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## Right of Privacy

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# ARTICLES

## RIGHT OF PRIVACY

Larry M. Elison\* and Dennis NettikSimmons\*\*

### I. INTRODUCTION

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.<sup>1</sup>

From the beginning of recorded history there has been a strong urge to seek some measure of privacy.<sup>2</sup> From caves to castles, from phone booths to prison cells, the urge to be "let alone" is evident. Unfortunately, the parallel urge to snoop, infringe upon and control is equally evident. Montana has, in a sense, responded to both urges. The delegates to the 1972 constitutional convention tentatively discussed privacy, imprecisely and incompletely considered examples and arguments about privacy, and then decisively proposed that a right of privacy be included in the Montana Constitution. Presumptively, the delegates intended to guarantee the right of privacy to a greater degree than it had been under either the 1889 Montana Constitution or the federal Constitution, to accord the right unquestioned constitutional significance, and to insure that privacy encompassed at least the examples considered.

In May 1985, a decision by the Montana Supreme Court dramatically reduced the scope of privacy protection.<sup>3</sup> It did so in the course of overruling nearly fifteen years of Montana constitutional case law, case law that protected against the use in criminal proceedings of evidence that had been illegally seized by private per-

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1. MONT. CONST. art. I, § 9.

2. See A. WESTIN, *PRIVACY AND FREEDOM* (1967). Only industrialized nations have constitutionalized this right. This is probably the case because the complexity and development of such nations pose a significant threat to privacy.

3. *State v. Long*, \_\_\_\_\_ Mont. \_\_\_\_\_, 700 P.2d 153 (1985).

sons.<sup>4</sup> The result reached in the case was surprising although well supported by precedent outside of Montana. It was traditional when it could have been innovative; it limited a right which, in an increasingly complex society, needs to be expanded. As noted by Justice Sheehy in dissent, Delegate Campbell's remarks in the Montana Constitutional Convention are no less true today than when they were made: "Today, with wire taps, electronic and bugging devices, photo surveillance equipment and computerized data banks, a person's privacy can be invaded without his knowledge and the information so gained can be misused in the most insidious ways."<sup>5</sup>

The purpose of this article is to articulate the historical and philosophical underpinnings of the right of privacy, to review the apparent intentions of the framers of the Montana constitutional right of privacy, and to analyze how the Montana Supreme Court has interpreted this right. In short, it is an attempt to understand the nature of the Montana constitutional right of privacy.

## II. LEGAL DEVELOPMENT OF THE RIGHT OF PRIVACY IN THE UNITED STATES

### A. *Common Law Right of Privacy*

Though the term "privacy" was not used, something like the concept of privacy has been significant in American political thought since colonial times. Concerns about unreasonable searches and seizures,<sup>6</sup> notions of liberty,<sup>7</sup> private property law<sup>8</sup> and nuisance law<sup>9</sup> have always been implicit manifestations of a sense of privacy. A concept labelled "privacy," however, was not carefully developed until 1890 in an article by Samuel Warren and Louis Brandeis, entitled "The Right to Privacy."<sup>10</sup>

In that article, the authors argued for the recognition of a common law right of privacy. Beginning with the premise that "[p]olitical, social, and economic changes entail the recognition of new rights,"<sup>11</sup> they argued that not only property and reputation

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4. See *infra* text accompanying note 63.

5. Long, \_\_\_\_\_ Mont. at \_\_\_\_\_, 700 P.2d at 161 (quoting MONTANA CONSTITUTIONAL CONVENTION 1971-72, Vol. 5, at 1681 (1979) [hereinafter MONT. CONST. CONV.]).

6. See U.S. CONST. amend. IV. See also Declaration of Rights and Grievances, 1765, quoted in 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 196-98 (1971).

7. Frank v. Maryland, 359 U.S. 360 (1959); Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).

8. See *infra* text accompanying notes 103-06.

9. Frank, 359 U.S. 360.

10. 4 HARV. L. REV. 193 (1890).

11. *Id.* at 193.

but also “[t]houghts, emotions, and sensations demanded legal recognition.”<sup>12</sup> Rather than looking at the nature of the injuries resulting from an invasion of privacy, the courts were urged to base their interpretation of this right on the principle “of an inviolate personality.”<sup>13</sup>

In 1904, the Georgia Supreme Court, in *Pavesich v. New England Life Insurance Co.*,<sup>14</sup> became the first court to recognize a common law right to privacy. Acknowledging that there was no precedent for recognizing this right, the court supported its decision with an analysis of the right’s inchoate existence in other legal rights and with an observation about the changing social, political and economic conditions of society.<sup>15</sup>

The first common law invasions of privacy actions pertained to unauthorized use of a person’s likeness. As the right of privacy developed, however, it was invoked to protect other interests. In 1960, Dean Prosser concluded from his examination of privacy cases that there were: “four distinct kinds of invasion of four different interests . . . , which are tied together by the common name, [privacy], but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff . . . ‘to be let alone.’”<sup>16</sup> The four different invasions of privacy that Prosser discovered are: the “[i]ntrusion upon the plaintiff’s seclusion or solitude, or into his private affairs”; “[p]ublic disclosure of embarrassing private facts about the plaintiff”; “[p]ublicity which places the plaintiff in a false light in the public eye,” and; appropriation of the plaintiff’s name or likeness for commercial or similar use.<sup>17</sup> Today, the vast majority of states,<sup>18</sup> including Montana,<sup>19</sup> have recognized by statute or judicial decision a right to privacy which permits tort actions for invasion of at least one of these aspects of the right of privacy.

### B. *The Federal Constitution*

The story of the federal constitutional right of privacy, like

12. *Id.* at 195.

13. *Id.* at 205.

14. 122 Ga. 190, 50 S.E. 68 (1905).

15. *Id.* at 193-222, 50 S.E. at 69-78.

16. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

17. *Id.* at 389.

18. 62 AM. JUR. 2D, *Privacy* § 3 (1972).

19. See *Welsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816 (1952) (landlord moving back into house, while tenant still resided, thereby violating the tenant’s right to privacy). See also MONT. CODE ANN. § 45-8-213 (1985) (making it a crime for anyone other than law enforcement officials to intercept telephone transmissions.)

the common law right, begins with Louis Brandeis. In his dissenting opinion in *Olmstead v. United States*,<sup>20</sup> Justice Brandeis argued that the fourth amendment protected a person's right of privacy from invasions by government officials. His interpretation of the right of privacy, the very "principle underlying the Fourth Amendment,"<sup>21</sup> resulted in part from his conviction that if the right existed in common law against private citizens, it should also be applicable to the government: "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen."<sup>22</sup> Thus, he could declare:

The makers of our Constitution . . . 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.<sup>23</sup>

The right was subsequently invoked by a majority of the Court in search and seizure cases as early as 1949 in *Wolf v. Colorado*.<sup>24</sup> In *Wolf*, the Court held that the fourteenth amendment did not require state courts to exclude evidence that was obtained by an unreasonable search and seizure in a prosecution for a state crime. Nevertheless, Justice Frankfurter, writing for the Court, echoed the dissent of Justice Brandeis in *Olmstead* and held this right of privacy (though not the exclusionary remedy) applicable to the States: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."<sup>25</sup> Twelve years later, when the Court in *Mapp v. Ohio*<sup>26</sup> decided that the exclusionary rule ought to be applied to state court proceedings, it reaffirmed the right of privacy, referring to it as "Wolf's constitutional documentation of the right to privacy."<sup>27</sup>

Finally, in 1969, the Court in *Katz v. United States*<sup>28</sup> articu-

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20. 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

21. *Id.* at 476.

22. *Id.* at 485.

23. *Id.* at 478.

24. 338 U.S. 25 (1949).

25. *Id.* at 27-28.

26. 367 U.S. 643 (1961).

27. *Id.* at 654-55.

28. 389 U.S. 347 (1967).

iated what have been the two most significant facets of the nature of the privacy interest protected by the fourth and fourteenth amendments. First, the Court emphasized that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'"<sup>29</sup> Instead, "the 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."<sup>30</sup> Thus, there is an obvious difference in the scope or extent of the right of privacy to be protected by state government vis-a-vis the federal government. The scope of privacy to be protected by the federal government and the U.S. Constitution should be substantially less comprehensive than that to be protected by state governments. State governments should protect all of the privacy protected by the federal Constitution and more also.<sup>31</sup> The theory that directed the creation of the federal government and which was embodied in the federal Constitution was of a limited government possessing *only* enumerated and delegated powers reserving all other conceivable powers of government to the states or to the people.<sup>32</sup> Notwithstanding the enormously expanded activities of the federal government it has never been assumed that there is a general police power in the federal government such as exists in each of the state governments.

Second, the *Katz* Court redirected the thrust of the concept of privacy from the notion of a "constitutionally protected area"<sup>33</sup> to a consideration of the privacy of the person: "[T]he Fourth Amendment protects people, not places."<sup>34</sup> This statement was brief, clever and inaccurate. Privacy protects persons. It also protects places. The trespass doctrine that the courts previously had utilized in fourth amendment search and seizure analyses often failed to measure up to the provision it attempted to construe.<sup>35</sup> Thus, the trespass doctrine needed to be supplemented with the

29. *Id.* at 350.

30. *Id.* at 350-51.

31. *Supra* note 30, and *infra* notes 214-19 and text preceding note 214.

32. *See* U.S. CONST. amend. 10.

33. 389 U.S. at 351.

34. *Id.*

35. The trespass doctrine was applied by pre-*Katz* Courts to construe the fourth amendment's protection of "persons, houses, papers, and effects." In *Olmstead*, 277 U.S. 438, the Court held that the fourth amendment only protects "material" things. Thus, since there was no trespass in tapping the telephone wires, no violation of the defendant's fourth amendment rights occurred. *Compare* *Silverman v. United States*, 365 U.S. 505 (1961) (holding that the insertion of a "spike mike" into defendant's wall violated the fourth amendment). *See generally* Hufstедler, *Invisible Searches for Intangible Things: Regulation of Governmental Information Gathering*, 127 U. PA. L. REV. 1483, 1493-1497 (1979).

admonition that persons are also protected. But it is very important to recognize the intimate relationship between persons and their property; a relationship that undergirds much of Anglo-American law.<sup>36</sup>

*Katz* also articulated a test for what constitutes a "search" that has been adopted by some state courts in construing their own explicit state constitutional privacy provisions.<sup>37</sup> The majority opinion in *Katz* addressed the search and seizure in terms of governmental activities which "violated the privacy upon which [Katz] justifiably relied."<sup>38</sup> It is the test found in Justice Harlan's concurring opinion, however, that has been almost uniformly adopted by the courts. In order for a privacy interest to be protected by the fourth amendment, it is necessary "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"<sup>39</sup>

In addition to the right of privacy underlying the fourth amendment, the federal Constitution has been successfully invoked to protect an aspect of privacy that looks very much like what in other contexts had been called a "liberty" interest.<sup>40</sup> In 1965, the Court in *Griswold v. Connecticut*<sup>41</sup> held that laws forbidding the use of contraceptive devices violated "marital privacy."<sup>42</sup> Although the majority vote was based on different theories, six justices recognized the right of privacy to be a fundamental right protected by the Constitution.<sup>43</sup>

36. This is the point on which Warren and Brandeis as well as the *Katz* Court had to rely in arguing that privacy logically precedes property. See Warren and Brandeis, *supra* notes 10 & 12.

37. See, e.g., *City and Borough of Juneau v. Quinto*, 684 P.2d 127, 129 (Alaska 1984); *People v. Corr*, 682 P.2d 20, 26 (Colo. 1984); *State v. Fields*, \_\_\_ Haw. \_\_\_, \_\_\_, 686 P.2d 1379, 1390 (1984); *State v. Ragsdale*, 381 So. 2d 492, 497 (La. 1980); *State v. Boggess*, 115 Wis. 2d 443, 448 n.8, 340 N.W.2d 516, 520 (1983).

38. *Katz*, 389 U.S. at 353.

39. *Id.* at 361 (Harlan, J., concurring).

40. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (striking down an act requiring the sterilization of persons convicted two or more times of felonies involving "moral turpitude." The state's classification failed to survive strict scrutiny, which was mandated because the defendant would have been "deprived of a basic liberty.").

41. 381 U.S. 479 (1965).

42. *Id.* at 485.

43. The majority had different rationales, based not on a disagreement about the right of privacy, but about the source of the right. Justice Douglas writing the opinion for the Court held that "[v]arious [constitutional] guarantees create zones of privacy." *Id.* at 484. Such zones, like the particular guarantees, would be incorporated into the fourteenth amendment and thus would be applicable to state action. Justices Goldberg and Brennan and Chief Justice Warren concurred concluding that "the right of marital privacy though not mentioned explicitly in the Constitution is supported both by numerous decisions

The right of privacy enunciated in *Griswold* has since been recognized by the Supreme Court to protect both "the individual interest in avoiding [accumulation and] disclosure of personal matters, and . . . the interest in independence in making certain kinds of important [personal] decisions."<sup>44</sup> The personal decisions generally included are those "relating to marriage, procreation, contraception, family relationships and child rearing and education."<sup>45</sup> The Court has excluded some sexual choices for example, upholding criminal sodomy statutes.<sup>46</sup>

### C. Other State Constitutions

A number of states have recognized a constitutional right of privacy. The highest courts in some states have followed the United States Supreme Court's lead and have found an implicit right of privacy in their state constitutions.<sup>47</sup> A number of state constitutions have explicit provisions protecting the right of privacy. Some have included a proscription against invasions of privacy in their search and seizure provision,<sup>48</sup> others have a separate right of privacy provision.<sup>49</sup> The states of Washington and Arizona, on the other hand, have no search and seizure provision per se, but only a general right against illegitimate governmental intrusions: "No person shall be disturbed in his private affairs, or his home

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. . . and by the language and history of the Ninth Amendment . . ." *Id.* at 486-87 (Goldberg, J., concurring). Justice Harlan joined the decision because the anti-contraception statute violated "basic values 'implicit in the concept of ordered liberty.'" *Id.* at 500 (Harlan, J., concurring). Justice White concurred, finding that that statute was not "reasonably necessary for the effectuation of a legitimate and substantial state interest," and was "arbitrary or capricious in application." *Id.* at 504 (White, J., concurring).

44. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (holding that a New York law requiring doctors to reveal the names of persons purchasing certain kinds of drugs did not violate either facet of the right of privacy). For criticism of the Court's failure to distinguish in practice these two kinds of interests, see Huff, *Thinking Clearly About Privacy*, 55 WASH. L. REV. 777 (1980).

45. *Paul v. Davis*, 424 U.S. 693, 713 (1976).

46. *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986); *Enslin v. Bean*, 436 U.S. 912 (1978); *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976) (homosexual conduct); *Lovisi v. Slayton*, 363 F. Supp. 620 (E.D. Va. 1973), *aff'd* 539 F.2d 349 (4th Cir. 1976), *cert. denied*, *Lovisi v. Zahradnick*, 429 U.S. 977 (1976) (sodomosexual heterosexual conduct).

47. *See, e.g., In re Caulk*, 125 N.H. 226, 480 A.2d 93 (1984); *Commonwealth v. Beauford*, 327 Pa. Super. 253, 475 A.2d 783 (1984); *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976).

48. *See, e.g., ILL. CONST.* art. I, § 6; *LA. CONST.* art. I, § 5; *S.C. CONST.* art. I, § 10.

49. *See, e.g., ALASKA CONST.* art. I, § 22; *CAL. CONST.* art. I, § 1; *FLA. CONST.* art. I, § 12 (Florida also proscribes "unreasonable interception of private communication by any means" in its search and seizure provision, § 12); *HAW. CONST.* art. I, § 6 (Hawaii also proscribes "invasions of privacy" in its search and seizure provision, § 7); *MONT. CONST.* art. II, § 10.



invaded, without authority of law."<sup>50</sup>

The express right of privacy in some of these states, either by constitutional amendment<sup>51</sup> or by judicial decisions,<sup>52</sup> has given no greater protection in search and seizure cases than provided by the fourth amendment as construed by the United States Supreme Court. Other state courts, however, have interpreted their state constitutional rights of privacy to be more protective than the federal right. They have done so on the basis of express provisions recognizing privacy, or because the particular state's search and seizure provision is not identical to the fourth amendment.<sup>53</sup> Even when faced with the identical search and seizure provision, some state courts have simply interpreted the language in a different and more protective way.<sup>54</sup>

### III. DEVELOPMENT OF THE MONTANA RIGHT OF PRIVACY PRIOR TO THE 1972 CONSTITUTION

The Montana Supreme Court acknowledged a right of privacy fifty years before an explicit right of privacy was proposed and ratified as a part of the 1972 Montana Constitution. The first consid-

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

51. FLA. CONST. art. I, § 12:

This right shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the Fourth Amendment to the United States Constitution.

52. See *State v. Lee*, \_\_\_ Haw. \_\_\_, \_\_\_, 686 P.2d 816, 817-18, (1984); *People v. Hoskins*, 101 Ill. 209, 218, 461 N.E.2d 941, 945 (1984).

53. Compare, e.g., *Reeves v. State*, 599 P.2d 727 (Alaska 1979); *State v. Kaluna*, 55 Haw. 361, 520 P.2d 51 (1974); and *State v. Hernandez*, 410 So. 2d 1381 (La. 1982) with *New York v. Belton*, 453 U.S. 454 (1981) and *United States v. Robinson*, 414 U.S. 218 (1973) (permitting officers to search defendant's automobile pursuant to a custodial arrest); *State v. Glass*, 583 P.2d 872 (Alaska 1978) and *State v. Brackman*, 178 Mont. 105, 582 P.2d 1216 (1978) with *United States v. White*, 401 U.S. 745 (1971) (use of informant carrying concealed transmitter does not violate fourth amendment); *State v. Sawyer*, 174 Mont. 512, 571 P.2d 1131 (1977) with *South Dakota v. Opperman*, 428 U.S. 364 (1976) (permitting routine inventory searches of automobiles impounded when driver is arrested).

54. Compare, e.g., *People v. Clyne*, 189 Colo. 412, 541 P.2d 71 (1975); *People v. Gokey*, 60 N.Y.2d 309, 457 N.E.2d 723, 469 N.Y.S.2d 618 (1983), with *New York v. Belton*, 453 U.S. 454 (1981); *People v. Sporleder*, 666 P.2d 135 (Colo. 1983) and *Commonwealth v. Beauford*, 327 Pa. Super. 253, 475 A.2d 783 (1984) with *Smith v. Maryland*, 442 U.S. 735 (1979) (defendant had no expectation of privacy in his telephone records); *Charnes v. DeGiacormo*, 200 Colo. 94, 612 P.2d 1117 (1980); and *Commonwealth v. DeJohn*, 486 Pa. 32, 403 A.2d 1283 (1979), with *United States v. Miller*, 425 U.S. 435 (1976) (defendant had no expectation of privacy in his bank records). The thrust of this article is not directed toward the intrinsic value of the exclusionary rule in protecting the citizens' right of privacy. Nonetheless, it would be interesting to know how many tort, crime or administrative remedies have been effectuated in a case which initially focused on the exclusion of evidence.

eration of any aspect of the right of privacy within Montana was the Montana Supreme Court's initial interpretation of the search and seizure provision of the 1889 Montana Constitution. In *State ex rel. Samlin v. District Court*,<sup>55</sup> the court held that the defendant's whiskey had been seized pursuant to a defective warrant and ordered that the whiskey be returned. Having noted that the fourth amendment to the United States Constitution was not applicable to actions by state officials, the court approved of the interpretation of the fourth amendment given by the United States Supreme Court in *Weeks v. United States*<sup>56</sup> and held that the 1889 Montana Constitution was "expressive of the same fundamental principles and was intended to be equally as effective to prevent an invasion of the rights of the citizen of the state under the guise of law by the state government or any of its officers."<sup>57</sup>

Several years later, in *State ex rel. King v. District Court*,<sup>58</sup> the Montana Supreme Court reaffirmed its holding in *Samlin* and required that evidence seized pursuant to a defective warrant be excluded. In *King*, the court first articulated the relationship between the Montana Constitution's warrant requirement and the individual's right of privacy. The court declared:

The power to make searches and seizures is absolutely necessary to the public welfare. . . . But the process may be invoked only in furtherance of public prosecutions. Statutes providing for their issuance and execution are sustained under the constitutional provisions forbidding unreasonable search and seizure only as necessary means in the suppression of crime and the detection and punishment of criminals, and these are required to be cautiously framed and carefully pursued, in order that the constitutional rights of citizens may not be invaded. . . . The warrant must designate the premises to be searched and contain a description so specific and accurate as to avoid any unnecessary or unauthorized invasion of *the right of privacy*.<sup>59</sup>

The common law right of privacy was recognized by the Montana Supreme Court in 1952 in *Welsh v. Roehm*.<sup>60</sup> Following the rationales of other state courts, the *Welsh* court stated that "[t]he 'right of privacy' is embraced within the absolute rights of personal security and personal liberty"<sup>61</sup> and agreed that "[t]he basis of the

55. 59 Mont. 600, 198 P. 362 (1921).

56. 232 U.S. 383 (1914).

57. *Samlin*, 59 Mont. at 609, 198 P. at 365.

58. 70 Mont. 191, 224 P. 862 (1924).

59. *Id.* at 197-98, 224 P. at 864-65 (emphasis added).

60. 125 Mont. 517, 241 P.2d 816 (1952).

61. *Id.* at 523, 241 P.2d at 819.

'right of privacy' is the 'right to be let alone' and [that] it is 'a part of the right to liberty and pursuit of happiness.'"<sup>62</sup>

In the late 1960s, the Montana Supreme Court was required to consider challenges to searches and seizures based on the federal Constitution. Thus, the court had to apply the justifiable expectation of privacy test that had been announced in *Katz*.<sup>63</sup>

In *State v. Brecht*,<sup>64</sup> the Montana Supreme Court held that to admit testimony of a private citizen, obtained by listening on an extension phone to the defendant's conversation with a third party, would not only violate the defendant's federal right of privacy under *Katz* but also his constitutional rights under the search and seizure provision of the 1889 Montana Constitution. The court supported its interpretation that the Montana search and seizure provision provided a right to privacy on the authority of the broad assertions that the court had made concerning the right of privacy in *Welsh*.<sup>65</sup> Thus, the Montana Supreme Court, like Justice Brandeis in his dissent in *Olmstead*,<sup>66</sup> recognized that the same general concept of privacy underlay both the common law and constitutional rights of privacy.<sup>67</sup>

#### IV. MONTANA'S CONSTITUTIONAL RIGHT OF PRIVACY

##### A. *The 1972 Montana Constitution*

On June 6, 1972, the people of Montana ratified a new state Constitution. Among several provisions, either unique to Montana or similar to provisions in only a few other states,<sup>68</sup> is the right of privacy: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without a compelling state interest."<sup>69</sup>

62. *Id.*

63. *See, e.g., State v. Dess*, 154 Mont. 231, 462 P.2d 186 (1969).

64. 157 Mont. 264, 485 P.2d 47 (1971).

65. *Id.* at 270, 485 P.2d at 50-51.

66. *See Olmstead v. New York*, 277 U.S. 438, 485 (1922) ("Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen.").

67. *Brecht*, 157 Mont. at 271, 485 P.2d at 51 (to refuse to apply the exclusionary rule to evidence obtained illegally by private persons would create "a fictional distinction between classes of citizens").

68. Other provisions include a right to a clean environment, MONT. CONST. art. II, § 3; a broad equal rights provision, MONT. CONST. art. II, § 4; a right to know about and participate in government, MONT. CONST. art. II, §§ 8, 9; and a right to economic assistance and social and rehabilitative services, MONT. CONST. art. XII, § 3. For a discussion of similar provisions in other states, see Galie, *The Other Supreme Courts: Judicial Activism Among State Courts*, 33 SYRACUSE L. REV. 731, 734 (1982).

69. MONT. CONST. art. II, § 10.

The delegates to the 1972 Montana Constitutional Convention were aware that the right of privacy had been recognized by both the United States and Montana Supreme Courts. The Bill of Rights Committee cited both *Griswold* and *Brecht* in its comments<sup>70</sup> and *Welsh* was referred to during the debates.<sup>71</sup> Twice during the debates, delegates explicitly acknowledged that the Montana Supreme Court had already recognized a right of privacy.<sup>72</sup> Further, the chairman of the Bill of Rights Committee stated to the full convention that "[t]he committee in no way intend[ed] to overturn these decisions which establish[ed] so important a right."<sup>73</sup>

Despite the fact that there had already been judicial recognition of the right of privacy, the delegates thought it important to include the right in the constitution. There was no disagreement among the delegates concerning Delegate Campbell's assessment of the Bill of Rights Committee's "feeling . . . that the times have changed sufficiently that this important right should now be [explicitly] recognized."<sup>74</sup> Delegate Campbell attributed this change to "an increasingly complex society . . . [in which] our area of privacy has decreased, decreased, and decreased."<sup>75</sup> Delegate Campbell further provided a helpful analogy that one might conclude aptly characterized the sentiments of a vast majority of the delegates:

What this would do—by requiring that this area of privacy be protected unless there is a showing of a compelling state interest, it produces what I call a semipermeable wall of separation between individual and state; just as the wall of separation between church and state is absolute, the wall of separation we are proposing with this section would be semipermeable. That is, as a participating member of society, we all recognize that the state must come into our private lives at some point; but what it says is, don't come into our private lives unless you have good reason for being there. We felt that this, as a mandate to our government, would cause a complete reexamination and guarantee our individual citizens of Montana this very important right—the right to be

70. MONT. CONST. CONV., Comment to Bill of Rights Committee Proposal, Vol. II, at 632.

71. MONT. CONST. CONV., Vol. VI, at 1851.

72. *Id.* Vol. V, *supra* note 5, at 1681, Vol. VII, at 2484.

73. *Id.* Vol. VII, at 2484.

74. *Id.* Vol. V, at 1680. The interjection of "explicitly" correctly characterizes the Bill of Rights Committee's comments: "what (the right of privacy provision) accomplishes is the elevation of the judicially-announced right of privacy to *explicit* Constitutional status." *Id.* Vol. II, at 632 (emphasis added).

let alone; and this has been called the most important right of them all.<sup>76</sup>

Although it is clear that the right of privacy was intended to protect the citizen's right to be let alone, it is not as clear what relationship the delegates intended the right of privacy to have with the constitutional proscription against unreasonable searches and seizures. Originally, it had been proposed that the search and seizure provision contain an explicit reference to invasions of privacy.<sup>77</sup> Concern arose, however, about the possible conflict between the reasonableness requirement of the search and seizure provisions and, as it read at that point, the absolute language of the privacy provision.<sup>78</sup> Noting this effect, the delegates unanimously favored a motion striking "invasions of privacy" from the search and seizure provision.<sup>79</sup>

Even though this action by the delegates, standing alone, suggests that the search and seizure provision and the privacy provision were intended to address two different kinds of governmental intrusion, comments by the Bill of Rights committee and other delegates suggest that the two provisions could be applied together in certain circumstances. The committee stated that the search and seizure section (without the inclusion of the phrase, "invasion of privacy") "is the procedural companion of substantive section 10 [the right of privacy provision] . . . . They [both provisions taken together] stipulate that even after the showing of a compelling state interest the state must abide by certain procedural guidelines."<sup>80</sup> Thus, the search and seizure provision seems ultimately to have been viewed as one aspect of the more comprehensive concept of privacy.

Although the right of privacy has been most significant in Montana case law in the context of search and seizure issues,<sup>81</sup> the drafters of the privacy provision intended the right to include more than traditional search and seizure.<sup>82</sup> From the debates it is

76. *Id.*

77. *Id.* Vol. V, Delegate Proposal No. 14, at 98.

78. *Id.* Vol. V, at 1688.

79. *Id.*

80. *Id.* Vol. II, Comments to Bill of Rights Committee Proposal, at 633.

81. Ever since the passage of the new Montana Constitution the court has noted that "[i]n addition to the protections accorded by the Fourth Amendment to the Federal Constitution and the Montana Constitution, against unreasonable searches and seizures, the Montana Constitution specifically protects the individual's right to privacy." *City of Helena v. Lamping*, 719 P.2d 1245 (Mont. 1986).

82. The issue also arises in the construction of the right to know provision, MONT. CONST. art. II, § 9 which explicitly excepts from its mandate, "cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."

clear that the right was intended to protect citizens from illegal private action and from legislation and governmental practices that interfered with their autonomy to make decisions in matters that are generally considered private.<sup>83</sup> It was also intended to address what kinds of information could be gathered, as well as what methods are appropriate to gather such information.<sup>84</sup>

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83. In the Bill of Rights Committee comments, *Griswold* is cited as an example of what the right of privacy has already been held to entail. Vol. II, MONT. CONST. CONV., *supra* note 5, Comments to Bill of Rights Committee Proposal, at 632. Perhaps what is most suggestive of this facet of privacy is Delegate Campbell's description of the right as a "semipermeable wall between individual and state." See *supra* text accompanying note 75.

Very few cases raising this facet of privacy, however, have come before the Montana Supreme Court. In at least one case, *Yanzick v. School Dist. No. 23*, 196 Mont. 375, 641 P.2d 431 (1982), an opportunity for the interpretation and application of the autonomy facet of the right of privacy was not seized. In *Yanzick*, a teacher was fired at least in part because he was living with a woman, outside of marriage. Thus, a "zone of privacy" related to prior federally recognized zones was implied. Rather than address the privacy issue, the court solved the case on a broader basis, holding that "conduct of a teacher including a characterization that it is immoral, must be such as to directly affect the performance by the teacher of his duties as a teacher." *Id.* at 392, 641 P.2d at 441. See also *Storch v. Board of Directors*, 169 Mont. 176, 545 P.2d 644 (1976) (where an employee was dismissed because of physical appearance, bodily cleanliness, illicit cohabitation, and poor relationship with the medical community, the court refused to address the right of privacy, holding that "when an employee's conduct affects his ability to adequately perform his duties, he can be discharged." *Id.* at 184, 545 P.2d at 649). Cf. *Slohodan v. U.P.S., Inc.*, 193 N.J. Super. 586, 475 A.2d 618 (1984) (remanded to determine whether it was violative of any right of privacy to fire employees for extramarital sex and whether improper inquiry or surveillance was used by employer).

Similarly, privacy was mentioned in passing, but not analyzed in the context of the termination of parental rights in *In re L.F.G.*, 183 Mont. 239, 598 P.2d 1125 (1979). In an earlier termination case, however, *In re Guardianship of Doney*, 174 Mont. 282, 570 P.2d 575 (1977), the court declared that "[t]here are . . . few invasions by the state into the privacy of the individual that are more extreme than that of depriving a natural parent of the custody of his children." *Id.* at 285, 570 P.2d at 577. The court relied, however, on federal privacy cases, particularly *Stanley v. Illinois*, 405 U.S. 645 (1972) (striking down an Illinois statutory presumption that unmarried fathers are unsuitable and neglectful parents) rather than the Montana constitutional right of privacy. *Id.* at 286, 570 P.2d at 577.

In the only case where the court was clearly urged to adopt vanguard interpretation of privacy, *State ex rel. Zander v. District Ct.*, 180 Mont. 548, 591 P.2d 656 (1979), the court refused to strike down the criminalization of the possession of marijuana as violative of the right of privacy. Thus, the court did not follow the high court of its sister state Alaska, which construed its own right of privacy to permit the use of marijuana in one's own home. *Ravin v. State*, 537 P.2d 494 (Alaska 1975). See also *State ex rel. Zander*, 181 Mont. 454, 468, 594 P.2d 273, 285 (1979) (Shea, J., dissenting) (arguing that the court should have followed *Ravin*).

84. The government can only gather information in which it has a *compelling* state interest. Likewise, the delegates expressed concern about the ways in which the government gathered information in which it had a compelling interest. At least, the method must be reasonable. See *supra* note 78. MONT. CONST. CONV., Vol. 5, at 1688.

## B. What Constitutes a Constitutionally Protected Interest?

### 1. What Does the Concept of Privacy Entail?

From a survey of the development of the concept of privacy one comes to understand that perhaps no legal term has been used more equivocally by the courts and commentators than the term "privacy." It has been relied on to define and to protect many different and apparently unconnected activities and interests. It is most difficult to analyze these disparate concepts of privacy in a logical, coherent manner.

The Montana Constitution itself does not contain a principle for determining the particular kinds of interests that are protected by its right of privacy. The debates of the delegates at the constitutional convention provide little guidance except for articulating a concern about the growth of government and society, both in size and complexity, and about the impact that this growth has on the integrity of the individual.<sup>85</sup> Perhaps the most important guide comes from the delegates' express affirmation of the ways in which the state and federal courts had begun to protect the right of privacy.<sup>86</sup>

To date, in the United States and in Montana, a number of known interests have been given protection under the classification of privacy in regard to physical interference with one's person, one's home, and one's things. This part of the concept of privacy is also regularly classified and analyzed under search and seizure.<sup>87</sup> More subtle interference with one's person, including the surreptitious seizure of words, is protected under the case law development based on search and seizure theories but with more specific use of

85. Delegate Campbell put it this way:

Certainly, back in 1776, 1789, when they developed our Bill of Rights, the search and seizure provisions were enough, when a man's home was his castle and the state could not invade upon his home without the procuring of a search warrant with probable cause being stated before a magistrate and a search warrant being issued. No other protection was necessary; and this certainly was the greatest amount of protection that any free society had given its individuals. In that type of society, of course, the neighbor was maybe 3 to 4 miles away. There was no real infringement upon the individual and his right of privacy. However, today we have observed an increasingly complex society and we know that our area of privacy has decreased, decreased and decreased.

*Id.* Vol. V, at 1681.

86. See *supra* notes 70-73. MONT. CONST. CONV., Vol. II, at 632; Vol. V, at 1681; and Vol. VII, at 2484.

87. See generally *Terry v. Ohio*, 392 U.S. 1 (1968); *Schmerber v. California*, 384 U.S. 757 (1966); *Carroll v. United States*, 267 U.S. 132 (1925); *Hoster v. United States*, 265 U.S. 57 (1924); Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protections*, 43 N.Y.U. L. REV. 969 (1968).

the term privacy.<sup>88</sup> Coerced seizure of one's thoughts is also protected primarily under the fifth amendment analysis of self-incrimination.<sup>89</sup>

Respect for personal autonomy has spawned another group of rights protected by the concept of privacy. First, there are core rights alluded to by Brandeis and Warren and generally sustained under tort theories that encompass the right to be let alone. These include concepts of seclusion or solitude, private facts, and false publicity.<sup>90</sup> These concepts are only slight additions to or variations on ancient privacy concepts generally classified as trespass, designed to protect one's property—including person, place and things.<sup>91</sup> Second, there are protected determinations about procreation,<sup>92</sup> sexual choices,<sup>93</sup> pornography,<sup>94</sup> family relationships,<sup>95</sup> child rearing, and education.<sup>96</sup>

An additional procedural dimension of privacy, at least in Montana, is built upon the right to know.<sup>97</sup> The collection, use, and dissemination of private facts by government agencies or private persons may infringe upon rights of privacy. For example, the credit information gathered and sold by private credit corporations, or information gathered and disseminated by the NCIC or by the Montana Highway department. By permitting access to this information via the right to know provision, citizens are enabled to police the acquisition and use of information about them. Thus, it is an important means to protect privacy.

88. See *Katz*, 389 U.S. at 353.

89. *E.g.*, see *Watts v. Indiana*, 338 U.S. 49 (1949). This case construes the fourteenth amendment and speaks to due process, not the fifth amendment of self-incrimination.

90. See *Prosser*, *supra* note 16.

91. *E.g.*, the common law torts of trespass to person, chattel, and land. See *W. KEETON, PROSSER & KEETON, ON THE LAW OF TORTS* 292 (1984). The right may also be violated by a variety of criminal events such as assault, theft, or burglary. The common law privacy actions are attempts to plug the gap between traditional trespass actions and crimes. See *Prosser*, *supra* note 16, at 392.

92. *Griswold v. Connecticut*, 381 U.S. 497 (1965); *Pie v. Ullman*, 367 U.S. 997, 523 (1961) (Harlan, J., dissenting); *Roe v. Wade*, 410 U.S. 113 (1973); see also *Skinner v. Oklahoma*, 316 U.S. 535 (1942), which did not mention a right of privacy but to which the right might be traced insofar as it includes sexual matters.

93. *Roe*, 410 U.S. 113.

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

95. *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

96. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

97. MONT. CONST. art. II, § 9:

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 delegates to the 1972 Montana Constitution explicitly referred to a number of rights of privacy in drafting the privacy provision, but deliberately drafted a general provision which protects "individual privacy."<sup>98</sup> Like the courts that had considered many aspects of privacy, the delegates to the 1972 constitutional convention did not attempt to define privacy;<sup>99</sup> nor has the Montana Supreme Court since attempted any comprehensive definition of the term.

It is constructive, however, to make at least an attempt to sketch a single concept of privacy. Such a sketch could help put the historical development of these rights of privacy in context, as well as provide the conceptual means for further principled development of these rights. Privacy (with a capital "P"), perhaps, can best be understood by examining the political theory that was seminal to the way in which the persons who drafted our original state and federal constitutions understood (and the way in which we generally still understand) persons and their relationships with other persons both as individuals and together as society. This political theory was that of the English philosopher John Locke. Although the central themes of Locke's theory were not original,<sup>100</sup> Locke's version of these themes most influenced colonial American political theory.<sup>101</sup>

It is true that neither Locke nor the colonial Americans explicitly expressed their theory about the relationships between persons (even their proscription against unreasonable searches and seizures) in terms of "privacy."<sup>102</sup> Nevertheless, as one scholar on privacy has concluded, it was "a series of assumptions—drawn heavily from the philosophy of John Locke—that defined the context for privacy in a republican political system."<sup>103</sup>

The prevalent concept of liberty in colonial America derived

98. The delegates added the word "individual" on the floor. MONT. CONST. CONV., Vol. V, at 1680-81.

99. They intended for the courts to evolve and apply the principle of privacy as circumstances in society inevitably change. See MONT. CONST. CONV., Bill of Rights Committee Comments, Vol. II, at 632; Delegate Campbell, Vol. VI, MONT. CONST. CONV., *supra* note 5, at 1851. The Montana Supreme Court overruled the *Katz* test. See *Montana Human Right Div. v. Billings*, 199 Mont. 434, 649 P.2d 1283 (1982). But the *Katz* test itself, relying on the subjective expectation of the person alleging a violation of privacy and the court's determination of whether that expectation is reasonable according to prevailing societal standards, eludes comprehensive definition.

100. See 1 W. BLACKSTONE, COMMENTARIES \*134.

101. WESTIN, *supra* note 2, at 330.

102. In point of fact, the term privacy was not used until the late nineteenth century. See *supra* notes 10-13.

103. WESTIN, *supra* note 2, at 330.

from European political and legal theory was remarkably narrow, particularly when considered in conjunction with the other two American ideals, life and property.<sup>104</sup> As a legal right, liberty simply meant freedom of movement.<sup>105</sup> Whereas rights of privacy might be considered to be species of liberty, in the sense of both being free to do something and being free from having to do something, seventeenth and eighteenth century political theory would not have spoken of these rights or liberty in quite this way.

For example, instead of speaking of liberty as encompassing all other rights and their complementary duties, John Locke, in his *Second Treatise on Government*, used the notion of private property to encompass these rights and duties, and ultimately derived liberty from that notion.<sup>106</sup> All three fundamental American ideals, "life, liberty and estate [property in the narrow sense]," were considered by Locke to be kinds of property.<sup>107</sup>

An examination of what Locke meant by "property" sheds some light on what the courts, for nearly a century, have been calling privacy. These two concepts are intimately related because the foundation of Locke's entire political theory is the inherent property that one has *in his own person*. For Locke, the property interest one has in his own person exists logically and temporally prior to the creation of any other property rights. Locke expressed this priority by speaking of the rights that persons possess in "the state of nature." In the state of nature, "[t]hough the earth and all inferior creatures be common to all men, yet every man has a property in his own person; this nobody has any right to but himself."<sup>108</sup> Other property rights come into being as persons mingle what is truly their own, their ideas and labor, with what is initially the property of no one.<sup>109</sup> Thus, these subsidiary property rights that persons have in things or land arise through the process of making them personal and private.<sup>110</sup>

Because property (life, liberty and estate) is the basis for all moral and legal rights, the protection of property is both the purpose for civil and political society and the standard for evaluating

104. Otherwise expressed as the pursuit of happiness.

105. This process is also how land rights developed in the western United States through homesteading and the staking of mining claims. See generally *The Homestead Act of 1862*, 43 U.S.C. § 161 (repealed 1976), and *The Mining Law of 1872*, 30 U.S.C. §§ 22-39.

106. See J. LOCKE, *SECOND TREATISE OF GOVERNMENT* § 87 (Thomas P. Reardon ed. 1952) (1st ed. London 1690).

107. *Id.*

108. *Id.* at § 27.

109. *Id.* at §§ 28, 32.

110. *Id.*

both the legitimacy of its creation and the process by which it carries out its purpose.<sup>111</sup> But because property is merely an expression of the interest each person has in himself, simply by virtue of his personal sense of being, all government derives from self-government. Thus, the crucial feature of Locke's theory is that political or civil society may only be formed by the consent of all who would be subject to its jurisdiction.<sup>112</sup> Further, even though society functions by "the will and determination of the majority"<sup>113</sup> once persons have consented, there are limitations upon government: the majority cannot legislate "farther than the common good, but is obliged to secure every one's property"<sup>114</sup> and cannot otherwise act arbitrarily.<sup>115</sup>

Because Locke's notion of "property" rests on a right that one has to his own person, we might justifiably characterize Locke's state of nature as a state of individual privacy rather than property. That this interest of a person in his own person constitutes a more basic concept of privacy is demonstrated in two ways. First, the very etymological meaning of the term privacy aptly characterizes Locke's conception of persons. Privacy, like privation, privy, etc., comes from the latin word, "*privus*," which has two meanings. *Privus* means "single" or "each" and "particular," "special," or "one's own."<sup>116</sup> Both aspects of the concept, particularly the sense of "one's own," aptly describe Locke's property notions. Persons are inherently individuals and no one else has a right to control their person or their other property without their consent. Second, to identify the concept of privacy with Locke's notion of property is consistent with the historical development of various rights of privacy, both in the common law and in constitutional law, which have utilized property analyses. For example, all of the common law tort actions for invasion of privacy involve a kind of trespass or appropriation.<sup>117</sup> Likewise, until *Katz*, fourth amendment analyses of unreasonable searches and seizures utilized notions of trespass.<sup>118</sup> Even after *Katz*, property concepts are still used by the Court to flesh out the boundaries of the fourth amendment.<sup>119</sup>

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111. *Id.* at §§ 87, 94, 95.

112. *Id.* at §§ 95 & 96.

113. *Id.*

114. *Id.* at § 131.

115. *Id.* at § 142.

116. CASSELL'S NEW LATIN DICTIONARY (1959).

117. *See supra* notes 16 & 17.

118. *See, e.g.,* *Olmstead v. New York*, 277 U.S. 438 (1922); *Goldman v. United States*, 316 U.S. 129 (1942).

119. *See infra* notes 152 & 154; *See also* *United States v. United States Dist. Ct.*, 407

U.S. 297 (1972).

The conclusion to be drawn is that the aim of all law is the protection of persons' privacy, which includes their persons, places and things. Our society has done this by protecting a person against trespasses both upon his body<sup>120</sup> and upon his tangible property.<sup>121</sup> In addition, civil and criminal laws and constitutional provisions have protected other less tangible facets of our person or property. Such facets have included likenesses of persons,<sup>122</sup> freedom of expression<sup>123</sup> and conscience,<sup>124</sup> emotional tranquility, and ultimately personal choices that do not seriously threaten harm to the privacy of others.<sup>125</sup>

Ultimately, what is the meaning of "privacy"? In the broadest context possible it is the right "to be let alone" by other persons, as well as by the government. From the preceding analysis, it follows that the legal protection of "privacy" encompasses the substantive concepts of both "tort" and "crime." The law provides sanctions to discourage others from intruding on you and yours and compensation when they have done so. It also encompasses substantive protection from governmental intrusions; for example, no taking without compensation, absolute freedom of conscience, freedom to choose as to intimate personal matters, and freedom from self-incrimination. Likewise, it encompasses aspects of procedural due process. Even when there is a legitimate basis for the government to invade a person's privacy, there must be procedural standards for such invasions; for example, the need to show probable cause to support searches, seizures and electronic surveillance.

Although it would not be appropriate to abandon traditional civil, criminal and constitutional terms, like assault, negligence and self incrimination; the recognition that all legal rights spring from a single, broad concept of "privacy" is important. It is important because it explains how the "sense of privacy" and what the courts have sometimes called "privacy" in common law, statutory and constitutional contexts relates to other legal rights and duties. Further, it justifies how the courts have used "privacy" (and hopefully will continue to do so in a principled manner) to remedy invasions and harms initiated or caused by private persons, corporations and government that do not fit the traditional causes of action, crimes or constitutional protections.

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120. See *supra* note 91.

121. *Id.*

122. See *supra* note 17.

123. U.S. CONST. amend I.

124. *Id.*

125. See W. PROSSER & W. KEETON, ON TORTS 849, § 117 (4th ed. 1984).

Perhaps this expansive notion of privacy can provide a basis for that "complete reexamination" of the relationship between persons as individuals and persons as government that the delegates to the 1972 Montana Constitutional Convention sought.<sup>126</sup> As such, it can serve as a criterion both for evaluating how the Montana Supreme Court has construed the constitutional right of privacy and for suggesting how the right ought to be further developed.

## 2. *The Reasonable Expectation of Privacy Test*

As noted above, the United States Supreme Court has developed separate and somewhat distinct approaches in analyzing constitutional privacy interests. In the area of personal autonomy, the court has recognized that certain "zones of privacy" may be protected by the fourteenth amendment.<sup>127</sup> By contrast, in analyzing unreasonable searches and seizures the Court has relied on the "reasonable expectation of privacy" test,<sup>128</sup> more recently expressed as the "legitimate expectation of privacy" test.<sup>129</sup>

In light of pre-1972 standards for determining privacy interests which the Montana Supreme Court was compelled to apply in appeals grounded on the fourteenth amendment, it is understandable why, after the ratification of the 1972 Montana Constitution, the court usually has applied the federal "reasonable expectation of privacy" test to determine whether a particular interest was protected by Montana's right of privacy. Occasionally the Montana Supreme Court has referred to the existence of some ephemeral "Montana right of privacy" to justify deviating from the federal standard.<sup>130</sup>

It further appears that the Montana Supreme Court has adopted the *Katz* test as the primary if not the sole method of interpreting the Montana privacy provision. In 1982, in *Montana Human Rights Division v. City of Billings*,<sup>131</sup> the court stated that the standard for determining whether a person's constitutionally

126. MONT. CONST. CONV., Vol. V, at 1681.

127. See *supra* notes 91-96.

128. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). See also *Terry*, 392 U.S. 1.

129. See, e.g., *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) ("[The *Katz* Court] held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." The *Katz* majority opinion, however, protected the petitioner's "privacy upon which he justifiably relied . . ."); *Katz*, 389 U.S. at 353.

130. See, e.g., *State v. Hyem*, \_\_\_ Mont. \_\_\_, 630 P.2d 202 (1981).

131. 199 Mont. 434, 649 P.2d 1283 (1982).

protected privacy interest has been violated "is whether the party involved subjectively expected the information to be and remain private, and whether society is willing to recognize that expectation as reasonable."<sup>132</sup> The *Montana Human Rights* case is significant because it applied the *Katz* test even though it did not involve a search and seizure in a criminal investigation. Rather, it involved the city's refusal to turn over personnel files and test scores pursuant to an investigation of alleged discrimination. Further, the city of Billings did not assert that the procedure for obtaining these materials was unreasonable but that the materials themselves were protected by the right of privacy.

That the *Katz* "reasonable expectation of privacy" test is to be applied even in civil cases was made evident in *Missoulian v. Board of Regents*<sup>133</sup> decided in 1984. In *Missoulian*, the Montana Supreme Court was required to construe the individual privacy exception to the right to know provision of the Montana Constitution.<sup>134</sup> The Court held that to determine whether there is a privacy interest that clearly exceeds the public's right to know, the person whose privacy interest is being asserted must have a reasonable expectation of privacy.<sup>135</sup>

Montana is not unique in using the *Katz* test to construe constitutional privacy interests. The "reasonable expectation of privacy" test is supported by strong federal precedent<sup>136</sup> as well as decisions in other states.<sup>137</sup> Even Alaska, which has a separate constitutional privacy provision has relied on the test.<sup>138</sup> Further, its use in construing the Montana right of privacy is supported indirectly by the fact that the constitutional convention delegates, who must have known of the *Katz* decision, neither criticized it nor proposed alternatives to it. Unfortunately, the *Katz* test like its predecessor, the trespass doctrine, is not adequate to construe the Montana Constitution's right of privacy.

The *Katz* test is a federal standard created to define the reasonableness of a search or seizure as demanded by the fourth amendment to the United States Constitution. Although the dele-

132. *Id.* at 442, 649 P.2d at 1287.

133. — Mont. —, 675 P.2d 962 (1984).

134. For the text of this provision, see *supra* note 97.

135. *Missoulian*, — Mont. at —, 675 P.2d at 967.

136. See *United States v. White*, 401 U.S. 745 (1971); *United States v. United States Dist. Ct.*, 407 U.S. 297.

137. *People v. Edwards*, 90 Cal. Rptr. 633, 458 P.2d 713 (1969); *Crocker v. State*, 477 P.2d 122 (Wyo. 1970).

138. See *City and Borough of Juneau v. Quinto*, 684 P.2d 127 (Alaska 1984); *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

gates to the Montana Constitutional Convention approved of the advances made by the Warren Court in protecting the right of privacy,<sup>139</sup> they still elected to have an express Montana constitutional provision. This at least suggests an intent that Montana should have its own high standard of protection against violations of privacy and that Montana should not simply constitutionalize the level of privacy protection provided by the federal courts. Delegate Campbell put it this way:

We had much discussion before our committee, and why not try to define the right, to put in specific examples. But it was our feeling that once you do that, you are running a risk that you may eliminate other areas in the future which may be developed by the court.<sup>140</sup>

Apparently, the delegates did not want to “fix” the concept of privacy but allow it to expand.

To rely on a federal test defeats the purpose of including a state constitutional provision expressly protecting individual privacy. To follow federal decisions or the decisions of sister states that have no express and independent right of privacy forecloses the opportunity to develop a “Montana right of privacy.” In the recent decision *State v. Long*, the Montana court obviously followed federal precedent.<sup>141</sup> It is arguable that the court also followed federal precedent in *Hastetter v. Behan*,<sup>142</sup> where it relied on “persuasive federal authority” to hold that a person had no “legitimate expectation of privacy in the mere fact that a telephone call was made to a particular number.”<sup>143</sup>

Even the use of the *Katz* test does not require an interpretation of the test identical with the United States Supreme Court. For example, other state courts using the *Katz* test have rejected the United States Supreme Court’s conclusion that the use of pen registers to record the number to which a phone call was made did not violate a reasonable expectation of privacy.<sup>144</sup> Likewise, other state courts have held that a person has a reasonable expectation of privacy in his bank records.<sup>145</sup>

There is the chance that the use of a federal test to construe a

139. See *supra* notes 70-72.

140. MONT. CONST. CONV., Vol. VI, at 1851.

141. — Mont. at —, 700 P.2d at 157.

142. 196 Mont. 280, 639 P.2d 510 (1982).

143. *Id.* at —, 639 P.2d at 512 (author notes that eight paragraphs of the decision were inadvertently omitted from the Montana Reports.)

144. See state court cases cited *supra* note 53.

145. See state court cases cited *supra* note 53.

state constitutional provision may permit the United States Supreme Court to review the decision based on a conclusion that the state court did not rest its decision on an independent and adequate state ground.<sup>146</sup> State courts are permitted to utilize federal cases as persuasive authority in construing their own constitutions.<sup>147</sup> However, the Burger Court has emphasized that the state courts who do so may suffer reversal if they inaccurately interpret the federal decisions. Additionally, to avoid the threat of reversal, state courts must clearly state they do not feel compelled by those federal decisions in construing their own constitutions and must clearly specify independent and adequate state grounds to support their decisions.<sup>148</sup> Therefore, whenever a claim of privacy is made pursuant to both federal and state constitutions, and the *Katz* "reasonable expectation of privacy" test is mentioned, the Montana Supreme Court opinion should at least include a plain statement that the *Katz* test is mentioned as a helpful but not a controlling guide for construing the Montana Constitution.<sup>149</sup>

Not only is the use of the *Katz* test suspect because of concerns about federalism, the test itself has been the subject of criticism by courts and commentators. First, the *Katz* test overemphasizes a person's *subjective* expectation of privacy. Second, the abandonment of the trespass doctrine in favor of the *Katz* test has led to the withdrawal of some of the protection of tangible property, formerly afforded in fourth amendment search and seizure cases.

Justice Harlan, who authored the two-part test, later expressed his misgivings about it in a dissenting opinion.<sup>150</sup> He warned that in doing the analysis the person's actual expectations should not be overly emphasized because they "are in large part reflections" of what is the status quo rather than setting a standard for what ought to be protected.<sup>151</sup> One commentator, in an analysis of the development of California's right of privacy, has made similar criticisms. He states that in the *Katz* analysis "[t]he substance of privacy is ignored in favor of a consideration of the

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146. For a general discussion of the doctrine of independent and adequate state grounds, see Elison & NettikSimmons, *Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds*, 45 *MONT. L. REV.* 177 (1984).

147. See *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

148. *Id.*

149. *Id.* at 1041 ("If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.")

150. See *United States v. White*, 401 U.S. 745, 768 (1971) (Harlan, J., dissenting).

151. *Id.* at 786.



pain occasioned by disappointment."<sup>152</sup> He applauds the approach the California Supreme Court took in one case, where it seemed to focus on the intrusiveness of the governmental activity rather than on the disappointed expectations of the individual.<sup>153</sup>

Further, Justice Harlan, in his concurring opinion in *Katz*, carefully noted that this test was not inconsistent with but rather enveloped the prior analyses that were based on notions of property.<sup>154</sup> The catchy phrase that the constitution protects people not places is simply erroneous. Obviously, the Constitution protects both people and places. In light of the philosophical analysis above, one would argue that protection is given to places only insofar as they are the property of people and thereby conclude that the less catchy but more accurate phrase should be that the constitution protects people and people's property.<sup>155</sup> The Burger Court has used the reasonableness, or justifiable, prong of the *Katz* test to withdraw protection from interests that would have been protected under property-based analysis. This subtle shift is indicated in the Court's increasing use of the term "legitimate" for the earlier term "reasonable."<sup>156</sup> For example, persons no longer have automatic standing to assert a fourth amendment violation in possessory crimes.<sup>157</sup> Likewise, persons' privacy interests in tangible property, particularly automobiles, has been diminished.<sup>158</sup>

Some state courts have continued to consider property notions in addition to the *Katz* test. For example, in *State v. Jones*,<sup>159</sup> a New Jersey Superior Court, Appellate Division, held that an officer's search of the defendant's automobile for evidence of the ownership without providing the defendant the opportunity to produce such evidence constituted a violation of his "constitutional

152. Gerstein, *California's Constitutional Right to Privacy: The Development of the Protection of Private Life*, 9 HASTINGS CONST. L.Q. 385, 389 (1982).

153. *Id.* at 402-04 (citing *White v. Davis*, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975)).

154. *Katz*, 389 U.S. at 360-62.

155. To be both complete and accurate the statement should include persons, and property belonging to persons, including both real property (particularly but not exclusively one's home) and personal property.

156. *See supra* note 129.

157. *See United States v. Salvucci*, 448 U.S. 83 (1980).

158. *See e.g.*, *United States v. Knotts*, 460 U.S. 276 (1983) (monitoring beeper placed inside a 5 gal. drum of chloroform purchased by defendant . . . did not constitute a fourth amendment search); *New York v. Belting*, 453 U.S. 454 (1981) (not only may police search the passenger compartment of car, incident to lawful arrest, but may also examine contents of any containers found in passenger compartment); *Illinois v. Lafayette*, 462 U.S. 640 (1983) (permitting inventory of defendant's shoulder bag, defendant having been arrested for disturbing the peace).

159. 195 N.J. Super. 119, 478 A.2d 424 (1984).

right to privacy in his vehicle and personal effects."<sup>160</sup>

The Pennsylvania Supreme Court, on the other hand, simply rejected the federal test in *Commonwealth v. Sell*.<sup>161</sup>

We decline to undermine the clear language of [our constitutional proscription against unreasonable searches and seizures] . . . by making the Fourth Amendment's amorphous "legitimate expectation of privacy" standard a part of our state guarantee against unreasonable searches and seizures . . . . We believe the United States Supreme Court's current use of the "legitimate expectation of privacy" concept needlessly detracts from the critical element of unreasonable governmental intrusion . . . . [O]wnership or possession of the seized property is adequate to entitle the owner or possessor thereof to invoke the constitutional protection . . . .<sup>162</sup>

If the Montana court continues to rely on the *Katz* test and its federal interpretation, the Montana right of privacy will not always be given the significance and careful construction that it deserves. Of course, where it is the privacy of a dwelling that is invaded, the Montana court, like the United States Supreme Court, has been extremely protective. In a case involving the property interest of a defendant in his home, the Montana court found that as "the situs of protected private activities . . . the constitution extends special safeguards to the privacy of the home."<sup>163</sup>

In at least one case since the adoption of the right of privacy, however, the Montana Supreme Court reached a conclusion relying on the reasonable expectation of privacy analysis that could prove to be less protective than an analysis based on a possessory interest. In *State v. Dess*,<sup>164</sup> the court held that because a camper had a diminished expectation of privacy in his campsite on public land next to a public road, he had no standing to assert a fourth amendment claim against the seizure of items found in that campsite. The court quoted with approval the Supreme Court's statement in *Salvucci* that the question should be "whether he had an expectation of privacy in the area searched."<sup>165</sup>

160. *Id.* at 124, 478 A.2d at 427.

161. 504 Pa. 46, 470 A.2d 457 (1983).

162. *Id.* at \_\_\_\_\_, 470 A.2d at 468-69.

163. *State v. Carlson*, 198 Mont. 113, 126, 644 P.2d 498, 505 (1982) (holding full custodial arrest improper on warrant for traffic misdemeanor and entry into defendant's home incident to such arrest was unlawful). *Cf. State v. Wood*, \_\_\_\_\_ Mont. \_\_\_\_\_, 666 P.2d 753 (1983) (right of individual privacy must yield to compelling state interests allowing full custodial arrests; searches pursuant to felony warrants.).

164. 201 Mont. 456, 655 P.2d 149 (1982).

165. *Id.* at 463, 655 P.2d at 153 (quoting *United States v. Salvucci*, 448 U.S. 83, 92-93 (1980)). The court also relied on a second theory, that the officer had probable cause to seize the items found in the campsite.

The *Katz* test has in other instances provided a greater area of protected privacy interest than a property-based analysis. For example, in *State v. Isom*,<sup>166</sup> the Montana Supreme Court held that a nephew had standing to contest the legality of a search of his uncle's home. The court stated that "protection from unreasonable searches and seizures does not depend upon a property right in the invaded place, but rather upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion."<sup>167</sup> Of course, this result could have been reached using a property-based analysis by permitting the nephew to assert the privacy interests of his uncle. Such an analysis would have been consistent with an approach that focuses on the degree of intrusion by the government rather than the harm to the petitioner.<sup>168</sup>

The two tests need not be mutually exclusive. The *Katz* notion of protected persons, as Justice Harlan noted, should fully contain within its protection those places protected through the notion of property. One might utilize both tests in the following manner. First, the court should ask whether the area to be searched or the object to be seized is owned or possessed by the party. If so, there ought to be a presumption of a legitimate or reasonable expectation of privacy in that property. Second, if there is no interest that society would call ownership or possession, then the *Katz* test should be applied. To be adequate the *Katz* test should be twofold. First, the subjective aspect of the test would be considered: did the defendant have an *actual* expectation of privacy which Montana is willing to consider worthy of protection? Second, if the defendant had no subjective expectation, because his expectations have been restricted by the status quo, the court ought to consider the intrusiveness of the government's activity and determine whether it was excessive. Such a twofold application of the *Katz* test would best protect evolving privacy interests.

Even if the Montana Supreme Court continues to use the *Katz* test, it should independently apply it. It should consider what expectations are reasonable not simply according to federal authorities or the authority of states that are culturally, politically, and geographically different from Montana, but by considering

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166. 196 Mont. 330, 641 P.2d 417 (1982).

167. *Id.* at 336, 641 P.2d at 420.

168. Montana courts have consistently refused to permit standing to vicariously assert the infringement of third person's constitutional right. See MONT. CODE ANN. § 46-5-103 (1985). This standing provision is couched in terms of whether a search is illegal as to a particular person rather than whether a particular person is entitled to challenge the search; see *State v. Allen*, \_\_\_ Mont. \_\_\_, 612 P.2d 119 (1980); *State v. Kao*, \_\_\_ Mont. \_\_\_, 697 P.2d 903 (1985); *In re Gilliam*, \_\_\_ Mont. \_\_\_, 707 P.2d 1100 (1985).

Montana's unique political, cultural, and legal heritage.

The Montana Supreme Court has begun to demonstrate a willingness to make independent use of the reasonable expectation of privacy test. For example, one way in which it has done so is to give some weight to the expectations of privacy of persons other than the defendant in considering whether the invasiveness of a search or seizure requires a warrant. In *State v. Fogarty*,<sup>169</sup> the court, speaking in terms of the *Katz* test, stated that although a probationer's status carried with it a reduced expectation of privacy, unlimited warrantless searches and seizures could not be a condition of probation. The court further held that law enforcement must have probable cause and comply with the warrant requirements and that only the probation officer is permitted to meet the lower standard of having articulable reasons to believe that the probationer's conditions of probation have been violated.<sup>170</sup> One of the significant reasons for the court's decision was that the needs of society had to be balanced against not only the rights of the probationer but also the rights of his family and friends.<sup>171</sup> This consideration certainly departs from the subjective aspect of the *Katz* test and, instead, examines the intrusiveness of the government's actions.

Likewise, the Montana Supreme Court has in some instances recognized that an expectation of privacy may be reasonable for Montana though unreasonable elsewhere. For example, in *State v. Brackman*,<sup>172</sup> the court reached a different conclusion than the United States Supreme Court had reached in a similar case and held that a warrantless recording of the conversation of two parties, even with the consent of one of them, violated the Montana right of privacy.<sup>173</sup> More recently, in *State v. Solis*,<sup>174</sup> the court held that a person had a reasonable expectation that his private meeting with another person was not being videotaped by the government.<sup>175</sup>

The Montana Supreme Court has boldly announced that it will not "march lock step with the United States Supreme Court

169. 187 Mont. 393, 610 P.2d 140 (1980).

170. *Id.* at 414-16, 610 P.2d at 152-53.

171. *Id.*

172. 178 Mont. 105, 582 P.2d 1216 (1978); *Cf. White*, 401 U.S. 745.

173. 178 Mont. at 117, 582 P.2d at 1222. *But see State v. Hanley*, 186 Mont. 410, 420, 608 P.2d 104, 110 (1980) (Montana Supreme Court claims that *Brackman* was consistent with *White*. *Brackman*, however, explicitly followed Justice Harlan's dissent in *White*. *Brackman*, 178 Mont. at 115, 582 P.2d at 1221).

174. \_\_\_\_ Mont. \_\_\_\_, 693 P.2d 518 (1984).

175. *Id.* at \_\_\_\_, 693 P.2d at 522.

where constitutional issues are concerned, even if applicable Montana Constitutional provisions are identical or nearly identical to those of the Federal Constitution."<sup>176</sup> The court used similarly strong language in *Butte Community Union v. Lewis*<sup>177</sup> stating that the "court need not blindly follow the United States Supreme Court when deciding whether a Montana statute is constitutional pursuant to the Montana Constitution."

The court should continue to independently determine what is reasonable in Montana while remaining cognizant of authority from other jurisdictions. For example, an expectation of privacy in certain open fields<sup>178</sup> might be reasonable because in Montana, like agricultural Georgia, the "use of fences and barricades has always played an important part in defining landowners' right to privacy."<sup>179</sup>

### C. *Whose Privacy Interest Is Protected?*

#### 1. *Who Has Standing to Invoke the Right?*

The reasonable (or legitimate) expectation of privacy test has also been used in determining whether a person had standing to contest a questionable search or seizure. Standing thus addresses a second question: whose privacy interest is protected? The question of standing in the context of federal search and seizure or invasion of privacy claims has two parts. First, there is the general federal constitutional requirement "that the party seeking relief have an adversary interest in the 'outcome of the controversy.'"<sup>180</sup> Second, the person having the adversary interest must show that his constitutional rights have been violated, since "fourth amendment rights are personal rights which . . . may not be vicariously asserted."<sup>181</sup>

Traditionally, the question about whether a person had standing to seek relief was analyzed separately from the question about whether a constitutional right had been violated.<sup>182</sup> The federal law

176. *State v. Johnson*, \_\_\_ Mont. \_\_\_, \_\_\_, 719 P.2d 1248, 1254 (1986).

177. \_\_\_ Mont. \_\_\_, \_\_\_, 712 P.2d 1309, 1313 (1986).

178. Montana has applied the "open field" exception to the warrant requirement. See *State v. Bennett*, \_\_\_ Mont. \_\_\_, 666 P.2d 747 (1983) (use of spotting scope by Sheriff to spot marijuana growing in defendant's garden); *State v. Charvat*, 175 Mont. 267, 573 P.2d 660 (1978) (marijuana plants left in open field on defendant's ranch were not in an area where any expectation of privacy exists).

179. *Lo Giudice v. State*, 251 Ga. 711, 719, 309 S.E.2d 355, 360 (1983) (Smith, J., dissenting).

180. *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

181. *Alderman v. United States*, 394 U.S. 165, 174 (1969).

182. See e.g., *Jones v. United States*, 362 U.S. 257 (1960).

since *Rakas v. Illinois*,<sup>183</sup> however, has placed the issue of a person's standing to assert his fourth amendment right of privacy within the *Katz* analysis itself—i.e., whether that person had a reasonable or legitimate expectation of privacy. The United States Supreme Court in *Rakas* merged the question of standing to contest the admission of evidence resulting from an illegal search and seizure into the general fourth amendment analysis, stating that the question is "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect."<sup>184</sup> Although it might make sense to merge standing into a general analysis of whether the *defendant's* fourth amendment rights were violated, this has had the effect of making the showing of standing more difficult.<sup>185</sup>

Unlike the United States Constitution, at least one state constitution expressly provides for standing.<sup>186</sup> The Montana Constitution's privacy and search and seizure provisions do not.<sup>187</sup> Nevertheless, the Montana Supreme Court has developed standing rules for the assertion of constitutional claims.<sup>188</sup> Although, in search and seizure claims, it has often relied on federal rules,<sup>189</sup> it is unclear whether the Montana Supreme Court will follow the United States Supreme Court's lead in making the showing of standing more difficult. Clearly, the court is free to establish its own rules concerning standing to assert the violation of the Montana Constitution's right of privacy.<sup>190</sup>

The Montana Supreme Court has at least implicitly addressed the issue of standing in conjunction with the right of privacy in two cases. In *Fogarty* the court stressed that the right of privacy of a probationer's family and friends was at stake in the use of probation conditioned on nonconsensual, warrantless searches by the probation officer or any other law enforcement official.<sup>191</sup> *Fogarty* suggests that the privacy interests of others do play some role in determining what constitutes a reasonable search or seizure, as

183. 439 U.S. 128 (1978).

184. *Id.* at 140.

185. *Id.*

186. See *supra* LA. CONST. art. I, § 5 ("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.")

187. But see *supra*, note 168, MONT. CODE ANN. § 46-5-103 (1985).

188. *Supra* note 168. See also *Dess*, 154 Mont. 231, 462 P.2d 186 (following *Jones v. United States*, 362 U.S. 257 (1960)).

189. *Id.*

190. See *Elison & NettickSimmons, supra* note 146.

191. 187 Mont. at 414, 610 P.2d at 152.

against the principal claimant.<sup>192</sup>

It appears that under some circumstances the privacy interests of third parties can be asserted.<sup>193</sup> In *Montana Human Rights Division*, the court permitted the city of Billings, in seeking to prevent the Division from obtaining its personnel files, to assert the privacy rights of its employees.<sup>194</sup> It did so because the city might have been liable to its employees for disclosing the information.

In the case of *Belth v. Bennett*, a case now on appeal to the Montana Supreme Court, District Court Judge Gordon Bennett held in favor of the public's right to know and denied the state auditor (Andrea Bennett) the right to assert any claimed right of privacy.<sup>195</sup> The memorandum opinion by Judge Bennett does not specifically prohibit the government agency from vicariously asserting an individual's right of privacy. That issue was not directly before the court. Nonetheless Judge Bennett's suggested procedure for vindication of rights protected by the Montana constitutional right of privacy and right to know includes notice to the individual who might claim a right of privacy in records held by a state agency. Presumptively the agency holding the records, acting in a fiduciary capacity, would be required to both notify the privacy claimant and to protect the records in the interim. The agency would have to be granted standing to assert vicariously the privacy right of the third person simply as an incident of the fiduciary responsibility or on some theory of potential liability to the primary claimant as in the *Montana Human Rights Division* case.<sup>196</sup>

## 2. Corporate Rights of Privacy: Persons vs. Individuals

Under federal and state law, a corporation is a fictional "person" and thereby enjoys a different panoply of legal rights, than a natural person.<sup>197</sup> In the debates of the 1972 Montana Constitu-

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192. The peculiar aspect of this case is a court ordered diminished right of privacy before the fact of any actual or potential infringement. The order diminished privacy, by necessity, affects more than the probationer.

193. 199 Mont. 434, 649 P.2d 1283 (1982).

194. *Id.* at 443, 649 P.2d at 1288.

195. *Belth v. Bennett*, No. BDV 85733, Memorandum Re: Petitioner's Motion for Summary Judgment, Lewis and Clark County District Court.

196. Since Judge Bennett determined that the potential third party claimant was a corporation and that corporations are not afforded any right of privacy under the Montana Constitution he was not forced to reach the ultimate issue as to agency standing in regard to a legitimate third party claim of privacy.

197. H. HENN, *LAWS OF CORPORATION*, in Hornbook series 144, ¶ 78 (1983). Corporations are persons for the purpose of the fifth and fourteenth amendments to the U.S. Constitution except for the prohibition against self-incrimination. See *Santa Clara County v. Southern Pac. Ry.*, 118 U.S. 394 (1886).

tional Convention the delegates recognized this difference and seemed less concerned about protecting any corporate right of privacy. This intent is evidenced by use of the word "individual" rather than "person." Although corporations are "persons" for purposes of most laws,<sup>198</sup> they are obviously collectives and not "individuals."

This inference from the language of the privacy provision is supported by the comments of delegates during the debates. In discussing the term, "individual," in the context of the privacy exception to the right to know, Delegate Dahood, the chairman of the Bill of Rights committee, stated that although "a person can, of course, . . . be defined to include a corporation under the law[,] . . . [a]n individual . . . would not be a corporation . . ." <sup>199</sup> In discussion concerning the right of privacy provision, the question again arose concerning the privacy of corporations. Delegate Campbell, speaking for the Bill of Rights Committee, stated: "We do not feel that a corporation is an individual. It can be considered a person, but not an individual."<sup>200</sup>

Despite this clear intent of the delegates, the Montana Supreme Court in *Mountain States Telephone and Telegraph Co. v. Department of Public Service Regulation*<sup>201</sup> sub silentio held that corporations are protected by the Montana constitutional privacy provision. *Mountain States* involved the utility's claim that it did not have to provide certain materials containing trade secrets to the Public Service Commission, whose proceedings are subject to the Montana Constitution's right to know provision.<sup>202</sup> In analyzing the right to know provision, the court stated that "the demands of individual privacy of a corporation as well as of a person might clearly exceed the merits of public disclosure . . ." <sup>203</sup> This was clearly an erroneous interpretation of the language of the constitution and the intent of the drafters.

More significantly, this interpretation seemed to precipitate a faulty analysis of the problem. In the case of most corporations, the public right to know has no relevance. The constitutional provision says, "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or

198. Corporations are persons for the purpose of the fifth and fourteenth amendments of the U.S. Constitution except for the prohibition against self-incrimination.

199. MONT. CONST. CONV., Vol. V, at 1680.

200. *Id.* at 1681.

201. \_\_\_ Mont. \_\_\_, 634 P.2d 181 (1981).

202. *Id.* at \_\_\_, 634 P.2d at 184.

203. *Id.* at \_\_\_, 634 P.2d at 188.



agencies of state government and its subdivisions . . . .”<sup>204</sup> The provision does not give the citizenry any right to examine documents of corporations, or the documents or dealings of their fellow citizens.

Why then the problem? Because public utilities are not typical corporations. They are state regulated monopolistic enterprises. They are given special support by government and they are specially controlled by government. In the process of that control, government as agent of the people is authorized to examine certain records. In order to make a reasonable rate determination the Public Service Commission is obligated to gather the facts. This is precisely the kind of public agency deliberation the constitutional provision intended to allow the citizenry to observe. Too often, commissions formed to regulate industries such as utilities have become subservient to the industry. Thus, the necessity for public observations is obvious.

The intent of the Montana Constitution is equally obvious. Granted, the court faced a complex collision of not only state rights but also federal rights, since the utility had also claimed that the disclosure of its trade secrets by the Public Service Commission would constitute a taking of property without due process in violation of the fourteenth amendment.<sup>205</sup> But in answer to these contentions, the court had available relatively clear legal answers. First, full procedural due process was in fact afforded the corporation, or if not, it could have been remanded for that purpose. Second, there was no taking by the state and only a prospective possibility of a taking by some third party. And finally, if the court had concluded from a careful review of the facts that a taking would occur if the trade secrets were disclosed, it could have required the state to post a bond or make restitution for any financial loss that ultimately could be proved to have been sustained by the utility corporation. The corporate claim of privacy, however, was inappropriate and should have been summarily dismissed.

To be sure, the public’s right to know may occasionally conflict with the “*individual’s*” right to privacy and the court will be forced to reach an accommodation. The delegates to the constitutional convention recognized this problem. Neither the right to know nor the right of privacy is absolute. Recognizing that the government qua government has no right of privacy,<sup>206</sup> but that gov-

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204. MONT. CONST. art. II, § 9.

205. — Mont. at —, 634 P.2d at 183.

206. Government proceedings must be open to public participation, MONT. CONST. art. II, § 8, and subject to public scrutiny, MONT. CONST. art. II, § 9. The only exception is where

ernment is made up of individuals who have a right of privacy, the delegates made the right to know provision subject to the requirement that individual privacy be protected.<sup>207</sup> Likewise, the delegates realized that the barrier between individuals and government must be "semi-permeable."<sup>208</sup> The semi-permeability of the barrier means that a member of society may be required to disclose his private affairs to the extent that they materially affect the affairs of others.<sup>209</sup>

This principle explains why some corporations are regulated by the state; their activities greatly affect the lives of the other citizens of Montana. Consequently, their privacy interests should be proportionately diminished if, in fact, they have any legitimate claim to privacy. Likewise, government officials, whose acts certainly affect others, have reduced expectations of privacy. It is inconceivable, however, that there would ever be a legitimate basis for the complete elimination of the privacy of an individual as a participant in a corporation or as an agent of government. To do so would be to deny their individuality.<sup>210</sup>

#### D. *Against Whose Invasions Does the Right of Privacy Protect?*

Justice Morrison, speaking for the majority, has adamantly stated in *State v. Long*<sup>211</sup> that constitutions are limitations on the

"individual" privacy is threatened, not governmental privacy. See MONT. CONST. CONV., Vol. V, at 1670 per Delegate Eck, "The committee intended by this provision that the deliberation and resolution of *all* public matters *must* be subject to public scrutiny." *Id.* (emphasis added). It is urged that this is especially the case in a democratic society wherein the resolution of increasingly complex questions lead to the establishment of a complex bureaucratic system of administrative agencies.

207. MONT. CONST. CONV., Vol. V, at 1670 ("We were aware of this, really, from the beginning in our committee deliberations the fact that there is a right to privacy involved in the right to know."); *Id.* at 1673 ("There has got to be a limit to it [i.e., access to government discounts]. The reason we organize in a free society is to make sure we have dignity, . . . that our private affairs are not open to public scrutiny.").

208. See *supra* text accompanying note 76.

209. E.g., crimes, communicable disease, and concealed assets. Thus, individual privacy is not an absolute trump. It is possible that the privacy interest does not clearly exceed the merits of public disclosure. See MONT. CONST. CONV., Vol. V, at 1671, per Delegate Eck, (continuing public scrutiny of ordinary personnel matters to the dismissal of an agency head, the latter situation requiring that "the public has a right to know the reason of dismissal").

210. MONT. CONST. art. II, § 10 would require a compelling state interest to invade an individual's right of privacy. A valid state interest in the complete elimination of privacy is difficult to imagine. Certainly, any statutory attempt to pursue a valid and compelling state interest that resulted in excessive infringement of individual privacy would be vague, over broad, or not reasonably related to the interest invoked.

211. *State v. Long*, \_\_\_ Mont. \_\_\_, 700 P.2d 153 (1985).

exercise of the powers of government, not citizens. From this premise, it follows that only invasions of privacy by state officials are protected by the constitutional privacy provision. This is the position of the federal courts concerning the federal Bill of Rights, including the search and seizure provision.<sup>212</sup> Likewise, it is the position of nearly all of the state courts who have considered the question.<sup>213</sup>

Although the notion that a constitution's sole purpose is to limit the powers of the institutions of government may be appropriate to the federal Constitution, it is not necessarily an appropriate understanding of state constitutions. A state constitution should not only limit the institutions of government —i.e., the people in their collective capacity—but should also authorize and, in some instances require, that these institutions limit the people in their individual capacities. That the Montana Constitution performs a very different function from the federal Constitution is made evident by a consideration of the 1972 Montana Constitutional proceedings and prior Montana case law, as well as by general considerations of state constitutional theory.

The Montana Constitution's right of privacy provision neither limits itself to state action (as does the fourteenth amendment to the federal Constitution)<sup>214</sup> nor explicitly states that it applies to actions by citizens, as does the Montana right to dignity provision.<sup>215</sup> Although the delegates primarily considered the privacy provision to protect against governmental intrusions, there is evidence that they were concerned about invasions of privacy by private citizens. Delegate Campbell approvingly read a newspaper ed-

212. See *United States v. Jacobsen*, 466 U.S. 109 (1984). See *infra* notes 310 & 311.

213. See, e.g., *People v. Brewer*, 690 P.2d 860 (Colo. 1984); *Gajdos v. State*, 462 N.E.2d 1017 (Ind. 1984); *State v. Von Bulow*, 475 A.2d 995 (R.I. 1984). But see *People v. Zelinski*, 24 Cal. 3d 357, 594 P.2d 1000, 155 Cal. Rptr. 575 (1979) (searches by private security guard subject to right of privacy); *Allen v. Sears, Roebuck & Co.*, 409 So. 2d 1268, 1274 (La. 1982) ("We think . . . that Article 1, Section 5 prohibits unreasonable searches by anyone, whether private persons or police"); *State v. Clauk*, 454 So. 2d 232 (La. Ct. App. 1984) (refusing to apply the exclusionary rule to the evidence obtained by an unreasonable private search); *Settle v. State*, 679 S.W.2d 310 (Mo. Ct. App. 1984) (unlawful stop by officer out of his jurisdiction with no probable cause for a citizen's arrest subjected to exclusionary rule for violation of citizen's arrest statute).

214. U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty or property without due process of law . . . ." (emphasis added)). In *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) the Court stated that the federal exclusionary rule was "a restraint upon the activities of sovereign authority, and . . . not . . . a limitation upon other than governmental agencies." The *Burdeau* Court's conclusion, however, was based on a historical investigation of the framers' intent concerning the fourth amendment.

215. MONT. CONST. art. II, § 4 ("Neither the state nor any person, firm, corporation or institution shall discriminate against any person in the exercise of his civil or political rights . . . .").

itorial, which noted:

It isn't only a careless government that has this power to pry; political organizations, private information gathering firms, and even an individual can now snoop more easily and more effectively than ever before. We certainly hope that such snooping is not as widespread as some persons would have us to believe, but with technology easily available and becoming more refined all the time, prudent safeguards against the misuse of such technology are needed. Some may urge and argue that this is a legislative, not a constitutional issue. We think the right of privacy is like a number of other inalienable rights; a carefully worded constitutional article affirming this right is desirable.<sup>216</sup>

More importantly, perhaps, the Bill of Rights Committee cited *Brecht* in its comments as an example that the right of privacy had been already judicially recognized in Montana.<sup>217</sup> In *Brecht*, the court excluded evidence obtained through the violation of the defendant's right of privacy by his sister-in-law, who had acted on her own initiative, without state agency encouragement.<sup>218</sup> The delegates also were cognizant of a civil case, *Welsh*, in which the court recognized the right as being fundamental and applied it in a dispute between two private citizens.<sup>219</sup>

Irrespective of the delegates' intentions, until *State v. Long*<sup>220</sup> was decided in 1984, the Montana Supreme Court had affirmed in a long line of cases from *Brecht* in 1971 to *State v. Van Haele*<sup>221</sup> in 1982 that the Montana Constitution protected against invasions of privacy by private citizens irrespective of any state action.<sup>222</sup> These cases expressed several rationales for applying the constitutional privacy provision to actions by private persons.

In *Brecht* the Montana Supreme Court first applied what has

216. MONT. CONST. CONV., Vol. V, at 1681.

217. *Id.* Vol. II, at 632; *See also* Vol. V, at 1686-87 (mention of *Brecht* during floor debate).

218. *State v. Brecht*, 157 Mont. 264, 485 P.2d 47 (1971).

219. *Id.* at 271; MONT. CONST. CONV., Vol. VI, at 1851. Since *Brecht* and *Welsh* were the only cases where the right of privacy was previously addressed and since the delegate's research briefs cited *Welsh*, *see* *Welsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816 (1952), they must have approved the concept. *See supra* note 72. *See also per* Delegate Campbell, Transcript at 1851, ("As recently as 1952 . . . Montana adopted the right by express holding and with no misgiving.").

220. \_\_\_ Mont. \_\_\_, 700 P.2d 153.

221. 199 Mont. 522, 649 P.2d 1311 (1982).

222. *State v. Sayers*, 199 Mont. 228, 648 P.2d 291 (1982); *Hastelter v. Behan*, \_\_\_ Mont. \_\_\_, 639 P.2d 510 (1982); *State v. Hyem*, \_\_\_ Mont. \_\_\_, 630 P.2d 202 (1981); *Duran v. Buttrey Foods, Inc.*, \_\_\_ Mont. \_\_\_, 616 P.2d 326 (1980); *State v. Helfrich*, 183 Mont. 484, 600 P.2d 816 (1979); *State v. Coburn*, 165 Mont. 488, 530 P.2d 442 (1974); *Brecht*, 157 Mont. 264, 485 P.2d 47.

since been called the private search rule. The *Brecht* court based its exclusion of the evidence on two grounds. First, the court not only found that the sister-in-law's testimony about what the defendant said while she was eavesdropping on his phone conversation constituted an invasion of privacy but also expressed a concern that the defendant had, in effect, incriminated himself.<sup>223</sup> Second, the court reasoned that to permit certain citizens to invade privacy of persons while forbidding other citizens (state officials) from doing so would be absurd and unfair.<sup>224</sup>

In a subsequent case decided under the 1889 Montana Constitution, *State v. Coburn*,<sup>225</sup> the court used an expanded version of what was called the "silver platter doctrine" as its rationale for excluding evidence obtained by a private person through a search violative of the right of privacy. The "silver platter doctrine" was the phrase used to describe evidence obtained by state officials in violation of federal law and subsequently delivered to federal agents on a "silver platter."<sup>226</sup> Antagonism with the concept has encouraged some courts to exclude evidence wrongfully seized by quasi-law enforcement personnel, such as private security guards.<sup>227</sup>

After the new rights provisions of the 1972 Montana Constitution went into effect, a majority of the court placed less express reliance on the *Brecht* and *Coburn* rationales and, instead, based its holdings on Montana's unique constitutional right of privacy provision.<sup>228</sup> The court found that this provision demanded greater protection for the right of privacy than the United States Constitution.<sup>229</sup> In fact, the Montana courts had afforded more protection for the right of privacy than any other state.<sup>230</sup> Perhaps the unique and colorful Montana history which witnessed the harsh actions of vigilantes<sup>231</sup> and yet has been committed to individuality, may par-

223. 157 Mont. at 270, 485 P.2d at 50.

224. *Id.* at 271, 485 P.2d at 51.

225. 165 Mont. 488, 530 P.2d 442 (1974).

226. Originally such evidence was admitted since the federal exclusionary rule was not applicable to state officials. Concern over the "silver platter doctrine" led to its early demise. See *Elkins v. United States*, 364 U.S. 206 (1960).

227. See, e.g. *People v. Zelinski*, 24 Cal. 3d 352, 594 P.2d 1000, 155 Cal. Rptr. 575 (1979); See *Van Haele*, 199 Mont. at 353-56, 649 P.2d at 1317 (Morrison, J., concurring).

228. See, e.g., *State v. Hyem*, \_\_\_ Mont. \_\_\_, \_\_\_, \_\_\_, 630 P.2d 202, 206, 208 (1981).

229. *State v. Helfrich*, 183 Mont. 484, 488-89, 600 P.2d 816, 817-18 (1979).

230. See *supra* notes 65 & 66.

231. For an interesting account of the exploits of vigilantes in Montana, see T. DIMSDALE, *THE VIGILANTES OF MONTANA* (1953); W. SANDERS, *BISCUITS AND BADMEN* (1983). It is arguable, however, that excluding evidence in legal proceedings encourages vigilante actions. See also Ranney, *The Exclusionary Rule—The Illusion vs. The Reality*, 46 MONT. L. REV.

tially explain why the private search rule was invoked by the *Brecht* court, and approved by the delegates to the 1972 Constitutional Convention.

In addition to being supported by the transcript of the convention, prior case law, and unique characteristics of Montana's history, the constitutional protection against invasions of privacy by individuals, as well as government, is supported by state constitutional jurisprudence. Although the United States Constitution is a delegation of powers by the people to the federal government, rather than a delegation by the states, as were the Articles of Confederation,<sup>232</sup> it is nonetheless a *delegation*. Thus, the United States Constitution entails the granting of specific powers.<sup>233</sup> State governments, on the other hand, have *plenary* governmental powers, except for those powers delegated by the people to the federal government or expressly forbidden to both federal and state governments.<sup>234</sup> These plenary powers traditionally have been called police powers, i.e., the power to protect the health, safety, welfare, and morals of society.<sup>235</sup>

These powers are given to the state by the persons who make up that state. In terms of social contract theory, the constitution represents that contract among the citizens of the state granting to the state its police powers.<sup>236</sup> This contract is not between persons

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289 (1985).

232. See Art. of Confederation art. II. ("Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."). Cf. U.S. CONST. Preamble ("We the people of the United States . . . do ordain and establish this Constitution for the United States of America.").

233. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 405 (1819) ("This government is acknowledged by all, to be one of enumerated powers.") See also THE FEDERALIST No. 45, at 290 (J. Madison) (H. Lodge ed. 1888) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

234. See *McCulloch*, 17 U.S. (4 Wheat) at 402-06; see also Note, *What is the Nature of the Montana Constitution?* 15 MONT. L. REV. 93 (1954). See also R. ROETTINGER, THE SUPREME COURT AND THE STATE POLICE POWER (1957).

235. R. ROETTINGER, THE SUPREME COURT AND THE STATE POLICE POWER (1957).

236. See THE FEDERALIST No. 11 (A. Hamilton) ("Nothing is more certain than the indispensable necessity of government; and it is equally undeniable that whenever and however it is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers."); *McCulloch*, 17 U.S. (4 Wheat) at 404-05 ("The government of the Union, then . . . is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.") See also W. ADAMS, THE FIRST AMERICAN CONSTITUTION: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN A REVOLUTIONARY ERA 145 (1980). Both the federal and the state Constitutions at least partially derive from more simple and pure social compacts, such as the Mayflower Compact and the Puritans' royal charter. See P. SMITH, THE CONSTITUTION: A DOCUMENTARY AND NARRATIVE

and the state; for it is the contract itself that creates the state. Rather, a state constitution is a contract among individual persons to establish a state to protect their life, liberty and property.<sup>237</sup> The creation of the state itself is an attempt to ensure a level of due process for individuals in their relations with each other that is not adequately achieved without a state. Thus, while the state constitution limits state government, it also establishes and authorizes it to carry out its police power functions. Because state constitutions establish the police power of the state, they serve not only as limitations on the institutions of government but also as a statement of the guiding principles that the institutions of the government have a duty to advance and protect.<sup>238</sup>

The state fulfills its constitutional purpose only when it protects life, liberty and property. It can fail to do so in one of two ways. First, as an institution it can oppress individuals and directly jeopardize their life, liberty and property.<sup>239</sup> A second and more subtle failure is to negligently carry out its duties. Thus, if the state fails to protect the life, liberty and property of its citizens it

HISTORY 26-27 (1978).

237. See Locke, *supra* note 106, at § 123:

If a man in the state of nature be so free, as has been said; If he be absolute lord of his own Person and Possessions, equal to the greatest, and subject to no Body, why will he part with his freedom? . . . [T]his empire, and subject himself to the Dominion and Control of any other Power? To which, it is obvious to Answer, that though in the state of Nature he hath such a right, yet the Enjoyment of it is very uncertain, and constantly exposed to the Invasions of others. For all being Kings as much as he, every Man his Equal, and the quarter part no strict Observers of Equity and Justice, the enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to quit a Condition, which however free, is full of fears and continual danger: And it is not without reason, that he seeks out, and is willing to joyn in Society with others who are already united, or have a mind to unite for the mutual preservation of their Lives, Liberties, and Estates, which I call by the general Name, Property.

238. See *Id.* at § 135:

The Obligations of the Law of Nature cease not in Society but only in many Cases are drawn Closer, and have by Humane Laws known Penalties annexed to them, to enforce their observation. Thus the Law of Nature stands as an Eternal Role to all Men, Legislators as well as others. The Rules that they make for other Men's Actions, must, as well as their own and other Men's Actions, be conformable to the Law of Nature . . . .

See also J. Harlan's dissent in *The Civil Rights Cases*, 189 U.S. 3 (1883) (discussing the affirmative duties of government. The absurd development of a "state action" requirement by the U.S. Supreme Court in application of the sixth amendment is highlighted by the reasoning in such cases as *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 315 (1974)).

239. This is the common variety of unconstitutional acts by government, such as taking property without just compensation, unreasonable searches and seizures, discriminating laws or regulations, and deprivation of judicial and administrative due process.

has violated its constitutional duties.<sup>240</sup>

The scope of this affirmative duty may be more or less clearly expressed in the constitution. For example, in the individual dignity provision, the Montana Constitution prohibits discrimination by government or private groups or persons.<sup>241</sup> This would seem to be a complete prohibition against discrimination by private persons or agencies of government. There is no requirement of state action. Perhaps the inalienable rights provision of the Montana Constitution, however, best expresses an affirmative duty of persons, as individuals and as government. That provision states that "All persons are born free and have certain inalienable rights. . . . In enjoying these rights, all persons recognize corresponding responsibilities."<sup>242</sup> These responsibilities include respecting the rights of others both as private individuals and as participants in and agents of state government. Thus, even though the right of privacy provision does not explicitly address invasions by private citizens, the right of privacy does include the corresponding responsibility not to invade another's right.

The right to a clean environment does not include the words private groups or persons as does the individual dignity provision. However, since the most usual violators of a clean and healthy environment have been private corporate activities it is to be hoped that the court will not demand "state action" before there is a constitutional violation and some protection due.

In *State v. Long*<sup>243</sup> the issues were confused. Obviously, individuals' rights of privacy are protected from infringement by other individuals through the criminal and civil law and have been since the birth of Anglo-American common law. An individual's right of privacy is also protected from government infringement; however,

240. Though this point may be conceded, the truly difficult question is whether any such action is justifiable, i.e., whether the court may mandate that the legislature pass certain laws or that an agency adopt certain procedures to ensure that life, liberty and property are sufficiently protected. Given federal case law, see *Baker v. Carr*, 369 U.S. 186 (1962), such a contention would likely be held unjustifiable. See also J. ELY, *DEMOCRACY AND DISTRUST* (1980) (arguing that the courts are not to interject any substantive law into the democratic system but are merely to police the system and ensure that it operates democratically). However, it is arguable that if the institution is patently acting against the interests of society as a whole, there is a malfunction somewhere in the democratic machinery.

241. MONT. CONST. art. II, § 4:

The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

242. MONT. CONST. art. II, § 3.

243. \_\_\_ Mont. \_\_\_, 700 P.2d 153 (1985).



the government is sometimes granted limited exceptions by the document protecting the right.<sup>244</sup> For example, the right of privacy is granted by the Montana Constitution at the same time it is limited by the provisions on unreasonable searches and seizures, as well as the compelling state interest exception. Corollary problems of enforcing a constitutional proscription of invasions of privacy by private citizens should not be permitted to confuse the issue. The typical and most effective remedy to date to restrain overzealous agents of government who might violate privacy has been the exclusionary rule.<sup>245</sup> If considered solely as a deterrent, it becomes most difficult to justify as a remedy for private wrongs that infringe privacy.<sup>246</sup> This does not mean, however, that non-governmental infringement of privacy should not be accorded constitutional protection; the inappropriateness of a single remedy to a particular class of wrongdoers (here, private individuals) ought not to diminish the constitutional significance of invasions of privacy by the institutions of government or by individuals. The provision still has significance as a constitutional foundation that makes it the state's duty to prevent, punish and compensate for violations of an individual's privacy by either the state or other persons.<sup>247</sup> Thus, the state has a duty to provide effective, alternative remedies to invasions of privacy by private individuals.<sup>248</sup>

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244. *E.g.*, U.S. CONST. amend. IV and MONT. CONST. art. II, § 11 permit government to trespass against persons, things or places so long as they comply with the probable cause requirement.

245. *But see* Ranney, *supra* note 231 (arguing that the exclusionary rule is not an effective remedy).

246. *See* State v. Coburn, 165 Mont. 488, 510-14, 530 P.2d 442, 454-56 (1974) (Castles, J., dissenting). *See also* Note, State v. Brecht: Evolution or Offshoot of the Fourth Amendment Exclusionary Rule? 34 MONT. L. REV. 187, 197 (1973).

247. Judicial enforcement of their duties, of course, would depend on the Montana Supreme Court's construction of the scope of its judicial powers vis-a-vis the legislative and the executive branch. It would also depend on the nature of the particular breach of duty in question.

248. Consider other provisions of the Montana Constitution such as art. II, § 3 (the environment provision). The principal potential invaders are large corporate concerns, not government. Because of the requirement of state action, injured persons will not have a direct constitutional claim but must rely on the whims of majority political attitudes expressed in legislation for the protection of environmental concerns often encountering overwhelming special interest pressure from well financed corporate entities. This will be required notwithstanding, that the people of Montana established environmental concerns as a first priority and that a clean and healthy environment was a fundamental right and was to remain as such regardless of legislative activity until and unless the constitution itself should be amended. One should also consider the rights of speech, press and religion which should also be guaranteed against infringement by private persons as well as the state or agents of the state.

C. *Exceptions to the Right of Privacy: What Constitutes a Compelling State Interest?*

The Montana Constitution permits infringement of the right of privacy only if a compelling state interest for doing so is shown.<sup>249</sup> The clause requiring this showing was the subject of considerable debate during the constitutional convention. Although the provision, as it was drafted by the Bill of Rights Committee, included the clause permitting an infringement where there is a showing of a compelling state interest,<sup>250</sup> the clause was stricken during the floor debates. Delegate Harper, who made the motion that the clause be stricken, stated that he was "a little worried about that phrase 'without the showing of a compelling state interest' because that may be interpreted by whatever state agency happens to have an interest in invading my privacy at that particular time."<sup>251</sup> The motion passed unanimously.

Later in the debates, however, the clause was reinstated on the motion of Delegate Ask. His concern was that without the clause, the right was absolute and that the convention should give guidance to the court about how to balance the right with other interests.<sup>252</sup> But the delegates nevertheless intended that the right of privacy be accorded a fundamental status in this balancing.<sup>253</sup> In the context of deleting a reference to invasions of privacy from the search and seizure provision, the delegates believed that invasions of privacy ought not be permitted on the mere basis of showing probable cause.<sup>254</sup> The compelling state interest requirement was thought to address both concerns: the right of privacy is not absolute but it is a fundamental right.

The compelling state interest standard is not unique to this provision. It has long been interpreted to be required by the fourteenth amendment under both the due process clause and the equal protection clause when a fundamental right is infringed or a suspect classification has been made.<sup>255</sup> Early on, this standard focused primarily on the gravity of the threat of the prohibited conduct to any legitimate state interest rather than on the significance of the state interest itself. For example, in an early fourteenth amendment due process case, *West Virginia State Board of Edu-*

249. MONT. CONST. art. II, § 10.

250. MONT. CONST. CONV., Vol. II, at 632.

251. *Id.* Vol. V, at 1682.

252. *Id.* Vol. VI, at 1852.

253. *Id.* Vol. VI, at 1851.

254. *Id.* Vol. V, at 1688.

255. See *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

*ation v. Barnette*,<sup>256</sup> the Court expressed what the state was required to demonstrate, if fundamental rights had been infringed. Such rights "are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."<sup>257</sup> More recently, the Court has focused both on the significance of the state interest at issue and the means used to further that interest. For example, in *Zablocki v. Redhail*,<sup>258</sup> a right of privacy case, the Court stated that "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."<sup>259</sup>

For the same reason that the Montana Supreme Court is not bound to interpret the Montana Constitution's privacy provision according to the *Katz* standard,<sup>260</sup> it is free to interpret the privacy provision's compelling state interest standard in a sense different from the federal courts'. In making its interpretation, however, the court should carefully consider the legal meaning that the clause had when it was adopted by the delegates. Clearly, their intent was to classify the right as fundamental, although not absolute, and to require a showing that more than just any state interest was at stake; the interest must be compelling.<sup>261</sup>

The Montana Supreme Court has never really defined what compelling means and its determination of what constitutes a compelling state interest has been made largely on an *ad hoc* basis. Nevertheless, several patterns do emerge from its determinations. First, in a number of cases the court has found that a need to protect property or one's person constitutes a compelling state interest.<sup>262</sup> Second, the court has cited the state's need to enforce its

256. 319 U.S. 624 (1943).

257. *Id.* at 639.

258. 434 U.S. 374 (1978).

259. *Id.* at 388.

260. See *supra* text accompanying notes 144-46.

261. See, e.g., Delegate Harper's remarks during the debate.

The reason I said it in the first place . . . "without the showing of a compelling state interest" is not defined, at least clearly, in my mind as to who must show the compelling interest, what it must be, and who decides what it must be . . . I guess I am just not that worried about the state taking care of itself as I am worried about the individual being able to take care of his own privacy.

MONT. CONST. CONV., Vol. VI, at 1852.

Delegate Campbell's remarks: "what it [the privacy provision] says is, don't come into our private lives unless you have a good reason for being there." *Id.* Vol. V at 1681.

262. See *State v. Bradford*, \_\_\_ Mont. \_\_\_, \_\_\_, 683 P.2d 924, 928 (1984); *State ex rel. Zander v. District Ct.*, 180 Mont. 548, 556, 591 P.2d 656, 660 (1979); see also *State v. Sayers*, 199 Mont. 228, 231, 648 P.2d 291, 293 (1982).

criminal laws as a compelling interest.<sup>263</sup> Third, the need to protect other state constitutional rights has been found to be a compelling state interest.<sup>264</sup> Fourth, the court held that a law enacted by the people through the initiative process created a compelling state interest.<sup>265</sup>

Some of these state interests invoked are clearly compelling in the sense of being "very important," at least in the subjective evaluation of most people. For example, the need to protect other constitutional rights is an important interest. Likewise, the similarity between the process required to amend the Montana Constitution and the initiative process<sup>266</sup> gives an aura of constitutionality to laws passed by initiative. Nevertheless, it should be noted that in drafting at least one other right, the right to know, the delegates made its operation subject to the right of individual privacy.<sup>267</sup> Arguably, the principle implied by this act is that a collective good, the right of the people of Montana to know what goes on in state and local government, is subservient to an individual good, the right of privacy.<sup>268</sup> However, other fundamental rights, like free speech, freedom of religion or a due process right to a fair trial that pertain primarily to the individual, would be considered sufficiently significant to constitute a compelling state interest, unless otherwise expressly provided.

Other interests held by the court to be compelling are problematic in several respects. This can be demonstrated by the court's repeated invocation of the protection of property as a compelling state interest. First, though it is arguable that the right to protect private property is as fundamental as the right of privacy, balancing them becomes questionable when both rights belong to the same person. Indeed, since the two are intimately related, it is

263. See *State v. Wood*, \_\_\_ Mont. \_\_\_, \_\_\_, 666 P.2d 753, 754 (1983) (apprehension of felony suspects is compelling state interest); *State v. Coleman*, 189 Mont. 492, 503-04, 616 P.2d 1090, 1096 (1980) (possible life sentence for selling amphetamines demonstrates compelling state interest in apprehending such sellers); *State v. Hall*, 183 Mont. 511, 515, 600 P.2d 1180, 1182 (1979) (child abuse statutes demonstrate compelling state interest).

264. *Montana Human Rights Division v. City of Billings*, 199 Mont. 434, 444, 649 P.2d 1283, 1289 (1982) (to protect against discrimination is a compelling state interest).

265. *Montana Auto. Ass'n v. Greely*, \_\_\_ Mont. \_\_\_, \_\_\_, 632 P.2d 300, 303 (1981).

266. Compare MONT. CONST. art. XIV, §§ 8 & 9 and MONT. CONST. art. III, § 4.

267. See MONT. CONST. art. II, § 9. See *supra* note 207 and accompanying text.

268. The right to know may also entail individual rights as well as collective rights. *E.g.*, an individual person may need to know what information a state agency has accumulated about him to adequately protect his privacy or to purge inaccurate information that might destroy his credit or his ability to obtain automobile insurance. Further, if the right were not limited to state action the individual would have a much deserved and needed constitutional right to demand access to any information accumulated about him by private corporations such as banks or credit organizations.

questionable whether they could truly conflict. Nevertheless, the Montana Supreme Court believed that the two rights could and did come in conflict even with respect to the same person. In *State ex rel. Zander v. District Court*<sup>269</sup> the court held that officers were justified in violating the defendant's privacy when they conducted a warrantless search of his home and found marijuana plants in plain view. They were justified because their reason for entering his house, the need to check out a reported burglary, constituted a compelling state interest "to which the right of individual privacy must yield."<sup>270</sup>

Second, even if the right to own and protect property is a fundamental right, it is dangerous to permit a state agency to invoke an abstract fundamental right, like this right concerning property, without also showing that the right was imminently threatened in a substantial way.<sup>271</sup> The court's analysis of the property right in *Zander* failed to take this problem into account. In other cases, however, the court seems to have required some balancing of the right of privacy with the particular compelling interest invoked. For example, in *Duran v. Buttrey Food, Inc.*,<sup>272</sup> the court rejected the dissent's compelling state interest analysis, which simply stated that "the protection of a person's property furnishes a compelling state interest to which the right of individual privacy must yield."<sup>273</sup> In *Duran* a criminal statute<sup>274</sup> purported to grant a private person the power to stop and detain another private person for up to thirty minutes and to allow the public search of a purse, all of which caused indignity and embarrassment. Instead of simply invoking the compelling state interest in property, the court balanced the two rights. In doing so, though implicitly acknowledging that in the abstract the protection of property is a compelling state interest, the court "fail[ed] to discern a compelling state interest which would justify the very serious invasion of a person's privacy."<sup>275</sup> A similar balancing was suggested by the court in *State v. Carlson*,<sup>276</sup> in which it noted the need to limit searches

269. 180 Mont. 548, 591 P.2d 656 (1979).

270. *Id.* at 556, 591 P.2d at 661.

271. It is an interesting aside that in this case the court found a fundamental constitutional right, which the state had a compelling interest to affirmatively protect from unknown third parties, to justify the invasion of a second fundamental right by agents of the state.

272. 189 Mont. 381, 616 P.2d 327 (1980).

273. *Id.* at 392, 616 P.2d at 333. See also *id.* at 398, 616 P.2d at 336 (Haswell, C. J., and Harrison, J., dissenting).

274. MONT. CODE ANN. § 46-5-503 (1985).

275. *Duran*, 189 Mont. at 392, 616 P.2d at 333 (emphasis added).

276. 198 Mont. 113, 644 P.2d 498 (1982).

and seizures "under circumstances where the privacy rights of the offended party *exceeded* the compelling state interest of the state in making the intrusion."<sup>277</sup>

This balancing of the degree of invasion of privacy against the claimed state interest at stake might justifiably affect the quality of probable cause necessary to justify a particular search or seizure. For example, in *State v. Olson*<sup>278</sup> the court held that smell alone is not probable cause "sufficient to justify the invasion of the privacy of one's home."<sup>279</sup> Perhaps for similar but implicit reasons, the court in a prior case, *State v. Schoenthaler*,<sup>280</sup> found the officer's smell of marijuana to be insufficient probable cause to search the defendant's car when he had been stopped for a violation of a traffic ordinance.

Further, in both *Duran* and *Carlson* the court's language suggested that a third facet of the compelling interest requirement was considered in its balancing. In the kind of general balancing that the court performed, the invasiveness of the means was taken into account in the court's evaluation.<sup>281</sup> Means less restrictive of the right of privacy resulting in less invasive governmental intrusion may have been permissible. More recently, in *State v. Sierra*,<sup>282</sup> the Montana Supreme Court explicitly adopted as part of a compelling state interest analysis the requirement that even if the state has a compelling state interest it must pursue this interest by means that are the least restrictive of the fundamental right to be infringed.

The court also seems to have implicitly considered this principle of least restrictive means in the *Montana Human Rights Division* case, where the government intrusion had not yet occurred. Even though the court held that a compelling state interest existed for requiring the City of Billings to provide its personnel files to the Human Rights Division, it took precautions to be as protective as possible of the privacy interests involved. The court order was

277. *Id.* at 123-24, 644 P.2d at 503-04 (citing *State v. Hyem*, \_\_\_ Mont. \_\_\_, 630 P.2d 202 (1981); *State v. Allen*, \_\_\_ Mont. \_\_\_, 612 P.2d 199 (1980)) (emphasis added).

278. 180 Mont. 151, 589 P.2d 663 (1979).

279. *Id.* at 155, 589 P.2d at 665. A rather dubious conclusion based on the level of probable cause that could be ascertained by "smell" in the case of marijuana as compared with other acceptable levels of probable cause. The case is more rationally predicated on the degree of invasion vis-a-vis the seriousness of the crime.

280. 176 Mont. 376, 578 P.2d 730 (1978).

281. *Duran*, 189 Mont. at 392, 616 P.2d at 333 (causing great indignity and embarrassment, without making an arrest); *Carlson*, 198 Mont. at 121-22, 644 P.2d at 502-03 (full custodial arrest of defendant, half asleep and in underwear, for failing to comply with order to appear that was never served).

fashioned to protect privacy by limiting the information that the Human Rights Division could obtain.<sup>283</sup>

A similar concern about restricting the means used by the state to intrude upon the privacy of individuals has been expressed by Justice Shea, in dissents, as well as in writing for the court. His concern, which has also been a long-time concern of the Montana Supreme Court,<sup>284</sup> was that the use of warrants and the procedure for obtaining them should be strictly enforced by the courts since the purpose of warrants is to minimize the invasion of privacy.<sup>285</sup>

On the other hand, there is a basis for arguing from the comments of the Bill of Rights Committee that, at least as far as search and seizures are concerned, the means need not be the least restrictive but only reasonable. This inference could be made from their comment that the search and seizure provision would be the procedural counterpart of the privacy provision.<sup>286</sup> Nevertheless, even if two distinct standards were intended, it would be inappropriate for the court simply to adhere to what federal courts believe to be reasonable means under the federal Constitution, which does not require a compelling state interest for invasions of privacy by search and seizures, but only requires that they be reasonable.<sup>287</sup> In other words, in conjunction with Montana's right of privacy reasonableness might very well require that the least restrictive means be used to make searches and seizures.

#### F. *What Are The Remedies For Invasions of Privacy?*

The Montana Constitution's privacy provision does not suggest what remedy persons should have for potential or imminent violations of their privacy. Montana cases, however, provide examples of three different kinds of remedies.

First, in a criminal proceeding, evidence that has been unlawfully seized through an invasion of the defendant's privacy may be excluded.<sup>288</sup> Montana was one of the first states to adopt its own exclusionary rule, years before the United States Supreme Court required states to apply it. In 1925, the court in *State ex rel. King*

283. *Montana Human Rights Div.*, 199 Mont. at 449, 649 P.2d at 1291.

284. See *supra* text accompanying notes 58 & 59.

285. See, e.g., *Sierra*, \_\_\_ Mont. \_\_\_, 692 P.2d 1273 (per Shea, J.); *State v. Fogarty*, 187 Mont. 393, 610 P.2d 140 (1980) (per Shea, J.); *State v. Meader*, 184 Mont. 32, 44, 601 P.2d 386, 392 (1979) (Shea, J., concurring) (seizure of items beyond those described in the warrant would have violated defendant's right of privacy).

286. See MONT. CONST. CONV., Vol. II, at 633.

287. U.S. CONST. amend. IV.

288. MONT. CONST. ANN. § 46-13-302 (1985).

*v. District Court*<sup>289</sup> discussed the exclusionary rule as the only effective means of enforcing the Montana state search and seizure provision. The court stated its disapproval of "courts . . . claiming admiration for the high and splendid principle of the constitutional mandate [against unreasonable searches and seizures], [who] refuse to put it into effect. That is not our idea of enforcing the law; it is mere lip service."<sup>290</sup>

The Montana Supreme Court in *Brecht*, and after adoption of the express constitutional right of privacy, from *Coburn* until *State v. Long*, dared to take seriously its constitutional mandate. As recently as 1982 in *State v. Van Haele*,<sup>291</sup> the court excluded evidence resulting from an invasion of the defendant's privacy by a private citizen. The court's rationale for doing so went beyond the current singlefold deterrence rationale of the United States Supreme Court as it was expressed in *United States v. Calandra*.<sup>292</sup> Instead, the court stated:

We base our reasoning on the firm stance taken by the Montana Constitution guaranteeing an individual's right of privacy. Our holding today is also rooted in the concept of judicial integrity, i.e., the judicial system must not become an accomplice to constitutional violations by admitting evidence illegally obtained.<sup>293</sup>

Consistent with this rationale, the court in *Van Haele* refused to permit a good-faith exception to the exclusionary rule because it only addresses a deterrence rationale, not the judicial integrity rationale invoked by the court.

Most recently, in *State v. Long*,<sup>294</sup> however, the Montana Supreme Court recanted. *State v. Van Haele* was overruled along with all cases expressing similar sentiments.<sup>295</sup> The court swallowed the federal theory that the exclusionary rule is no more than a rule of court procedure designed to deter unlawful police activities.<sup>296</sup> Although the Montana Supreme Court discussed the concept of "judicial integrity" as a possible justification for applying the exclusionary rule to private action, it declined to do so in that case. Nevertheless, it made a most unique distinction. If the private party invading ones privacy and illegally seizing evidence

289. 70 Mont. 191, 224 P. 862 (1924).

290. *Id.* at 197, 224 P. at 864.

291. 199 Mont. 522, 649 P.2d 1311 (1982), *overruled by State v. Long*, \_\_\_ Mont. \_\_\_, 700 P.2d 153 (1985).

292. 414 U.S. 338 (1974).

293. 199 Mont. at 526, 649 P.2d at 1313.

294. \_\_\_ Mont. \_\_\_, 700 P.2d 153.

295. *Id.* at \_\_\_, 700 P.2d at 156.

296. *Id.* at \_\_\_, 700 P.2d at 157-58.



commits no more than a misdemeanor (a trespass in the case discussed), the admission of the evidence does not impinge on judicial integrity.<sup>297</sup> But the court then "reserve[d] for another day the determination of whether to apply the exclusionary rule to evidence gathered as the result of felonious conduct."<sup>298</sup> This unusual distinction, which would make the decision to exclude evidence seized illegally by a private person turn on the *level* of illegality, seems to be a confusing measure of obeisance to the principled concept of judicial integrity. Further, it fails to relate this conclusion to the court's first assertion in *Long* that there was no constitutional violation in any event since the constitutional provision only protects against state action.<sup>299</sup> Is the court's use of privately illegally seized evidence the necessary "state action" to call into play the constitutional mandate prohibiting illegal search and seizure? Would it also require the court, as a matter of judicial integrity, to exclude the evidence if the illegality is substantial, that is, felonious? Only time will tell.

Nevertheless, the exclusionary rule remains a possible remedy for violations of privacy insofar as the violation is by government.<sup>300</sup> The apparent commitment of the Montana court to follow indiscriminately the federal lead, however, forces one to conclude that the vitality of the exclusionary rule in Montana will be short-lived.<sup>301</sup>

A second remedy that has been provided by the court is a protective order. This is what the City of Billings sought in *Montana Human Rights Division*.<sup>302</sup> This remedy provides the court with some flexibility to accommodate the privacy interest in the face of a compelling state interest. Although the city was not able to prevent the agency from obtaining the personnel files, the court did fashion an order to "establish some substantial protection of the privacy of those individuals . . ."<sup>303</sup> Presumably, where there is no compelling state interest, an injunction would be granted.

Third, there is, at least potentially, a remedy in tort. The court has left this possibility open. In *Hastetter v. Behan*,<sup>304</sup> a district court had dismissed the plaintiff's action in tort, based on the

297. *Id.* at \_\_\_\_, 700 P.2d at 158.

298. *Id.*

299. *Id.* at \_\_\_\_, 700 P.2d at 157.

300. *See, e.g.,* *Massachusetts v. Shepard*, 468 U.S. 981 (1984); *United States v. Leon*, 468 U.S. 897 (1984) (The federal exclusionary rule has been limited.)

301. *Id.*

302. 199 Mont. 434, 649 P.2d 1283.

303. *Id.* at 446, 649 P.2d at 1290.

304. 196 Mont. 280, 639 P.2d 510 (1982).

violation of his constitutional right of privacy, because the defendant was not a state official, and his invasive act was not done in conjunction with state activities. The Montana Supreme Court, however, reversed the district court, suggesting that the constitutional provision did create a cause of action in tort. The court then dismissed the plaintiff's suit, holding that he had no reasonable expectation of privacy in the identity of the phone numbers he calls.<sup>305</sup> Although this plaintiff brought the privacy action under the Montana Constitution's right of privacy provision, obviously there were available tort remedies for violation of privacy based in the common law of torts. For example, in the *Long* case the defendant should have a potential tort cause of action for the "trespass." But the question as to whether there is a constitutional tort predicated on the constitutional right of privacy if a non-state employee infringes individual privacy seems most dubious after the *Long* decision.

Further, there is no assurance that a "constitutional tort" remedy would be available if an agent of government (state action) violated a constitutional right of privacy.<sup>306</sup> Montana's constitutional waiver of sovereign immunity<sup>307</sup> and the court's interpretation of the right to a judicial remedy<sup>308</sup> could provide, however, a basis for an implied constitutional cause of action against either the state or a state official who invades plaintiff's privacy.

Finally, other remedies that are at least theoretically possible are administrative sanctions against individual employees of government who violate a citizen's right of privacy.<sup>309</sup> And, of course, many serious invasions of privacy constitute crimes such as trespass, burglary, theft, and assault. Thus, criminal actions could and should be brought against either private persons or government agents who knowingly or purposely violate a citizen's privacy. Unfortunately in those cases in which the exclusion of evidence is a possible remedy there is rarely if ever a criminal prosecution.

## V. CONCLUSION

Privacy is a fundamental right and perhaps more. It may well be the foundation of civilized society. It is the right "to be let

305. *Id.* at 283, 639 P.2d at 513.

306. *See Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971) (the U.S. Supreme Court permitted such a claim).

307. MONT. CONST. art. II, § 18.

308. MONT. CONST. art. II, § 16. *See also White v. State*, \_\_\_ Mont. \_\_\_, 661 P.2d 1272 (1983).

309. *See Ranney, supra* note 231, at 303.

alone" by other persons, as well as by government. It encompasses concepts of both tort and crimes and assures protection from private and governmental intrusions. While it is not absolute, it is fundamental.

The question of "state action" generates additional confusion. It was misplaced from the beginning. The refusal to protect basic human rights in the *Civil Rights Cases*<sup>310</sup> was insensitive and a continuing source of frustration.<sup>311</sup> The question should be simply whether the claimant or petitioner is being denied a basic right guaranteed by the constitution and whether another right is in conflict therewith. This should be true whether the right is a first amendment right of free speech, a fifteenth amendment right to vote or a nontextual right of privacy. What difference does it make if a private person detains me and I am denied the right to vote and the state declines to protect me, or an agent of the state refuses to accept my ballot. In either event I have been denied the right to vote, a fundamental political right.

If state action should not be the issue in applying the federal Constitution and there are strong arguments that it should not,<sup>312</sup>

310. *Civil Rights Cases*, 109 U.S. 3 (1883). These cases involved exclusion of black persons by private persons and private corporations (railroads) from public facilities and conveyances because of their race. Indictments and the civil penalty invoked were reversed. The court held the fourteenth amendment was not applicable since the cases did not involve state action. Montana's constitutional response to this problem is addressed in the specific language of Article II. While the court may have been legally and philosophically correct in its holding in the *Civil Rights Cases*, that does not mean the same reasoning should extend to the interpretation of a state constitution. In fact, one of the principal arguments in support of the majority position in the *Civil Rights Cases* was that if Congress had power to protect these rights against private deprivations it would be a usurpation by the federal government of state functions in violation of the principles inherent in the tenth amendment. Implicitly then the protection of the rights should be an obligation of state government, and such basic rights should appropriately be included in a state constitution.

311. It was most insensitive in a humanistic sense, to tell the states to protect the rights of the black citizens knowing full well the political power base and the general attitude of those persons in control of state government. Insensitive at least as considered from the perspective of a new morality and a hundred years of hindsight. As a continuing source of frustration, the court has turned and twisted for the last 40 years to find violations of the fourteenth amendment even though the actions condemned were not state actions, at least not in any traditional sense. See, e.g., *Evans v. Newton*, 382 U.S. 296 (1966); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Smith v. Allwright*, 321 U.S. 649 (1944).

A direct reversal of the civil rights cases has not been forthcoming but in *United States v. Guest*, 383 U.S. 745 (1966), a majority of the justices seemed to hold that Congress could regulate private actions. *Amalgomated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968) *overruled* by *Hodgens v. National Labor Relations Bd.*, 424 U.S. 507 (1976); and see the absurd results in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). By extension of the reasoning in the *Jackson* case a person could be denied electricity by a "privately" owned electric utility company on the basis of race and have no claim to constitutional protection.

312. See *Civil Rights Cases*, 109 U.S. at 26-62 (Harlan, J., dissenting); *Guest*, 383 U.S.

it definitely is not an appropriate question in the interpretation of a state constitution. As noted in *Katz*<sup>313</sup> “[t]he protection of person’s general right to privacy—his right to be let alone by other people . . . is . . . left largely to the law of the individual states.” And the people of the state of Montana spoke loud and clear. The right of privacy is fundamental and should protect against infringement by private persons as well as government officials. The difficult question should never be state action; but if constitutionally guaranteed rights collide, how should they be valued in relation to each other and how can the particular conflict be resolved with the minimum restriction on either right?

Isolated determinations such as the conclusion that phone numbers are not protected by the right of privacy<sup>314</sup> are troublesome but focus on the scope of protection provided by the privacy concept. Disagreement as to the scope of privacy is understandable. Likewise, elimination of the exclusionary rule in relation to illegal private searches is a discouraging reliance on the recent federal conclusion that the rule is justified only as a deterrent. Nonetheless, it is understandable if not expected. But the unnecessary plummet into the federal maze of “state action” will cause the Montana court untold grief and tend to result in a misfocus of the real issues. One need only read a handful of the federal cases to be assured of this conclusion.<sup>315</sup>

It should be noted that the right of privacy is of sufficient breadth and sufficiently confused, in the best legal tradition, to defy truly satisfactory definition, generally acceptable analysis or anything approaching complete historical or philosophical description. Nonetheless, the concept is useful and can be defined, analyzed, and made pertinent. The first step has been taken. The right has been given formal, textual, and constitutional recognition in Montana, as well as recognition in the U.S. Constitution. Inclusion in the state constitution is an expression by the people of a fundamental value not to be infringed by government and more, a value to be protected by government from infringement by private persons.

The process of definition and analysis has begun. Ultimately “privacy” will become one of the most encompassing and significant concepts in law. Its mention will force decision-makers to con-

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313. 389 U.S. 347 (1967).

314. *Smith v. Maryland*, 442 U.S. 735 (1979). *See also Hastetter v. Behan*, 196 Mont. 280, 639 P.2d 510 (1982).315. *See supra* note 311.

sider the meaning of human autonomy and dignity on the one hand and the procedural and substantive limits of governmental control on the other.