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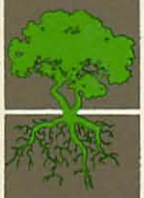
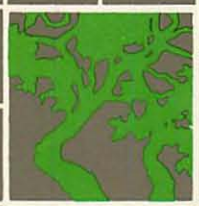


Securing privacy
through law
and education

# REPORT OF THE COMMISSION ON PERSONAL PRIVACY

DECEMBER, 1982



BURT PINES
CHAIRPERSON

THOMAS F. COLEMAN
EXECUTIVE DIRECTOR

# COMMISSION ON PERSONAL PRIVACY

December, 1982

The Honorable Edmund G. Brown Jr., Governor of California;

The Honorable David A. Roberti, President pro Tempore of the Senate
and Members of the Senate;

The Honorable Willie L. Brown, Speaker of the Assembly
and Members of the Assembly;

The People of California:

Pursuant to the mandate of Executive Order B74-80 (issued October 9, 1980), the Commission on Personal Privacy is pleased to present this Report of the Commission's work and recommendations to the Governor, Legislature, and People of the state. The Commission was charged with the investigation of invasions of the right of personal privacy and discrimination based upon sexual orientation in both the public and private sectors, the identification of existing remedies, and the suggestion of legislative, administrative, and other action where present measures provide inadequate protection. The concern underlying the Report is the safeguarding of human potential as the state's most valuable resource.

Of all the issues facing the state and the nation, none is more important or more bipartisan than the right of privacy. Privacy is seen as the insulating factor protecting individuals from unwarranted intrusions into their personal lives. This insulation becomes more critical as we shift from an industrial to an informational society in which modern advances in technology make our personal information, heretofor not easily accessible, readily available to persons within government and other institutions.

The right of privacy includes not only the right to be free from unjustified interference by government and other institutions, but also the right to make decisions affecting one's own identity and one's relationships with others. If freedom has any meaning, it must include "autonomous control over the development and expression of one's intellect, interests, tastes, and personality." This is the essence of the right of personal privacy.

We are not unmindful of the serious fiscal constraints currently being experienced by the people of this state and their institutions. Yet the Commission believes that a postponement in dealing with the issues contained in this Report may result in an irretrievable loss of what has been aptly labelled "the right to be let alone--the most comprehensive of rights and the right most valued by civilized men."

The Commission also recognizes that our most valued freedoms can remain available to the majority only by ensuring their protection for the minority. The safeguarding of one's personal information, of one's privacy in one's home and bedroom, and of one's decisions in formulating one's own personality and relationships, must necessarily depend, in part, upon protections against discrimination based upon sexual orientation. In addition, such discrimination limits the full participation in and contribution to society of a significant portion of the state's population.

We hope the Report will serve two functions: first, inform and help educate the people of this state and others as to the right of personal privacy; and, second, operate as a catalyst for implementation of whatever protections are still needed to make that right a practical reality.

Sincerely,

Burt Pines
Chairperson, Commission on Personal Privacy

State of California

# COMMISSION ON PERSONAL PRIVACY

FINAL REPORT

December, 1982

Burt Pines
Chairperson

Thomas F. Coleman
Executive Director

## THE TREE OF PERSONAL PRIVACY

The seed of personal privacy is found in the fertile soil of natural law and natural human instincts. Three roots provide the basic grounding of and sustenance for the right:

> **decisional/associational privacy,** sometimes called "freedom of choice," which protects one from interference in one's decisions and inclinations regarding one's personality and one's relationships and in other manifestations of the exercise of autonomy over one's body, mind, and emotions;
>
> **territorial privacy,** which insulates one from intrusions in specific locations, including one's home and anywhere else one has a reasonable expectation of privacy or reasonable desire to be left alone; and
>
> **informational privacy,** which shields one from unfair and unnecessary collection and dissemination of personal information.

From these roots grow the double trunk -- the visible manifestation -- of the foundations of the right of privacy. While the entire trunk has constitutional stature, its two primary components are:

> **tort law,** for protection against infringements by persons or organizations; and
>
> **constitutional law,** for ensuring security from unreasonable governmental encroachments.

The principles of liberty and freedom pulsate through and emanate from the roots and trunk, providing nourishment for the branches, leaves, and blossoms, which represent the practical factual situations that touch people's lives.

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The list of those who participated in the work of the Commission and who assisted in the preparation of the Report and the other documents, is so long that it must be set forth separately, and those people must be thanked as a group. Their names are listed on the pages which precede this acknowledgement. It was a privilege to work with them and to receive the benefits of their expertise and knowledge; their contribution to the Report--in most cases without compensation--is inestimable. Others whose names are listed elsewhere and whose contribution to the work of the Commission was also substantial include the many witnesses who appeared at the public hearings, contributors to and authors of the reports found in the Supplements published with the Report of the Commission, and the hundreds of authorities whose works are cited in the "Notes" at the end of the Report.

A few other persons in state government must be singled out for special thanks. First and foremost, we express our appreciation to Governor Edmund G. Brown Jr., whose recognition of the human dignity, value, and potential of all people, resulted in the executive order that established this project. Without his rare courage, his insight into the intrinsic worth of humanity, and his vision of a dynamic society in which all are encouraged to contribute and participate, a Commission of this sort would not have been possible.

The Governor's commitment to the right of personal privacy and to this project guided his office, cabinet, staff, and other members of the executive branch in providing support and assistance to the Commission. Many worked far beyond normal hours and with excess of normal energy to give life to the project. Again, because of the magnitude of their number, we must acknowledge and thank as a group the administrators and employees of the various agencies and departments of state government that provided information, administrative support, and funding necessary to the existence of the Commission. The interest and personal commitment of many of these people added a special quality and sense of teamwork deeply appreciated by the Commission staff.

The State Personnel Board must be offered singular recognition as the main entity providing administrative support to the Commission. The Board's executive officer, Ron Kurtz, and the entire staff gave unceasingly of their energy, resources, and expertise considerably above and beyond their usual duties. In addition, Duane Morford and Pat Wakayama invested an extraordinary amount of personal time, interest, and hard work to ensure that the Report would be not only viable, but vibrant and comprehensive.

Finally, we all owe the greatest debt of gratitude to the Executive Director of the Commission, Thomas F. Coleman. His participation in the project stems back several years to work in this and other states on many related issues, not only as an attorney, but as an educator and noted legal scholar. He personally wrote the first draft of the executive order establishing the Commission and assisted the Governor's staff in all aspects of the project, from obtaining funding to choosing personnel.

As Executive Director, Mr. Coleman brought together, tapped the resources of, and inspired the participation of other scholars and professionals throughout the country and the state. The sheer volume of research and breadth of coverage of the Report were possible only through his indefatigable energy, his superb research and writing skills, and his selfless devotion to the tasks of the Commission. In truth, Mr. Coleman was the guiding light of the Commission from its inception to the publication of its Report.

Personally, I am deeply appreciative of the unique and profound educational experience I have had during my tenure as Chairperson of the Commission. I could not have enjoyed more stimulating colleagues or a more dynamic and historically significant subject matter.

Burt Pines

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AN EXECUTIVE SUMMARY OF THIS REPORT IS AVAILABLE

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# INTRODUCTION

The concept of "personal privacy" encompasses a broad range of human values and almost defies definition. As the United States Supreme Court once noted, "Virtually every governmental action interferes with personal privacy to some degree."[1]

Although record keeping has been a routine function of federal, state, and local governments from the founding of this country, informational privacy was not of primary concern to our ancestors because there was a built-in balance between the individual and government. Individuals were mobile and information was manually stored in files that could not easily be transported. Technological limitations and simple inefficiency preserved that balance. Recent technological advances have now created a major imbalance. With the computer entering the scene, government's ability to gather, retrieve, analyze, and disseminate personal information concerning its citizens has dramatically increased. A 1974 study of fifty-four federal agencies disclosed 858 computerized data banks containing 1.25 billion records on individual citizens. One commentator estimates that the average American citizen is the subject of at least twenty such records.[2]

John Naisbitt, a special assistant to President Lyndon B. Johnson and now the publisher of The Trend Report, observed that we are presently caught in a parenthetical time between two eras, witnessing the restructuring of America from an industrial society to an informational society. Many people feel uncomfortable about this shift. Naisbitt told the nearly 300 delegates to the Society of Consumer Affairs Professionals in Business, at a four-day international conference in Los Angeles, "We are no longer in an industrial society. In the last decade we created 20 million new jobs, and only a fifth of them were in manufacturing. Only eleven percent were in producing any sort of goods. Today, sixty percent of us spend our time processing information."[3] According to Naisbitt, there are other important shifts in progress: a movement from party politics to issue politics; a major decline in the amount of the work force which is unionized; and a restructuring from a centralized to a decentralized society. On the subject of changing family patterns, he added, "The family as the romanticized nuclear entity -- father as breadwinner, mother at home caring for two or three children -- is shifting to the individual (as head of family)." Only seven percent of households fits the old concept, Naisbitt said.[4]

It should not be surprising that both technological advances and our rapid transformation from an industrial society to an informational society have heightened our "privacy consciousness." It is partly in response to this increased public concern for privacy that this Commission was created.

T. Duncan and P. Wolfe wrote in the Washburn Law Journal in 1976:[5]

> People are more aware of threats to their privacy today than at any time in our history. Revelations of domestic political surveillance have jolted concerned citizens. Consumers perceive the harm that can befall them when decisions as to whether they either will be extended credit or allowed to purchase insurance are made on the basis of investigative reports that contain hearsay evidence almost exclusively. . . .
>
> People are also increasingly aware of the privacy claims that have recently been afforded legal protection. Women now exercise greater freedom in making decisions about the fate of their physical being, and people generally may now engage in a wider range of activities within the confines of their own home without fear of criminal prosecution. This recognition of privacy interests and exercise of privacy rights will continue to increase as people realize that, to various degrees, being left alone is essential to their happiness.

In 1978, Louis Harris and Associates, Inc. conducted a national opinion research survey on attitudes of the American public toward privacy. This $600,000 study dramatizes the extent to which the public is concerned about ever-increasing invasions of personal privacy. The results of this survey include the following points:[6]

- Public concern about privacy -- more specifically, the potential for misuse of personal information by business and government -- has increased steadily throughout the Seventies as documented by previous Harris surveys.
- Public concern about threats to their personal privacy jumped 17 percentage points in one year -- from 47% in January 1978 to 64% in December 1978.

• 3 out of 4 Americans now believe that "privacy" should be akin to the inalienable American right to life, liberty, and the pursuit of happiness.

• By 72% to 19%, the American public agrees that the organizations which collect information about people ask for more sensitive information than is necessary.

"Informational privacy" concerns are not the only aspects of privacy which are on people's minds these days. Humans' desire for "personal distance" may well be rooted in their animal origins. One basic finding of animal studies is that virtually all animals seek periods of individual seclusion or small-group intimacy. This is often described as a tendency toward "territoriality." Basically, humans set the same kinds of personal, intimate, and social distance in their interpersonal relationships as do mammals in the animal world.[7] Thus, one's instinctive concern for "territorial privacy" is apparently more basic than one's interest in "informational privacy."

Each person claims more space than he or she physically occupies. This sense of "personal space" has been defined by Psychologist Robert Sommers as "an area with invisible boundaries surrounding a person's body into which intruders may not come."[8] Maintaining control over this personal territory and limiting access to it is important to one's mental health. One's own experience tells us that when our personal space is invaded, we are likely to become upset, reacting with anxiety, irritation, often anger, and sometimes aggression. Behavioral scientists confirm that virtually everyone in our society will defend his or her personal space and react in such a manner when it is invaded:[9]

> The modern world seems to conspire against our finding peace and comfort. Urban crowding and suburban sprawl have packed more people closer together than ever before. In streets, public transportation, restaurants, offices, stadiums, and the rest of our public and semi-public environments, the crush of humanity seems overwhelming. Even parks and other spaces designed for contemplation and repose often are too overrun to serve their purposes.
>
> . . . There is no escape from the unending stream of messages marking the activity around us: the noise of typewriters, telephones and voices greets us in the office;

> vehicles whiz past; countless advertisements compete for our attention; the eyes of hundreds of our fellow creatures momentarily scan us as we scan them in the endless non-meetings that comprise our lives "in public" . . . Our world is filled with these and countless other sensory assaults.
>
> . . . But individuals need time devoted inwardly, "to observe and deal with ourselves without the distraction of others' input. It is privacy that permits us to carry out self-evaluation, a fundamental process in attaining self-understanding and self-identity."[10]

Personal privacy pertains to a much broader area of human concerns than those that are "informational" or "territorial" in nature. For over a decade the United States Supreme Court has consistently pronounced that the right of privacy protects certain personal decisions and associations. Privacy protects the independence of the individual in making certain kinds of important decisions, particularly those relating to marriage, procreation, contraception, family relationships, and child rearing and education.[11] The California Supreme Court has included in the concept of "decisional privacy," matters pertaining to "marriage, family, and sex."[12] Referring to the case of Griswold v. Connecticut, the California Supreme Court has noted, "the decision's concern for valued aspects of individual privacy may ultimately aid in protecting man from the dehumanization of an ever-encroaching technological environment. The retention of a degree of intimacy in interpersonal relations and communications lies at the heart of the broad rationale of Griswold; which opinion followed the teachings of N.A.A.C.P. v. Alabama . . . which struck down a state statute requiring an association to disclose its membership list as an unconstitutional impingement upon the members' right of privacy and anonymity."[13] Griswold was the landmark decision of the United States Supreme Court that broadened "associational privacy" to include the protection of intimate associations as well as political associations.[14]

Ever since the results of the famous Kinsey studies were published in 1948 and 1953,[15] which disclosed the tremendous gap between the sexual mores and actual sexual practices in society, there has been a continuing change in attitudes toward marriage, family, and sex. While a consensus once existed as to what was "right and wrong" in the area of sexual moral-

ity, the present trend is toward leaving matters of private morality up to the individual. To find out what Americans really thought about sexual morality in 1977, Time magazine commissioned Yankelovich, Skelly & White to undertake a special national survey.[16] Some of the survey results showed that:

- 68% of the persons surveyed agreed that "it's a lot better to have more openness about things like sex, homosexuality, premarital and extramarital relations."
- 61% felt that "it's getting harder and harder to know what is right and what is wrong these days."
- A majority stated that it was not morally wrong for couples who are not married to live together.
- A majority said that they would vote for legislation protecting the civil rights of homosexuals.

In addition to technological and attitudinal changes in each of the areas of privacy previously mentioned, a dramatic change has occurred in the relevant law and public policy. Tort law has expanded to meet the threat of media infringements on the right of personal privacy. Search-and-seizure law is rapidly developing in an attempt to cope with modern technological methods of surveillance. Notions of substantive due process have been resurrected to cope with burdensome statutory and administrative regulations on private aspects of our daily lives. Recently, the California Court of Appeal noted:[17]

> The breadth of the concept of privacy enunciated by Griswold v. Connecticut has been upheld in a multitude of fact contexts . . . but as yet remains a concept of "undetermined parameters" albeit in process of almost daily growth.

Since the decision in Griswold, major social and legal changes have occurred which underlie the present study. Some of those changes include:

- Legislative and judicial decriminalization of private sexual conduct between consenting adults; about half of the states, including California, have "decriminalized," and a majority of the population now resides in jurisdictions which recognize that what one does in one's own bedroom is none of the state's business.

- Many decisions by the United States Supreme Court expanding and interpreting various dimensions of personal privacy.
- Privacy amendments adopted by the voters of several states and added to their state constitutions.
- Hundreds of privacy statutes enacted by state legislatures protecting against countless invasions of privacy.
- Major changes in California law and public policy on both privacy and sexuality, including a constitutional amendment, over seventy-five significant appellate decisions on personal privacy, and dozens of legislative enactments on this subject.

It has been in response to these major changes, as well as increased public concern for this topic, that study commissions of this nature have been created.

## Other Study Commissions on Personal Privacy

The creation of the California Commission on Personal Privacy by Governor Edmund G. Brown Jr., in October, 1980, was in keeping with the tradition set by two other governors during the Seventies: Massachusetts Governor Francis Sargent established the Commission on Privacy and Personal Data in August, 1973, which issued a report on "informational" privacy problems some fifteen months later;[18] Indiana Governor Otis R. Bowen created an eighteen-month study commission on individual privacy in April of 1975, which issued a report on the status of informational privacy in Indiana on December 1, 1976.[19]

Four legislatively created commissions have been involved in the study of informational privacy. The Illinois Information Systems Commission has been an ongoing venture since 1975. Minnesota's eighteen-month study commission concluded its study and issued a report in January, 1977. The Iowa Citizens Privacy Task Force, created by that state's legislature in 1978, conducted a sixteen-month study on informational privacy. In 1979 the New Jersey Legislature established the Committee on Individual Liberty and Personal Privacy. This ten-member committee was comprised of legislators and privacy experts. After issuing an interim report it has become inactive.

The most comprehensive study of informational privacy was conducted by a temporary study commission created by Congress pursuant to the Privacy Act of 1974. The Privacy Protection Study Commission was well-funded and abundantly staffed. The main report of the Commission, published in 1977, is entitled Personal Privacy in an Informational Society.[20] The Commission's findings document that:

> • Public opinion data suggest that most Americans treasure their personal privacy, both in the abstract and in their daily lives.
>
> • Privacy encroachments are increasing. It is now commonplace for an individual to be asked to divulge information about himself for use by unseen strangers who make decisions about him that directly affect his everyday life, e.g., transactions involving credit, insurance, medical care, employment, education and social services.
>
> • There is a real need for ongoing monitoring and co-ordination of personal privacy issues and laws so that privacy and other competing interests are kept in proper balance.

Study Commissions on Sexuality and Sexual Orientation

In 1954, the Secretary of State for the Home Department (London) and the Secretary of State for Scotland created the Committee on Homosexual Offenses and Prostitution. The Chairman of that Committee was Sir John Wolfenden. The purpose of this Committee was to consider: (1) the law and practice relating to homosexual offenses and the treatment of persons convicted of such offenses by the courts; and (2) the law and practice relating to offenses against the criminal law in connection with prostitution and solicitation for immoral purposes; and to report what changes, if any, were desirable. In September 1957, by command of Her Majesty, the Secretaries presented the so-called "Wolfenden Report" to Parliament.[20a] As a result of that report, private homosexual acts between consenting adults were decriminalized, and private acts of prostitution remain to this day a matter of private morality and not a subject of English penal regulation.

In the United States, also during the Fifties, the American Law Institute conducted a comprehensive study of American penal codes, and adopted the

Model Penal Code.[20b] One of the major recommendations of the A.L.I. Model Penal Code was to decriminalize private homosexual conduct. These A.L.I. recommendations had a major impact on penal law reform in this country. In some twenty states, private homosexual conduct was decriminalized as the result of penal code reform packages based on the Model Penal Code.

In 1967, the United States Government's National Institute of Mental Health appointed the Task Force on Homosexuality. The fifteen members of this group consisted of outstanding legal experts and behavioral, medical, and social scientists. Each member had extensive research and study experience in the areas of sexuality and sexual orientation. The mandate of the Task Force was to review carefully the current state of knowledge regarding homosexuality in its mental health aspects, and to make recommendations for both social policy and Institute programming. Dr. Evelyn Hooker, Research Psychologist, University of California at Los Angeles, chaired the Task Force. The so-called "Hooker Report" concluded:[20c]

> • The extreme opprobrium that our society has attached to homosexual behavior, by way of criminal statutes and restrictive employment practices, has done more social harm than good and goes beyond what is necessary for the maintenance of public order and human decency.
>
> • It is recommended that there be a reassessment of current employment practices and policy relating to the employment of homosexual individuals.

Several years after the N.I.M.H. report was issued, the federal Civil Service Commission lifted its ban on government employment of homosexuals.

In 1975, Pennsylvania Governor Milton J. Shapp took a public stand on the issue of equal opportunity for lesbians and gay men and issued an executive order "committing this administration to work towards ending discrimination against persons solely because of their affectional or sexual preference."[21] An administrative task force was formed to study the problem and to make recommendations for further action. Less than a year later, Governor Shapp amended his executive order in response to those recommendations. The Pennsylvania Council for Sexual Minorities was created.[22] The membership of the Council is appointed by the Governor and

consists of representatives of selected state departments as well as members of the public. The Council functions effectively today and has survived transition from a Democratic to a Republican administration in Pennsylvania. The Council studies the problems of sexual minorities and is involved in a continuous process of working with the state agencies to implement the changes that are necessary to accomplish equality of opportunity. The staff of the California Commission has examined the annual reports of the Pennsylvania Council as well as a complete set of its minutes. Its accomplishments are significant; a list would be much too lengthy to set forth here. It is clear that such a major impact on government policies, as well as actual day-to-day practices, could not have been accomplished without an ongoing mechanism as the Council, comprised of highly qualified and dedicated persons. The Council's successful experience in working with state government on sexual orientation concerns has also had a profound impact on other states, including Oregon and California.[23]

The Oregon Task Force on Sexual Preference was established by Richard A. Davis, Director of the Department of Human Resources, at the request of Governor Bob Straub in March, 1976. Its directive was to assemble accurate information on homosexual men and women in Oregon and to make recommendations for legislative and administrative policies that would ensure the civil rights of all Oregonians regardless of sexual preference. The twelve members of the Task Force represented various perspectives of law, medicine, education, religion, labor, state and local government, parents, and minorities. Its final report was submitted to the Governor and the Legislature on December 1, 1978. The Task Force called for legislation prohibiting sexual orientation discrimination in employment, housing, and public accommodations. The section of its report on myths and stereotypes is comprehensive and well documented. The entire Oregon Report has been reviewed by this Commission.

Two years ago the Michigan Legislature conducted a similar study. The Michigan House Civil Rights Committee established the Task Force on Family and Sexuality, comprised of approximately forty citizens from various parts of the state. The report of that Task Force is presently being edited for publication; however, a draft has been provided to this Commission for consideration. The report calls for decriminalization of private sexual conduct between consenting adults, a move which occurred in 1976 in California. It also recommends statewide legislation prohibiting sexual

orientation discrimination in housing, employment, and public accommodations.[24]

Local communities and private organizations have also undertaken significant studies concerning sexuality and sexual orientation. An example of a local community study is one conducted by the Human Rights commission of Norman, Oklahoma. That 1977 study was undertaken "to determine the attitudes held by the various components of the Norman Community toward homosexuals."[25] Nearly half of the landlords surveyed said they would not rent to a homosexual couple. Of the employers surveyed, 75% said they would not favor an ordinance protecting the job rights of homosexuals, and nearly half said that they felt an employer should fire a person if it is discovered he or she is a homosexual. In the survey of households, almost two-thirds of those polled believed that employers should discharge persons believed to be homosexuals and about three-fourths stated that they would be opposed to living in the same neighborhood as a homosexual couple. Over two-thirds opposed adopting a city ordinance to prohibit sexual orientation discrimination.

A number of major churches in this country have also studied the issue of homosexuality. One of the most comprehensive and well documented of these studies was conducted by the United Presbyterian Church. A nineteen-member task force, representing many professions and a broad range of theological perspectives, met seven times during 1976-78. It conducted a series of regional hearings in various parts of the United States. The task force report was considered by the 190th General Assembly of the Church, which devoted ten hours of debate to the issues presented, on May 22, 1978. With respect to social issues and public policy, the Assembly recommended that:[26]

> Vigilance must be exercised to oppose federal, state and local legislation that discriminates against persons on the basis of sexual orientation and to initiate and support federal, state, and local legislation that prohibits such discrimination in employment, housing, and public accommodations.

While shifting public policies and attitudes prompted studies all across the country during the Sixties and Seventies, no major study of this nature has ever been done by the State of California. Government policies and

public attitudes in California have changed dramatically over relatively few years. Highlights of some official decisions over the past ten years which bear on the subject under study by this Commission include:

- A 1972 voter amendment to the state Constitution adding "privacy" to the list of basic rights.
- "Consenting Adults" legislation enacted in 1975.
- An Information Practices Act enacted in 1977.
- Over 75 appellate court decisions on privacy.
- Dozens of legislative enactments protecting privacy.
- Voter defeat of the so-called "Briggs Initiative."
- A Governor's Executive Order directing an end to sexual orientation discrimination in state government employment practices.
- An Attorney General Opinion affirming the illegality of such employment discrimination.
- Several court decisions prohibiting sexual orientation discrimination by employers and landlords.
- Several city ordinances outlawing sexual orientation discrimination.

## The Creation and Mandate of the California Commission

On October 9, 1980, Governor Brown signed the Executive Order which established the Commission on Personal Privacy.[29] His mandate to the Commission was:

> To study the problems of discrimination based upon sexual orientation or invasions of the right of personal privacy, in both the public and private sectors, documenting the extent of such problems, exploring in what forms the problems are manifested, noting existing remedies, and making recommendations for legislative, administrative, and other action where appropriate.

The Governor acknowledged in the order that "a study of the problems of sexual minorities and of the adequacy of existing law to protect the personal privacy of all individuals is necessary. . . ."

The Commission is composed of twenty-five members selected from law enforcement, business, labor, education, psychology, and other interested groups. The Governor appointed fifteen members to serve on the Commission, including former Los Angeles City Attorney Burt Pines as Chairperson. The Speaker of the Assembly appointed five members. The remaining five appointments were made by the Senate Rules Committee.

Commissioners reside in various parts of the state (San Diego, Los Angeles, Ventura, Fresno, Sacramento, and San Francisco) and have experience in a wide variety of privacy-related fields. An Executive Director was chosen who has extensive background in personal privacy law, research, writing, and community and public service.

The State Personnel Board was selected as the department to provide administrative support to the Commission. Commission staffing is supplied by the Policy and Standards Division within the Board. Commission funding came from several state departments which requested the Commission to study various personal privacy and sexual orientation problems faced by them in carrying out their constitutional and legislatively mandated duties. Although Commissioners were appointed in late 1980, the first meeting of the Commission was not held until June, 1981, because funding was not legislatively approved until that month. The Commission's total budget for an eighteen-month period was $244,699. Of that amount, nearly $60,000 came through federal funding.

At its first meeting on June 19, 1981, in Los Angeles, the Commission unanimously adopted the following statement of purpose:

> TO EXPLORE problems of discrimination based upon sexual orientation and invasions of the right of personal privacy, particularly among such groups as the elderly, the disabled, ethnic minorities, adolescents, gays and lesbians, unmarried persons, and institutionalized persons;
>
> TO DOCUMENT the extent of these problems;
>
> TO NOTE the adequacy of existing law to protect the personal privacy of all individuals in this state;
>
> TO REPORT our findings and to make any appropriate recommendations;
>
> SO THAT legislative and administrative action and public attitudes may be based upon accurate information in order that the public policies of this state to safeguard human potential as our most valuable resource, to judge individuals on their own qualities and merits, to protect against sexual orientation discrimination, and to protect the right of personal privacy against the threat of invasion, may be effectively implemented in both the public and private sectors.

## The Operations of the California Commission

The Commission held its first meeting on June 19, 1981, in Los Angeles. This meeting was organizational in nature. After hearing a number of presentations on personal privacy and sexual orientation discrimination, the Commissioners considered administrative matters presented by the State Personnel Board. A statement of purpose was officially adopted, and the following Committees were established:

Aging and Disability
Family Relationships
Youth and Adult Corrections
Criminal Justice
Data Collection and Dissemination
Education and Counseling
Employment Discrimination
Medical and Mental Health Services

During the summer months of 1981, the Commission secured its staffing, the Committees met, and the Commissioners read articles and reports on the topics under study.

The second meeting of the Commission was held on August 15, 1981, in Sacramento. Having met the previous day, all of the Committees reported to the Commission about their future plans and their progress to date. The Commission then decided to conduct public hearings during the month of November.

Two public hearings were held in November, 1981. The first hearing was held in Los Angeles on November 13. The second hearing was held in San Francisco one week later. Approximately thirty witnesses appeared at each hearing. The full text of both hearings is available to the public through the State Personnel Board.[30] An incredible number of problems on almost every conceivable aspect of personal privacy and sexual orientation discrimination was presented by a host of expert witnesses and members of the public.

The third meeting of the Commission was held in Sacramento on January 30, 1982. At this meeting, each Committee made a presentation concerning its proposed topical report. The Commission then gave directions to the staff on priorities and considerations for the main body of the Commission Report.

The fourth meeting of the Commission was held September 11-12, 1982. Throughout this weekend meeting, the Commission considered and deliberated over many topical reports and substantive recommendations. The recommendations adopted by the Commission are set forth in this Report.

In addition to the hundreds of hours of staff research, Committee and Commission meetings, and public hearing testimony, the work of the Commission was also conducted through the involvement of consultants. Some of these professionals volunteered their time to the Task Forces and others worked individually with the Commission. These dedicated persons made important and substantial contributions to our study.

The regular staff supplied through the State Personnel Board was supplemented with staff loaned on a temporary basis from the Department of Social Services and the Department of Fair Employment and Housing.

A number of students augmented our staffing. Some volunteered their time, some received credit, and yet others participated through work-study programs.

In sum, nearly two hundred people worked on this project in various capacities: commissioners, paid staff, loaned staff, task force members, consultants, students, and witnesses. The Commission on Personal Privacy was truly a cooperative effort of concerned citizens and community leaders.

## The Approach of This Report

The mandate of the Commission calls for an examination of the kinds of real life problems that involve invasions of personal privacy and sexual orientation discrimination. These problems are not unique to California, nor are they confined to recent times. In order to give the reader a more meaningful perspective, this Report will attempt to place issues in historical and national contexts.

The Commission has also been requested to examine existing remedies. For constitutional reasons, some remedies are ultimately in the hands of the federal government, while others are the responsibility of the State of California. For practical reasons, some conflicts will be decided in the courts, and others will be resolved in either the executive or legislative branches of government. The Commission has surveyed activities in all three branches of government, at the federal and at the state level.

In order to avoid "reinventing the wheel," the Commission researched existing California statutory and case law and examined remedial actions taken by other state governments under existing laws. As a result, the main body of this Report embodies a treatise on invasions of personal privacy and discrimination for reasons of sexual orientation in the United States, with a special focus on problems and remedies in California.

The Commission staff has explored the legal framework in which public policy decisions on the subject of personal privacy have been and will continue to be made.

This framework began with the evolution of our common law, and, later, a firm constitutional foundation developed as the basis for protecting personal privacy in this country. Later, as a visible consensus in society emerged on behalf of the right of privacy, legislative protections were employed. The People, in several states, have amended state constitutions to include "privacy" as a fundamental right, and the People in every state, through their elected representatives, have enacted various privacy legislation. Finally, the People of this country have spoken on a number of occasions in the recent past when congressional legislation has been enacted on a variety of privacy issues.

The United States Supreme Court is the ultimate authority on the right of personal privacy as it is protected by several provisions of the federal

Constitution. In this state, of course, the California Supreme Court has the final word on interpreting privacy protections found in the California Constitution.

The Commission staff has reviewed dozens of United States Supreme Court decisions on privacy and scores of lower federal court opinions on the subject. Federal legislation, as well as the report of the federal Privacy Protection Study Commission, has been considered.

The privacy provisions of the California Constitution have been compared with similar provisions in the constitutions of other states. Every major appellate court decision in California interpreting the right of personal privacy has been read. The statutory codes of this state have been combed in an effort to uncover all significant privacy-related legislation. To the extent possible, administrative regulations have also been reviewed.

Numerous books, articles, reports, journals and periodicals have been read. The enormity of research of this nature is underscored by the fact that since 1975, more than three hundred articles on various aspects of personal privacy have appeared in recognized legal periodicals in this country.

All of this material has been analyzed and synthesized by the Commission and organized in such a way as to make it readily understandable to the public and especially useful to policy makers. Although this Report is primarily intended to assist the executive and legislative branches of government in this state to formulate and administer rational and appropriate policies on personal privacy and sexual orientation, we trust that the judiciary will not hesitate to take judicial notice of our research.

## INVASIONS OF THE RIGHT OF PERSONAL PRIVACY

### Philosophical Underpinnings of Privacy

The basic foundation -- beyond constitution and statute -- of the right of personal privacy is described in the classic treatise On Liberty, by John Stuart Mill.[31] In that work, the philosophical underpinnings of the right find their most literate expression:

> . . . [T]here is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation. When I say himself, I mean directly, and in the first instance; for whatever affects himself may affect others through himself; . . . . This then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological . . . . Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong . . . .
>
> . . . The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.
>
> . . . [One] very simple principle [is] entitled to govern absolutely the dealings of society with the individual in the

way of compulsion and control, whether the means used be physical force, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually, or collectively, in interfering with the liberty of action of any of their own number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. These are good reasons for remonstrating with him or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to someone else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

• • •

## Scope of the Right of Personal Privacy

Speaking about the scope of privacy, Justice Brandeis, in his famous dissenting opinion in the case of Olmstead v. United States, stated:[32]

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They 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 the individual, by whatever means employed, must be deemed a violation.

Personal privacy protections run through the entire Bill of Rights enunciated in the federal Constitution. Some fifteen years ago, in speaking of the Fourth Amendment to that Constitution, the U.S. Supreme Court recognized that protections of individual privacy are found in that and in other provisions:[33]

> The First Amendment, for example, imposes limitations upon governmental abridgement of "freedom to associate and privacy in one's associations." [Citations.] The Third Amendment's prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion. To some extent, the Fifth Amendment too "reflects the Constitution's concern for . . . the right of each individual 'to a private enclave where he may lead a private life.'" [Citation.] Virtually every government action interferes with personal privacy to some degree."

Five years ago the Supreme Court of the United States alluded to the contours of the constitutional right of privacy:[34]

> The concept of a constitutional right of privacy still remains largely undefined. There are at least three facets

that have been partially revealed, but their form and shape remain to be fully ascertained. The first is the right of the individual to be free in his private affairs from government surveillance and intrusion. The second is the right of an individual not to have his private affairs made public by the government. The third is the right of an individual to be free in action, thought, experience, and belief from government intrusion.

An analysis of court decisions involving privacy disputes shows that personal privacy conflicts, generally speaking, can be categorized into three major classifications: (1) physical or sensory intrusions into private areas, hereinafter referred to as "territorial" or "locational privacy;" (2) collection or dissemination of personal information, hereinafter referred to as "informational privacy;" (3) substantive regulation of personal decisions or associations, hereinafter referred to as "decisional/associational privacy."

General Zones of Protection
Private Areas and Locations
Private or Confidential Information
Personal Decisions and Associations

Common Methods of Intrusion
Physical or Sensory Invasion
Substantive Regulation
Interrogation or Disclosure

Over the years, prominent jurists have commented on the two most sacred zones of privacy: body and home. Many years ago, Justice Cardozo stated, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body."[35] Commenting on Justice Brandeis' famous dissenting opinion on privacy, now-Chief Justice Burger in his dissent in Application of President and Directors of Georgetown College stated:[36]

> Nothing in this utterance suggests that Justice Brandeis thought an individual possessed these rights only as to sensible beliefs, valid thoughts, reasonable emotions, or well-founded sensations. I suggest he intended to include a great many foolish, unreasonable and even absurd ideas which do not conform, such as refusing medical treatment even at a great risk.

With respect to privacy of the home, the California Supreme Court has cautioned us:[37]

> An intrusion by the state into the privacy of the home for any purpose is one of the most awesome incursions of police power into the life of the individual. Unrestricted authority in this area is anathema to the system of checks envisioned by the Constitution. . . . The frightening experience of certain foreign nations with the unexpected invasion of private homes by uniformed authority to seize individuals therein, often in the dead of night, is too fresh in memory to permit this portentous power to be left to the uninhibited discretion of the police alone.

## Formal Foundation in Law

The right of personal privacy, as an independent legal concept, has two main foundational aspects: (1) tort law which affords damages for unlawful invasions of privacy accomplished through the actions of organizations or other individuals, and (2) constitutional law which protects personal privacy against unlawful government invasion.[38] Each of these areas will be discussed separately because it has a distinct legal/historical development and each has distinct rules for application to a privacy conflict.

## Invasion of Privacy as a Tort

Probably the earliest reference to a common law tort of invasion of privacy is found in Cooley on Torts (1888):[39]

> The right of one's person may be said to be a right of complete immunity: to be let alone.

Two years later, a major law review article on this subject appeared in the Harvard Law Review. It was written by Warren and Brandeis (later Justice Brandeis). It was in this article that the right of privacy was introduced as an independent right and distinctive principles of application were postulated.[40] This article is credited with having synthesized a whole new category of legal rights and having initiated a new field of jurisprudence.

After that article was published, it did not take long for the tort of invasion of privacy to catch on. In 1892, a New York court expressly recognized the right of privacy.[41] However, ten years later, New York's highest

court rejected privacy invasion as an independent tort.[42] The New York Legislature immediately responded by enacting a statute protecting the right of privacy.[43] This century has experienced a strong tide in favor of personal privacy, a right now recognized in all but a few jurisdictions, either through judicial development of the common law or through legislative action.[44] Only a few states have refused to acknowledge privacy invasion as a tort.[45]

Dean Prosser has analyzed an invasion of privacy in these words:[46]

> It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff "to be let alone."

The four areas protected under the rubric of the tort of invasion of "privacy" include: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[46]

Unlike its constitutional cousin, tort law privacy is a purely personal right; that is, one must always show an invasion of one's own right of privacy before one can recover.[47] Being personal, a cause of action for invasion of privacy does not survive one's death.[48] Being primarily designed to protect the sensibilities of human beings, corporations generally cannot claim the common-law right.[49]

Protection of personal privacy under tort law is relative to circumstances. It is determined by the norm of the ordinary person, i.e., protection afforded the right is limited to ordinary and reasonable sensibilities and does not extend to hypersensitivity.[50] There are some inconveniences and annoyances that are concomitants of life in an urban and densely populated society. Therefore, the law does not afford redress for every invasion of one's private sphere. To be actionable, privacy invasions must be unreasonably intrusive.

Truth is not a defense to an action for invasion of privacy.[51] Likewise, the motives of the intruder are generally not an issue in a privacy action.[52] The right of privacy can be waived, either expressly or impliedly or for limited purposes, and such a waiver is often revocable.

Before courts will impose damages or issue injunctions based on a privacy cause of action, other competing interests must be balanced against the right of privacy. The public interest in information gathering and sharing, buttressed by First Amendment protections, will often override a claim of privacy, as sometimes will the police power of the state.[53]

## Constitutional Privacy

Constitutional privacy protects the individual from unreasonable governmental actions of various sorts. Although there is no express privacy provision in the federal Constitution, it has been said that the right of privacy is rooted in the penumbra of various specific constitutional provisions that have been deemed to create "zones of privacy."[54] Some of these "privacy-emanating" provisions include: the First Amendment's guarantee of free speech and press and freedom of association; the Third Amendment's injunction against quartering of soldiers during peacetime in any house without the owner's consent; the Fourth Amendment's prohibition of unreasonable searches and seizures; the Fifth Amendment's privilege against self-incrimination; and the Ninth Amendment's reservation to the people of rights not otherwise enumerated in the Constitution.

A majority on the United States Supreme Court has held that the right of personal privacy is "implicit in the concept of ordered liberty" protected by the due process clause of the Fourteenth Amendment.[56]

Thus, it is clear that, while there is no explicit privacy provision in the federal Constitution, privacy protections radiate implicitly from the Bill of Rights.

In 1905, a state supreme court for the first time recognized a constitutional basis for protecting personal privacy. The case was Pasevich v. New England Life Insurance Company.[57] Justice Cobb, writing for the Georgia Supreme Court, noted that the right of privacy had its foundation in natural law:

> The individual surrenders to society many rights and privileges which he would be free to exercise in a state of nature, in exchange for benefits which he receives as a member of society. But he is not presumed to surrender all those rights, and the public has no more right, without his consent, to invade the domain of those rights which it is

> necessarily to be presumed that he has reserved, than he has to violate the valid regulations of the organized government under which he lives. The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private, and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law. . . . It may be said to arise out of those laws sometimes characterized as "immutable," because they are natural, and so just at all times and in all places that no authority can either change or abolish them.

A number of modern cases supports the proposition that personal privacy stems from natural law.[58] The California Constitution, of course, lists privacy with other "inalienable" rights, that is, those incapable of being withdrawn.

In summary, the seed of personal privacy is found in the fertile soil of natural law and natural human instincts. Nurtured by principles of liberty and freedom, three roots provide the parameters of this right:

> (1) Decisional/Associational Privacy, sometimes called "freedom of choice", which includes autonomy (physical, mental and emotional), personality, and relationships;
>
> (2) Territorial Privacy, including the home and anywhere else one has a reasonable expectation of privacy or reasonable desire to be left alone; and
>
> (3) Informational Privacy, including the collection and dissemination of personal information.

From these roots grow the double trunk, the basic visible manifestations of the foundations of the right of privacy, namely tort law for the protection against infringements by persons or organizations, and constitutional law, for

ensuring security from unreasonable governmenental encroachments. The principles pulsate through and emanate from the trunk and roots, providing nourishment for the branches, leaves, flowers, and fruit which are discussed throughout the Report of the California Commission on Personal Privacy.

## Attempts to Define Personal Privacy

The importance and usefulness of language as a tool for communication rest on the premise that there is a common ground of understanding and experience or common understanding of the meanings of words used to convey ideas. Therefore, explicitly defining terms is an important prerequisite to, and a necessary part of, any study of the sort contained in this Report.

While personal privacy has been aptly labeled "the right to be let alone," there is no consensus on a general generic definition of the right of privacy despite formidable efforts by various commentators. Privacy is, it seems, a highly subjective concept which has been used to describe many varied interests and rights, some related and others not. A review of some of these definitions and descriptions will give a proper perspective on the breadth of the right of privacy and, perhaps, make possible a more precise definition of this important philosophical and legal concept.

> Privacy is not simply an absence of information about us in the minds of others; rather, it is the control we have over information about ourselves. . . . Privacy, thus, is control over knowledge about oneself. . . . Privacy grants the control over information which enables us to maintain degrees of intimacy.[60]
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> • • •
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> The personal interest to be protected by a right of privacy is the individual's interest in preserving his essential dignity as a human being. It is his interest in securing the autonomy of his personality. It is an interest that society shares, because a society cannot long endure that is unable to preserve to its members the autonomy of their personalities. If the right is broad enough to encompass that interest, it is grand enough to deserve the tribute that it is the most

comprehensive of rights and the most valued. . . . The right to protect the autonomy of one's personality cannot be absolute, but it is nevertheless a fundamental constitutional right. In striking a balance between public interests and fundamental private rights, the weight is on the side of the private right unless there is a strong justification in favor of Government action, and the Government has chosen reasonable means for vindicating its overriding interest.[61]

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Man likes to think that his desire for privacy is distinctively human, a function of his unique ethical, intellectual, and artistic needs. Yet, studies of animal behavior and social organization suggest that man's need for privacy may well be rooted in his animal origins, and that men and animals share several basic mechanisms for claiming privacy among their fellows. . . . One basic finding of animal studies is that virtually all animals seek periods of individual seclusion or small-group intimacy. This is usually described as the tendency toward territoriality, in which an organism lays private claim to an area of land, water, or air and defends it against intrusion by members of his own species.[62]

• • •

[R]espect, love, friendship, and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather, without privacy they are simply inconceivable. They require a context of privacy for their existence. To make clear the necessity of privacy as a context for respect, love, friendship, and trust is to bring out also why a threat to privacy seems to threaten our very integrity as persons. To respect, love, trust, feel affection for others and to regard ourselves as the objects of love, trust, and affection is at the heart of the notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these actions, as oxygen is for combustion. . . . The view of morality upon which my conception of privacy rests is one which recognizes basic rights in persons, rights to which all are entitled equally, by virtue of their status as persons.

These rights are subject to qualification only in order to ensure equal protection of the same rights in others. In this sense, the view is Kantian; it requires recognition of persons as ends, and forbids the overriding of their most fundamental interests for the purpose of maximizing the happiness or welfare of all.[63]

• • •

Privacy has been described as that aspect of social order by which persons control access to information about themselves, or, the condition of human life in which acquaintance with a person or with affairs of his life which are personal to him is limited, or, as the claim of an individual to determine when, how, and to what extent information about him is communicated to others. These definitions, and others, share a concern for the ability of the individual to exert some control over the collection, maintenance, use, and dissemination of personal information.

Such definitions of the right of privacy have been criticized as too narrow to serve as an all-inclusive description of the privacy interests entitled to legal protection. Indeed, the United States Supreme Court has identified infringements upon constitutionally protected privacy that are not primarily related to a loss of control over personal information. For example, the privacy infringement involved in forcing a woman to bear an unwanted child has no relation to loss of control over personal information. Rather, these cases recognize, as a protected privacy claim, the ability to make certain personal decisions free of government interference. Also, there are intrusions upon a person's solitude that infringe upon a legally protected privacy interest without being related to a loss of control over personal information.

Although the concept of the right to control personal information will not serve as a description of all privacy interests entitled to legal protection, it does describe an important portion thereof.[64]

• • •

Privacy means different things to different people. Some require solitude and isolation; others need merely less noise. In this brochure, privacy refers to the individual sense of being sufficiently removed from one's environment to live and work in relative peace and comfort. . . . Privacy has been described as a self-determined need to be cut off from the world. This does not necessarily imply constant physical isolation. Most of us do not aspire to a hermit's life in order to achieve privacy. Nor is the desired degree of separation constant. Our need for privacy varies according to our immediate expectations. We expect less privacy on a subway than in a library, in an office than in a home, in an elevator than in a park. These expectations not only vary from situation to situation, but reflect patterns of behavior deeply imbedded in our own culture and time.

Wherever we are, if we hope to protect ourselves and our sense of privacy from interference we must learn to exercise control in two dimensions -- control over our personal territory and control over the human sources of interference.[65]

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On a more fundamental level, it is wholly unreasonable to expect courts alone to protect personal privacy because there is no adequate definition of the concept. Several leading commentators have urged that privacy is the "right to determine when, how, and to what extent information is . . . communicated to others." A control-oriented definition of privacy will permit elimination of some of the grosser abuses by records custodians. This definition alone can never guide the courts to a reasonable approach to privacy, however, because it does not facilitate a quantitative assessment of the right to privacy.[66]

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Privacy, Security, Confidentiality — These three words, in general English usage, describe conditions or states, briefly: privacy, the condition or state of being left alone, free from intrusion; security, protection from the threat of

loss or damage; confidentiality, the absence of general disclosure.

The specific application of these concepts to information systems is well described in U. S. Department of Commerce, NBS Technical Note 809: "Privacy is a concept which applies to individuals. In essence, it defines the degree to which an individual wishes to interact with his social environment, and manifests itself in the willingness with which an individual will share information about himself with others. . . Confidentiality is a concept that applies to data. It describes the status accorded to data and the degree of protection that must be provided for it. It is the protection of data confidentiality that is one of the objects of Security . . . Security is the realization of protection for the data, and the security mechanisms themselves. . . ." It would also improve communication if full concept names were more often used: personal privacy, data confidentiality, and system security.[67]

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A person's feeling that others should be excluded from something which is of concern to him, and also recognition that others have a right to do this.[68]

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A value to be oneself: relief from the pressures of the presence of others.[69]

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An outcome of a person's wish to withhold from others certain knowledge as to his past and present experience and action and his intention for the future; a desire to be an enigma to others or to control others' perceptions and beliefs about the self.[70]

• • •

The essence of privacy is no more, and certainly no less, than the freedom of the individual to pick and choose for himself the time and circumstances under which, and

importantly, the extent to which, his attitudes, beliefs, behavior, and opinions are to be shared with or withheld from others.[71]

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Obtaining freedom of choice or options to achieve goals, control over what, how, and to whom a person communicates information about the self.[72]

• • •

Selective control of access to the self or to one's group.[73]

• • •

The individual's ability to control the circulation of information relating to him.[74]

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David M. O'Brien, in his book entitled Privacy, Law, and Public Policy, surveys many of the attempts to define privacy and notes that much of the confusion which exists stems from the failure to distinguish between privacy as a condition and privacy as a legally recognized right.[75] Although he acknowledges that the distinction between the concept of privacy itself and the right of privacy remains somewhat obscure, he nonetheless ventures to draw it. He notes that the prevailing approach to privacy is inadequate because, first, its definitions are at once too broad and too narrow, and, second, it assumes fallaciously that privacy is solely voluntary and fundamentally involves control over personal information. With respect to the latter, he reminds us that many of the cases in which the Supreme Court has applied the right of privacy had nothing to do with information control at all. O'Brien defines "privacy" in a philosophical sense:[76]

> Privacy is a condition and as such it may be foregone, forfeited, or invaded. . . . Privacy is a condition about which claims may be made as to individuals' freedom from unwanted intrusions upon or disclosures of their affairs as well as their freedom to limit and define for themselves their engagements with others.
>
> Accordingly, privacy may be understood as fundamentally denoting an existential condition of limited access to an individual's life experiences and engagements.

O'Brien's definition of privacy presupposes four points: (1) privacy is both a necessary and a contingent condition of individuals' life experiences and engagements; (2) privacy as a condition of limited access to one's experiences and engagements may be compromised by either causal or interpretative access; (3) privacy as a condition is different from a right of claim; and (4) privacy is valuable for both its intrinsic worth and instrumental value.

This Report spotlights O'Brien's approach because of his clarity of thought, thoroughness in reviewing other commentators, and precision in terminology. Some of O'Brien's concepts are discussed in the following paragraphs.

INEVITABLE AND CONTINGENT PRIVACY: Some privacy is inevitable since individuals cannot communicate all their feelings or thoughts to others. The sharing of experiences is necessarily limited. As O'Brien states it, "Inevitable privacy results from a general limitation on individual communication. The necessary limitations on access to one's experiences and engagements thus derive from the nature of both human experience and communication. By contrast, and of greater concern, is contingent privacy. Contingent privacy refers both to what individuals choose to disclose (or not to disclose) about themselves through communication and engagements with others, and to the circumstances that impose limits on access to individuals. Hence, contingent privacy may be viewed as self-consciously chosen privacy, whereas inevitable privacy emphasizes those externalities that may condition and promote freedom from intrusions."

CAUSAL AND INTERPRETATIVE INVASIONS: Privacy is compromised when unwanted access to an individual's experiences and engagements is gained. There are two ways in which privacy may be invaded: causal and interpretative access. Causal access refers to direct access that influences one's enjoyment of one's engagements and future relationships. For example, trespass statutes restrict causal intrusions upon personal privacy, as do laws regulating loudspeakers, etc. Interpretative access is gained by accumulating information about an individual's engagements and relationships. Examples of interpretative privacy invasions include unwanted publicity by the media and collection of personal information by government agencies or private enterprises. Notwithstanding the inability to control the flow of information (access or disclosure), individuals often have legitimate privacy expectations. Causal access and interpretative access are thus two interdependent ways in which privacy may be compromised.

NORMATIVE VALUES OF PRIVACY: Privacy appears to be valuable for both its intrinsic worth as well as its instrumental value. O'Brien states, "The intrinsic value of privacy may well be intuitive, but the instrumental values of privacy can be demonstrated because disclosures may affect an individual's future activities. The instrumental values attached to privacy derive from its relation to individual freedom. . . . privacy is an existential condition that gives rise to a broad range of privacy interests, and those privacy interests are meaningful in themselves as well as in relation to individual freedom and autonomy."[77] Some values underlying privacy include

mental repose, physical solitude, physical exclusiveness, personal autonomy, inviolate personality, human freedom, and dignity.

PRIVACY VERSUS THE RIGHT OF PRIVACY: According to O'Brien, too much emphasis on the legal right of privacy narrows the focus of privacy definitions and neglects nonlegal safeguards of privacy; thus, he urges a distinction between privacy and the right of privacy. He states in his book, "Judicial and legislative recognition of privacy interests do not determine what privacy is. Rather, they only declare in what contexts and under what circumstances privacy will be afforded legal protection. Early proponents of privacy protection mistakenly assumed that privacy is isomorphic with a right of privacy."[78]

"Privacy" is a condition of limited access to an individual's life experiences and engagements in relationships. The "right of privacy" entitles individuals to the protection of privacy when their privacy claims are reasonable and are not overridden by other legal, moral, or political considerations. O'Brien calls the right of privacy a "prima facie right" because it is not absolute and can give way to more urgent considerations.[79]

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## Glossary of Working Definitions for Privacy Terms

Privacy: philosophically speaking, a condition of limited access to one's dominion, one's personal decisions, and one's personal life.

Personal Privacy: a more complete description of the condition of privacy denoting that privacy rights generally attach only to the individual whose interests are directly invaded.

Right of Privacy: an official acknowledgment by society that individual expectations of privacy are often reasonable and legally enforceable; primary development has been judicial, both in tort law and in constitutional law; more recently, statutory provisions have been legislatively created to protect personal privacy.

Tortious Privacy Invasions: violations of tort law committed by individuals or organizations, usually falling into one of four categories: (1) intrusion upon one's seclusion or solitude, or into one's private affairs; (2) public disclosure of embarrassing private facts; (3) publicity that places one in a false light in the public eye; and (4) appropriation of one's name or likeness, for the advantage of the intruder.

Unconstitutional Privacy Invasions: governmental actions that unreasonably interfere with major "zones of privacy," such as territorial privacy, informational privacy, or decisional and associational privacy.

Territorial Privacy Rights: privacy rights, founded in tort law, constitutional law, and statutory law, wherein society has acknowledged that individuals have reasonable expectations to be free from physical, sensory, or technological intrusions into their solitude, private affairs, or personal space.

Informational Privacy Rights: privacy rights, founded in tort law, constitutional law, and statutory law, wherein society has acknowledged that an individual may have reasonable expectations that access to personal data, confidential records, and private communications may be reasonably limited or controlled by that individual and that such information will not be the subject of unfair collection or dissemination practices.

Decisional and Associational Privacy Rights: privacy rights, founded in constitutional and statutory law, wherein society has acknowledged that individuals can reasonably expect autonomy in their personality development and personal associations and independence in making fundamental personal decisions, without being subject to unjustified government regulation.

## A NATIONAL OVERVIEW OF THE RIGHT OF PERSONAL PRIVACY

Personal privacy problems are not neatly packaged into separate governmental departments. They are numerous and often overlapping, because we live in a union of somewhat sovereign states forming a constitutional democracy that is based upon precepts of federalism and separation of powers.

Many personal privacy protections are based upon federal constitutional doctrines that are the supreme law of the land. Some solutions are uniquely in the hands of Congress either out of judicial deference or because of powers granted Congress under the commerce, general welfare, and supremacy clauses of the United States Constitution. However, in general, as the Supreme Court has noted, the law of personal privacy is most often left to the states to develop.[80]

Before moving on to a review of state privacy law, we pause to consider the foundation and expansion of privacy law at the federal level.

## THE ROLE OF THE FEDERAL COURTS IN CURBING UNREASONABLE GOVERNMENT INTERFERENCE

The provisions in the Bill of Rights of the United States Constitution protect the individual from unreasonable government actions, whether such action is taken by federal, state, or local authorities. One would expect to find express protection for the right of personal privacy in the Bill of Rights -- but one looks in vain. There is no explicit "privacy amendment" there to be found.

The development of constitutional privacy law at the federal level has occurred on a piecemeal basis. The blanket of federal privacy rights is patchwork indeed, but, nonetheless, often provides substantial protection.

### Territorial Privacy in Federal Case Law

Again, quoting O'Brien:

> Personal privacy attains perhaps its principal constitutional protection and the closest approximation of explicit recognition in the guarantees of the Fourth Amendment. The amendment, as similar provisions in state constitutions, was

drafted in response to abuses connected with general warrants or writs of assistance employed by British officials in the colonies prior to the American Revolution. . . . During this period colonists complained against the use of writs of assistance by royal officers. In Paxton's Case, James Otis declared in a historic indictment against the writs: "A man's house is his castle; and while is quiet, he is well guarded as a prince in his castle." Otis registered a belief of both Englishmen and colonists. That belief was perhaps most eloquently articulated by William Pitt, the Elder:[82]

> The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail -- its roof may shake -- the wind may blow through it -- the storm may enter -- the rain may enter -- but the King of England cannot enter -- all his force dare not cross the threshold of the ruined tenement.

The allusion of individuals' houses to castles is intelligible not merely because houses are fortresses and bastions of private property but also because they are the principal place in which individuals engage and conduct their affairs in private.[83]

James Madison drafted the initial proposal that, with minor modifications, became the Fourth Amendment to the United States Constitution, ratified on December 15, 1791:

> 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.[84]

In 1868, Judge Thomas Cooley linked up James Otis' declaration and James Madison's proposal when he noted: "The maxim that 'every man's house is his castle' is made a part of our constitutional law in the clause

prohibiting unreasonable searches and seizures."[85] Nearly two decades later, the Supreme Court, in its first explicit discussion of the relationship of privacy to the Fourth Amendment, held that the constitutional provision protects "the sanctities of a man's home and the privacies of life."[86]

Premised on a disapproval of illegal government activity and the recognition of the need to preserve the integrity of the judicial system, the United States Supreme Court adopted the "exclusionary rule" in 1914.[87] The exclusionary rule put teeth into the protections of the Fourth Amendment by prohibiting the admission into federal courts of evidence secured in violation of that amendment. It was not until 1961 that the Court recognized that privacy was a freedom implicit in the concept of ordered liberty, resulting in the application of the exclusionary rule to keep illegally seized evidence out of trials in state courts.[88]

Early development of the right of privacy as protected by the Fourth Amendment depended largely on concepts of territorial privacy, defined primarily in terms of whether or not an individual had a proprietary interest in the locus of his or her activities. The closer the connection between a person's actions and his or her home or other location in which he had an ownership interest, the more likely one's privacy claims would receive recognition under the Fourth Amendment.

Twentieth Century technology posed a new problem for the courts. They reluctantly and slowly moved away from protection only under trespass principles. In the 1928 decision of Olmstead v. United States, the Supreme Court, in a five-to-four decision, denied recognition of privacy expectations against nontrespassory intrusions.[89] Not until the mid-1960's did the Court denounce Olmstead's theory of protection only against physical trespasses that resulted in seizures of tangible property.

In 1967, in a case involving government wire-tapping of a conversation in a public telephone booth, the Supreme Court was called upon to expand the protections of the Fourth Amendment to give meaningful protection against modern threats to personal privacy. In Katz v. United States, the government argued that, since no physical trespass occurred, there was no search, and since nothing tangible was confiscated, there was no seizure. The Supreme Court noted, "It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry."[90] The Court then held:[91]

> We conclude that the underpinnings of Olmstead . . . have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. The government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

In Katz, the Court noted that Fourth Amendment privacy expectations can be reasonable in a whole host of places outside of the home (e.g., a business office, a friend's apartment, a taxicab, or a telephone booth). According to Katz and its progeny, the Fourth Amendment protects people and not places. It is not simply the nature of the area (public vs. private) on which cases now turn, but rather the relationship between the individual and the place.

Katz eliminated the slavish adherence to technicalities of trespass law. Even though the Fourth Amendment protects people and not places, analysis of a Fourth Amendment privacy claim will usually require reference to a place. Since no area is inherently and absolutely private, these privacy claims must be determined by reference to both the place and the circumstances of the individual's activity. In his concurring opinion in Katz, Justice Harlan noted that there are two elements to a valid Fourth Amendment privacy claim: (1) that the individual entertained a subjective expectation of privacy, and (2) societal recognition that such expectation was reasonable.[92]

However, in a series of cases in the Seventies, the Burger Court has retreated somewhat from the broad rationale of Katz. In 1974, the Court held that there is a "lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as a repository of personal effects."[93] Two years later, a similar position was taken when the Court stated that "the expectation of privacy with respect to one's automobile is significantly less than [that] relating to one's home or office."[94] Then, in 1978, Justice Rehnquist, for a five-member majority, rejected the notion that "anyone legitimately on the premises" of a place

searched could claim a reasonable expectation of privacy. He held that a passenger in an automobile has no valid expectations of privacy under the Fourth Amendment, noting that passengers generally have neither property nor possessory interests in the vehicle.[95]

Even prior to the advent of the Burger Court, general disclaimers were being issued by the High Court:[96]

> [T]he Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy -- his right to be let alone by other people -- is, like protection of his property and of his very life, left largely to the law of the individual States.

The sanctity of the home and the privacies of life have received tremendous protection under steadily developing Fourth Amendment privacy law, although the momentum appears to have reached a plateau in the late Sixties. While the federal courts are shying away from further expansion of search-and-seizure law at the present time, they are continuing to zealously protect against many other forms of privacy invasions under different constitutional theories.

## Decisional/Associational Privacy in Federal Case Law

Through the assertion and use of its police powers, our government often directs the conduct of its subjects via regulations or outright prohibitions. The "police power" of government is a shorthand way of referring to the authority of government to regulate public health, safety, welfare, and morals. However, this plenary power to regulate is not without its limits.[97] The United States Constitution restricts the police power when it is abusive of the rights of the individual. The Bill of Rights operates directly as a check on overreaching action by the federal government and, through the Fourteenth Amendment, on the activities of state and local government officials and laws.

The Sixties saw a youthful rebellion of sorts, partly based on a growing discontent with government interference in the area of personal decisions and associations. The movements of the Sixties all received a major boost from a Supreme Court and a federal judiciary that were more receptive to growing demands for freedom of choice in matters of individual lifestyle and personal associations.

A shot of legal adrenalin was injected into the privacy movement when the United States Supreme Court announced its decision in the case of Griswold v. Connecticut. In that case, the Court answered the pleas of a married couple and its doctor by voiding a state statute that banned the use of contraceptives. The plaintiffs argued that the law violated their right to marital privacy. In looking to the law of "freedom of association" as a possible foundation, the Court noted that heretofore only political associations had been afforded meaningful protection under this First Amendment doctrine. The Court surveyed the entire Bill of Rights and found peripheral privacy protection in numerous other amendments. In delivering the Court's opinion, Mr. Justice Douglas stated:[98]

> The foregoing cases suggest that the specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. . . . The Fourth and Fifth Amendments were described in Boyd v. United States [citation] as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." We recently referred in Mapp v. Ohio [citation] to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people." . . . We have had many controversies over these penumbral rights of "privacy and repose." [Citations.] These cases bear witness that the right of privacy that presses for recognition here is a legitimate one. . . .
>
> We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of

being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our decisions.

Since Griswold was decided in 1965, the United States Supreme Court has written full opinions in over four dozen cases dealing with decisional and associational privacy rights. Only a few will be mentioned here, although most of them have been read and considered in preparing this Report. Before highlighting some of these major cases, we might reflect on comments made by U.C.L.A. Law School Professor Kenneth Karst, in his treatise on this major aspect of personal privacy, "The Freedom of Intimate Association":[99]

> If Griswold has prevented any children from being conceived, none of the children-who-weren't would yet be fifteen years old. During this short time, the Supreme Court has decided about fifty cases dealing with marriage and divorce, family relationships, the choice whether to procreate, and various forms of intimate association outside the traditional family structure. There is a luxuriant variety in the factual contexts of these cases, which range from illegitimacy to the right to marry, from communes to homosexual association. Doctrinally, too, the cases reflect various hues on the constitutional spectrum. Some are discussed in equal protection terms; others inspire the rhetoric of due process; either procedural or substantive. Yet, for all their diversity, these decisions can usefully be seen as variations on a single theme: the freedom of intimate association.

Karst attributed the "seismic emergence of the freedom of intimate association as a feature in our constitutional landscape" to our "new appreciation and acceptance of cultural diversity, and to a reexamination of the place of women in society."[100] In speaking of a revival of substantive due process as a guarantee of individual freedom, Karst sees the freedom of intimate association as one of this movement's early products.

The freedom of intimate association is not absolute since, in particular cases, it may give way to overriding societal interests. It does not prevent the promotion of majoritarian views of morality, but calls for a serious

balancing of opposing interests before minority views and lifestyles are trampled. In his article on the subject, Karst gives us his definition of "intimate association."[101]

> By "intimate association" I mean a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship. An intimate association, like any group, is more than the sum of its members; it is a new being, a collective individuality with a life of its own. Some of the primary values of intimate association depend on this sense of collectivity, the shared sense that "we" exist as something beyond "you" and "me." The connecting links that distinguish such an association from, say, membership in the PTA may take the form of living in the same quarters, or sexual intimacy, or blood ties, or a formal relationship, or some mixtures of these, but in principle the idea of intimate association also includes close friendship, with or without any such links.

In addition to "associational privacy," many of the cases decided by the federal courts since Griswold, and based on its rationale, have focused on the interest of the individual in having independence in making fundamental life-decisions. Hence, the phrase "decisional privacy rights" has been coined to refer to this aspect of the right of privacy.

The first Supreme Court opinion after Griswold involving decisional privacy was handed down in 1969 in the case of Stanley v. Georgia.[102] Actually, Stanley is based upon a mixture of decisional privacy rights and territorial privacy rights. In addressing the power of the government to tell one what may or may not be read in one's own home, the Court said:[103]

> He [appellant] is asserting the right to read or observe what he pleases — the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights,, that there are certain types of materials that individuals may not read or even posssess. Georgia justifies this assertion by arguing that the films in the present case are obscene. But we think that mere cate-

> gorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think that they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.
>
> And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment.

Two years later, the Supreme Court was faced with a choice as to whether or not to limit the sexual autonomy doctrine conceived in Griswold, to the marital relationship. In Eisenstadt v. Baird, the Court, in deciding another contraceptive case, acknowledged that sexual autonomy was founded in the right of the individual, whether married or single:[103]

> It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the married couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything at all, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting the person as the decision whether to bear or beget a child.

Thus, the Court made it clear not only that associational privacy rights would be protected, but that the right of privacy was broad enough to include within its ambit independence in making fundamental personal decisions.

The realm of decisional and associational privacy rights may have reached a zenith when the Supreme Court was urged to apply the doctrine of personal privacy to protect a woman's freedom of choice in having an abortion. In 1973, the Court delivered its opinion on this subject in the now-famous case of Roe v. Wade.[104] In addressing the subject of decisional privacy rights, the Court noted that not every personal decision is protected from governmental regulation under the right of privacy:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as [1891] . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" [citation] are included in this guarantee of personal privacy. . . .
>
> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

The following year, the Supreme Court held that "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[105] In 1977, the Court decided two major privacy cases and gave further elucidation to this area of decisional privacy rights. In Whalen v. Roe,[106] the Court concluded that the right of personal privacy includes "the interest in independence in making certain kinds of decisions." The opinion in Carey v. Population Services International further elaborated:[107]

> While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among those decisions that an individual may make without unjustified government interference are personal decisions "relating to marriage . . . procreation . . . contraception . . . family relationships . . . and child-rearing and education."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

This section of the Constitution not only affords procedural guarantees against the loss of "liberty," but also protects substantive aspects of liberty against unconstitutional restrictions by the state. Hence, the phrase "substantive due process" is sometimes used by legal commentators and jurists. It is under this "liberty" provision in the constitution that the Supreme Court has found protection for personal-privacy rights insofar as they protect certain fundamental decisions. How expansive this doctrine may be, or what kinds of personal decisions come under its umbrella of protection, the Supreme Court has not yet concluded. In 1976, the Court noted the limited scope of its previous decisional privacy cases:[108]

> [Roe, Eisenstadt, and Stanley] involved a substantial claim of infringement on the individual's freedom of choice with respect to certain basic matters of procreation, marriage, and family life. But whether the citizenry at large has some sort of "liberty" interest within the Fourteenth Amendment in matters of personal appearance is a question on which this Court's cases offer little, if any, guidance.

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## A Caveat

One major caveat must be mentioned when discussing the protection that has been afforded to personal decisons by the United States Supreme Court subsequent to the Griswold case. Within the area of so-called "alternate lifestyles," the Supreme Court has demonstrated an unwillingness to apply the protections stemming from decisional and associational privacy rights to sexually oriented decisions and associations which are somewhat unconventional or which run against traditional mores. Three significant cases illustrate this point.

In 1974, the Court rejected privacy claims when they were invoked by persons living in the same household who were not related by blood, marriage, or adoption. The City of Belle Terre, New York, imposed zoning restrictions denying "single family" status to households where three or more persons were living together without being so related. The Court upheld the zoning restriction. In his dissent, Mr. Justice Marshall said:[109]

> The choice of household companions -- of whether a person's "intellectual and emotional needs" are best met by living with family, friends, professional associates, or others -- involves deeply personal considerations as to the kind and quality of intimate relationships within the home. That decision surely falls within the ambit of the right to privacy protection by the constitution.

In the years following the Belle Terre decision, the Court has attempted to steer clear of these "alternate lifestyle" controversies, even when it has meant that a refusal to apply privacy principles may allow serious government penalties to be imposed merely because of one's living arrangements. The Court often denies petitions for writs of certiorari, occasionally incurring the wrath of one of its dissenting members or legal scholars and commentators.

On December 11, 1978, the Supreme Court denied the petition of Rebecca Hollenbaugh.[110] She was a librarian and her boyfriend was the custodian at the Carnegie Free Library in Connellsville, Pennsylvania. The two were seeing each other socially, although her boyfriend was still married at the time. In 1972, Rebecca learned that she was pregnant and her boyfriend left his wife and moved in with Rebecca. Because of her pregnancy, she was granted a leave of absence from the library. Rebecca and Fred neither

concealed their relationship nor did they advertise it. Responding to some community complaints, the Board of Trustees of the Library tried to pursuade the two to discontinue living with each other. When they refused, they were both discharged from their jobs. They brought suit for reinstatement, and the lower federal courts denied their petition. Noting the fact that criminal penalties for adultery had been removed from the books by the Pennsylvania Legislature some years previous, Mr. Justice Marshall dissented from the Supreme Court's denial of certiorari:

> Petitioners' rights to pursue an open rather than a clandestine personal relationship and to rear their child together in this environment closely resemble the other aspects of personal privacy to which we have extended constitutional protection. That petitioners' arrangement was unconventional or socially disapproved does not negate that resemblance . . . particularly in the absence of a judgment that the arrangements so offend the social norms as to evoke criminal sanctions. And certainly, no distinction can be drawn between this case and those . . . in terms of the importance to petitioners of this personal decision.

The third example of judicial avoidance of cases involving unconventional lifestyles or relationships is the denial of certiorari by the Supreme Court on October 20, 1980, in the case of Jarrett v. Jarrett.[111] The facts of the case follow. In December, 1976, Jaqueline Jarrett was divorced from her husband and was given custody of her three minor daughters. She was awarded use of the family home as well as child support. Her husband, Walter, was given visitation rights. In April, 1977, Jacqueline told Walter that her friend, Wayne Hammon, was going to move into the family home. Walter objected and one week later filed a request for custody modification on the grounds that he objected to his wife's nonmarital relationship and did not wish to have his daughters raised in that type of an environment.

Following a hearing on the issue, the trial court granted a change in custody, citing the "moral and spiritual well-being and development" of the children as the controlling factor. The Illinois Appellate Court reversed, on the ground that there was no evidence that Jacqueline was unfit and no evidence showing that the best interests of the children required a change in custody. A divided Illinois Supreme Court reversed the Appellate Court and reinstated the change in custody. The Illinois Supreme Court concluded that

a change in custody was warranted and could be based on the mere possibility of harm in the future even though there was no evidence of actual present harm. The alleged future harm consisted of the possibility that the mother's nonmarital relationship could encourage her daughters to engage in similar activity as they matured. In their dissent from the refusal of the United States Supreme Court to grant Mrs. Jarrett a hearing, Justices Brennan and Marshall noted that the case had broad implications for millions of others throughout the country:

> The 1978 Census Bureau statistics cited by the Illinois Supreme Court reveal that there are 1.1 million households composed of an unmarried man and woman and upwards of 24 percent of those households also include at least one child. . . . While statistics do not reveal how many of these households were formed after a divorce, and with respect to which the noncustodial divorced parent may be able to seek custody, the crude figures alone suggest that the custodial pattern is a pervasive one.

The day after the Supreme Court decided not to take the case, newspapers across the country carried the story, thereby putting America's unmarried custodial parents and couples on notice that their children could be taken away on "public policy" grounds, as had been done to Mrs. Jarrett in Illinois.[112]

Notwithstanding the "hands off" approach taken by the Supreme Court in privacy cases involving unmarried cohabiting heterosexuals, many gains have been made in lower federal courts as well as in the state courts in recent years for members of these "alternate families." More about this will be discussed in the sections of this Report dealing with sexual orientation discrimination.

Before moving on to a discussion of the role of the federal courts in other aspects of personal privacy, mention should be made of the fact that several Supreme Court decisions in the Seventies touched upon the rights of teenagers. The Court has made it clear that youth have personal privacy rights too. Persons cannot be stripped of the right of privacy merely on account of their minority. While using a careful balancing approach, considering the interests of parents and family members on the one hand and the rights of minors on the other, several state restrictions on "family planning" measures for teenagers have been declared unconstitutionally overbroad.[113]

## Informational Privacy in Federal Case Law

The earliest foundation of the right of personal privacy in this country appears to be the Fourth Amendment, premised on the common law's concern for the sanctity of the home. It should be no great wonder, then, that the most substantial development of constitutional privacy rights during the first half of this century was primarily confined to search-and-seizure law. The Sixties saw associational privacy buds begin to open as the Supreme Court expanded this concept to include "intimate associations." With the unfolding of the Seventies, clusters of decisional privacy blossoms appeared in many areas of "personal decision-making."

As the Eighties edged closer, more demands were placed on the federal courts to referee an increasing number of "informational privacy" conflicts.

In 1976, the Supreme Court decided a case in which a novel privacy claim was presented for resolution: Does the right of privacy impose limitations on the authority of a state to publicize the fact of a person's arrest? In the case of Paul v. Davis, a photograph of Mr. Davis was included in a flyer of "active shoplifters" after he had been arrested, and the flyer was distributed by local police to nearby merchants. When the criminal charges were dismissed against him, Davis sued the police for "invasion of privacy" under the federal Constitution. In rejecting his claim, the Supreme Court stated:[114]

> While there is no "right of privacy" found in any specific guarantee of the Constitution, the Court has recognized that "zones of privacy" may be created by more specific constitutional guarantees and thereby impose limits upon government power . . . Respondent's case, however, comes within none of these areas. He does not seek to suppress evidence seized in the course of an unreasonable search. . . . And our other "right of privacy" cases, while defying categorical description, deal generally with substantive aspects of the Fourteenth Amendment. . . . Respondent's claim is far afield from this line of decisions. He claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private," but instead on

> a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions holds this or anything like this, and we decline to enlarge them in this manner.

The following year, the Court heard another "informational privacy" case involving a plea for constitutional protection. Whalen v. Roe involved a challenge to a New York statute requiring that when prescriptions for certain drugs were filled by a druggist, patient identification information had to be supplied to a central computerized agency of the state. A number of patients complained that this reporting requirement violated their rights of privacy. Citing privacy law development, with its origins in territorial privacy and associational privacy, the Roe appellees tried to convince the Court that privacy principles should apply to their fact situation. Their arguments were firmly rejected:[115]

> The Roe appellees also claim a constitutional privacy right emanates from the Fourth Amendment. [Citations.] But those cases involve affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations. We have never carried the Fourth Amendment's interest in privacy as far as the Roe appellees would have us. We decline to do so now.
>
> Likewise the Patient appellees derive a right to individual autonomy from our freedom of association cases . . . But those cases protect "freedom of association for the purpose of advancing ideas and airing grievances" . . . not anonymity in the course of medical treatment.

In his concurring opinion in Whalen, Mr. Justice Stewart noted: "Whatever the ratio decidendi of Griswold, it does not recognize a general interest in freedom from disclosure of private information."[116]

Resorting to earlier doctrine that proprietary interests must be present for Fourth Amendment claims to be valid, the Supreme Court has also held that bank customers have no justifiable expectation of privacy in records of their affairs routinely kept by banks.[117] Since bank records are the "property" of the financial institution, the bank may voluntarily disclose information and records to government authorities who have not previously obtained a judicial warrant.

Notwithstanding the refusal of the United States Supreme Court to recognize that informational privacy rights have a constitutional basis and should protect individuals from unreasonable government collection and dissemination practices, some lower federal courts have occasionally provided relief.[118]

It appears that informational privacy rights, whether based in common-law tort principles or in relatively new statutory schemes, will probably continue to receive the greatest protection under state law. Since the modern development of common-law principles has been focused primarily to compensate a victim for injuries inflicted by the mass media, privacy protections for other kinds of informational privacy violations have been founded either in state constitutions or in state statutes.

As Congress enacts federal privacy legislation protecting informational privacy, the federal courts will have an obligation to resolve disputes and interpret federal legislation on the subject. However, it is unlikely, at least in the foreseeable future, there will be "judicial legislation" at the federal level on the subject of informational privacy.

In the field of informational privacy, most activity is found in state governments. As a result, the portions of this Report surveying what has been done in other states, and particularly what remedial action has been taken by the State of California, are worthy of close attention.

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## THE ROLE OF THE FEDERAL COURTS IN BALANCING THE RIGHT OF PRIVACY WITH FREEDOM OF EXPRESSION

Protecting the privacy rights of individuals against unreasonable governmental actions is not the only function of the federal courts with respect to the resolution of personal privacy disputes. Oftentimes, in the name of preserving and enhancing the privacy rights of individuals, government officials pass laws, adopt policies, or take other measures that curb the conduct and speech of organizations or individuals. When these privacy protection measures come before the courts, it is often in the context of a constitutional challenge that has been leveled by someone who feels that freedom of expression has unreasonably suffered in the name of "protecting privacy." Our courts have the duty to uphold and defend the Constitution, and when two constitutional provisions are at odds, the task of balancing and resolving the conflict is a delicate one indeed.

In the "Handbill Cases" of the late Thirties, the Supreme Court faced such a conflict. In Martin v. City of Struthers, the Court struck down an ordinance that prohibited door-to-door solicitation by religious organizations.[119] In doing so, the Court observed that "the ordinance was designed to protect a legitimate interest, the right of privacy in the home, but that in balancing the interests, the considerations of free speech and free exercise of religion out-weighed this interest."

Political speech, much like religious expression, often overrides the right of personal privacy. In 1969, the Court unanimously reversed the disorderly conduct convictions of political picketers who had marched in front of the home of Chicago's Mayor Daley. However, a note of caution was expressed by Justices Black and Douglas in their concurring opinions:[120]

> Were the authority of the government so trifling as to permit anyone with a complaint to have the vast power to do anything he pleased, wherever he pleased, and whenever he pleased, our customs and our habits of conduct, social, political, economic, ethical, and religious, would all be wiped out. . . . I believe that the homes of men, sometimes the last citadel of the tired, the weary and the sick, can be protected by the government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with the fears of the unknown.

However, since the picketers in this case were peaceful and orderly, the right of privacy of a political leader yielded to the freedom of expression of the protesters.

Two years later, the Court again gave preference to the claims of free speech, when it reversed a lower court injunction that was designed to protect privacy interests against picketing and leaflet distribution in a residential suburb. Chief Justice Burger's majority opinion stated that "designating the conduct as an invasion of privacy . . . is not sufficient to support an injunction against peaceful distribution of informational literature."[121]

And yet, at other times, when the expression has been for commercial purposes, rather than religious or political purposes, the right of privacy has survived the balancing of interests. In Breard v. Alexandria, the Court upheld convictions under an ordinance that prohibited solicitors, peddlers, and transient vendors from entering private property without the owner's permission.[122] Similarly, privacy interests were considered paramount when the Court upheld a statute forbidding all advertising of tobacco and cigarettes on billboards and streetcar signs but permitting them in newspapers, magazines, and storefront windows. Justice Brandeis, writing for the Court, justified the distinction:[123]

> Billboards, streetcar signs, and placards and such are in a class by themselves. . . . [They] are constantly before the eyes of observers on the streets and in streetcars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message on the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or the streetcar placard.

In the case of Kovacs v. Cooper, the Court upheld an ordinance forbidding sound trucks from emitting "loud and raucous noises."[124] The Court distinguished the handbill cases in that privacy claims yielded to freedom of expression, noting, "[An individual] is practically helpless to escape this interference with his privacy by loudspeakers."

Three years later, distinguishing the Kovacs case, the Court rejected privacy claims of passengers on streetcars, who complained about piped-in music, with one-minute advertisements every half hour. The passengers complained that they were a captive audience and that being forced to hear music on the streetcars violated their right of privacy. The Court emphasized the distinction between privacy in the home and privacy in public places:[125]

> The Court below has emphasized the claim that the radio programs are an invasion of the constitutional rights of privacy of the passengers. . . . This position wrongly assumed that the Fifth Amendment secures to each passenger on a public vehicle regulated by the Federal Government a right of privacy substantially equal to the privacy to which he is entitled in his own home. However complete this right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance.

Commentator David O'Brien adeptly summarizes the principle that seems to emerge from these numerous First Amendment privacy cases:[126]

> Individuals have no reasonable expectations of privacy in places where they have no assertable proprietary interests and when they may reasonably avoid offensive public displays.

O'Brien's observation is supported by any number of Supreme Court decisions on the subject, including the famous "Fuck the Draft" case in which an individual was arrested in the Los Angeles County Courthouse for wearing such a sign on the back of his jacket. The United States Supreme Court, in reversing the conviction, concluded:[127]

> While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home . . . we have at the same time consistently stressed that "we are often captives" outside of the sanctuary of the home and subject to objectionable speech. . . . The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.

Two recent examples of privacy interests that survived a challenge on freedom-of-expression grounds involve the mails and the airwaves as methods of intrusion. In Rowan v. United States Post Office Department, the Court held that "a mailer's right to communicate must stop at the mailbox of an unreceptive address."[128] Rowan upheld a statute that penalizes mailers if they continue to send material to householders who have protested that the material was offensive and their requests for discontinuance of similar mailings.

The second case involved Pacifica Foundation's challenge to an F.C.C. rule prohibiting the use of seven "dirty words" over the airwaves. The F.C.C. found that George Carlin's monologue, "Filthy Words," a satire about words one could not say on the air, was patently offensive, although not legally obscene. Writing for the majority, Justice Stevens discussed the balance between privacy rights and other First Amendment rights:[129]

> [T]he broadcasting media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be let alone plainly outweighs the First Amendment rights of the intruder.

What emerges from an analysis of these privacy-versus-freedom-of-expression cases seems consistent with the rest of the privacy landscape: the right of privacy, whether it be informational, territorial, or decisional/associational in nature, is strongest when it is associated with privacy in the home. Taken out of the "castle" context, the outcome of any conflict is dependent on three factors: (1) the objectionableness of the method of intrusion, (2) the theme of the content of the message (e.g., religious, political, commercial), and (3) the degree of captivity of the audience.

With respect to privacy-versus-freedom-of-press cases, the United States Supreme Court has been jealously protective of the rights of a free press. Basically, the Court applies the same standards in privacy cases as it does in libel cases.[130] Any privacy protection legislation designed to prevent tortious invasions of personal privacy by the media must be narrowly drawn in order to survive a First Amendment attack.

One hard and fast rule has been developed by the Supreme Court in these press freedom cases, namely, publication of accurate facts obtained by

resorting to the public record is not actionable under the privacy rubric.[131] The Commission urges public policy makers and administrators to keep this First Amendment rule in mind when deciding what information should be requested or collected from individuals. Furthermore, whenever the Public Records Act vests administrators with discretion or when the terms of the Act are ambiguous, the Commission urges that administrators carefully balance all competing interests before personal information in the hands of public agencies is disclosed to the public.

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## THE ROLE OF CONGRESS

Congressional involvement in protecting personal privacy from the threat of invasion by the federal government, by the states, or by the actions of private organizations, has become more significant in recent years. In 1974, Congress enacted the Federal Privacy Act declaring that informational privacy "is a personal and fundamental right protected by the Constitution."[132] Through various means, this Act purports to give individuals some power to limit the collection, maintenance, and dissemination of personal information about them by agencies of the federal government.

Of greater significance, however, is the Freedom of Information Act, which, according to Arthur Miller, a noted privacy advocate, "probably does more to end privacy in the United States, ostensibly in pursuit of the public's right to know, than any other enactment in the last fifty or sixty years."[133]

The Guidebook to the Freedom of Information and Privacy Acts, reviewed by the staff of this Commission, is a thorough analysis of the strengths and weaknesses of both Acts. It makes several observations and conclusions worthy of mention here:[134]

- Numerous deficiencies and manifold exemptions render the Privacy Act little more than a legislative statement of unenforceable rights.

- The original Senate bill provided for an independent privacy commission with power to investigate, hold hearings, and recommend prosecution of agency violations. A legislative compromise resulted in the establishment of a temporary study commission and left sole responsibility on the individual to enforce the provisions of the Act. Unfortunately, it provides neither the tools nor the incentives necessary to make individual enforcement a reality.

- Because neither Act requires agencies to notify the subjects of disclosure requests, an agency may disclose personal information before anyone can assert nondisclosure rights.

- The subject of a personal record, not its governmental custodian, is harmed by its disclosure. Yet only the latter

may invoke the Freedom of Information Act's privacy exemptions.

- The Privacy Act often subordinates substantial privacy interests to insignificant Freedom of Information interests.

- Provisions of the Privacy Act require each agency to keep an accounting of the date, nature, purpose, and recipient of each disclosure of a personal record. However, other sections of the Act waive the requirement if the disclosure is made pursuant to the Freedom of Information Act. The absence of an accounting of FOIA disclosures assures that many individuals will never discover that agencies have wrongfully disclosed information in violation of the Privacy Act, thereby creating another barrier to effective enforcement of the Act.

- The failure to provide for an independent commission to oversee and aid in the enforcement of the Act guaranteed the Act's impotency.

THE COMMISSION RECOMMENDS that the members of California's Congressional delegation introduce legislation to correct the deficiencies listed above.

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## The Privacy Protection Study Commission

Congress was well aware of the fact that it had not solved all informational privacy problems with the Privacy Act of 1974. In an effort to consider all relevant data that were available on the subject of informational privacy before making any drastic moves, Congress established the Privacy Protection Study Commission. That Commission was charged with the responsibility of studying privacy problems and reporting back to Congress with recommendations for further action to enhance the protection of personal privacy. The Commission conducted a thorough analysis of the subject and issued its final report in 1977.

The Commission concluded that any effective national privacy protection policy must have three concurrent objectives:

> MINIMIZING INTRUSIVENESS: inspecting the relationship and creating a proper balance between what an individual is expected to divulge to a record-keeping organization and the benefit he seeks from the government in return;
>
> MAXIMIZING FAIRNESS: opening up record-keeping operations in ways that will minimize the extent to which recorded personal information is itself a source of unfairness in any decision about and individual made on the basis of it; and
>
> MAINTAINING CONFIDENTIALITY: defining obligations with respect to the uses and disclosures of recorded information about an individual; thereby fostering legitimate, enforceable expectations of confidentiality.

The Commission's Report consists of hundreds of pages of written material on the subject of informational privacy and has been read by members of the staff of this Commission. After analyzing the material contained in that Report, the California Commission on Personal Privacy is convinced that many personal privacy protections can be delivered only by Congress. Data collection and dissemination practices are carried on daily through both national and international networks; many corporations stretch over state and national boundaries. In many cases, state legislation is powerless to check increasing informational privacy abuses.

THE COMMISSION RECOMMENDS that California's congressional delegation introduce additional legislation to create a strong and effective national policy on informational privacy. The Commission further recommends cooperative efforts among the states, in the form of interstate compacts or uniform state laws, as well as joint federal/state projects in order to keep privacy protections on a par with increasingly complex privacy infringements.

## Some Findings of the Federal Commission

In its report, the Privacy Protection Study Commission made the following observations:

> The Commission's findings clearly reveal an overwhelming imbalance in the record-keeping relationship between an individual and an organization, and its policy recommendations aim at strengthening the ability of the individual to participate in that relationship. This can be accomplished in three ways: by prohibiting or curtailing unjustifiably intrusive information collection practices; by granting the individual basic rights, such as the right to see, copy and correct records about himself, coupled with obligations of organizations to incorporate protections for personal privacy in their routine recordkeeping operations; and by giving the individual control over the disclosure of records about him.
>
> . . . A primary objective of the Commission's implementation strategy is to make sure that privacy issues stay in proper focus. This requires continuing attention from a broad public-policy perspective -- a need that is not fulfilled today even with the scope of the Privacy Act. A means must be found to provide for continued public awareness of what is clearly a continuing and pivotal concern, and assure ongoing attention to develop and refine understanding of specific and emerging problems. Notwithstanding the broad scope of this report, a number of tasks remains. . . . [E]xperience with other public-policy issues of this sort suggests a continuing need to coordinate the policies that have been and will be adopted, and to assist in identifying and resolving real or

apparent conflicts between existing, modified, and new statutes and regulations.

. . . Finally, in all areas of the public sector the Commission has studied, the need for a mechanism to interpret both law and policy is clear.[135]

The federal Commission recommended that the President and Congress establish an entity within the federal government, charged with responsibility for: (1) monitoring and evaluating the implementation of any statutes and regulations enacted pursuant to the recommendations of the Privacy Protection Study Commission; (2) continuing research, study, and investigation of privacy problems; and (3) advising the President and Congress, government agencies, and, upon request, the states, regarding privacy implications of proposed federal or state statutes or regulations.

International data flows, electronic funds transfers, information pools for the exchange of criminal history information or child-support delinquencies, and credit or insurance information exchanges are a few of the concerns to be further addressed at the federal level. Solid research, study, and monitoring are needed if government protections of privacy are going to keep up with humans' ingenuity for inventing privacy-infringing techniques. A federal privacy board would move us closer to the achievement of the goals described in the report of the Privacy Protection Study Commission.[135]

THE COMMISSION RECOMMENDS the establishment of a federal privacy board as suggested in the final report of the Privacy Protection Study Commission. The Commission supports legislation (such as H.R. 1050 in the 97th Congress) which would accomplish this result.

## Congressional Authority to Protect Privacy

Under the Commerce Clause of the United States Constitution, Congress has the power to regulate business enterprises that are involved in interstate commerce.[137] Therefore, Congress may enact laws to regulate many privacy-intensive industries, such as credit and insurance.

Since the right of privacy has been determined to be "implicit in the concept of ordered liberty" within the Fourteenth Amendment of the United States Constitution, Congress has the power to pass laws to enforce that provision of the Constitution by prohibiting state or local government

agencies from taking action that violates individual privacy rights under that amendment.[138]

Finally, Congress may condition participation in federal funding programs for state, local, and private sector projects on maintenance of certain standards of privacy protection.

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## PERSONAL PRIVACY AND THE PRESIDENT

In July of 1977, the Privacy Protection Study Commission presented Congress and the President with 162 specific recommendations. In response, President Carter designated a committee to carry out an interagency review. The committee then hired the general counsel to the federal Commission as a consultant to assist in developing a White House "options paper" on informational privacy.[139]

This committee, in turn, reported in April and October of 1979, with specific legislative proposals, such as:[140]

> (1) Privacy of Medical Information Act: assuring rights of access, correction, notification of and limitations on disclosure;
>
> (2) Fair Information Procedures Act: providing new privacy safeguards for the records of consumers in "privacy intensive" industries; and
>
> (3) The Privacy of Electronic Funds Transfers Act: providing electronic funds transfers with privacy safeguards comparable to protections for telephone calls and letters.

Oversight of the complex and mammoth federal bureaucracy is one of the President's chief duties. Public policies on personal privacy, as announced in Supreme Court decisions or established by Congress, lose significance if the Executive Branch fails to implement them effectively.

The Domestic Council, the Office of Management and Budget, and the newly-created Cabinet Council on Management and Administration assist the President in managing and coordinating interagency and intergovernmental activities. Since the right of personal privacy rests largely in the hands of government agencies on a day-to-day basis, it is crucial that a concerted effort takes place within all federal departments to implement constitutional and statutory privacy protections in a meaningful fashion. The right of privacy deserves priority and the focused attention of the President and top advisors. An ineffective or weak privacy-protection policy at the federal level ultimately has an adverse effect on attempts by state governments to protect privacy rights.

THE COMMISSION RECOMMENDS that the Governor of California, the California Legislature, and California's congressional delegation request the President of the United States, pursuant to the authority vested by virtue of the Office, to issue an executive order creating an ongoing Interdepartmental Task Force on the Status of Personal Privacy, and a Citizens' Advisory Council on the Right of Privacy. The Interdepartmental Task Force and the Advisory Council can assist the Domestic Council, the OMB, and the Cabinet Council on Management and Administration in the difficult job of administrative oversight and coordination of privacy policies and practices.[141]

It should also be acknowledged that our nation is presently experiencing a time of fiscal crisis. As a result, governmental services and protections have been limited to -- and sometimes to less than -- necessities. There may, therefore, be a great temptation to put off action in the area of privacy until it can be afforded. The Commission on Personal Privacy recognizes these factors and strongly urges that a postponement in dealing with these issues may result in an irretrievable loss of what has been aptly labled "the right most valued by civilized men." A careful prioritizing must include listing personal privacy among the first of governmental involvements; the speed of movement of the technological and informational age mandate that approach. The protections need to be set in place by people in the institutions of government before those very institutions develop a stake in perpetuating the loss of personal privacy. This suggestion applies to our federal and our state governments and takes as its rationale the words of the Bill of Rights Committee of the Illinois Constitutional Convention in 1970 as expressed on page 70 of this Report.

## THE ROLE OF THE STATES IN PROTECTING PERSONAL PRIVACY

As the Supreme Court of the United States noted in its decision in Katz v. United States some fifteen years ago, state governments must play the primary role in protecting the so-called "general right of privacy." As a result, any overview of personal privacy in America today must examine developments at the state level.[142]

The staff of this Commission has surveyed state constitutions, as well as protective measures taken by all three branches of state governments throughout the country, in order to provide a backdrop for an analysis of privacy in California.

### State Courts and State Constitutions

The earliest judicial activity surrounding the right of privacy occurred around the turn of the century and it involved the recognition of privacy as a concept in tort law. Through subsequent development of the common law during the first half of this century, personal privacy has received almost universal protection against tortious invasions. Only a handful of state courts has declined to support this concept.[143]

It is not unusual, during the course of civil or criminal judicial proceedings in state courts, for a federal constitutional issue to be raised. State courts have the authority and the duty to interpret federal constitutional provisions, subject, of course, to being overturned by the United States Supreme Court. Probably more federal constitutional issues are decided by state courts than by federal courts, because of the sheer volume of state court litigation. The right of personal privacy, as protected by various provisions of the federal Constitution, is not infrequently invoked by state courts to invalidate state statutes or administrative actions.[144]

Within the past ten years, an increasing number of state court decisions have decided cases involving the right of privacy on state grounds rather than on federal grounds. Sometimes these decisions have been based on explicit privacy provisions found in state constitutions. On other occasions, when state constitutions have been silent on the issue of privacy, the courts have discovered that the right of privacy is implicitly protected by one or more state constitutional provisions.

The following paragraphs share information gathered during this Commission's search through the state constitutions and court decisions in several other jurisdictions in this country.

## Voter Amendments to State Constitutions

On December 15, 1970, at a special election, Illinois voters adopted a new state Constitution including clauses forbidding "invasions of privacy" and prohibiting unreasonable searches and seizures.[145] The Bill of Rights Committee of the Constitutional Convention commented on the new addition to the state Constitution:[146]

> It is doubtless inevitable that any person who chooses to enjoy the benefits of living in an organized society cannot also claim the privacy he would enjoy if he were to live away from the institutions of government and the multitudes of his fellow men. It is probably also inevitable that infringements on individual privacy will increase as our society becomes more complex, as government institutions are expected to assume large responsibilities, and as technological developments offer more effective means by which privacy can be invaded. In the face of these conditions the Committee concluded that it was essential to the dignity and well-being of the individual that every person be guaranteed a zone of privacy in which his thoughts and highly personal behavior were not subject to disclosure or review. The new provision creates a direct right to freedom from such invasions of privacy by government or public officials.

Just as Illinois was the first state to decriminalize legislatively private sexual conduct between consenting adults, thereby initiating what has become a national trend, it was the first state expressly to prohibit, through a constitutional amendment, invasions of privacy. California,[147] Montana and Alaska[148] soon followed suit, and in 1978, Hawaii added its privacy provisions to its state Constitution.[149] These provisions were in addition to the already existing prohibitions against unreasonable searches-and-seizures.

In 1980, Florida voters supplemented existing search and seizure provisions of their state Constitution, by adopting an express privacy provision prohibiting government interference with one's private life. Thus, Florida

ushered in the new decade by becoming the sixth state in the country to create broad privacy protection within a state Constitution.[150]

In addition to the six states just mentioned, a few others have judicially recognized rather comprehensive privacy protections. The earliest judicial recognition of this sort occurred in 1905 when Georgia Supreme Court Justice Cobb acknowledged that personal privacy was an element of "liberty" protected by the due process clause of the Georgia Constitution.[151]

In 1966, the Supreme Court of Pennsylvania noted, "One of the pursuits of happiness is privacy. The right of privacy is as much property of the individual as the land to which he holds title and the clothing he wears on his back."[152] Thus, the right of privacy was determined to be implicit in that provision of the Pennsylvania Constitution listing the pursuit of happiness as an inalienable right.[153]

In 1976, in the famous Quinlan case, the New Jersey Supreme Court held that the right of privacy, implicitly guaranteed under both the federal and state Constitutions, protects the freedom of choice of an individual to "die with dignity." In that case the Court authorized the withdrawal of life-support systems pursuant to the request of Karen Quinlan's family, on her behalf.[154] Subsequent privacy decisions in New Jersey voided a prohibition against consenting adult heterosexual behavior and restrictions on alternate family living arrangements. Both decisions were based on privacy as an implied right in the state Constitution.[155]

In 1978, the Supreme Judicial Court of Massachusetts, in an advisory opinion to the state Senate, delicately hinted that the right of privacy "may be inferred in the broad language of article 1 of the Massachusetts Declaration of Rights. . ."[156] Not until 1981, when it was drawn into an abortion-funding controversy, did it finally acknowledge that privacy was protected under the state Constitution.[157] In Moe v. Secretary of Administration, the Court voided funding restrictions, notwithstanding an earlier ruling by the United States Supreme Court that similar restrictions did not violate the right of privacy in the federal Constitution.

Although they do not have general protections for privacy expressly mentioned within their state constitutions, any number of states do protect various aspects of personal privacy pursuant to search-and-seizure provisions.[158] Whether comprehensive privacy protections will be expressly added by the voters, or judicially recognized as implicit in other provisions, remains to be seen.

## TABLE OF STATES
## with major*
## CONSTITUTIONAL PRIVACY PROTECTIONS

### Express Provisions

ALASKA
(1972)

CALIFORNIA
(1972)

FLORIDA
(1980)

HAWAII
(1978)

ILLINOIS
(1970)

MONTANA
(1972)

### Implicitly Protected

GEORGIA
(1905)

MASSACHUSETTS
(1981)

NEW JERSEY
(1976)

PENNSYLVANIA
(1966)

* in addition to restrictions on unreasonable searches and seizures