubstantive and that the court's position was contrary to the manifest intent of the Convention.⁴²⁴

The mischief in *Illinois State Employees* is not necessarily in the result reached but in the extremely restrictive reading given the right

421. 289 N.E.2d at 413.

422. 315 N.E.2d 9 (Ill.), cert. denied, 419 U.S. 1058 (1974).

423. *Id.* at 15. Apparently the absence of a comma after the word "privacy" led the court to this bizarre conclusion. *See id.*

424. *Id.* at 20-21.

of privacy language. If this construction is followed literally in future cases, the right of privacy will be reduced to a nullity. Some hope may remain, for the court rested its decision in part on a financial disclosure provision of the constitution.⁴²⁵ The way is conceivably open for the court to restrict its holding to matters of financial disclosure only.

From later cases it is difficult to divine the court's exact position on privacy. The court followed *Illinois State Employees* without elaboration in another financial disclosure case.⁴²⁶ In *St. Louis v. Drolet*,⁴²⁷ the court granted expungement of the arrest records of a juvenile who had been detained but released without being charged. The opinion expressed concern about confidentiality of such records and also noted that an adult would be granted expungement as a matter of right under the same circumstances. In another case, a criminal defendant argued that the addition of privacy to article I, section 6, created a more stringent test for the reasonableness of a search and seizure than the standard required by the fourth amendment. Rejecting that argument, the court saw "no reason for construing the section as imposing additional conditions which must be met before a search may be deemed a reasonable one."⁴²⁸

While the reports of the demise of article I, section 6, may be premature, the prognosis is poor.

3. *South Carolina*.—In 1971 South Carolina amended its constitution to include a privacy statement within the search and seizure section. Article I, section 10, now reads:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

The privacy language was proposed by the Committee to Make a Study of the South Carolina Constitution of 1895, which formulated a comprehensive revision to be undertaken by the legislature through an article-by-article amendment process. The Committee recommended that the traditional search and seizure provision be retained. It continued:

425. *Id.* at 15.

426. *Buettell v. Walker*, 319 N.E.2d 502 (Ill. 1974). While the financial disclosure measure passed muster from a privacy standpoint, it was invalidated for other reasons.

427. 364 N.E.2d 61 (Ill. 1977).

428. *People v. Clark*, 357 N.E.2d 798, 801 (Ill. 1976).

In addition, the Committee recommends that the citizen be given constitutional protection from an unreasonable invasion of privacy by the State. This additional statement is designed to protect the citizen from improper use of electronic devices, computer data banks, etc. Since it is almost impossible to describe all of the devices which exist or which may be perfected in the future, the Committee recommends only a broad statement on policy, leaving the details to be regulated by law and court decisions.⁴²⁹

This sparse statement of intent awaits elaboration by the courts. There are, as yet, no reported decisions on the newly added right of privacy.

4. *Louisiana*.—The Louisiana Constitution of 1974 provides, in article I, section 5:

Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

Two commentators have differed sharply about the scope of article I, section 5.⁴³⁰ One of them, Convention Delegate Louis Jenkins, described the steps taken to expand the coverage of the traditional search and seizure section.⁴³¹ "Property" was added to assure that all of a person's possessions would be protected, lest the traditional "houses, papers, and effects" be given a restrictive meaning. "Communications" was intended to include "censorship of the mails, wiretapping, eavesdropping and other interference with private communications."⁴³² That proscription, indicated Delegate Jenkins, was intended to prohibit the enactment of any law permitting "the interception or inspection of any private communication or message."⁴³³

429. SOUTH CAROLINA, FINAL REPORT OF THE COMMITTEE TO MAKE A STUDY OF THE SOUTH CAROLINA CONSTITUTION OF 1895, at 15 (1969).

430. Verbatim transcripts of the Constitutional Convention proceedings were made and, although unavailable to this writer, were relied upon by the writers cited below.

431. Jenkins, *The Declaration of Rights*, 21 LOY. L. REV. 9, 27 (1975).

432. *Id.*

433. *Id.* (citation omitted). Another writer agrees that the language of article I, section 5, is susceptible of that interpretation but argues that a blanket proscription would be unwise. Miller, *The Declaration of Rights: Criminal Provisions*, 21 LOY. L. REV. 43, 44-46 (1975).

With regard to "invasions of privacy," Delegate Jenkins stated that the new right was "intended to give the courts wide latitude in invalidating state laws and actions."⁴³⁴ In his opinion, measures which could be invalidated included requirements to disclose the names of campaign contributors, stop-and-frisk laws, onerous building and health inspection requirements, and the use of Social Security numbers for identification in state court pleadings.

Delegate Jenkins vehemently maintained, however, that the right of privacy reached only government action, "in accord with the view of the committee that a bill of rights cannot reach private action."⁴³⁵ Thus the new right of privacy would not proscribe privately conducted searches and seizures; information obtained thereby would continue to be admissible in court.⁴³⁶ The privacy right would not limit the use of privately owned data banks,⁴³⁷ nor would it create a new tort action.⁴³⁸

According to Jenkins, the standing provision was intended to confer broader protection against "unreasonable searches, seizures, or invasions of privacy" than had been available under previous law. Persons affected by an illegal search directed against third parties would have standing to object. Moreover, in Delegate Jenkins' view, a person could object to seizure of his medical records from his physician or hospital, or seizure of his financial records from his bank.⁴³⁹

A more expansive view of the right of privacy was taken by Professor Lee Hargrave, coordinator of legal research for the constitutional convention. Making it clear that he expressed a personal view only, Hargrave differed with Jenkins on several important points.⁴⁴⁰ While conceding that a contrary interpretation was possible, Hargrave argued that the right of privacy applied to private as well as government entities. He noted that section 5 was placed apart from the other criminal procedure measures, which were grouped together in sections 13 through 21. The phrase "no law shall," which would indicate a limitation on state action only, was not used. Individual delegates had

434. Jenkins, *supra* note 431, at 28 (footnote omitted).

435. *Id.* The writer did not explain how the drafters reconciled that philosophical view with the freedom of expression section, which confers freedom of speech and press but holds each person "responsible for abuse of that freedom." LA. CONST. art. I, § 7; see Jenkins, *supra* note 431, at 31.

436. Jenkins, *supra* note 431, at 28, 30.

437. *Id.* at 28.

438. *Id.* at 30.

439. *Id.* at 29-30.

440. Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 20-25 (1974). The Hargrave article preceded the Jenkins article, but Jenkins has been dealt with first because he purports to present the intent of the convention; Hargrave relies more substantially on textual interpretation.

expressed concern about private searches and information-gathering through computer data banks. In Hargrave's view, the privacy section would be "a fertile ground for development in tort law as well as the non-criminal aspects of government operations."⁴⁴¹ The standard of protection would be one of "reasonableness," for only "unreasonable . . . invasions of privacy" were prohibited.⁴⁴²

Hargrave also differed with Jenkins on the subject of wiretapping. While the Committee on the Bill of Rights and Elections had at one time drafted a complete proscription on interception of private communications, it was eliminated in favor of the final language. In Hargrave's view, wiretapping could be permitted if the "reasonableness" requirement was satisfied, but the warrant requirement would have to be met as well.⁴⁴³

The Louisiana Supreme Court has not resolved these disputes, since it has had few occasions on which to construe the right of privacy apart from the classic search and seizure context.⁴⁴⁴ The court has decisively rejected the Jenkins view that the right of privacy precludes laws requiring disclosure of campaign contributions. In *Guidry v. Roberts*, the court sustained a law requiring reporting of contributions in excess of rather generous stated amounts; any infringement on privacy was held to be incidental.⁴⁴⁵

In another case the Louisiana Supreme Court reasoned that the presence of the "invasion of privacy" language in article I, section 5, was intended "to extend the 'probable cause' requirement to protect that right, as well as the right to be secure against unreasonable searches and seizures."⁴⁴⁶ The court continued:

It can hardly be argued that the right of privacy protected by Article 1, § 5 of the Louisiana Constitution of 1974 does not include at least that right discussed by Justice Brandeis in his dissent to a case which permitted the use of wire tap evidence:

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness . . . 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."⁴⁴⁷

441. *Id.* at 21; *see id.* at 20–25.

442. *Id.* at 21.

443. *Id.* at 21–22.

444. The court has cited both writers' views on article I, section 5, for a point on which both agreed. *See State v. Culotta*, 343 So. 2d 977, 981–82 (La. 1976).

445. 335 So. 2d 438, 449–50 (La. 1976).

446. *State v. Kinnemann*, 337 So. 2d 441, 443–44 (La. 1976).

447. *Id.* at 444, *citing* *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

While the context was a search and seizure case, the language suggests that the Louisiana Supreme Court may take an expansive reading of the new right of privacy.

5. *Florida*.—Florida's Constitution of 1968 contains the narrowest of the privacy provisions considered thus far. Article I, section 12, provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

According to the commentator, the search and seizure provision was carried forward substantially intact from the previous constitution.⁴⁴⁸ The innovations were the prohibition against "the unreasonable interception of private communications by any means," and the addition of a constitutionally mandated exclusionary rule prohibiting the use of "information obtained in violation of this right." The privacy right clearly was directed at the specific problem of electronic surveillance. Neither the text of the section nor the brief comments accompanying it betray any suggestion that privacy was considered in a larger context.

The Florida Supreme Court has construed the interception provision of article I, section 12, to afford greater protection than the fourth amendment. In *Tollett v. State*,⁴⁴⁹ tape recordings were made of conversations between an informer and the defendant. At trial the state introduced the tape recordings into evidence over objection, despite the fact that the informer was inexplicably unavailable to testify about his consent. Instead, the deputy sheriff from whose office the calls were made assured the court that consent had been given.

The Florida Supreme Court recognized that the recordings would be admissible under the fourth amendment,⁴⁵⁰ but found that the state constitution created a higher standard. The only exception to the

448. 25A FLA. STAT. ANN. 269 (1970) (Commentary). The debates of the 1965 Constitution Revision Commission and the legislative deliberations leading to the 1968 revision have not been reproduced in generally accessible form.

449. 272 So. 2d 490 (Fla. 1973).

450. *Id.* at 492, citing *United States v. White*, 401 U.S. 745 (1971).

warrant requirement of article I, section 12, was a valid consent, which, the court ruled, must be given through the informer's direct testimony, not by hearsay statements of police informers. The court expressed concern over the general increase in the use of wiretaps and "participant recordings," and indicated that uncontrolled eavesdropping "has no place in a free state."⁴⁵¹

Section 12 almost certainly applies only to government-conducted wiretapping, not to private action. There is, however, some slight contrary suggestion in *Markham v. Markham*.⁴⁵² In that case, a husband wiretapped and recorded his wife's telephone conversations with third persons; he sought to introduce them into the couple's divorce and child custody proceedings. Neither party to the actual conversations had consented to the interception. The husband's conduct clearly violated the Florida wiretap statute, since there was not a valid consent by at least one of the parties to the conversation.⁴⁵³ The statute contained an exclusionary rule barring the use of such an illegally intercepted communication in a court proceeding,⁴⁵⁴ and the Florida Supreme Court held that the evidence must be excluded. Although the case could have been decided entirely on statutory grounds, the supreme court noted with approval that the court below had relied on constitutional, as well as statutory, grounds. The supreme court went on to say that section 12 "'shores up the conclusion that a husband does not possess the right to invade his wife's right of privacy by utilizing electronic devices.'"⁴⁵⁵

One student has interpreted *Markham* to hold that article I, section 12 reaches private as well as state action. The writer reasoned that section 12 does not expressly require state action; therefore it reaches privately conducted searches and seizures, in addition to privately conducted wiretaps.⁴⁵⁶ This view is almost surely incorrect. The 1968 Constitution carried forward the language of a predecessor provision

451. 272 So. 2d at 493, citing Professor Westin. The court also cited the statement of intent in Florida's wiretap statute, but the decision rested on constitutional grounds. See *id.* at 494. See generally 2 FLA. ST. U.L. REV. 188 (1974).

452. 272 So. 2d 813 (Fla. 1973), *aff'g* 265 So. 2d 59 (Fla. 1st Dist. Ct. App. 1972).

453. The Florida wiretap statute was subsequently amended to require consent by all parties to a communication before it can be intercepted. See FLA. STAT. § 934.03(2)(d) (1975); *cf.* *Shevin v. Sunbeam Television Corp.*, 351 So. 2d 723 (Fla. 1977) (first amendment does not confer privilege to gather the news so as to allow reporters to record conversations without consent of other party). There is a law enforcement exception, whereby a warrantless interception may take place if the law enforcement officer is a party to the conversation or if one party to the conversation consents—essentially the rule in *Tollet*. See FLA. STAT. § 934.03(2)(c) (1975).

454. See 272 So. 2d at 814; FLA. STAT. § 934.06 (1975).

455. 272 So. 2d at 814, quoting 265 So. 2d at 62.

456. 26 U. FLA. L. REV. 166, 169-70 (1973).

substantially intact, save the addition of the express exclusionary rule, the "private communications" provision, and one other minor change.⁴⁵⁷ Cases construing the predecessor language had held that it applied only to state action.⁴⁵⁸ The commentary accompanying the 1968 Constitution indicated that section 12 "includes the substance of the searches and seizures section of the Constitution of 1885 as amended, . . . in a re-organized fashion and with new material added."⁴⁵⁹ Just two weeks prior to *Markham*, the Florida Supreme Court held that section 12, like the fourth amendment, did not apply to "searches and seizures made by a private individual."⁴⁶⁰ It appears, therefore, that the *Markham* discussion of section 12 merely signifies judicial recognition of a strong state policy against unauthorized wiretapping regardless of who does it. The 1968 Constitution "shores up" the statute only by adding indirect support to the court's decision not to engraft a judicial exception for the husband-wife relationship, a position which had been advocated by one dissenting justice.⁴⁶¹

Even in the context of criminal proceedings, the courts may decide not to apply the constitutional exclusionary rule in a literal way. Florida was one of the minority of states that had adopted the exclusionary rule by judicial decision⁴⁶² prior to *Mapp v. Ohio*.⁴⁶³ One district court of appeal has regarded the express constitutional exclusionary rule as a mere codification, not an expansion, of the prior decision-law rule.⁴⁶⁴ In a nonwiretap case, that court ruled illegally seized evidence could be admitted for impeachment purposes, notwithstanding the apparently total prohibition of section 12. If that decision were applied to interception of communications, the statutory exclusionary rule would afford

457. 25A FLA. STAT. ANN. 269 (1970) (Commentary).

458. *Jeffcoat v. State*, 138 So. 385, 388-89 (Fla. 1931); see *Church v. State*, 9 So. 2d 164, 166-67 (Fla. 1942) (en banc); *Carlton v. State*, 149 So. 767, 768 (Fla. 1933).

459. 25A FLA. STAT. ANN. 269 (1970) (Commentary). FLA. CONST. OF 1885, Declaration of Rights, § 22, provided:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches, shall not be violated and no warrants issued, but upon probable cause, supported by oath or affirmation, particularly describing the place or places to be searched and the person or persons, and thing or things to be seized.

460. *Bernovich v. State*, 272 So. 2d 505, 506-07 (Fla. 1973). In a later decision, the First District Court of Appeal, which had been quoted by the Florida Supreme Court in *Markham*, clearly distinguished the scope of the constitutional and statutory provisions. See *Horn v. State*, 298 So. 2d 194, 200-01 (Fla. 1st Dist. Ct. App. 1974).

461. 272 So. 2d at 814.

462. Note, *Admissibility of Illegally Obtained Evidence in Noncriminal Proceedings*, 22 U. FLA. L. REV. 38, 52-53 (1969).

463. 367 U.S. 643 (1961).

464. *Dornau v. State*, 306 So. 2d 167, 169-70 (Fla. 2d Dist. Ct. App. 1974), cert. denied, 422 U.S. 1011 (1975).

greater protection than the constitutional one; unlike the constitutional rule, the statutory exclusionary rule could not be regarded as a codification of prior court decisions. That the Florida Supreme Court may take a different view of wiretapping, however, is suggested by a 1973 case in which the court relied on constitutional and statutory grounds to prevent illegally intercepted communications from being considered by a grand jury proceeding.⁴⁶⁵

One writer has argued that the constitutional exclusionary rule applies to all judicial proceedings, civil or criminal.⁴⁶⁶ Thus evidence illegally seized by government agents would be inadmissible in civil as well as criminal proceedings. That question was not resolved by the pre-1968 cases under Florida's judicially developed exclusionary rule.⁴⁶⁷ Another writer has reasoned that the constitutional exclusionary rule is in terms applicable to such civil proceedings, but doubts that the Florida Supreme Court would so hold.⁴⁶⁸ The question must be regarded as an open one, but the wiretap statute should continue to secure the exclusion of illegally intercepted communications in civil litigation, even if the 1968 Constitution does not.⁴⁶⁹

The debate among commentators about the exact meaning of section 12, and the confusion in the aftermath of the *Markham* decision, illustrate another hazard in placing a right of privacy within a search and seizure section. So long as the intent of the framers is to reach state action only, then such placement of the privacy right may be apt. Where, however, the intent is to reach private action, and where the conventional search and seizure section has been held to reach state action only, confusion is likely to be the result.

The published evidence suggests that the framers of the Florida provision intended only to reach governmental action with the prohibition against "unreasonable interception of private communications." If so, the constitutional mandate has achieved its purpose. Moreover, as the *Markham* case illustrates, the constitutional measure has encouraged the courts rigorously to enforce wiretapping statutes, even where the constitutional provision was not directly applicable. It is conceivable that a more expansive interpretation of article I, section 12, was intended by the framers, but so long as the wiretapping statute affords comprehensive protection there is unlikely to be pressure for constitutional change.

465. *In re Grand Jury Investigation* (Frank Cobo), 287 So. 2d 43 (Fla. 1973) (per curiam).

466. Levinson, *Florida Constitutional Law*, 28 U. MIAMI L. REV. 551, 603 (1974).

467. Note, *Admissibility of Illegally Obtained Evidence in Noncriminal Proceedings*, *supra* note 462, at 53-54.

468. *Id.*

469. See FLA. STAT. § 934.06 (1975).

C. *States in which the Privacy Section is the Equivalent of the Prohibition against Unreasonable Searches and Seizures*

The foregoing eight states can be visualized as occupying a spectrum in the degree of protection conferred on the right of privacy. At one end of the spectrum are the states reviewed in part *A* of this section, each having a free-standing right of privacy. In the middle of the spectrum are the states discussed in part *B* of this section which confer an intermediate level of protection: something more than the traditional prohibition against unreasonable searches and seizures, but something less than a free-standing right.

Washington and Arizona, the two states examined in this section, occupy the other end of the spectrum. Their privacy sections were designed to serve as the traditional proscription against unreasonable searches and seizures. On the eve of statehood, both states chose to eschew the traditional language of the fourth amendment and instead adopted a more succinct substitute, couched in the language of privacy. Formulated in 1889 and 1910, respectively, their privacy sections are the oldest of any in the state constitutions.

1. *Washington*.—Unchanged since 1889, article I, section 7, of the Washington Constitution provides:

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

The genesis of this unprecedented constitutional provision remains wrapped in mystery. It was formulated at the 1889 Washington State Constitutional Convention, which had been called pursuant to a congressional enabling act authorizing Washington to make the transition from territory to state. There had been a territorial constitution drafted in 1878, but Congress had failed to approve it; the 1889 effort was to produce the first official constitution.⁴⁷⁰

It would be of considerable interest to know the rationale for the protection of "private affairs." In 1889 the term "privacy" had rarely been used in legal or constitutional terminology. Thomas Cooley had written of the right "to be let alone" in 1880,⁴⁷¹ and *Boyd v. United States* had been decided in 1886,⁴⁷² but Warren and Brandeis were not to write their law review article until 1890.⁴⁷³ Were the verbatim

470. JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at iii (B. Rosenow ed. 1962) [hereinafter WASHINGTON STATE JOURNAL].

471. T. COOLEY, *supra* note 80.

472. 116 U.S. 616 (1886); the case is discussed in section IV *supra*.

473. Warren & Brandeis, *supra* note 3.

transcripts of the 1889 Washington Convention extant, they might provide much-needed insight into early state views of privacy. But for want of an appropriation by the Washington Legislature, the reporters' verbatim notes of debates languished untranscribed and were ultimately destroyed.⁴⁷⁴

There remains a journal of convention proceedings which provides limited information about the 1889 meeting. The Convention had before it two proposals relating to search and seizure, both of which tracked the language of the fourth amendment. Likewise, the search and seizure provision of the premature 1878 Constitution had followed the fourth amendment.⁴⁷⁵ The "fourth amendment" proposals were referred to a committee; when the Declaration of Rights emerged, the search and seizure section had been transformed into its present state.⁴⁷⁶ Clearly the Convention considered the new language the functional equivalent of the traditional search and seizure proscription. Whether anything more was intended is not revealed in the convention journal or in contemporary newspaper accounts.⁴⁷⁷

Despite the apparent innovativeness of the 1889 Constitutional Convention in creating a zone of protection for one's "private affairs," the Washington courts have been anything but innovative in their application of the section. The Washington judiciary has consistently construed article I, section 7, to deal only with search and seizure; the provision has not served as the source for any other privacy right. So closely is section 7 held to parallel the fourth amendment that federal and state precedents are commonly cited interchangeably. The following is a typical formulation: "It is apparent that the fourth amendment to the United States Constitution and article 1, section 7 of the Washington State Constitution are comparable and are to be given comparable constitutional interpretation and effect. Accordingly, in this opinion, reference will be made only to the Fourth Amendment."⁴⁷⁸ While section 7 is much cited, it is invariably mentioned in connection with a search and seizure issue.

One might expect that the reference to "private affairs" would have afforded a basis for early recognition of the invasion of privacy tort.

474. WASHINGTON STATE JOURNAL, *supra* note 470, at vi-vii.

475. WASH. CONST. OF 1878, art. V, § 10.

476. WASHINGTON STATE JOURNAL, *supra* note 470, at 19, 51-53, 153-54, 360, 491, 497, 518.

477. The analytical index to the WASHINGTON STATE JOURNAL, *supra* note 470, includes cross-references to contemporary newspaper accounts. *See id.* at xi, 491.

478. *State v. Smith*, 559 P.2d 970, 972-73 (Wash. 1977) (en banc); *accord, e.g.*, *State v. Miles*, 190 P.2d 740, 743 (Wash. 1948) ("although they vary slightly in language, are identical in purpose and substance"); *State v. Gibbons*, 203 P. 390, 395 (Wash. 1922) ("these guaranties are in substance the same in both").

Quite to the contrary, the Washington Supreme Court has repeatedly declined to take that step, ruling as early as 1911 that any relief must be granted by the legislature.⁴⁷⁹ In more recent cases the court has been at pains to avoid the issue.⁴⁸⁰ In lower courts there has been some erosion of this persistent resistance,⁴⁸¹ but the supreme court has yet to make a definitive, direct statement about recognition of the tort. Significantly, when the Washington Supreme Court has on occasion undertaken to discuss the possible existence of the invasion of privacy action, it has never mentioned section 7 as even being relevant to the analysis, much less a potential source of a privacy right.

Some recognition of the right of privacy has occurred when it was believed that the United States Constitution required it. Thus, when the Washington Supreme Court sustained the state's financial disclosure law, it reasoned:

The right of the electorate to know most certainly is no less fundamental than the right of privacy. When the right of the people to be informed does not intrude upon intimate personal matters which are unrelated to fitness for public office, *see* *Griswold v. Connecticut*, . . . the candidate or office holder may not complain that his own privacy is paramount to the interests of the people.⁴⁸²

The other source of privacy considered in that case was the first amendment;⁴⁸³ section 7 went unmentioned.

Another Washington case won the dubious distinction of being singled out by the Privacy Protection Study Commission to illustrate the privacy problems posed by governmental recordkeeping. In *State ex rel. Tarver v. Smith*,⁴⁸⁴ a welfare mother sought unsuccessfully to have removed from her file a social worker's report that recommended Ms. Tarver's children be made wards of the juvenile court. Ms. Tarver asserted that the report was "false, misleading and prejudicial"; she was especially concerned over possible repercussions if the information were made available to other agencies.⁴⁸⁵ Ignoring the privacy ques-

479. *See* *Lewis v. Physicians and Dentists Credit Bureau, Inc.*, 177 P.2d 896, 897-98 (Wash. 1947); *Hillman v. Star Publishing Co.*, 117 P. 594 (Wash. 1911).

480. *See* *State v. Rabe*, 484 P.2d 917, 924 (Wash. 1971) (en banc); *Brink v. Griffith*, 396 P.2d 793, 796 (Wash. 1964).

481. *See* *State v. Adler*, 558 P.2d 817, 820 n.2 (Wash. Ct. App. 1976); *Venegas v. United Farm Workers Union*, 552 P.2d 210, 212 (Wash. Ct. App. 1976); *Eddy v. Moore*, 487 P.2d 211, 217 (Wash. Ct. App. 1971).

482. *Fritz v. Gorton*, 517 P.2d 911, 925 (Wash.) (en banc), *appeal dismissed*, 417 U.S. 902 (1974).

483. 517 P.2d at 923-25.

484. 470 P.2d 172 (Wash. 1970) (en banc), *cert. denied*, 402 U.S. 1000 (1971).

485. 470 P.2d at 174; *see* 402 U.S. 1001-02 (Douglas, J., dissenting).

tions involved, the Washington Supreme Court ruled that state-mandated "fair hearings" under the federal AFDC program were designed solely to contest agency rulings on eligibility and benefits, not to seek review of the contents of agency files. The United States Supreme Court's denial of certiorari provoked an angry dissent from Justice Douglas.⁴⁸⁶ The Privacy Protection Study Commission chose Ms. Tarver's case as one of two it used to highlight the perils of unregulated recordkeeping.⁴⁸⁷

Perhaps the foregoing critique is overly harsh. While the Washington courts' handling of federal privacy cases could definitely be improved,⁴⁸⁸ there is no inherent reason why article I, section 7 should have served as the source of expanded privacy rights for its citizens. Whether or not the framers of this section intended such a narrow construction, the Washington courts have at least been rigorously consistent in construing it to apply only to searches and seizures. Nonetheless, the contrast is striking: a constitutional right against disturbance in one's private affairs suggests an expansive view of personal privacy, while the actual body of decisions ranks Washington among the most restrictive of the states.

2. *Arizona*.—In 1910, Arizona drafted its statehood constitution. Its article II, section 8, is identical to Washington's article I, section 7:

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

The Arizona measure was adopted without discussion or efforts to amend it.⁴⁸⁹ The only particular in which it differs from the Washing-

486. 402 U.S. at 1000.

487. PRIVACY PROTECTION STUDY COMMISSION, *supra* note 35, at 6-8. The other case was *United States v. Miller*, 425 U.S. 435 (1976), holding that a bank's records regarding individual depositors are business records of the bank rather than private records of the individual accountholder; *see* note 228 *supra*.

488. For example, the Washington Supreme Court cited *Griswold* in holding the movie "Carmen Baby" obscene, since the film could be observed from some private residences near the drive-in theater at which it was shown. The court reasoned that the film was an intrusion on individual privacy and domestic solitude. The United States Supreme Court promptly reversed. *State v. Rabe*, 484 P.2d 917, 924-25 (Wash. 1971) (en banc), *rev'd per curiam*, 405 U.S. 313 (1972). Washington courts persistently confuse the tort law of privacy with the federal constitutional right of privacy, often reasoning that the latter mandates the former. *See State v. Rabe*, 484 P.2d at 924; *Venegas v. United Farm Workers Union*, 552 P.2d at 212; *Eddy v. Moore*, 487 P.2d at 217. *See also Fritz v. Gorton*, 517 P.2d at 925.

489. *See* JOURNALS OF THE [1910] CONSTITUTIONAL CONVENTION OF ARIZONA 351, 462-75, 573-74, 593 (compiled by C. Cronin 1925); MINUTES OF THE [1910] CONSTITUTIONAL CONVENTION OF THE TERRITORY OF ARIZONA 234-35, 291-98 (1910).

ton Constitution is its caption. Arizona called article II, section 8, the "Right to Privacy" while Washington denominated article I, section 7, "Invasion of Private Affairs or Home Prohibited."

Arizona's experience with its "Right to Privacy" has been similar to that of Washington: the vast majority of cases have dealt with search and seizure. Like Washington, Arizona has consistently viewed the function of the state provision to be the same as that of the fourth amendment.⁴⁹⁰ While Arizona has recognized the invasion of privacy tort, the supreme court relied primarily on the Restatement of Torts; article II, section 8, was nowhere mentioned as a source.⁴⁹¹ One court has indicated that section 8 applies purely to state action and thus could never provide a constitutional foundation for actions between private individuals, whether through the invasion of privacy tort or otherwise.⁴⁹²

In a recent case, the Arizona Supreme Court considered a privacy-based challenge to state laws forbidding sodomy and lewd and lascivious behavior.⁴⁹³ The court confined its privacy discussion entirely to the construction of the federal right of privacy, never suggesting that the state "right of privacy" was even remotely involved. Also typical of its general approach was the court's decision in *State v. Murphy*,⁴⁹⁴ a challenge to the state's possession of marijuana law, as applied to possession of a small amount in the home for personal use. The court construed section 8 only because law enforcement officers had obtained the marijuana during a search. The court restricted its analysis to the question of what level of scrutiny was required for searches of one's home. Section 8 was not perceived to create any larger substantive right beyond the traditional notions of freedom from unreasonable searches and seizures. The remainder of the analysis was devoted to federal privacy cases, culminating in the conclusion that private possession of marijuana could be proscribed.

To date, Arizona's privacy section has served solely as the functional equivalent of the fourth amendment.⁴⁹⁵ In its constitutional language, as in its case law, Arizona closely resembles Washington.

490. See *Turley v. State*, 59 P.2d 312, 316-17 (Ariz. 1936).

491. *Reed v. Real Detective Pub. Co.*, 162 P.2d 133 (Ariz. 1945).

492. *Cluff v. Farmers Insurance Exchange*, 460 P.2d 666, 669 (Ariz. Ct. App. 1969).

493. *State v. Bateman*, 547 P.2d 6 (Ariz.) (en banc), cert. denied, 97 S. Ct. 170 (1976).

494. 570 P.2d 1070 (Ariz. 1977) (en banc).

495. One Arizona court considered a challenge to a state financial disclosure law predicated in part on the theory that section 8 had been violated. The court ruled that the plaintiffs lacked standing and thus did not reach the merits of that particular claim. *Town of Wickenburg v. State*, 565 P.2d 1326 (Ariz. Ct. App. 1977).

VIII. ANALYSIS AND RECOMMENDATIONS

A. *The Right of Privacy*

The twentieth century is hazardous to personal privacy. The nation's growth into a highly populated, urbanized society has created an urgent need for individual privacy while at the same time posing its greatest threat. Scientific advances have made possible greater health and comfort in the society while at the same time producing the technology that threatens our freedom to enjoy it.

We are in the midst of transition. One hundred years ago our ideas about liberty were closely intertwined with our ideas about private property. One's rightful property was not subject to search and seizure; warrants were available only for stolen or forfeited goods. The motion to suppress illegally seized property was but a replevin or trespass action against the government, asserting the actual owner's superior title; a search was valid against a thief because the possessor of contraband had no rightful title to assert.⁴⁹⁶

The fourth amendment, it is often forgotten, establishes "[t]he right of the people to be *secure* in their persons, houses, papers, and effects," a provision designed not so much to protect private ownership of property as to establish a physical zone of personal privacy. The *Boyd* decision asserted the inviolability of one's papers; *Botsford*, the inviolability of one's body.⁴⁹⁷ An illegal search was egregious not so much because it deprived the owner of the beneficial use of property, but because it took away the physical means by which personal freedom was protected. Thus an illegal search and seizure constituted compulsion akin to that of compelled testimony in violation of the fifth amendment. As the *Boyd* Court said, "In this regard the Fourth and Fifth Amendments run almost into each other."⁴⁹⁸

To be sure, this system was shot through with anomalies which became more apparent with time. One's standing to object to an illegal search and seizure depended on whether one had a sufficient possessory interest in property to maintain trespass or replevin—a distinction gone, but not entirely forgotten. For decades the old property concepts prevented interpretation of the fourth amendment to apply to wiretapping; applied formalistically, the amendment afforded protection only if there was a physical trespass in the installation of a tap.⁴⁹⁹

Nonetheless, to state the old rules is to see how far we have moved from the original notion of an inviolate physical zone—a bubble—of

496. See text accompanying notes 105–16 *supra*; Kurland, *supra* note 182, at 7–8.

497. See text accompanying notes 105–20 *supra*.

498. 116 U.S. at 630.

499. See text accompanying notes 112–18, 126–44 *supra*.

personal liberty. With the growth of an increasingly industrial society, ownership of real property ceased to be the primary source of wealth; property relationships became increasingly unsatisfactory as a means of defining the scope of personal rights. Under pressure of economic and social change, our focus has shifted away from the physical inviolability of person or possessions and instead has concentrated on the process by which rights are abridged or enforced. All objects and persons are vulnerable to search, but only upon observing the proper legal procedure for doing so. Our notions about liberty have broken loose from their moorings in the concept of private property, but they have not yet found anchor in a new harbor.

The persistent vitality of the privacy idea stems from the effort to describe the place of the individual in a society that has undergone fundamental change. Privacy expresses the idea of sanctuary, a zone of security in which one is free from physical and psychological intrusion and in which one has the latitude to make important decisions about one's liberty. But liberty is an attribute of a group, of the people at large, as well as an attribute of the individual. Privacy is personal; the word connotes a physical and psychological zone possessed by each individual alone. This is more than a mere play on words: how else can one explain the extraordinary resiliency of the privacy idea in a society whose constitutions have protected liberty for two hundred years?

The uncertainty over the content of the right of privacy arises in part because of the inherent difficulty in defining broad legal principles; the content of the term "liberty" is likewise difficult to define with specificity. More fundamentally, however, the difficulty in defining privacy arises because we are at this moment still involved in defining the relationship of the individual to the society, in a time in which societal and scientific realities have undergone and continue to undergo profound change. The definition is unsettled because social relationships are unsettled. While the federal right of privacy has entered a stage of arrested development, the states have begun to give new shape to the concept.

B. Privacy in the States

Express rights of privacy, considered in a modern sense, have been provided for in state constitutions for ten years or less.⁵⁰⁰ The only exceptions, the states of Washington and Arizona, have confined their

500. See Appendix for the texts of the state constitutional provisions and dates of adoption. The state constitutional developments discussed in this section are reviewed in detail, by state, in section VII *supra*.

privacy sections to a strictly traditional concept of search and seizure; they may be ignored for purposes of this analysis.

Free-standing rights of privacy are an even more recent innovation, entering state constitutions in 1972 and 1974. Because express privacy rights are of such recent vintage, there are comparatively few cases to reveal their dimensions and test their efficacy. But enough evidence is available to support some tentative conclusions.

From an examination of state constitutions, constitutional convention proceedings, and case law, several basic privacy issues emerge. These include the protection of private communications from interception by government; the protection of private communications from interception by private persons; the protection of one's general right of privacy from governmental intrusion; and the protection of one's general right of privacy from private intrusion.

1. *Protection of Private Communications from Interception by Government.*—Where a state desires to regulate electronic surveillance, but not to prohibit it entirely, the simplest and most direct method is that followed by Florida, Hawaii, and Illinois: incorporation in the search and seizure section of an express prohibition against unreasonable interception of private communications. Search and seizure sections usually reach state action only; inclusion of the unreasonable interception proscription would likewise reach state action. Such placement automatically incorporates existing standards of reasonableness as well as requirements for a warrant or other writ. While there has not been an abundance of litigation under state constitutional sections of this type, Florida's experience suggests that an interception provision can be quite effective in conveying a clear statement of state policy to the judiciary, thereby prompting a firm line in constitutional and statutory enforcement.

Where a state is in the dilemma faced by Montana, the path is less clear. Montana constitutional convention delegates were inclined to believe that wiretapping should be banned entirely, but were unwilling to take the step of adopting a flat constitutional proscription. They feared, however, that constitutional language prohibiting only "unreasonable interceptions" would create an authorization for wiretapping where none previously existed, thus overriding any blanket proscription that might be enacted by the legislature. Montana's decision to opt for silence on the subject was reasonable under the circumstances. As an alternative, an express policy statement could have been devised, permitting legislative proscription or regulation, subject in the latter event to the reasonableness and warrant requirements of the search and seizure section.

The virtues of silence about surveillance will also be tested in Louisiana. One Louisiana constitutional convention delegate suggested that the omission of any reference to the subject indicated an intention to prohibit all electronic surveillance; any law permitting it would be beyond constitutional authority and void. It seems unlikely that the state courts would draw any such inference, save perhaps with the clearest statement in the convention proceedings. The more likely course would be to regard *Katz v. United States*⁵⁰¹ as persuasive authority, thereby permitting surveillance subject to the warrant requirement. Clearly, if a state wishes to adopt a constitutional prohibition against electronic surveillance, it should do so expressly, as Puerto Rico has done.⁵⁰² Trusting in an inference to be drawn from silence is hazardous at best.

As in the modification of any constitutional section, the inclusion of communications in the search and seizure section should prompt a careful review of existing constitutional doctrines that may be implicitly adopted. As the discussion of the Florida provision indicates, one should consider the extent to which the search and seizure section reaches private action, if at all; whether illegally seized evidence is admissible before grand juries, in civil litigation, or other proceedings; and whether state rules of standing restrict the ability of adversely affected persons to challenge an illegal search or seizure. While constitutional convention proceedings invariably reveal an intention to adopt strong measures against unregulated wiretapping, the preexisting gloss on the search and seizure section may severely weaken the efficacy of the surveillance provision. Express constitutional language dealing with problems of standing or exclusion of evidence may be needed in order to make a surveillance measure fully effective; a collateral advantage would be the strengthening of the search and seizure provision generally.⁵⁰³

501. 389 U.S. 347 (1967).

502. PUERTO RICO CONST. art. II, § 10, provides in part, "Wire-tapping is prohibited."

503. It is beyond the scope of this paper to conduct a comprehensive analysis of the role of the search and seizure section in the protection of personal privacy. A few observations may be in order, for with the passage of time the search and seizure section is likely to take on increased importance.

The usual search and seizure section has two branches. First, there is a right to be free from unreasonable searches and seizures. Second, there must be a warrant in order to conduct a search or seizure. Aside from certain exceptions, it is hornbook learning that a warrantless search is unreasonable per se. There is also an unfortunate contemporary tendency to believe that the converse is true: that every search with a warrant is reasonable per se.

But the two branches of the search and seizure section are conceptually distinct. If, for example, one's papers are inviolate (as in *Boyd*), then a search, even with a warrant, is unreasonable. With the demise of the older concepts of property and liberty, the two branches have tended to converge: any person, object or area is vulnerable to search and seizure, provided only that the relevant (and low) standards of probable cause and

particularity are met. For a generation accustomed to security clearances, credit investigations, stop-and-frisk, airline security screens, domestic surveillance, compulsory blood testing for alcohol consumption while driving, body cavity searches, wiretapping, and dossiers of all description, it is hard to imagine a time when something was inviolable, when a search or seizure was unreasonable even when conducted *with* due process of law. Whether ever observed so fully in practice as in concept, the idea of an absolutely inviolable physical barrier between individual and society is not a contemporary one.

The weakness of procedural definitions of liberty—the notion that any governmental intrusion is acceptable if it is accomplished with a warrant or other procedural due process—becomes each year more apparent. Several recent federal electronic surveillance decisions are especially sobering. Present federal law provides for the interception of communications, subject to the procedural safeguard of obtaining a warrant. The courts have now taken the next logical step. Two Circuits have held that the federal statute not only permits the use of electronic surveillance devices, but also permits surreptitious entry, under judicial authorization, to install them. *Application of United States*, 563 F.2d 637 (4th Cir. 1977); *United States v. Agrusa*, 541 F.2d 690 (8th Cir. 1976), *cert. denied*, 97 S. Ct. 751 (1977). The Fourth Circuit case involved installation of three listening devices in a building, one in a private office and two in a “public” area, for an organized gambling investigation. The court purported to find, in the federal statute, a “paramount concern” with “allowing law enforcement personnel to conduct constitutionally inoffensive, yet effective, surveillance.” *Id.* at 642. Safeguarding privacy was, in the court’s view, a distinctly secondary objective. The fourth amendment was to be satisfied by issuance of a warrant for the surreptitious entry, when necessary for the installation of the listening device.

The Eighth Circuit in *Agrusa* likewise approved surreptitious entry of business premises, pursuant to a warrant, to install a surveillance instrument. It resolved the fourth amendment issue by a wholly wooden analogy to “no-knock” entry to prevent destruction of contraband while executing a warrant. Since the Supreme Court had approved “unannounced breaking and entering” for that purpose in *Ker v. California*, 374 U.S. 23 (1963), it followed that unannounced breaking and entering was permissible for this purpose as well.

The dissenting judge perceived the more fundamental issue:

I would hope there still exists “a private enclave where [a person] may lead a private life” without fear of stealthy encroachment by government officials. . . .

. . . The majority, I sense, is uneasy about the precedent set today, and attempts to limit its holding to business offices rather than to homes. The true danger of the holding lies there, however, for the distinction between home and office under the Fourth Amendment is tenuous at best. . . .

If this were a private home, then upon what ground, under the majority’s reasoning, could the search be struck down? A warrant was obtained upon probable cause and the relevant statutes were theoretically complied with. The only ground for reversal would be that the sanctity and privacy of the home is too great and therefore that the search was unreasonable. But I suggest that the privacy of a person within business premises deserves the same consideration. Rather than draw artificial distinctions, I would hold searches such as this to be unreasonable *per se*.

541 F.2d at 703–04 (Lay, J., dissenting) (footnote & citations omitted).

The Fourth and Eighth Circuits both ruled that the fourth amendment required issuance of a warrant for surreptitious entry, apart from the statutory procedure for approval of the electronic interception itself. At least three district courts, however, have pushed the logic one step further, holding that authorization of interception automatically authorizes covert entry, without the specific prior knowledge or approval of the court. *See Application of United States*, 563 F.2d at 644 n.7, *citing United States v. Dalia*, 426 F. Supp. 862 (D.N.J. 1977); *United States v. London*, 424 F. Supp. 556 (D. Md. 1976), *aff’d on other grounds sub nom. United States v. Clerkley*, 556 F.2d 709 (4th Cir. 1977);

The remaining question is whether a state adopting a free-standing right of privacy should also adopt a provision on interception of communications in the search and seizure section. Usually, but not always, the answer is yes. Where the state wishes to permit limited electronic interception of communications, and where the search and seizure section is otherwise adequate or can be made so, then the advantages are all on the side of the express provision. The intent of the framers will be unmistakably clear to the legislature and courts. Nothing will be left to chance in the interpretation of a more general right of privacy.

If, however, the search and seizure section is weak or unworkable, or if a more restrictive standard is desired than reasonableness and a warrant, then the search and seizure section is less appropriate. Carefully drawn constitutional language could solve the problem, either in a separate section or as part of a comprehensive privacy section. In the last extremity, a state may choose to rely on a general privacy section instead of express language, but there is always the risk that the state courts will rely on *Katz* to permit wiretapping, subject only to the warrant requirement. This writer's bias is toward an express communications provision, if at all possible.

United States v. Altese, No. 75-CR-341 (E.D.N.Y., filed Oct. 14, 1976).

As the *Agrusa* dissent argued, if these decisions are allowed to stand, then there appears to be no principled basis on which to bar the most extreme uses of electronic surveillance. If one may burglarize to install a listening device in an office, then there is no reason why one may not burglarize a home for the same purpose. If one may install the three listening devices the Fourth Circuit approved, then there is no reason in principle why one may not wire for sound every inch of a home, office, or other building. There is judicial supervision, to be sure: issuance of a warrant upon an ex parte representation of necessity.

Taking this analysis one step further, suppose technology advances to the point that miniature television transmitters become readily available to law enforcement agencies. Suppose such transmitters are capable of maintaining constant visual and auditory surveillance wherever installed. Given these suppositions, there would be no reason in principle why one could not burglarize to install such devices throughout a home or office, thus keeping every inch of space under continuous visual and auditory observation.

If one may burglarize to install electronic listening devices, is there any reason in principle why one may not take all of the remaining steps? Would there then be privacy? Would there then be freedom in the society? True, this scenario does not produce an exact replica of Orwell's telescreens in 1984, but the parallel is close enough. Yet this result follows simply by pursuing existing legal principles to their logical conclusions.

At some point the cost to the society in freedom outweighs any conceivable benefit gained by government intrusion. With judicial burglary, the tolerable limit has certainly been surpassed, if indeed the limit had not been surpassed already. Extraordinary intrusions tolerated in the name of a campaign against organized gambling give way to intrusions for other reasons; reminder is hardly needed of the abuse of the national security exception during the Nixon administration. Total surveillance of one's home or office, like that suggested above, would make feasible the scrutiny of one's most intimate activities, associations, thoughts, and beliefs. There is much merit in the idea that some searches are *inherently* unreasonable, even *with* prior judicial authorization. The notion is old, but not antiquated.

2. *Protection of Private Communications from Interception by Private Persons.*—Florida cases have shown some confusion about the extent to which its interception of communications measure reaches private action. Unless the contrary appears from the language, an interception of communications provision in a search and seizure section will reach private action only to the extent the search and seizure section reaches it; in the usual case, not at all.

While most state constitutional interception measures have been directed at government action only, California's free-standing right of privacy was directed at private surveillance as well. Where this is the intention, the search and seizure section will ordinarily be an uncomfortable resting place. Awkwardness is introduced if the search and seizure section as a whole reaches state action, but the surveillance portion reaches private action in addition. Confusion is likely to be the result.

While there is, as yet, insufficient experience with the California provision to draw any conclusions, something like the California approach would be the preferred method for a state wishing to adopt constitutional regulation of private surveillance. The topic could be dealt with in a general right of privacy, as California has, or in a special provision dealing only with interception of communications.

3. *Protection of the Right of Privacy from Government Intrusion.*—The approach adopted by Alaska, California, and Montana has been to establish a free-standing right of privacy, either in a separate constitutional section or as part of the statement of inalienable rights. Experience to date shows that this is an effective way to establish a strong right of privacy. Court decisions have given effect to the intention of the voters to establish a constitutional right of equal stature with other major constitutional provisions. The courts have carefully considered the standard of review to be applied in privacy cases and the scope of the privacy right intended to be created. Federal precedent has been examined whenever helpful for analysis, but the California and Alaska courts have charted their own courses, thereby affording greater protection of the right of privacy than that conferred by the federal constitution.

By contrast, the experience of Hawaii and Illinois shows it is extraordinarily ineffective to try to establish a general right of privacy in the search and seizure section of the state constitution. Hawaii's cases reveal this approach submerges the right of privacy, conferring on it a subordinate status. The protection against "unreasonable" invasions of privacy anchors it to the rational basis test, a minimal level of scrutiny which would be applied by the courts in any event as part of due process or equal protection analysis.

Placement in the search and seizure section also leaves open the possibility of confusion about intent; illustrative is Illinois, where the supreme court has suggested that "invasions of privacy" refers only to "interceptions of communications." Finally, if there is any intention to reach private action, hopeless confusion could result, since the search and seizure section ordinarily reaches state action alone. In sum, the dismal record to date in Hawaii and Illinois indicates that the search and seizure section is to be avoided in the establishment of a general right of privacy.

In mandating a strong right of privacy, therefore, the preferred approach is to use a free-standing privacy section. The measures adopted by California, Alaska, and Montana each have something to commend them.

California's approach has at once both great strength and great weakness. The placement of the word "privacy" with the other inalienable rights gives privacy equal priority with life, liberty, property, and happiness. It suggests that the courts are to use the same degree of scrutiny when privacy is threatened as when other inalienable rights are threatened. Use of the single word affords maximum flexibility for deciding what privacy means on a case-by-case basis.

On the negative side, the use of the single word "privacy" is cryptic. There are no textual clues to its meaning. It should be noted that the strength of the California privacy right stems not from the placement of the word in the constitution, nor from the deductive powers of the California Supreme Court, but rather from the court's adoption of the sponsor's statement as the legislative history of the amendment. It is doubtful that, without the legislative history, the court ever would have decided that the amendment reached private action, which is atypical for a provision in a declaration of rights. California's excellent system for developing succinct statements of intent for its election brochures is of great value, but the practice is not followed in many states. More usually, the statements of intent are spread among the pages of constitutional convention reports and debate, and state courts do not consistently pay heed to statements of intent, even when available. Thus the California approach has the advantage of great flexibility, but also the hazard that courts may construe the privacy right to be a weak one. The method worked in California, but the unique features of the California system must be born in mind.

The Alaska and Montana privacy sections are genuinely free-standing, thus providing considerable prominence to the privacy right and a somewhat more specific statement of what is intended. The Montana constitution provides: "The right of individual privacy is essential

to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." This is at once the most elegant and the most uncomprising of the various privacy statements. It is clearly self-executing. It designates the standard of judicial review. It is suggestive of a philosophical stance like that taken by Mill. The right is one of "individual" privacy; it is intended to apply to natural persons and not to corporations.⁵⁰⁴ It is limited to state action, for the standard of review is "compelling state interest."

A potential problem may be created by specifying the standard of judicial review in the constitution itself. The compelling state interest standard has been subject to substantial criticism in recent years.⁵⁰⁵ The Alaska Supreme Court adopted it for privacy matters, then rejected it in favor of a "means-ends" inquiry. Inclusion of the compelling state interest standard could prevent future changes in the standard of review; but the other side of the dilemma is that failure to state a standard of review could result in subordination of the privacy right, as Hawaii has done.

In Alaska, the constitutional provision states that, "[t]he right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section." Alaska's "right of the people to privacy" may serve the same function as the "right of individual privacy": to indicate that the right pertains to individuals only, not other entities. There is, as yet, no case on the point.

The most immediate difficulty with the Alaska section is the second sentence. Alaska has from the outset treated its provision as self-executing. Under Alaska's reading, the first sentence declares the right; the second directs the legislature to take action to help effectuate it. It seems probable to this writer, however, that most courts would take a different view. The section is susceptible of the construction that the right of privacy is not self-executing; rather it is to be recognized only to the extent implemented by the legislature. Thus, if the Alaska approach were to be followed elsewhere, the second sentence should be eliminated or rephrased to eliminate any possible ambiguity.

The Alaska provision does not state a standard of review. This has the virtue of allowing flexibility to the judiciary in deciding the standard of review, and the Alaska courts have done a very able job with that issue. But this approach likewise presents difficulties. By its terms, the Alaska section states an absolute: the right to privacy "shall not be infringed." But Alaska courts have held the right is not ab-

504. *But see* note 334 *supra*.

505. *See, e.g.,* Craig v. Boren, 97 S. Ct. 451, 464 (Stevens, J., concurring); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

solite. The courts have adopted a standard of review and have engaged in balancing of interests to determine when the right of privacy will prevail and when other social interests will prevail. Use of absolute language invariably creates the same question that has surrounded the first amendment: is the provision to be interpreted literally or not?

There is the additional possibility that an absolute "shall not be infringed" statement will lead to a strained reading of "the right to privacy." Since the command is that the right of privacy "shall not be infringed," the analysis could focus on the question, what is a privacy right? A court could make decisions by determining intuitively whether the right being asserted is socially tolerable or not. If so, it will be recognized as a privacy *right* and will not be infringed. If the right being asserted is not felt to be socially tolerable, then the court can simply conclude that it is a mere privacy *interest*, which does not rise to the dignity of a privacy right, and which thus can be infringed.

A final difficulty with the Alaska language is that it provides flexibility for evolving standards of judicial review, thereby allowing adoption of something other than the compelling state interest standard. However, this does potentially allow a weakening of the privacy right by adoption of a lower standard; indeed, there is no apparent reason why the rational basis standard could not be adopted.

There is, then, something to be said for and against the privacy formulations of California, Alaska, and Montana. As all three are effective statements of a strong privacy right, to some degree it is purely a matter of preference which statement is most appropriate for an individual state. For this writer, the optimum combination would be a combination of the Alaska and Montana language:

The right of the people to privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

This approach expressly recognizes the balancing process. As H.L.A. Hart described it in commenting about John Stuart Mill's *On Liberty*, the essential process is that of "*justification* [W]e are committed at least to the general critical principle that the use of legal coercion by any society calls for justification as something *prima facie* objectionable to be tolerated only for the sake of some countervailing good."⁵⁰⁶ From the Hart-Mill viewpoint, it is vital to include specifically this justification stage, together with an explicit indication of the relative weights of the individual and societal interests. The state interest

506. H.L.A. HART, *supra* note 289, at 20.

must be compelling, a vitally important interest, before the right of privacy is overcome.

The proposed language adopts the Alaska "right of the people to privacy" rather than the Montana "right of individual privacy." Both phrases signify that privacy is a right of natural persons, not corporate entities. However, the phrase "individual privacy" could conceivably be construed to exclude associational privacy; in this respect the Alaska language may be preferable. The measure reaches state action only; it is a compelling *state* interest that must be shown.

The phrase "essential to the well-being of a free society" signifies that without privacy, a society is not truly free. It does not signify that privacy is a right to be enjoyed only in groups. Privacy is an individual right, but the society can only be deemed to be free if each individual enjoys that right. The Alaska reference to the legislature is omitted; the section is self-executing.

4. *Protection of the Right of Privacy from Private Intrusion.*—The California privacy measure is unique in establishing a self-executing right that operates against both governmental and private agencies. The precise impact on the private sector is unknown; the California Supreme Court has not yet decided a case in which the new right of privacy was asserted against intrusion by private actors. Its decision on banking records involved the private sector, but the case dealt with the discovery rules for civil litigation, a form of state action.

A more conventional and probably more generally acceptable approach was taken by Illinois. There, "privacy" was included in the section on "right to remedy and justice." This standard access-to-courts provision serves in many states as the specific authorization for the jurisdiction's common law. Illinois intended that the judiciary continue to fashion remedies in invasion of privacy cases. Thus intrusions by private actors could be remedied either by judicial or legislative action. The Illinois inclusion of privacy in the right-to-remedy section was merely declaratory of the existing situation; Illinois privacy law had already developed as a matter of judicial decision.

It seems likely that the California provision will result in somewhat more vigorous enforcement of the privacy right. The "right to remedy" or "access to courts" provisions of state constitutions are not always given an expansive reading; Florida's mandate that the courts "be open to every person for redress of any injury" has never been construed to mean what it literally says.⁵⁰⁷ On the other hand, courts are unaccustomed to the enforcement of self-executing constitutional provisions against the private sector. Relevant standards are unavailable.

507. See FLA. CONST. art. I, § 21; Bass, *Article I, Section 21: Access to Courts in Florida*, 5 FLA. ST. U.L. REV. 871 (1977).

There may be judicial reluctance to engage in a searching examination of internal business practices to evaluate whether a compelling interest exists for the maintenance of particular records. While one would expect the California measure to confer greater protection, only time will demonstrate whether that expectation is correct.

While it is rare for state constitutional provisions to reach private action directly, the reasons may in part be historical. True, from a doctrinal standpoint, the legislature and courts are empowered to deal with private action; in this view, to reach private action in a state constitution is needlessly to include statutory matter in the organic document. But when the first constitutions were drafted in this country, intrusion by the private sector did not pose a significant threat. Today, unrestrained information gathering can be equally extensive and equally objectionable, whether done by the private sector or by government.

The historic purpose of the invasion of privacy tort action was precisely to remedy private intrusions on privacy. While Warren and Brandeis directed their ire and most of their thinking to invasions of privacy by the press, the underlying concept is the protection of one's right to be let alone, regardless of the source of the intrusion. The difficulty with the tort action is, ironically, that it has become a rather widely accepted cause of action. With acceptance comes ossification. Prosser has catalogued four categories for the invasion of privacy; what will be the reaction of the courts when someone proposes a fifth? Courts are often reluctant to innovate; they may confine the invasion of privacy action within existing boundaries, leaving individual plaintiffs to a legislative remedy or none at all.

The point of Chief Justice Overton's remarks on privacy at the opening session of Florida's 1977-78 Constitution Revision Commission was to ask for guidance for the judiciary.⁵⁰⁸ Appellate courts are seeing an increase in privacy litigation in both the public and private sectors; the courts need guidance for the handling of those cases. The Illinois approach affords one possible solution. The addition of the word "privacy" to the "right to remedy" section is a clear directive for judicial attention to private intrusion. But Illinois intended by that addition to ratify and encourage the development of existing Illinois invasion of privacy tort law. There remains the possibility that Illinois courts will confine their efforts to the traditional boundaries of the tort, rather than construing the mandate more flexibly. The Illinois constitutional convention delegate who had pushed for stronger measures expressed a desire to establish a right of individual access to privately maintained records about oneself, as well as the means to correct or purge incorrect

508. See text accompanying note 6 *supra*.

information. Whether invasion of privacy decisional law is elastic enough to encompass new concepts remains to be seen.

It is not clear what avenue would provide the optimum handling of private intrusions on privacy. It is not certain that there is a necessity for a self-executing constitutional measure, nor is it known what the effects might be. The Illinois approach represents an intermediate step; another alternative would be the adoption of a non-self-executing policy statement to provide some direction for judicial and legislative action. And, in states like Washington, some direct statement will be needed even to accomplish the more modest goal of recognizing the invasion of privacy tort.

CONCLUSION

The experience of the states suggests that the most efficacious approach to the protection of privacy is the adoption of a "package" of measures. Subject to the reservations stated above, there are three essential elements. The first is inclusion of a provision relating to the interception of communications, within the section on searches and seizures. Second, and most important, is a free-standing right of privacy, following the Montana, Alaska, or California models, to protect against governmental intrusion. Finally, appropriate constitutional language should be added, if needed, to assure that the courts and legislature have a mandate to fashion remedies against intrusions by the private sector. For the adventurous, the California approach beckons.

The occasion for the preparation of this note has been the initiation of Florida's 1977-78 constitutional revision process. Ten years ago, when the 1968 Constitution was written, Florida gave consideration to the subject of individual privacy. An important step was taken by adopting a carefully drafted measure to protect private communications. The mandate of article I, section 12, has been taken seriously by the courts and the legislature. A strong and effective policy against unsupervised or unconsented-to eavesdropping has been the result.

Events of the past ten years have brought to the fore privacy issues on a larger scale. At the same time, retrenchment by the United States Supreme Court and the report of the Privacy Protection Study Commission have made it abundantly clear that the right of privacy will be fully protected only if there is action by the states. It is time to take that step. It is vital to a free society to establish a zone of privacy in which each individual is free from physical and psychological intrusion and has the autonomy to make vital personal decisions. "[T]he right to be let alone," Brandeis said, is "the most comprehensive of rights and

the right most valued by civilized men."⁵⁰⁹ It is time to protect that right—by establishing the right of privacy as a matter of state constitutional law.⁵¹⁰

GERALD B. COPE, JR.

509. *Olmstead v. United States*, 277 U.S. 438, 478 (Brandeis, J., dissenting).

510. After the completion of its initial drafting in January, 1978, the Constitution Revision Commission had taken action to establish a free-standing right of privacy as a separate section of the constitution and had specifically addressed the subject of privacy in other constitutional provisions as well.

The proposed right of privacy contains two branches: a self-executing right to be free from government intrusion, and a non-self-executing policy statement against private intrusion. Proposal No. 132, adopted by the Commission January 9, 1978, provides:

Right of privacy.—

(a) Every individual has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided in this constitution.

(b) The legislature shall protect by law the private lives of the people from intrusion by other persons.

On the same day, the Commission approved Proposals No. 137 and 138, which establish constitutional measures on open meetings and public records:

Open meetings.—No person shall be denied access to any meeting at which official acts are to be taken by any nonjudicial collegial public body in the state or by persons acting together on behalf of such a public body. The legislature may exempt meetings by general law where it is essential to protect privacy interests or overriding governmental purposes.

Public records.—No person shall be denied the right to examine any public record made or received in connection with the public business by any non-judicial public officer or employee in the state or by persons acting on their behalf. The legislature may exempt records by general law where it is essential to protect privacy interests or overriding governmental purposes.

Proposals 137 and 138 excluded judicial bodies from coverage. The judicial department of government was the subject of Proposal No. 133. Adopted January 24, 1978, it would add the following language to article V, section I:

All judicial hearings and records and all proceedings and records of judicial agencies except grand and petit juries shall be open and accessible to the people. Where it is essential to protect privacy interests or overriding governmental purposes, the supreme court by rule or the legislature by general law may exempt hearings, proceedings and records from this section.

Proposal No. 133 also deletes those portions of article V, section 12(b), relating to confidentiality of proceedings of the Judicial Qualifications Commission; confidentiality would in the future be governed by the new language in article V, section 1.

The existing protection against interception of private communications contained in article I, section 12, remains unchanged. Likewise article II, section 8, the ethics and financial disclosure section, was retained intact.

A sequel to this note, to appear in a later issue of the *Review*, will examine in detail the final version of the Constitution Revision Commission's privacy provisions.

APPENDIX

The current versions of the state constitutional privacy provisions are given here. The dates are those on which the right of privacy was added, and not necessarily the date of the last revision of the indicated section.

ALAS. CONST. art. I, § 22:

Section 22. Right of Privacy.—The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

Adopted by amendment, 1972.

ARIZ. CONST. art. II, § 8:

Section 8. Right to privacy.—No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Constitution adopted, 1910.

CAL. CONST. art. I, § 1:

Section 1. Inalienable rights.—All people are by nature free and independent and have inalienable rights. Among those are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

Adopted by amendment, 1972.

FLA. CONST. art. I, § 12:

Section 12. Searches and seizures.—The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

Constitution adopted, 1968.

HAWAII CONST. art. I, § 5:

Section 5. Searches, Seizures and Invasion of Privacy.—The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures, and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

Constitution adopted, 1968.

ILL. CONST. art. I, §§ 6, 12:

Section 6. Searches, Seizures, Privacy and Interceptions.—The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

Section 12. Right to Remedy and Justice.—Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.

Constitution adopted, 1970.

LA. CONST. art. I, § 5:

Section 5. Right to Privacy.—Every person shall be secure in his person, property,

communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

Constitution adopted, 1974.

MONT. CONST. art. II, §§ 9, 10:

Section 9. Right to know.—No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Section 10. Right of privacy.—The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Constitution adopted, 1972.

S.C. CONST. art. I §, 10:

Section 10. Searches and seizures; invasions of privacy.—The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

Adopted by amendment, 1971.

WASH. CONST. art. I, §7:

Section 7. Invasion of Private Affairs or Home Prohibited.—No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Constitution adopted, 1889.

