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# A New Approach to the Fourth Amendment in Light of Proposition Eight

By Robert K. Calhoun, Jr.

It has now been almost two and one-half years since the California electorate passed Proposition 8 and attempted, with one scatter-shot provision, to change much of the criminal justice landscape in California. Despite this significant passage of time, only two of the many issues raised by Proposition 8 have been resolved with any clarity by the California Supreme Court: The constitutional adequacy of the election process which produced Proposition 8 (*Brosnahan v Brown* (1982) 32 Cal3d 236), and the non-retroactivity of its provisions (*People v Smith* (1983) 34 Cal3d 251).

While its many provisions present a bonanza of potential issues requiring resolution by the Court, perhaps no other is of such sweeping importance as that of the effect of Article 1 section 28 (d) (the so-called "Right to Truth-in-Evidence") upon that vast body of independent state law that the California courts have developed in recent years in reliance upon the California Constitution—i.e., whether Article 1 section 28 (d) does away with an exclusionary remedy for California's independent state law and imposes, in its stead, a federal standard for all suppression issues.

It is not the intent of this article to canvass the arguments that can and have been made with respect to Proposition 8's ultimate effect upon rules of exclusion (except to note in passing that the issue is one which is very much alive—thanks in large part to the sloppy drafting of the authors of Proposition 8).

It is also not the intent here to suggest that the proposition's effect upon rules of exclusion can be reduced to a single discreet issue. To a large extent, it presents as many issues as there are rights which are currently enforced in California by an exclusionary remedy—for example, a decision that Proposition 8 mandates an end to exclusionary rule enforcement for independent California search and seizure law does not necessarily mean the

same result for the independent body of law developed pursuant to California's privilege against self-incrimination (Article 1, section 15) and the *Miranda* decision since Article 1 section 28 (d) by its very terms exempts "statutory rule [s] of . . . privilege" from its sweep (and constitutional provisions are "statutes" under California's Evidence Code).<sup>1</sup>

The purpose of this article is instead quite simple. It confines itself to the area of search and seizure law and begins by assuming the worst—that the Court eventually rules that a federal standard applies to all such suppression issues. It then goes on to propose an argument which is intended to rescue as much of California's independent search and seizure law as is possible. (For most of you, of course, there is no need to assume the worst. Substantial numbers of the state's trial judges already view Proposition 8 as having achieved such a result and are busily applying the federal standard. This merely provides you with the opportunity to give this argument an early audition.)

The argument can best be summarized as follows: The scope of the Fourth Amendment is defined in terms of expectations of privacy. Concepts of privacy have historically been associated with state law. State law, thus, may still be relevant to the exclusionary issue—not as an independent basis of exclusion, but as a potential means of expanding the scope of the Fourth Amendment itself.

## Reasonable expectation of privacy

Ever since the Court decided *Katz v U.S.* 399 U.S. 347 in 1967, we have defined the basic sweep of the Fourth Amendment in terms of personal privacy: i.e. the question of whether the Fourth Amendment even applies to particular police activity (i.e. whether there has been a "search") is defined

in terms of whether the government has invaded a person's reasonable expectation of privacy<sup>2</sup>; the question of which individuals have access to the protections of the Fourth Amendment (i.e. standing) has been translated into a question of *whose* reasonable expectation of privacy has been violated.<sup>3</sup> The problem, of course, with formulating these issues in this way is that *Katz* and its progeny have given us virtually no guidance in determining which privacy expectations are reasonable and which are not. This is hardly surprising. Prior to *Katz*, Fourth Amendment jurisprudence was grounded in notions of property law, so one would not expect prior Fourth Amendment cases to be particularly enlightening on the latter issue. Moreover, to the extent the Court might wish to look to a federal law of privacy outside the Fourth Amendment arena, authority around the time of *Katz* was scant to say the least, since the constitutional right to privacy had only been "created" two years before in very narrow terms in *Griswold v Connecticut* (1965) 381 U.S. 479. Thus, as Mr. Justice Stewart recognized in his majority opinion in *Katz*:

*"The protection of a person's general right to privacy—his right to be left 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>4</sup>

And that, pure and simple, is the basis of the argument here: that to the extent the court is called upon to determine the reasonableness of privacy expectations, it is, of necessity, compelled to look not only at whatever federal law there may be on the subject, but also the law of the individual state in which the case arises. (In the case of California, that is an argument of some significance because in a variety of ways California stands out dramatically in terms of the vigor with

<sup>2</sup>*Katz v U.S.* (1967) 389 U.S. 347. (This oft-quoted language actually comes from Mr. Justice Harlan's concurring opinion).

<sup>1</sup>Calif. Evid. Code §230.

which it protects personal privacy—a matter which will be developed at length below).

### State privacy provisions

Besides the dearth of available federal law, the idea of looking to the states for help in defining privacy makes sense for a number of other reasons. Primary among these is the fact that—as Stewart recognized in *Katz*—the states had in fact been developing a body of privacy law long before *Katz* and *Griswold* came upon the scene. At the time of *Katz*, a firm majority of the states recognized some form of right to privacy as part of their tort law.<sup>5</sup> A few even contained explicit provisions in their constitutions protecting privacy.<sup>6</sup> As of today, those numbers have increased so that a tort of privacy is recognized by a total of 46 states and the District of Columbia<sup>7</sup> and at least 10 states<sup>8</sup> have some form of explicit privacy provision in their constitutions. Moreover, a substantial number of states, such as California, have developed an impressive body of statutory law<sup>9</sup> protecting the privacy rights of their citizens. If the *Katz* question really does ask which privacy expectations “society is prepared to recognize as reasonable,” it is difficult to conceive of a better answer than those instances where society has actually spoken—either through its legislatures, initiative processes or courts.

There is yet another—perhaps more important—reason to look to state law on these matters. As we as a nation struggle to fine-tune the balance between the needs of effective law enforcement and the individual’s need for privacy in a post-1984 world, it is becoming increasingly evident that the concept of privacy that the United States Supreme Court has begun to develop in recent years<sup>10</sup> bears little relationship to the concept of privacy

that has developed in a number of the individual states. (Probably no better example of this can be found than in California—a matter which also will be developed below).

If the citizens of a given state do, in fact, define privacy more broadly than does the present court, and they do so in some fashion that may be readily and easily determined by the Court, then there is no reason in precedent or in policy why Fourth Amendment theory should not incorporate that state law as a separate, supplemental source of legitimization for an individual’s subjective expectation of privacy. Independent state ground theory presently permits the states the freedom to provide increased protections for their citizens through the independent operation of their own state constitutions<sup>11</sup> (provided they do not undercut the minimum nationwide standard required by the U.S. Constitution as established by the Court). The theory proposed here is quite similar although it differs in one crucial respect. It would allow states to provide greater protection to their citizens by legitimizing greater privacy expectations than otherwise exist in federal law.

The difference is that it would protect these expectations through the operation of the Fourth Amendment and the enforcement powers of the federal courts. The states would, in effect, be allowed to define the scope of the Fourth Amendment. That would mean, of course, that the scope of the Fourth Amendment protections would vary from state to state. This should not be so strange as it first appears if we are in fact talking about the legitimacy of privacy expectations, since it should be obvious that, in reality, societal understandings as to which privacy expectations are reasonable vary enormously from state to state.<sup>12</sup> Moreover, this “federalization” of the scope question of the Fourth Amendment is hardly heresy. The U.S. Supreme Court has for some time looked to state law to give content and meaning to a number of other



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provisions of the U.S. Constitution, including the Due Process Clause,<sup>13</sup> the Contract Clause<sup>14</sup> and the First Amendment,<sup>15</sup> to name a few.

No less a champion of “States’ Rights” than Mr. Justice Rehnquist himself seems to have advocated something very close to this theory in a recent standing case. Speaking for the majority in *Rakas v Illinois* (1978) 439 U.S. 128, he said (at f.n. 12):

[I]t would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases. Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.

Of course, he never refers specifically to state law here but his reference to property law in conjunction with “societal understandings” which have their source beyond the terms of the Fourth Amendment itself is noteworthy in that property law has traditionally

<sup>3</sup>*Rakas v Illinois* (1978) 439 U.S. 128.

<sup>4</sup>*Katz*, supra at pp. 350-351.

<sup>5</sup>37 Mont. L. R. 39, f.n. 4.

<sup>6</sup>Id at pp. 43-44.

<sup>7</sup>Id at p. 39, f.n. 4. Cf West’s Wisc. Stats.

Ann. §895.50; Rev. Stats. of Nebr. §20-201; Gen. Laws of R.I. § 9-1-28.1.

<sup>8</sup>Op. Cit. at pp. 43-45.

<sup>9</sup>See, for example, Invasion of Privacy Act (Calif. P.C. §630-637.5) and Right to Financial Privacy Act (Gov’t Code §§ 7460-7493, plus amendments to several other codes.)

<sup>10</sup>See, for example, *U.S. v Miller* (1976) 425 U.S. 435 and *Smith v Md.* (1979) 442 U.S. 735.

<sup>11</sup>*Cooper v Calif.* (1967) 386 U.S. 58, 62.

<sup>12</sup>Dash, Schwartz, & Knowlton, “The Eavesdroppers” Da Capo Press, 1971 at p.8.

<sup>13</sup>*Board of Regents v Roth* (1972) 408 U.S. 564.

<sup>14</sup>*Indiana ex rel Anderson v Brand* (1938) 303 U.S. 95.

<sup>15</sup>*Miller v Calif.* (1973) 413 U.S. 15.

been viewed as a preserve of the states. For example, in *Board of Regents v Roth* (1972) 408 U.S. 564, Rehnquist was part of a majority that held that:

"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ." <sup>16</sup>

### Ample precedent

Actually, there is ample precedent for the proposition that federal courts can look to state law to determine the parameters of federal law. Probably the most compelling example is to be found in the procedural due process decisions of the Court over the past decade.

The Fourteenth Amendment prohibits the states from depriving any individual of "life, liberty, or property" without due process of law. In determining what standard of fairness to apply to state governmental action, the Court has utilized a number of different analytical models.<sup>17</sup> But since 1972, when it decided *Morrisey v Brewer* (1972) 408 U.S. 471 and *Board of Regents v Roth*, supra, the Court has tended to follow a two step mode of analysis: the first step being a threshold determination of whether the interests of the affected individual rise to the level of "life, liberty or property" (i.e. whether the Fourteenth Amendment is applicable at all); and the second step (assuming a positive answer to the first) being a determination of what process is due.<sup>18</sup> What is significant for our purposes about this line of cases is that, in determining the first issues (whether there is a "liberty" or "property" interest involved) the court has increasingly looked to state law for the answer.

For example, in *Board of Regents v Roth*, supra, the Court held that non-tenured instructors at a state university did not have a protectable "property" interest in their continued employment sufficient to guarantee them some form of procedural protections prior to their termination because the applicable state law had not created a "legitimate claim of entitlement."<sup>19</sup>

<sup>16</sup>*Roth*, supra at p. 577.

<sup>17</sup>Nowak, Rotunda & Young, *Constitutional Law*, 2d Ed. pp. 528-530.

<sup>18</sup>*Morrisey v Brewer* (1972) 408 U.S. 471, 481 (1972).

This approach was required, according to the Court, because property interests "are not created by the constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."<sup>20</sup>

Similarly, in *Paul v Davis* (1976) 424 U.S. 693, the Court observed that "liberty" interests were every bit as difficult to define as "property" interests for purposes of the Due Process Clause and that often "these interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law."<sup>21</sup> The Court then declined to find that petitioner had a "liberty" interest in avoiding governmental defamation (despite a long line of previous Supreme Court authority to the contrary)<sup>22</sup> unless the defamation was accomplished by interference with some other more "tangible" interest created by state law<sup>23</sup>—which they found not to be the case on the facts of *Paul v Davis*.

Thus, the Court has done in the procedural Due Process area exactly what is being proposed be done in the area of the Fourth Amendment enforcement. They have used state law to determine the threshold question of the applicability of a federal constitutional right.

It should probably be noted that *Roth* and *Paul* and the cases which follow them<sup>24</sup> have been severely criticized<sup>25</sup> and that the principle of deference to state law which they articulate has evolved as part of an overall pattern of limiting access to the federal courts. A cynic might question whether the Court is truly prepared to defer to state law if its effect would actually be to expand the scope of federal constitutional protections. A positive answer may be found in a recent prison transfer case, *Hewitt v Helms* (1983) 459 U.S. 460. There the

<sup>19</sup>*Roth*, supra at p. 577.

<sup>20</sup>Id at p. 577.

<sup>21</sup>*Paul v Davis* (1976) 424 U.S. 693, 710.

<sup>22</sup>See, for example, *Wisconsin v Constantineau* (1971) 400 U.S. 433.

<sup>23</sup>Op. Cit. at p. 707.

<sup>24</sup>See, for example, *Arnett v Kennedy* (1974) 416 U.S. 134 and *Bishop v Wood* (1976) 426 U.S. 341.

<sup>25</sup>See Monaghan, "Of 'Liberty' and 'Property'," 62 *Corn. L.R.* 405.

Court reiterated its position that the transfer of an inmate to less amenable and more restrictive quarters for non-punitive reasons fails to implicate any "liberty" interest protected by the Due Process Clause. The Court went on, however, to find that the state of Pennsylvania had itself created a liberty interest. This conclusion was based upon state statutes and regulations which required certain procedures to be followed prior to placing someone in administrative segregation, as well as the fact that the state had established "specific substantive predicates" before administrative segregation could be imposed.<sup>26</sup> Our cynic might point out that the Court nevertheless went on to determine that the procedural protections actually provided by the state were constitutionally sufficient. Nonetheless, the fact cannot be overlooked that firm authority exists not only for the proposition that the scope of constitutional protections may, in appropriate circumstances, be defined by reference to state law but also that this may result in more expansive application of the federal constitutional right.

This principle is not limited to procedural due process cases. A similar approach may be found, for example, as part of traditional analysis under the Contract Clause. Article 1 section 10 of the U.S. Constitution provides that no state shall pass any law impairing the obligation of contracts. Here again we find the U.S. Supreme Court declaring that the threshold issue "as to the existence and nature of the contract [is] . . . one primarily of state law."<sup>27</sup> Thus, the contract clause essentially throws a federal constitutional shield around property interests initially created by state law<sup>28</sup> and, in so doing, makes the scope of the federal right dependent upon the prior state law question.

### Applicable to obscenity cases

Yet another example of "societal understandings" of a state or local nature determining the scope of rights under the federal constitution may be found in the area of recent First Amendment obscenity law. Here the threshold question concerning the scope of the constitutional right is a

<sup>26</sup>*Hewitt v Helms* (1983) 459 U.S. 460, 470.

<sup>27</sup>*Indiana ex rel. Anderson v. Brand*, supra.

<sup>28</sup>Monaghan, supra at p. 435.

determination of whether the disputed material is "obscene" or not. A determination that certain material is obscene is a determination that it simply is not covered by the protections of the First Amendment. (*Roth v U.S.* (1975) 354 U.S. 476 at 485.)

In making this threshold determination as to obscenity, juries are currently asked to decide among other things, whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to prurient interests. (*Roth v U.S.*, *supra* at p. 489.)

What is significant about this for our purposes is that, at least since 1973 when the Court decided *Miller v California* (1973) 413 U.S. 15, the jury is instructed to make this decision by applying statewide standards of offensiveness and prurience rather than national standards because, according to chief Justice Burger, "[O]ur Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation, even assuming the prerequisite consensus exists." (*Miller*, *supra* at p. 30).

Moreover, this rule with respect to the application of state standards has been held to apply in federal court as well, determining the sweep of First Amendment protections for federal obscenity prosecutions as well as for those based upon state law. (*Hamling v U.S.* (1974) 418 U.S. 87.)

Consequently, the sweep of the First Amendment expands or shrinks in direct relationship to the "societal understandings" of the various states. This is viewed positively by Chief Justice Burger to the extent that he finds "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." (*Miller*, *supra*, at p. 32).

On the other hand, this "federalization" of the scope of First Amendment protection has been severely criticized for the possible chilling effect it may have upon expression and the potential it raises for local censorship and political opportunism.<sup>29</sup> But the ultimate

wisdom of *Miller* (or, for that matter, any of the Court's attempts to regulate obscenity) is not what is before us. What recommends this aspect of the obscenity laws to our attention is the fact that it represents yet another example of the Court determining the scope of a particular federal constitutional right by explicit reference to some aspect of state law or local "societal understandings" and buttresses our argument that such an approach is appropriate in the Fourth Amendment arena where the scope of the constitutional protections depends upon a determination of whether a given expectation of privacy is reasonable or not.

### Ramifications of theory

Assuming this theory is viable, what would it actually mean in application? In a state such as California, which has a very substantial body of law protecting the privacy rights of its citizens, I think its effects would be quite significant.

Its primary effect would be realized with respect to that substantial body of California case law that speaks directly to the *Katz* question. To the extent that

the California courts have made a specific determination as to whether a given privacy expectation is reasonable or not and, thus, have provided the federal courts with authority that is clear-cut and readily discernible, the California approach should control—for the reasons set forth in the first half of this article (subject, of course, to the caveat we encounter in the independent state ground area that state courts cannot undercut the *minimum* standards established by the United States Supreme Court).

A critic might challenge this assertion, contending that the body of independent state privacy law that we wish to rely upon is part and parcel of the very state law that has been presumed lost to Proposition 8's "Right-to-truth-in-Evidence," i.e. that what cannot be done directly with California law also cannot be done indirectly.

Ignoring the intriguing question of whether the electorate really could have had something so specific as this in mind when it passed Proposition 8, let us move on to what does seem to be a very obvious answer to our critic.

Article I section 28 (d) ("The Right-to-Truth-in-Evidence"), by its very terms,

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- The case of the man who locked his rape victim in the trunk of his car so she wouldn't escape while he was appearing in court to face charges of rape, kidnapping, and armed robbery.
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<sup>29</sup>Community Standards and the Regulation of Obscenity," 24 DeP. L. R. 185, 190.

does not rescind any California constitutional protections. All it purports to accomplish is the abrogation of an exclusionary remedy to enforce the substantive provisions of California's independent state constitutional law. Independent California law is looked to but the theory in no way depends upon an exclusionary remedy to enforce the exclusionary rule—but only in the service of the Fourth Amendment. It must be re-emphasized that we are talking about federal rights here. California law becomes relevant only as a means of interpreting those rights. And, of course, pursuant to the Supremacy Clause of the United States Constitution,<sup>30</sup> the exclusionary rule for federal search and seizure law, made applicable to the states in *Mapp v Ohio* (1961) 367 U.S. 643, can in no way be undermined by Proposition 8.

Moving specifically to the *Katz* question, it is fair to say that this is an area where the California Supreme Court has spoken frequently and forcefully. The Court has relied primarily upon Article 1 section 13 of the California Constitution<sup>31</sup> (the state search and seizure provision) although "coexistent" authority has been found to emanate from California's Article 1 section 1 right to privacy.<sup>32</sup> (Indeed, at least two justices are of the opinion that Article 1 section 1 mandates even broader privacy protections than have been developed to date under traditional Article 1 section 13 analysis).<sup>33</sup>

### Courts divided on privacy

Whatever the basis, the case law is impressive. It undoubtedly marks the California Supreme Court's most striking division with the U.S. Supreme Court in the area of search and seizure law. The two courts are literally talking about different concepts of privacy. This is probably made clearest in the area of informational privacy. In the

<sup>30</sup>U.S. Const. art VI, cl.2.

<sup>31</sup>"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

<sup>32</sup>*People v Crowson* 33 Cal3d 623 at 629.

<sup>33</sup>Id at pp. 638-639 (dissent by Bird with Reynoso concurring).

area of bank records (*Burrows v Superior Court* (1974) 13 Cal3d 238), credit records (*People v Blair* (1979) 25 Cal3d 640), and telephone records (*Blair, supra* and *People v Chapman* (1984) 36 Cal3d 98), the California Court has developed a theory of privacy that recognizes that the exigencies of modern life require the individual to provide all sorts of personal data to numerous state and private bureaucracies; that in doing so, the individual has no realistic choice but to comply (only people in law school hypotheticals choose not to use banks, phones, credit cards, etc.); but that it is still reasonable for such a person to expect that those bureaucracies which have been given a glimpse of his or her personal life will use the data only for valid internal purposes rather than misuse it by disclosing it indiscriminately to the outside world for totally unrelated purposes. The U.S. Supreme Court, on the other hand has, to quote Chief Justice Bird of the California Supreme Court, "accepted the fiction that there is no expectation of privacy in bank records (*Miller*)<sup>34</sup> or in outgoing telephone call records (*Smith*)<sup>35</sup> because the user voluntarily conveys this information to a third party—the bank (*Miller*) or the telephone company (*Smith*). As a result, the individual user assumes the risk that the third party will in turn disclose it to the police upon request."<sup>36</sup>

Clearly, such disparate theories of privacy cannot be reconciled. While the approach of the California Supreme Court provides the possibility of maintaining some modicum of privacy in a world that is characterized by increasing circulation and stockpiling of personal information, the approach of the U.S. Supreme Court has led Professor Yale Kamisar to observe that:

*"It is beginning to look as if the only way someone living in our society can avoid 'assuming the risk' that various intermediary institutions will reveal information to the police is by engaging in drastic discipline characteristic of life under totalitarian regimes . . ."*<sup>37</sup>

<sup>34</sup>*U.S. v Miller* (1976) 425 U.S. 435.

<sup>35</sup>*Smith v Md.* (1979) 442 U.S. 735.

<sup>36</sup>*People v Chapman* 36 Cal3d 98, 108. f.n. 5.

<sup>37</sup>Choper, Kamisar & Tribe, *The Supreme Court: Trends and Developments, 1978-79* at p. 143 (1979).

This disparity is just as apparent in those areas other than informational privacy where the courts have been called upon to determine what constitutes a reasonable expectation of privacy.

For example, in *People v Triggs* (1973) 8 Cal3d 884, and *Smayda v U.S.* (9th Cir., 1965) 352 F2d 25, we find the California Supreme Court and the Ninth Circuit taking dramatically different positions on whether individuals charged with homosexual conduct in a public bathroom which was vacant (except for vice squad officers hidden in the walls) can be entitled to a reasonable expectation of privacy from clandestine observations by policemen.

The California Court observed that "*Most persons using public restrooms have no reason to suspect that a hidden agent of the state will observe them. The expectation of privacy a person has when he enters a restroom is reasonable and not diminished because the toilet stall being used lacks a door.*" (*Triggs, supra*, at p. 891)

The Ninth Circuit declined to follow California's lead, finding instead that the individuals assumed the risk—both because the stall was not completely enclosed and also apparently because people who "resort to such a public toilet for criminal purposes . . . deliberately take the chance that they may be observed by police officers." (*Smayda, supra*, at p. 254).

### Garbage and privacy

Trash cans and garbage form the backdrop of yet another independent application of the *Katz* doctrine by the California Supreme Court, In *People v Krivda* (1971) 5 Cal3d 357; vacated 409 U.S. 33; reaffirmed 8 Cal3d 623 (1973), the Court declared that a householder retains a reasonable expectation of privacy against police rummaging through the contents of a trash can placed at the curb for collection. Most federal courts which have dealt with this issue have tended to find the trash as having been abandoned and the subsequent police activity as not constituting a search. (See, for example, *U.S. v Shelby* (1978) 573 F2d 971).

There is yet another significant area where the California Courts have taken a clearcut stand on the legitimacy of privacy expectations that conflicts directly with that espoused by the U.S. Supreme Court. It involves the question of whether the Fourth Amendment

applies within a prison context—i.e. whether prisoners have any expectation of privacy that is reasonable.

In the past, various pluralities of the U.S. Supreme Court have expressed grave doubts on this issue (see, for example, *Lanza v New York* (1962) 370 U.S. 139 and *Bell v Wolfish* (1979) 441 U.S. 520). This past term, however, a majority specifically held that "society is not prepared to recognize as legitimate any subjective expectations of privacy that a prisoner might have in his prison cell and . . . accordingly, the Fourth Amendment proscription against unreasonable searches and seizures does not apply within the confines of the prison cell." *Hudson v Palmer* (1984) 104 S.Ct. 3194 at 3200.

California, on the other hand, in *DeLancie v Superior Court* (1982) 31 Cal3d 865 held that sections 2600 and 2601 of the California Penal Code accord prison inmates a statutory right to privacy in prisons and jails that may not be abridged except "to provide for the reasonable security of the institution . . . and for the reasonable protection of the public." Although it is obvious that those two exceptions contemplate substantial abridgement of the right, nonetheless, the Court did specifically hold that the county jail in question could therefore not monitor prisoners' conversations with visitors for the general purpose of gathering evidence for use in criminal proceedings, but rather only

to maintain the security of the jail.

The independent course of the California Courts with respect to the definition of privacy law in this area is as clear as it is dramatic. It acquires greater significance in light of the fact that the Court continues to move forward in the development of this area (*People v Chapman*, supra, decided just this past summer reaffirms and expands upon the principles of *Burrows*, *Blair*, etc.)—whereas in other substantive areas of search and seizure law, the Court shows signs of retreating to a federal standard without ever invoking Proposition 8 (see for example, *People v Superior Court (Valdez)* (1983) 35 Cal3d 11 and *People v Chavers* (1983) 33 Cal3d 462 which adopt the standard set out in *U.S. v Ross* (1982) 456 U.S. 798 for warrantless car searches.)

#### Current California cases

The California Court currently has before it two cases which raise extremely difficult questions regarding application of these independently developed *Katz* principles: *People v Mayoff*, Crim 23608 and *People v Cook*, Crim 23651 each present the question of the reasonableness of privacy expectations against aerial surveillance of marijuana fields. However the Court ultimately decides these specific cases, it is unlikely to retreat in any significant way from the coherent set of principles that it has developed in

this area—principles which have guided California privacy expectations for at least the last decade and a half and which we as California citizens have every right to rely upon as a source of legitimacy for our own subjective expectations under the Fourth Amendment of the United States Constitution.

The theory we have been discussing would have a number of other significant effects in California. Preeminent among these would be the possibility of tying California's constitutional right to privacy (Article 1, section 1, California Constitution) to federal search and seizure analysis. California has something which the federal constitution does not have—a specific protection of the "inalienable" right to privacy. It was placed in the constitution by a vote of the electorate in 1972. (For what its worth, it passed by a considerably greater electoral margin than did the initiative which produced Proposition 8.<sup>38</sup> If, as we have been saying, the scope of the Fourth Amendment depends upon which expectations of privacy society is prepared to accept as reasonable, here we have a situation where, quite literally, society has spoken. Not only did they speak up to add privacy to the list of "inalienable" rights considered fundamental to a free people, but they did so in the context of a ballot argument that is one of the most forceful condemnations of uncontrolled governmental surveillance one is likely to find anywhere.

California decisions have long recognized the propriety of looking to such election brochures as the equivalent of "legislative history" of initiative measures (see, for example, *Carter v Com. on Qualifications, etc* (1939) 14 Cal2d 179). The California Supreme Court did this specifically with respect to the election brochure for Article 1 section 1 (*White v Davis* (1975) 13 Cal § 757, 775). In so doing, the Court in *White* quoted the following language directly from the election brochure as establishing some of the parameters of the right to privacy as it now exists in California:

"At present there are no effective restraints on the information activities of government

<sup>38</sup>Privacy Admendent passed 62.9% to 37.1%; Proposition 8 passed 56.4% to 43.6%. Summary of Vote, Primary election, compiled by Secretary of State.

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(Emphasis in original.)

"The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate with the people we choose. It prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us." (13 Cal3d at 774.)

Needless to say, this language (as well as much of the rest of the election brochure) is noteworthy not only because of the vigor with which it champions the cause of personal privacy but also the specificity with which it disapproves of certain governmental conduct.

Rather than leaving the Court to plumb its own vague intuitions as to what society might be prepared to tolerate, this document identifies the "principle mischiefs" associated with invasions of privacy so precisely that the Court felt compelled to list them:

(1) "government snooping" and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; and (4) the lack of a reasonable check on the accuracy of existing records. (13 Cal3d at 775.)

Needless to say, it is quite difficult to reconcile "societal understandings" about privacy of this sort with the rationale that underlies the informational privacy cases of the U.S. Supreme Court (*U.S. v Miller*, supra, *Smith v Maryland*, supra, etc.). So too, the vast body of privacy law that the California Supreme Court has developed in interpreting Article 1, section 1 conflicts directly with much of that of the United States Supreme Court (contrast, for example, *City of Santa Barbara v Adamson* (1980) 27 Cal3d 123 with *Village of Belle Terre v Boraas* (1974) 416 U.S. 1 on the issue of whether zoning regulations restricting the number of persons who may live together in a single household unit violate the right to privacy. If Article 1, section 1 has a role to play

here, then it may be a significant one indeed.

It should probably be pointed out that the California Supreme Court has yet to rely upon Article 1, section 1 as the sole basis for exclusion in a suppression context. However, as was noted earlier, a majority of the justices do concur that Article 1, section 1 and Article 1, section 13 of the California Constitution (as well as the Fourth Amendment of the United States Constitution) are at least "coextensive when applied to police surveillance in the criminal context." (*People v Crowsen*, supra at p. 629). It is not exactly clear what is meant by this. It seems reasonable to infer that Justices Bird and Reynoso (who argue in dissent that Article 1, section 1 expands privacy rights in the search and seizure context) would vote to enforce the provision with an exclusionary remedy. What Justices Kaus and Mosk meant by the use of the term "coextensive" in the plurality opinion is less clear. The most obvious interpretation would seem to be that Article 1, section 1 provides parallel, co-equal authority for that body of privacy law that the Court has already developed in the search and seizure area—even though the Court has not seen fit to cite it in the past. This seems reasonable since the "mischief" toward which the right is directed are precisely those with which the Court has been confronted in its Article 1, section 13 privacy decisions (i.e. *Burrows*, *Blair*, *Chapman*, *Triggs*, etc.)—all of which have utilized an exclusionary remedy.

Nevertheless, this is all somewhat beside the point. The theory that is before us does not require Article 1, section 1 to be enforced with an exclusionary remedy. The exclusionary rule would be used to enforce the Fourth Amendment which would, in turn, be read in light of the policy underlying Article 1, section 1.

### Compelling interest

One last speculative observation remains about the possible role for Article 1, section 1 if it were tied to Fourth Amendment scope theory, as the Court observed in *White v Davis*, supra, the election brochure "makes clear that the amendment does not purport to prohibit all incursion into individual privacy but rather that any such intervention must be justified by a compelling interest." (*White v Davis*

at p. 775, emphasis added). That is not the language one traditionally finds in search and seizure literature and this may be what led two Justices in *People v Crowsen* (supra at p. 629, f.n. 5) to cast doubt upon its application in a traditional search and seizure case. Nonetheless, it is interesting to speculate upon its possible application in such a context. Could compelling state interest theory (plus its traditional companion requirement that the government use the least drastic means to achieve its interest) serve as a basis for strengthening the warrant requirement of the Fourth Amendment, as applied in California? In other words, could one argue that Article 1, section 1 demonstrates that California's citizens consider privacy so important a value that they expect it to be violated only upon a showing of probable cause (the compelling interest) which has been demonstrated to a magistrate by application for a warrant (the least drastic means)?

Moving back from the speculative to the concrete, one further area where the theory would seem to have obvious application would be in the area of standing—provided, that is, that the California Supreme Court decides in a case that is presently before it (*in re Lance W.*, Crim. 23551) that Proposition 8 eliminates the "vicarious standing" rule in California. Whether Proposition 8 does, in fact, achieve this result is as arguable as its effect upon the exclusionary rule in general.

It is difficult to see how the theory is of any assistance in bolstering the argument for actual retention of the vicarious standing rule. As articulated in *People v Martin* (1955) 45 Cal. 2d 755, and *Kaplan v Superior Court* (1971) 6 Cal3d 150, vicarious standing is based upon theories of greater deterrence and the imperative of judicial integrity—rather than any explicit theory of protecting privacy expectations. Privacy expectations really only become relevant once we have a standing requirement—as the principle factor in determining who has standing. *Rakas v Illinois*, supra.

### Law of standing

The theory we have been examining would be of considerable significance, however, in interpreting the law of standing if it is found to be applicable once again in California. Let us take



an example from the recent U.S. Supreme Court decisions in this area and analyze it in light of the assumption that California's privacy laws would have some bearing on the core question.

In *Rawlings v Kentucky* (1980) 448 U.S. 98, petitioner placed a large quantity of drugs in the purse of a female companion named Cox (apparently with her consent) just prior to the arrival of six police officers. In holding that petitioner has no reasonable expectation of privacy in his companion's purse (which was subsequently searched), the Court relied on the following factors: 1) that Rawlings had known Cox for only a few days; 2) that "petitioner had never sought or received access to her purse prior to that sudden bailment," 3) that petitioner did not, "have any right to exclude other persons from access to Cox's purse" and the fact that a third person had access to the purse earlier in the day; 4) the precipitous nature of the transaction and 5) the fact that Rawlings admitted he had no subjective expectation of privacy in Cox's purse because he admitted at the suppression hearing that he thought the police might search Ms. Cox's purse.

Before analyzing this in terms of California's independent tradition of privacy it should first be noted that several of the factors Rehnquist relied upon in *Rawlings* might loosely be referred to as concepts of property law. Remembering that a state's independent property law may be as important as its privacy law in providing a source outside the Fourth Amendment for the legitimization of privacy expectations (*Rakas v Illinois*, supra at 143-44 n. 12), the first point should be that it is clear that California property law contemplates that an enforceable bailment can be created between total strangers.<sup>39</sup> Moreover, first time bailments are every bit as enforceable as continuing or subsequent ones.<sup>40</sup> Thus, in California it is much less significant that Rawlings had not "sought or received access to her purse" previously.

The primary factor in Rehnquist's analysis, however, seems to be Rawlings' lack of exclusive control over

<sup>39</sup>See 3 Witkin, *Summary of Ca. Law, 8th Ed.*, §§109 et seq.

<sup>40</sup>Id.

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the purse, i.e., the fact that he did not have the right to exclude others from access to it as well as the fact that another individual had had access to the purse earlier in the day. Such exclusive control is simply not necessary to establish a protectable privacy interest in California. The privacy tradition which has developed with great clarity in such cases as *Burrows*, *Blair* and *Chapman* and which is bolstered emphatically by the legislative history of Article 1, section 1 is one which contemplates that simply because an individual sacrifices some degree of privacy with respect to one individual or agency does not mean that he has abandoned any and all claims of privacy with respect to the entire world. It is difficult to see how Rawlings' act of putting drugs in Cox's purse is any different from Mr. Burrows putting his money in the Bank of America. In California, each has a reasonable expectation that the government will stay out.

The last important factor in the case was Rawlings' frank admission that he did not believe that Cox's purse would remain free from governmental intrusion, thus evincing an absence of any subjective expectation of privacy on his part. As Professor Wayne LaFave has pointed out, "The question (as set forth in footnote 3 of the opinion) quite obviously asks the defendant what he thought was going to happen *after* the police were on the scene and *after* they had told him and the others that a warrant was being sought . . . But if one can be deprived of Fourth Amendment standing by being informed in advance by the police of the intrusion they intend to make then it is certainly correct, as the *Rawlings* dissenters complained, that the majority "has turned the development of the law of search and seizure on its head."<sup>41</sup> Once again California law is critical precisely because it has not been turned on its head in this fashion. As the California Supreme Court held in *DeLancie v Superior Court*, *supra*, at p. 876, "Privacy is not safe if a search or intrusion can be justified merely by proof that the state announced its intention in advance. This court recognized in *People v Hyde* (1974) 12 Cal3d

<sup>41</sup>LaFave, *Search and Seizure: A Treatise on The Fourth Amendment* (pp. 192-96 of 1983 pocket part to Vol. 3, §11.3).

158, that 'such a concept would sanction an erosion of the Fourth Amendment by the simple and expedient device of its universal violation.'"

Thus, although Mr. Rawlings may not have standing in Kentucky, if the court interprets the *Rakas* expectation of privacy standard in light of California's independent body of privacy and property law, there is a strong argument to be made that he would have standing for Fourth Amendment purposes in California.

#### Privacy statutes

One last area where the theory we have been discussing might have direct application is with respect to the vast array of statutory law that the California legislature has enacted over the years in order to protect the privacy expectations of its citizens. We have, in fact, already seen an example of how this might work when we looked at *DeLancie v Superior Court*, *supra*. Although the Court there was not faced with the larger question of how California statutes might affect the scope of federal constitutional law, it nonetheless had no difficulty in utilizing sections 2600 and 2601 of the Penal code to determine the *Katz* question for purposes of California law. A more expansive use of California statutes to determine the scope of federal rights would seem equally appropriate.

California's statutory privacy protections are, in many ways, as impressive as the protections we have examined in other contexts. For example, California has the oldest wire tapping prohibition in the world. It prohibited the interception of telegraph messages in 1862.<sup>42</sup> Telephone wiretapping was first prohibited in 1905<sup>43</sup> and today the entire area is regulated by the Invasion of Privacy Act (Cal. P.C. § 630 to 637.5). The Privacy Act covers much of the same territory as Title III of the Omnibus Crime Control and Safe Street Act of 1968 (18 U.S.C. § 2510-2520) although it differs in at least two crucial respects: 1) subject to a law enforcement exception, the state act requires all parties to consent to warrantless interceptions of telephone conversations while the federal act permits such interception where the consent of only one party has been obtained (*People v Conklin* (1974) 12 Cal3d 259, 270; and 2) it

<sup>42</sup>Dash, *supra* at p.8.

<sup>43</sup>Id at p. 8.

appears that California has not authorized the interception of communications by warrant while Title III provides express approval for such law enforcement activity (*People v Conklin*, *supra* at p. 271. f.n. 10).

Another example of an expansive statutory scheme protecting privacy may be found in the area of financial records. California privacy rights in this area are provided protection through the Right to Financial Privacy Act (Government Code sections 7460-7493, plus amendments to several other codes). (Federal regulation may be found in the Bank Secrecy Act of 1970 (Pub. L. No. 91-508, 84 Stat. 114 et seq.)).

The potential conflicts between these last two sets of legislation serve to illustrate the last major issue which is raised by the theory we have been examining. This concerns the question of whether the utilization of state law in the manner we have been discussing might run afoul of the supremacy clause of the United States Constitution. So long as we are talking solely about its application in California courts, the answer seems to be implicit within the theory itself. The basic presupposition is that state law is *part* of the federal law—i.e., that the Fourth Amendment incorporates the corresponding state law to define its scope. If state law is, in fact, part of the federal law then it can hardly be in conflict and supremacy clause issues are of little or no concern.

The real problem is that our theory carries us much further. Precisely because it purports to explicate federal law, it leads us to the conclusion that it must be applied in federal courts sitting in California and it must control the actions of federal officials operating in that state. Thus, for example, federal law enforcement officers would be bound by—among other things—the wiretapping provisions of the California Privacy Act. While the thought that the states might establish rules governing the actions of the F.B.I. and the application of federal law in federal courts might look somewhat attractive in a state with a progressive tradition such as California, such a concept does nonetheless seem to run counter to traditional approaches regarding the appropriate allocation of power between state and federal governments.

### Three approaches

There is neither sufficient time nor space here to explore fully the implications of such an application of the theory to federal court practice. It is suggested, however, that there are at least three separate ways that the issue might be dealt with in a sufficiently principled manner so as not to undermine the primary objective, which is its application in state courts.

The first approach would be to say the theory simply does not apply in federal court—that what is required in federal court by way of the Fourth Amendment need not be identical to that which is required in state court by way of the Fourteenth Amendment. There has been a strain of incorporation doctrine represented most recently by Justice Harlan's dissent in *Williams v Florida* (1970) 399 U.S. 78 (the 6 person jury case) and Justice Powell's concurrence in *Apodaca v Oregon* (1972) 406 U.S. 404 (the non-unanimous jury verdict case) which maintains that federal rights imposed upon the states through the Fourteenth Amendment need not mirror the federal right in every detail. This approach has not commanded a majority since the Warren Court abandoned the "fundamental fairness" standard of incorporation doctrine in the early 1960's. Nonetheless, it also has not been considered in light of an approach such as ours where the "freedom to experiment" accorded to the states would be considered only where the states have chosen to provide greater protection to individual liberties rather than less.

The second possible approach is the neatest conceptually but the least likely to succeed. This approach would be identical to the one we utilize in state court and would maintain that since any state law we look to is part of the Fourth Amendment, there is no supremacy clause problem. If the theory requires an F.B.I. agent to follow the guidelines of the California statutes regulating wiretapping rather than Title III of the Omnibus Crime Control Act, that is only because the policies underlying the California act have become part of the Fourth Amendment (when the latter is applied in California) and certainly a congressional statute such as Title III is subordinate to the United States Constitution (*Marbury v Madison* (1803) U.S. (1 Cranch) 137, 178. While

this is interesting as a theoretical conceit, at least to the extent that it subordinates congressional regulation of federal law enforcement goals and operations to the will of the individual states, it seems to contradict every traditional concept of the supremacy clause and the pre-emption doctrine.

The last approach would contend that the theory applies in federal

court but that it is subject to traditional preemption analysis when the predicate state law conflicts with acts of Congress. To the extent that the state law conflicts with prior Supreme Court decisions on the scope question it would merely supplement them and become part of a more fully explicated Fourth Amendment. But to the extent that state law actually

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conflicts with an act of Congress intended to regulate criminal activity on a national level, it might obstruct federal law enforcement policy in a way prohibited by traditional application of the preemption doctrine (see, for example, *Pennsylvania v Nelson* (1956) 350 U.S. 497).

To say that pre-emption theory might apply is not to say that it prevents our looking to state law whenever there is federal legislation in the field. Pre-emption issues depend heavily upon determinations of legislative intent and tend to lead to considerable judicial ad hoc balancing. Thus, the result in any given case is often far from clear-cut. For example, we might briefly consider the effect of the Bank Secrecy Act of 1970, *supra*, upon the utilization of the banking aspects of California's information privacy law as part of our theory. To the extent that the Act requires banks to maintain certain customer records, specifically for the purpose of facilitating federal tax and regulatory investigations, it might be viewed as undermining the principles espoused in *Burrows*, *supra*. However, both the legislative history of the act and the regulations promulgated pursuant thereto make specific reference to the fact that access to the

records is to be controlled by legal process. Since that is all that *Burrows* requires, one could argue that at least this part of the Act does not preempt California law. Needless to say, if the courts look favorably upon the theory in general there will be plenty of time to develop any pre-emption implications it might present.

### Theory a Longshot

As should now be obvious, the principle problem with this theory is that the final arbiters of its validity sit on the U.S. Supreme Court. Therefore, to the extent it is novel and ultimately redounds to the benefit of persons accused of crime, it must realistically be assessed as a longshot.

But before we reject it as being totally unrealistic, it is worth pausing to look at the authority upon which it rests.

With virtually no exceptions, every U.S. Supreme Court case that it relies upon has been authored by either one of the moderates or conservatives of the Court. Furthermore, the theory really is a conservative one at its core—at least to the extent that states' rights and notions of federalism are still viewed as being conservative in concept.

Moreover, it is increasingly obvious that the present majority is engaged in a process of taking the federal courts out of the business of protecting federal rights. Along the way, they keep suggesting that states retain the power to pick up the slack—either in terms of traditional independent state ground theory or, more recently, by actually defining the scope of federal rights as they are given application within the particular states' borders. Whether this latter concept is merely rhetoric intended to muffle the sound of courthouse doors slamming shut or whether it is a sincere invitation to state action remains to be seen. But it is clear that to the extent personal liberties are to receive any meaningful protection in the near future, it is the states which must take the lead. In the independent state ground area an impressive array of state courts are breaking ranks with the U.S. Supreme Court to do just that. California has, of course, been at the forefront of this battle. This article suggests a way in which California can continue to do this—even in the face of a regressive countermeasure such as Proposition 8. □

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