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Recently, a federal district court sitting in New York ruled unconstitutional portions of a New York City ordinance which required various public officials to disclose certain details of their personal finances.[1] Like many counterparts enacted throughout the country, this statute sought to facilitate the identification by the city of potential conflicts of interest on the part of its employees.[2] Of course, it is not extraordinary for the federal judiciary to declare state and local statutes and ordinances unconstitutional; what was extraordinary about this case was the rationale upon which the court based its exercise of judicial review.

The theory upon which the district court based its order was that the disclosures required by the statute violated the constitutional guarantee of privacy.[3] The court explicitly held that the Constitution protects individuals from compelled disclosures of certain types of

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1. Slevin v. City of New York, 551 F. Supp. 917 (S.D.N.Y. 1982).
2. *Id.* at 917.
3. *Id.* at 934-49.

unprivileged information at the order of the government in a civil proceeding.[4] The opinion is exceptional because the court systematically explores all the possible bases of this right in the text of the Constitution and purports to find the source of that right.

This case and others provide a helpful analogy for another closely related question which is the focus of this paper: what impact do privacy rights have on existing civil discovery practice? The discovery provisions of the modern Federal Rules of Civil Procedure and many state counterparts were designed and adopted long before the recent rise of privacy to constitutional status. As will be demonstrated, the development of this new right appears to require some reevaluation of the federal and California rules of procedure.

For the purpose of this inquiry, this paper will be divided into two main parts. Part I presents the existing federal and California constitutional law of privacy in the context of civil discovery. This part briefly identifies these constitutional rights and, to the extent possible, derives coherent rules about their impact on civil discovery practice from pertinent case law.[5] Part II offers existing case-law interpretations of the federal and California rules of procedure that those respective courts might adopt in order to further protect the privacy interest of individuals involved in litigation.

Privacy Interests in Civil Litigation

In federal and California practice since 1938 and 1957, respectively, it has been beyond cavil that discovery is a tool which the courts administer in a generous and liberal fashion.[6] The command of both the Federal Rules of Civil Procedure and the California Code of Civil Procedure is that discovery be allowed of all facts "relevant to the subject matter" of an action.[7] Treatises on federal practice echo the

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4. *Id.*

5. This paper will not address the extant philosophical literature which attempts to develop a definition of privacy in abstract and generalized terms. The interested reader may begin a study of that subject with the following articles: Gerety, *Redefining Privacy,* 12 Harv. C. R.-C. L. L. Rev. 233 (1977); Henkin, *Privacy and Autonomy,* 74 Colum. L. Rev. 1410 (1974); Parker, *A Definition of Privacy,* 27 Rutgers L. Rev. 275 (1974); Kurland, *The Private,* The University of Chicago Magazine 7 (autumn, 1976); A. Westin, Privacy and Freedom (1967); Fried, *Privacy,* 77 Yale L. J. 475 (1967); Ruebhausen and Brim,Jr. *Privacy and Behavioral Research,* 65 Colum. L. Rev. 1184 (1965); Pound, *Interests of Personality,* 28 Harv. L. Rev. 343 (1915); and generally, XIII Nomos (1971).

6. *See generally* Hickman v. Taylor, 329 U.S. 495 (1947) and *Greyhound Corp. v. Superior Court,* 56 Cal. 2d 355 (1961).

7. Fed. R. Civ. P. 26(b)(1) and Cal. Code of Civ. Proc. §2016(b).

statement that doubts about discovery should generally be resolved in favor of its allowance.[8]

These expansive procedures were, of course, novel developments in 1938 and 1957. Earlier practice made only limited use of depositions and interrogatories to adverse parties and third parties. The advantage of expanded discovery in terms of judicial economy and prevention of unfair surprise constituted an impetus for its adoption in both the federal and California systems.

Since 1957, however, there has arisen in both state and federal constitutional law an increasingly acute concept of individual privacy. Numerous courts, grappling with the nature of the privacy right, remark that it is still largely undefined.[9] Despite the manifest difficulty of formulating any concrete definition of this right, however, both federal and California courts find it among those guaranteed by their respective constitutions. The analysis of privacy issues by those courts provides authoritive guidance as to the legal significance of privacy in relation to disclosure of information in discovery.

A. Federal Doctrine

An understanding of the federal view of privacy probably best begins with consideration of *Whalen v. Roe*[10] and *Nixon v. Administrator of General Services*,[11] two United States Supreme Court cases dealing with the right of an individual to prevent or curb the collection by government process of personal information. Although these cases are somewhat complex in factual terms, they deserve close attention.

Whalen v. Roe involved the question of whether the state of New York could constitutionally record, in a centralized file, the names and addresses of all persons who obtained, through a doctor's prescription, certain drugs for which there were both lawful and unlawful markets. This information-gathering scheme, created by statute, sought to provide law enforcement authorities with better information in their campaign to reduce trafficking in illegal drugs. The Supreme Court upheld the statute against the objections of doctors and patients that their rights of privacy were infringed. The Supreme Court explained its conception of privacy as follows:

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8. *See* 8 C. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §2007 (1970 and Supp. 1984); 4 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE Paras. 26.55 and 26.56 (1984).

9. Plante v. Gonzalez, 575 F. 2d 1119, 1127 (5th Cir. 1978); Slevin v. City of New York, 551 F. Supp. 917, 927-28 (S.D.N.Y. 1982); White v. Davis 13 Cal. 3d 757, 773 (1975); Valley Bank of Nevada v. Superior Court, 15 Cal. 3d 652, 656 (1975).

10. 429 U.S. 589 (1977).

11. 433 U.S. 425 (1977).

> The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.[12]

In a footnote to this passage, the court defined "certain kinds of important decisions" . . . as "matters relating to marriage, procreation, contraception, family relationships and child rearing and education."[13] The court observed that "[i]n these areas, it has been held that there are limitations on the States' power to substantively regulate conduct."[14]

In *Nixon v. Administrator of General Services*, the ex-President argued privacy as an objection to a federal statute providing for the seizure and sorting of his presidential papers by federal archivists. Commingled with official papers were, allegedly, others documenting "extremely private communications between him [Mr. Nixon] and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files."[15] The court conceded that [o]ne element of privacy has been "characterized as '[t]he individual interest in avoiding disclosure of personal matters'. . . ."[16] The court then weighed the public interest in allowing archival screening of the Presidential materials of the Nixon administration[17] against the competing interest in privacy and concluded that the archival process was a reasonable device for the resolution of the conflict.[18]

From these two cases, there emerges a discrete concept of the federal constitutional right(s) of individual privacy. Specifically, that right involves both an individual interest in "autonomy" in the sense of freedom from regulation of certain conduct, and an interest in "confidentiality" in the sense of non-disclosure of confidential or personal information. Each of these branches implies certain limitations on civil discovery.

1. The Autonomy Interest and Civil Discovery

Admittedly, of the two wings of privacy doctrine set forth in *Whalen*

12. 429 U.S. 598, 599-600 (1977).
13. *Id.* at 600 n. 26.
14. *Id.*
15. 433 U.S. 425, 459 (1977).
16. *Id.* at 457.
17. *Id.* at 458-65.
18. *Id.*

and *Nixon*, that involving protection of "certain important decisions" seems less relevant to discovery. In a discovery or subpoena dispute, an assertion of privacy amounts to an argument that certain information should not be disclosed by the person holding the information to the person seeking it. This notion of privacy contrasts with that of the autonomy wing, which constitutes an objection to statutes and other state action(s) regulating conduct. Accordingly, the doctrine has seldom been argued as an objection to information disclosure.

In *Whalen*, the appellant challengers argued that the New York statute would deter individuals from seeking medical help.[19] The Court declined to embrace this argument on the ground that no significant deterrance existed on the facts of the case.[20] The circuit and district courts, for their part, have had little experience with this question. The Fifth Circuit, however, confronted this argument head on in *Plante v. Gonzalez*,[21] a case involving a Florida statute imposing financial disclosure requirements on various elected officials.[22] The Fifth Circuit was aware that the Supreme Court had clearly indicated that financial decisions were not among the "certain important decisions" immune from regulation.[23] Nevertheless, the appellants valiantly tied their argument to those "certain important decisions" by asserting that disclosure of their finances under the statute would impermissably impact the way family and personal decisions were made.[24] This argument found some support in the fact that the statute required disclosures to the public at large, and not just to selected officials.[25] The court characterized this point as an assertion that disclosure "might deter some decisions,"[26] apparently with the same effect as an outright statutory prohibition against those decisions.

The Fifth Circuit rejected this argument on the basis that the required disclosures impacted those decisions less seriously than many other permissible forms of government regulations. The court made the following observations of Supreme Court privacy decisions:

> The Court has limited the horizontal reach of the privacy right in similar situations. In *Whalen v. Roe*, the Court assumed that pro-

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19. 429 U.S. 589, 602-03 (1977).
20. *Id.* For its part, *Nixon* is not apposite to the autonomy wing of privacy doctrine.
21. 575 F. 2d 1119 (5th Cir. 1978).
22. *Id.*
23. *Id.* at 1128-32.
24. *Id.*
25. *Id.* at 1136-37.
26. *Id.* at 1131.

> tection of the autonomy right could extend to decisions concerning medical care. It recognized that the state law requiring that records be kept concerning some drug prescriptions had discouraged the use of those drugs. This was held to have insufficient effects on the patients' decisions to constitute an invasion of the patients' rights. Similarly, in *Planned Parenthood of Central Missouri v. Danforth*, the Court upheld record-keeping requirements for abortions over an objection that this would be governmental interference with the woman's choice. Finally, in *Poelker v. Doe, Maher v. Roe*, and *Beal v. Doe*, the Court held that neither states participating in the medicaid program nor cities operating municipal hospitals need provide free abortions to indigent women. Although the cost of an abortion operates as a much stronger influence on the choice involved than does financial disclosure in this case, the Court held that government actions which did not work as a bar to abortions would not be subject to scrutiny. If such strong secondary effects on family do not demand scrutiny, this financial disclosure law cannot require a close examination because of its impact on the family.[27]

The possibility remains that actual or threatened information disclosure may indirectly have the same impact on a particular activity (form of conduct) or decision as a statute directly outlawing that activity or pre-empting that decision. Inasmuch as one purpose of penal statutes is deterrence of particular conduct or results, the prospect of compelled disclosure of information relating to that conduct or those results might just as effectively deter such activities or decisions as a statute making them illegal. This might be the case, for example, if government process were used to compel disclosure of the sordid details of an abortion in the first trimester of pregnancy. In *Roe v. Wade*,[28] the court established that women have a constitutional right to choose to have such abortions; because disclosure of such information to a sufficiently large audience would curtail a woman's willingness to exercise this right, such a disclosure, arguably, is constitutionally impermissible. Similarly, discovery requests for information relating to "certain important decisions" may be constitutionally objectionable, depending on the degree of deterrent effect they generate. Discovery requests may thus seek disclosures so severely affecting protected autonomy interests as to require denial of the request. Subsequent to *Whalen* and *Nixon*, however, no case denying discovery on these grounds has been decided.

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27. *Id.* 1132-32 (citations omitted).
28. Roe v. Wade, 410 U.S. 113 (1973).

2. *The Confidentiality Interest and Civil Discovery*

In the context of a discovery dispute, the other branch of federal privacy doctrine, the confidentiality interest, facially appears the more apposite to disputes over whether and to what extent information should be disclosed. The extant case law in this area reveals the features of the right to confidentiality as a federal constitutional doctrine.

In *Whalen*, the Supreme Court considered the appellant's confidentiality and autonomy arguments simultaneously. The Court rejected both in a single analysis on the grounds that (1) the intrusion into privacy resulting from the New York program was no greater than many other intrusions ordinarily associated with the receipt of medical services, (2) a substantial number of people seemed undeterred from requesting medical assistance, and (3) the state had the power to prohibit all use of the drugs whose prescription required reporting.[29] Among these reasons, only the first is responsive to an allegation that a confidentiality interest has been infringed. The fact that no substantial deterrence occurred speaks to the automony interest, not any right of confidentiality, and the possibility of a state prohibition of the use of particular drugs is likewise not relevant to constitutional confidentiality rights, especially when no such prohibition in fact exists.

More persuasive in regard to confidentiality is the idea that many disclosures similar to those required by the New York statute routinely occur as a necessary concomitant of the receipt of medical services. As the Court pointed out in *Whalen*, the intrusions resulting from the statutory program were not "meaningfully distinguishable from a host of other unpleasant invasions of privacy [apparently permissible ones] that are associated with many facets of health care."[30] The Court, in effect, said that the confidentiality interests presented did not rise to constitutional heights. This finding may be paraphrased as the idea that no reasonable expectation of privacy existed. Indeed, this interpretation of how the Court characterized the confidentiality interest is the only explanation for the failure of the Court to reach the next logical question of the case: the determination of the appropriate standard of review of government intrusions into constitutionally cognizable confidentiality interests.[31]

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29. 429 U.S. 589, 602-04 (1977).

30. 429 U.S. 589, 602 (1977).

31. Justice Stevens' use of authority to support his analysis further suggests that this interpretation of the opinion's conception of confidentiality interests is the correct one. The footnote, *id.* at 599 n. 25, which purports to state the authoritative basis of the constitutional

Both the logic of this opinion and the authorities cited therein indicate that the Fourth Amendment law of search and seizure is the principle source of the constitutional right of confidentiality. The pertinent authorities cited by the court involve Fourth Amendment law, and the strongest, and perhaps the only tenable, argument for the result reached is that no reasonable expectation of privacy existed. Of course, the concept of a reasonable expectation of privacy is one of the fundamental elements of Fourth Amendment search and seizure law.

Nixon v. Administrator of General Services[32] further supports this view. In that case, the Court assumed without much analysis (and perhaps arguendo) that the ex-President had privacy interests of constitutional dimensions in the non-disclosure of the various documents at issue.[33] The Court disposed of the privacy argument by balancing the competing interests for and against disclosure,[34] and in so doing, cited several leading Fourth Amendment cases.[35] The balancing test is the standard under which courts review the "reasonableness" of police searches.[36] Thus, *Nixon* is a strong indicator that the Fourth Amendment is the source of the right of confidentiality.[37]

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interest in confidentiality, after a ritualistic reference to the dissent of Justice Brandeis in Olmstead v. United States, 277 U.S. 438 (1928), cites Stanley v. Georgia, 394 U.S. 557 (1969), and California Banker's Assn. v. Schultz, 416 U.S. 21 (1974). In *Stanley*, the court struck down a Georgia statute that made possession of obscene material a crime; the opinion noted in passing that state control over the availability and consumption of "ideas" implicated individual autonomy interests, 394 U.S. 557, 564 (1969), but the holding rested solely on the First Amendment, *id.* at 565-68. This reference to *Stanley*, thus, is somewhat oblique. On the other hand, *California Banker's Assn.* was a case in which various banks challenged a statute requiring them to provide records and information about certain transactions to the Treasury Department, 429 U.S. 589, 602 n.25 (1977). The appellants' argument therein was that the statute constituted an unreasonable search, 416 U.S. 21, 67-68 (1974), but the court never reached the merits of that claim because none of the appellants had standing to raise it, *id.* at 68-69. *California Banker's Assn.* speaks of privacy in the sense of Fourth Amendment protection against unreasonable government investigations.

32. 433 U.S. 425 (1977).

33. *Id.* at 457-59.

34. *Id.* at 458 "[a]ny intrusion [into the appellant's privacy] must be weighed against the public interest in subjecting the Presidential materials of appellant's administration to archival screening. Camara v. Municipal Court, 387 U.S. 523, 534-39, 87 S.Ct. 1727, 1733-36, 18 L.Ed.2d 930 (1967); Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968)." *Id.* at 458.

35. *See supra* note 34. Just before the passage quoted in footnote 34, *supra*, the court also said: "We may assume with the District Court, for the purposes of this case, that [the existing] pattern of *de facto* Presidential control [of the documents in issue] and congressional acquiescence gives rise to appellant's legitimate expectation of privacy in [the materials at issue in the case]. Katz v. United States, 389 U.S. 347, 351-53, 88 S.Ct. 507, 511-12, 19 L.Ed.2d 576 (1967)." 433 U.S. 425, 457-58 (1977).

36. Terry v. Ohio, 392 U.S. 1, 21 (1968); Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

37. This interpretation finds more and less explicit acceptance by lower federal courts.

Closer to the civil discovery setting, two cases make the reasonable expectation of privacy and the balancing test central features of their analysis of privacy objections to administrative subpoenas. In *United States v. Westinghouse Electric Corp.*,[38] the United States attorney sued to enforce subpoenas issued by the National Institute for Occupational Safety and Health (NIOSH) to Westinghouse Corp. in connection with an investigation of health and safety conditions at a Westinghouse facility. NIOSH specifically sought medical files of employees, and Westinghouse objected, urging the privacy interests of its employees. The Third Circuit recognized that constitutional confidentiality interests were involved, stating "[t]here can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection."[39] This statement amounts to a finding that the employees had a reasonable expectation of privacy as to the contents of their medical files. The court then balanced the competing interests for and against disclosure to reach a decision in favor of enforcement of the subpoena.[40]

In *E. I. du Pont de Nemours & Co. v. Finklea*,[41] a case involving a similar NIOSH proceeding, a district court in West Virginia relied exclusively on *Whalen* to find that disclosure of employee files to NIOSH did not tread upon any reasonable expectation of privacy.

In *Slevin*, though the district court did not ground its analysis of confidentiality interests in the Fourth Amendment, it interpreted *Whalen* as holding that "[i]n essence, the law did not affect a reasonable expectation of privacy, because limited disclosure of potentially embarassing medical information is 'often an essential part of modern medical practice,'" Slevin v. City of New York, 551 F. Supp. 917, 929 (S.D.N.Y. 1982). The District Court claimed that the Supreme Court's opinion in *Whalen v. Roe* "firmly established," *id.* at 927 n.9, that the source of the constitutional right of confidentiality was "the fourteenth amendment's guarantee of the substantive liberty interest in privacy." *Id.* at 927. While this statement may be accurate with respect to the source of the right to individual "autonomy," it is clearly erroneous to the extent it also purports to identify the source of the right of "confidentiality." Indeed, the district court's own opinion undercuts such a proposition when it observes that the analysis of confidentiality interests in *Whalen* centered on whether "a reasonable expectation of privacy" existed as to the information in issue, *id.* at 929, and that the same analysis in *Nixon* pivoted on the reasonableness of the intrusion into the ex-president's "legitimate expectation of privacy" as to the materials there in issue, *id.* at 930. In Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), the court phased its analysis of confidentiality rights in terms of whether the appellants entertained a "legitimate expectation of privacy" as to the financial information whose disclosure the Florida statute required, *id.* at 1135. It also explicitly justified its endorsement of that statute on the grounds that elected officials could reasonably expect less privacy than ordinary citizens, *id.* at 1135-36.

38. 638 F.2d 570 (3rd Cir. 1980).
39. *Id.* at 577.
40. *Id.* at 578-80.
41. 442 F. Supp. 821 (S.D.W.Va. 1977).

The court in *Finklea* asserted, contrary to *Westinghouse*, that employees could not reasonably expect that their files would remain confidential as against a NIOSH investigation.[42]

Finally, it seems logical that the Fourth Amendment should be the source of constitutional privacy limitations in civil discovery. If the Fourth Amendment bars unreasonable intrusions by the state into areas in which individuals entertain reasonable expectations of privacy, then the same amendment should also prevent such intrusions when the government acts as an agent for a private principal.[43] The discovery provisions of the modern rules of procedure enable civil litigants to invoke judicial power to compel the production of information, under penalty of sanctions for failure to comply. Such coercive power is state action even when exercised by a private litigant. Indeed, without the discovery provisions, no civil litigant could ever compel production of information on a routine basis. Therefore, subjecting a civil litigant to all the restrictions applied to government efforts to obtain information is entirely appropriate since the litigant is elevated to the controls of the governmental discovery apparatus.

In this connection it is important to remember that routine discovery is a relatively modern innovation. Prior to 1938 and 1957, federal and California practice, respectively, allowed discovery only in unusual circumstances. Consequently, the issue of privacy limitations on discovery is a recent development, since the problem did not exist until recently. Presently, the logical way to deal with the problem is to extend the Fourth Amendment law of search and seizure to cover "searches" through discovery by private litigants of their opponents and third parties.

3. Indicia of Privacy Interests

Plainly, the concept of a reasonable expectation of privacy is an intuitive one that is inherently difficult to define in concrete terms. Quite literally, a reasonable expectation of privacy exists whenever, in a normative sense, ordinary people think it should. Notwithstanding this common sense of the concept, federal courts seem to inform their intuition on this subject by reference to various discrete indicators of privacy interests. Understanding authorities that have been or could be persuasive as to the existence of reasonable expectations of privacy

42. *Id.* at 825.
43. *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

is helpful for purposes of predicting what courts will do in this area.

First, federal courts find a strong inference in favor of reasonable expectations of privacy when the information in question is of a type which, if possessed by a government agency, would be exempt from the disclosure provisions of the Freedom of Information Act.[44] In *Slevin v. City of New York* the district court noted that "[t]he Freedom of Information Act, and analogous state and local laws, all contain provisions limiting public access where information might compromise privacy interests."[45]

The opinions in *Westinghouse Electric Corp.* and *E.I. du Port de Nemours* were more explicit. In the former case the court buttressed its finding that employees had a reasonable expectation of privacy in their medical records by citing the Freedom of Information Act:

> Medical files are the subject of a specific exemption under the Freedom of Information Act. [citations omitted]. This difference in treatment reflects a recognition that information concerning one's body has a special character. The medical information requested in this case is more extensive than the mere fact of prescription drug usage by identified patients considered in *Whalen v. Roe* and may be more revealing of intimate details. Therefore, we hold that it falls within one of the zones of privacy entitled to protection.[46]

Since the Freedom of Information Act is a Congressional pronouncement, the sensitivity to individual privacy expressed therein commanded great respect from the court, even in an argument by analogy.

The court in *E. I. du Pont de Nemours* made slightly different use of the Freedom of Information Act. That court held that disclosure of medical files to NIOSH alone infringed no reasonable expectations of the employees, but went on to rule that NIOSH could not disseminate that information to third persons as follows:

> [S]ubsection 552(b)(6) of the Freedom of Information Act contains a specific exemption for personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted inva-

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44. 5 U.S.C.A. §552(b)(1)-(9) (West 1983) in pertinent part reads:
. . . (2) (material) related solely to the internal personnel rules and practices of an agency; . . . (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; (6) personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

45. 551 F. Supp. 917, 947 (S.D.N.Y. 1982).

46. 638 F.2d 570, 577 (3rd Cir. 1980).

> sion of privacy. . . . The court holds that such disclosure would constitute such invasion of personal privacy. Therefore, NIOSH would be prohibited by law from releasing the protected information gathered from the medical and personnel files, or disclosing same to any unauthorized persons.[47]

Again, the exemptions to the disclosure provisions of the Act provided guidance as to the existence of protected privacy interests.

Another potent indicator of privacy interests in the discovery context has heretofore gone unnoticed by the federal courts, but could nevertheless be effectively argued. Specifically, the federal judiciary has long accepted the propriety of permitting litigants, especially plaintiffs, to sue under pseudonyms in cases implicating "matters of a sensitive and highly personal nature."[48] In the federal forum, plaintiffs may sue under assumed names in birth control cases,[49] abortion cases,[50] homosexuality cases,[51] and cases involving illegitimate children or children whose fathers have abandoned them.[52] In cases in which only economic interests or professional reputations are at stake, however, the federal courts ordinarily refuse to allow use of assumed names on the ground that the same privacy interests are lacking.[53]

4. *The Significance of the Scope of Dissemination of Information Obtained Through Discovery*

Various federal court opinions indicate that the degree of intrusiveness in discovery requests relates directly to the foreseeable scope of dissemination of the information obtained. These same courts further hold that stronger interests must be shown to authorize discovery in which the information obtained will foreseeably be disseminated more broadly. In short, the foreseeable degree of dissemination is an important aspect of the magnitude of the intrusiveness of a discovery inquiry.

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47. 442 F. Supp. 821, 825 (S.D.W.Va. 1977).
48. Free Mkt. Compensation v. Commodity Esch., 98 F.R.D. 311, 312 (S.D.N.Y. 1983).
49. *E.g.*, Poe v. Ullman, 367 U.S. 497 (1961).
50. *E.g.*, Doe v. Bolton, 410 U.S. 179 (1973).
51. *E.g.*, Doe v. Dep't of Transp., Fed. Aviation Admin., 412 F.2d 674 (8th Cir. 1969); Doe v. Commonwealth's Attorney for City of Richmond, 403 F. Supp. 1199 (E.D. Va. 1975); Doe v. Chafee, 355 F. Supp. 112 (N.D. Cal. 1973).
52. *E.g.*, Doe v. Carleson, 356 F. Supp. 753 (N.D. Cal. 1973); Doe v. Gillman, 347 F. Supp. 483 (N.D. Iowa 1972); Doe v. Lavine, 347 F. Supp. 357 (S.D.N.Y. 1972).
53. Free Mkt. Compensation v. Commodity Exch., 98 F.R.D. 311, 313 (S.D.N.Y. 1983); Doe v. Deschamps, 64 F.R.D. 652 (D. Mont. 1974); *accord* S. Methodist Univ. Ass'n. of Women Law Students v. Wynne & Jaffe, 599 F.2d 707, 712-13 (5th Cir. 1979).

Regrettably, the judgment and opinion of the case most clearly articulating this idea was vacated by the District of Columbia Circuit in *Tavoulareas v. Washington Post Co.*[54] on March 15, 1984, pending rehearing en banc.[55] The case involved a third party's motion for a protective order preventing public disclosure of discovery materials sealed because of their commercial sensitivity to the movant, Mobil Oil Corp. The underlying suit was a libel action by an officer of Mobil against the Washington Post. Mobil became entangled in the litigation on the basis of subpoenas served upon it.

The opinion in that case clearly articulates the proposition that disclosure of "private" information to the general public requires greater justification than disclosure to only state employees who are under a duty of confidentiality.[56] In this connection, the court noted that the "fact that measures were taken to guard against such public dissemination figured importantly in the holdings [of *Whalen* and *Nixon*] favoring disclosure to the respective agencies."[57] The Court further observed that broader dissemination of information constituted a "more severe intrusion on confidential matters."[58]

The rules stated in *Tavoulareas* were foreshadowed in earlier federal court opinions. As the court suggests, the Supreme Court opinions discussing privacy attached significance to the likely scope of dissemination of the information in issue. In *Whalen*, the organization of the court's opinion reflects this notion. Justice Stevens divided the discussion in that case between, on one hand, the dangers posed to privacy by public dissemination of the information gathered and on the other, the intrusion into privacy attendant to disclosure to state officials alone.[59] As mentioned, the court found the latter constitutionally unob-

54. 724 F.2d 1010 (D.C. Cir. 1984) (Rehearing en banc granted March 15, 1984; judgment and opinion vacated).

55. The en banc disposition came on June 25, 1984, Tavoulareas v. Washington Post Co., 737 F.2d 1170 (D.C. Cir. 1984), but it provides little guidance. Apparently the en banc panel perceived the main issue of the case as the First Amendment question of public access to discovery materials: the panel remanded the case to the district court for reconsideration in light of Seattle Times Co. v. Rhinehart, 104 S.Ct. 2199 (1984). Over the dissent of two judges, the court refused to reinstate the opinion of the original three judge panel on the ground that nothing in *Seattle Times* "suggested that Fourth Amendment privacy interests mandated . . . the protective order" upheld therein. 737 F.2d at 1172. In short, the presence of First Amendment interests in these cases seems to have clouded the identification of Fourth Amendment privacy interests. No reason exists to believe the original three judge panel's opinion should be discounted, in cases in which free speech concerns do not arise, inasmuch as the opinion constitutes a statement about Fourth Amendment privacy interests in discovery.

56. 724 F.2d at 1020.

57. *Id.*

58. *Id.*

59. 429 U.S. 589, 603-04 (1977).

jectionable because, in effect, no reasonable expectation of privacy existed as to disclosure to the state alone.[60] As to the former, however, the court said:

> Public disclosure of patient information can come about in three ways. Health Department employees may violate the statute by failing, either deliberately or negligently, to maintain proper security. A patient or a doctor may be accused of a violation and the stored data may be offered in evidence in a judicial proceeding. Or, thirdly, a doctor, a pharmacist, or the patient may voluntarily reveal information on a prescription form.
>
> The third possibility existed under the prior law and is entirely unrelated to the existence of the computerized data bank. Neither of the other two possibilities provides a proper ground for attacking the statute as invalid on its face. There is no support in the record, . . . or in the experience of assumption that the security provisions of the statute will be administered improperly. And the remote possibility that judicial supervision of the evidentiary use of particular items of stored information will provide inadequate protection against unwarranted disclosures is surely not a sufficient reason for invalidating the entire patient-identification program.[61]

A clear negative inference from this lengthy discourse is that the prospect of widespread public disclosure of the prescription information would have made the New York program constitutionally impermissible.

In *Nixon*, the analysis of the Court was based on the same logic:

> [T]he privacy interest asserted by appellant is weaker than that found wanting in the recent decision of *Whalen v. Roe, supra.* Emphasizing the precautions utilized by New York State to prevent the unwarranted disclosure of private medical information retained in a state computer bank system, *Whalen* rejected a constitutional objection to New York's program on privacy grounds. Not only does the Act challenged here mandate regulations similarly aimed at preventing undue dissemination of private materials but, unlike *Whalen*, the government will not even retain long-term control over such private information; rather, purely private papers and recordings will be returned to appellant . . . .[62]

Again, the degree of intrusiveness varies with the foreseeable magnitude of dissemination of the personal information involved, and by negative

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60. *Id.*
61. *Id.* at 600-02 (footnotes omitted).
62. 433 U.S. 425, 458 (1977).

inference, greater public interests must be demonstrated to justify broad dissemination.

Plante v. Gonzalez[63] is further authority for the same proposition. The court in *Plante* explicitly observes that "[the Supreme Court] distinguished disclosures to employees of the state, who are under a duty to keep information obtained confidential, from disclosures to the public."[64] However, as the court in *Tavoulareas* observed, the Fifth Circuit, "after recognizing that financial privacy is a 'matter of serious concern, deserving strong protection,' . . . concluded that the public interest in [public] disclosure [of personal finances] for elected officials was even stronger."[65] *Westinghouse Electric Corp.* is consistent with this view of the role of such protective orders. In that case, the court ordered deletion of names and identifying characteristics as a prerequisite to disclosure by NIOSH of the medical information in issue to any third parties.[66] Deletion of names is a rather clever alternative to a complete bar to dissemination, but it is consistent with the notion that some such order curtailing foreseeable dissemination must be forthcoming before courts will permit the inquiry to go forward.

Finally, the *Tavoulareas* court could have cited *Slevin* and *E. I. du Pont de Nemours*, discussed above, as further support for the same views. The opinion in *Slevin* flatly states that "[t]he degree of intrusion stemming from public disclosure of the details of a person's life is exponentially greater than disclosure to government officials."[67] *E. I. du Pont de Nemours* is an almost perfect example of this principle in operation. That court permitted NIOSH access to employee medical files with the proviso that there be no disclosure of their contents to the general public, as, for example, through the Freedom of Information Act.[68]

In summary, courts are not without power to affect the foreseeable degree of dissemination of information obtained through civil discovery and subpoena. *Tavoulareas* plainly demonstrates this; to the extent a protective order limits use of discovery materials to litigants and their counsel and, then, only for the purposes of the litigation, the order substantially reduces the intrusiveness of discovery.[69] A given

63. 575 F.2d 1119, (5th Cir. 1978).
64. *Id.* at 1133.
65. 724 F.2d 1010, 1020 (D.C. Cir. 1984).
66. 638 F.2d 570, 580 (3rd Cir. 1980).
67. 551 F. Supp. 917, 934 (S.D.N.Y. 1982).
68. 442 F. Supp. 821, 825 (S.D.W.Va. 1977).
69. 724 F.2d 1010, 1029 (D.C. Cir. 1984).

discovery request or subpoena, apparently, is permissible only when such a protective order eliminates any foreseeability of disclosure to third parties; in that case these courts find the balance tips in favor of discovery.

B. California Doctrine

California Constitution, Article 1, Section 1 provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*."[70] Privacy was added to this list of inalienable rights by popular vote in 1972. Prior to that time, the state constitution made no explicit mention of privacy as a protected right.

In the absence of any specific legislative history, the California Supreme Court has looked to the arguments included in the voter's pamphlet distributed in that election to develop this somewhat cryptic reference to privacy into a workable legal doctrine.[71] In this connection, the California Supreme Court has interpreted this constitutional guarantee of "privacy" to include three distinct aspects. In *White v. Davis*,[72] a case involving police surveillance of college classes without a search warrant, the court explained the meaning of the right of "privacy" found in Article 1, Section 1 as follows:

> Several important points emerge from this election brochure "argument," a statement which represents, in essence, the only "legislative history" of the constitutional amendment available to us. First, the statement identifies the principal "mischiefs" at which the amendment is directed: (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. Second, the

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70. Emphasis added.

71. In White v. Davis, 13 Cal. 3d 757, 775 n.11 120 Cal. Rptr. 96, 106 (1975), the Court said: "California decisions have long recognized the propriety of resorting to such election brochure arguments as an aid in construing legislative measures and constitutional amendments adopted pursuant to a vote of the people. (*See, e.g.*, Carter v. Com. on Qualifications, etc. (1939) 14 Cal. 2d 179, 185, 93 P.2d 140; Beneficial Loan Society, Ltc. v. Haight (1932) 215 Cal. 506, 515, 11 P.2d 857; Story v. Richardson (1921) 186 Cal. 162, 165-66 198 P. 1057 110 Cal. Rptr. 881)."

72. 13 Cal. 3d 757 (1975).

> statement 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. Third, the statement indicates that the amendment is intended to be self-executing, i.e., that the constitutional provision, in itself, "creates a legal and enforcebable right of privacy for every Californian."[73]

Clearly, the concept of privacy found in Article 1 differs substantially from its federal counterpart. First, this notion of privacy focuses soley on access to "personal information" in the sense of facts that are confidential. In relation to federal privacy doctrine, the California right of privacy most closely resembles the "confidentiality" wing described above.

Further, the right of privacy described in *White v. Davis* explicitly places limits on "the use of information properly obtained for a specific purpose." In other words, this constitutional right separately and independently limits the ability of the government and perhaps private party accomplices to distribute or disseminate "confidential information," even when that information has been obtained without any violation of privacy. This treatment is in contrast with the federal concept of the right of confidentiality, in which the foreseeability of dissemination is an aspect of the "reasonableness" of a particular intrusion into privacy or, alternatively, the "reasonableness" of a particular expectation of privacy is considered in relation to a given intrusion. Thus, federal doctrine mixes the questions of initial disclosure with considerations of dissemination, whereas California law treats the two as separate issues.

Third, the California Supreme Court clearly indicates that strict scrutiny is the standard of review applicable to efforts to obtain confidential information. The federal standard is the Fourth Amendment balancing test, as described above. Although, as yet, the lower California courts and even the state Supreme Court apparently recognize no particular distinction between this balancing test and the requirement that a compelling state interest justify any intrusions into privacy,[74] strict scrutiny may entail a more difficult showing than that

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73. *Id.* at 775. The full text of the arguments in that brochure can be found in Appendix A.

74. Some California courts articulating the standard of review applicable to cases under Article 1, Section 1 observe that an intrusion into privacy requires the showing of a compelling state interest, but then paradoxically, the opinions state that a balancing or weighing of the competing interests is the appropriate standard. These cases include: Board of Trustees v. Superior Court, 119 Cal. App. 3d 516, 525, 174 Cal. Rptr. 160, 164 (1st Dist. 1981)(discovery sought into personnel files); City & County of San Francisco v. Superior Court, 125 Cal. App. 3d 879, 882, 178 Cal. Rptr. 435, 437 (1st Dist. 1981)(discovery sought into personnel files); Jones

required to satisfy a balancing test.[75]

1. The Threshold Requirement: A Reasonable Expectation of Privacy

In applying the principles of Article 1, Section 1, as deduced by the California Supreme Court, one District Court of Appeal recently summarized the import of the right of privacy in the context of discovery as follows:

> During the early years following the enactment of California's 1957 discovery statute, courts operated generally upon the assumption that all-out discovery at the earliest time was the highest good. But experience through the years has exposed the unnecessary hardship and expense which have become the all too common consequences of unregulated discovery. The adoption of the constitutional right of privacy emphasizes the duty of the courts to protect both parties

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v. Superior Court, 119 Cal. App. 3d 534, 550, 174 Cal. Rptr. 148, 158 (1st Dist. 1982) (discovery sought into gynecological history). Another set of cases holds that strict scrutiny is the appropriate standard (i.e. require a compelling state interest). Those cases include: Fults v. Superior Court, 88 Cal. App. 3d 899, 903; 152 Cal. Rptr. 210, 212 (1st Dist. 1979) (discovery sought into history of sexual relations); Board of Medical Quality Assurance v. Gherandini, 93 Cal. App. 3d 669, 677-81, 156 Cal. Rptr. 55, 60-62 (4th Dist. 1979) (discovery sought into medical information); Rietz v. California Camino Bank, 154 Cal. Rptr. 3, 11-12 (1st Dist. 1979) (discovery sought into financial records) (when it declined to hear the case, the Supreme Court ordered that the opinion not be officially published); Willis v. Superior Court, 112 Cal. App. 3d 277, 297, 169 Cal. Rptr. 301, 312 (2nd Dist. 1980) (discovery sought into attorney's client files); Morales v. Superior Court, 99 Cal. App. 3d 283, 290, 160 Cal. Rptr. 194, 198 (5th Dist. 1979) (discovery sought into extramarital sexual conduct). Another line of cases adopts the balancing test: Jacobs v. State Bar, 136 Cal. Rptr. 920, 926-27 (1st Dist. 1977) (not published officially) reversed on other grounds 20 Cal.3d 191, 141 Cal. Rptr. 812 (1977) (discovery sought into attorney's client files); Doyle v. State Bar, 32 Cal. 3d 12, 20; 184 Cal. Rptr. 720, 724 (1982) (discovery sought into attorney's client files); Rifkind v. Superior Court, 123 Cal. App. 1045, 1050, 177 Cal. Rptr. 82, 84 (2nd dist. 1981) (discovery sought into financial information). Last, but certainly not least, the California Supreme Court has twice stated that the balancing test is the appropriate standard of review, contrary to its position in *White v. Davis*, 13 Cal. 3d 757 (1975). Those two cases are: Doyle v. State Bar, 32 Cal. 3d 12, 20; 184 Cal. Rtpr. 720, 724 (1982) (discovery sought into attorney's client files); and Valley Bank of Nevada v. Superior Court, 15 Cal. 3d 652, 657, 125 Cal. Rptr. 553, 555 (1975) (discovery sought into financial records). Thus, divining any coherent view of the California courts as to the appropriate standard of review under Article 1, Section 1 is difficult.

75. *Compare* Tavoulareas v. Washington Post Co., 724 F.2d 1010, 1023 (D.C. Cir. 1984):

> On the basis of this case law [*Whalen, Nixon, Plante*, and *Westinghouse*], we adopt a balancing approach in determining the lawfulness of intrusions on protected non-disclosure rights. Such a balancing standard should afford necessary flexibility in serving conflicting interests in disclosure and confidentiality. We add, however, that our adoption of a balancing approach does not preclude in all circumstances the government's need to present a compelling interest to justify an intrusion. Indeed, when the intrusion is severe, a compelling interest is required to justify the intrusion. "Severe" intrusions include public dissemination of confidential information as opposed to disclosure of such information only to the government or litigants.

The other federal cases discussed above employed only a balancing test.

> and nonparties against unnecessary intrusions into matters which people ordinarily consider to be private.[76]

As the last sentence of this passage indicates, numerous California courts begin their application of Article 1, Section 1 to the civil discovery setting by posing the threshold question of whether an individual entertains a reasonable expectation of privacy as to the information sought through discovery or subpoena.

The very fact of this threshold inquiry distinguishes post-1972 practice from earlier law. Under the well known rule of *Greyhound v. Superior Court*,[77] any discovery broadly "relevant to the subject matter"[78] of a suit was almost automatically permissible, subject only to the proviso that privileged information could not be obtained. Under Article 1, Section 1, the finding that an individual has a reasonable expectation of privacy as to the information sought precludes discovery upon a mere showing of the relevance of that information to the subject matter of the suit. The constitutional right of privacy has reversed the presumption of discoverability of information relevant to the subject matter of lawsuits in a number of factual scenarios. A review of the situations in which courts have employed this new rule is instructive.[79]

Financial Information

In cases in which discovery of personal financial information is sought, the California Supreme Court has said that bank customers enjoy a reasonable expectation of privacy as to financial information held by their banks.[80] This right exists as against both government and private party efforts to obtain financial information,[81] and the

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76. Rifkind v. Superior Court, 123 Cal. App. 3d 1045, 1051-52; 177 Cal. Rptr. 82, 85 (2nd Dist. 1981) (discovery sought into financial information).

77. 56 Cal. 2d 355, 15 Cal. Rptr. 50 (1961).

78. Calif. Code of Civ. Proc. §2016(b).

79. *See generally*, Matzger: *Discovery and the Right of Privacy: Applying the Brakes to Greyhound*, 5 S.F. Bar J. 11 (No. 11 Nov. 1980).

80. Valley Bank of Nevada v. Superior Court, 15 Cal. 3d 652, 656, 125 Cal. Rptr. 553, 554 (1975).

81. Rietz v. California Camino Bank, 154 Cal. Rptr. 3, 10 (1st Dist. 1979) (not officially published) (reasonable expectation of privacy in bank records exists as against Franchise Tax Board investigation); Doyle v. State Bar, 32 Cal.3d 12, 19-20, 184 Cal. Rptr. 720, 723-24 (1982) (reasonable expectation of privacy in financial records exists as against State Bar investigation); Rifkind v. Superior Court, 123 Cal. App. 3d 1045, 1050, 177 Cal. Rptr. 82, 84-85 (2nd Dist. 1981) (reasonable right of privacy exists in financial information as against discovery in a divorce proceeding); Moskowitz v. Superior Court, 137 Cal. App. 3d 313, 316, 187 Cal. Rptr. 4, 6 (2nd Dist. 1982) (private financial information is within constitutional privacy protection as against discovery request investigating damages resulting from alleged commercial injury);

right may be asserted even if the individual is not dealing with an institutional entity. The court makes clear that ". . . an individual has a reasonable expectation of privacy to materials he submits to third parties."[82] Further, when the information is sought about the financial affairs of business enterprises, each of the partners or participant owners has a reasonable expectation of privacy as to their interest in the venture, although their finances are commingled with those of the business entity.[83]

Moreover, when discovery into finances is sought to be justified as relevant to the ability to pay damages, the same reasonable expectation of privacy exists irrespective of the substantive claims asserted in the litigation. Contrary to practice prior to 1972, the statement of a claim for punitive damages does not automatically entitle the plaintiff to immediate discovery into the personal finances of the defendant.[84] Finally, in attorney-client relations, attorneys possess a "right . . . to maintain reasonable privacy regarding their financial and business affairs, which right extends to their files for particular clients against state bar investigations."[85] As one court of appeal stated, however, "the expectation of privacy by a client merely as to his identity and the fee charged, . . . is in most circumstances probably nonexistent."[86]

For present purposes, the important principle exhibited by each of these cases is that the finding of a reasonable expectation of privacy reverses the presumptive discoverability of unprivileged information relevant to the subject matter of the action. Each court found that Article 1, Section 1 required further analysis of the question of discoverability in terms of privacy rights.

Richards v. Superior Court, 86 Cal. App. 3d 265, 273, 150 Cal. Rptr. 77, 81 (2nd Dist. 1978) (protected personal information includes financial information as against discovery based on statement of a claim for punitive damages).

82. Jacobs v. State Bar, 136 Cal. Rptr. 920, 926 n.2 (1st Dist. 1977) (not officially published) (State Bar investigation of an attorney's clients' expectation of privacy extends to confidential materials given to doctors and lawyers).

83. Rifkind v. Superior Court, 123 Cal. App. 3d 1045, 177 Cal. Rptr. 82 (2nd Dist. 1981) (in divorce proceedings, spouse of partner sought discovery into financial affairs of the partnership).

84. Richards v. Superior Court, 86 Cal. App. 265, 272, 150 Cal. Rptr. 77, 81 (2nd Dist. 1978); Cobb v. Superior Court, 99 Cal. App. 3d 543, 550-51, 160 Cal. Rptr. 561, 566-67 (2nd Dist. 1979).

85. Jacobs v. State Bar, 136 Cal. Rptr. 920, 927 (1st Dist. 1977) (not officially published).

86. Willis v. Superior Court, 112 Cal. App. 3d 277, 297, 169 Cal. Rptr. 301, 312 (2nd Dist. 1980).

Sexual Relations

Using as their touchstone federal constitutional limitations on the ability of the states to regulate sexual conduct, California courts infer a state constitutional interest in the confidentiality of sexual matters. In a paternity suit, the woman whose pregnancy is the subject matter of the proceeding has a reasonable expectation of privacy in "the names and addresses . . . of all persons with whom . . . [she has] been romantically or sexually involved . . ." around the probable time of conception.[87] Similarly, a husband suing for the wrongful death of his wife and alleging loss of consortium has a reasonable expectation of privacy in any extra-marital sexual relations he may have had,[88] and that expectation is shared by the women, if any, with whom he was involved.[89] Finally, in suits for personal injury in which the plaintiff alleges that the use of defective drugs caused prenatal injury, the plaintiff's mother, a third party to the action, has a reasonable expectation of privacy in the details of her obstetrical-gynecological history.[90]

The recognition of a reasonable expectation of privacy in the facts of each of these cases caused the courts to reject immediate discovery based on the relevance of the information to the subject matter of the suit. Although the court allowed discovery in some of these cases, the discovery was permitted only after an analysis of the privacy interests presented.

Medical Information

In the area of medical information, California discovery practice has been significantly influenced by the well-known case of *Britt v. Superior Court*.[91] In that case, the California Supreme Court denied discovery of information not directly related to the injuries alleged by a group of plaintiffs who sued a local airport on the basis of its allegedly excessively noisy operations. Without reference to Article 1, Section 1, *Britt* and its progeny articulate a doctrine of limitation of discovery into medical information. The rationale of *Britt* was

87. Fults v. Superior Court, 88 Cal. App. 3d 899, 902-05, 152 Cal. Rptr. 210, 211-24 (1st Dist. 1979).

88. Morales v. Superior Court, 99 Cal. App. 3d 283, 291-92, 160 Cal. Rptr. 194, 199 (5th Dist. 1979).

89. *Id.*

90. Jones v. Superior Court, 119 Cal. App. 3d 534, 548-50, 174 Cal. Rptr. 148, 156-57 (1st Dist. 1981).

91. 20 Cal. 3d 844, 143 Cal. Rptr. 695 (1978).

that a defendant's inquiry into medical facts not directly related to the alleged injury deterred plaintiffs from asserting their rights in court.[92] In the context of discovery into medical information, *Britt* protects plaintiffs from intrusive discovery tending to discourage them from litigation, though the decision also leaves defendants unable to establish pre-existing medical conditions as a basis for reduction of damage awards.

Notwithstanding *Britt*, Article 1, Section 1 has crept into the law of discovery of medical information. One court has held that medical patients have a reasonable expectation of privacy in their records as against an investigation by the State Board of Medical Quality Assurance into the professional abilities of a physician.[93] Although the patients were third parties to the proceeding in that case,[94] a litigants' expectations of privacy presumably would be no different. In such cases, Article 1, Section 1 represents an alternative to the *Britt* analysis that would prevent automatic discovery into medical information based on the mere showing of relevance to the subject matter of the case.[95]

Personnel Files and Arrest Records

California courts also hold that employees entertain a reasonable expectation of privacy as to the contents of personnel files kept by their employers. A criminal defendant accused of assaulting a police officer who asserts provocation as his defense may not automatically obtain discovery into the complaints in that officer's personnel files with past employers.[96] Similarly, in a libel action by a member of a medical school faculty against the school and various faculty members, where the gist of the alleged libel is that the individual defendants cast doubt on the plaintiff's scientific abilities, apparently both the contributors to the file and the individual about whom the file

92. *Id.* at 706-08.

93. Board of Medical Quality Assurance v. Gherardini, 93 Cal. App. 3d 669, 680, 156 Cal. Rptr. 55, 62 (4th Dist. 1979).

94. *Id.* at 679, 156 Cal. Rptr. at 61.

95. Notably, this subject matter area presents a clear opportunity for the comparison of California privacy law and its federal counterpart, as articulated in Whalen v. Roe, 429 U.S. 589 (1977), and the NIOSH subpoena cases described above. Unfortunately, the precedents in both judicial systems do not appeal to easy comparison. *Britt* introduced an unusual exception into California privacy law. And, as described above, the federal precedents, seem to reach conflicting results especially in the NIOSH cases. Perhaps time will bring the situation into better focus.

96. City and County of San Francisco v. Superior Court, 125 Cal. App. 3d 879, 882, 178 Cal. Rptr. 435, 437 (1st Dist. 1981).

is kept possess reasonable expectations of privacy as to the non-disclosure of the contents of the file.[97] Finally, in the third-party case where a criminal defendant seeks the names and addresses of individuals arrested by a particular police officer in order to develop a defense, the arrestees have a reasonable expectation of privacy respecting the fact of their arrest.[98]

Although some of these examples involve criminal cases, the concept of a reasonable expectation of privacy was the touchstone of analysis in all, and that concept is easily transferable to the civil setting.[99] The significant feature of these cases, for present purposes, is that the *Greyhound* rule of the presumptive discoverability of facts is reversed by the finding of a reasonable expectation of privacy, which necessitates inquiry beyond the mere question of the relevance of the information to the subject matter of the action.

2. *Indicia of Privacy Interests.*

Although recognition of a reasonable expectation of privacy constitutes a necessary first step in any analysis of privacy interests, the concept is somewhat amorphous and difficult to define in generalized terms. Several references routinely relied upon by courts to determine the presence of reasonable expectations of privacy, however, are useful for purposes of predicting when a court is likely to find a reasonable expectation of privacy.

First, California courts apparently rely on the "autonomy" wing of the federal right of privacy to find areas in which individuals enjoy a state constitutional right of confidentiality. Specifically, various state courts have taken the federal prohibition of regulation of sexual conduct as authorization for a right of confidentiality as to the same matters.[100] Since U.S. Supreme Court case law extends such prohibitions against state regulation to "matters relating to marriage, . . . family relationships, and child rearing and education"[101] as well as procreation and contraception,[102] the California courts logically could

97. Board of Trustees v. Superior Court, 119 Cal. App. 3d 516, 526, 174 Cal. Rptr. 160, 165 (1st Dist. 1980).

98. Craig v. Municipal Court, 100 Cal. App. 3d 69, 77-78; 161 Cal. Rptr. 19, 23 (2nd Dist. 1979).

99. For example, in subsequent 1983 suit by criminal defendants.

100. Fults v. Superior Court, 88 Cal. App. 3d 899, 902-05, 152 Cal. Rptr. 210, 211-14 (1st Dist. 1979) (discovery sought into identities of sexual partners in a paternity suit); Morales v. Superior Court, 99 Cal. App. 3d 283, 289, 160 Cal. Rptr. 194, 197 (5th Dist. 1979)(discovery sought into husband's extramarital sexual activities).

101. Whalen v. Roe, 429 U.S. 589, 600 n.26 (1977).

102. *Id.*

be expected to find a reasonable expectation of privacy in these areas as well.

Aside from the logical symmetry of finding a reasonable expectation of privacy in these areas as well as in the area of sexual conduct, another argument in favor of this result is that the effectiveness of the ban on state regulation in these areas is impaired if civil litigants are able to use judicial process to compel disclosure of information relating to the same matters. The deterrent effect of such disclosures on the conduct sought to be insulated from government influence might be just as great as that flowing from an outright state prohibition. If the idea of the federal bar to state regulation is that the government should not affect people's lives in these matters, the notion of a reasonable expectation of privacy in those areas aids in preventing the governmental discovery apparatus from being used by civil litigants to accomplish what the state is forbidden to accomplish directly.

Further, the analysis used by several California courts suggests that the privacy provisions of the federal Freedom of Information Act and the California Government Code are probative of the situations in which reasonable expectations of privacy manifest themselves. Two courts have relied upon the exemption from disclosure provisions of the Freedom of Information Act and California Government Code to support their findings that employees have a reasonable expectation of privacy as to the contents of their personnel files.[103] Both courts quoted the passage of the Freedom of Information Act which exempts from disclosure "personnel . . . or similar files, the disclosure of which would constitute an unwarranted invasion of privacy" as well as an identically-worded portion of the California Government Code.[104] While these exemptions are the only ones utilized thus far by California courts to deduce when reasonable expectations of privacy exist, there is every reason to suspect that other statutory exemptions may also provide guidance.[105]

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103. Board of Trustees v. Superior Court, 119 Cal. App. 3d 516, 529, 174 Cal. Rptr. 160, 167 (1st Dist. 1981); City and County of San Francisco v. Superior Court, 125 Cal. App. 3d 879, 882, 178 Cal. Rptr. 435, 437 (1st Dist. 1981).

104. CAL. GOVT. CODE §6254.

105. CAL. GOVT. CODE §6254 reads, in pertinent part:

> Except as provided in Section 6254.7, nothing in this chapter shall be construed to require disclosure of records that are any of the following:
>
> (a) Preliminary drafts, notes, or interagency or intra-agency memoranda which are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding such records clearly outweighs the public interest in disclosure.

The California legislature recently enacted a statute imposing new limitations on the ability of civil litigants to obtain "personal records" by subpoena duces tecum.[106] California Code of Civil Procedure Section 1985.3 requires that notice be given to the individual whose records are sought by service of a subpoena on a third party custodian or keeper in sufficient time (at least 15 days) to allow that individual to bring a motion to quash.[107] The statute extends protective coverage to the following:

> Personal records [meaning] books, documents or other writings pertaining to a consumer and which are maintained by any "witness" which is a physician, hospital, state or national bank, state or federally chartered savings and loan association, state or federal credit union, trust company, security brokerage firm, insurance company, underwritten title company, attorney, accountant, institution of the Farm Credit System, as specified in Section 2002 of Title 12 of the United States Code, or telephone corporation which is a public utility, as defined in Section 216 of the Public Utilities Code.[108]

(b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810) of Title 1 of the Government Code, until such litigation or claim has been finally adjudicated or otherwise settled.
(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.
. . .
(h) The contents of real estate appraisals, engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property, or to prospective public supply and construction contracts, until such time as all of the property has been acquired or all of the contract agreement obtained, provided, however, the law of eminent domain shall not be affected by this provision.
(i) Information required from any taxpayer in connection with the collection of local taxes which is received in confidence and the disclosure of the information to other persons would result in unfair competitive disadvantage to the person supplying such information.
. . .
(n) Statements of personal worth or personal financial data required by a licensing agency and filed by an applicant with such licensing agency to establish his personal qualification for the license, certificate, or permit applied for.
(o) Financial data contained in applications for financing under Division 27 (commencing with Section 44500) of the Health and Safety Code, where an authorized officer of the California Pollution Control Financing Authority determines that disclosure of such financial data would be competitively injurious to the applicant and such data is required in order to obtain guarantees from the United States Small Business Administration. The California Pollution Control Financing Authority shall adopt rules for review of individual requests for confidentiality under this section and for making available to the public those portions of an application which are subject to disclosure under this chapter.

106. CAL. CIV. PROC. CODE §§1985-1985.3.
107. CAL. CIV. PROC. CODE §1985.3.
108. CAL. CIV. PROC. CODE §1985.3 (a)(1).

The only District Court of Appeal to hear a pertinent case under this statute[109] observed that the section is probably a codification of the rule in the *Valley Bank of Nevada* case,[110] which requires, as a matter of state constitutional law, notice to bank customers of any subpoenas of their records. Since that case relied upon Article 1, Section 1,[111] however, the new statute appears to attempt a listing of at least some situations in which a reasonable expectation of privacy arises and to provide a procedural format through which the right of privacy may be asserted. Although the statute may not define all the situations in which such privacy interests exist, even in the context of financial information, the section provides a plain indication of when such interests are likely to be found by a court.

Finally, though California procedure apparently does not permit litigants to proceed under pseudonyms or anonymous surnames,[112] a court might look to the above-referenced federal decisional law respecting suit under pseudonyms to infer reasonable expectations of privacy in appropriate cases.[113]

3. *The Distinction Between the Initial Intrusion into Privacy and the Improper Dissemination of Information Legitimately Obtained.*

In *White v. Davis*, the California Supreme Court determined that one of the principal "mischiefs" sought to be remedied by the passage of Article 1, Section 1 was "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."[114] Lower courts interpreting Article 1, Section 1 in light of *White v. Davis* find an important distinction between the initial intrusion into privacy involved in responding to discovery questions and the violation of privacy which occurs when information properly obtained through such processes is communicated to persons other than the parties and their counsel

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109. Sasson v. Katash, 146 Cal. App. 3d 119, 194 Cal. Rptr. 46 (2nd Dist. 1983).

110. *Id.* at 124-25, 194 Cal. Rptr. at 49.

111. Valley Bank of Nevada v. Superior Court, 15 Cal. 3d 652, 656, 125 Cal. Rptr. 553 (1975).

112. California Rules of Court, Rule 201; CAL. CIV. PROC. CODE §442.40; 49 CAL. JUR 3d §74 *Pleading* at pp. 448-49 "[i]n the complaint, the title of the action must include the names of all the parties to the action.") *Id. But see* Central Valley Chap. 7th Step Foundation v. Younger, 95 Cal. App. 3d 212, 157 Cal. Rptr. 117 (1979) (individual plaintiffs were allowed to proceed under anonymous surnames).

113. *See* discussion of federal practice *supra* notes and accompanying text.

114. 13 Cal. 3d 757, 775, 120 Cal. Rptr. 94 (1975).

for purposes other than use in the particular litigation. The distinction between these two privacy interests is, of course, quantitative and not qualitative. The former is an interest in confidentiality as against the world while the latter is an interest in confidentiality as against the whole world, except the parties to a particular case and their attorneys.

Privacy is seldom a successful objection when the objectant refuses even to answer discovery inquiries. A discussion of the circumstances in which such refusal prevails over the competing interest in factfinding in connection with civil proceedings constitutes the bulk of Part II of this paper; for immediate purposes it suffices to say that existing case law overwhelmingly holds that disclosure of personal information to only litigants and their counsel for use in preparation of a particular case is supported by the compelling state interest in "the ascertainment of truth in connection with legal proceedings."[115] In short, with certain limited exceptions, courts find that the societal need for discovery prevails over the competing interests in privacy, at least when the disclosures are directed only to litigants.[116]

Courts distinguish this interest in confidentiality as against the world from the separate concept of an interest in preventing dissemination of personal information beyond the parties to a particular case. In a legal malpractice action alleging financial injury, where the defendants sought discovery into the plaintiff's financial condition and announced their intention to distribute that information to "such other persons 'related to the litigation to whom counsel for defendants believe such dissemination is necessary for the purposes of preparing this matter for trial,' "[117] the Second District Court of Appeals stated:

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115. The first case to articulate this proposition was In Re Lifschutz, 2 Cal.3d 415, 432-33, 85 Cal. Rptr. 829, 840 (1970) (state's interest in facilitating ascertainment of truth in connection with legal proceeding requires disclosure of confidential patient-psychotherapist communications). Since *Lifschutz*, numerous courts passing on privacy objections to discovery across diverse factual settings have adopted this view, although not all have found that the balance tips in favor of allowing discovery. Morales v. Superior Court, 99 Cal. App. 3d 283, 290, 160 Cal. Rptr. 194, 198 (1979) (discovery sought into plaintiff-husband's extramarital sexual conduct in wrongful death suit alleging loss of consortium); Fults v. Superior Court, 88 Cal. App. 3d 899, 904, 152 Cal. Rptr. 210, 213 (1979) (discovery sought into woman's sexual conduct in a paternity suit); Valley Bank of Nevada v. Superior Court, 15 Cal. 3d 652, 657-58, 125 Cal. Rptr. 553, 556 (1975) (discovery sought into third party's finances); Moskowitz v. Superior Court, 137 Cal. App. 3d 313, 316, 187 Cal. Rptr. 4, 6 (1982) (discovery sought into financial information); City & County of San Francisco v. Superior Court, 125 Cal. App. 3d 879, 881-82, 178 Cal. Rptr. 435, 437 (1981) (discovery sought into personnel files); Board of Trustees v. Superior Court, 119 Cal. App. 3d 516, 525, 174 Cal. Rptr. 160, 164 (1981) (discovery sought into personnel files); Jones v. Superior Court, 119 Cal. App. 3d 534, 550, 174 Cal. Rptr. 148, 157-58 (1981) (discovery sought into woman's gynecological history).

116. *See* Part II, *infra* for discussion of these exceptions.

117. *Moskowitz v. Superior Court*, 137 Cal. App. 3d 313, 315, 187 Cal. Rptr. 4, 6 (1982).

> Here, unlike the situation in cases such as *Britt v. Superior Court, supra*, petitioner [the plaintiff-discoveree] does not seek to restrict the scope of discovery, nor does he deny that real parties are entitled to discover the details of his financial affairs. Petitioner seeks only to prevent disclosure of the personal financial information, contained in his deposition, to persons who have no legitimate interest in its use for purposes of the litigation. Contrary to real parties' [defendants'] contention, the fact that petitioner is attempting to restrict the use of the facts discovered, rather than the scope of the discovery itself, cannot justify denial of his constitutional right of privacy in the financial information divulged in his deposition.

The manifest meaning of this analysis is that the individual interest in privacy substantially outweighs any state interest in the disclosure of materials obtained through discovery to persons other than the litigants and their counsel.

Similarly, in a suit between two former partners in a law firm for breach of contract where discovery was sought over various clients and cases of the partnership, the court found that the state interest in disclosure outweighed the interest of the clients in confidentiality. However, after noting several cases involving limitations on discovery posed by Article 1, Section 1, the court went on to hold:

> While we agree with the trial court that discovery is warranted, information of the nature requested should not be used by defendant or his counsel for any purpose beyond the restricted confines of this litigation and should not be imparted to other persons beyond the immediate needs of this controversy. If such a problem should be perceived, plaintiff's remedy would be a motion for a protective order to prevent such dissemination.[118]

The court's extensive analysis of Article 1, Section 1 as a prelude to this holding clearly indicates that the constitutional right of privacy was the basis for the ruling.

Explicitly in these two cases and implicitly in others, the courts balance the interests in disclosure against the interests in confidentiality as to non-participants in the litigation and find that the balance tips heavily in favor of confidentiality. The noteworthy point is that these courts undertook this balancing at all; California constitutional law provides a separate and discrete right to maintain the confidentiality of information obtained through discovery in relation to persons other than the litigants and their counsel.

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118. Willis v. Superior Court, 112 Cal. App. 3d 277, 298, 169 Cal. Rptr. 301, 313 (1980).

In the context of civil litigation, the constitutional right to limit the dissemination of confidential personal information amounts to the proposition that an individual about whom private information has been obtained through discovery is presumptively entitled to a protective order limiting the distribution of that information to counsel and parties solely for the purposes of the instant litigation. Perhaps in light of the relative historic novelty of modern discovery, this rule can be paraphrased as the idea that individuals have a reasonable expectation that confidential information furnished in discovery will be used solely for the ends of the litigation and otherwise will remain confidential. This principle emerges from a review of existing case law.

In a case involving discovery into a defendant's financial status on the ground that a claim for punitive damages had been alleged, the District Court of Appeal articulated this concept clearly:

> [D]isclosure of financial information in civil discovery related to a cause of action seeking punitive damages presents a situation where disclosure to counsel for the parties for the purpose of the lawsuit is relevant to the public purpose served by judicial dispute resolution. So long as the disclosure is so limited, none of the evils to which the California Constitutional declaration of the right of privacy is addressed are present. . . . So long as the disclosure is limited by a properly fashioned protective order, the invasion into privacy is held within the limits required [by the Calif. constitution].[119]

In terms of remedial devices, the question of protective orders limiting the dissemination of discovery materials correlates with the privacy implications of such dissemination. The question of the permissibility of the inquiry itself correlates with the privacy implications of disclosing the information sought solely to the limited audience consisting of the litigants and their counsel. As to the latter issue, this court found that the public interest in effective judicial dispute resolution required that the information sought be forthcoming. As to the former, however, the court said:

> We hence conclude that where a party is compelled in civil discovery to reveal financial information because the information is relevant to the subject matter of a claim for punitive damages, that party is, upon his motion, presumptively entitled to a protective order that the information need be revealed only to counsel for the discovering party or to counsel's representative, and that once so revealed, the information may be used only for the purposes of the lawsuit. The

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119. Richards v. Superior Court, 86 Cal. App. 3d 265, 273, 150 Cal. Rptr. 77, 81 (1978).

> burden is upon the opposing party to establish a substantial reason why the order should be denied. That reason must be related to the lawsuit.[120]

Numerous other cases involving diverse factual settings adopt the same rule, albeit less articulately. In a state bar investigation of alleged misconduct by a member, one court allowed subpoena of all files, documents, and papers in the possession of the attorney relating to a particular client, over the attorney's privacy objection on the basis that the state bar's investigation was confidential.[121] Such mandatory confidentiality, of course, amounts to a de facto protective order. Similarly, in another state bar investigation into an attorney's misappropriation of a client's funds, the Supreme Court enforced a similar subpoena over the privacy objection of both the attorney and client, reasoning that "all State Bar disciplinary proceedings, of course, are conducted in strict confidence, thereby assuring that private financial or other information contained in clients' files and records will not be made public nor divulged to third persons."[122]

In a legal malpractice action in which the defendants sought financial information relevant to the damages claimed, the issue of privacy arose on the plaintiffs' motion for a protective order limiting the use made of the information obtained.[123] The plaintiff did not dispute the defendant's right to that information. The court said:

> Petitioner argues that he is presumptively entitled to a protective order limiting dissemination of the financial information contained in his deposition, and the burden therefore was on real parties to show that such relief is not warranted. In support of this contention petitioner cites *Richards v. Superior Court* [citation omitted], wherein this court held: "[W]here a party is compelled in civil discovery to reveal financial information because the information is relevant to the subject matter of a claim for punitive damages, that party is, upon his motion, presumptively entitled to a protective order that the information need be revealed only to counsel for the discovering party or to counsel's representative, and that once so revealed, the information may be used only for the purpose of the lawsuit. The burden is on the opposing party to establish a substantial reason why the order should be denied. That reason must be related to the lawsuit." While the protective order in *Richards* was sought by a defendant against whom a claim for punitive damages was asserted,

120. *Id.* at 272, 150 Cal. Rptr. at 81.
121. Jacobs v. State Bar, 136 Cal. Rptr. 920 (1977) (not officially published).
122. Doyle v. State Bar, 32 Cal.3d 12, 21, 184 Cal. Rptr. 720, 725 (1982).
123. Moskowitz v. Superior Court, 137 Cal. App. 3d 313, 187 Cal. Rptr. 4 (1982).

> we think the holding of that case is applicable here, for even though petitioner (the plaintiff) himself put in issue his financial worth, he thereby waived his constitutional right of privacy only to the extent necessary for a fair resolution of the action.[124]

Finally, cases which utilize devices other than protective orders to finesse privacy problems in discovery are not inconsistent with this proposition. *Cobb v. Superior Court*[125] involved another effort by a plaintiff to obtain complete financial information about a defendant on the basis of a claim for punitive damages. That the defendant had a right to a protective order of the type described was not questioned in the case. The opinion begins with a recitation that such an order was granted. The court explicitly stated that "[s]ealing and limited access [to discovery materials] should also be considered [as a means of protecting privacy], the latter a mandatory requirement under *Richards* if appropriate objection is made."[126] The *Cobb* court went on to refuse to compel even initial answers to questions regarding finances until after the plaintiff had made a prima facie showing of the right to punitive damages.[127] This procedure seems dubious in light of the important countervailing interest in disclosure of such information in order to promote early settlement in such cases, but no part of the court's opinion undercuts the litigant's right to a protective order limiting dissemination of information legitimately obtained. In fact, the explicit language of the opinion endorsed the *Richards* approach.

Similarly, in *Morales v. Superior Court*,[128] a suit by a surviving spouse for the wrongful death of the other spouse, the court required the plaintiff to tell whether he had been having extramarital sexual relations but refused to allow the disclosure of the identities of the individuals with whom he had been involved if any. The deletion of the names and identifying characteristics of third parties who have in no sense waived their right to privacy avoids undue infringement upon those rights. Allowing such deletions, however, is not inconsistent with the availability of protective orders of the type described.[129]

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124. *Id.* at 317-18, 187 Cal. Rptr. at 7-8.
125. 99 Cal. App. 3d 543, 160 Cal. Rptr. 561 (1979).
126. *Id.* at 551, 160 Cal. Rptr. at 561.
127. *Id.*
128. 99 Cal. App. 3d 283, 160 Cal. Rptr. 194 (1979).
129. In *Craig v. Municipal Court, supra* note 98 at 69, where a criminal defendant accused of assaulting an officer sought discovery into the identities of individuals arrested by the officer, the court similarly denied the discovery because the matter of disclosure of identities was the only question before the court.

Finally, in *Board of Trustees v. Superior Court*,[130] a libel plaintiff sought discovery into his own and one of the individual defendant's personnel files, which were maintained by a co-defendant medical school. The court again granted the discovery, but with the proviso that all names and identifying characteristics of the contributors to the files be deleted. The issue of a protective order was not raised.

Hence, these cases are not inconsistent with the rule of *Richards*, entitling individuals over whom discovery is sought to protective orders limiting the dissemination of information obtained. While most courts find that the interest in ascertaining truth in judicial and administrative proceedings outweighs the individual's interest in complete confidentiality, those same courts hold that the constitutional right of privacy is paramount to any other uses of the discovered information, since the same compelling state interest is absent.

Reading the Discovery Rules in Light Of The New Right Of Privacy

As described above, in most instances it appears that privacy objections to discovery are overcome by the entry of a protective order limiting the dissemination of the discovery materials. Under California law, such a protective order is a constitutional requirement when a reasonable expectation of privacy inheres in the information in question. In federal practice, the entry of such a protective order makes a particular intrusion into privacy less severe and therefore reasonable in light of the individual's expectation of privacy. Also, such techniques as the deletion of names and identifying characteristics are available in both systems to reduce the impact of discovery upon legitimately held expectations of privacy.

This state of the law, however, leaves open the questions of whether and when discovery, even subject to such a protective order, is impermissible as an invasion of privacy. Phrased simply, does an individual have a privacy interest which protects him from even answering certain questions? At most, the law set forth above established only that protective orders are necessary to eliminate invasions of privacy. That law cannot reasonably be interpreted to mean that protective orders are *always sufficient* to meet privacy objections to discovery. In both the federal and state judicial systems, the proper test to resolve this question is some sort of balancing of interests,

130. 119 Cal. App. 3d 516, 174 Cal. Rptr. 160 (1981).

and as a theoretical matter, the individual's privacy right clearly may outweigh the need for discovery in instances in which the state interest in disclosure is weak.

The difficulty in finding such a case, however, is that enabling the parties to find new evidence and new legal issues pertinent to their case is one of the great advantages of "broad" and "liberal" discovery. The policy of modern discovery recognizes the great social utility in permitting the parties to exhaustively explore facts which have only an attenuated logical relation to the suit which originally provides the foundation for that discovery. Indeed, putting aside considerations of efficiency and economy, the best way to avoid "trial by ambush" would be to let the parties inquire into anything they wanted to. Thus, the challenge to discovery jurisprudence is to articulate a principled, instrumental test which identifies particular situations in which the state interest in disclosure of private facts is too weak to justify *any* intrusion.

A. Federal Practice

Although the Rules of Civil Procedure contain no provisions concerning privacy as such, a party may obtain a protective order barring discovery entirely[131] or circumscribing the permissible scope of discovery,[132] provided good cause is shown that the order is necessary "to protect a party or person from annoyance [or] embarassment . . ."[133] As many participants in the litigation process are painfully aware, however, this standard is not especially helpful in raising privacy objections because the set of facts whose revelation is annoying or embarrassing often includes those facts which are crucial to and perhaps even determinative of the outcome of the litigation. Unfortunately, "annoyance or embarrassment," standing alone, constitutes an overbroad description of the situations in which privacy interests exist.

Hence, as a cursory review of treatises of federal practice will reveal, the protective order provisions of Rule 26 are most often called upon to remedy abuses of discovery which are basically clerical in nature, such as redundant and excessively burdensome requests for information.[134] The protective order provisions may have some value

131. FED. R. CIV. P. 26(c)(1).
132. FED. R. CIV. P. 26(c)(4).
133. FED. R. CIV. P. 26(c).
134. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§2036-45 (1970 and Supp. 1983); 4 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE Paras. 26.67- 26.76 (1983).

to the privacy interests of nonlitigant third parties,[135] but those provisions are essentially silent as to protection for litigants from unnecessary discovery into personal matters when the information sought is broadly "relevant to the subject matter of the action."[136] In short, these provisions do not make privacy a ground for objection to discovery when the separate question of relevancy to the subject matter has already been resolved in favor of disclosure.

The balance of Rule 26(c) provides no guidance as to how a court might distinguish between permissible discovery requests and abusive ones unduly infringing upon individual privacy. Furthermore, the presence of improper motives on the part of the discoveror, which might be seen as sufficient to trigger protections, is not only intractable as a judicial inquiry without endless discovery into those motives, but also is likely to concur with valid grounds for legitimate discovery. Moreover, *in camera* review of every such issue is not practicable as a device for the routine resolution of such questions, especially when answers to interrogatories or deposition questions are sought. If protection from disclosure of private information is to be forthcoming, some other provision of the federal rules must furnish it.

Perhaps the judicial tool most commonly relied upon for denial of discovery in federal practice is the ground that the information sought is not relevant to the subject matter of the action. Federal Rule of Civil Procedure 26(b)(1) provides:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[137]

As the advisory committee comments to this passage make clear the scope of relevancy in discovery is broader than at trial, not being confined to the issues to be presented in court.[138]

The last sentence of Rule 26(b)(1) is extremely important because,

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135. Dart Industries Co. v. Westwood Chemical Co., 649 F.2d 646, 649 (9th Cir. 1980), citing Collins and Aikman Corp. v. J.P. Stevens & Co., Inc., 51 F.R.D. 219, 221 (D.S.C. 1971): " '[T]here appear to be quite strong considerations indicating that . . . discovery would be more limited to protect third parties from harassment, inconvenience, or disclosure of confidential documents.'"

136. FED. R. CIV. P. 26(b)(1).

137. *Id.*

138. FED. R. CIV. P. 26(b) advisory committee note, (1946 amendment to subdivision (b)).

more clearly than any other provision unrelated to privilege in the discovery rules, the sentence links relevancy in discovery to admissibility under the Rules of Evidence. This reference constitutes an important insight into the operation and function of discovery relevancy because without it no clear guide to the meaning of "relevant to the subject matter" of the action can be found. "Relevant to the subject matter" does not explain how to distinguish between the potentially infinite range of events which are logically related to a lawsuit and that subset of those events which should, in light of practicability and other considerations pertinent to the function of courts and civil litigation, be subject to discovery. Thus, only by the reference to the Rules of Evidence can any meaning be made of the command of Federal Rule of Civil Procedure 26(b)(1) that discovery not be restricted to the issues to be argued at trial.

The last sentence of rule 26(b)(1) is probably best interpreted, in light of these considerations, as permitting discovery of any facts directly admissible as evidence at trial as well as other facts which may, under some plausible vision of the reality of the dispute, lead to further facts themselves admissible. The argument has never been made that discovery should not be allowed over unprivileged facts directly relevant and admissible at trial. However, the proposition that discovery should be allowed when "reasonably calculated to lead to the discovery of admissible evidence" is not similarly time-honored: the last sentence of Rule 26(b)(1) was added to the rules by amendment in 1946.

As the negative language of the sentence indicates, the Advisory Committee sought, by this amendment, to eliminate an undesirable trend then developing in case law that denied discovery unless the evidence sought would be directly admissible at trial.[139] The ancient equity practice, as the committee noted in its comments, had been to restrict discovery to facts in and of themselves admissible.[140] This

139. *Id.* The amendments to subdivision (b) make clear the broad scope of examination and that [examination] may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case (citations ommited). In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice. Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry, but to the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible (citations ommited).

140. *Id.*

rule had never been widely observed as a bar to discovery in America, where most judges sat in both law and equity even prior to 1938, and many legislatures had already repudiated the rule when the Advisory committee rejected it in 1946.[141] The manifest purpose of the change was to allow discovery into facts that, as the committee put it, might uncover "leads" to other admissible evidence.[142] In so acting, the committee did not consider how discovery to obtain "leads" might ever be limited in any principled way. The concern of the authors seems to have focused on maintaining discovery as a broad and liberal tool.

One tenable construction of this provision is that the trial judge may deny discovery of facts whose disclosure is not "reasonably calculated" to produce admissible evidence. Most people would probably agree that limitation on this basis does not pose an onerous burden on fact finding and the ascertainment of truth. The evidence rules admit a wide range of information as hearsay exceptions, impeachment material, and under certain circumstances, even character evidence. Given such generous standards, significant diminution of fact finding from the adoption of this interpretation of "relevant to the subject matter" in Rule 26(b)(1) is unlikely.

More pertinent to the issue at hand, however, Rule 403 of the Rules of Evidence represents a tool for the protection of privacy. The rule provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

While guided by the factors stated, the power of the court to exclude evidence is well known as a substantially discretionary one, unlikely to be overturned on appeal. By this rule, federal judges have the power to exclude evidence which they feel would unduly slant or color a case to the prejudice of one of the litigants. The implications of this rule for discovery are manifest once the idea is accepted that a necessary relation exists between admissibility at trial and relevancy in discovery. In effect, Rule 403 serves as a source of judicial power to bar discovery over particular topics on the ground that the court would only reject any evidence gleaned from the inquiry because that evidence would be unduly prejudicial to a party.

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141. *Id.*
142. *Id.*

In this view, Rule 403 is a useful device for the protection of privacy in discovery because, empirically, matters may be extremely private precisely because disclosure will be prejudicial to the individual about whom the information relates in the eyes of others. Often, the reason such information is sought is that it relates to and casts some aspersions on a litigant. As a statistical fact of life, the overlap between the set of facts whose disclosure is an intrusion on a reasonable expectation of privacy and the set of facts whose disclosure gives rise to prejudice in jurors is substantial. The proposition, thus, is that the evidentiary standard of prejudice should be used to evaluate assertions of privacy as a bar to discovery. The high correlation between intrusions on reasonably held expectations of privacy and prejudice in jurors supports the reasonableness of this proposition. In substantial part, one person's embarrassment and another's prejudice are two sides of the same coin.

Such a rule preserves broad discovery because the standard of prejudice generally implicates a relatively narrow range of subject matter areas, and under this rule, discovery is still available when likely to lead to evidence which would not be excluded under Rule 403. At the same time, by putting privacy questions in a specific factual context, this standard makes privacy determinations less problematical. The test is a functional one that is already familiar to trial judges, and has the further advantage of protecting much private information while stopping short of extending "protection" to individuals who are unduly sensitive in a normative sense. Finally, and most important, this approach has the added attribute of only negligible infringement upon the ability of litigants to vindicate their rights at trial, since the trial court necessarily would reject any such facts actually offered in any trial. In terms of balancing privacy interests against the societal interest in disclosure, this test identifies situations in which a reasonable expectation of privacy is confronted by a *de minimus* interest in disclosure of any sort.

Well-reasoned case law supports this interpretation. Specifically, in the recent case of *Priest v. Rotary*,[143] a waitress alleged that her refusal to submit to her employer's requests for sexual favors resulted in dismissal from her job. In the action under title VII, the defendant-employer answered that the dismissal actually occurred because the plaintiff had been trying to "pick up" male customers. No assertion was made that the plaintiff was soliciting clients for prostitution. The

143. 98 F.R.D. 755 (N.D. Cal. 1983).

defendant then sought "to discover detailed information about plaintiff's sexual history, including the name of each person with whom she had sexual relations in the past ten years."[144] Pivoting his analysis on the last sentence of Rule 26(b)(1), Judge Henderson considered every possible theory under which this information might have been admissible. Borrowing the language of Rule 403 the court rejected a number of these theories on the ground that facts adduced by such discovery should not be admissible at trial because "[t]he probative value of each of the suggested inferences is so weak that it could not outweigh the obvious risk of prejudice which evidence about a person's past intimate relationship entails."[145] For this reason, discovery was denied. Notably, the waitress in this case did not argue any constitutional theory of privacy rights. The court apparently invoked the concept of prejudice in the sense of Rule 403 without realizing that the concept reflected the substantial privacy interests present in the case. A litigant such as this waitress could make her objections to discovery more compelling by pointing out her privacy interests. The case is extraordinary, though, because its analysis of the resolution of a discovery dispute relies solely on the Rules of Evidence.

Another application of this analysis is found in *Reeg v. Fetzer*,[146] a medical malpractice case in federal district court on the basis of diversity jurisdiction. In *Reeg*, the plaintiff sought discovery over whether the attending physician had completed a particular medical residency program. The court denied discovery into that matter on the alternative grounds that the information sought was irrelevant to the case and, more interestingly, that even if relevant, the information would only be excluded as unduly prejudicial under Rule 403. The court explained this extraordinary use of the rules of Evidence to resolve a discovery dispute as follows:

> [A]s the pre-trial Order in this case indicates that Defendant Shaughnessy was engaged in the general practice of medicine and the duty and standard of care would be measured on such basis, evidence as to his failure to complete a specialty residency training would not only be irrelevant, but would possibly be prejudicial and any probative value it might have would be far outweighed by the prejudicial effect of same. Such evidence would be excluded by Rule 403 . . . . Looking back to the provisions of Rule 26(b)(1), supra,

144. *Id.* at 756.
145. *Id.* at 760.
146. 78 F.R.D. 34 (D. Okla. 1976).

> it does not appear that the information sought by Plaintiff to which the instant Motion to Quash is directed is a proper subject of discovery in this action. Said Motion which properly is considered a Motion for Protective Order pursuant to Rule 26(c), Fed. Rules. Civ. Proc. is sustained on the basis the Court finds the discovery which is the subject of Plaintiff's Notice to Take Deposition filed herein January 26, 1976, should not be had as the information sought lacks the required relevance or if deemed relevant should be excluded on the basis of unfair prejudice and confusing and misleading the jury. Rule 403, Federal Rules of Evidence.[147]

In an earlier portion of the opinion, the court rejected the defendant's argument that a federal statute relating to privacy rights in information held by the registrars at medical schools created a privilege.[148] In 1976, when *Reeg* was decided, the Supreme Court had not yet decided *Whalen v. Roe* or *Nixon v. Administrator of General Services*. Consequently, the existence of a privacy interest in such records, which are akin to personnel records, had moral but not legal significance in the absence of any privilege.

Were *Reeg v. Fetzer* decided today, the court could reach the same result by combining the presence of privacy interests with its point about the prejudice arising from disclosure of that private information. The concern of this case with both privacy interests and prejudice to jurors again indicates that prejudice often results from disclosure of information with respect to which the individual possesses a reasonable expectation of privacy. Moreover, when the only reasonably foreseeable product of a discovery effort is prejudicial information as in *Reeg*, no state interest supports that discovery, and thus, intrusion on a legitimate privacy interest is improper.

B. California Doctrine

As described above, most California courts find that inquiries into an individual's private life, subject to appropriate protective orders, are justified by the compelling state interest in the ascertainment of truth in connection with legal proceedings. This determination is, in theory, the product of weighing these competing interests on a case by case basis. As in federal practice, the possibility remains open that in a given case the interest in individual privacy may outweigh the societal interest in the production of answers since the information

147. *Id.* at 37.
148. *Id.* at 36.

sought would only be excluded at trial and is unlikely to lead to other admissible evidence.[149] In short, the same argument just made with respect to federal practice could be made in a California court by substituting, Section 352[150] of the Evidence Code for Rule 403 of the Federal Rules of Evidence.

In reality, however, the California courts, taking Article 1, Section 1 as their guide, embrace a much more broad doctrine of protection of privacy expectations against disclosure to litigants. Three recent cases have denied even initial inquiry into private affairs and, in so doing, articulate an important new interpretation of the California discovery statutes in situations implicating individual privacy.

In *Board of Trustees v. Superior Court*,[151] Justice Elkington read the discovery statutes in light of Article 1, Section 1. That case was a libel action by a medical school faculty member against a colleague and the medical school. The basis of the alleged libel was that undue aspersions had been cast on the plaintiff's scientific abilities. The school objected to the plaintiff's attempted discovery of his own and the individual defendant's personnel files kept by the school, on the basis of Article 1, Section 1. The discoveree medical school specifically argued that contributors to those files held a reasonable expectation that the contents would not be disclosed outside the medical school hierarchy. Predictably, the plaintiff responded that a compelling state interest in the ascertainment of truth in connection with legal proceedings supported the request.[152]

Justice Elkington took note of these arguments and stated:

> In an effort to reconcile these sometimes competing public values, it has been adjudged that inquiry into one's private affairs will not be constitutionally justified simply because inadmissible, and irrelevant, matter sought to be discovered might lead to other, and rele-

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149. Much like its federal counterpart, CAL. CODE. CIV. PROC. §2016(b) provides:

> Unless otherwise ordered by the court . . . , the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, ... It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

CALIF. CODE CIV. PROC. §2019, which governs discovery through written interrogatories, adopts by reference this same standard for the scope of inquiry.

150. CAL. EVID. CODE. §352 reads: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

151. 119 Cal. App. 3d 516, 174 Cal. Rptr. 160 (1981).

152. 119 Cal. App. 3d at 525, 174 Cal. Rptr. at 164.

> vant evidence. (See Greyhound Corp. v. Superior Court, supra, 56 Cal.2d 355, 390-393, 15 Cal. Rptr. 90, 364 P.2d 266.) "When compelled disclosure intrudes on constituionally protected areas, it cannot be justified solely on the ground that it may lead to relevant information." And even when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must be a "careful balancing" of the "compelling public need" for discovery against the "fundamental right of privacy. [citations omitted]"[153]

Justice Elkington's statement requires some clarification. The citation to *Greyhound Corp. v. Superior Court*[154] modifies the preceding sentence in a peculiar way. *Greyhound* held, in the passage cited, that inquiry into facts that are inadmissible is still permissible when such inquiry might lead to other evidence that is admissible.[155] When Justice Elkington refers to facts themselves "inadmissible, and irrelevant", he must mean irrelevant in the sense of inadmissible or in the sense of excludable at trial. Likewise, when the Justice later in the same sentence speaks of justifying discovery on the ground that it "may lead to other, and relevant, evidence," he must mean relevant in the sense of (and to the extent) admissible at trial. The court in *Greyhound* (in the cited passage) discussed only the question of admissibility at trial as an objection to discovery. No statements were made by the court respecting "relevance" in any sense independent of admissibility. Section 2016(b) of the California Code of Civil Procedure is the only statutory source of any right to discovery not withstanding the inadmissibility of the facts sought. In light of the language of Section 2016(b) as interpreted in *Greyhound*, Justice Elkington's statement makes sense only to the extent he really means "admissible" when he says "relevant".

Taken in this light, however, the sentence following the *Greyhound* citation has a very cogent meaning for those interested in protecting individuals from intrusive discovery inquiries. A clearer paraphrasing of that sentence would indicate that, when compelled disclosure intrudes on constitutionally protected areas, it cannot be justified solely on the ground that it may lead to admissible evidence. Actually, truly vociferous advocates of privacy rights as against discovery might prefer the word "relevant" in place of "admissible", since the set of facts

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153. *Id.*
154. 56 Cal. 2d 355, 15 Cal. Rptr. 90 (1961).
155. *Id.* at 391-93, 15 Cal. Rptr. at 108-10.

admissible at trial is a subset of those relevant to the issues. However, a completely literal reading of the opinion is not justified by Section 2016(b), its only possible source in the Code of Civil Procedure, nor by the general thesis of *Greyhound Corp. v. Superior Court*. The foregoing, more restrained interpretation is the only logical one in light of the statutes and authorities.

Understood in this way, the rule of this case furnishes effective protection against even initial discovery inquiries into personal matters. The clear negative implication of this rule is that discovery is not permissible into private matters when the only justification is that the discovery might yield admissible evidence. While the court does not explicitly state it, the rationale of this rule must be that the state interest in compelling disclosure of information is weaker when the sole value of the information sought is that it might lead to other information itself admissible. A strong state interest is clearly manifest as to facts directly relevant to issues at trial, but that interest is lacking when the usefulness of the information sought is more speculative and the likelihood of discovery of admissible evidence is minimal.

The authorities support this interpretation of California law. In *Board of Trustees*, the court allowed discovery into the files only after the names and identifying characteristics of the contributors had been removed,[156] but cases cited by Justice Elkington in the opinion were even less sympathetic to the discovery sought. In *Fults v. Superior Court*,[157] the court of appeal flatly rejected interrogatories propounded by a defendant in a paternity suit that inquired into the identity of sexual partners around the probable date of conception. Using the same line of reasoning as that found in *Board of Trustees*, the court rejected the interrogatories *in toto*.[158] Similarly, in *Morales v. Superior Court*,[159] the identical argument was the basis of the rejection by the court of interrogatories which inquired into the names, addresses, and telephone numbers of individuals with whom a wrongful death plaintiff had had sexual relations during his marriage to his deceased spouse. In both cases, the courts said "[w]hen compelled disclosure intrudes on consitutionally protected areas, it cannot be justified solely on the ground that it may lead to relevant information."[160] Although this

156. 119 Cal. App. 3d 516, 532, 174 Cal. Rptr. 160, 168 (1980).
157. 88 Cal. App. 3d 899, 152 Cal. Rptr. 210 (1979).
158. *Id.* at 905, 152 Cal. Rptr. at 214.
159. 99 Cal. App. 3d 283, 160 Cal. Rptr. (citing Shelton v. Tucker, 364 U.S. 479, 483-85), 194 (1979).
160. *Id.* at 288-89, 160 Cal. Rptr. at 197.

statement is borrowed from a United States Supreme Court case decided in a much different context, in light of Article 1, Section 1, it should be read as a statement that discovery should not be allowed when the only justification offered for it is that the discovery might lead to admissible evidence.

Conclusion

Article 1, Section 1 of the California Constitution provides considerable protection for individuals who find that details of their private lives have become a target of discovery. The drafters of the 1957 Civil Discovery Statutes originally envisioned that considerable improvement in the efficiency and effectiveness of litigation could be realized by allowing the parties to obtain discovery into all unprivileged matters broadly relevant to the subject matter of the suit. In accordance with that premise, broad and sweeping access to information was the object. The same can be said of the 1938 federal discovery rules and the 1946 amendments thereto. Practice, however, shows this outlook gives insufficient consideration to the privacy interests of individuals against whom intrusive inquiries are directed. Article 1, Section 1 of the California State Constitution and less powerfully, the Fourth Amendment to the U.S. Constitution, provide a basis for judicial protection of privacy interests as against intrusive discovery. In both federal and state practice, a reasonably-held expectation of privacy delimits the set of situations in which such a right arises; various discrete indicators, other than mere intuition, provide guidance as to when such reasonable expectations of privacy exist. Third parties may claim their rights as well as litigants.

In both state and federal practice, courts are quick to grant protective orders limiting dissemination of the information sought or obtained through discovery to the parties and their counsel and then only for use in the instant litigation. In both systems, however, the state interest in the ascertainment of truth in connection with judicial proceedings ordinarily requires that intrusive inquiries be answered, provided an appropriate protective order is available.

California practice, finally, differs from federal practice in that California affords more opportunities for an individual to legitimately refuse to answer intrusive discovery inquiries even when a protective order limiting the dissemination of the answers might be entered. Just as Rule 403 of the Federal Rules of Evidence should provide a basis for refusal to answer inquiries into personal affairs, California decisional law interpreting Article 1, Section 1 can be read to the effect

that such questions need not be answered when the only justification for the inquiry is that it "might" lead to admissible evidence. Although balancing the competing interests in factfinding and in privacy is assuredly a difficult and problematical endeavor in many cases, the latter undoubtedly should prevail when confronted by only a negligible or speculative interest in the former.

APPENDIX A

Argument in Favor of Proposition 11

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

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

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

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

Even more dangerous is the loss of control over the accuracy of government and business records on individuals. Obviously if the person is unaware of the record, he or she cannot review the file and

correct inevitable mistakes. Even if the existence of this information is known, few government agencies or private businesses permit individuals to review their files and correct errors.

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

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

Proposition 11 also guarantees that the right of privacy and our other constitutional freedoms extend to all persons by amending Article 1 and substituting the term "people" for "men". *There should be no ambiguity about whether our constitutional freedoms are for every man, woman and child in this state.*

KENNETH CORY
Assemblyman 69th District
George R. Moscone
State Senator, 10th District

Rebuttal to Argument in Favor of Proposition 11

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

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

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

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

JAMES E. WHETMORE

State Senator, 35th District

Argument Against Proposition 11

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

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

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

The most important reason why the amendment should be defeated, however, lies in an area where possibly privacy should *not* be completely guaranteed. Most govenment welfare programs are an attempt by California's more fortunate citizens to assist those who are less fortunate; thus, today, millions of persons are the beneficiaries of government programs, based on the *need* of the recipient, which in turn can only be judged by the revealing his income assets and general ability to provide for himself.

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

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

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

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

JAMES E. WHETMORE
State Senator, 35 District

Rebuttal to Argument Against Proposition 11

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

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

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

KENNETH CORY
Assemblyman, 69th District