THE ENDANGERED RIGHT TO PRIVACY: USE OF INTERNATIONAL NORMS BY MUNICIPAL FORUMS

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The right to privacy has attracted attention for at least a century in the United States on account of the lack of direct protection it has received by the content of municipal law. Over these years this attention has turned into deeper and deeper concern corresponding to the gravity of danger into which notions of privacy have been exposed. Indeed, at the moment of writing this narrative, the United States Senate, through one of its subcommittees, seems to be examining at least one particular aspect of the onslaughts on the privacy of an individual by the process of computers.[1]

While the matter clearly remains deserving of serious attention at the level of domestic law, quite *unexpectedly* it has received valuable support from the domain of international human rights law. Recent court adjudications have suddenly given impetus to a new line of argument: that in appropriate situations, with imaginative approaches, municipal forums can profitably utilize international norms to provide fresh aid and support for this endangered right to privacy.

If case law on these lines can develop, it is possible that not only domestic notions of a right to privacy will be further matured, but international dimensions of this matter will attain sharper focus. It is important to realize that internationally also efforts should be accelerated to deal with this problem. If privacy has to be guaranteed, transnational interferences no less than domestic ones, must be effectively checked.

International human rights law is now in its third generation.[2]

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1. N.Y. Times, Dec. 13, 1982, at 1, col. 1.

2. The human rights of the first generation are said to be civil and political in nature, while that of the second generation are directed towards economic, social and cultural matters.

Indeed in the last few years efforts at the international level have been progressing to create *more*, but somewhat complex, kinds of human rights.[3] But while this has been occurring, it is somewhat surprising that the right to privacy, clearly acknowledged as far back as 1948, has received scant attention at the international level.

The following discussion, *inter alia*, will highlight the point that as both consciously and unconsciously modern society's reliance on science and technology has produced a massive interference in the privacy of an individual, there has also taken place a growing realization in countries like the United States that the norms of the law should also protect one's privacy from intrusions which have taken place as a *consequence of such mechanisms*. As a result of this realization there has been manifestly a movement *in evidence*, though not very successful, to *extend*, as and when required, the guarantees of the law to protect a person from newer kinds of invasions of his private life.[4] The use of the word "extend" should be noted. We will soon see that the domestic constitutional systems like that of the United States generally speaking do *not* directly address the question of privacy *stricti sensu*. As such, courts and juristic efforts have contributed to the *enlargement* of the protections given by other rights, which are directly recognized by the domestic law to cater for newer kinds of invasions of privacy.

In contradistinction to this municipal position, for example, of

3. The present third generation of human rights deals with more complex types of protections to be offered to the people particularly as a consequence of the establishment of the New International Economic Order. *See, e.g.,* UNESCO, *Experts Report*, Rapporteur, Peter O'Brien (SS-78/CONF. 630/COL. 2). In 1980, UNESCO engaged international human rights experts for presenting theses on *new* human rights. The new set of human rights examined were: (1) the right to communicate; (2) the right to be different; (3) the right to environmental; (4) the right to peace; (5) the right to development; and, (6) the right to common heritage of mankind. This author was assigned the task of devising the second of the rights mentioned above. *See* UNESCO, SS/CONF-806/Col. 7.

4. For the most recent debate on this question see *Senators to Examine Official Use of Computor Data on Individuals*: *Hearings by the Oversight Subcomm. on Governmental Affairs of the Senate*, *reprinted in* N.Y. Times, Dec. 13, 1982, at 1, col. 1. The purpose of these hearings are summed up by the following passage in the report:

> More than 200 Federal and state projects are using computers to examine the names, addresses and other information about millions of Americans, looking for waste of public funds and a variety of criminal activities.
> A broad range of politicians, business executives, agency officials and public interest groups say the projects save taxpayers money and improve public administration. Others question the efficiency, ethics and long-term impact of at least some of the programs, including those involving the Internal Revenue Service.
> The Oversight Subcommittee of the Senate Committee on Governmental Affairs will hold hearings this week on the growing number of computer matching projects, as they are called, and their effect on both individual freedoms and government efficiency.

the United States, it will be seen that internationally, the right to privacy is specifically acknowledged. It will be later discussed that when the post-World War II human rights developments began, *inter alia*, by the creation of the Universal Declaration of Human Rights (Universal Declaration), the right to privacy was indeed mentioned by this famous international instrument.

Since subsequent international developments in the evolution of human rights did little to project this matter, it might be concluded, that possibly, it was not considered altogether urgent to do so with great fervor of dedication. Or perhaps, similar to the domestic field, it might have been the unconscious feeling that other existing rights could solve the *kinds* of problems which this right could possibly redress. Or could the real reason for neglecting this matter be ignorance? The manner in which privacy has been gradually invaded during the last thirty years might never have been realized.[5]

At the outset one important point about this matter must be emphasized: *privacy*, both domestically as well as internationally, as a desirable human goal, is definitely in the category of "endangered species." It will be submitted in this short presentation that scientific progress coupled with increasing governmental and institutional control over the individual have so much eroded conceptions of privacy that unless: (1) the *gravity* of the situation is recognized internationally (and of course nationally), and (2) appropriate measures are taken to alleviate the problem, the international legal system (like the municipal ones) will increasingly become powerless to safeguard some *fundamental* aspects of an individual's life. In this context it will be argued that one method of protecting privacy domestically is through the use of international norms dealing with this subject.

With regard to the invasions of the privacy of Americans by computers and machines, the Director of the Washington Office of American Civil Liberties Union, in a very recent report, stated:

> Conducting huge fishing expeditions into personal files, using them for purposes wholly unrelated to why the files were initially

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5. *Id.* at 14, col. 1.

Among civil libertarians, the worry is that computer matching is gradually eroding the ethical values expressed by the First, Fourth and Fifth Amendments to the Constitution. These provisions protect citizens' rights to free speech and to freedom from improperly intrusive Government activities, and some critics believe that the protection is weakened by computer examination of the records of large groups of people, most of whom are not guilty of any wrongdoing.

Id.

> collected and working on the basic assumption that people must prove their innocence of wrongdoing if their name appears in a computer printout is an assault on the most basic concept of personal privacy and freedom.[6]

While this paper will not provide any tangible answers of how to remove this peculiar deprivation of human freedom, it will stress that in appropriate domestic cases, efforts may be made to redress the underlying problems by using international norms in municipal forums. It will be suggested to call in aid, or simply incorporate, the normative international law on the point by the enforcement-remedial process of domestic systems of States.

This suggestion is essentially based on an awareness that international enforcement procedures in any case are difficult to create and may not be the best solution (under the present setup of international realities) to deal with the kinds of problems we want to solve. In particular, the somewhat imprecise nature of protection required by the individual under this right may be better served by domestic forums. Furthermore, as any *infringement* of privacy will usually occur within the territorial jurisdiction of a country, most likely in an area which is on the "penumbra" of one or several domestically protected rights, municipal forums may be better equipped to deal with the situation.[7]

In this context two recent domestic United States cases will be seen which have made use of this technique to aid notions of *human privacy, dignity and decency* as contained in *international* texts while deciding *domestic controversies*. It should also be noted at the beginning that while lawyers are not too comfortable with labels such as "dignity" and "decency," this is a field where this must be done. *Ex hypothesi, these are the very matters, abstract as they might appear on first glimpse, which a right to privacy will be directed to protect*.

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6. *Id.* at 14, col. 2. Similarly, President Nixon, in an address to the nation, is reported to have said:

> What a person earns, what he owes, what he gives to his church or to his charity is his own personal business and should not be spread around without his consent . . . When personal information is given or obtained for one purpose such as a loan or credit at a store, it should not be secretly used by anyone for any other purpose.

Id. at 14, col. 3.

7. "Penumbra," as a term, was used by Justice Douglas in *Griswold v. Connecticut*, 381 U.S. 479, 483, 485 [hereinafter cited as Griswold]. *Griswold* concerned the use of contraceptives by married people; the Court stuck down the law forbidding such use.

I. THE SCOPE OF THE RIGHT TO PRIVACY

As already indicated the premier source of a right to privacy in the international sphere is the Universal Declaration. To that we shall turn to shortly, but it is well to point out that it is not really possible to project the true scope of this right at the international level within the limited field envisaged by this Article. But that is not to say that even with larger ambitions, it would be easy to do so either domestically or transnationally. At least that much will become clear in the next section of this Article.

The right to privacy was mentioned in the Universal Declaration, along with a number of other matters. Article 12 of the Declaration reads as follows: "No one shall be subjected to arbitrary interference with his privacy, family, home or corresponding, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."[8]

Before turning our attention to the right to privacy, which is protected by this article, it will be helpful to briefly comment on the other protections called for by this provision. It will be apparent that the protection of home and correspondence will be readily found to exist in the laws (even if not in practice) of most States. Usually, both constitutional law as well as diverse rules of criminal law protect such spheres. The matter of family by law may differ from State to State as well as the notion of what constitutes a family. The question of reputation and honor is not very bothersome as it would normally be protected by both the law of torts as well as in some cases by the criminal law. That leaves us with the concept of privacy.

The *extent* to which various aspects of privacy may be remedied by the other rights mentioned in article 12 (or by other articles) of the Universal Declaration need not be examined. We will later see that while discussing this subject there is great advantage in being flexible on this point. But conceding that certain aspects of what constitutes privacy could be dealt with by other internationally proclaimed or protected rights, what is it which, *stricti sensu*, can be emphasized to constitute the *core* of a right to privacy? What is, essentially, the *foundation* of this right?

A short answer to this question will be provided in a moment.

8. G.A. Res. 217A, 3 GAOR (A/810) at 71-77, *reprinted in* L. SOHN & T. BURGENTHAL, BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS 30-34 (1973).

However, it must be added that the manner in which this is being done here is not necessarily the only way of approaching this problem. It is possible, depending upon one's perspectives and goals, to argue that this right is grounded on diverse premises.

But with this preface, it is submitted that while existing tabulation of rights usually found in constitutional texts aim to provide guarantees against encroachment of specific types by the State against an individual's freedom of actions, and to protect his person or property, this right is really concerned with ensuring that the *dignity* of man is not violated. Admittedly, it can be argued that the concept of "dignity" might itself be as vague or abstract as that of privacy. But, as we shall soon see, it appears that by virtue of two recent court decisions (and, of course, some earlier ones), it is possible to justifiably contend that the right to privacy is indeed deriving a major or substantial part of its genesis from what in civilized societies we designate by notions of "dignity" and "decency." In essence, a right to privacy will keep such considerations sacrosanct for an individual.

That considerations such as these really constitute the heart of the concept of privacy can be seen by examining the language of article 12 quoted above. While separately each of the other matters needing protection, as already submitted, is usually specifically covered by diverse rules of domestic laws, we obtain a more clear idea about privacy, at least as conceived by this clause, by looking at the *totality* of the protection article 12 envisages. The five particular matters which must be safeguarded against "arbitrary interference" after privacy are said to be: family, home, correspondence, honor and reputation. It would seem that not only does privacy precede the other five requiring protection, but in many ways it guides us to see the philosophical basis of this entire provision.

Quite clearly the protection being advocated is not in respect of the common variety of private interests that civilized legal systems generally protect. The traditional list of such protected interests consists of the integrity of the person and property of an individual together with other matters which progressively developing societies came to accept as deserving of sanctity. In this category, matters such as reputation, intellect and spiritual predilictions were given a protected status. But what domestic legal systems generally did not do, or even try to accomplish, was to evolve directly a comprehensive legal theory or apparatus to allow an individual complete mastery over information which pertains to his *own af-*

fairs—provided of course that no infringement of the law was involved. In other words, an opportunity to be left alone or secure from the scrutiny or gaze of outsiders in all matters (consisting of information about him) in which they had no concern is not provided. When viewed in this light it appears reasonable to submit that mention of the *immediate* surroundings of an individual (i.e., his home, family, and honor) clearly meant to convey the message of affording him, in his own habitat, an inviolable position.

In this context two further points need attention. First, the inviolability described above was placed by this provision only at the level of "arbitrary interference." In other words, this protection was subject to lawful and reasonable control and regulation by the State. Second, mention of matters such as family and honor manifestly emphasize the *intimate* nature of relationships that an individual may have which were to be accorded security of protection. In sum, the privacy which this provision meant to protect was to extend to all personal and intimate information that every individual, regardless of his status in life, possesses. Conversely, if outsiders acquired information of this kind about an individual, he would invariably be placed in a position of indignity — at least from the perspective of the individual.

II. RIGHT TO PRIVACY: PROBLEMS OF DEFINITION

We can now briefly advert to the problem of lexicography pointed out above, i.e., unless the scope of the undertaking is *truly exhaustive*, even in domestic systems, it is difficult to encompass the definition, extent and scope of a right to privacy.

One of the most illustrative depictions of this matter can be seen by looking at the Bill of Rights to the United States Constitution. *Prime facie*, it will be seen that this most famous of documents of its kind does not mention a right to privacy. While assaults of various kinds on the person or property (including reputation) find laws in their path, the prerogative of an individual *to be left alone* about his feelings and thoughts, or to keep information about himself away from others—as long as directly or indirectly no law is infringed—is not directly acknowledged.

In view of this fact the judges in this country, in some cases, attempted to safeguard some hithertofore unprotected spheres of an individual's personal existence by extending the halo of acknowledged guarantees. In the context of our discussion perhaps the

most well known case of this category is *Griswold v. Connecticut*.[9] In this case Justice Douglas, *inter alia*, said:

> *Various guarantees create zones of privacy*. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is *another facet of that privacy*. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to *create a zone of privacy* which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparge others retained by the people.[10]

Justice Douglas then referred to other cases[11] and writings [12] and concluded that "the present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[13] It is thus clearly manifest that without defining privacy, the protection of certain *private* aspects of a per-

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9. Griswold, 381 U.S. 479.

10. *Id.* at 484 (emphasis added).

11. *Id.* For the fourth and fifth amendments the Court referred to *Boyd v. United States*, 116 U.S. 616, 630, which provided protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." Other cases considered were: *Mapp v. Ohio*, 367 U.S. 643, 656; *Breard v. Alexandria*, 341 U.S. 622, 626, 644; *Public Utilities Comm'n v. Pollak*, 343 U.S. 451; *Monroe v. Pape*, 365 U.S. 167; *Lanza v. N.Y.*, 370 U.S. 139; *Frank v. Maryland*, 359 U.S. 360; and, *Skinner v. Okla.*, 316 U.S. 535.

12. Griswold, 381 U.S. at 485. The Court referred to Beaney, *The Constitutional Right to Privacy*, 1962 SUP. CT. REV. 212 and Griswold, *The Right to be Let Alone*, 55 NW. U.L. REV. 216 (1960).

13. Griswold, 381 U.S. at 485. While referring to the *Boyd* case, the Court reiterated in a note its opinion therein:

> The principles laid down in this opinion [by Lord Camden in *Entick v. Carrington*, 19 How St Tr 1029] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgement. In this regard the Fourth and Fifth Amendments almost run into each other.

Id. at 484-85.

son's life was extracted from the "penumbra" of specified guarantees in the Bill of Rights. Accordingly, while a right to privacy does find mention in the *case law*, we do not have a direct acknowledgment of it in the Constitution of the United States.[14] Nevertheless, we do have in the United States several cases, particularly from the domain of constitutional and criminal law, which indicate or identify the situations where this right might apply.[15]

A brief look historically at the right of privacy would show that the subject had attracted the attention of earlier writers and authorities long before most of the cases referred to in *Griswold*. Perhaps the most important of such accounts is an article by Samuel Warren and Louis Brandeis, entitled *The Right to Privacy*, written in December of 1890 and published in the *Harvard Law Review*.[16] Apparently, Warren had been upset at reports published about him by the press and wanted to stress the need to be "let alone." For example, the article states:

> That the *individual* shall *have full protection* in person and property is a principle as *old as the common law*; but it has been found *necessary* from *time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society*. Thus, in very early times, the law gave a remedy only for physical interference with life and property . . . . *Later, there came a recognition of man's spiritual nature, of his feelings and his intellect*. Gradually the scope of these legal rights broadened; *and now the right to life has come to mean the right to enjoy life,—the right to*

14. While the Federal Constitution does not mention this right, it is mentioned in state constitutions. See, e.g., art. 1, § 1 of the California constitution which states: "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." This section was added November 5, 1974. *See also* Behr, *Privacy: To Be Or Not To Be, That Is The Question*, 10 PAC. L.J. 633 1979; Alexander & Spurgeon, *Privacy, Banking Records and the Supreme Court: A Before And After Look at Miller*, 10 SW. L. REV. 13 (1978); Bryant, *Sexual Display of Women's Bodies—A Violation of Privacy*, 10 GOLDEN GATE U. L. REV. 1211 (1980); Comment, *The Relational Right Of Privacy*, 4 U.C.L.A. L. REV. 92 (1956); Comment, *Constitutional Limitations Upon Congressional Investigations*, 5 U.C.L.A. L. REV. 645, 653 (1958); Note, *In re Scott K.: The Juvenile's Right to Privacy in the Home*, 68 CALIF. L. REV. 783 (1980).

15. Some other important cases dealing with the right to privacy are *Katz v. United States*, 389 U.S. 347 (1967) ("reasonable expectation of privacy") and *Rakus v. Ill.*, 439 U.S. 128 (1978) ("legitimate expectation of privacy"). The leading electronic surveillance case is fifteen years old. *Berger v. United States*, 388 U.S. 41 (1967). *See also* cases cited *supra* notes 9 and 11. *See generally* W. LAFAVE, SEARCH AND SEIZURE (1978).

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

> *be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession — intangible, as well as tangible.*[17]

A sound prophesy as to the *means* which might be used to *invade* the privacy of a person (in the sense described above) were described to be:

> *Recent inventions* and business *methods* call attention to the *next step which must be taken* for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." *Instantaneous photographs* and newspaper enterprise have *invaded the sacred precincts of private and domestic life*; and *numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops."*[18]

We accordingly attain a glimpse of the methods, which as far back as the last century, were considered potentially employable to take from a person the private aspects of his life. That this kind of attack was an affront to the *dignity, spirituality* and *intellect* of people in civilized societies was, perhaps, the underlying justification for having such a right considered worthy of protection by the law at the municipal level.

From this brief resume we can state at least the following four conclusions about this right in the domestic law of the United States:

(1) The right to privacy is not directly mentioned by the Constitution of the United States.

(2) Nevertheless, privacy is referred to by numerous cases which without defining it state that the source of this protection lies in the "penumbra" or the "zones of protection" of different constitutional rights.

(3) While being based on the notions of a civilized society regarding the "dignity" of the individual,[19] its exact parameters were left undefined; this was clearly done consciously as to allow its application whenever necessary, without being bogged down by rigid lines of precedents or lexicography.

(4) The invasions of an individual's privacy were identified as coming from newer inventions by which the public or the State

17. *Id.*

18. *Id.* at 195 (emphasis added).

19. Warren and Brandeis further observed that "the common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others." *Id.* at 198.

could acquire information which was the individual's right to *keep to himself*. The right to privacy was indeed said to be the same thing as the right to be *left alone*.

Accordingly, it is submitted that the wisdom of earlier authorities leads us to shy away from undertaking a comprehensive lexicographical task of expounding in detail what this right covers or may cover in the international field. We will have a fair idea of what needs attention in the future if we realize (1) what needs protection (the right of an individual to keep to himself what he does not want others to see or know about him since it pertains to his person or his private matters)[20] and, (2) from what quarters the invasion is likely to come (through new inventions of science and technology).

A. International Human Rights Law and the Right to Privacy

After this brief survey of the position of this right to privacy in the domestic case law of the United States, we can revert to the discussion of this subject in the field of international law.

The foremost point to notice is that, perhaps, here is a rare case where the normative content of a particular human right appears to be more clearly supported by a leading international text of high authority[21] than by the provisions of the constitutional law of a country. Indeed, the country we are speaking of is no other than the one which gave birth to the idea of having fundamental human

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20. This still covers a large field even if one takes away the few cases where States might impinge on privacy for matters of national security or crime prevention. While addressing such matters, Senator William S. Cohen, Chairman of the Oversight Committee on Governmental Affairs said:

> Computer matching offers an excellent opportunity for the government to crack down on waste and fraud . . . . But there must be a proper safeguard to protect against an unwarranted invasion of privacy. I am hopeful these hearings will provide an opportunity to discuss what the proper balance between these two concerns should be.

N.Y. Times, Dec. 13, 1982, at 1, col. 1.

21. The Universal Declaration of Human Rights, G.A. Res/ 217(III). U.N. Doc. A/810 (1948). *See also* Schwelb, *The Influence of the Universal Declaration of Human Rights on International and National Law*, 53 A.S.I.L. Proc. 217 (1959). The following United Nations report states:

> During the years since its adoption the Declaration has come, through its influence in a variety of contexts, to have a marked impact on the pattern and content of international law and to acquire a status extending beyond that originally intended for it. In general, two elements may be distinguished in this process: first, the use of the Declaration as a yardstick by which to measure the content and standard of observance of human rights; and, second, the reaffirmation of the Declaration and its provisions in a series of other instruments. These two elements, often to be found combined, have caused the Declaration to gain a cumulative and pervasive effect.

The Secretary General, 1971 Survey of International Law (A/CN.4/245, at 196).

freedoms incorporated into its Constitution some two hundred years ago. As such, while domestic decisions, some of which were referred to earlier, have had to argue to find support for this right in the confines of other directly recognized guarantees, we have in the international field a clear acknowledgment of this particular matter.

And this is important since the two cases which form the underlying basis for writing this short Article have commendably buttressed their rulings by *also* referring to, admittedly in a supporting role, the clear acceptance of notions of individual privacy, dignity and fairness as found in texts of an international character. As these judicial developments occur at a time when international human rights law has received considerable significance in two other cases,[22] the opportunity is presenting itself at a propitious time to strengthen and accelerate juridical efforts to advocate the cause of the right to privacy not only on the basis of domestic law, but on the transnational norms as well. As demonstrated in *Fernandez v. Wilkinson*, international human rights law can find itself appearing through the channel of incorporation or as an interpretive aid in the domestic law of a State like the United States.

In this country the use of transnational norms by domestic forums in human rights matters is currently experiencing a tremendous upsurge.[23] Historically, a manifest shift is visible from the days of the famous case of *Sei Fujii v. California* in which the California Supreme Court refused to accept that the Charter of the United Nations, which is admittedly a treaty, could not be given effect internally without corresponding domestic legislation.[24] This is the well known controversy about executing and non-self executing treaties and may not need further comment here. But in the last few years the judiciary seems to be following, at least in some matters, a shift away from its earlier refusal to allow the flourishing of

22. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) [hereinafter cited as Filartiga] and *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980), *aff'd sub. nom. Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981) [hereinafter cited as Wilkinson].

23. *See generally* Hassan, *Panacea or Mirage? Domestic Enforcement of International Human Rights Law: Recent Cases*, 4 HOUS. J. INT'L L. 13, 32 (1981); Schneebaum, *International Law as Guarantor of Judicially-Enforceable Rights: A Reply to Professor Oliver*, 4 HOUS. J. INT'L L. 65 (1981). *See also* Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation*, 4 HOUS. J. INT'L L. 39, 47 n.48 (1981).

24. Sei Fujii v. Cal., 38 Cal. 2d 718, 242 P.2d 617 (1952). See also Article VI of the United States Constitution, which contains the "supremacy clause" making treaties the "supreme Law of the Land."

international human rights in domestic controversies.[25] If this is an indication of a *trend*, one may have good grounds for hoping that the threatened right to privacy in the domestic realm may have supportive norms available from the domain of international human rights law. Both cases where this has been recently done will exhibit that notions of privacy of the individual can be juristically supported by such a recourse. The sudden and unexpected support for the right to privacy from such a quarter should be fully utilized in the future, in addition to the traditional techniques applied for this purpose in the past.

It is also hoped by this author that two important realizations will emerge as a result of the ensuing discussion. First, the two cases which we propose to deal with will signify that this right to privacy is *not only* to be located in Article 12 of the Universal Declaration, but in other international instruments as well. Consequently, it will be contended that just as in the domestic United States law where the right to privacy has been drawn from various sources to *cover diverse situations*, similarly, from the international field, we may be able to project *zones of privacy* by drawing on different subjects protected by the international human rights law. Second, it will be submitted that municipal courts and jurists ought to take initiative to follow the *modus vivendi* adopted by these two recent cases of locating the protection of this right in the diverse norms of the international society for *possible use* in *domestic* litigation. This process will invariably also add to the jurisprudence of transnational human rights law on a subject, which as already noted, is of increasing importance in both domestic and international law.

III. A DIFFICULT PROBLEM

Before turning to an examination of the two cases in which what is submitted above has been done, it is necessary to properly

25. Some of the well known cases in which courts refused to invoke international human rights law are: e.g., Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); American Federation of Labor v. American Sash & Door Co., 335 U.S. 538 (1949); Boyer v. Garret, 183 F.2d 582 (4th Cir. 1950); Ruiz Alicia v. United States, 180 F.2d 870 (1st Cir. 1950); Katzenbach v. Morgan, 384 U.S. 641 (1966); Keeney v. United States, 218 F.2d 843 (D.C. Cir. 1954); South African Airways v. New York State Division of Human Rights, 64 Misc. 2d 707, 315 N.Y.S. 2d 651 (N.Y. Sup. Ct. 1970); New York Times Co. v. City of New York Comm'n on Human Rights, 362 N.Y.S. 2d 321 (N.Y. Sup. Ct. 1974) *aff'd*, 49 App. Div. 2d 851, 374 N.Y.S. 2d 312 (1977); Diggs v. Schultz, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); Diggs v. Civil Aeronautics Board, 516 F.2d 1248 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 910 (1976).

comprehend the real dimensions of the problem articulated previously. Warren and Brandeis complained in 1890 that thoughts, feelings and some very personal matters of an individual were threatened by new advances in technology. We are faced with such a threat today. Indeed, never before has this threat been more real than in our own age. When the Universal Declaration was drafted in 1948, something was known pertaining to what this right of privacy was meant to protect. But in the last three decades, the unbelievable advances in science and technology have given totally new significance to the *potential* of vehicles of encroachment, which has increased the *awareness* of the need for such a protection. The increase in the capacity of technological gadgets and computers, nationally and internationally, has given both governments and big institutions an enormous ability to know many things about an individual. In fact, it is no hyperbole to state that the information so acquired constitutes most unbelievable *power over the individual*. Whether the knowledge thus acquired is properly or improperly used is less relevant than the awareness that the law must not allow the individual to be placed at such a disadvantage. Knowledge about the most personal and private aspects of a person's life, when no crime has been committed by him, is something which free and civilized societies never intended to be placed in the hands of anyone except the individual concerned. If we allow this to happen, it is undeniable that the *freedom protected elsewhere* will also be threatened or actually impacted.

Alas, as a corollary to advances in science, the ordinary individual has no alternative in his daily life but to rely, wittingly or unwittingly, on the services and facilities of such a nature. As such, he is bound to hand over many aspects of his most "personal" data to machines which can be utilized in various ways. The use of this knowledge need not be adverse to him. The harm is done even if such personal matters become public knowledge.

Developments of this nature have occurred almost as a by-product of this society's reliance on the help science has brought to our existence. The international legal system is still, it is submitted, not fully aware of what directions such matters are taking or may eventually take.[26]

A look at the domestic situation with regard to this subject may be helpful. If we look generally at the developments which

26. *See supra* notes 4-6.

have occurred within the United States, it will be found that since the adoption of the Bill of Rights, the courts have endeavored to increase the protections available to the individual under the enumerated guarantees. But in the last three decades, many such juristic human rights advances are under serious threat by the machines which this society has come to utilize. Freedom of, or in our context, the privacy of the individual is all but eroded if the State desires to infringe upon such privacy. Both advanced countries such as the United States and developing nations possess the means to wiretap and bug anything they choose. This can occur domestically or internationally. Distance, in this respect, is meaningless. Machines which can both hear and see are available on land, sea, air and even in areas beyond this planet's atmosphere. Furthermore, many types of very personal information (specifically in countries like the United States) become public knowledge the moment they appear on the tape of a computer (e.g., bank deposits, buying, selling and other matters relating to such things as credit or business undertakings). Concerns associated with crime prevention have all but utterly taken away the inviolability of the home and automobile.[27] While this phenomenon should be considered bad enough in countries like the United States, what can one speak of many other countries where dictators of various ideologies hold sway?

The extent to which information about individuals is being collected today surpasses anything of this nature that has occurred in the past. Not only the quantity, but the promptness with which it can be utililzed, thanks to modern machines and computers, is a serious blow to conceptions of freedom on which democratic societies are based. In a totalitarian society, at least ideologically, this kind of extraordinary control over individuals is understandable even if repugnant to liberal intellectual sensitivists. But to allow this to happen simply as an *incidence* of a modern scientific era is something to be deplored in those communities which pride themselves in being founded on considerations of freedom, equality and individual initiative.

Perhaps a century ago, an individual, for most matters, had control over all aspects of information about him, his home, his name or his family. The excessive use of data and statistics in

27. For recent automobile cases see *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), *Del. v. Prouse*, 440 U.S. 648 (1979), *Robbins v. Cal.*, 453 U.S. 420 (1981), *N.Y. v. Belton*, 453 U.S. 454 (1981) and *United States v. Ross*, 102 S. Ct. 2157 (1982).

nearly all domains of our existence, whether collected by the State or commercial and private institutions, has utterly changed that state of affairs. The passing of such information into the hands of others is no longer a matter of volitional control of the individual concerned. What an individual feels, does or thinks, for many important matters, is no longer guaranteed to remain secreted deep in the place or institution where it was deposited or transmitted with volition.

Since the dimensions of this problem do not stop at national frontiers, it is necessary to argue for and create international protections. Internationally, therefore, privacy was not that much in jeopardy in 1948 when the Universal Declaration was speaking of it, *as it is today*. Given the international realities of the day (i.e., the desire of both States and other multinational institutions to collect as much data as possible on individuals they may have to deal with), this author is not sure if anything at all can be done to negate this trend. But, like in other areas of human rights, one simply has to try.

IV. RECENT CASES

Having laconically identified the nature of the problem, we can now turn to the two recent United States decisions in which, while dealing with the cases of prisoners, the two courts *utilized an international instrument* in one case to support the right to privacy, and in the other to safeguard the "dignity" of the individual in accordance with standards of decency of civilized nations. The importance of these cases, in the context of the theme of this Article, lies in the fact that the courts, admittedly domestic, were able to refer to, in addition to domestic law, international norms as an index of the desires of the international community. Moreover, the particular source of such notions was said to be a text which is not the Universal Declaration (which as already emphasized, does contain specific acceptance of a right to privacy).

The two cases are *Lareau v. Manson*[28] and *Sterling v. Cupp*.[29] In both cases, the courts referred to the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations in support of domestic law to conclude that certain types of *indignities* could not be thrust upon the prisoners by the administration.

28. 507 F. Supp. 1177 (D. Conn. 1980) [hereinafter cited as Manson].
29. 290 Or. 611, 625 P.2d 123 (1981) [hereinafter cited as Cupp].

In *Manson*, the prisoners contended that (1) overcrowding violated their rights and, (2) they required protection from the chance of being given communicable diseases by the failure of the officials to properly medically screen new inmates. After analyzing relevant laws, the court noted that its attention had been directed towards the United Nation's Standard Minimum Rules for the Treatment of Prisoners referred to above. After an examination of these rules the court noted:

> The adoption of the Standard Minimum Rules by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders and its subsequent approval by the Economic and Social Council does not necessarily render them applicable here. *However, these actions constitute an authoritative international statement of basic norms of human dignity and of certain practices which are repugnant to the conscience of mankind.* The standards embodied in this statement are relevant to the "canons of decency and fairness which express the notions of justice" embodied in the Due Process Clause.[30]

In a later passage the court addressed the subject of standards of human "decency" utilized by civilized nations by stating:

> The "*evolving standards of decency*" with which the overcrowding of inmates at the HCCC are incompatible include the Standard Minimum Rules for the Treatment of Prisoners, which have been adopted by the United Nations Economic and Social Council (the members of which include some nations whose standards of decency and human rights are far less stringent than our own) and thus form part of *the body of international human rights principles establishing standards for decent and humane conduct by all nations*.[31]

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30. Manson, 507 F. Supp. at 1188.

31. *Id.* at 1192. The supporting note (18) to this citation may be quoted verbatim as it stresses the relevant international human rights law on the varied facets of "decency."

> The relevance of international norms such as the Standard Minimum Rules to the determination of the "evolving standards of decency" which are basic to our Eighth Amendment jurisprudence is underscored by Article 7 of the International Covenant on Civil and Political Rights, which prohibits "cruel, inhuman or degrading treatment or punishment" of individuals. The Covenant (which, in Article 7, parallels the Eighth Amendment to the United States Constitution) is an international treaty; although it has not been ratified by the United States Senate, it is not necessarily without significance for this country (which signed it on October 5, 1977, *see U.S., Fulfilling Promise, Signs 11-Year Old Rights Pacts at U.N.*, N.Y. Times, Oct 6, 1977, p. A2, col. 5), since "multilateral agreements designed for adherence by states generally . . . may come to be law for non-parties by virtue of state practice and *opinio juris* resulting in customary law." Comment f to *Restatement of the Foreign Relations Law of the United States (Revised)* § 102 (Tent. Draft No. 1, 1980). Similarly, Article 5 of the Universal Declaration of Human Rights prohibits "cruel, inhuman or degrading treatment or punishment." As the Court of Appeals for the Second Circuit recently observed, the United Nations General Assembly "has de-

The court, thereafter, examined existing precedents and applicable rules and granted both requests of the prisoners.

While this case does not speak directly for a right to privacy as such, the thrust of the court's discussion is clearly aimed to stress that when the space allocated to prisoners, already very limited, is reduced through over-crowding, it offends the standards of decency of civilized people. The court, as already emphasized, referred to canons of fairness. Its reference to international instruments and writings of international lawyers brought to focus the desire to stress that at least some degree of protection of a person's personal life (in this case of prisoners) finds support on a transnational plane. The "zones" of privacy in this case were said to exist, *inter alia*, in the international Standard Minimum Rules for the Treatment of Prisoners. Admittedly, the court decided the case more on the basis of available domestic law than by the application of international norms. The court did state, however, that certain obligations pertaining to human rights involving human secrecy were a part of customary international law, and constituted the "expression" of the "international community."[32]

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clared that the [UN] Charter precepts embodied in the Universal Declaration [of Human Rights] 'constitute basic principles of international law.' " *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980), *quoting* G.A. Res. 2625 (XXV) (Oct. 24, 1970). The Universal Declaration is " 'an authoritative statement of the international community,' " *id.* at 883, *quoting* E. Schwelb, Human Rights and the International Community 70 (1964); which "creates an expectation of adherence, and 'insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States.' " *Id.*, *quoting* 34 U.N. ESCOR, Supp. (No. 8) 15, U.N. Doc. E/cn. 4/1/610 (1962) (memorandum of Office of Legal Affairs, U.N. Secretariat). As our Court of Appeals noted in *Filartiga*, "several commentators have concluded that the Universal Declaration has become, *in toto*, a part of binding, customary international law." *Id. See* Schluter, *The Domestic Status of the Human Rights Clauses of the United Nations Charter*, 61 Cal. L. Rev. 110, 145-46 (1973); cf. *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975).

Id. at 1193 n.18.

32. *Inter alia* note 9 states:

Apart from Connecticut's administrative adoption of the United Nations Standard Minimum Rules for the Treatment of Prisoners, those standards may be significant as expressions of the obligations to the international community of the member states of the United Nations, cf. *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980), and as part of the body of international law (including customary international law) concerning human rights which has been built upon the foundation of the United Nations Charter. *See generally* Buergenthal, *Codification and Implementation of International Human Rights* 15-19 in Human Dignity: The Internationalization of Human Rights (A. Henkin ed. 1978). It is well established that customary international law is part of the law of the United States. *See, e.g.*, *The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 299, 44 L.Ed. 320 (1900); L. Henkin, Foreign Affairs and the Constitution 221 (1972). The United Nations Charter is, of course, a treaty ratified by the United States. 59 Stat. 1031, T.S. No. 993 (1945). Although not self-executing, *see Hitai v. Immigration & Naturalization Service*, 343 F.2d 466, 468 (2d Cir. 1965), the Charter's provisions on human rights are

It is thus submitted that such a highly progressive attitude of a domestic court by which it argued for canons of *dignity* and *fairness*, which individuals must possess in a civilized society by virtue of transnational instruments, deserves our highest appreciation.[33] The reference to concepts of "dignity" and "fairness," which some may term more philosophic and idealistic than real law, emphasizes the apparently limitless potential of this right as well as its moral content.[34] It is perhaps a manifestation of an awareness that notions of a person's "dignity" are not really esoteric or platonic, but are desirable practical ends to be accomplished or safeguarded through positive law. Domestically, the courts in the United States, as previously noted, had done so in many areas, such as the sanctity of a married persons life,[35] but by the aid of the provisions of the Bill of Rights. On the other hand, in *Manson*, the same type of attitude of the court is discernible for providing some protection to persons in the judicial custody of a State, by reference not merely to domestic law, but also by calling into aid the aspirations of the international society on this point.

The facts of *Cupp* were more unusual. In that case, male pris-

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evidence of principles of customary international law recognized as part of the law of the United States. *See Filartiga v. Pena-Irala*, *supra* 630 F. 2d at 881-82 & n.9; *see generally United States v. Toscanino*, 500 F.2d 267, 277 (2d Cir. 1974); *Restatement of the Foreign Relations Law of the United States (Revised)* §§ 102(1)(b), 102(3), 131 & Comment h to § 102 (Tent. Draft. No. 1, 1980). Article 55 of the Charter provides that the United Nations shall promote the observance of human rights; in Article 56 the member states pledge "to take joint and separate action in cooperation with the Organization for the achievement" of the goals of Article 55; and Article 62(2) of the Charter authorizes the Economic and Social Council of the United Nations to "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all."

Id. at 1188 n.9.

33. *See supra* note 30.

34. Some authors, like Professor Watson, however, argue that human rights and international law do not have much connection. "Advocacy on the part of scholars in the area of human rights has replaced serious study to such an extent that law and wishful thinking are inextricably interwined. The result—an attractive, if futile, philanthropy." *See* Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 1979 U. ILL. L.F. 609, 614 (1979).

35. In *Griswold*, the Court remarked:

> And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 US 288, 307, ... Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?

Griswold, 381 U.S. at 485.

oners requested the prohibition of body searches or frisking by female employees. The constitutional premise for the protection they sought was based on the Oregon State and United States Constitution. The court of appeals granted the relief sought by the plaintiffs by agreeing that the prisoner's "right of privacy" was infringed upon by this practice.[36] The court of appeals was aware of the import of *Griswold*, but added in a footnote that the source of this right was not altogether clear.[37] In an excellent judgment, Justice Linde in the supreme court on the state's appeal noted that it was not an easy matter (for any court) to ascertain what precisely this right might or could cover. He said:

> That the court found "privacy" a difficult premise for decision is not surprising. When a single term is stretched to reach from a civil claim against undesired disclosure or publicity, *see* Prosser, Law of Torts 802 (4th ed 1971); White, Tort Law in America 173-176 (1980), by way of a constitutional barrier against government intrusion into activities normally conducted in private, *see Grisowld v. Connecticut, supra*, (marital use of contraceptives), and a privilege to engage at home in conduct forbidden elsewhere, *see Ravin v. State*, 537 P.2d 494 (Alaska 1975) (use of marijuana at home), *cf. Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) (possession of pornography at home), to claims of personal autonomy in choices of conduct, *see Roe v. Wade*, 410 U.S. 113, 93 S.Ct.705, 35 L.Ed.2d 147 (1973) (abortion) and choices of domestic associations, *see City of Santa Barbara v. Adamson*, 27 Cal.3d 123, 610 P.2d 436, 164 Cal.Rptr. 539 (1980)(residential "family" of unrelated individuals), the law is bound to pay a price in clarity and cogency. One may pause at the delegation to courts implicit in adopting such a protean and

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36. Cupp, 44 Or.App. at 758, 607 P.2d at 209.

37. Justice Linde, after noting the quintessence of the view of the dissenting members of the court of appeals, stated interestingly:

> If the "right of privacy" lacks a "principled explanation," it is not for lack of attempts. *See, e.g., Carey v. Population Services International*, 431 U.S. 678, 684-686, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); Tribe, American Constitutional Law 886-889 and sources there cited; cf. Kurland, *The Private I*, Univ. Chi. Mag. 7 (1976), quoted in *Whalen v. Roe*, 429 U.S. 589, 599 n.24, 97 S.Ct. 869, 876 n.24, 51 L.Ed.2d 64 (1977).
>
> Inquiry into a distinctive meaning for "privacy," stimulated by *Griswold* and its sequels, has been similarly inconclusive among philosophers. *See, e. g.*, Thompson, *The Right to Privacy*, 4 Phil. & Pub.Aff. 295 (1975)(concluding that no right in the "privacy cluster" is not covered by some other "cluster" of rights), and responses by Scanlon, 4 Phil. & Pub.Aff. at 315, and Rachels, 4 Phil. & Pub.Aff. at 323; Fried, *Privacy*, 77 Yale L.Jnl. 475 (1968) and Fried, *Privacy: Economics and Ethics, A Comment on Posner*, 12 Ga. L. Rev. 423 (1978); Huff, *Thinking Clearly About Privacy*, 55 Wash.L.Rev. 777 (1980). *See also* NOMOS XIII: *Privacy* (1971).

Cupp, 625 P.2d at 127 n.3.

> emotive term as a test of the validity of laws. "A concept in danger of embracing everything is a concept in danger of conveying nothing." Tribe, American Constitutional Law 888-889 (1976).[38]

Justice Linde went on to consider the relevant constitutional provisions of both the state and Federal Constitution, particularly those dealing with punishment, to stress that the law did envisage a guarantee of "humane treatment" for those in the state's custody.[39] While the case was ultimately decided on domestic law, the court importantly said:

> It may well be that the interest asserted by the prisoners in this case can be brought within one of the kinds of "privacy" said to be protected by unexpressed penumbras of the United States Constitution. *See Gunther v. Iowa State's Men's Reform*, 612 F.2d 1079 (8th Cir. 1980) *cert. den.* 446 U.S. 100 S.Ct. 2942, 64 L.Ed.2d 825 (1980).[40]

The court also noted:

> *Indeed, the same principles have been a worldwide concern recognized by the United Nations and other multinational bodies*. The various formulations in these different sources in themselves are not constitutional law. We cite them here as contemporary expressions of the same concern with minimizing needlessly harsh, degrading, or dehumanizing treatment of prisoners that is expressed in article I, section 13.[41]

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38. *Id.* at 127.

39. *Id.* at 127-29.

40. *Id.* at 129. Subsequently, while dealing with applicable domestic rules, the court stressed the need to maintain the *dignity* and *integrity* of the prisoners. *Id.* at 130.

41. *Id.* at 131 (emphasis added). Note twenty-one, where this discussion takes place, may be reproduced verbatim with advantage:

> The Universal Declaration of Human Rights, proclaimed "as a common standard of achievement" under the directive to "promote . . . universal respect for, and observance of human rights" in Article 55 of the United Nations Charter, states in Article 5: "No one shall be subjected to torture or to cruel, inhuman or *degrading* treatment or punishment." (Emphasis added). In the later International Covenant of Civil and Political Rights, this principle is repeated in Part III, Article 7 and further spelled out and expanded in Part III, Article 10:
>
> "1. All persons deprived of their liberty shall be treated with humanity *and with respect for the inherent dignity of the human person*.
>
> "2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons;
>
> (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
>
> "3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status." (Emphasis added).
>
> The formulation of the Universal Declaration is used in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. [European] Convention for the Protection of Human Rights and Fundamental Free-

Having concluded that privacy included the maintenance of the individual's "dignity" and integrity, the court went out of its way to point out that, in essence, these principles had been recognized by the United Nations when proclaiming the Standard Minimum Rules for the Treatment of Prisoners.

A. Functional Use

It will thus be apparent from the United States cases discussed above that the right to privacy has been *functionally* helpful in many diverse situations. Since in the domestic field, the right, as such, does not find any mention in the United States Constitution, its deployment is, as far as precedent is concerned, entirely a judicial creation. It fully exhibits in this author's submission the liberal or progressive trait which distinguishes a civilized system of law.

It would also be apparent from the references mentioned hithertofore, both by this author and others who have been quoted, that the subject has received in the past a fairly extensive coverage in the domain of constitutional and criminal law. But despite this coverage by the courts and writers for more than a century, we are no more nearer to finding the *extent* to which it might be used. Nevertheless, the vast *diversity of situations* in which it has been mentioned to provide a remedy is *very encouraging*. It gives us good grounds for stating that the great functional advantage of having an undefined right to privacy lies in its *elasticity*.

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doms, art. 3, *signed* Nov. 4, 1950, *entered into force* Sept. 3, 1953, 213 U.N.T. 222. It was applied by the European Court of Human Rights in *Ireland v. United Kindgom*, judgment of Jan. 18, 1978 Series A no. 25 *reprinted in* 17 Int'l Legal Materials 680 (1978) (detention and interrogation practices held violative of art. 3). In the American Convention on Human Rights the same formulation is followed by the sentence "All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person." American Convention on Human Rights, art. 5, § 2, *signed* Nov. 22, 1969, *entered into force* July 18, 1978, 36 OAS Treaty Series 1, OAS Off. Rec. OEA/Ser. L/V/II.23 doc. rev. 2. The *Standard Minimum Rules for the Treatment of Prisoners* adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and approved by the Economic and Social Council in 1957 (Resolution 663C (XXIV) provide for the separation of male and female prisoners (Rule 8(a), and for minimizing conditions "which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings." (Rule 60(1).) *Contained in* the Report on the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders (U.N.Pub., No.: 1956. IV.4), *reproduced in* Compendium of Model Correctional Legislation and Standards at Compendium IV-10, IV-13 (American Bar Association and Council of State Governments, 1972). This expression of the United Nations in turn had antecedents in the League of Nations. *See* S. Rubin, The Law of Criminal Correction 286 n.7 (1963).

The history of these standards and their application is reviewed in Skoler, *World Implementation of the United Nations Standard Minimum Rules for Treatment of Prisoners*, 10 Jnl.Int.L.&Econ. 453 (1975).

Id. at 131 n.21.

This brings us back to the fundamental point of this matter. The need to use this right today is not only urgent, but is also one in which only a concept as flexible as this one may be of some help. As it was indicated, human privacy, unknowingly to the individual, is being taken away by the use of sophisticated machines. Inch by inch, personal information and data, and private thoughts and deliberations, are falling into the hands of governments, corporations, or in some cases, the ordinary public at large. Only the imaginative use of this prerogative can prevent a mass erosion of such cherished human concerns.

The importance and relevance of using international instruments to strengthen the right to privacy lies in the fact that unlike, for example, the United States Constitution, this right of privacy is directly acknowledged by the most famous of modern human rights documents—the Universal Declaration. Furthermore, numerous other international texts refer to "dignity" and cherished values of mankind.[42] As such, there may exist sufficient international material, broadly dealing with this subject, which can be beneficially used in accelerating the movement of protecting this right domestically by reference to internationally proclaimed values.

V. CONCLUSIONS

The relevance of creating an international *concern* in this regard is obvious. As already pointed out, the dimensions of invasions of an individual's privacy do not end with national boundaries. The use of machines to pry on and collect data concerning an individual is as evident in the international field as it is domestically. An individual needs the kind of protection outlined above transnationally as much as within the territory of a State.

A mere abundance of liberal thought on this subject is not enough to win a battle of this nature. While commercial interests will fight to protect the information thus acquired or which may be acquired over the individual (who may be an employee or a competitor), the governments will have other types of concerns, such as national security or crime prevention, which will not allow for the eventual implementation of this right which is expressly referred to by the Universal Declaration. Since States have to devise new international norms, there is not a strong possibility that appropriate

42. *See, e.g.*, UNESCO, Declaration on Race and Racial Prejudice adopted by the General Conference at its twentieth session Paris, 27 November 1978, Preamble, Article 9. *See also supra* note 41.

international enforcement legislation may be readily forthcoming. From the above discussion, however, this much is clear: even if more international legislation is slow to come, or does not come at all (an awareness of equal validity in the domestic scene on this matter), we can still solve this problem, even if partially, through the use by domestic forums of international human rights law as demonstrated by cases like *Cupp, Filartiga* and *Wilkinson*. Furthermore, as evidenced by the later two cases which have received extended periodical comment, the doctrine of incorporation may be available to allow courts to draw upon international instruments to strengthen or clarify the right to privacy in domestic controversies.[43]

One salvation, therefore, of the endangered right to privacy lies in the innovative use by domestic courts, of not only national precedents but also international sources, to create *zones of privacy* for the individual by the interpretation of existing international texts. The undefined limits of this right, both nationally and internationally, will provide its greatest asset. By emphasizing concepts of "dignity," "decency" and "fairness," much more can be accomplished than by the most erudite definition which may juristically be given to this right. It is, in a way, ironical. Whereas in most cases, the law is better off when known with precision, here is a case when the contrary will prove more helpful.

The major conclusions of this short account about the *use* by domestic forums of the right to privacy as found in international texts may be said to be the threat to privacy—not merely as a national problem, but as an international problem. Since, unlike major national constitutions, a leading international instrument directly refers to such a right, innovative use can be made of such a text to aid this matter nationally as well as internationally. Indeed, use can also be made of other international documents to find more support to develop its content.[44] For the present, domestic enforce-

43. See *Filartiga*, 630 F.2d 876 (2nd Cir. 1980) and *Wilkinson*, 654 F.2d 1382 (10th Cir. 1981). *See also* Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53 (1981); Note, *The Alien Tort Statute: International Law as the Rule of Decision*, 40 FORDHAM L. REV. 504 (1981); Case Comment, *Torture as a Tort in Violation of International Law: Filartiga v. Peña-Irala*, 33 STAN. L. REV. 353 (1981). For the present author's view, see Hassan, *supra* note 23, at 32.

44. It is also interesting to note that while using the Standard Minimum Rules for the Treatment of Prisoners, the *Manson* court emphasized notions of "decency" and "fairness," while the *Cupp* court focused on conceptions of privacy.

ment seems to be the best method to further this particular part of the international human rights law.