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THE CONSTITUTION AND INFORMATIONAL PRIVACY, OR HOW SO-CALLED CONSERVATIVES COURTENANCE GOVERNMENTAL INTRUSION INTO A PERSON'S PRIVATE AFFAIRS

MICHAEL P. SENG*

The popular conception of conservatism as embodied in the political figure of Ronald Reagan is that it aims at getting the government off the backs of the people. While the aim of some libertarians is to dismantle government and leave people free to do their own thing, it is clearly not the agenda of the Reagan administration when it comes to questions of personal privacy. Nor is it the agenda of those judges who fulfill a conservative role on the Supreme Court.¹

In implementing its program to turn America back to "traditional" values, the Reagan administration is willing to rely on more government and not less government. These conservatives advocate less government involvement in the private economy, thus leading, for example, to the non-enforcement of anti-trust and conservation laws. These conservatives also advocate less federal government control in state and local affairs resulting in the non-enforcement of civil rights laws. These same conservatives, however, do not wish to get the government out of the lives of private individuals. Proposed laws prohibiting abortion and permitting school prayer are examples of governmental measures which would intrude into the lives of private individuals. Moreover, the Reagan

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1. One could endlessly debate the characteristics of a true conservative. Does the true conservative favor less government or more government? This paper will not enter that debate. Rather, the term "conservative" is used to designate those who are politically aligned with Ronald Reagan and those members of the judiciary who are philosophically aligned with Warren Burger and William Rehnquist. Regardless of how one defines a conservative, one has the feeling that Ronald Reagan and Warren Burger would be more comfortable lunching with George III than with Thomas Jefferson or Thomas Paine.

Of those Justices presently on the Supreme Court, Burger, Rehnquist and O'Connor are the most consistently conservative. Brennan and Marshall are the most consistently liberal.

administration's concern with internal and external security has created pressure for increased governmental surveillance of private individuals and groups as well as for restrictions which would limit the access of the press and the public to governmental information.²

The program of the Reagan administration is supported by those conservatives on the Supreme Court who would limit or overrule the decisions permitting a woman to choose whether to give birth to a child³ and permit more interaction between religion and government.⁴ These conservatives would also rewrite the fourth amendment and other clauses which prevent law enforcement officials from intruding into the private lives of individuals.⁵ Additionally, these justices would allow the government to curtail the public's access to unclassified government information.⁶ Given the Reagan agenda and an increasingly conservative Court, the presently ill-defined right to information privacy is unlikely to be given further constitutional protection in the near future.⁷

I. THE CONSTITUTIONAL FOUNDATION FOR A RIGHT TO INFORMATIONAL PRIVACY

The term "privacy" does not appear in the United States Constitution. Justice Brandeis defined the right to privacy as "the right to be let alone."⁸ Justice Brennan adopted a broad humanistic ap-

2. Sheinfeld, *Washington v. The Right to Know*, NATION, April 13, 1985 at 426; Shattuck, *Cutting Back on Freedom by Fiat*, NATION, June 11, 1983, at 719; Peterzell, *Unleashing the Dogs of McCarthyism*, NATION, January 17, 1981, at 33. The Reagan administration has instituted a program to monitor the long distance telephone calls of federal employees, including calls to the news media, congressional offices, and public interest groups. New York Times, April 13, 1985, at 7, col.3. Recently, a federal district judge ruled that the Reagan administration committed an unwarranted invasion of privacy when it ordered a full FBI security investigation of two civil rights attorneys in the Department of Education. New York Times, April 4, 1985, at 13, col. 5.

3. See, e.g., *Akron v. Akron Center for Reproductive Health, Inc.*, 463 U.S. 416 (1983) (O'Connor J., joined by White & Rehnquist J.J., dissenting).

4. *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984).

5. See, e.g., *Payton v. New York*, 445 U.S. 573 (1980) (White, J., joined by Burger C.J., & Rehnquist J., dissenting).

6. See, e.g., *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam, Stevens, J. joined by Brennan & Marshall, J.J., dissenting).

7. It is quite appropriate that the Reagan administration received its landslide re-election in "1984." See G. ORWELL, 1984 (1939).

8. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Justice Douglas relied on the right to be let alone in his dissenting opinion in *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952), where the majority upheld an opinion of the Public Utilities Commission for the District of Columbia allowing sound amplification devices to broadcast radio programs on city streetcars and buses.

The case comes down to the meaning of "liberty" as used in the Fifth Amendment. Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed

proach to privacy in his dissent in *Paul v. Davis*, arguing that one of the Supreme Court's "most important roles is to provide a formidable bulwark against governmental violation of the constitutional safeguards securing in our free society the legitimate expectations of every person to innate human dignity and sense of worth."⁹

Nonetheless, the concept of privacy is not new. As Professor Alan Westin observed, "the notion put forward by legal commentators from Brandeis down to the present that privacy was somewhat a 'modern' legal right which began to take form only in the late nineteenth century is simply bad history and bad law." Professor Westin also noted that pre-Civil War America had its own set of rules which effectively protected individual and group privacy from oppressive governmental interference.¹⁰

In *Griswold v. Connecticut*,¹¹ Justice Douglas outlined the various zones of privacy protected in the Bill of Rights:

The right of association contained in the penumbra of the First Amendment is [an emanation of privacy]. 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

the beginning of all freedom. Part of our claims to privacy is in the prohibition of the Fourth Amendment against unreasonable searches and seizures. It gives the guarantee that a man's home is his castle beyond invasion either by inquisitive or by officious people. A man loses that privacy of course when he goes upon the streets or enters public places. But even in his activities outside the home he has immunities from controls bearing on privacy. He may not be compelled against his will to attend a religious service; he may not be forced to make an affirmation or observe a ritual that violates his scruples; he may not be made to accept one religious, political, or philosophical creed as against another. Freedom of religion and freedom of speech guaranteed by the First Amendment give more than the privilege to worship, to write, to speak as one chooses; they give freedom not to do nor to act as the government chooses. The First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief. To think as one chooses, to believe what one wishes are important aspects of the constitutional right to be let alone.

Id. at 467-68 (Douglas, J., dissenting). Justice Douglas's dissent was cited with approval by the Supreme Court in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974), which upheld a ban on political advertising in city buses.

9. 424 U.S. 693, 734 (1976). The Constitution only protects the right of privacy against governmental action. *Cf.* *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Hudgens v. NLRB*, 424 U.S. 507 (1976). Thus, as Justice Stewart stated in *Katz v. United States*, 389 U.S. 347 (1967): "[T]he protection of a person's general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States." *Id.* at 350-51.

10. A. WESTIN, *PRIVACY AND FREEDOM* 337 (1967).

11. *Id.* 479, 484 (1965).

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 disparage others retained by the people.

Griswold applied the right of privacy to invalidate a state law which prohibited any person from using contraceptive devices or from aiding or counseling the use of such devices. The Court noted that the case concerned a relationship embodied within the zone of privacy created by fundamental constitutional guarantees.¹²

Recently, the Court has tried to distinguish between two different interests protected by its privacy decisions. In *Whalen v. Roe*,¹³ Justice Stevens noted that there is a zone of privacy that involves "the individual interest in avoiding disclosure of personal matters" and another zone of privacy that involves "the interest in independence in making certain kinds of important decisions." The first interest has not fared particularly well in recent years due to Justice Rehnquist's implicit repudiation, in his majority opinion in *Paul v. Davis*,¹⁴ of a long line of Supreme Court precedents. In *Davis*, the Court held that the interest in one's reputation is not given constitutional recognition. The result of *Davis*, therefore, is that the majority of recent privacy decisions have involved the second interest: the right to personal autonomy in decision making.

The Supreme Court has held that the right to privacy protects a woman's autonomy to decide whether to bear a child¹⁵ and it protects the right of parents to make decisions about the education and rearing of their children.¹⁶ It also protects a right to decide who

12. *Id.* at 485.

13. 429 U.S. 589, 599 (1977).

14. 424 U.S. 693 (1976).

15. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court invalidated Connecticut's anti-contraceptive statute on the ground that it violated the right of privacy of married couples. The Court later extended this right to single persons by means of the equal protection clause. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). In *Roe v. Wade*, 410 U.S. 113 (1973), the Court held that the constitutional right of privacy protected a woman's decision whether or not to terminate a pregnancy. In *Buck v. Bell*, 274 U.S. 200 (1927), Justice Holmes upheld a state law authorizing the forced sterilization of handicapped persons on the dubious ground that "three generations of imbeciles are enough." *Id.* at 207. However, in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the Court invalidated Oklahoma's Habitual Criminal Sterilization Act on equal protection grounds because the act infringed upon "one of the basic civil rights of man." *Id.* at 541.

16. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 708 (1977) (Powell, J., concurring) (right of parents to determine if children will have access to contraceptives); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right to send children to a private school); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to teach children a foreign language). Also, in *Parham v. J.R.*, 442 U.S. 584 (1979), the Court upheld the authority of parents to commit their children to state mental institutions.

one marries¹⁷ and by implication the right to terminate a marriage.¹⁸ In *Roberts v. Jaycees*, Justice Brennan recently stated that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."¹⁹ Nonetheless, the Court has shown a reluctance to extend the logic of these decisions to homosexual²⁰ or adulterous relationships,²¹ to decisions on personal appearance or hair style,²² to the rights of pre-trial detainees²³ or institutionalized persons,²⁴ or to decisions concerning with whom one may live.²⁵

An examination of the range of Supreme Court decisions involving so-called privacy interests leads to the conclusion that the Supreme Court suffers from a severe case of schizophrenia. The explanation for this schizophrenia is twofold. First, there is the Court's ambivalence about its "role in a democratic society."²⁶ Justice Brennan's view that the Court's role is to provide a formidable bulwark against governmental intrusions into the lives of individuals²⁷ is not shared equally by all members of the Court. Justices such as Rehnquist are willing to give wider deference to the legisla-

17. *Zablocki v. Redhail*, 434 U.S. 374 (1974) (invalidating Wisconsin's requirement that certain persons who have an obligation to pay child support get prior court permission to marry); *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating Virginia's anti-miscegenation law).

18. *United States v. Kras*, 409 U.S. 434, 444 (1973); *Boddie v. Connecticut*, 401 U.S. 371, 382-83 (1971).

19. *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984).

20. *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976) (summary affirmation). This past year the Court divided four to four and thereby affirmed a lower court's invalidation of an Oklahoma statute which made it unlawful for a school teacher to even advocate that private homosexual activity be made legal. *Board of Education v. National Gay Task Force*, 53 U.S.L.W. 4408 (U.S. March 26, 1985).

21. *Hollenbaugh v. Carnegie Free Library*, 439 U.S. 1052 (1978) (denial of certiorari).

22. *Kelley v. Johnson*, 425 U.S. 238 (1976).

23. *Bell v. Wolfish*, 441 U.S. 520 (1979) (privacy of pretrial detainees does not require a "one man, one cell" standard and does not prohibit officers from conducting strip searches).

24. In *Mills v. Rogers*, 457 U.S. 291 (1982), the Court ducked the issue whether involuntarily committed mental patients had a constitutional right to refuse treatment with anti-psychotic drugs.

25. In *Belle Terre v. Boraas*, 416 U.S. 1 (1974), the Court upheld a village ordinance prohibiting unrelated persons from living in the same household. However, in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), a sharply divided Court overturned the conviction and jail sentence of a grandmother who took in her orphaned grandson.

26. The term is used by Justice Powell in *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

27. *Paul v. Davis*, 424 U.S. 693, 734 (1976). See, e.g., M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* (1982).

ture when individual or minority rights are concerned.²⁸ This debate is central to the privacy issue because the area necessarily involves the legitimacy of the doctrine of substantive due process; specifically, can the Court give substantive protection to rights not explicitly enumerated in the Constitution?²⁹

The second area of ambiguity concerns our system of federalism.³⁰ While the post-Civil War Amendments were clearly aimed at nationalizing individual rights,³¹ the Court has been ambivalent about these amendments.³² It is, therefore, entirely consistent with one aspect of the Reagan agenda for Justice Rehnquist to insist that individuals must look to state tort law to protect their privacy and not to the fourteenth amendment.³³

28. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (Burger, C.J., joined by White, Rehnquist & O'Connor, J.J., dissenting); *United States R. R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980). This deference does not hold when the case involves the conservative agenda to eliminate affirmative action. *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (Stewart, J., joined by Rehnquist, J., dissenting); *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (Rehnquist, J., joined by Burger, C.J., dissenting) or the protection of state rather than individual rights. *National League of Cities v. Usery*, 426 U.S. 833 (1976) (overruled in *Garcia v. San Antonio Metro. Transit Auth.*, 105 S. Ct. 1005 (1985)).

29. See S. ELY, *DEMOCRACY AND DISTRUST* (1980). The Court was particularly articulate about the debate on substantive due process in *Griswold v. Connecticut*, 381 U.S. 479 (1965). Justice Douglas, by relying upon penumbras emanating from the Bill of Rights, expressly disclaimed any reliance upon the doctrine of substantive due process as articulated in *Lochner v. New York*. *Griswold*, 381 U.S. at 482. However, Justice Black accused the Court of doing precisely what it was disclaiming. *Id.* at 509-10. Justice Goldberg relied explicitly on the language and history of the ninth amendment to demonstrate that the Court could properly find rights rooted in the "traditions and [collective] conscience of our people." *Id.* at 493. However, only Justice Harlan was willing to rely on the due process clause itself to find that the state had invaded the privacy of married couples. *Id.* at 500.

Justice Blackmun premised his majority opinion in *Roe v. Wade*, 410 U.S. 113, 153 (1973), squarely on the fourteenth amendment's due process concept of personal liberty, as did the plurality in *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977). Nonetheless, in *Whalen v. Roe*, 429 U.S. 589, 596-97 (1977), Justice Stevens expressly repudiated an approach based on *Lochner*, as did Justice Blackmun in *Roe v. Wade*, 410 U.S. 113, 117 (1973).

It should be noted that the conservative wing is not unwilling to act as a "super-legislature" to expand the rights of the states. Cf. *Atascadero State Hosp. v. Scanlon*, 53 U.S.L.W. 4985 (U.S. June 25, 1985); *Pennhurst State School v. Halderman*, 451 U.S. 1 (1984); *National League of Cities v. Usery*, 426 U.S. 833 (1976) (overruled in *Garcia v. San Antonio Metro. Transit Auth.*, 105 S. Ct. 1005 (1985)).

30. Cf., *Younger v. Harris*, 401 U.S. 37 (1971).

31. *Ex Parte Virginia*, 100 U.S. 339 (1880). See H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW* 386-438 (1982).

32. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

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

II. THE RIGHT NOT TO HAVE PERSONAL INFORMATION DISCLOSED BY THE GOVERNMENT

Two Supreme Court cases gave explicit recognition to the constitutional right not to have personal information disclosed to the public.³⁴ Yet both of these cases refused to find a violation of that right in the particular contexts in which the issue was presented to the Court.

In *Whalen v. Roe*,³⁵ the Supreme Court, in an opinion written by Justice Stevens, considered the constitutionality of a New York statute which required the state to record in a centralized computer the names and addresses of all persons who obtained certain drugs pursuant to a doctor's prescription. The lower court held that the statute invaded the doctor-patient relationship protected as a zone of privacy under the Constitution, and that the state had failed to demonstrate a sufficient necessity for the invasion.

The Supreme Court upheld the statute, on its face, on the ground that it did not pose a sufficiently grievous threat to the patient's privacy interests. It noted that there were only three possible ways the compiled information could be disclosed to the public. First, health department officials could deliberately or negligently fail to secure the system. Second, the doctor or patient could be accused of a crime resulting in the data's disclosure in a judicial proceeding. Third, the doctor, patient or pharmacist could voluntarily reveal the information. The Court noted that the third invasion could occur with or without the statute and that the first two types of invasions presented only remote problems. The Court also stated that disclosures of the information to representatives of the state having responsibility for the health of the community did not automatically amount to an impermissible invasion of privacy.³⁶

The Court also rejected an argument that the knowledge that the information would be readily available in a computerized file might cause some people such concern that they would decline needed medication. The Court did state that it was aware of the threat to privacy posed by the vast accumulation of personal information filed in computerized data banks and government files. It indicated that the right to collect such data might also be accompanied by a constitutionally rooted duty to avoid unwarranted disclosures, but that it was not necessary to decide the question in that case because the New York statute evidenced a proper concern for the individual's privacy interest.

34. *Nixon v. Administrator of General Servs.*, 433 U.S. 425 (1977); *Whalen v. Roe*, 429 U.S. 589 (1977).

35. 429 U.S. 589 (1977).

36. *Cf. Jaffess v. Secretary, Dept. of HEW*, 393 F. Supp. 626, 629 (S.D. Fla. 1975).

The *Whalen* decision, therefore, is somewhat ambiguous in regards to the nature of the privacy interest involved and also on the degree of scrutiny that should be given to governmental invasions of that interest. The Court referred to the "State's vital interest in controlling the distribution of dangerous drugs" and held that the law was a "reasonable exercise of New York's broad police powers."³⁷ Yet it also stated that the Court could not hold legislation which has some effect on individual liberty or privacy unconstitutional simply because it "finds it unnecessary, in whole or in part."³⁸ Nonetheless, in classifying the privacy interest as similar to the interest involved in the autonomy cases, the Court seemed to indicate that it would not be entirely deferential to the choices made by the legislature.³⁹

The Supreme Court, in an opinion written by Justice Brennan, again considered the issue of informational privacy in *Nixon v. Administrator of General Services*.⁴⁰ Under the Presidential Records and Materials Preservation Act,⁴¹ the Administrator of General Services was directed to take custody of Nixon's presidential papers and sift through them to determine which were private, which were to be returned to Nixon, and which were of historical value to be maintained by the government. The director was also ordered to promulgate regulations to govern public access to the papers.

The Court noted that Nixon had surrendered a large part of his privacy when he voluntarily entered public life and put himself in the public spotlight. The Court held that it was premature to consider the issue of public access because no regulations had yet been promulgated, thus it only considered the invasion which would occur through the screening process. The Court subsequently rejected the argument that screening was analogous to a general search prohibited by the fourth amendment, holding that the statute was carefully drafted to minimize privacy intrusions and was "designed to serve important national interests asserted by Congress."⁴²

37. *Whalen*, 429 U.S. at 598.

38. *Id.* at 597.

39. The Court applied the "compelling interest" standard in *Roe v. Wade*, 410 U.S. 113 (1973). However, by rejecting the "necessity" standard in *Whalen*, the Court indicated that a more deferential standard should be employed. In recent years the Court has applied an intermediate standard in some cases which involve important rights but do not involve traditional suspect classes or fundamental rights. Under intermediate scrutiny the statute must rationally further a "substantial" governmental interest. See *Plyler v. Doe*, 457 U.S. 202, 224 (1982); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). See generally Note, *The Interest in Limiting the Disclosure of Personal Information: A Constitutional Analysis*, 36 VAND. L. REV. 139, 182 (1983).

40. 433 U.S. 425 (1977).

41. 77 U.S.C. § 2107 (1982).

42. *Nixon*, 433 U.S. at 464.

The Court carefully considered the objection that the act would necessarily result in "some intrusion into private communications unconnected with any legitimate governmental objectives,"⁴³ but found that the number of such documents were minimal in relation to those of public importance. Further, no "less restrictive means" to segregate the private documents commingled with those of public importance existed.⁴⁴ On the related issue of whether sifting through certain documents of a political character might not violate Nixon's right of associational privacy and political speech, the Court found "a compelling need that cannot be met in a less restrictive way."⁴⁵

While both *Whalen* and *Nixon* appear to recognize the right to be free from unlimited disclosure by the government of personal information, it is not clear what interest must be implicated before the right will apply. Justice Rehnquist's opinion in *Paul v. Davis*⁴⁶ indicated that it is not just any disclosure of personal information that will involve a constitutionally protected privacy interest. In *Paul*, the Louisville Police Department circulated a flyer to merchants with the plaintiff's name and picture under the caption: "Active Shoplifters." The plaintiff had been charged with shoplifting, although his guilt had not been resolved at the time of the circulation. In rejecting the plaintiff's claim for damages under section 1983, the Court ruled that the interest in one's reputation alone is not a liberty or property interest recognized in the Constitution, and that there was no privacy interest which prevented the state from publicizing a record of an official act such as an arrest.

Paul, therefore, seems to hold that no cognizable constitutional violation exists if the only injury which results from the public disclosure of private information is injury to an individual's reputation. The Court distinguished prior cases which supposedly recognized one's reputation as a protected interest as actually involving the right to earn a living or to continued government employment,⁴⁷ or a right previously held under state law to purchase

43. *Id.* at 463.

44. *Id.* at 464.

45. *Id.* at 467. In a dissenting opinion, Justice Burger, who is normally quite reluctant to recognize a right to privacy, argued that the law was an unwarranted invasion of the President's privacy interest in both family and political matters. He argued that the court should use the most exacting scrutiny to review the legislation and that the burden should be on the government to justify the invasion. *Id.* at 527.

46. 424 U.S. 693 (1976).

47. *Paul*, 424 U.S. at 702-06. See also *Bishop v. Wood*, 426 U.S. 341 (1976); *Doe v. United States Dept. of Justice*, 753 F.2d 1092 (D.C. Cir. 1985). Cf. *Shelton v. Tucker*, 364 U.S. 479, 486 (1960).

or obtain liquor.⁴⁸

Injury to one's reputation was not alleged in either *Whalen* or *Nixon*. In *Whalen*, it was alleged that the state's compilation of data was an unwarranted intrusion into the doctor-patient relationship and affected the individual's right to acquire and use needed medication. Nixon argued that the Presidential Recordings and Materials Preservation Act intruded into two traditional privacy interests of presidents; those areas relating to his decisions, development of policies, appointments, and communications in his role as a leader of a political party, and those areas relating to purely private matters involving his family, property, investments, diaries, and intimate conversations. The Court held that Nixon's political activities were recognizable under the first amendment,⁴⁹ and acknowledged a privacy claim in "extremely private communications between him, and among others, his wife, his daughters, his physician, his lawyer, and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files."⁵⁰

III. THE RIGHT AGAINST DISCLOSURE BALANCED AGAINST THE FIRST AMENDMENT

Undoubtedly, the right against the disclosure of private information will conflict with the free speech and press provisions of the first amendment. The first amendment protects both the right to disseminate and the right to receive information.⁵¹ Clearly, the public may also claim an important interest in being informed about private facts concerning certain individuals who may or may not be public figures.

The difficulty in finding an accommodation between the two interests, however, is no reason for the courts to refuse to recognize

48. *Paul*, 424 U.S. at 708 (citing *Wisconsin v. Constantineau*, 400 U.S. 433 (1971)).

49. *Nixon*, 433 U.S. at 467; see also *Lamont v. Postmaster General*, 381 U.S. 301 (1956) (first amendment guarantees that an addressee of arriving mail not have to come forward and affirmatively claim documents); *Talley v. California*, 362 U.S. 60 (1960); (first amendment guarantees freedom of anonymity); *NAACP v. Alabama*, 357 U.S. 449 (1958) (first amendment guarantees privacy in one's associations).

50. *Nixon*, 433 U.S. at 459. In a footnote to his dissenting opinion, Chief Justice Burger noted that while the Supreme Court had previously refused to afford constitutional protection to such commercial matters as bank records, *California Bankers Ass'n v. Schultz*, 416 U.S. 21 (1974), or drug prescription records, *Whalen*, 429 U.S. 589, these instances only served to emphasize the importance of truly private papers or communications, such as a personal diary or family correspondence. *Nixon*, 433 U.S. at 459. According to Chief Justice Burger, these private papers lie at the core of first and fourth amendment interests. *Id.*

51. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1979).

the right of privacy. The courts will still be faced with finding a balance between the first amendment, state-created common law privacy interests and privacy interests created by the legislature.⁵² The accommodation reached between those interests would presumably be the same as the accommodation reached between the constitutional right of privacy and the first amendment.

The Supreme Court has considered the issue in only a few narrowly defined cases. In *Time, Inc. v. Hill*,⁵³ the Court considered the application of a New York "right of privacy" statute in relation to the first amendment. Hill and his family were held hostage by three escaped convicts in their home. The family was later released unharmed. A novel and play were subsequently written based on the incident, both incorrectly depicted that the family was harmed by the convicts. Life magazine published an article about the play which gave the impression that the play mirrored the family's experience. The Hills sued for damages under the New York statute on the ground that Life falsely reported the family's ordeal, and the Hills were awarded \$30,000 in damages. The Supreme Court, in an opinion written by Justice Brennan, set aside the judgment. The Court decided that the New York statute could be applied "to redress false reports of matters of public interest" only when the report is published "with knowledge of its falsity or in reckless disregard of the truth."⁵⁴ The Court noted that:

We have no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest. 'The line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press].' Erroneous statement is no less inevitable in such a case than in the case of comment upon public affairs, and in both, if innocent or merely negligent, . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . .⁵⁵

52. See Arnolds & Seng, *Picketing and Privacy: Can I Patrol on the Street Where You Live?* 4 S. ILL. U.L.J. 463 (1983) (a discussion of the balance between the right to picket and the interest in residential privacy).

53. 385 U.S. 374 (1967).

54. *Id.* at 388.

55. *Id.* (citations omitted). The Court also stated:

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' 'No suggestion can be found in the Constitution that the freedom there guaran-

The *Hill* case leaves open more questions than it answers. The case involved a false report about a matter of public interest. The Court did not address the issue of publishing either a false or a true report about a more personal matter. In a dissenting opinion, however, Justice Fortas, joined by Justices Warren and Clark, surveyed the history of the right to privacy and concluded that it was a basic right which the states could protect. Additionally, when the right to privacy is invaded by the press "the most careful and sensitive appraisal of the total impact of the claimed tort upon the congeries of rights is required."⁵⁶

In *Cox Broadcasting Corp. v. Cohn*,⁵⁷ the father of a rape victim brought an action against a broadcasting company to recover damages for an invasion of privacy which identified the victim during television coverage of the rape trial. The Georgia Supreme Court, in reviewing an order granting summary judgment to the father, held that the Georgia statute, enacted to protect the right of privacy of rape victims, did not conflict with the first amendment. The United States Supreme Court, in a decision written by Justice White, reversed. The Court distinguished *Hill* as involving the publication of false or misleading information, but expressly left open the question "whether truthful publication of very private matters unrelated to public affairs could be constitutionally proscribed."⁵⁸ The Court upheld the right of the press to publish information contained in public records, especially judicial records maintained in connection with a public prosecution which themselves are open to public inspection.⁵⁹

Right of privacy claims conflicted with Congress' informing

ted for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression.' *Id.* (citations omitted).

56. *Hill*, 385 U.S. at 415. The impact upon *Hill* by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) is still uncertain. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 490 n. 19 (1975); *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 250-51 (1974). *Gertz* held that a private person could recover in a libel action without meeting the *New York Times* standard of knowledge or reckless disregard for the truth even if the matter involved an area of general or public interest. In *Dunn & Bradstreet v. Greenmoss Builders*, 53 U.S.L.W. 4866 (U.S. June 25, 1985), the United States Supreme Court balanced the right of privacy against the first amendment and held that punitive damages could be recovered in an action for defamation when the defamatory statements did not involve matters of public concern.

57. 420 U.S. 469 (1975).

58. *Id.* at 491. In a concurring opinion, Justice Powell argued that at least in those cases in which the interests sought to be protected were similar to those considered in *Gertz*, truth ought to be recognized as a complete defense. *Id.* at 500. Justice Douglas maintained his position that the government has no power to suppress or penalize the publication of "news of the day." *Id.* at 501 (Douglas, J., concurring).

59. See *Paul v. Davis*, 424 U.S. 693, 713 (1976) (publication of an arrest allowed). But see *Doe v. Webster*, 606 F.2d 1226 (D.C. Cir. 1979) (juvenile records must be set aside so as not to be available for public disclosure).

function⁶⁰ in *Doe v. McMillan*.⁶¹ A congressional subcommittee had published a report dealing with the District of Columbia schools which revealed the names, absence reports, test scores, and disciplinary records of individual children. The Court, in an opinion by Justice White, held that the congressmen and their staffs were completely immune from suit under the speech and debate clause.⁶² The Court held that those who printed and distributed the document, although with congressional authorization, were protected by official immunity only to the extent that their acts served legitimate legislative functions. The majority expressly avoided deciding whether the plaintiffs had pleaded a valid cause of action or whether the defendants would have any defense, constitutional or otherwise, beyond the immunity issue.

In a concurring opinion, Justices Douglas, Brennan and Marshall did reach the privacy issue. They argued that Congress had exceeded the "sphere of legitimate legislative activity" because the publication of the students' names was unnecessary to either Congress' investigatory or informing functions.⁶³ In a separate opinion, Justice Blackmun, joined by Chief Justice Burger, argued that the judiciary was engaging in a censorship prohibited by the "Congressional free speech concept embodied in the Speech and Debate Clause" as well as imposing its judgment in a matter textually committed to the legislative branch of the government.⁶⁴ Justice Rehnquist, in an opinion joined by Chief Justice Burger, and Justices Blackmun and Stewart, also expressed concern that the Court's opinion might adversely affect "public participation in a relatively open legislative process."⁶⁵

IV. THE RIGHT AGAINST DISCLOSURE IN THE LOWER FEDERAL COURTS

Given the various opinions of the Supreme Court, it is not surprising that the lower federal courts have had trouble delineating the contours of the constitutional right to be free from unwarranted governmental disclosures. For example, the Fifth Circuit has up-

60. HAMILTON, *THE POWER TO PROBE* (1977) 121-55.

61. 412 U.S. 306 (1973).

62. U.S. CONST. art. 1, § 6, cl. 1.

63. *McMillan*, 412 U.S. at 330.

64. Although it is regrettable that a person's reputation may be damaged by the necessities or the mistakes of the legislative process, the very act of determining judicially whether there is substantial evidence to justify the inclusion of 'actionable' information in a committee report is a censorship that violates the congressional free speech concept embodied in the Speech and Debate Clause and is, as well, the imposition of this court's judgment in matters textually committed to the discretion of the Legislative Branch by Art. I of the constitution. *Id.* at 377 (footnotes omitted).

65. *Id.* at 341.

held financial disclosure laws for public officials using an intermediate scrutiny standard.⁶⁶ It has also held that Florida law protected the privacy rights of a man under investigation by state law enforcement officials. The officials obtained confidences from him on the condition that they would not reveal the information, but then later released the personal matter to private insurers who were investigating the same incident.⁶⁷

The Third Circuit relied on a strong public interest to allow the National Institute for Occupational Safety and Health to subpoena employee health records of a corporation. The court, recognizing that the files might contain highly sensitive information which could fall into the hands of third persons, required that prior notice be given the employees so they could raise their individual claims to privacy.⁶⁸

The Sixth Circuit, however, has rejected the suggestion that the Constitution encompasses a general right of nondisclosure of personal information. It has held that the state can compile social histories of juveniles and their families and make them available to over fifty different governmental, social and religious organizations.⁶⁹ Similarly, the Ninth Circuit has refused to recognize that health care providers suffer any invasion of a privacy interest when a state law requires them to release their cost information to the public.⁷⁰

The Fifth and Third Circuits, carefully weighing the interests on a case by case basis, follow a sensitive approach in dealing with the issues. Although the Ninth Circuit may have reached the correct result in requiring health care providers to disclose their cost information, both it and the Sixth Circuit wrongfully refused to recognize any interest in informational privacy. Such nonrecognition serves a great injustice to our most basic values.

V. THE RIGHT NOT TO HAVE PERSONAL INFORMATION COLLECTED BY THE GOVERNMENT

Although it appears that there is a majority on the Supreme Court that will give some recognition to the right not to have personal information disclosed, there does not seem to be the same support for a right against the government collecting personal in-

66. *Duplantier v. United States*, 606 F.2d 654, 672 (5th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981); *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979). See also *Sevin v. City of New York*, 551 F. Supp. 917 (S.D.N.Y. 1982).

67. *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981).

68. *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3d Cir. 1980).

69. *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981).

70. *St. Michael's Convalescent Hosp. v. California*, 643 F.2d 369 (9th Cir. 1981).

formation about individuals or groups. In *Laird v. Tatum*,⁷¹ the Supreme Court, in an opinion by Chief Justice Burger, affirmed the dismissal of a suit brought by citizens who claimed that their rights were being invaded by the Army's alleged surveillance of their lawful and peaceful civilian activities.⁷² The district court originally dismissed the complaint on the ground that the plaintiffs failed to show any action by the Army that was unlawful in itself and failed to allege any injury or threats to their rights. The court of appeals reversed, finding that the surveillance could have a present inhibiting effect on the plaintiffs' first amendment rights.

The Supreme Court found that the plaintiffs had failed to allege that they had sustained, or were immediately in danger of sustaining a direct injury as a result of the government's actions. The only injury suffered by the plaintiffs according to the Court was that the executive branch had failed to accept their perception that the Army's data-gathering system was inappropriate under our form of government or that the Army might misuse the data at some future date so as to cause the plaintiffs a direct harm.⁷³ Chief Justice Burger explicitly stated that the Court was intimating "no view with respect to the propriety or desirability, from a policy standpoint, of the challenged activities of the Department of the Army."⁷⁴ Nonetheless, from the Court's opinion it is clear that citizens sustain no constitutionally recognized injury when the government merely collects information about their first amendment or political activities.

In *Whalen v. Roe*,⁷⁵ the Court refused to list the interest to be free from governmental collection of private information among the privacy rights protected by the Constitution. In a footnote, the Court, quoting Professor Kurland, listed three interests protected by the right to privacy.⁷⁶ Professor Kurland originally listed the right to be free from governmental surveillance and intrusion at the top of the list, but the Court noted that additional recognition of this interest was unnecessary because it was directly protected by the fourth amendment.⁷⁷ The Court thus established that governmental surveillance violates the Constitution only when the gov-

71. 408 U.S. 1 (1972).

72. The Army began, in 1967, to collect information on activities thought to have at least some potential for civil disorder. It stored this information in computers. Most of the information came from Army Intelligence agents who attended public meetings and from data supplied by local law enforcement agencies. Based upon congressional concern, the Army later reduced some of its activities and some of the records were destroyed.

73. *Laird*, 408 U.S. at 13.

74. *Id.* at 15.

75. 429 U.S. 589, 599 (1977).

76. Kurland, *The Private I*, THE UNIV. OF CHI. MAG. 7, 8 (Autumn 1976).

77. *Whalen*, 429 U.S. at 599 n. 26.

ernment commits a search or seizure prohibited by the fourth amendment.

Originally, the Court's interpretation of the fourth amendment focused upon whether the government had trespassed upon an individual's property rights.⁷⁸ Thus, the Court held that governmental wiretapping did not violate the fourth amendment unless property had been seized or there was a physical trespass.⁷⁹ The Supreme Court explicitly rejected this approach in *Katz v. United States*,⁸⁰ and held that government agents had violated the fourth amendment when they placed a listening device outside a public telephone booth. Justice Stewart noted that:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.⁸¹

In *Terry v. Ohio*,⁸² the right to be free from unreasonable governmental intrusions was held to depend upon whether the individual could harbor a reasonable expectation of privacy. Despite the fact that the Court continues to question in each case whether an individual has a reasonable expectation of privacy, the search is essentially circular because one cannot reasonably have such an expectation unless the Court has recognized the right to be free from governmental intrusions under the circumstances. Thus, one has no reasonable expectation of privacy in his banking records⁸³ or in his commercial dealings.⁸⁴ Nor does the Constitution protect one from surveillance by undercover police agents.⁸⁵

The problem of delineating when someone has a reasonable expectation of privacy under the fourth amendment is well evidenced in the various opinions of the Justices in *United States v. Karo*,⁸⁶ decided in 1984. The government had inserted a beeper in a container of chemicals with the consent of the original owner. The container was then delivered to Karo who had no knowledge of the beeper. Karo took the container to his home. Agents then tracked it from Karo's home, to Horton's home, to Horton's father's home, and then to a commercial storage facility. Thereafter, by means of

78. See, e.g., *Gouled v. United States*, 255 U.S. 298 (1921); *Weeks v. United States*, 232 U.S. 383 (1914); *Boyd v. United States*, 116 U.S. 616 (1886).

79. *Olmstead v. United States*, 277 U.S. 438 (1928).

80. 389 U.S. 347 (1967).

81. *Id.* at 351.

82. 392 U.S. 1, 9 (1968).

83. *United States v. Miller*, 425 U.S. 435 (1976).

84. *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974).

85. *United States v. White*, 401 U.S. 747 (1971); *Lopez v. United States*, 373 U.S. 427 (1963); *On Lee v. United States*, 343 U.S. 747 (1952).

86. 104 S. Ct. 3296 (1984).

the beeper and both visual and video surveillance, agents monitored the situation until the beeper ended up in a home in Taos where agents arrested the defendants on charges of possessing cocaine.

Although the government had obtained a warrant to install the beeper, the lower courts held it to be invalid and suppressed the evidence obtained from its use. In an opinion written by Justice White, the Supreme Court held that the installation of the beeper violated no one's fourth amendment rights because it was installed with the consent of the original owner and that the subsequent sale of the container to Karo did not infringe upon his reasonable expectation of privacy.⁸⁷ The Court went on to consider whether the monitoring of a beeper in a private residence, not open to visual surveillance, violated the fourth amendment. The Court found that the use of a beeper in a private residence did violate the fourth amendment. The government, therefore, must obtain a warrant because even though the beeper is less intrusive than a full-scale search, it does reveal a critical fact about the interior of the premises that could not have been visually verified.⁸⁸

Justice O'Connor, in an opinion joined by Justice Rehnquist, argued that homeowners have no reasonable expectation of privacy in a container which is brought into their homes with their permission and which is not under their control or ownership.⁸⁹ She analogized this to the situation where a homeowner invites a guest into his home who is wired with a microphone, which was held not to violate the fourth amendment in *United States v. White*.⁹⁰ Justice White distinguished the *White* situation, where a homeowner takes the risk that a friend will cooperate with the government, from the situation where the government bugs a friend without the friend's knowledge or consent. In the former case, one might expect a friend to reveal a private conversation, but in the latter case, one has no reasonable expectation that the contents of a private conversation will be revealed without either party's consent.⁹¹ Justice Stevens, joined by Brennan and Marshall, argued that by attaching the beeper to the property the government was asserting "dominion and control" over the property, which is "a 'seizure' in the most basic sense of the term."⁹² He also argued that the privacy interest protected was not limited only to the times when the beeper was in the home, but to all times when the property was concealed from public view.⁹³

87. *Id.* at 3303.

88. *Id.* at 3304.

89. *Id.* at 3310-11.

90. 401 U.S. 745 (1971).

91. *Karo*, 104 S. Ct. at 3304 n.4.

92. *Id.* at 3315.

93. *Id.* at 3316-17.

Even if one accepted the fact that the "reasonable expectation" test grants some degree of protection to the right to be free from unwarranted governmental surveillance and intrusion, the fourth amendment, as construed by the Supreme Court, offers no protection if the government is not collecting the information directly from the individual. Hence, a person has no standing to object if the government collects personal information about him from a third person or from places or documents over which he has no control even if the methods used by the government violate fourth amendment standards.⁹⁴ Also, while fourth amendment protections are not narrowly dependent upon the subject being a criminal suspect, the Court has sustained regulations requiring welfare recipients to consent to home visits by caseworkers as a condition to public assistance. Justice Blackmun wrote that such an intrusion is not a "search" under the fourth amendment.⁹⁵ Similarly, while the fifth amendment privilege against self-incrimination creates a zone of privacy against government intrusions, as recognized by Justice Douglas in *Griswold v. Connecticut*,⁹⁶ this amendment applies only when the information would tend to implicate the subject in a crime⁹⁷ and does not apply if the evidence is produced by a third party.⁹⁸

The interest of the government in collecting information about a person's sex life,⁹⁹ as the FBI did in the case of Martin Luther King,¹⁰⁰ or about lawful first amendment activities engaged in by individuals and groups,¹⁰¹ or about other intimate aspects of an individual's personality,¹⁰² without a showing of some important government interest, clearly runs counter to the proper role of a

94. See, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1979).

95. *Wyman v. James*, 400 U.S. 309 (1971).

96. 381 U.S. 479, 484 (1964).

97. *In re Gault*, 387 U.S. 1 (1967).

98. *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 55 (1974).

99. See *Shuman v. City of Philadelphia*, 470 F.Supp. 449 (E.D. Pa. 1979), where the court held it was improper for a police department to inquire into an officer's private sexual activities when the questions had no bearing upon his job performance. On the other hand, the government may have an important interest in requiring police officers to disclose the sources of their income and assets. *O'Brien v. DiGrazia*, 544 F.2d 543 (1st Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

100. See A. SCHLESINGER, ROBERT KENNEDY AND HIS TIMES at 361-65 (1978).

101. See *Alliance to End Repression v. City of Chicago*, 561 F.Supp. 537 (N.D. Ill. 1982), where the district court approved a consent decree preventing Chicago and the defense department from engaging in spying and harassment of the plaintiff's lawful political, religious, educational or social activities. *Accord*, *Handschu v. Special Serv. Div.*, 605 F. Supp. 1384 (S.D.N.Y. 1985).

102. In a recent case, the United States District Court for the District of Columbia held that the Reagan Administration had acted illegally in ordering full security investigations of government civil rights lawyers whose jobs do not affect national security. See *New York Times*, April 4, 1983, at 13, col. 5.

government in a democratic society. By its refusal to recognize an independent privacy interest in this area, the Supreme Court is failing to live up to its role as a "formidable bulwark against governmental violation of the constitutional safeguards securing in our free society the legitimate expectations of every person to innate human dignity and sense of worth."¹⁰³

VI. THE RIGHT TO INFORMATIONAL PRIVACY UNDER THE CONSTITUTIONS OF THE STATES

Unlike the Federal Constitution, a small number of state constitutions do explicitly recognize the right to privacy.¹⁰⁴ In only a few of these states, however, have these clauses been interpreted to

103. *Paul v. Davis*, 424 U.S. 693, 734 (1976) (Brennan, J., dissenting).

104. ALASKA CONST., Art. 1, § 22: "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section."

ARIZ. CONST., Art. II, § 8: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

CAL. CONST., Art. 1, § 1: "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."

FLA. CONST., Art. 1, § 23: "Every natural person has the right to be free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."

HAWAII CONST., Art. 1, § 6: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right."

ILL. CONST., Art. 1, § 6: "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the person or things to be seized."

LA. CONST., Art. 1, § 5: "[E]very person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this section shall have standing to raise its illegality in the appropriate court."

MONT. CONST., Art. 2, § 10: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."

S.C. CONST., Art. 1, § 10: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained."

WASH. CONST., Art. 1, § 7: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

give them any real bite. Although the Illinois Supreme Court initially gave an expansive reading to its constitutional provision protecting privacy, using a "compelling governmental interest" standard to uphold the Government Ethics Act which required public officials to disclose their business connections and interests,¹⁰⁵ it later expressly qualified the right.¹⁰⁶ The court rejected the argument that the Illinois Constitution restricted the legislative, executive or judicial branches with respect to the disclosure of economic interests by state officers or employees. It indicated that some members of the court did not think the provision should be applied beyond invasions of privacy by eavesdropping devices or other means of interception.

The Florida Constitution specifically exempts public records from privacy protection,¹⁰⁷ and the Florida Supreme Court has held that public housing tenants have no right to enjoin a housing authority from allowing access to information provided by them and by prospective tenants.¹⁰⁸ The Supreme Court of Montana has noted that its Constitution, in requiring a showing of a "compelling state interest" before a disclosure of private information can be made, affords more protection to privacy than does the Federal Constitution.¹⁰⁹ The court thus held that the state human rights commission has to handle information it receives from employers in the course of an investigation so as to minimize invasion of the privacy rights of prospective and current employees who submit information to an employer and expect it to remain private.¹¹⁰ For example, job performance evaluations of university presidents made by the state board of regents cannot be turned over to the press.¹¹¹

The Alaska Supreme Court has stated that under its Constitution the level of justification required of the state when it infringes on the right of privacy depends upon the nature of the privacy interest involved.¹¹² The court used a high level of scrutiny to evaluate a state law which was read to require a physician, who was also

105. *Stein v. Howlett*, 52 Ill.2d 570, 573, 289 N.W.2d 409, 413 (1972).

106. *Illinois State Employees Ass'n v. Walker*, 57 Ill.2d 512, 517-18, 315 N.E.2d 9, 14-15 (1974).

107. *See supra* note 104.

108. *Forsberg v. Housing Auth. of the City of Miami Beach*, 455 So.2d 373 (1984). *Cf. Doe v. Sarasota-Bradenton Fla. Television Co.*, 436 So.2d 328 (Fla. Ct. App. 2d Dist. 1983).

109. *See Montana Human Rights Div. v. City of Billings*, 199 Mont. 434, 649 P.2d 1283 (1982).

110. *Id.* However, the court has held that one has no reasonable expectation of privacy in his telephone records. *Hastetter v. Behan*, 196 Mont. 280, 639 P.2d 510 (Mont. 1982).

111. *Missoullian v. Board of Regents*, ___ Mont. ___, 675 P.2d 962 (Mont. 1984).

112. *Falcon v. Alaska Public Offices Comm'n*, 570 P.2d 469, 476 (Alaska 1977).

a member of a school board, to disclose the names of his clients, holding the law to be inapplicable to him.¹¹³ The court also refused to enforce a law which required anyone who expended money for or against a particular ballot proposition to disclose to the public his name, address, occupation, employer, and the amount of his expenditure.¹¹⁴

The decision of the California Supreme Court in *White v. Davis*¹¹⁵ is significant because it focuses upon the right to be free from governmental surveillance and intrusion rather than merely on the right not to have private information made public.¹¹⁶ In *White*, police officers posed as university students to record class discussions in order to compile dossiers and intelligence reports on students and professors who were involved in illegal activities. The court found the activities of the police violated freedom of speech and assembly and constituted an unwarranted invasion of privacy. It specifically noted that the moving force behind the adoption of the California constitutional amendment protecting privacy was the concern "relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society."¹¹⁷

VII. THE RIGHT TO PRIVACY UNDER INTERNATIONAL STANDARDS

The United States lags behind the international community in giving explicit recognition to privacy as a fundamental right.¹¹⁸ Article 12 of the Universal Declaration of Human Rights provides that "[N]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of

113. *Id.*

114. *Messerli v. State*, 626 P.2d 81 (Alaska 1981). The court has held that the state constitution does not protect taxpayers from having to turn over their financial records to the State Department of Revenue. *State Dept. of Revenue v. Oliver*, 636 P.2d 1156 (Alaska 1981).

115. 13 Cal.3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).

116. *White* was the first case construing the California Constitution's privacy amendment adopted in 1975. See *supra* note 104. Prior to the adoption of the California privacy amendment, however, the California Supreme Court had struck down, on federal privacy grounds, a law requiring public officials to disclose their assets. *City of Carmel-by-the-Sea v. Young*, 2 Cal.3d 259, 466 P.2d 255, 85 Cal. Rptr. 1 (1970). Subsequently, the California Supreme Court upheld a narrower statute. *County of Nevada v. MacMillen*, 11 Cal.3d 662, 522 P.2d 1345, 114 Cal. Rptr. 345 (1974). Also, the California Supreme Court recognized, unlike the United States Supreme Court, a privacy right in bank records under the California constitutional provision against unreasonable searches. *Burrows v. Superior Court*, 13 Cal.3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).

117. *White*, 13 Cal. 3d at 774, 533 P.2d at 233, 120 Cal. Rptr. at 105.

118. See, e.g., MCDUGLAS, LASSWELL & CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 816 (1980).

the law against such interference or attacks."¹¹⁹ Similar protection is given to the right to privacy (although not explicitly recognizing the right to reputation) by the European Convention on Human Rights.¹²⁰ The American Convention on Human Rights explicitly protects a person's privacy interest in his honor and dignity.¹²¹

VIII. CONCLUSION

Although the Supreme Court has not closed the door to a right to informational privacy, its acceptance of the concept has been somewhat less than enthusiastic. The Court has given limited recognition to the right to be free from governmental disclosure, but its rejection of an independent interest in one's honor and reputation has made its support of this right somewhat tentative. The Court's failure to recognize any limits to government surveillance and data gathering beyond those contained in the fourth amendment is troublesome, especially given the clear intent of the conservatives on the Court to cut back on the protections accorded by the fourth amendment.¹²² Consequently, the right to informational privacy in the United States may actually lag behind what is articulated by international standards.

119. Universal Declaration of Human Rights, art. 12 (1948). The same language is repeated in the International Covenant on Civil and Political Rights, art. 17 (1976). While the United States Supreme Court has invalidated laws arbitrarily interfering with individual rights to privacy, family, home, and correspondence, it has, unlike the Universal Declaration, refused to recognize any independent constitutionally protected liberty interest in one's honor or reputation. *Paul v. Davis*, 424 U.S. 693 (1976).

120. European Convention on Human Rights, art. 8, § 1 (1953). Compare *Klass v. Federal Republic of Germany*, 2 EHRR 214 (1978), upholding a German statute permitting authorities to open and inspect mail and listen to telephone conversations on the ground that the statute provided an administrative procedure which protected the individual and because the law was "necessary in a democratic society," with *Malone v. United Kingdom*, 5 EHRR 384 (1982), invalidating a practice in the United Kingdom of intercepting postal and telephone communications because of a lack of sufficient safeguards against abuse. For an informative discussion of European protections afforded against data processing of personal information, see *Hondius, Data Law in Europe*, 16 STAN. J. INT'L LAW 87 (1980).

Patterned on the European Convention, the 1979 Constitution of Nigeria protects human dignity from degrading or inhuman treatment, art. IV, § 31, and the "privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communication." Although relying on freedom of press rather than the right to privacy, the Nigerian courts have held that a newsman cannot be compelled to reveal his sources. *Momoh v. Senate of the National Assembly*, [1981] 1 N.C.L.R. 105 (High Court: Lagos); *Olushola Oyegbemi v. Attorney General*, [1982] 3 N.C.L.R. 895 (High Court: Ikeja). Cf. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

121. American Convention on Human Rights, art. 11 (1978).

122. See *Wasserstrom, The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984).

While reliance on state law may provide some protection against invasions by state and local governments and by private groups and individuals, it leaves the federal government free from such restraints. It is the proliferation of federal bureaucracies and law enforcement schemes that pose perhaps the biggest threat to privacy interests today. Legislation can provide some protection, but legislation is always dependent upon the popular will and is unlikely to provide a check if the majority is willing to tolerate an invasion. This of course means that the privacy rights of minorities will always be in jeopardy. While Americans are generally concerned about their privacy,¹²³ many people are willing to put up with some intrusions in order to enforce their own moral standards upon the whole.¹²⁴

Conservatives on the Supreme Court may couch their opinions in terms of judicial restraint and deference to Congress and the states, but this is only a camouflage. No matter how they express themselves they have made a value judgment that the Constitution provides little or no protection to the individual against governmental intrusions. The conservatives on the Court may not be saying they like invasions of privacy, but they are in effect giving their blessing to legislators or bureaucrats who want to intrude into private affairs on one pretext or another. Just as the post-Civil War Supreme Court proclaimed itself powerless to stop segregation and thereby ushered in the "Separate but Equal" era,¹²⁵ so might the conservatives on this Court be ushering in an era of "Big Brother."

It is entirely true that recognition of a constitutional right to information privacy will require the Court to reconcile the right with freedom of the press and the public's right to know, but this should not be a deterrent. In fact, this is the reason we have federal judges whose pay and tenure is protected. It is their job under our Constitution to make these decisions. Federal judges one way or another do decide the underlying substantive issues.¹²⁶ They either do so explicitly in a well written opinion which tries to balance or reconcile the particular values presented, or they do so implicitly when they duck the issues and talk about judicial restraint and federalism. Whichever way they proceed, the judges do decide and should be held accountable for the substantive results which flow therefrom.

123. See L. HARRIS & A. WESTIN, *THE DIMENSIONS OF PRIVACY* (1981).

124. See R. HARRIS, *FREEDOM SPENT* 246, 440-41 (1976).

125. *Plessy v. Ferguson*, 163 U.S. 537 (1886).

126. See L. TRIBE, *CONSTITUTIONAL CHOICES* 9-20 (1985).

