CONSTITUTIONAL LAW: COURT OF APPEALS FOR NINTH CIRCUIT HOLDS STATE INVASION OF PRIVACY ACTIONABLE UNDER THE CIVIL RIGHTS ACT

THE Civil Rights Act creates a cause of action[1] and affords a federal forum[2] for alleged deprivation, by persons acting under color of state law or custom,[3] of rights secured by the Constitution or laws of the United States. It is settled that federal claim is created even though the act violated state law and was not specifically motivated by the intent to deprive plaintiff of his constitutional rights.[4] A problem arises, however, in determining the scope and nature of the rights secured by the Constitution against arbitrary state infringement. *York v. Story*,[5] a recent case of first impression, gave a broad scope to the constitutional rights in recognizing a federal claim under the Civil Rights Act for an arbitrary invasion of privacy by one acting under color of state law.[6]

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[1] REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958). "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress." See generally Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952) (history); Comment, *The Civil Rights Act and Mr. Monroe*, 49 CALIF. L. REV. 145 (1961); Note, *The Proper Scope of the Civil Rights Acts*, 66 HARV. L. REV. 1285 (1953).

[2] The jurisdictional basis does not depend on diversity or jurisdictional amount. 28 U.S.C. § 1343(3) (1958). Reasons for the special jurisdictional basis are set forth by Mr. Justice Stone in Hague v. CIO, 307 U.S. 496, 531 (1939). See also Comment, *supra* note 1, at 147-63; Comment, *Federal Jurisdiction: Amount in Controversy in Suits for Nonmonetary Remedies*, 46 CALIF. L. REV. 601 (1958). Cases are collected in 1 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 37, at 198-200 (rev. ed. 1960).

[3] "Under color of" state law has been interpreted to mean purporting to exercise authority vested by the state, even if the action is unauthorized by state law. Monroe v. Pape, 365 U.S. 167, 172 (1961). See also Screws v. United States, 325 U.S. 91, 110-13 (1945); United States v. Classic, 313 U.S. 299 (1941); Hague v. CIO, 307 U.S. 496 (1939); Alfange, *"Under Color of Law": Classic and Screws Revisited*, 47 CORNELL L.Q. 395 (1962); 1961 DUKE L.J. 452. *But see* Monroe v. Pape, *supra* at 216-17 (Frankfurter, J., dissenting).

[4] Monroe v. Pape, *supra* note 3, at 184-85. State remedies do not have to be exhausted before bringing action under the Civil Rights Act. *Id.* at 183. See also Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375 (1958).

[5] 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964). See 50 VA. L. REV. 174 (1964).

[6] To speak of an unqualified right of privacy means little as the tort law of privacy

In *York*, the female plaintiff entered the local police station to file an assault complaint. Defendant police officer, under the guise of obtaining evidence of the assault, allegedly photographed the plaintiff in indecent nude positions, despite her objections and assertion that there was no need to take the photographs. The defendant subsequently advised the plaintiff that the photographs had been destroyed while in fact they were circulated among police personnel. Plaintiff complained that defendants, acting under color of state law, violated the fourth amendment proscription of unreasonable search and seizure[7] and the guarantee of liberty,[8] both secured against state action by the due process clause of the fourteenth amendment.[9] Conceding that the defendants acted under color of state law, the district court dismissed solely on the ground that the plaintiff failed to state a claim based on rights secured by the Constitution or laws of the United States.[10] The Court of Appeals for the Ninth Circuit reversed, holding that the plaintiff stated a claim predicated on the constitutional right to be free from arbitrary state invasions of privacy.[11]

Although the right of privacy is broad in scope,[12] it is restricted in the instant case to freedom from arbitrary interference with one's personal security. The court held that personal security was protected from arbitrary state interference by the fundamental substan-

transcends many areas of the law and includes protection against defamation, the appropriation of one's name or likeness for commercial purposes, and against intrusion into one's security or seclusion. See generally PROSSER, TORTS § 97 (2d ed. 1955); Davis, *What Do We Mean By "Right to Privacy?"* 4 S.D.L. REV. 1 (1959); Day & Berkman, *Search and Seizure, and the Exclusionary Rule: A Re-Examination in the Wake of Mapp v. Ohio*, 13 W. RES. L. REV. 56 (1961); Nizer, *The Right of Privacy*, 39 MICH. L. REV. 526 (1941).

For a full discussion of the right to privacy secured by the Constitution see Nutting, *The Fifth Amendment and Privacy*, 18 U. PITT. L. REV. 533 (1957); Comment, *Constitutional Right to Privacy*, 40 N.C.L. REV. 788 (1962) (first amendment).

[7] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, 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, and the person or things to be seized." U.S. CONST. amend. IV.

[8] "[N]or shall any State deprive any person of... liberty... without due process of law...." U.S. CONST. amend. XIV, § 1.

[9] It is settled that the specific prohibitions of the fourth amendment are incorporated into the due process clause of the fourteenth amendment and afford the same protection against the state as against the federal government. Ker v. California, 374 U.S. 23 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

[10] 324 F.2d 450, 454 (9th Cir. 1963).

[11] *Id.* at 453-54.

[12] See note 6 *supra*.

tive rights inherent in the due process clause. It is equally important, however, to examine the fourth amendment rights as a standard for determining the constitutional protections afforded against state action.[13] The fourth amendment has been interpreted primarily in criminal cases, in which it has been invoked to suppress illegally obtained evidence.[14] Thus, while the standard to be followed in state criminal cases is clear,[15] there is no federal precedent by which to gauge the scope of the fourth amendment rights when asserted as a basis for an affirmative civil action. The few civil cases involving the fourth amendment are similar to the numerous criminal cases in that the amendment was interposed as a defense.[16]

Lack of civil precedent predicating recovery of damages on violation of rights secured by the fourth amendment results both from the immunity of federal agents from suit and from the reluctance of courts to imply a private cause of action based on the express prohibitions of the Constitution. Federal agents, acting in a ministerial capacity, have only qualified immunity, the rationale being that when authority is exceeded, the person no longer represents the government.[17] Since the fourth amendment is only a prohibition

[13] See note 9 *supra.*

[14] See Beaney, *The Constitutional Right to Privacy in the Supreme Court,* 1962 SUP. CT. REV. 212. See also Barrett, *Personal Rights, Property Rights, and the Fourth Amendment,* 1960 SUP. CT. REV. 46; Fraenkel, *Concerning Searches and Seizures,* 34 HARV. L. REV. 361 (1921); Grant, *Our Common Law Constitution,* 40 B.U.L. REV. 1 (1960); Wood, *The Scope of the Constitutional Immunity Against Searches and Seizures,* 34 W. VA. L.Q. 1 (1927).

[15] Mapp v. Ohio, 367 U.S. 643 (1961), held that the federal standard of excluding evidence obtained through illegal search and seizure applied to the states. *Mapp* overruled Wolf v. Colorado, 338 U.S. 25 (1949), which permitted use of such evidence in state courts. See, *e.g.,* Reynard, *The Right of Privacy,* FUNDAMENTAL LAW IN CRIMINAL PROSECUTIONS 85 (Harding ed. 1959); Traynor, *Mapp v. Ohio At Large in the Fifty States,* 1962 DUKE L.J. 319.

[16] *E.g.,* Abel v. United States, 362 U.S. 217 (1960); Zimmermann v. Wilson, 81 F.2d 847 (3d Cir. 1936) (held fourth amendment applied to tax cases); *In re* Andrews' Tax Liability, 18 F. Supp. 804 (D. Md. 1937). See generally DeReuil, *Applicability of the Fourth Amendment in Civil Cases,* 1963 DUKE L.J. 472; Way, *Application of the Fourth Amendment to Civil Proceedings,* 14 FOOD DRUG COSM. L.J. 534 (1959).

[17] Immunity is based on the necessity of proper functioning of the federal government and extends only to the outer perimeter of the line of duty. Barr v. Matteo, 360 U.S. 564, 575 (1959). See also Howard v. Lyons, 360 U.S. 593 (1959); Moon v. Price, 213 F.2d 794 (5th Cir. 1954); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied,* 339 U.S. 949 (1950); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity,* 77 HARV. L. REV. 1 (1963); Jaffe, *Suits Against Governments and Officers: Damage Actions,* 77 HARV. L. REV. 209 (1963); *Developments in the Law—Remedies Against the United States and Its Officials,* 70 HARV. L. REV. 827 (1957). The immunity of state officials is not fully recognized in actions under the Civil Rights Act. Monroe v. Pape, 365 U.S. 167 (1961) (police); Spires v. Bottoroff, 317 F.2d 273 (7th Cir. 1963) (claim for relief recognized against state judge); Scolnick v.

on government action, there is no constitutional prohibition on unreasonable search and seizure by individuals.[18] Moreover, in absence of statute, the federal courts refuse to imply a private cause of action to remedy alleged abuses of rights expressly secured by the Constitution against infringement by the federal government.[19] While dismissing the alleged federal questions, the federal courts frequently decline to exercise pendant jurisdiction and decide the collateral questions of state law.[20] Thus, as the applicable civil rights legislation applies only to acts under color of state law,[21] plaintiffs abused by federal authorities have been relegated to state courts and traditional tort remedies.

Although there is no authoritative precedent for the application of the fourth amendment in the instant case, the Supreme Court has considered the substantive protections of the fourth amendment divorced from the context of the exclusion of evidence. The amendment was raised as a basis for the alleged unconstitutionality of ordinances imposing criminal penalties for the refusal to permit an administrative search, without a warrant, of one's house or premises.[22] In *Frank v. Maryland*[23] the Court explicitly stated that the

Winston, 219 F. Supp. 836 (S.D.N.Y. 1963) (action allowed against state attorney general). See generally 1961 DUKE L.J. 452; 50 VA. L. REV. 174 (1964).

[18] See, *e.g.*, Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

[19] Wheeldin v. Wheeler, 373 U.S. 647 (1963); Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947). See also Johnson v. Earle, 245 F.2d 793 (9th Cir. 1957). See generally *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 136 (1963).

[20] Bell v. Hood, 71 F. Supp. 813, 820 (S.D. Cal. 1947). See Note, 62 COLUM. L. REV. 1018, 1034-41 (1962). *But see* Wheeldin v. Wheeler, 373 U.S. 647, 653 (1963) (Brennan J., dissenting); *The Supreme Court, 1962 Term, supra* note 19, at 139-40. See generally Note, *Problems of Parallel State and Federal Remedies*, 71 HARV. L. REV. 513 (1958).

[21] The Civil Rights Act does not apply to federal agents. Wheeldin v. Wheeler, *supra* note 20. Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); Swanson v. Willis, 114 F. Supp. 434 (D.C. Alaska 1953) *aff'd*, 220 F.2d 440 (9th Cir. 1955). It has been suggested that a federal agent might come within the Civil Rights Statute, REV. STAT. § 1980 (1875), 42 U.S.C. § 1985 (1958), which affords a civil remedy for conspiracy to deprive one of federally secured rights. Wheeldin v. Wheeler, *supra* note 20, at 650 n.2. There is no comparable federal statute creating a civil remedy for deprivation of federally secured rights by persons acting under color of federal law.

[22] Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960); Frank v. Maryland, 359 U.S. 360 (1959); District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950). The cases consider the infringement of administrative searches on the right of privacy secured by the Constitution. Numerous cases recognize the states' power to protect the health of citizens. *E.g.*, Jacobson v. Massachusetts, 197 U.S. 11 (1904) (compulsory vaccination); United States v. Crescent-Kelvan, 164 F.2d 582 (3d Cir. 1948) (inspection by food and drug authorities); People *ex rel.* Barmore v. Robertson, 302 Ill. 422, 134 N.E. 815 (1922) (compulsory quarantine); Givner v. State, 210 Md. 484, 124 A.2d 764 (1956) (upholding routine inspection of housing during daylight hours); Nelson v. City of Minneapolis, 112 Minn. 16, 127

amendment is a guarantor of privacy as well as the right of self protection. However the fourth amendment was interpreted to mean considerably less when invoked to protect privacy than when invoked to exclude illegally obtained evidence.[24] More explicit support for the two-fold interpretation can be found in recent dissenting opinions[25] as well as in the classic dissent of Mr. Justice Brandeis in *Olmstead v. United States*.[26] The current interpretation of the fourth amendment is, however, bound by precedent which developed through the almost exclusive use of the amendment as a defense in criminal actions, and thus it provides weak support for a broad constitutional right of privacy.

Thus, to the extent that the fourth amendment has become too ossified from continual use in criminal actions,[27] it is necessary to pursue the reasoning of the court in the instant case and look to the guarantee of liberty under the due process clause as the basis for the constitutional right of privacy. The flexibility of due process as a substantive provision on which to predicate rights not expressly

N.W. 445 (1910) (compulsory quarantine); Dederick v. Smith, 88 N.H. 63, 184 Atl. 595, *appeal dismissed*, 299 U.S. 506 (1936) (tuberculosis inspector may enter barn without warrant); Richards v. City of Columbia, 277 S.C. 538, 88 S.E.2d 683 (1955) (inspection of substandard dwellings); Reinhart v. State, 193 Tenn. 15, 241 S.W.2d 854 (1951) (routine health inspection). *Contra*, District of Columbia v. Little, *supra*.

See generally, VARON, SEARCHES, SEIZURES AND IMMUNITIES 199 (1961); Note, 72 HARV. L. REV. 504, 545, 549 (1959).

[23] 359 U.S. 360 (1959).

[24] At least one commentator suggests that the majority opinion completely denies the applicability of the fourth amendment beyond protection in criminal cases. Comment, 44 MINN. L. REV. 513, 524 (1960). It is important, however, not to overlook the fact that Mr. Justice Frankfurter, who wrote the majority opinion in *Frank*, did not adhere to the premise that the due process clause of the fourteenth amendment incorporates the specific prohibitions of the fourth amendment. *E.g.*, Mapp v. Ohio, 367 U.S. 643, 672-86 (1961) (dissenting opinion). Furthermore *Frank* was decided prior to *Mapp*, and thus its reasoning may be subject to reconsideration. 2 VARON, *op. cit. supra* note 22 (Supp. 1962). *Compare* 28 U. CINC. L. REV. 478 (1959), *and* 27 TENN. L. REV. 406 (1960) (critical of *Frank*), *with* 26 BROOKLYN L. REV. 117 (1959), *and* 10 W. RES. L. REV. 304 (1959) (favorable). *Frank* has been termed "the dubious pronouncement of a gravely divided court." Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 269 (1960) (dissenting opinion).

[25] Frank v. Maryland, 359 U.S. 360, 374 (1959) (Douglas, J., dissenting); Ohio *ex rel* Eaton v. Price, *supra* note 24 (Brennan J., dissenting). See also District of Columbia v. Little, 178 F.2d 13, 17 (D.C. Cir. 1949) *aff'd on other grounds*, 339 U.S. 1 (1950).

[26] 277 U.S. 438, 471 (1928). "They [the framers of the Constitution] conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, *every* unjustifiable intrusion by the government upon the privacy of an individual, *whatever the means employed*, must be deemed a violation of the Fourth Amendment." *Id.* at 478. (Emphasis added.) See also Beaney, *supra* note 14, at 224-35.

[27] See Beaney, *supra* note 14, at 247-48.

guaranteed by the Constitution[28] is particularly important in this case to the extent that a court is unwilling to recognize an express constitutional right of privacy. Due process embodies not just a series of specific prohibitions on state action but rather freedom from all substantive inhibitions and purposeless restraints.[29] On this basis recent cases under the Civil Rights Act have held such substantive prohibitions as assault, battery, and false imprisonment violative of due process.[30] The plaintiff in the instant case sought relief for a grievance perhaps less tangible but by no means less real than the infliction of physical restraint or injury.

The tort action for invasion of privacy has enjoyed rapid growth in the past seventy years.[31] Many state courts justified recognition of the right of privacy by equating it to the fundamental rights secured by the Constitution.[32] Although the Supreme Court has never considered the substantive guarantee of liberty as embodying the right of privacy, at least one member of the Court has expressed favor with such a broad interpretation of due process.[33] Liberty must, of course, be qualified to imply freedom from arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the community interest. As reasonableness defies any objective standard, it is the judicial balancing of interests, following a particularistic analysis of the facts, which determines the reasonableness of a search in any given case.[34]

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[28] *E.g.*, Frank v. Maryland, 359 U.S. 360, 365-66 (1959).

[29] Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 157 (1931); Chicago, B. & Q. R.R. v. McGuire, 219 U.S. 549, 567 (1911). See also Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

[30] *E.g.*, Monroe v. Pape, 365 U.S. 167 (1961); Geach v. Moynahan, 207 F.2d 714 (7th Cir. 1953) (assault); Dye v. Cox, 125 F. Supp. 714 (E.D. Va. 1954) (false arrest and false imprisonment). See Comment, 49 CALIF. L. REV. 145 (1961); 1961 DUKE L.J. 452; 50 VA. L. REV. 174, 176-78 (1964).

[31] The common law right of privacy developed from the classic article by Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). See authorities cited note 6 *supra*.

[32] *E.g.*, Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68, 71 (1905); Welch v. Pritchard, 125 Mont. 517, 241 P.2d 816 (1952). *Contra*, Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1922) (dictum). See also McGovern v. Van Riper, 137 N.J. Eq. 24, 33, 43 A.2d 514, 519 (Ch. 1945), *aff'd*, 137 N.J. Eq. 548, 45 A.2d 842 (Ct. Err. & App. 1946) (held unnecessary to decide question based on the federal constitution).

[33] Poe v. Ullman, 367 U.S. 497, 515-22 (1961) (Douglas, J., dissenting); Public Utils. Comm'n v. Pullak, 343 U.S. 451, 467-69 (1952) (Douglas J., dissenting). See also Silverman v. United States, 275 F.2d 173, 178 (1960) (dissenting opinion), *rev'd on other grounds*, 365 U.S. 505 (1961); Douglas, *The Bill of Rights Is Not Enough*, 38 N.Y.U.L. REV. 207 (1963).

[34] See, *e.g.*, United States v. Rabinowitz, 339 U.S. 56, 63 (1950); Harris v. United States, 331 U.S. 145, 150 (1947).

The timing of the judicial determination is important in the protection of liberty. There is disagreement whether the reasonableness should be determined prior to the search as part of the process of issuing a warrant or after the fact as an incident to an award of damages or in a suppression of evidence.[35] A warrant provides an objective standard on which an individual can rely as indicative of the reasonableness of the requested search as determined by an impartial party who has considered the necessity for the intrusion on individual privacy. Under the *Frank* decision, however, an undefined class of administrative searches are permissable without a warrant.[36] If confronted with an inspection request which borders on an unreasonable invasion of privacy, a person therefore can only refuse at the risk of criminal sanctions which will be imposed if the court fails to agree that the request was unreasonable,[37] and even the Supreme Court often disagrees on the question of reasonableness.[38] The possibility of abuse of powers resulting from *Frank* illustrates the need for a federal civil remedy for the invasion of privacy.

Although the possibility of recovery from those who abuse authority should provide the incentive necessary to prevent abuses,[39]

[35] A warrant requires judicial consideration of probable cause for the search. When the requirement is relaxed, the judiciary is bypassed until the question of reasonableness is raised on trial. *Compare* Johnson v. United States, 333 U.S. 10, 14 (1948), *with* Frauk v. Maryland, 359 U.S. 360 (1959).

[36] 359 U.S. 360 (1959).

[37] In State *ex rel.* Eaton v. Price, 168 Ohio St. 123, 151 N.E.2d 523 (1959), *aff'd sub. nom. by an equally divided court,* 364 U.S. 263 (1960) (per curiam), conviction was upheld under a health inspection ordinance which carried the penalty of a fine of not more than $200 or imprisonment of not more than thirty days, or both, and each day of failure to comply with the search order was a separate violation. The ordiuance did not require probable cause for suspecting that a health hazard existed within the building.

[38] *E.g.,* Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 270-71 (1960); United States v. Rabinowitz, 339 U.S. 56 (1950).

[39] Foote, *Tort Remedies for Police Violations of Individual Rights,* 39 MINN. L. REV. 493 (1955). The primary incentive for conformance by police to the requirements of reasonable search and seizure is provided by the exclusion of illegally seized evidence. Mapp v. Ohio, 367 U.S. 643 (1961); Wolf v. Colorado, 338 U.S. 25, 41 (1949) (dissenting opinions); Traynor, *supra* note 15, at 322; Waite, *Police Regulation by Rules of Evidence,* 42 MICH. L. REV. 679 (1944).

While criminal prosecution of offending officials may provide incentive, the federal statute has not been strictly enforced. See 18 U.S.C.A. § 2236 (Supp. 1963). See generally Edwards, *Criminal Liability for Unreasonable Search and Seizure,* 41 VA. L. REV. 621 (1955); Kaplan, *Search and Seizure: A No Man's Land in the Criminal Law,* 49 CALIF. L. REV. 474, 486 (1961); Comment, 47 NW. U.L. REV. 493, 505 (1952); Comment, 58 YALE L.J. 144 (1948).

It has been suggested as an alternative that violations be punished as contempt of court. Comment, 47 NW. U.L. REV. 493, 506 (1952).

it is submitted that requiring a warrant would better remove the uncertainty surrounding administrative searches by requiring consideration of reasonableness before the search. The administrative privileges which could be derived from a broad interpretation of *Frank* can be compared to the prerevolutionary general writ which was a factor giving rise to the specific prohibitions of the fourth amendment.[40] A restrictive interpretation of *Frank* is necessary if the fourth amendment is to retain any vitality beyond protection for those accused of a crime.[41] Furthermore, divorcing the right of privacy from the requirement of a warrant and construing it solely as an element of liberty allows consideration of reasonableness only after the harm is done. There is little possibility of development of the concept of liberty to the extent that it is as definite as the fourth amendment requirement of a warrant.

On the other hand, the guarantee of liberty has the benefit of being free of the fourth amendment requirement of physical trespass, a questionable limitation which is recognized in criminal cases.[42] The trespass requirement would probably bar recovery for invasion of privacy under the Civil Rights Act if constitutional objections were made, for example, to continued state surveillance or shadowing.[43] Moreover, the aspect of mental suffering inherent in invasion of privacy suits[44] should not bar recovery, as due process embodies liberty of the mind as well as liberty of the body.[45] Due process embodies the flexibility necessary to protect privacy in our rapidly changing technological society—flexibility necessary to insure that police, as well as other government authorities, take action only pursuant to duly conferred authority.

[40] See generally Fraenkel, *supra* note 14, at 364; Kaplan, *supra* note 39, at 476; Comment, 44 MINN. L. REV. 513, 522-23 (1960).

[41] See generally Reynard, *Freedom From Unreasonable Search and Seizure—A Second Class Constitutional Right?*, 25 IND. L.J. 259, 262-77 (1950) (history of the fourth amendment); Comment, *supra* note 40, at 521-23 & nn.29-38.

[42] *E.g.*, Silverman v. United States, 365 U.S. 505 (1961). When the fourth amendment has been used as a defense in criminal cases the courts have emphasized physical trespass rather than invasion of privacy. See Traynor, *supra* note 15, at 333.

[43] Dean Prosser suggests that many of the cases predicating recovery on invasion of privacy are primarily concerned with the protection of a mental interest and thus may be absorbed into the tort of intentional infliction of mental distress as it is recognized. PROSSER, TORTS § 97 at 639 (2d ed. 1955).

[44] A tort action for invasion of privacy by surveillance or shadowing is recognized at common law. Schultz v. Frankford Marine, Acc. & Plate Glass Inc. Co., 151 Wis. 537, 139 N.W. 386 (1913). *But see* Chappell v. Stewart, 82 Md. 323, 33 Atl. 542 (1896), *appeal dismissed*, 169 U.S. 733 (1898) (declined to enjoin surveillance but without reference to right of privacy).

[45] Palko v. Connecticut, 302 U.S. 319 (1937) (Cardozo, J.).