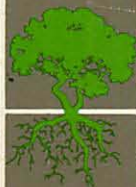


STATE OF CALIFORNIA

EXECUTIVE SUMMARY



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, heretofore 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,

A handwritten signature in black ink, appearing to read "Burt Pines".

Burt Pines
Chairperson, Commission on Personal Privacy

State of California

COMMISSION ON PERSONAL PRIVACY

EXECUTIVE SUMMARY

December, 1982

Burt Pines
Chairperson

Thomas F. Coleman
Executive Director

REPORTING TO STATE

COMMISSION OF FORESTRY



REVISION

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 grows 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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THE MAIN REPORT OF THE COMMISSION IS ALSO AVAILABLE

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TABLE OF CONTENTS

Chapter	Page
Letter of Transmittal	i
The Tree of Personal Privacy	v
Commissioners	vi
Staff Members and Consultants	vii
Credits for the Report and Executive Summary	viii
Acknowledgement	ix
For Further Information . . .	x
PART ONE: INTRODUCTION AND BACKGROUND	
I. <u>Approach of the Executive Summary</u>	1
II. <u>Creation and Mandate of the California Commission</u>	2
III. <u>Operations of the California Commission</u>	3
IV. <u>Other Study Commissions on Privacy</u>	5
V. <u>Other Study Commissions on Sexuality and Sexual Orientation</u>	6
PART TWO: CONTEXT -- LEGAL, PHILOSOPHICAL, AND HISTORICAL	
VI. <u>Preliminaries</u>	9
A. UNDERLYING PHILOSOPHY	9
B. THE RIGHT OF PRIVACY vs. FREEDOM OF EXPRESSION	12
VII. <u>The Tree of Personal Privacy</u>	14
A. THE FOUNDATIONS	14
1. Tort Law	14
2. Constitutional Law	16
B. THE ROOTS	20
1. Territorial Privacy	20
2. Informational Privacy	25
3. Decisional/Associational Privacy	29
VIII. <u>Relationship Between Personal Privacy and Sexual Orientation (MYTHS)</u>	36 (40)

Chapter	Page
PART THREE: PRACTICAL IMPLICATIONS AND MANIFESTATIONS	
IX.	
<u>Information Practices and Records</u>	45
A. FEDERAL STANDARDS	45
B. STATE STANDARDS	48
C. IN THE COURTS	51
1. Discovery	51
2. Litigation -- Use of Initials	54
3. Juries	55
D. LIBRARY CENSORSHIP	57
X.	
<u>Criminal Justice</u>	58
A. SURVEILLANCE; SEARCH AND SEIZURE	58
B. PRISONERS AND INSTITUTIONS	60
C. OTHER PENAL CODE REFORM	62
1. Loitering	62
2. Sex Offender Registration	63
3. Age of Consent	64
D. ARREST/CASE INFORMATION	64
E. VIOLENCE	65
XI.	
<u>Employment</u>	68
A. USE OF POLYGRAPHS	69
B. LAW ENFORCEMENT	70
C. TEACHERS IN PUBLIC SCHOOLS	72
D. PRIVATE SECTOR	74
E. MONITORING/IMPLEMENTING EXISTING LAW	77
XII.	
<u>Housing</u>	83
A. AMENDING/IMPLEMENTING EXISTING LAW	83
B. HOUSING/EMPLOYMENT DISCRIMINATION STUDY	84
C. PROTECTION FOR RENTERS WITH CHILDREN	84
XIII.	
<u>Consumer Issues</u>	85
A. CREDIT	85
B. INSURANCE	86
C. ELECTRONIC FUND TRANSFERS	88
XIV.	
<u>Family Matters</u>	89
A. DEFINING FAMILY	89
B. TAXES	89
C. FAMILY PLANNING	90
D. SEX EDUCATION	91
E. INSTITUTIONALIZED CHILDREN	92
XV.	
<u>Medical and Mental Health</u>	93
A. PATIENTS' RIGHTS	93
B. ACCESS TO INFORMATION	101
C. TRAINING FOR PROVIDERS AND STAFF	103
D. ALCOHOL AND DRUG PROGRAMS	105
XVI.	
<u>Immigration</u>	106

Chapter		Page
	PART FOUR: CONCLUSION	
XVII.	<u>Public Policy of the State</u>	108

APPENDICES

APPENDIX A:	EXECUTIVE ORDER B74-80, Governor Edmund G. Brown Jr. (10-9-80)	112
APPENDIX B:	OTHER DOCUMENTS PRODUCES BY THE COMMISSION	114
	Supplement One	114
	Supplement Two	115
	Supplement Three	115
	Supplement Four	115
APPENDIX C:	TABLE OF WITNESSES	116
	Los Angeles Public Hearing (11-13-81)	116
	San Francisco Public Hearing (11-20-81)	119
APPENDIX D:	RECOMMENDATIONS -- LISTED BY ADDRESSEE	122
	United States	122
	State of California	122
	Executive/Administrative Branch	122
	Legislative Branch	125
	Judicial Branch	127
	Local Governmental Entities	127
	Businesses and Associations	127
APPENDIX E:	CONTENTS OF THE MAIN REPORT	128

* * *

PART ONE: INTRODUCTION AND BACKGROUND

I. Approach of the Executive Summary

This Executive Summary is centered around the recommendations of the Commission on Personal Privacy. Additional material is presented in order to give those recommendations a meaningful perspective and to place them in a legal and historical context. All of the text contained herein is presented in a more elaborated form in the Report of the Commission on Personal Privacy.

For ease of reading and clarity of documentation, the right column of each page is reserved for citations of primary and secondary authorities--including cases, legislation, and constitutional provisions--as well as references to the Report and the Supplements published by the Commission.

The Report of the Commission--containing (1) an examination of real life problems that involve invasions of personal privacy and sexual orientation discrimination, (2) an evaluation of existing remedies, and (3) the recommendations--is based upon a study and analysis of many factors:

* the legal framework in which public policy decisions on personal privacy are made, including:

- the common law;
- United States Supreme Court and other federal court cases;
- all California Supreme Court and appellate court cases interpreting the right of personal privacy;
- United States, California, and other state constitutions;
- Congressional and California and other state legislative enactments;
- the myriad of California's administrative regulations which have an impact on the subject; and
- executive orders and other executive branch action;

The Report of the Commission on Personal Privacy is hereafter referred to as "REPORT".

See Appendix "B", page 114, below, for list of other documents produced by the Commission.

REPORT, page 16.

- * the reports of earlier study commissions, federal and state, from within and from outside this country;

- * books, reports, journals, periodicals, and over 300 articles on various aspects of personal privacy; and

- * the testimony and reports of experts, consultants, and witnesses who have shared information with the Commission.

II. Creation and Mandate of the California Commission

On October 9, 1980, Governor Brown signed an executive order which established the Commission on Personal Privacy. 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 with varied professional backgrounds, including business, education, journalism, labor, law, law enforcement, and psychiatry. The Governor appointed former Los Angeles City Attorney Burt Pines as Chairperson and 14 other commissioners. The Speaker of the Assembly appointed five commissioners. 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.

The Commission chose an Executive Director who has an extensive background in law and a special expertise in personal privacy, research and writing, and public education.

The State Personnel Board was selected as the department to provide administrative support to the Commission.

REPORT, page 12.

Executive Order B74-80; see Appendix "A", page 112, below.

Commission staffing was supplied by the Policy and Standards Division within the Board. The Commission's funding came from several state departments which requested that the Commission study various personal privacy and sexual orientation problems which the departments often encountered while carrying out their constitutionally and legislatively mandated duties. The Commission's total budget for an eighteen-month period was \$244,699.00. Of that amount, nearly \$60,000.00 was obtained through federal funding.

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

REPORT, page 13.

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.

III. Operations of the California Commission

At the first meeting, the following Committees were established:

REPORT, page 14.

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.

Two public hearings were held in November, 1981. The first hearing was held in Los Angeles on November 13. The second was held in San Francisco one week later. Approximately 30 witnesses appeared at each hearing, presenting the Commission with an extremely wide variety of issues. The full text of both hearings is available to the public through the State Personnel Board.

The third meeting of the Commission was held in Sacramento on January 30, 1982. During the fourth meeting, held September 11 and 12, 1982, the Commission considered and deliberated over its main Report, many topical reports, and substantive recommendations. The recommendations adopted by the Commission are set forth herein.

Nearly two hundred people worked on this project in various capacities: commissioners, paid staff supplied through the State Personnel Board, staff loaned from the Department of Social Services and the Department of Fair Employment and Housing, task force members, special consultants, students on work-study programs, student volunteers, and witnesses. The Commission on Personal Privacy was truly a cooperative effort of concerned citizens and community leaders.

IV. Other Study Commissions on Privacy

Prior to the creation of the California Commission, Massachusetts Governor Francis Sargent and Indiana Governor Otis R. Bowen had each created a state study commission on privacy. The Massachusetts Commission on Privacy and Personal Data was established in August, 1973, and issued a report on "Informational" privacy problems some fifteen months later. The Indiana Commission on Individual Privacy was formed in April, 1975, and published its report, also on "Informational" privacy, on December 1, 1976.

REPORT, page 6.

Four legislatively created commissions have been involved in the study of "Informational" privacy:

<u>State</u>	<u>Commission</u>	<u>Date</u>
Illinois	Information Systems Commission	1975-present
Minnesota	Joint House-Senate Privacy Study Commission	1975 (18 mo)
Iowa	Citizens Privacy Task Force	1978 (16 mo)
New Jersey	Committee on Individual Liberty and Personal Privacy	1979 (became inactive af- ter interim report)

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's main report, entitled Personal Privacy in an Information Society, documented that:

REPORT, page 7.

* 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 one to be asked to divulge information about oneself for use by unseen strangers who make decisions about one that directly affect one's everyday life, e.g., transactions involving credit, insurance, medical care, employment, education, and social services.

* There is a real need for ongoing monitoring and coordination of personal privacy

issues and laws so that privacy and other competing interests are kept in proper balance.

V. Other Study Commissions on Sexuality and Sexual Orientation

Several study commissions have, in the past, examined issues relating to sexuality. In some cases, the recommendations of those bodies have prompted substantial legislative or administrative changes in the law.

REPORT, page 7.

In 1954, the Secretary of State for the Home Department (London) and the Secretary of State for Scotland created a Committee on Homosexual Offenses and Prostitution. The report of this Committee, known as the "Wolfenden Report" after Sir John Wolfenden, the Committee's chairperson, was presented to Parliament by command of Her Majesty, in September, 1957. As a direct result, 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.

Report of the Committee on Homosexual Offenses and Prostitution, Command Paper 247 (Home Office, 1957), Sir John Wolfenden, Chairperson.

In the United States, also during the 1950's, the American Law Institute conducted a comprehensive study of American penal codes and adopted the Model Penal Code. One of the major recommendations of the Code was to decriminalize private homosexual conduct. The A.L.I. recommendation had a significant impact on penal law reform in this country; some twenty states decriminalized private homosexual conduct as the result of penal code reform packages based on the Model Penal Code.

Model Penal Code and Comment, American Law Institute (1980).

In 1967, the United States Government, National Institute of Mental Health, appointed a Task Force on Homosexuality. The report of the Task Force, known as the "Hooker Report" after Dr. Evelyn Hooker, the Task Force's chairperson, concluded:

Final Report of the Task Force on Homosexuality, National Institute of Mental Health (1970), Dr. Evelyn Hooker, Chairperson.

* 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.

16 Santa Clara L. Rev. 495, 497, fn. 13.

In 1975, Pennsylvania Governor Milton J. Shapp issued an executive order "committing this administration to work towards ending discrimination against persons solely because of their affectional or sexual preference." An administrative task force was formed to study the problem and to make recommendations for further action. Less than a year later, in response to those recommendations, Governor Shapp amended the executive order, creating the Pennsylvania Council for Sexual Minorities. Membership of the Council consists of representatives of selected state departments as well as members of the public. The Council has continued to function effectively through Democratic and Republican administrations.

REPORT, page 8.

Executive Order No. 1975-5 (April 23, 1975).

The Oregon Task Force on Sexual Preference was established in March, 1976, by Richard A. Davis, Director of the Department of Human Resources, at the request of Governor Bob Straub. 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 Final Report, submitted to the Governor and the Legislature on December 1, 1978, called for legislation prohibiting sexual orientation discrimination in employment, housing, and public accommodations. There was also a comprehensive and well-documented section on "myths and stereotypes."

REPORT, page 9.

Two years ago the Michigan Legislature's House Civil Rights Committee established a Task Force on Family and Sexuality. The Report of that Task Force, presently being edited for publication, calls for decriminalization of private sexual conduct between consenting adults and statewide legislation prohibiting sexual orientation discrimination in employment, housing, and public accommodations.

Local communities and private organizations have also undertaken significant studies concerning sexuality and sexual orientation. The results of some of those studies underscore the critical need for public education. One such study, undertaken by the Human Rights Commission of Norman, Oklahoma, in 1977, proposed "to determine the attitudes held by the various components of the Norman Community toward homosexuals." The responses of those surveyed showed that:

REPORT, page 10.

* Nearly half of the landlords would not rent to a homosexual couple.

* About three-fourths of the employers would not favor an ordinance protecting job rights of homosexuals.

* Nearly half of the employers felt an employer should fire a person discovered to be a homosexual.

* Almost two-thirds of the householders believed that employers should discharge persons believed to be homosexuals.

* About three-fourths of the householders opposed living in a neighborhood in which a homosexual couple also resided.

* Over two-thirds opposed any city ordinance prohibiting 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. Its Task Force Report was presented to the 190th General Assembly of the Church on May 22, 1978. As a result, the Assembly recommended that:

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.

REPORT, page 10.

The Church and Homosexuality, the United Presbyterian Church in the United States of America (1978).

PART TWO: CONTEXT -- LEGAL, PHILOSOPHICAL, AND HISTORICAL

VI. Preliminaries

A. UNDERLYING PHILOSOPHY

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. In that work, the philosophical underpinnings of the right find their most literate expression:

REPORT, page 19.

Mill, John Stuart, On Liberty
(George Rutledge, 1905).

. . . [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.

. . . [O]ne very simple principle is enti-

tled 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 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.

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

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.

REPORT, page 21.

Olmstead v. United States (1928)
277 U.S. 438, 478 [48 S.Ct. 564,
572].

Over the years, other prominent jurists have commented on the extent of the protection afforded by the right of privacy. For example, in discussing Justice Brandeis' dissenting opinion in Olmstead, present Chief Justice Burger in his dissent in Application of President and Directors of Georgetown College, stated:

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.

Again, in the context of physiological autonomy, 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."

In modern times, both technological advances and our rapid transformation from an industrial society to an informational society have heightened our "privacy consciousness."

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

. . . 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.

REPORT, page 22.

Application of President and Directors of Georgetown College (D.C. Cir. 1964) 331 F.2d 1010, 1017.

Schloendorff v. Society of New York Hospital (1914) 211 N.Y. 125 (105 N.E. 92, 93).

Duncan, T. and P. Wolfe, "Informational Privacy: The Concept, Its Acceptance and Effect on State Information Practices" (1976) 15 Washburn Law Journal 273.

National opinion research surveys have shown public concern about misuse of personal information by business and government has increased steadily throughout the Seventies and that 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.

Behavioral scientists confirm that privacy is essential to a human's sense of well-being:

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."

Finally, the flexibility and versatility of privacy as a legal principle affording protection to individuals have been noted recently by the California Court of Appeal:

The breadth of the concept of privacy is as yet a concept of undetermined parameters albeit in process of almost daily growth.

B. THE RIGHT OF PRIVACY vs. FREEDOM OF EXPRESSION

Often, 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.

What emerges from an analysis of the 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" setting, 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., whether it is religious, political, or commercial); and (3) the degree of captivity of the audience.

REPORT, page 2.

Louis Harris and Associates, Inc., The Dimensions of Privacy, a survey conducted for Sentry Insurance Company (1979).

Insell, Paul, Carol Lindgren, Henry Clay, Too Close for Comfort: The Psychology of Crowding (1978), pages 21-22.

Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal.App.3d 669, 676.

REPORT, page 55.

REPORT, page 58.

Kovacs v. Cooper (1949) 336 U.S. 77; Breard v. Alexandria (1951) 341 U.S. 105; Rowen v. U.S. Post Office Dept. (1970) 397 U.S. 728; Federal Communications Commission v. Pacifica Foundation (1978) 98 S.Ct. 3026.

With respect to privacy-versus-freedom-of-the-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 these cases as it does in libel cases. 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 publication-of-information cases. Publication of accurate facts obtained by resorting to the public record is not actionable under the privacy rubric.

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; since publication of information that is in the public record is not actionable, the utmost of care should be exercised in determining what becomes a matter of public record. Furthermore, whenever the Public Records Act vests administrators with discretion in disseminating such public record information, 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 released or disclosed to the public.

REPORT, page 58.

Time, Inc. v. Hill (1974) 385 U.S. 374.

Cox Broadcasting Corp. v. Cohn (1975) 420 U.S. 469.

REPORT, page 59.

VII. The Tree of Personal Privacy

The seed of personal privacy is found in the fertile soil of natural law and natural human instincts. This fact is alluded to in the quotation from John Stuart Mill, cited above, as well as in the words of Justice Cobb in a 1905 opinion of the Georgia Supreme Court.

Two foundational structures support the practical manifestations of the right of personal privacy:

tort law, which provides protection against infringements by persons or organizations; and

constitutional law, which ensures security from unreasonable governmental encroachments.

Of course, both of these foundations are undergirded by constitutional principles and, in some cases, explicit constitutional and statutory provisions.

Three roots provide the basic grounding for and scope of the right. The root most commonly thought of in the privacy context is **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.

Informational privacy is also commonly understood as an important aspect of the right. This root shields one from unfair and unnecessary collection and dissemination of personal information.

Not as obvious, but of equal importance and significance in people's lives, is the aspect of the right which is called **decisional or associational privacy**. This root, sometimes also called "freedom of choice," protects one from interference in one's decisions and inclinations regarding one's personality and one's relationships and any other manifestations of the exercise of autonomy over one's body, mind, and emotions.

The tree of privacy, in all its aspects, is nurtured by the principles of liberty and freedom which underlie our entire society and system of government.

A. THE FOUNDATIONS

1. Tort Law

Probably the earliest reference to a common law tort of invasion of privacy is found in Cooley on Torts:

REPORT, page v.

Pasevich v. New England Life Ins. Co. (Ga. 1905) 50 S.E.2d 68; see page 17, below.

REPORT, page 23.

Prosser, Torts (3rd Ed., 1964) §112, page 832.

16A Am.Jur.2d, Constitutional Law, Section 601.

Katz v. United States (1967) 389 U.S. 347.

REPORT, pages 63, 130.

Stanley v. Georgia (1969) 394 U.S. 557; Carey v. Population Services International (1977) 97 S.Ct. 2010; benShalom v. Secretary of Army (E.D. Wisc. 1980) 489 F.Supp. 964, 975-976.

REPORT, page 23.

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. This article is credited with having synthesized a whole new category of legal rights and having initiated a new field of jurisprudence.

Dean Prosser has analyzed the tort of invasion of privacy in these words:

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 or her 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.

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. Being personal, a cause of action for invasion of privacy does not survive one's death. Being primarily designed to protect the sensibilities of human beings, corporations generally cannot claim the common-law right.

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. 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.

Cooley on Torts (1888), page 29.

Warren and Brandeis, "The Right of Privacy" (1890) 4 Harvard L.Rev. 193.

Prosser, Torts (3rd Ed., 1964) §112, page 852.

REPORT, page 24.

Mrs. Jesse James v. Screen Gems, Inc. (1959) 17 Cal.App.2d 650, 653.

Melvin v. Reid (1931) 112 Cal.App. 285, 290.

62 Am.Jur.2d, Privacy, §11.

REPORT, page 24.

62 Am.Jur.2d, Privacy [see article for general treatise on privacy issues].

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

REPORT, page 24.

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.

2. Constitutional Law

Constitutional privacy protects the individual from unreasonable governmental actions of various sorts, whether such action is taken by federal, state, or local authorities. It has been said that the right of privacy is rooted in the penumbra of various specific constitutional provisions of the Bill of Rights of the United States Constitution that have been deemed to create "zones of privacy." Some of these "privacy-emanating" provisions include:

REPORT, page 25.

Griswold v. Connecticut, cited above.

- * 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;

Katz v. United States, cited above; Griswold v. Connecticut, cited above.

- * 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 of justices 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.

Roe v. Wade (1973) 93 S.Ct. 705, 726.

One would expect to find express protection for the right of personal privacy in the federal Constitution, but one looks in vain. There is no explicit "privacy amendment" there to be found. However, it is clear that privacy protections radiate implicitly from the Bill of Rights and other constitutional provisions.

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

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.

In 1905, a state supreme court for the first time recognized a constitutional basis for protecting personal privacy. As noted earlier, Justice Cobb, writing for the Georgia Supreme Court, found that the right of privacy has 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

Whalen v. Roe (1977) 429 U.S. 589.

REPORT, page 25.

Pasevich v. New England Life Ins. Co., cited above.

times and in all places that no authority can either change or abolish them.

Other states also provide a source of constitutional support for the right of personal privacy. The following states now have express provisions in or judicial interpretations of their state constitutions giving protection to a right of privacy in addition to provisions restricting unreasonable searches and seizures:

REPORT, page 72.

<u>Express Provisions</u>	<u>Implicitly Protected</u>
ALASKA (1972)	GEORGIA (1905)
CALIFORNIA (1972)	MASSACHUSETTS (1981)
FLORIDA (1980)	NEW JERSEY (1976)
HAWAII (1978)	PENNSYLVANIA (1966)
ILLINOIS (1970)	
MONTANA (1972)	

Tuesday, November 7, 1972, was an historic day for the right of privacy in California. By a nearly two-to-one margin, the voters of the state determined that the state Constitution would be amended to include "privacy" among other inalienable rights. The "principle mischiefs" at which the amendment was directed included:

REPORT, page 93.

(1) "government snooping" and the secret gathering of personal information;

(2) the overbroad collection and retention of unnecessary personal information by government and business interests;

(3) the improper use of information properly obtained for a specific purpose, for example, use for another purpose or disclosure to some third party; and

(4) the lack of a reasonable check on the accuracy of existing records.

White v. Davis (1975) 13 Cal.3d 757, 775.

The amendment, according to the Court, was "self-executing" in that it needed no enabling legislation. In

REPORT, page 101.

addition, it created a "legal and enforceable right of privacy for every Californian" not merely against state action, but against anyone violating this "inalienable right."

Early cases seemed to center around "informational privacy." However, the Supreme Court made it clear that the ambit of the amendment was not so limited. In 1980, the Court held that Article I, Section 1 "comprehends the right to live with whomever one wishes or, at least, to live in an alternate family with persons not related by blood, marriage, or adoption."

The bulk of privacy cases decided in California after 1975 has invoked the doctrine of "independent state grounds"; that is, these cases have relied upon the state's constitutional privacy provisions and its judicial interpretations, independent of any rights recognized under the United States Constitution as interpreted by the federal courts.

This doctrine, and the power of the state to afford more protection or a higher standard than that found in federal law, was recently discussed by the California Supreme Court:

In emphasizing . . . "the incontrovertible conclusion that the California Constitution is, and always has been, a document of independent force," our court explained that "[i]t is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse. . . . The federal Constitution was designed to guard the states as sovereignties against potential abuses of centralized government; state charters, however, were conceived as the first and at one time the only line of protection of the individual against the excesses of local officials." Accordingly, . . . guarantees contained in state constitutions, are "independently responsible for safeguarding the rights of their citizens."

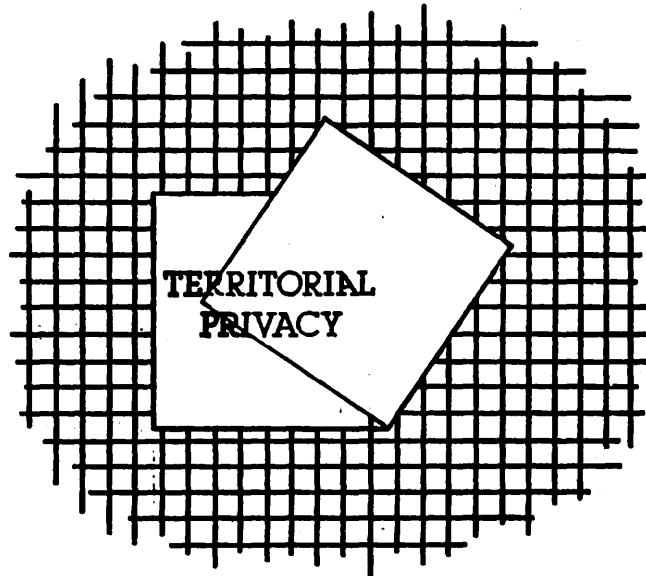
On several occasions, the California Supreme Court has noted that the federal right of privacy "appears to be narrower than what the voters approved in 1972 when they added 'privacy' to the state Constitution."

City of Santa Barbara v. Adamson
(1980) 27 Cal.3d 123.

REPORT, page 106.

Committee to Defend Reproductive Rights v. Myers (1981) 29 Cal.3d 252, 261.

REPORT, page 107.

B. THE ROOTS

1. Territorial Privacy

During the period before the American Revolution, during which colonists complained about the use of writs of assistance by royal officers, William Pitt, the Elder, in a speech on the excise bill, spoke out eloquently:

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.

James Madison drafted the initial proposal that, with minor modifications, became the Fourth Amendment to the United States Constitution, ratified in December, 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.

Discussing the Fourth Amendment and its California counterpart, the California Supreme Court has noted that the purpose of the law is to preserve privacy:

Frank v. Maryland (1959) 359 U.S. 360 (quoting Pitt, Speech on Excise Bill).

United States Constitution,
Fourth Amendment.

The point of the Fourth Amendment, which is often not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

People v. Edgar (1963) 60 Cal.2d
171, 175-176.

. . . "[B]oth the United States Constitution and the California Constitution make it emphatically clear that important as efficient law enforcement may be, it is more important that the right of privacy guaranteed by these constitutional provisions be respected. Since in no case shall the right of the people to be secure against unreasonable searches and seizures be violated, the contention that unreasonable searches and seizures are justified by the necessity of bringing criminals to justice cannot be accepted."

With respect to the home, the Court has cautioned:

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.

People v. Ramey (1976) 16 Cal.3d
263, 275.

To provide protection from misuse of this discretion, and premised on a disapproval of illegal government activity and the recognition of the need to preserve the integrity of the judicial system (by preventing complicity of a judge in illicit police conduct), the United States Supreme Court adopted the "exclusionary rule" in 1914. The 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; the exclusion of such evidence was seen as a major (and perhaps the only effective) deterrent to law enforcement officers violating the sanctity of one's home without a warrant or a legal substitute for a warrant. Of course, this protection would benefit some criminals for the greater good of discouraging and controlling government abuses and providing a measure of privacy or security regarding one's home and one's person.

It was not until 1961 that the federal Supreme 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.

The California Supreme Court commented specifically on the "exclusionary rule" in 1973 in the context of a case in which the police had systematically and surreptitiously spied on numerous patrons of a public restroom:

In seeking to honor reasonable expectations of privacy through our application of search-and-seizure law, we must consider the expectations of the innocent as well as the guilty. When innocent people are subjected to illegal searches -- including when, as here, they do not even know their private parts and bodily functions are being exposed to the gaze of the law -- their rights are violated even though such searches turn up no evidence of guilt. Save through the deterrent effect of the exclusionary rule there is little the courts can do to protect the constitutional rights of persons to be free from unreasonable searches.

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 an individual had a proprietary interest in the locus of his or her activities. The closer the connection between one's actions and one's home or other location in which one had an ownership interest, the more likely the privacy claims would be recognized.

Weeks v. United States (1914) 232 U.S. 383.

Mapp v. Ohio (1961) 367 U.S. 643, 651.

People v. Triggs (1973) 8 Cal.3d 884, 893.

REPORT, page 39.

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

Later, the federal Supreme Court recognized that 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). People, not places, are protected. It is, therefore, not simply the nature of the area (public versus private) on which cases now turn, but rather the relationship between the individual and the place. The test for this relationship involves two elements:

(1) that the individual entertained a subjective expectation of privacy, and

(2) societal recognition that such expectation was reasonable.

Because of the transient nature of automobiles, rules have developed which significantly limit one's expectation of privacy to less than that which attaches to one's home or office.

Today, California privacy law protects the individual against interference with freedom of movement; verbal, written, or physical interference with one's solitude or seclusion; non-consensual entry into one's home or other private dwelling; and sensory and technologically aided surveillance of private areas that violates one's reasonable expectation of privacy. Tort law and Article 1, Section 1 of the state Constitution provide a remedy of damages or injunctive relief for such invasions of privacy, whether they are perpetrated by government officials or by private individuals. Article 1, Section 13 affords the protection of the exclusionary rule for governmental violations of settled principles of search-and-seizure law.

The Commission has noted that each of these provisions of law is necessary, that each of the existing remedies serves a valuable and essential purpose in protecting personal privacy, and that the traditional principles of federalism upon which the country was founded, are important to the prescription of territorial privacy rights for Californians. Therefore, with respect to the right of privacy in the state Constitution, the Commission supports the continued development of the doctrine of independent state grounds as a viable principle.

* * *

The cliché, "What two consenting adults do in the privacy of their own bedroom is none of the law's business," also has its foundation in territorial privacy

Katz v. United States, cited above.

REPORT, page 40.

REPORT, pages 108-112.
People v. Spear (1939) 32 Cal. App.2d 165; Vescovo v. New Way Enterprises (1976) 60 Cal.App.3d 582; Agnello v. United States (1925) 269 U.S. 20; People v.

Reeves (1964) 61 Cal.2d 268.

People v. Arno (1979) 99 Cal. App.3d 505.

Porten v. University of San Francisco (1976) 64 Cal.App.3d 825.

People v. Cahan (1955) 44 Cal.2d 434; Badillo v. Superior Court (1956) 46 Cal.2d 269.

REPORT, page 112.

REPORT, page 312.

concerns. At one stage of the development of the sexual civil liberties movement, this was both the beginning and the end of the privacy argument. Notwithstanding the emergence of more sophisticated privacy arguments concerning the fundamental right of consenting adults to express themselves sexually, much can still be said about the soundness of the privacy-in-the-bedroom argument.

Some of the earliest developments in privacy law arose out of a sense of territoriality. The adage, "A man's home is his castle," is only one example of this perspective on privacy. The Griswold case could be said to be the first major bridge between territorial privacy and decisional privacy in the context of a right to sexual expression. In Griswold, the Supreme Court asked, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" Answering in the negative, the Court referred to "the sanctity of a man's home and the privacies of life." Homes are not stripped of their inherent privacy protections merely because they may be occupied by people who engage in sexual acts not approved by the majority.

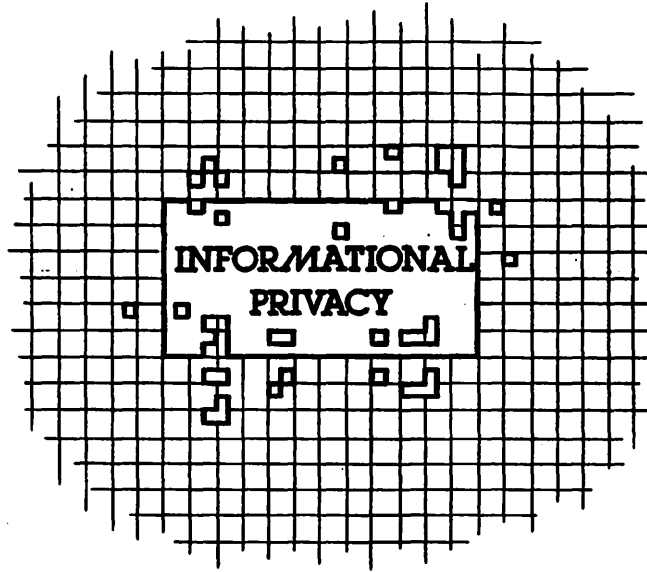
Territorial privacy rights also have been invoked to protect gay social clubs from warrantless searches. Speaking of a police entry into a gay men's social club without the owner's permission, the Appellate Department of the Los Angeles Superior Court declared such an entry illegal in violation of the privacy rights protected by the Fourth Amendment:

Whether the Corral Club should be classified as a private club or a commercial enterprise is of little moment where the ultimate question is whether the officer had the right to make a warrantless entry of the facility in which the club conducted its activities. If the area involved "was one in which there was a reasonable expectation of freedom from government intrusion," it was constitutionally protected from a warrantless search. . . . "[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

REPORT, page 312.

Griswold v. Connecticut (1965)
381 U.S. 479.

People v. Brown (1975) 53 Cal.
App.3d Supp. 1, 7.



2. Informational Privacy

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 safeguard for the individual. People were mobile and information was manually stored in files that could not easily be transported. Technological limitations and simple inefficiency preserved the 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. It has been estimated that the average citizen is the subject of at least twenty such records.

In the contexts of arrest records, drug prescription information, and bank records, the United States Supreme Court has refused to recognize constitutionally based informational privacy rights, although some lower federal courts have occasionally granted relief. It does appear that protection for informational privacy violations will receive the greatest protection under state law, based upon state statutes or constitutions. Congress may enact federal privacy legislation protecting informational privacy, and then the federal courts will have an obligation to resolve disputes in this area. However, it is unlikely at this time that the courts will find protection through judicial interpretation of the federal Constitution.

REPORT, page 1.

REPORT, pages 51-53.

Paul v. Davis (1976) 424 U.S. 693, 713; Whalen v. Roe, cited above; California Bankers Assn. v. Schultz (1974) 416 U.S. 21.

The tort aspect of informational privacy is summarized above in the section on Tort Law. Some members of the California Supreme Court feel that evolving common law principles should be expansive enough to protect a "right of publicity" as well as a right of privacy. The right of publicity would protect individuals against commercial exploitation by placing a value on individual personalities; the right of privacy, on the other hand, protects the sensibilities and feelings of individuals against exploitation by others. One main difference between the two rights would be that the right of publicity would be assignable and would survive the death of an individual.

The Commission suggests that the Legislature review both sides of the arguments regarding the right of publicity as set forth by members of the California Supreme Court in a recent case involving a dispute between the heirs of Bela Lugosi and Universal Pictures, with a view toward clarifying the law.

Sometimes, when the common law tort falls short of providing needed protection, Article 1, Section 1 of the state Constitution, as amended by the voters in 1972, is available. Of the four principal "mischiefs" that the amendment was directed to correct, one pertains to disclosures of personal information, namely, "the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party."

Dealing with arrest records in particular, there exists in this state a statutory scheme which provides sufficient informational privacy protection so that the Supreme Court has refused to impose any additional constitutional duties or liabilities on agencies involved in the processing of such arrest information. This protective legislation includes:

* Penal Code Section (hereinafter, P.C. §) 849.5 (some arrests must be recorded as simple "detentions");

* P.C. §851.6 (a certificate of release must be issued when the prosecutor fails to file a formal charge after an arrest, describing the arrest as a "detention," and the incident must be removed from the arrest records of the arresting agency and the Department of Justice);

* P.C. §11115 (agencies reporting arrests to the Department of Justice or the F.B.I.

Lugosi v. Universal Pictures
(1979) 25 Cal.3d 813.

REPORT, page 157.

Porten v. University of San Francisco (1976) 64 Cal.App.3d 825.

REPORT, page 161.

Loder v. Municipal Court (1976)
17 Cal.3d 859.

must report if a person is released without formal charges being filed, if the arrest is deemed a detention, and, if so, the specific reason for the release);

* P.C. §11116 (if formal charges are filed, the court clerk must furnish a disposition report to the investigating agency, and if the case is dismissed, the reason must be specified);

* P.C. §11117 (disposition reports must also be furnished to the Department of Justice and the F.B.I., who must submit the report to all bureaus which have previously been furnished with arrest data);

* P.C. §§11116.7-11116.9 (subjects of disposition reports must be given access to them);

* P.C. §§11120-11125 (subjects of Department of Justice criminal records may inspect them and demand correction of inaccuracies);

* P.C. §851.8, §851.7, and §1203.45 (if a person is a minor or if an accused has been determined to be "factually innocent," that person may have his or her arrest and court records sealed);

* P.C. §§11141-11143 and Labor Code §432.7, subd. (b) (criminal and civil penalties attach to unauthorized disclosures of arrest records);

* P.C. §11077 (the Attorney General is responsible for the security of criminal record information, and he must (1) establish regulations to assure information is not released to unauthorized persons or without a demonstration of necessity, (2) coordinate the California system with interstate systems, and (3) undertake a continuing educational program for all authorized personnel in proper use and control of such information);

* Bus. & Prof. Code §475 (a showing of substantial connection with effective performance of duty must be made before an arrest or conviction can be the basis of a denial or revocation of a professional license);

* Bus. & Prof. Code §461 (no public agency may ask about or require on an initial application form that the applicant reveal any record of arrest not resulting in a conviction); and

* Labor Code §432.7 (criminal and civil penalties attach to public and private employers who ask for or use, in making employment decisions, information concerning an applicant's arrests not resulting in conviction, either from the applicant or from any other source).

In balancing the privacy interests in any particular case against the competing public or state interest, the Court of Appeal has pointed out that "administrative burden," which often accompanies informational privacy protections, "does not constitute a compelling state interest which would justify the infringement of a fundamental right."

However, the state constitutional right of privacy does not prohibit disclosures of personal information obtained from confidential government files, if those disclosures are made internally within a department in an investigation for possible fraud against the department.

* * *

Informational privacy rights are also often violated in the context of sexual orientation discrimination. Persons who are suspected of homosexual activity or tendencies may be the subjects of interrogation or surveillance, the object of which is to ferret out homosexuals in order to punish them or deny them jobs, housing, or other benefits.

Especially when one is in a very vulnerable profession, such as teaching in public schools, the security of informational privacy is of critical importance. If questions about sexual orientation are asked, being dishonest or less than candid in response may provide grounds enough for dismissal or denial of employment. If one answers honestly, one may risk the charge of immorality and suffer the consequences of dismissal. Or one may be required to submit to psychiatric examination for further study.

Invasions of informational privacy also occur in jobs requiring security clearances, those involving law enforcement, and in military settings. Further, such issues are found in immigration and naturalization, child custody, and government surveillance cases.

REPORT, page 163.

Central Valley Chapter of 7th Step Foundation v. Younger (1979) 95 Cal.App.3d 212.

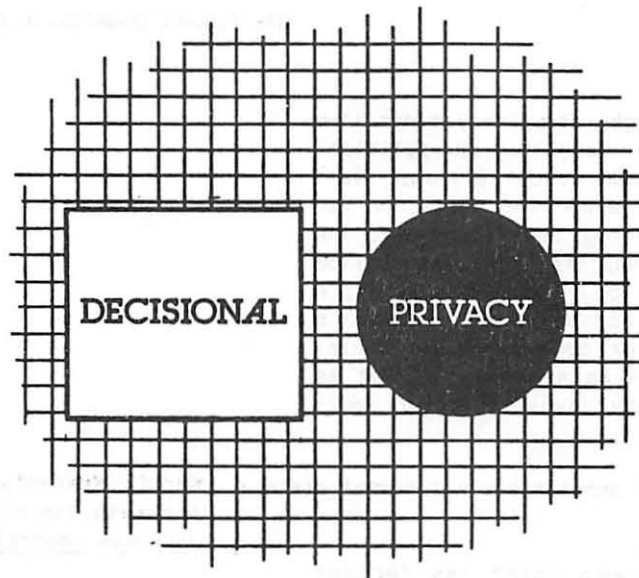
Haskins v. San Diego County Dept. of Public Welfare (1980) 100 Cal.App.3d 961.

REPORT, pages 314-318.

Acanfora v. Board of Education (4th Cir. 1974) 491 F.2d 498; Gaylord v. Tacoma School District (Wash. 1977) 559 P.2d 1340; Gish v. Board of Education (N.J. App. 1976) 336 A.2d 1337.

REPORT, page 353.

D.O.D. Reg. 5220.6; 25 C.F.R. §14399 (security clearances); Adams v. Laird (D.C. Cir. 1969) 420 F.2d 230 (security clearances); Beller v. Middendorf (9th Cir. 1980) 632 F.2d 788 (military); Lesbian/Gay Freedom Day Committee v. INS, No. C-81-2522 RPA, [U.S. Dist. Ct., N.D. Cal., Op. Issued June 17, 1982] (Immigration); Los Angeles Times, Sept. 9, 1982, Part II, page 12 (F.B.I. surveillance).



3. Decisional/Associational Privacy

Privacy protects the independence of the individual in making certain kinds of important decisions, particularly those relating to marriage, procreation, contraception, family relationships, sex, political and intimate associations, and child rearing and education. Privacy also protects conduct which is the manifestation of those important decisions. It is the concern for these valued aspects of privacy by the courts which may ultimately aid in protecting man from the dehumanization of an ever-encroaching technological environment.

The police power 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. 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.

Freedom of choice in making fundamental personal decisions and freedom of association, both political and social, are set in the context of freedom from interference by the police power of government in these areas.

It was in the Griswold case that the United States Supreme Court recognized that, among the zones of privacy created by various provisions of the Bill of Rights, the intimate association of marriage was one of the most sacred:

REPORT, pages 41-53.

Carey v. Population Services,
cited above.

REPORT, page 41.

Lawton v. Steele (1894) 152 U.S.
133.

Griswold v. Connecticut, cited
above.

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.

A leading constitutional scholar has noted that since Griswold:

. . . [t]he 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.

* * *

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.

The fundamental right to make personal decisions is stronger still when combined with the territorial privacy of one's 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 the right is strong also when sexual autonomy is involved in the context of decisions regarding having children (contraception):

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.

The realm of decisional and associational privacy

Karst, Kenneth, "The Freedom of Intimate Association" (1980) 89 Yale Law Journal 624, 625.

Stanley v. Georgia, cited above.

Eisenstadt v. Baird (1971) 405 U.S. 438, 453.

rights is not all-encompassing. Not every personal decision is protected from governmental regulation:

Roe v. Wade, cited above.

. . . [O]nly personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" . . . 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 United States Supreme Court has further held that the right of personal privacy includes "the interest in independence in making certain kinds of decisions." And further:

Carey v. Population Services, cited above.

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."

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. Such judicial avoidance of cases involving unconventional lifestyles or relationships has prompted constitutional evolution in this area to take place most often in the state courts.

REPORT, page 48.

In a decision declaring the New Jersey fornication statute unconstitutional in violation of the right of privacy, the Supreme Court of that state discussed decisional privacy rights of consenting adults:

State v. Saunders (N.J. 1977) 381 A.2d 333, 339.

We conclude that the conduct statutorily defined as fornication involves, by its very nature, a fundamental personal choice. Although persons may differ as to the propriety and morality of such conduct and while we certainly do not condone its particular manifestations in this case, such a decision is necessarily encompassed in the concept of

personal autonomy which our Constitution seeks to safeguard.

... [Supreme Court decisions have] underscored the inherently private nature of a person's decision to bear or beget children. It would be rather anomalous if such a decision could be constitutionally protected while the more fundamental decision as to whether to engage in the conduct which is a necessary prerequisite to child-bearing could be constitutionally prohibited. Surely, such a choice involves considerations which are at least as intimate and personal as those which are involved in choosing whether to use contraceptives. We therefore join with other courts which have held that such sexual activities between consenting adults are protected by the right of privacy.

A unanimous panel of judges in a New York appellate court recently made some pertinent remarks on the subject in a case challenging the constitutionality of New York's sodomy law:

Thus it is seen that the concept of personal freedom includes a broad and unclassified group of values and activities related generally to individual repose, sanctuary and autonomy and the individual's right to develop his personal existence in the manner he or she sees fit. Personal sexual conduct is a fundamental right, protected by the right to privacy because of the transcendental importance of sex to the human condition, the intimacy of the conduct, and its relationship to a person's right to control his or her own body. The right is broad enough to include sexual acts between non-married persons and intimate consensual homosexual conduct.

When the New York sodomy law was subsequently reviewed by the highest court of that state, the New York Court of Appeals took pains to emphasize the aspect of privacy involved in the constitutional challenge:

Because the statutes are broad enough to reach non-commercial, cloistered personal sexual conduct of consenting adults and because it permits the same conduct between persons married to each other without sanction, we agree with defendants' contentions that it violates both their right of privacy and the right to equal protection

People v. Onofre (1980) 424
N.Y.S.2d 566.

People v. Onofre (N.Y. 1980) 415
N.E.2d 936, 938-941.

of the laws guaranteed them by the United States Constitution.

As to the right of privacy. At the outset it should be noted that the right addressed in the present context is not, as a literal reading of the phrase might suggest, the right to maintain secrecy with respect to one's affairs or personal behavior; rather, it is a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accord with those decisions, undeterred by governmental restraint.

* * *

The People are in no disagreement that a fundamental right of personal decision exists; the divergence of the parties focuses on what subjects fall within its protection, the People contending that it extends to only two aspects of sexual behavior -- marital intimacy . . . and procreative choice Such a stance falls however adequately to take into account the decision in Stanley v. Georgia . . . and the explication of the right of privacy contained in the court's opinion in Eisenstadt

In light of these decisions, protecting under the cloak of the right of privacy individual decisions as to indulgence in acts of sexual intimacy by unmarried persons and as to satisfaction of sexual desires by resort to material condemned as obscene by community standards when done in a cloistered setting, no rational basis appears for excluding from the same protection decisions -- such as those made by defendants before us -- to seek sexual gratification from what at least once was commonly regarded as "deviant" conduct, so long as those decisions are voluntarily made by adults in a non-commercial, private setting. . . .

Following is a chart of those states that have decriminalized private sexual conduct between consenting adults. The chart is limited to areas not involving commercial sexual conduct or adulterous cohabitation.

It should be noted that Pennsylvania and New York had their statutes that criminalized such behavior voided by judicial decisions. The remaining states decriminalized through the legislative process (although in some cases

shortly after a judicial decision). While criminal sanctions have not formally been removed from the law in Massachusetts, the Commonwealth's Supreme Judicial Court has indicated that private consensual conduct is beyond the legitimate interest of the state. This state and several others are in transition and are considered "reformed" by some legal scholars. As of the printing of this Report, a federal district court in Texas has declared unconstitutional the statute which criminalizes private homosexual conduct in that state. Appellate remedies have not yet been exhausted, so the case is not final.

ALASKA	IOWA	OHIO
CALIFORNIA	MAINE	PENNSYLVANIA
COLORADO	NEBRASKA	SOUTH DAKOTA
CONNECTICUT	NEW HAMPSHIRE	VERMONT
DELAWARE	NEW JERSEY	WASHINGTON
HAWAII	NEW MEXICO	WEST VIRGINIA
ILLINOIS	NEW YORK	WYOMING
INDIANA	NORTH DAKOTA	

The major legal conflicts which have arisen in this state concerning decisional/associational privacy, fall into four major categories:

(1) decisions regarding one's personal appearance and grooming standards, which are constitutionally protected, subject to overriding business or societal interests according to the circumstances of each case;

(2) sexual privacy and reproductive rights, which are constitutionally protected in the areas of birth control and contraception, and one's sexual history (except where limited disclosure is appropriate, as in a paternity suit), but are limited in the area of acting as a midwife without a professional license;

(3) cohabitation and alternate families, which are constitutionally protected and can not be used as a basis for discriminating against someone in employment, in federal assistance (such as food stamps), in child

Baker v. Wade, Docket No. CA3-79-1454-R, ___ F.Supp. ___ IN.D. Tex., Op. Del. Aug. 17, 1982).

REPORT, page 79.

REPORT, pages 113-116.

Chambers v. Calif. Unemployment Ins. Appeals Board (1973) 33 Cal.App.3d 923, 926-927.

REPORT, pages 116-122.

People v. Belous (1969) 80 Cal.Rptr. 354, 359; Fults v. Superior Court (1979) 88 Cal. App.3d 899; Morales v. Superior Court (1979) 99 Cal.App.3d 283; Bowland v. Municipal Court (1976) 18 Cal.3d 479, 494.

REPORT, pages 123-127.

Mindel v. U.S. Civil Service Commission (N.D. Cal. 1970) 312 F.Supp. 485, 487-488; Moreno v. U.S. Dept. of Agriculture (1972) 413 U.S. 528.

EXECUTIVE SUMMARY

CALIFORNIA COMMISSION ON PERSONAL PRIVACY

custody (absent compelling evidence that the conduct has significant bearing upon the welfare of the child), and zoning, although practical considerations have restricted alternate family rights in prison settings; and

(4) medicine and drugs, which is most restricted and controlled by the state and which enjoys the least protection under the privacy rubric, especially in the area of use of drugs such as marijuana, and even use of unorthodox and, perhaps, untested medical treatment, such as with Laetrile.

In re Wellman (1980) 104 Cal. App.3d 992; City of Santa Barbara v. Adamson (1980) 27 Cal.3d 123; In re Cummings (1982) 30 Cal.3d 870.

REPORT, pages 128-129.

N.O.R.M.L. v. Gain (1979) 100 Cal.App.3d. 586, 593.

People v. Privitera (1979) 23 Cal.3d 697.

VIII. Relationship Between Personal Privacy and Sexual Orientation

While a consensus once existed as to what was "right and wrong" in the area of sexual morality, the present trend is toward leaving matters of private morality up to the individual. In another national opinion research poll, a majority of people surveyed felt:

REPORT, page 304.

"The New Morality," Time, November 21, 1977, page 111.

* it is beneficial to have more openness about things like sex, homosexuality, and pre-marital and extramarital relations;

* it is becoming more difficult to know for a certainty what is right and what is wrong these days;

* it is not morally wrong for couples who are not married to live together; and

* they would vote for legislation protecting the civil rights of homosexuals.

Part of the reassessment of values and traditions which is occurring today includes a reevaluation of non-traditional lifestyles and relationships in the context of personal privacy principles. Without either condoning or condemning the unusual or the unconventional, the focus is shifting to a more honest appraisal of the fear and other motivations behind those who feel it necessary to discriminate against those who are different.

In his Executive Order, the Governor stressed several reasons for including the subject of sexual orientation discrimination in the overall study of privacy:

REPORT, page 301.

Executive Order B74-80 (October 9, 1980).

* California must recognize the full human potential of all its citizens as its most valuable resource;

* In order to safeguard this human potential, it is necessary to protect the fundamental right to personal privacy against the threat of discrimination for reasons of an individual's sexual orientation;

* Sexual orientation discrimination contravenes the policy of this state;

* Certain stereotypes relating to sexual minorities which are held in common by many people often result in an individual's being judged without regard for that person's qualities and merits; and

* A study is necessary as an educational tool so that legislative and administrative action and public attitudes may be based upon accurate information, thus encouraging protection of the civil rights of all Californians against unjust discrimination.

The Commission agrees with the underlying suggestion, implicit in the Governor's Executive Order, that protection of the right of privacy for all requires vigorous enforcement for even those minorities that may be unpopular to many. The principle that freedoms can remain safeguarded for the majority only by ensuring their protection for the minority can also be seen at work in many other areas of the law.

REPORT, page 301.

For example, the chain of protection of personal religious freedom is only as strong -- even for the majority -- as the protection offered the most heretical minority. It is to the credit of many religious leaders that, while they espouse their faith as singularly true, they strongly defend as a principle the right of all to freedom in religious belief.

REPORT, page 302

It is ironic, yet often true, that the constitutional rights we take for granted may obtain their real thrust and power in unpopular cases. Yet, these cases are sometimes the only testing-ground for the protection of those rights and, objectively speaking, are a crucial element in constitutional evolution. The dangers inherent in a suspension of constitutional principles because of popular sentiment against a person or group are so enormous that the temptation must be assuaged by public education. The right of personal privacy is viable only if the right and all its aspects -- territorial, decisional/associational, and informational -- are afforded all participants in the life of the state.

The connection between sexual orientation discrimination and invasions personal privacy has been explained by a federal judge in a recent opinion which ordered the Secretary of the Army to reinstate a woman into the Army Reserves after she had been discharged for "being a homosexual":

REPORT, page 304.

If what the United States Supreme Court itself has termed the right of "personal privacy" . . . means anything at all, it should safely encompass an individual's right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as one's personality, self-image, and indeed, one's very identity.

benShalom v. Secretary of Army, cited above.

The ". . . autonomous control over the development and expression of one's intellect, interests, tastes, and personality" (emphasis added) are among the most precious of rights protected by the First Amendment.

As stated above, [the Army regulation on homosexuality] effectively "chills" the free association of any soldier with known or suspected homosexuals. The right of association is found in the penumbral zone of privacy created by the First Amendment. . . . Incur- sion on this right of association, therefore, invades the right to privacy in one's reli- gious, political, economic, or cultural asso- ciations. . . .

On a broader scale, the Army's policy of discharging people simply for having homo- sexual personalities also offends privacy interests in the First Amendment.

One's personality develops and is made manifest by speech, personal expression and association of one's self with certain persons to the exclusion of others. . . . A homosexual personality -- formed genetically or by human experience; the product of deliberate choice or predetermination -- may be displeasing, disgusting and immoral to many. These, how- ever, are social judgments, not ingredients for gauging constitutional permissibility.

New York Attorney General Robert Abrams recently addressed the connection between privacy and sexual ori- entation:

. . . [The right of privacy] conceptually encompasses control over one's body and con- trol over one's decisions about personal life- style. It is a right already recognized as a fundamental right by the United States Supreme Court

Before the police power of the state can be invoked to justify an intrusion into an individual's personal decisions, compelling reasons to do so must be shown. The state clearly has a legitimate interest in pro- tecting its citizens from violence and other clearly defined harm. The state must cer- tainly be involved in protecting children from violence and from situations in which their inability to make mature judgments is manipu-

REPORT, page 306.

See New York University Review of Law and Social Change, Vol. 8, No. 3 (1978-79).

lated and used against them. But justifications for discrimination against lesbians and gay men, which are based on prejudices, religious dogma, and unsubstantiated, unfounded and false presumptions are not compelling. . . . (It is not) justifiable to deny employment, or housing, or other basic rights to lesbians and gay men because of these prejudices. Nor can such rights be denied because of a presumption that homosexuals molest children when the facts indicate overwhelmingly that it is young girls who are sexually molested, and that they are molested by adult men who are heterosexual and all too often members of the girl's immediate family.

The right of privacy protects not only activities which are private acts between consenting adults, but also private and personal decisions, even if publicly acknowledged. The issue of privacy as broadly defined should encompass the right to live one's life unhindered, no matter how controversial or unconventional that lifestyle is.

Earlier this year, after the Wisconsin Legislature gained the distinction of being the first state legislature in this country to pass comprehensive legislation protecting the civil rights of lesbians and gay men, Republican Governor Lee Sherman Dreyfus decided to sign the measure into law because of the right of privacy:

I have decided to sign this bill for one basic reason, to protect one's right to privacy. As one who believes in the fundamental Republican principle that government should have a very restricted involvement in people's private and personal lives, I feel strongly about governmentally sanctioned inquiry into an individual's thoughts, beliefs and feelings.

Discrimination on sexual preference, if allowed, clearly must allow inquiries into one's private life that go beyond reasonable inquiry and in fact invade one's privacy.

No one ought to have the right [to inquire into] and no one ought to be placed in a position of having to reveal such personal information when it is not directly related to an overriding public purpose. . . .

REPORT, page 308.

Governor's Enactment Message for AB No. 70 (February, 1982).

This broad concept of privacy has been articulated by some members of the federal judiciary:

REPORT, page 311

The "right of privacy," apt in some cases, is a misleading misnomer in others. . . . This freedom may be termed more accurately "the right to be let alone," or personal autonomy, or simply "personhood." One thing for sure -- it is not limited to the conduct of persons in private. . . . [S]ecrecy is not a necessary element of the right and . . . the right exists, whether or not exercised in secret.

Lovisi v. Slayton (4th Cir. 1976) 539 F.2d 349, 354-356.

The manifestations of violations of the personal privacy of lesbians and gay men often fall into a category known as sexual orientation discrimination. The Commission is convinced that a primary cause of such discrimination is "homophobia" or an irrational fear of homosexuality. The fear, whether based upon religious conviction or personal insecurity, is nurtured by myths and stereotypes about lesbians and gay men, and the fear is perpetuated by ineffectual communication and education. Sometimes the misinformation has been handed down through the generations. Those who have questioned the so-called truths about homosexuality have often been the targets of ridicule, discrimination, and even violence.

REPORT, page 337.

*
* THE COMMISSION RECOMMENDS that the California Department of Education prepare and distribute a booklet entitled "Myths and Stereotypes about Homosexuality."
* A booklet of this nature was prepared by the Pennsylvania Department of Education and has been very well received as an educational tool in that state. The Commission finds that such a booklet is needed in California for use in both the public and private sectors.
*

REPORT, page 339.

"BOOKLET ON MYTHS ABOUT HOMOSEXUALITY"

The Commission has examined a few of the most prevalent myths about homosexuality and has set forth its research in the main Report of the Commission. The Commission has found the myths to be unjustifiable and inconsistent with the facts:

REPORT, page 340.

MYTH: Gays Are an Insignificant Minority

Discrimination against even a few, of course, is unjust. However, statistics provided by the Kinsey Institute and findings of other researchers indicate that lesbians and gay men constitute approximately ten percent of the population; given the population of California,

Kinsey, Pomeroy, and Martin, Sexual Behavior in the Human Male (Philadelphia: W.B. Saunders, 1948); Bullough, V., Sin, Sickness and Sanity (New York: Garland Press, 1977), page 209; U.S. News and World Report (April 4, 1980) pages 93-95; Final Report of the State of Oregon Task Force on Sexual Preference (1978) pages 18-19.

there may be over two million lesbians and gay men residing in the state -- not an insignificant number.

MYTH: Gays Are Not Victims of Discrimination

The Commission has found substantial evidence of discrimination in the forms of intimidation and violence, sometimes fatal; employment discrimination, including active "witchhunts" for gays in civil service positions; exclusion and deportation of immigrants; exclusion and discharge from the military; surveillance by police and investigative agencies; arrest and incarceration for public displays of affection; denial of government benefits; loss of child custody and visitation rights; higher taxation; judicial intolerance; discriminatory enforcement of the law; police harassment; and unfair treatment by public accommodations and private businesses, such as health care and nursing facilities, insurance companies, financial institutions, and entertainment facilities.

As the country's largest employer and deliverer of benefits, it is appropriate for the federal government to end its discriminatory practices and to encourage state and local governments to do the same. Some progress toward this end has been made during some administrations, although the tradition of discrimination and privacy invasions has by no means been reversed.

*
* THE COMMISSION RECOMMENDS that members of the
* California congressional delegation initiate a series
* of regional hearings throughout the United
* States to determine the extent of sexual orientation
* discrimination, its causes, and the personal and
* social costs of such discrimination for the purpose
* of framing appropriate remedial legislation.
*

Until 1976, private homosexual conduct between consenting adults, even in the privacy of their own bedrooms, was punishable by up to life imprisonment in California. While the criminal law and public policy of the state have changed in this regard, remnants of the earlier time are still apparent in the policies of many police departments regarding hiring of persons with a homosexual orientation. And as recently as last year, a member of the Board of Supervisors of one local community publicly announced that he "would not knowingly hire a 'queer'."

MYTH: Gays are Child Molesters

REPORT, pages 341-358.

Crompton, L., "Gay Genocide: from Leviticus to Hitler," The Gay Academic (Palm Springs: Etc. Press, 1978); Duberman, M., "Hunting Sex Perverts," Christopher Street, Vol. 5, No. 12 (1981) pages 43-48.

Senate Document No. 241, 2nd Session, 81st Congress.

REPORT, page 388.

Causey, M., "The Federal Diary," The Washington Post, May 14, 1980, page C-2.

REPORT, page 354.
"CONGRESSIONAL HEARINGS ON SEXUAL ORIENTATION DISCRIMINATION"

REPORT, page 354.

REPORT, page 418.

See Imperial Valley Press, Jan. 6, 1982, page 1.

REPORT, page 359.

The Commission's research, as well as that of the Oregon Task Force on Sexual Preference, shows that most victims of child molestation are female, and the perpetrators are most often adult male relatives. "Child molesting is primarily a problem within the family," and is not related to having lesbians and gay men in "sensitive" positions, such as police work, hospital jobs, and positions in elementary and secondary schools.

MYTH: Homosexuality is a Mental Illness

In responding to a worried mother, Sigmund Freud wrote in 1935:

. . . Homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual development. Many highly respected individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo da Vinci, etc.). It is a great injustice to persecute homosexuality as a crime, and cruelty, too. . . .

Kinsey's research was the catalyst which prompted many other talented researchers to reexamine the myths surrounding homosexuality. One of these researchers was Dr. Evelyn Hooker, a psychologist, who found that, among her test sample, "by any objective criteria, other than their sexual preference, these men could be classified as normal. Her findings forced a rethinking of the classification of homosexuality as a pathological illness, and later research has tended to confirm her findings."

In 1967, the National Association for Mental Health removed homosexuality from its list of mental illnesses. Within seven years, both the American Psychiatric Association and the American Psychological Association followed suit. Later, the nation's Surgeon General and the United States Public Health Service were to concur.

* * * * *
*
* THE COMMISSION RECOMMENDS that the Legislature amend *
* section 8050 of the Welfare and Institutions Code. *
* That statute seems to be based on the "mental ill- *
* ness model" intertwined with the child-molestation *
* myth, and directs the Department of Mental Health to *
* "plan, conduct, and cause to be conducted scientific *
* research into the causes and cures of sexual devia- *
* tion, including deviations conducive to sex crimes *
* against children, and the causes and cures of homo- *
* * * * *

People v. Giani (Cal.App. 1956) 362 P.2d 813, 815; Report of the Subcommittee on "Homosexual Activity and the Law" to the San Francisco Mental Health Advisory Board, adopted unanimously by the Board on April 10, 1973; "Molester Data Erroneous, Gates Admits," July 12, 1978, L.A. Times, Part II, page 1.

REPORT, page 361.

Bullough, Sin, Sickness and Sanity, cited above.

See Bullough, cited above.

REPORT, page 363.

"Psychiatrists Change View of Homosexuals," L.A. Times, Dec. 16, 1973, Part I, page 12.

REPORT, page 367.

"AMEND LAW ON CAUSES AND CURES OF HOMOSEXUALITY"

* sexuality" Section 8050 should be amended *
 * to delete the phrase which has been underscored. *
 * * * * *

Putting lesbians and gay men in the same category as child molesters is not only inaccurate but also dangerous, perpetuating myths and encouraging bigotry. While neither the Department of Mental Health nor the Langley Porter Clinic is conducting research into the causes and cures of homosexuality, elimination of that portion of the statute will have at least symbolic significance, indicating that the myths underlying the section do not have official legislative sanction.

REPORT, page 368.

MYTH: Contact with or Exposure to Homosexuals is Dangerous

REPORT, page 364.

Many persons consider the homosexual condition undesirable. Some feel homosexuality is morally wrong; others base their conclusions on the mental illness myth; still others simply note that homosexuality remains the basis for considerable discrimination in society and carries a significant social stigma. Most of these people fear that personal contact with homosexuals is risky and dangerous for themselves and their children.

Three assumptions underlie these viewpoints: one, that homosexuality is a threat to the continuity of the species; two, that homosexuality is caused by contact with or exposure to homosexuals; and three, that the tradition of prejudice is perpetual and cannot be ended.

First, homosexuality is not a threat to the survival of the human race and has existed throughout history with no appreciable effect on the growth of world population.

Second, while there is no conclusive evidence as to whether homosexuality is caused by genetic and pre-natal factors, hormonal makeup, or early learning experiences, "there is general agreement (a) that it happens very early in life, well before the age of five, (b) that individuals do not choose their sexual orientation, and (c) that a conscious choice to suppress behavioral expression of one's sexual orientation is possible but it is unlikely to be successful over a long period of time." Researchers Bell and Weinberg concluded that the "popular stereotype" that homosexuality results from exposure or seduction "is not supported by our data."

Berzon and Leighton, Positively Gay (Celestial Arts, 1979) page 5.

Bell, Weinberg and Hammersmith, Sexual Preference (Bloomington: Indiana University Press, 1981) page 185.

Finally, the Commission believes that the self-destruction of prejudice is a natural by-product of the educational process, personal acquaintanceship being the most potent instructor.

MYTH: A Proper Justification for Sexual Orientation Discrimination is that Homosexuality is Unnatural

REPORT, page 369.

The question of whether or not homosexuality is unnatural is one of the genre of debates which can never conclude with unanimity of opinion. The arguments on both sides are based upon personal and religious convictions as well as upon definition of terms.

The Commission itself has no unanimity even as to the meaning of the word "unnatural" in this context; the issue is academic. It is the position of the Commission, however, that whatever conclusion one reaches, there is no justification or excuse for discrimination or for any denial of equal opportunity in society or equal justice under law. Even some religions that hold the view that homosexuality is sinful (or have not yet decided the issue), nonetheless take a stand in favor of legislation to end sexual orientation discrimination in employment, housing, and public accommodations.

Central Conference of American Rabbis (1977 Convention); American Catholic Bishops (1976); Union of American Hebrew Congregations (1977).

The academic, religious, and intellectual arguments surrounding the "naturalness" issue provide no useful rationale for justifying discrimination. The Commission recognizes that gay men and lesbians do exist and are not an insignificant element of society. The Commission also recognizes that society must deal constructively with this reality and that it is not useful, but rather destructive, to deny equal opportunity and justice on the basis of academic and unanswerable questions.

REPORT, page 373.

Ironically, the ultimate loss accrues to the society when discrimination limits a group's participation, thus yielding less than the full potential of the human resources of the state. This harm to society is the product not only of the myths discussed above, but also of the many other myths and stereotypes not explored here, including the myths that homosexuality causes the fall of civilizations; that homosexuals have gender confusion, lesbians acting masculine and gay men effeminate; and that homosexuals are promiscuous and are proselytizers.

Society has felt the impact of drawing negative generalized characterizations of entire racial and ethnic groups in the past. Those types of generalizations are no more useful and no less destructive in the case of those with a minority sexual orientation. The debates about the truthfulness of the generalizations may go on forever. Our form of government, our state and federal constitutions, and the collective conscience and intelligence of our society, all require justice and fair-play in the meantime.

PART THREE: PRACTICAL IMPLICATIONS AND MANIFESTATIONS

IX. Information Practices and Records

A. FEDERAL STANDARDS

In 1974, Congress enacted the Federal Privacy Act declaring that informational privacy "is a personal and fundamental right protected by the Constitution." 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."

The Guidebook to the Freedom of Information and Privacy Acts contains a thorough analysis of the strengths and weaknesses of both Acts. The observations and conclusions cited in the Guidebook include the following:

* 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.

REPORT, page 61.

Bouchard, R. F. and J. D. Franklin, ed., Guidebook to Freedom of Information and Privacy Acts (New York: Clark Boardman Co., Ltd., 1980).

Guidebook, page 63.

Guidebook, pages 45-64.

* 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 guarantees the Act's impotency.

*
* THE COMMISSION RECOMMENDS that the members of
* California's congressional delegation introduce leg-
* islation to correct the deficiencies listed above.
*

REPORT, page 62.
"AMEND FEDERAL PRIVACY ACT"

The Commission notes 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, legislation is powerless to check increasing informational privacy abuses.

REPORT, page 63.

*
* 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 between 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.
*

REPORT, page 64.
"NATIONAL PRIVACY PROJECTS"

In its report, the federal Privacy Protection Study Commission recommended that the President and Congress establish an entity within the federal government, charged with responsibility for: monitoring and evaluating the implementation of statutes and regulations enacted pursuant to the recommendations of the Study Commission; (2) continuing research 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. Some of the concerns to be addressed include: 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.

REPORT, page 64.

The Report of the Privacy Protection Study Commission (1977)
"Personal Privacy in an Informational Society" (U.S. Government Printing Office, Stock No. 052-003-00395-3).

*
* THE COMMISSION RECOMMENDS the establishment of a
* Federal Privacy Board as suggested in the final re-
* port of the Privacy Protection Study Commission. The
* Commission supports legislation (such as H.R. 1050 in
* the 97th Congress) which would accomplish this re-
* sult.
*

REPORT, page 65.

"ESTABLISH FEDERAL PRIVACY BOARD"

Under the Commerce Clause of the United States Constitution, Congress has the power to regulate business enterprises that are involved in interstate commerce and, hence, may enact laws affecting many privacy-intensive industries, such as credit and insurance. Congress may also condition participation in federal funding programs for state, local, and private sector projects on maintenance of certain standards of privacy protection.

U.S. Const., Art. I, Section 8(3).

In July of 1977, the Privacy Protection Study Commission presented Congress and the President with 162 specific recommendations. In response, the President designated a committee to carry out an interagency review. This committee reported back in 1979 with specific legislative proposals consistent with the duty of the nation's chief executive to oversee the complex federal bureaucracy and to implement the law.

REPORT, page 66.

*
* 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 au-
* thority vested in him by virtue of his Office, to
* Issue an Executive Order creating an ongoing Interde-
* partmental Task Force on the Status of Personal Pri-
* vacy.

REPORT, page 68.

"REQUEST PRESIDENT TO ESTABLISH TASK FORCE AND COUNCIL"

* vacy, and a Citizens' Advisory Council on the Right *
 * of Privacy. The Interdepartmental Task Force and the *
 * Advisory Council can assist the Domestic Council, the *
 * Office of Management and Budget, and the Cabinet *
 * Council on Management and Administration in the dif- *
 * ficult job of administrative oversight and coordina- *
 * tion of privacy policies and practices. *
 * * * * *

In summary, the public's right to inspect public records maintained by the federal government is guaranteed by the Freedom of Information Act. Individuals who are the subjects of personal records maintained by the federal government have a right to inspect, copy, and correct records under the Privacy Act of 1974.

B. STATE STANDARDS

The public has the right to inspect public records maintained by California's state agencies pursuant to the Public Records Act. Individuals who are the subject of records of state agencies containing personal information have rights of access to copy those records and to have inaccuracies corrected under provisions of the Information Practices Act.

REPORT, page 271.

California's Public Records Act was adopted by the Legislature in 1968, with the following intent:

Gov. Code Section 6250.

In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in the state.

According to the Act, public records are open to inspection at all times during the office hours of the state or local agency, and every citizen has a right to inspect any public record, except for records that are specifically exempted from such inspection.

Gov. Code Section 6253.

The Government Code exempts certain records from mandatory disclosure; however, once the custodian of a particular record makes a voluntary disclosure, the custodian cannot later claim an exemption.

Gov. Code Section 6254.

Gov. Code Section 6254.5.

Notwithstanding the vital concern for openness in government operations, and after a "lengthy and turbulent process," the California Legislature enacted the Information Practices Act of 1977 (sometimes called the California Privacy Act). This Act applies only to state

REPORT, page 274.

Civil Code Section 1798 et seq.

agencies and was designed to limit dissemination of information to third parties and use of information for purposes other than those for which the information was originally collected. The Office of Information Practices was established within the Executive Office of the State Personnel Board to assist in the implementation of the Act.

Civil Code Section 1798.4.

The public also has a right to inspect public records maintained by local government agencies pursuant to the Public Records Act. However, as the law now stands, individuals do not have rights to inspect, copy, and correct local agency records containing personal information about them because the Information Practices Act does not apply to local government.

REPORT, page 280.

*
* THE COMMISSION RECOMMENDS that the Legislature extend
* the provisions of the Information Practices Act that
* give individuals a right to inspect and copy records
* containing personal information about them to such
* records maintained by local government agencies.
* Since the agencies may charge reasonable fees for
* such services, there should be no significant cost to
* local government agencies if this aspect of the In-
* formation Practices Act were so extended. The other
* aspect of this law that should be extended to local
* governmental entities is the requirement to correct
* or amend any records containing inaccurate personal
* information. Individuals may be severely harmed by
* the maintenance of inaccurate or incomplete personal
* information in the records of agencies within local
* government as well as at the state and federal lev-
* els. The nominal costs involved in correcting inac-
* curate information is a small price to pay for pro-
* tecting important personal privacy rights.
*

REPORT, page 280.

"EXTEND PRIVACY ACT TO LOCAL GOVERNMENTS"

Because of the cost factor, the Commission is not recommending, at the present time, a blanket extension of the entire Information Practices Act to cities, counties, and other local government entities. However, the Legislature should consider awarding a grant to a "model city" that would voluntarily adopt the entire Act for three years on a trial basis.

During the Public Hearings, the Commission on Personal Privacy learned that the Office of Information Practices consists of only two people. These two people have the responsibility to perform various duties including overseeing the information practices of all state agencies, departments, boards, and commissions. In the

Supplement Four, "Transcript of Public Hearings," pages SF/124-SF/125.

recent past, the Office of Information Practices had a staff of five persons, but because of budget restraints, the staff was cut by more than fifty percent. The Commission also learned that since 1979, the Office of Information Practices has not engaged in any major educational efforts to inform the public of its existence and functions or to inform individuals that they have information privacy rights pursuant to the Information Practices Act.

The Commission on Personal Privacy finds that the Office of Information Practices is severely understaffed. Even within its present scope of responsibility, it is not realistic to expect that two people alone can enforce the mandates of the Information Practices Act.

REPORT, page 281.

* THE COMMISSION RECOMMENDS that the Legislature provide funding to accomplish the following objectives:

REPORT, page 281.

* FIRST: An Information Privacy Advisory Council should be created to advise the Office of Information Practices. The Advisory Council would function in a manner similar to the Advisory Board to the Office of Family Planning. Its members would be appointed by the Executive Officer of the State Personnel Board and would consist of experts on legal and practical aspects of informational privacy. Members of the Advisory Council would not receive compensation but would receive reimbursement for expenses. The Advisory Council should meet quarterly and should issue a yearly report on state government information practices. The Advisory Council should hold public hearings at least once a year to receive testimony regarding the effectiveness of the Public Records Act, Information Practices Act, and other policies and practices of state and local government that have an impact on informational privacy rights. The Advisory Council could make recommendations for legislative or administrative changes it deems appropriate. A position should be created so that the Advisory Council has an Executive Secretary to assist the Council and to manage its day-to-day affairs.

"CREATE PRIVACY ADVISORY COUNCIL"

* SECOND: A section on Systems and Public Information should be established within the Office of Information Practices. This section would perform the following duties: (1) gather and maintain the annual statements

* which must be filed by each agency regarding
 * its information system and personal informa-
 * tion practices; (2) assist each agency in
 * developing regulations for complying with the
 * Act as well as any training programs necessary
 * to keep agency employees who handle personal
 * information advised of their duties under the
 * Act; (3) assist individuals in locating per-
 * sonal information within an agency and gaining
 * access to such information; and (4) conduct
 * such educational programs as may be necessary
 * to keep the public informed of the existence
 * of the Office and rights created by the Act.
 * Present personnel within the Office of Infor-
 * mation Practices are already performing these
 * functions.

* THIRD: An Informational Privacy Research
 * Center should be created as an adjunct to the
 * Office of Information Practices. The purpose
 * of this Research Center would be to keep a-
 * breast of legislative and judicial develop-
 * ments that affect personal privacy rights.
 * Court decisions and legislative enactments
 * affecting personal privacy rights would be
 * analyzed and summarized in plain English. The
 * Research Center would be available to testify
 * regarding pending legislation affecting per-
 * sonal privacy and to file amicus curiae briefs
 * in pending appellate litigation on that sub-
 * ject. The Research Center would regularly
 * brief the Office of Information Practices, its
 * Advisory Council, and other state government
 * officials on any significant changes or pro-
 * spective changes in privacy law.

"CREATE PRIVACY RESEARCH
 CENTER"

C. IN THE COURTS

1. Discovery

"Discovery" refers to the compelled disclosure of
 personal information pursuant to administrative or judi-
 cial proceedings. Discovery may take one of several
 forms: (1) administrative warrant for inspection of
 premises; (2) subpoena of documents or records; (3) depo-
 sition; (4) interrogatories; or (5) examination during a
 hearing or trial.

REPORT, page 130.

The federal Constitution's Fifth Amendment, requiring
 that no person "shall be compelled in any criminal case
 to be a witness against himself," and the corresponding
 section of the state Constitution, are one type of limi-

Cal. Const., Art. 1, Sec. 15.

tation on compelled disclosures. Besides the criminal law context, discovery issues arise in most judicial settings and involve bank and other business records; professional records of lawyers, doctors, and psychologists; private associations and groups; criminal history records; Department of Motor Vehicle records; and a myriad of other sources of information.

A number of important lessons can be gleaned from the appellate cases dealing with discovery of personal information pursuant to administrative or judicial proceedings:

FIRST: Although the statutory privileges for confidentiality of personal information in discovery proceedings are exclusive, and courts are not free to create new ones as a matter of judicial policy, discovery proceedings, insofar as they provide for compelled disclosure of personal information, are subject to constitutional limitations under the privacy provisions of the state and federal constitutions.

SECOND: Limitations imposed by the right of privacy against compelled disclosures of personal information during discovery proceedings apply to purely private litigation as well as to litigation where the state is a party.

THIRD: The adoption of the constitutional right of privacy emphasizes the duty of the courts to protect both parties and non-parties against unnecessary intrusion into matters that people ordinarily consider to be private. People generally agree that the following categories are included in those areas which are private in nature: records of arrest not resulting in conviction; records of medical treatment and history; records and information concerning personal finances; personnel records; and information concerning one's sexual or political associations.

FOURTH: The custodian of records that contain personal information has the right, in fact the duty, to resist attempts at unauthorized disclosures, and the person who is the subject of the record is entitled to expect that his or her right of privacy will be asserted. Furthermore, the custodian of the records may not waive the privacy rights of persons who are constitutionally guaranteed

REPORT, page 148.

Valley Bank of Nevada v. Superior Court (1975) 15 Cal.3d 652.

Britt v. Superior Court (1978) 20 Cal.3d 844.

Rifkind v. Superior Court (1981) 123 Cal.App.3d 1045.

Craig v. Municipal Court (1979) 100 Cal.App.3d 69.

their protection.

FIFTH: Some custodians, such as banks, have an additional duty to take reasonable steps to notify an individual when attempts are being made to gain access to personal information so that the individual who is the subject of the record may come forward to object to disclosure, or at least have the opportunity to do so.

Valley Bank, cited above.

SIXTH: When a discovery request is made for personal information about a party to the lawsuit, that party has the duty to assert his or her own privacy rights and demonstrate why the discovery should not be granted. But when the requested information may invade the privacy of a non-party, the custodian of the personal records or the person holding the personal information has the duty to object on behalf of the non-party, sometimes notifying the individual whose interests are potentially in danger. If the custodian fails to exercise this obligation, it is the duty of the court itself to consider denying or limiting discovery to protect the privacy of the non-party to the action.

Craig v. Municipal Court, cited above.

SEVENTH: Because they are the initiators of lawsuits, thereby subjecting certain issues to the judicial process, plaintiffs often waive their own privacy rights. However, any waivers should be limited to the immediate needs of the case, and the right of privacy should be liberally construed in favor of the plaintiffs so that unnecessary information is not disclosed to adversaries who may have an interest in misusing the information.

In re Lifschutz (1970) 2 Cal.3d 415.

Britt v. Superior Court, cited above.

EIGHTH: Even where discovery of private information is found to be directly relevant to the issues of ongoing litigation, it will not automatically be allowed; courts have a duty to balance carefully any compelling public need for disclosure against the fundamental right of privacy.

Board of Trustees v. Superior Court (1981) 119 Cal.App.3d 516.

NINTH: Income tax returns are not subject to compelled disclosure at the request of private litigants.

Rifkind v. Superior Court, cited above.

TENTH: Rather than totally denying discovery on privacy grounds, courts should consider formulating protective orders so the

Valley Bank, cited above.

partial discovery can be allowed under appropriate conditions. Such protective orders can include: restricting the questions that can be asked; prohibiting the inspection of certain records; allowing only the parties and their attorneys to be present at a deposition and enjoining disclosure by these participants to others; sealing of court documents after limited discovery and allowing the records to be opened only upon a subsequent showing of good cause; and even for evidence that is elicited at trial, disallowing the question if the probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice to the party whose privacy is being invaded.

*
* THE COMMISSION RECOMMENDS the enactment of legisla- *
* tion amending the civil discovery statutes, which *
* would incorporate the above-mentioned constitutional *
* protections of privacy recently articulated by the *
* California appellate courts. *
*

REPORT, page 150.

"AMEND CIVIL DISCOVERY STATUTES"

2. Litigation -- Use of Initials

The Commission's staff has reviewed the California Style Manual, a handbook of legal style for California courts and lawyers. Unlike the California Rules of Court, which requires compliance, adherence to the guidelines established in the Style Manual is voluntary.

REPORT, pages 283-288.

Several sections of the Style Manual discuss non-disclosure of parties or other persons associated with a case:

Formichi, R., California Style Manual (1977) Section 213.

Recognizing that the publication of the names of innocent victims of sex crimes and the names of minors who, without blame, are caught up in the type of case where damaging disclosures are made serves no useful legal or social purpose, the Supreme Court has issued the following policy memorandum to all appellate courts: "To prevent the publication of damaging disclosures concerning sex-crime victims and minors innocently involved in appellate court proceedings it is requested that the names of these persons be omitted from all appellate court opinions whenever their best interests would be served by anonymity."

This Commission has found existing rules and policies on the subject of non-disclosure of parties and witnesses in appellate cases inadequate to protect effectively the privacy of persons who are actually or presumptively innocent of any wrongdoing. One way of protecting presumptively innocent appellate litigants is to require anonymous identifiers in all pretrial appellate opinions in criminal cases. Another area ripe for consideration involves cases filed in appellate courts, whether by extraordinary writ or appeal, in which the litigant is seeking to vindicate a privacy right. Presently, persons are deterred from engaging in civil or criminal appellate litigation to redress a violation of personal privacy because any relief granted in a published opinion may cause more harm because of the publication than originally suffered from the substantive violation. A policy might also be established for criminal appeals in which the trial court is ordered to enter a judgment of acquittal or a dismissal based upon insufficiency of the evidence, or to seal records.

*
* THE COMMISSION RECOMMENDS to the California Judicial *
* Council the adoption of a rule which would provide *
* for the use of initials in the title and body of *
* appellate opinions in criminal cases at states in *
* which defendants remain presumptively innocent or *
* when they are acquitted, and in civil cases when a *
* litigant's rights have been vindicated and when the *
* information contained in the opinion of the court *
* could cause an invasion of privacy or further harm or *
* ridicule to an innocent person. This type of rule *
* should especially apply to sensitive cases, such as *
* those involving child custody. *
*

REPORT, page 288.

"USE OF INITIALS IN APPELLATE OPINIONS"

3. Juries

The Commission has noted the invasions of privacy which are presently endured by jurors and prospective jurors throughout the state and country. The recommendations in this section are based upon the following findings:

REPORT, page 289.

Lehman, G., "Invasion of Juror Privacy," Supplement Three.

- 1. Routine practices, such as background investigations by private investigators, jury questionnaires used by jury commissioners, and extensive voir dire in the courtroom regarding personal matters, are conducted with court approval or knowledge and constitute serious invasions of privacy.

2. Present practices utilized in selecting jurors are often employed in an attempt to obtain a partial rather than an impartial jury.

3. Most jurors are not aware that they might refuse to answer personal questions on a variety of constitutional grounds. Information regarding the possibility of objecting to questions is not imparted to prospective jurors by court personnel.

4. Overbroad collection and wholesale dissemination of personal information through public records and public trials constitute a serious threat to the jury system.

5. Invasions of the privacy rights of jurors and prospective jurors has been allowed to continue over the years mainly because the legal system has focused almost exclusively on the rights of defendants and witnesses.

 *
 * THE COMMISSION RECOMMENDS that the Judicial Council *
 * conduct a study regarding the privacy rights of *
 * jurors and prospective jurors. The Commission sug- *
 * gests that during 1983, the Chairperson of the Judi- *
 * cial Council convene a Select Committee on Juror *
 * Privacy. It is further recommended that members of *
 * this committee be chosen from the bench, the bar, *
 * and the community-at-large. At least one represen- *
 * tative from each of the following groups should *
 * serve on the committee: municipal court judges, *
 * superior court judges, appellate court justices, *
 * jury commissioners, public defenders, city attor- *
 * neys, county counsels, members of law enforcement *
 * agencies, private practitioners, law school profes- *
 * sors, the media, and persons who have served on *
 * juries. *
 *

REPORT, page 289.
 "JUDICIAL COUNCIL STUDY ON
 JUROR PRIVACY"

The Commission suggests that a preliminary report of the committee be widely disseminated in order to obtain comments and suggestions from interested groups and individuals. A final report should be filed with the Judicial Council, appropriate committees of the Legislature, and presiding judges of the municipal and superior courts throughout the state.

 *
 * THE COMMISSION RECOMMENDS that the names of jurors
 * not be released before trial to any person except as
 * necessary to summon jurors: that release of any name
 * be considered a misdemeanor; and that when names of
 * jurors are drawn at the commencement of trial, only
 * the communities of residence, without home address,
 * be announced for the purpose of establishing that the
 * juror candidates are bona fide residents of the des-
 * ignated county, municipality, or judicial district.
 *
 * THE COMMISSION FURTHER RECOMMENDS that the Judicial
 * Council create a standard questionnaire to be sent to
 * prospective juror candidates throughout the state,
 * limited to qualifications to serve or reasons for
 * being excused and any other matters which the Judi-
 * cial Council deems essential. It is further recom-
 * mended that the Judicial Council promulgate rules
 * governing the confidentiality of the information
 * received in such questionnaires.
 *
 * FINALLY, THE COMMISSION RECOMMENDS that the Legisla-
 * ture repeal Section 227 of the California Code of
 * Civil Procedure. This statute authorizes seizure in
 * public areas of citizens for jury service. The
 * Legislature should create a new section initiating a
 * practice of telephoning juror candidates who have
 * previously been advised that they are on stand-by for
 * emergency calls, and allowing a reasonable number of
 * hours to appear at court, and specifying a period of
 * days for such stand-by status.
 *

REPORT, pages 289-290.

"LIMIT RELEASE OF NAMES OF JURORS"

"STANDARD QUESTIONNAIRE FOR JUROR CANDIDATES"

"REPEAL LAW ON SEIZURE OF JUROR CANDIDATES"

D. LIBRARY CENSORSHIP

In 1980, the California Legislature amended state law to exempt library circulation records from mandatory disclosure as public records. Yet, the Commission joins the Office of Intellectual Freedom of the American Library Association in noting another problem: the alarming increase in incidents of library censorship in the country.

Cal. SB No. 604, Amending Gov. Code Section 6354, approved July 16, 1980.

 *
 * THE COMMISSION RECOMMENDS that the California State
 * Board of Education and the California Library Association establish a policy of resistance to any demands for library censorship and develop guidelines to prepare local entities to respond to censorship pressures or campaigns.
 *

REPORT, page 74.

"DEVELOP LIBRARY CENSORSHIP POLICIES"

X. Criminal Justice

A. SURVEILLANCE; SEARCH AND SEIZURE

Federal constitutional privacy provisions, particularly the Fourth Amendment, place restrictions on surveillance and other information gathering by law enforcement agencies. Article 1, Section 13 of the state Constitution, which is similar to but broader than the Fourth Amendment, also checks unreasonable searches and seizures which are conducted during criminal investigations. Article 1, Section 1 of the state Constitution has expanded privacy law to prevent other unreasonable information gathering practices by organizations and individuals in the private sector as well as government.

REPORT, pages 165-172.

The Commission is disturbed by the rule articulated in case law which permits government eavesdropping at locked doors of private residences without the authority of a search warrant. Such activity seems to run counter to the reasonable expectation of privacy inherent in every home. Otherwise, "a citizen, in order to preserve a modicum of privacy, would be compelled to encase himself in a light-tight, air-proof box." Because there is no definitive court decision limiting such intentional eavesdropping, the Commission points to the need for clarifying legislation.

REPORT, page 171.

*
* THE COMMISSION RECOMMENDS that legislation be enacted
* to require a search warrant prior to intentional
* police surveillance or eavesdropping at doors, en-
* trances, or walls of private residences or dwellings,
* including residences which are considered public
* accommodations. This restrictive legislation should
* include an exclusion for cases involving exigent
* circumstances. Further, this legislation should
* contain a "plain hearing" exception similar in ra-
* tionale to the "plain view" doctrine which has been
* established by the courts.
*

REPORT, page 172

"POLICE SURVEILLANCE OF PRIVATE RESIDENCES"

On May 18, 1982, the Los Angeles Police Commission held hearings on new guidelines it had recently adopted for operation and oversight of the police department's Public Disorder Intelligence Division. Critics of these new guidelines cite as shortcomings or inconsistencies the absence of standards for initiating investigations, the explicit mandate for the infiltration of political groups if such infiltration helps to establish the "cover" of a police officer, and the concentration of

REPORT, page 179.

review procedures in the hands of the Chief of Police.

The Commission feels that all segments of society would benefit from statewide standards, codified in legislation, which detail guidelines that must be met prior to police surveillance of the lawful activities of individuals or infiltration of organizations. Local police departments or police commissions may wish to adopt even stricter voluntary regulations than any minimum standards that are adopted at the state level.

REPORT, page 181.

 *
 * THE COMMISSION RECOMMENDS that the Legislature adopt
 * and enact into law, standards or detailed guidelines
 * which must be met prior to police surveillance of the
 * lawful activities of individuals or police infiltra-
 * tion of organizations not involved in conducting or
 * planning illegal activities.
 *

REPORT, page 181.
"POLICE SURVEILLANCE OF
LAWFUL ACTIVITIES"

Related is the problem of unauthorized monitoring of telephone conversations, whether by police, by investigative journalists, or by private citizens. The Commission finds that participants to a private telephone conversation reasonably assume that their conversations are not being recorded by other participants, just as they reasonably expect that such conversations are not subject to warrantless wire-taps or other means of eavesdropping by third parties. The present definition of "confidential communication" in Section 632 of the Penal Code is insufficient to put potential violators on notice as to which conversations are confidential and which are not. Furthermore, the privacy of telephone users is not adequately protected by this definition.

REPORT, pages 204-207.

 *
 * THE COMMISSION RECOMMENDS that the definition of
 * "confidential communication" contained in Section 632
 * of the California Penal Code be amended. This amend-
 * ment should create a presumption that any telephone
 * conversation is confidential and that participants to
 * such a conversation may reasonably expect that the
 * conversation is not being recorded by anyone, unless
 * permission to do so has been expressly requested and
 * granted prior to recording. An exception to this
 * presumption should exist for obscene or harassing
 * phone calls.
 *

REPORT, page 207.
"CONFIDENTIALITY OF TELE-
PHONE CONVERSATIONS"

The Commission notes that users of restrooms and dressing rooms in department stores and other public facilities also have a reasonable expectation of privacy. The motivation for surveillance in these areas is often to detect shoplifters or possible sexual activity. Just as the use of two-way mirrors has been outlawed by the Legislature to protect citizens against a serious loss of privacy, other legislation should be adopted to restore a proper balance between the privacy of users of such facilities and the property interests of the proprietors.

REPORT, page 192.

People v. Triggs (1973) 8 Cal.3d 884.

Penal Code Section 653n.

Some department stores have taken reasonable security measures to protect themselves against theft while at the same time respecting reasonable expectations of privacy of patrons. Before customers are allowed access to dressing rooms in these stores, a clerk counts the number of items the customer wishes to try on, and the customer is given a token bearing that number on it. When leaving the dressing room, the customer must return the token. Such a practice is commendable.

*
* THE COMMISSION RECOMMENDS that sections 630 et seq.
* of the California Penal Code be amended to prohibit
* video monitoring and clandestine surveillance of
* restrooms and dressing rooms in business establish-
* ments. Non-clandestine surveillance of cubicles in
* dressing rooms also should be prohibited by law.
* Furthermore, legislation should be enacted to require
* business establishments to post notices warning users
* of restrooms if such areas are subject to surveil-
* lance of a non-clandestine nature.
*

REPORT, page 193.

"SURVEILLANCE OF RESTROOMS AND DRESSING ROOMS"

B. PRISONERS AND INSTITUTIONS

In order to ensure fundamental privacy rights in penal institutions, even in situations in which intrusions may be legal (such as for institutional security), all persons, including prisoners, should be put on notice of routine practices that infringe on subjectively held privacy expectations. Unless they are given notice, many incoming prisoners will expect that their mail is not being censored and that their visitations with family and loved ones are not subject to surveillance. Once one is given notice of the necessity of such procedures, assuming that the basis of the need is institutional security, then it would be unreasonable for one to form an expectation of privacy. Of course, privacy invasions beyond what is necessary for institutional security and public safety must remain unlawful.

REPORT, page 177.

* THE COMMISSION RECOMMENDS that legislation be enacted
 * requiring prison officials to notify prisoners in
 * writing, upon entry into the prison setting or when
 * there is a significant change in prison policy or
 * practice in this regard, of the extent to which (1)
 * their mail is censored; (2) audio or visual recording
 * devices are routinely employed in visitation or other
 * settings; and (3) other privacy intrusions can be
 * expected by the prisoners.

* THE COMMISSION FURTHER RECOMMENDS that the Department
 * of Corrections and the Youth Authority comply with
 * the letter and the spirit of Section 4695 and Sec-
 * tions 3132-3165 of Title 15 of the California Admin-
 * istrative Code. These regulations govern the opening
 * of inmate/ward mail and limit the opening of such
 * mail by authorities to situations where there is an
 * immediate and present danger to the safety of persons
 * or a serious threat to institution security.

* THE COMMISSION FURTHER RECOMMENDS that all youth and
 * adult correctional facilities institute procedural
 * safeguards for the handling and distribution of con-
 * fidential correspondence in compliance with Sections
 * 3134-3143 of Title 15 of the California Administra-
 * tive Code. These regulations govern the opening of
 * confidential correspondence between inmates/wards and
 * attorneys, judges, and other persons. It is also
 * recommended that if and when these regulations are
 * violated by staff members, disciplinary procedures
 * should be instituted by management.

* THE COMMISSION FURTHER RECOMMENDS that the Department
 * of Corrections and the Youth Authority distribute
 * directives to all institutions under their jurisdic-
 * tion requiring management at correctional facilities
 * to ensure that notices are posted at all telephones
 * used by inmates or wards warning them that telephone
 * calls are regularly monitored. Notwithstanding in-
 * terdepartmental directives and administrative codes
 * which require such notices to be posted, the Correc-
 * tions Committee of this Commission, during its insti-
 * tutional visits, observed numerous telephones without
 * such warnings posted nearby. The Commission recom-
 * mends that these notices be posted in both English
 * and Spanish.

* THE COMMISSION FURTHER RECOMMENDS that the definition
 * of "family" that is currently used by the Department
 * of Corrections for eligibility to participate in
 * family visiting programs, be expanded. Just as a
 * person who becomes married during incarceration may

REPORT, pages 177-178.

Also see "Report of the
 Corrections Committee,"
Supplement Three.

"PRIVACY IN CORRECTIONAL
 FACILITIES"

* be eligible to have private contact visits with the
 * new spouse, a person who adopts or becomes adopted
 * while incarcerated should be eligible for such visits
 * with the newly adopted family member. A person who
 * chooses not to marry or adopt, but who nonetheless
 * has a family relationship with a consenting adult
 * partner, should be considered eligible, prima facie,
 * to participate in the family visiting program upon
 * the filing of a Declaration of Family Status. The
 * declaration would state, under oath, that the inmate
 * and the prospective visitor were domiciled in the
 * same household prior to incarceration, and they con-
 * sider themselves to be a family unit.
 *
 * FINALLY, THE COMMISSION RECOMMENDS that the Office of
 * Information Practices investigate the practices of
 * the California Youth Authority relating to collec-
 * tion, maintenance, and disclosure of information
 * about wards. The Office of Information Practices
 * should make recommendations for corrective legisla-
 * tion to protect the privacy rights of CYA wards.
 *
 * * * * *

C. OTHER PENAL CODE REFORM

1. Loitering

Penal Code Section 647, Subdivisions (d) and (e) criminalize certain types of loitering. The former subdivision prohibits lingering in or near a public restroom for the purpose of engaging in or soliciting lewd conduct. The latter prohibits lingering in a public place and not having identification satisfactory to the police.

REPORT, page 269.

What these subdivisions have in common is criminalization of less than overt criminal behavior. The Commission recognizes the chilling effect on many lawful activities which results from having to account for one's presence in a location or having to produce identification for police upon demand. For example, someone walking down a public street to a meeting of some politically or socially unpopular group may not want to carry identification. One's only purpose may be to explore anonymously a minority lifestyle or viewpoint without danger of implication to the mainstream of one's life. The right of personal privacy certainly should protect this venture. The virtuous goal of preventing crime before it happens is not a sufficient rationale for harassing people whose conduct may be subject to various interpretations but does not amount to a crime.

The freedom to choose anonymity from time to time is a right of fundamental importance to members of society.

REPORT, page 270.

Under constitutional principles, intrusions by the state based upon mere suspicion are not justifiable.

 *
 * THE COMMISSION RECOMMENDS that subdivisions (d) and
 * (e) of section 647 of the Penal Code (loitering) be
 * repealed. Such legislative action will maintain the
 * integrity of the criminal law and protect freedom of
 * private thought and movement from unreasonable intru-
 * sions.
 *

REPORT, page 270.

"REPEAL CERTAIN LOITERING STATUTES"

2. Sex Offender Registration

Sex offender registration, which allows for special police surveillance, access to personal information, and other invasions of privacy affecting the right to travel and the right to limit government's use of the personal information gathered, may be appropriate when a sex crime is inherently dangerous to society and when the expectation of the dangerous crime being repeated is high.

REPORT, page 269.

However, there is a category of misdemeanor non-commercial disorderly conduct offenses [such as Penal Code Section 647, Subdivisions (a) and (d)], which involves only consenting adults or consenting adults and vice-officers who are pretending to be consenting adults. In these cases, the Commission feels that the stigma created by sex registration, as well as the invasions of privacy, may constitute cruel and unusual punishment. At best, registration in these situations is a "gratuitous" humiliation which is out of all proportion to the crime committed. In addition, the sex registration law, as it bears on these misdemeanor offenses, has an exceptionally large impact on the male homosexual portion of the population; arrests are almost always made by vice-officers in locations which are known meeting areas for gay males.

Under California law, mere arrest for these misdemeanors has harsh ramifications on persons working in certain professions because of the connection between these misdemeanors and the sex registration statute.

 *
 * THE COMMISSION RECOMMENDS to the Legislature that
 * Penal Code Section 290, which specifies the offenses
 * subject to the sex offender registration require-
 * ment, be amended to delete Subdivisions (a) and (d)
 * of Section 647 of the Penal Code from coverage.
 *

REPORT, page 269.

"MODIFY SEX REGISTRATION STATUTE"

3. Age of Consent

The Commission recognizes that a serious problem exists with the present age of sexual consent being set at 18 years. Several sections of the California Penal Code (viz., §266.5, §286, §288, and §647a) presently criminalize all private consensual sexual conduct of and with teenagers under 18 years of age. A 23 year old who is engaged in a relationship with a 17 year old could, under present law, face state prison. Many state legislatures across the country have studied this issue and have lowered the age of sexual consent below 18 years; several have chosen the age of 16 as a realistic limitation. The Commission believes that California would also benefit from such a legislative study of this issue.

REPORT, page 208.

*
* THE COMMISSION RECOMMENDS that the California Legis-
* lature consider lowering the age of sexual consent to
* an appropriate age and that the Legislature immedi-
* ately initiate a study to determine what the appro-
* priate age is.
*

REPORT, page 208.

"AGE OF CONSENT FOR PRIVATE SEXUAL CONDUCT"

D. ARREST/CASE INFORMATION

*
* THE COMMISSION RECOMMENDS that the Legislature repeal
* existing sections of the Public Records Act allowing
* public access to arrest records prior to the time
* that an accusation is filed with a court by a prose-
* cutor. Up to the time a formal accusation is filed,
* arrest records should be deemed confidential. It is
* further recommended that the practice of printing
* arrest information in "police blotters" in newspapers
* be curtailed in the interests of justice and fairness
* and because the information is of extremely limited
* use to the public and is more inflammatory than
* reliable as to guilt. The Commission suggests that
* the self-restraint thus exercised by the press is in
* the best tradition of responsible journalism.
*

REPORT, page 282.

"LIMIT ACCESS TO SOME ARREST RECORDS"

Persons who have been arrested and who are determined to be factually innocent are the beneficiaries of new legislation that authorizes the sealing or destruction of police and court records that were generated as a result of such arrests. Under this statute, petitioners can file for relief in cases in which the arrest occurred or accusatory pleading was filed up to five years prior to

REPORT, page 283.

Penal Code Section 851.8.

the effective date of the statute (September 29, 1980). Thus, persons who are the subjects of such arrests and court records generated between 1975 and 1980 will lose their right to have these records sealed or destroyed unless they file for relief by the end of this year.

The Commission feels that this privacy legislation is a valuable tool for those who have found themselves caught up in the criminal justice system but who were innocent of any wrongdoing. However, the Commission has found that there has been little publicity or education of the public regarding the terms and benefits of this remedial statute.

*
* THE COMMISSION RECOMMENDS that the Legislature amend
* Section 851.8 of the Penal Code to eliminate the
* deadline of January 1, 1983, so that all persons who
* were innocently arrested in the past may seek relief
* under the statute whenever they learn that such re-
* lief is available.
*

REPORT, page 283.

"SEALING OF RECORDS FOR INNOCENT ARRESTEES"

E. VIOLENCE

Physical violence against the person of another is the most serious form of invasion of personal privacy. The Society for the Psychological Study of Social Issues (a division of the American Psychological Association) formed the Task Force on Sexual Orientation to gather reliable information, from a scientific perspective, on homosexuality and to prepare educational materials on this subject. In its final report, the Task Force documented widespread violence, both in random attacks and in organized violence, which has included destruction of gay churches, newspapers, and community institutions. The Task Force was also able to show how the violence was linked to ignorance. Such violence is also often connected to covertness in one's sexual orientation, which leads one to anonymous and secret liaisons.

REPORT, pages 375-385.

San Francisco Examiner, Aug. 29, 1981, pages 1, 6.

Also see "Transcript of Public Hearings," Supplement Four, pages SF/154 - SF/157.

Education and training of law enforcement personnel in this state as to both the existence and the dynamics of anti-gay violence are necessary. Police officers, prosecutors, and probation officers need to be properly equipped to handle this most devastating form of discrimination. Lesbians and gay men need to feel secure that when they report incidents of violence to law enforcement officials, they will be received with genuine interest and sensitivity.

REPORT, page 384.

 *
 * THE COMMISSION RECOMMENDS that the Commission on *
 * Peace Officer Standards and Training (P.O.S.T.) *
 * develop and certify programs on the handling of cases *
 * involving violence against lesbians and gay men for *
 * use at academies, basic training, and advanced offi- *
 * cer training. P.O.S.T. should develop resource and *
 * training materials on this subject. *
 *
 * THE COMMISSION FURTHER RECOMMENDS that the Department *
 * of Justice and local law enforcement agencies incor- *
 * porate into existing procedural handbooks or training *
 * materials used for sexual assault cases, sections *
 * suggesting sensitive interview approaches and proce- *
 * dures in cases of violence directed against lesbians *
 * and gay men. This could serve as a guide for all *
 * officers in the state when victims report such vio- *
 * lent attacks. *
 *
 * *****

REPORT, page 384.

"P.O.S.T. CERTIFIED PRO-GRAMS AND MATERIALS ON VIOLENCE"

"PEACE OFFICER TRAINING REGARDING VICTIMS OF VIOLENCE"

In researching existing remedies to combat violence and intimidation, the Commission discovered section 51.7 of the California Civil Code:

All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, or position in a labor dispute.

Section 52 of the Civil Code provides a minimum of \$10,000 in damages for persons who successfully prove that they were victims of violence for one of the reasons enumerated in the aforementioned statute.

 *
 * THE COMMISSION RECOMMENDS that "sexual orientation" *
 * be added to the protected classifications mentioned *
 * in section 51.7 of the Civil Code. Lesbians and gay *
 * men need the help of the California Legislature to *
 * combat violence and intimidation directed at them *
 * because of their sexual orientation. A strong signal *
 * needs to be sent to would-be perpetrators of such *
 * that it will not be condoned. *
 *
 * *****

REPORT, page 385.

"AMEND ANTI-VIOLENCE STATUTE"

The Commission has also noted the absence of "age" and "disability" from this anti-violence statute. It is common knowledge that elderly and disabled persons are often targeted for violent attacks by would-be robbers because they are believed to be easy prey. The Commission finds that the personal privacy and physical security of elderly and disabled persons would be strengthened by further amending section 51.7 to include the terms "age" and "disability."

*
* THE COMMISSION RECOMMENDS that, in addition to *
* "sexual orientation," the terms "age" and "dis- *
* ability" be added to section 51.7 of the Civil Code. *
*

REPORT, page 385.

"AMEND ANTI-VIOLENCE
STATUTE"

XI. Employment

The research of the Commission has revealed employment as an area which involves a host of potential and actual privacy infringements.

REPORT, pages 246-255.

Applicants, employees, and even workers previously terminated face privacy problems ranging from background checks and medical examinations to polygraph testing, psychological profiles, and monitoring of telephone calls.

It is self-evident that the gathering, maintenance, and use of some of this information for some purposes, are necessary to the functioning of the employer-employee relationship. Protections and restrictions are also necessary, however, to secure employees from abuses over which they have no power or control.

Government employees generally have more protections against employment-related privacy invasions than do most employees in the private sector, including:

(1) protections against unreasonable searches and seizures, under the federal Constitution's Fourth Amendment and article 1, section 13 of the state Constitution;

(2) article 1, section 1 of the state Constitution, which protects privacy as an inalienable right;

(3) federal, state, and local government merit systems;

(4) the Information Practices Act, which regulates the collection and disclosure of personal information by state agencies and departments; and

(5) employment-privacy exemptions in the Public Records Act.

With limitations in the areas of letters of reference and criminal investigations, the Labor Code provides employees access to their personnel files which are used "to determine the employee's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action. . . ."

Labor Code Section 1198.5

Use and disclosure of medical information by employers are governed by the recently enacted Confidentiality of Medical Information Act. The Act requires

Civil Code Sections 56.20-56.245.

employers to develop procedures to ensure the confidentiality and protection from unauthorized use and disclosure of employees' medical information, to obtain written authorizations before the release of such information, and to limit internal use of such information or the fact that such information was withheld by the employee.

Disclosures regarding job performance may be conditionally privileged and non-actionable if made to others within the company for legitimate business reasons or to other potential employers concerning past performance and qualifications, in good faith, without malice, and if the contents of the disclosures are true.

REPORT, page 249.

Under the California Labor Code, questions regarding or use of information relative to employee or applicant arrest records must be limited to cases resulting in conviction. Violation of these provisions of the Labor Code gives rise to civil and criminal liability. Similarly, public agencies may not require an applicant for any license, certificate, or registration, to reveal a record of arrest that did not result in a conviction.

Labor Code Section 432.7.

A. USE OF POLYGRAPHS

One major problem that surfaced several times during the Public Hearings pertains to the use of polygraph testing of employees or applicants for employment. The Labor Code's ban on such testing exempts the federal government and any agency thereof and the state government and any agency or local subdivision thereof, including, but not limited to, counties, cities, districts, authorities, and agencies.

REPORT, pages 250-254.

Labor Code Section 432.2; Business and Professions Code Section 461.

The Government Code states that police officers may not be required to submit to polygraph examinations in departmental investigations or otherwise. The statute does not prohibit the use of polygraph tests for applicants for employment with law enforcement agencies.

Gov. Code Section 3307.

Based upon its study of the problem, the Commission finds that current law falls adequately to protect employees from serious privacy invasions caused by the use of polygraph tests. Polygraph testing is one of the most intrusive procedures that has come to the attention of the Commission.

REPORT, page 253.

* * * * *
*
* THE COMMISSION RECOMMENDS that Government Code Section 3307, which prohibits law enforcement agencies from requiring peace officers to submit to polygraph tests, be amended to protect applicants for peace officer positions from being required to take such

REPORT, page 253.

"LIMITS ON USE OF POLYGRAPHS IN EMPLOYMENT"

* tests. Furthermore, if peace officer applicants are
 * requested to take such tests, the law should mandate
 * that personnel officials inform applicants of their
 * right to refuse to submit to polygraph testing.
 * There should be no effect on applicant status for
 * refusal to consent to polygraph testing.

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* THE COMMISSION FURTHER RECOMMENDS that Section 432.2
 * of the California Labor Code be amended. Presently,
 * this statute exempts state and local government em-
 * ployers from its provisions. Section 432.2 prohibits
 * employers from requiring or demanding that applicants
 * or employees submit to polygraph testing as a condi-
 * tion of employment or continued employment. The
 * blanket exemption of governmental employers from this
 * provision should be eliminated. The only exempt
 * positions should be those requiring top security
 * clearances.

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REPORT, page 253.

* FINALLY, THE COMMISSION RECOMMENDS that if any appli-
 * cant or employee voluntarily submits to polygraph
 * testing, the law should prohibit questioning in cer-
 * tain highly intimate and private areas including:
 * religious, labor, sexual, or political activities and
 * associations. Violation of this prohibition should
 * carry criminal penalties, civil recovery of actual
 * damages or \$1,000, whichever is greater, and reason-
 * able attorney fees and costs to any employee who
 * prevails in any litigation arising under this stat-
 * ute.

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REPORT, page 254.

After being adopted into law and in effect for a few
 years, if these recommendations do not appear to have
 solved the problem of abusive polygraph practices, the
 Legislature should consider prohibiting the use of poly-
 graph testing under any conditions in employment set-
 tings.

B. LAW ENFORCEMENT

Historically, some of the greatest resistance to
 equal employment opportunities for lesbians and gay men
 has come from law enforcement employers. The Commission
 staff has reviewed the employment practices and policies
 of a few local law enforcement agencies in California.
 While the Chief of Police in San Francisco, both within
 his department and publicly, has encouraged lesbians and
 gay men who are currently employed as officers to feel
 free to acknowledge their status without fear of
 repercussions, such has not been the policy in Los
 Angeles.

REPORT, page 414.

 *
 * THE COMMISSION RECOMMENDS that all police, sheriff,
 * and fire departments throughout the state follow the
 * San Francisco precedent and officially make a public
 * statement to members of these departments that there
 * will be no repercussions if an employee's sexual
 * orientation becomes known.
 *

REPORT, page 416.

"NO REPERCUSSIONS REGARDING EMPLOYEES' SEXUAL ORIENTATION"

Because many law enforcement employers are unaware of their legal responsibilities, the Commission believes that all employers of peace officers in this state would benefit from management counseling regarding the illegality of sexual orientation discrimination both in recruitment and selection. Likewise, all police and sheriff departments could use assistance in developing instruction materials and segments of courses about the gay and lesbian communities to help dispel the myths and stereotypes which are still so pervasive within the departments and which foster the continuity of prejudice.

REPORT, page 420.

The California Commission on Peace Officer Standards and Training (P.O.S.T.) is "responsible for the establishment and maintenance of minimum standards of physical, mental and moral fitness for the recruitment, selection, and training of law enforcement officers."

Attorneys' Directory of Services and Information: Federal, California, and County Governments (Berkeley: Continuing Education of the Bar, 1977) pages 151-152.

 *
 * THE COMMISSION RECOMMENDS that the Commission on
 * Peace Officer Standards and Training, within its
 * established programs, develop minimum standards for
 * non-discrimination and equal employment opportunity
 * in recruitment, selection, and education by law
 * enforcement employers in the area of sexual orientation
 * discrimination. These standards should be disseminated
 * to all law enforcement employers in this state
 * at the earliest possible opportunity. Finally, on-
 * going audits conducted by P.O.S.T. should include an
 * examination of compliance with constitutional and
 * statutory sexual orientation discrimination laws.
 *

REPORT, page 421.

"P.O.S.T. STANDARDS FOR EQUAL EMPLOYMENT OPPORTUNITY"

Since sheriff departments are operated within the personnel system of counties, the County Personnel Administrators Association of California could provide assistance to its members in the form of educational programs and materials as well as professional counseling. The Local Government Services Division of the State Personnel Board plays an important role within this organization.

REPORT, page 421.

 *
 * THE COMMISSION RECOMMENDS that the SPB, through its
 * Local Government Services Division, develop or cause
 * to be developed educational and counseling materials
 * to assist county personnel administrators in under-
 * standing and meeting their legal and moral obliga-
 * tions to include "sexual orientation" within their
 * existing equal employment opportunity programs.
 *
 * THE COMMISSION FURTHER RECOMMENDS that city attor-
 * neys, county counsels, and district attorneys
 * throughout the state familiarize themselves with
 * formal legal opinions on the subject of sexual ori-
 * entation discrimination in government and private
 * employment, such as Gay Law Students Association v.
 * Pacific Telephone Co. (1979) 24 Cal.3d 458 and 63
 * Ops. Cal. Atty. Gen. 583 (1980). Then city and
 * county personnel administrators should be advised of
 * their current legal obligations not to discriminate
 * on the basis of sexual orientation. A policy state-
 * ment should also be developed and distributed to
 * deputy district attorneys regarding investigation and
 * prosecution of complaints alleging violation of sec-
 * tions 1101 and 1102 of the Labor Code, which sections
 * prohibit discrimination by private employers by rea-
 * son of an employee's political activity, including
 * being openly gay at work.
 *
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REPORT, page 421.
 "SPB TRAINING FOR COUNTY
 PERSONNEL OFFICERS"
 "EDUCATION OF LOCAL GOV-
 ERNMENT ATTORNEYS"

C. TEACHERS IN PUBLIC SCHOOLS

The legal obligation, in public school teacher em-
 ployment practices, not to discriminate on the basis of
 sexual orientation, is based upon constitutional provi-
 sions dealing with privacy and equal protection as well
 as various government code sections.

School boards in cities such as Palo Alto, Santa
 Barbara, and San Francisco have adopted policies which
 prohibit such discrimination. Also, the major associa-
 tions and unions for educators have condemned sexual
 orientation discrimination against teachers, including:

- * American Federation of Teachers
- * United Federation of Teachers
- * California Federation of Teachers
- * National Education Association
- * National Council of Teachers of English

REPORT, page 422.
Gay Law Students Association v.
Pacific Telephone (1979) 24
 Cal.3d 458.
 Mendenhall, G., "Teacher Rights
 Approved," The Advocate, July 16,
 1975.

 *
 * THE COMMISSION RECOMMENDS that the State Board of
 * Education and the Superintendent of Public Instruc-
 * tion send notification to all local school districts
 * throughout the state reminding them that sexual ori-
 * entation discrimination in employment is illegal and
 * requesting them to update their equal employment
 * opportunity policy statements accordingly.
 *

REPORT, page 423.

"NOTIFY LOCAL DISTRICTS REGARDING EMPLOYMENT DISCRIMINATION"

The Commission takes note that the Board of Trustees of the California State University and Colleges System and some community colleges have already taken some action with respect to non-discrimination on the basis of sexual orientation.

 *
 * THE COMMISSION RECOMMENDS that the Board of Regents
 * of the University of California, the Trustees of the
 * California State University System, and the Board of
 * Governors of the California Community Colleges should
 * each review the nondiscrimination policies within
 * their respective systems for both admissions and
 * employment practices to ensure that "sexual orienta-
 * tion" has been added as a protected classification.
 * Equal employment opportunity personnel within each
 * system should receive training on sexual orientation
 * discrimination within ongoing training programs.
 * College placement services should require employers
 * to certify that they do not engage in sexual orienta-
 * tion discrimination.
 *

REPORT, page 422.

"UPDATE OF COLLEGE/-UNIVERSITY EMPLOYMENT POLICIES"

Public school teachers in California must be credentialed by the Commission on Teacher Preparation and Licensing. According to the California Supreme Court, a teacher's homosexuality, in itself, may not form the basis for revoking a teaching credential. Other professional licensing agencies in California have issued policy statements that "publicly affirmed homosexuality does not in itself preclude a person otherwise qualified from" obtaining a professional license.

Morrison v. State Board of Education (Cal. 1969) 461 P.2d 375.

 *
 * THE COMMISSION RECOMMENDS that the Committee of Cre-
 * dentials of the California Commission for Teacher
 * Preparation and Licensing issue a policy statement
 * that publicly-affirmed homosexuality will be treated
 *

REPORT, page 423.

"NON-DISCRIMINATION STATEMENT FROM CREDENTIALS COMMITTEE"

* the same as publicly-affirmed heterosexuality for *
 * purposes of denying, suspending, or revoking a teach- *
 * ing credential. *
 * * * * *

D. PRIVATE SECTOR

While employers in the private sector have more latitude in their employment practices than do government employers, they are still subject to a variety of restrictions that protect employee privacy, including:

REPORT, page 247.

- (1) common law privacy protection;
- (2) article 1, section 1 of the state Constitution;
- (3) state legislation prohibiting certain types of employment discrimination;
- (4) state legislation prohibiting the collection of certain information about employees or applicants;
- (5) sexual harassment legislation and administrative regulations; and
- (6) state legislation protecting employees from other forms of privacy infringements.

Some cities, such as Los Angeles and San Francisco, have ordinances which make it illegal for a private employer to discriminate on the basis of sexual orientation. Any applicant or employee who suffers from such discrimination has a private cause of action against the employer and can bring suit in court alleging a violation of such an ordinance.

REPORT, page 424.

For example, see Los Angeles Municipal Code, Ch. IV, Art. 4, Sec. 49.70 et seq.

Employers who engage in such discrimination in municipalities which do not have such an ordinance may still be liable under the law. A memo issued on June 13, 1979, by the State Labor Commissioner to those working in branch offices throughout the state underscored that criminal sanctions may be imposed against private employers who discriminate against openly gay employees:

REPORT, page 424.

In a recent Supreme Court decision . . . the court decided that homosexuals may assert a cause of action against an employer for violation of Labor Code Sections 1101 or 1102, alleging they were discriminated against because of their being "manifest" homosexuals or persons making "an issue of their homosexual-

ity." In its opinion, the court states, "The struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity."

. . . Note that the remedy for violation is criminal prosecution.

Sexual orientation discrimination by private employers may also constitute a violation of the right of privacy in the state Constitution. A number of court decisions have held that an individual's sexual orientation is presumptively unrelated to fitness for a job; thus, such information is "unnecessary." One of the principal mischiefs that was to be addressed by the 1972 Privacy Amendment adopted by the voters was to curb the overbroad collection and retention of unnecessary personal information by government and business interests.

Finally, interrogations of applicants or employees about their sexual orientation may constitute a violation of the common law tort of privacy, being an intrusion into their private affairs.

Protection against sexual orientation discrimination in private employment is also being achieved through voluntary methods. Some private employers have announced that they do not discriminate on the basis of sexual orientation; some have disseminated their policies in company publications, such as personnel manuals and company newsletters. The following companies, among others, have used this approach:

ABC	Carnation Company	Oscar Mayer Co.
American Express	Adolph Coors	J.C. Penney
American Motors	Firestone Tire	Pitney Bowes
Anheuser Busch	General Electric	Rockwell Internat'l
Avon Products	Gibraltar Savings	Schlitz Brewing Co.
Bank of America	Honeywell	Sears
Bell & Howell	INA Corp.	Standard Oil of CA
Bendix	Johnson & Johnson	TRW
CBS	Metropolitan Life	United Airlines

In the process of collective bargaining, some employers are now being faced with union demands to include "sexual orientation" in the non-discrimination agreement. This method is proving to be another source of protection against sexual orientation discrimination in employment.

Both employers and employees would benefit from legislation creating a uniform statewide policy on sexual orientation discrimination in private employment.

White v. Davis (1975) 13 Cal.3d 757, 776.

Prosser, Torts (3rd Ed., 1964) Section 112, page 832.

REPORT, page 425.

 *
 * THE COMMISSION RECOMMENDS that the Legislature amend
 * the Fair Employment Practices Act to include "sexual
 * orientation" among those categories of discrimination
 * specifically prohibited by law.
 *

REPORT, page 426.
 "AMEND FAIR EMPLOYMENT
 PRACTICES ACT"

Privacy in private-sector employment is an area de-
 serving of focused and long-range study, not only because
 of the number of problems that exists, but also because
 of the complexity of the problems and because of the
 competing and often valid interests of employers.

 *
 * THE COMMISSION RECOMMENDS that the Labor Commissioner
 * establish a 12-month Task Force on Private-Sector
 * Employment Privacy. The purpose of this Task Force,
 * composed of a cross-section of business and labor
 * representatives, would be to identify recurring inva-
 * sions of employee privacy, to present legal provi-
 * sions which protect employee privacy, and to make
 * recommendations for legislative or administrative
 * actions that are necessary to further protect the
 * privacy rights of private-sector employees. This
 * Task Force should be created in early 1983 and should
 * report its findings and recommendations to the state
 * Labor Commissioner in early 1984. In turn, the Labor
 * Commissioner should make recommendations to the Leg-
 * islature based upon the report of this Task Force.
 *

REPORT, page 254.
 "CREATE LABOR COMMISSIONER
 TASK FORCE"

* THE COMMISSION FURTHER RECOMMENDS that the Legisla-
 * ture add a chapter to the California Labor Code that
 * would prohibit an employer from:

REPORT, page 255.
 "AMEND LABOR CODE TO PRO-
 TECT PRIVACY"

* (a) soliciting or requiring the divulgence
 * of any information about an employee's (or
 * prospective employee's) private life that has
 * not been demonstrated by the employer to be
 * necessary to the performance of the job;

* (b) using any information acquired about
 * an employee's (or prospective employee's)
 * private life that has not been demonstrated
 * by the employer to be necessary to the perfor-
 * mance of the job, to influence any decision
 * regarding the hiring, placement, promotion,
 * assignment, or termination of the employee;

* (c) subjecting an employee to harassment
 * or interrogation on the basis of information
 * acquired about the employee's private life

* that has not been demonstrated to be necessary *
 * to the performance of the job. *
 * * * * *

E. MONITORING/IMPLEMENTING EXISTING LAW

Since 1975, the United States Civil Service Commission has evaluated the suitability of individuals for federal employment based upon "fitness" or "merit" rather than allowing exclusions solely because a person is a homosexual or has engaged in homosexual acts.

REPORT, page 387.

5 C.F.R. Section 731.202(b); 40 Fed. Reg. 28047 (1975).

The Civil Service Reform Act of 1978 further "prohibits any employee who has authority to take personnel actions from discriminating for or against an employee or applicant for employment on the basis of conduct which does not adversely affect either the employee's own job performance or the performance of others."

In 1980, the federal Office of Personnel Management (OPM) issued a directive intended to advise and educate agency heads of the policy of OPM regarding the Civil Service Reform Act's effect on privacy and sexual orientation:

REPORT, page 389.

Causey, M., "The Federal Diary," The Washington Post, May 14, 1980, Page C-2.

The privacy and constitutional rights of applicants and employees are to be protected. Thus, applicants and employees are to be protected against inquiries into, or action based on, non-job-related conduct, such as religious, community, or social affiliations, or sexual orientation. An applicant or employee is also to be protected against any infringement of due process, self-incrimination or other constitutional rights.

The Department of Defense and the federal military are not affected by the reforms mentioned above, although courts in recent years have not been unanimous in their treatment of discharge proceedings based solely on homosexual status or tendencies (as opposed to conduct).

REPORT, page 390.

benShalom v. Secretary of Army, cited above; cf. Beller v. Middendorf, cited above.

In California, until 1979, there was no state agency specifically charged with the responsibility to investigate and remedy complaints alleging discrimination based upon sexual orientation. Similarly, there was no clear-cut legal authority giving lesbians and gay men a private cause of action against the state if it discriminated.

REPORT, page 392.

On April 4, 1979, Governor Edmund G. Brown Jr. issued an executive order prohibiting sexual orientation discrimination in state employment. This landmark order stated:

Executive Order B-54-79 (April 4, 1979).

WHEREAS, Article I of the California Constitution guarantees the inalienable right of privacy for all people which must be vigorously enforced; and

WHEREAS, government must not single out sexual minorities for harassment or recognize sexual orientation as a basis for discrimination; and

WHEREAS, California must expand its investment in human capital by enlisting the talents of all members of society;

NOW, THEREFORE, I, Edmund G. Brown Jr., Governor of the State of California, by virtue of the power and authority vested in me by the Constitution and statutes of the State of California, do hereby issue this order to become effective immediately:

The agencies, departments, boards, and commissions within the Executive Branch of state government under the jurisdiction of the Governor shall not discriminate in state employment against any individual based solely upon the individual's sexual preference. Any alleged acts of discrimination in violation of this directive shall be reported to the State Personnel Board for resolution.

Within months after the executive order was signed, California's Supreme Court and Attorney General had issued opinions which confirmed and supported the anti-discrimination of the Governor.

The implementation agency for the non-discrimination policy of the state is the State Personnel Board. Since sexual orientation discrimination has been deemed to be "arbitrary discrimination," and violative of merit principles embodied in the state Constitution and state civil service laws, it is also appropriate for the SPB to have jurisdiction because of its constitutional mandate to oversee civil service.

The Commission's recommendations which follow may overlap to some extent the provisions in the SPB's implementation memo which is set forth in full in the Report of the Commission. In those cases, the purpose of the recommendation is to provide support and, in some aspects, practical assistance to the Board.

Gay Law Students Association, cited above; 63 Ops. Cal. Atty. Gen. 583 (1980).

REPORT, page 398.

Cal. Const., Art. VII, Sec. 3(a).

See SPB Memo at REPORT, pages 400-407.

 *
 * THE COMMISSION RECOMMENDS that the Executive Officer
 * of the State Personnel Board issue a new memorandum
 * to "All State Agencies and Employee Organizations"
 * fully explaining all legal bases of protection a-
 * gainst such discrimination. Such a memo is evidently
 * a part of the present plan of implementation, and the
 * Commission refers the Executive Officer to the sum-
 * mary of the legal bases found by the Commission,
 * below.
 *

REPORT, page 408.
 "SEND NEW MEMORANDUM TO
 ALL STATE AGENCIES"

SUMMARY OF LAW GOVERNING
 SEXUAL ORIENTATION DISCRIMINATION
 IN STATE EMPLOYMENT

REPORT, page 397.

(1) Article VII, §1(b) of the state Constitution [civil service]: merit system employers must not discriminate against any applicant or employee on account of his or her sexual orientation;

63 Ops.Cal.Atty.Gen. 583, 586 (1980).

(2) Article I, §1 of the state Constitution [right of privacy]: state agencies must refrain from prying into the sexual orientation of applicants or employees and must refrain from sharing or using sexual orientation information in a manner which may have an adverse impact on an applicant or employee;

Morrison v. State Board of Education, cited above; White v. Davis, cited above; Gunn v. Employment Development Department (1979) 94 Cal.App.3d 658; Fults v. Superior Court (1979) 88 Cal.App.3d 899; Morales v. Superior Court (1979) 99 Cal.App.3d 283.

(3) Article I, §7 of the state Constitution [equal protection]: state agencies must afford equality of opportunity to lesbians and gay men on the same terms as opportunities and benefits are afforded to applicants or employees with a heterosexual orientation;

Gay Law Students Association, cited above.

(4) State Civil Service Statutes [such as Government Code §18500 et seq.]: state agencies governed by these statutes must not discriminate on the basis of the sexual orientation of applicants or employees;

63 Ops.Cal.Atty.Gen. 583, 585 (1980).

(5) Government Code §3201 et seq. [political activities]: state agencies must refrain from pressuring employees to remain "in the closet" or discriminating against those who identify themselves as lesbians and gay men or who are involved in gay-rights activities;

Gay Law Students Association, cited above.

(6) Fourteenth Amendment to the United States Constitution [equal protection and due process]: government agencies may not engage in invidious discrimination against persons of one sexual orientation and must refrain from taking arbitrary action against employees or applicants; and

63 Ops.Cal.Atty.Gen. 583 (1980).

(7) Executive Order B-54-79, as construed by the California Attorney General.

63 Ops.Cal.Atty.Gen. 583 (1980).

*
* THE COMMISSION RECOMMENDS that the State Personnel
* Board establish a systematic procedure for monitoring
* and auditing departmental compliance with non-dis-
* crimination policies. After the Executive Officer
* sends out a revised memo explaining all bases for
* legal protection for the sexual orientation classifi-
* cation, departments should be advised that audits
* will require proof: (1) that "sexual orientation"
* has been added to non-discrimination policies wherev-
* er they appear in departmental literature; and (2) of
* the dates, circumstances, and methods which have been
* employed to inform personnel of the nature of sexual
* orientation discrimination and all legal bases under
* which it is prohibited. An audit of every department
* under the jurisdiction of the State Personnel Board
* should be completed within one year.
*

REPORT, page 408.
"SPB MONITORING/AUDITING
ALL STATE AGENCIES"

Plans of implementation depend to a large extent on the allocation of human resources to develop and monitor programs both inside and outside of the State Personnel Board. Presently, one person is assigned sexual orientation duties one-quarter time within the SPB. This is insufficient and has created frustration, delays, oversights, and many deficiencies in implementation.

*
* THE COMMISSION RECOMMENDS that a person at the man-
* ager level be assigned to coordinate, on a full-time
* basis, implementation and monitoring of the Board's
* constitutional and statutory duties with respect to
* sexual orientation discrimination, and that, begin-
* ning with the 1983-1984 budget year, the Legislature
* provide funding for such a position.
*

REPORT, page 408.
"AUTHORIZE FUNDING FOR
FULL-TIME SPB POSITION"

It is also apparent to the Commission that recent changes in state law have not filtered down to all local government officials throughout the state. Some municipalities are either unaware of their obligations under present law or simply choose to ignore them.

*
* THE COMMISSION RECOMMENDS that the Chair of the Local
* Government Committee of the California State Senate
*

* request from the California Attorney General a formal
 * written opinion stating whether sexual orientation
 * discrimination by local government employers is pres-
 * ently illegal and, if so, setting forth the consti-
 * tutional and statutory provisions under which local
 * government employers are prohibited from discriminat-
 * ing on the basis of sexual orientation. It is
 * further recommended that after such an opinion is
 * obtained, the local Government Committee transmit
 * copies of this legal opinion to city attorneys, coun-
 * ty counsels, and local government personnel officers.
 * This would be a constructive and positive way to
 * eliminate some of the discrimination which is a prod-
 * uct of ignorance of the law.
 *
 * * * * *

REPORT, page 412.
 "ATTORNEY GENERAL OPINION
 ON DISCRIMINATION"

The Commission also believes that self-enforcement by local government employers or, ultimately, judicial enforcement when victims have enough resources to use the courts, are inadequate remedies. No other minority group has been expected to "fight city hall" by itself. Racial and ethnic minorities, women, elderly, disabled, and other groups have the services of the state Department of Fair Employment and Housing to investigate and remedy discrimination against its members.

* * * * *
 *
 * THE COMMISSION RECOMMENDS that the Legislature au-
 * thorize the Department of Fair Employment and Housing
 * to investigate, conciliate, and remedy complaints
 * which allege that local government employers have
 * engaged in sexual orientation discrimination against
 * employees or job applicants with respect to hiring,
 * dismissal, or any other term or condition of employ-
 * ment. To accomplish this purpose, legislation should
 * be enacted to add "sexual orientation" to the Fair
 * Employment and Housing Act.
 *
 * * * * *

REPORT, page 412.
 "AMEND FAIR EMPLOYMENT AND
 HOUSING ACT"

There is also a tremendous lack of information as to the level of compliance by local government employers with non-discrimination laws. With respect to each of 6,000 municipalities, a number of questions should be answered:

- * Is the employer aware that sexual orientation discrimination is presently illegal under state law?
- * Has the employer up-dated its non-discrimination policy in all relevant departmen-

tal employment documents and literature to reflect non-discrimination on the basis of sexual orientation?

* Have personnel officers, equal employment opportunity officers, affirmative action officers, and supervisory personnel in each department within the municipality received training regarding sexual orientation discrimination?

* Have pre-employment forms, questionnaires, and oral interviews eliminated direct or indirect questions relating to sexual orientation or "homosexual tendencies"?

* Have civil service rules eliminated homosexuality as a disqualifying employment factor?

 *
 * THE COMMISSION RECOMMENDS that the Local Government
 * Committee of the California State Senate conduct or
 * cause to be conducted a survey of local government
 * employers in California to determine the answers to
 * the questions listed above. The Local Government
 * Committee should devise a method to fund the survey
 * and might consider delegating the responsibility for
 * oversight of the project to the State Personnel
 * Board, Local Government Services Division. A report
 * containing survey results and an analysis should be
 * published by the Legislature.
 *

REPORT, page 413.

"CONDUCT LOCAL GOVERNMENT SURVEY ON COMPLIANCE"

XII. Housing

A. AMENDING/IMPLEMENTING EXISTING LAW

The practice of discriminating because of race, color, religion, sex, marital status, national origin, or ancestry, in housing accommodations has been declared to be against public policy and in violation of California fair housing law (formerly called the Rumford Fair Housing Act and now contained in the Fair Employment and Housing Act) as well as the Unruh Civil Rights Act. Although only certain categories are actually enumerated in each act, the Unruh Act has been held actually to cover all arbitrary discrimination, the explicit specification being merely "illustrative."

REPORT, page 427.

Marina Point, Ltd. v. Wolfson
(1982) 30 Cal.3d 721.

The California Department of Fair Employment and Housing is charged with the responsibility to enforce the present law. If it is determined that the law has been violated, certain remedies may be available, including, but not limited to, the sale or rental of the housing accommodations and payment of actual and punitive damages under the fair housing law, and processing and conciliation of complaints under the Unruh Act.

It has not been publicized, and it would be difficult for a layperson to ascertain, that the D.F.E.H. is empowered to handle housing complaints alleging sexual orientation discrimination or that the law covers such discrimination under Unruh Act jurisdiction.

```

* * * * *
*
* THE COMMISSION RECOMMENDS that the following actions
* be taken to ensure fair housing practices for les-
* bians and gay men:
*
* (1) a legislative amendment of the Unruh Civil Rights
* Act and Rumford Fair Housing Act, listing "sexual
* orientation" with other enumerated bases of dis-
* crimination which are prohibited;
*
* (2) a technical amendment to the Unruh Civil Rights
* Act, indicating that the Department of Fair Em-
* ployment and Housing has jurisdiction to receive
* complaints alleging violations under that Act;
*
* (3) an immediate update by the Department of Fair
* Employment and Housing of the literature that it
* disseminates to the public, to indicate clearly
* that the Department has jurisdiction to investi-
* gate housing cases alleging sexual orientation
* discrimination; and
*

```

REPORT, page 431.

"ADD 'SEXUAL ORIENTATION'
TO HOUSING LAWS"

"INDICATE AGENCY JURISDIC-
TION IN UNRUH ACT"

"UPDATE D.F.E.H. LITERA-
TURE"

* (4) that the Housing Unit within the Department of
 * Fair Employment and Housing engage in educational
 * projects, to increase community awareness of the
 * protections already afforded under the Unruh Act
 * with respect to sexual orientation discrimina-
 * tion.
 *
 *
 * * * * *

"EDUCATIONAL PROJECTS IN
 D.F.E.H. HOUSING UNIT"

B. HOUSING/EMPLOYMENT DISCRIMINATION STUDY

State law authorizes the Fair Employment and Housing
 Commission to create advisory councils to study discrimi-
 nation in any field of human relationships.

Labor Code Section 1418(g).

* * * * *
 *
 * THE COMMISSION RECOMMENDS that the Fair Employment
 * and Housing Commission establish a statewide Advisory
 * Council on Sexual Orientation Discrimination. Its
 * mandate should be to study the causes and manifesta-
 * tions of sexual orientation discrimination in
 * California, especially as it occurs in the areas of
 * employment and housing. That Council periodically
 * should advise the Fair Employment and Housing Commis-
 * sion on the status of such discrimination and could
 * recommend administrative and legislative actions to
 * further the policy of this state to eliminate such
 * discrimination.
 *
 * * * * *

REPORT, page 432.
 "CREATE ADVISORY COUNCIL
 ON SEXUAL ORIENTATION DIS-
 CRIMINATION"

C. PROTECTION FOR RENTERS WITH CHILDREN

A recent California Supreme Court decision prohibits
 discrimination by landlords against renters with chil-
 dren. Notwithstanding this judicial precedent, as a mat-
 ter of setting priorities, the Department of Fair Employ-
 ment and Housing has directed its staff not to accept
 cases involving such discrimination. Discrimination
 against persons who choose to raise children not only
 constitutes arbitrary discrimination within the meaning
 of various civil rights statutes, but also infringes on
 decisional privacy rights protected by Article I, Section
 1 of the California Constitution.

Marina Point, Ltd. v. Wolfson,
 cited above.

* * * * *
 *
 * THE COMMISSION RECOMMENDS that the Department of Fair
 * Employment and Housing include housing cases involv-
 * ing discrimination against renters with children
 * within its list of "priorities."
 *
 * * * * *

REPORT, page 432.
 "EXERCISE JURISDICTION IN
 RENTERS-WITH-CHILDREN
 CASES"

XIII. Consumer Issues

A. CREDIT

The California Legislature has enacted a number of statutes protecting personal privacy in various financial transactions. Under the Consumer Credit Reporting Agencies Act, consumers have a right to inspect any files or records about them maintained by such an agency. If information is inaccurate, the consumer has a right to have corrections made. Users of credit reports from these agencies must notify a consumer if an adverse decision pertaining to that consumer is based in whole or part on such a report.

REPORT, page 256.

Civil Code Section 1785.1 et seq.

The Civil Code also gives consumers who are the subjects of investigations conducted by investigative consumer reporting agencies a right to inspect all files and records maintained by the agency about them.

The Commission's study has revealed that existing legal provisions protecting consumers against loss of privacy are inadequate.

*
* THE COMMISSION RECOMMENDS that the Legislature amend
* the Consumer Credit Reporting Agencies Act to accom-
* plish the following objectives: (1) the definition
* of "legitimate business need" be narrowed to include
* only "consumer-initiated transactions"; and (2) con-
* sumer credit bureaus that maintain computerized con-
* sumer credit files be required to obtain a special
* permit to do business in California, and that such
* permits be issued or renewed by the California De-
* partment of Consumer Affairs only to credit bureaus
* that conduct certified annual audits of data security
* systems, proving that their systems record the
* date, time, and identification of anyone gaining ac-
* cess to computerized credit files.
*

REPORT, page 258.

"CONSUMER CREDIT REPORTING AGENCIES"

The Commission is troubled by the fact that tenant reporting services are not presently covered by the Consumer Credit Reporting Agencies Act and that present law does not adequately protect millions of California renters from the abusive information practices of some of these reporting services.

REPORT, page 258.

"'Tenant Check' Lists the Un-desireable -- And the Innocent," L.A. Times, April 13, 1982, Part 1, page 3; 12 Loyola of L.A. Law Rev. 301 (1979).

*
* THE COMMISSION RECOMMENDS that the Legislature enact
* legislation to subject renter reporting services to
*

* the protections contained in the California Consumer
 * Credit Reporting Agencies Act. Accuracy of Informa-
 * tion, fair notice procedures, consumer access to
 * records, and purging of adverse information after a
 * reasonable period of time should all be included in
 * any future legislative efforts on behalf of the pri-
 * vacy rights of tenants.
 *
 *
 * * * * *

REPORT, page 260.
 "REGULATE RENTER REPORTING SERVICES"

Several other statutes regulate the area of financial privacy. Customer lists of telephone answering services and employment agencies are protected as trade secrets. The willful betrayal of a professional secret by a physician constitutes unprofessional conduct, which may result in discipline being imposed by the Board of Medical Examiners. Private trust companies may not disclose information concerning the administration of any private trust confided to them. Credit may not be denied to anyone on the basis of marital status. Bookkeeping services may not disclose the content of any records or information to anyone other than the person or entity who is the subject of the record. Finally, the California Right to Financial Privacy Act sets forth the procedures and policies for government access to client records maintained by financial institutions.

Bus. and Prof. Code Sections 16606, 16607.
 Bus. and Prof. Code Section 2379.
 Financial Code Section 1582.
 Civil Code Section 1812.30 et seq.
 Civil Code Sections 1799, 1799.1.
 Gov. Code Section 7460 et seq.

B. INSURANCE

The Insurance Information and Privacy Protection Act became law as of October 1, 1981, and is scheduled to expire in 1989. The remedies provided by this Act are both exclusive and rather limited. Lawsuits based upon defamation, invasion of privacy, or negligence for wrongful disclosures, are specifically prohibited. If an insurance entity fails to comply with those sections of the Act that provide guidelines for access to records, correction of records, or adverse underwriting decisions, the aggrieved consumer has only two non-monetary remedies: (1) complain to the Insurance Commissioner, or (2) seek a court order requiring the company to comply with the law. If an insurance entity violates the section on unauthorized disclosures, the person harmed may recover only actual damages for the violation.

REPORT, page 263.
 Insurance Code Section 791 et seq.

* * * * *
 *
 * THE COMMISSION RECOMMENDS that the California Legis-
 * lature amend section 791.20 of the Insurance Code to
 * provide for damages when insurance entities violate
 * the rights of consumers to gain access to their
 * records, to correct or amend inaccurate records, and
 * to obtain an explanation for adverse underwriting
 * decisions. Each violation of these particular rights

REPORT, page 267.
 "INCREASE DAMAGES FOR VIOLATION OF LAWS"

* should carry a minimum penalty of \$1,000 or the
 * amount of actual damages suffered, whichever is
 * greater.
 *
 * THE COMMISSION FURTHER RECOMMENDS that the California
 * Legislature amend section 791.20(b) of the Insurance
 * Code to provide for a minimum penalty of \$1,000 or
 * actual damages, whichever is greater, for unau-
 * thorized disclosures of personal information.
 *
 *
 * * * * *

Communications with persons in the Insurance Commis-
 sioner's office regarding any fact concerning the holder
 of, or applicant for, a certificate or license issued
 under the Insurance Code, are deemed to be made in offi-
 cial confidence. This statute affords some privacy pro-
 tection to persons cooperating with the Commissioner in
 investigations pertaining to businesses that must hold
 certificates or licenses under the Insurance Code.

Insurance Code Section 12919.

Persons or financial institutions that lend money for
 real property transactions usually have a beneficial
 interest in fire or casualty insurance policies on the
 subject property. As a result, the lending institution
 gains possession of personal information about the bor-
 rower. Section 770.1 of the Insurance Code prohibits the
 lender from sharing such personal information with busi-
 nesses that may desire to solicit the owner to purchase
 additional or substitute insurance coverage on the prop-
 erty if the borrower has filed a statement with the
 lender prohibiting the sharing of such information. The
 Commission finds the intent of this provision to be
 laudable but the protection to be inadequate.

REPORT, page 267.

* * * * *
 *
 * THE COMMISSION RECOMMENDS that Section 770.1 of the
 * Insurance Code be amended to prohibit lenders from
 * sharing with third parties any personal information
 * about borrowers that lenders obtain from the bor-
 * rowers' insurance policies, unless lenders have spe-
 * cifically sought and obtained authorization from the
 * borrowers for such disclosure. Present laws au-
 * thorize disclosure unless the borrower takes affirma-
 * tive action to file a prohibitory statement. The
 * proposed amendment would reverse this and prohibit
 * such disclosure unless the lender takes affirmative
 * steps to notify the borrower of the intended disclo-
 * sure and gives the borrower a genuine opportunity to
 * authorize or refuse to allow this type of a disclo-
 * sure.
 *
 * * * * *

REPORT, page 268.

"AMEND INSURANCE CODE TO
PROVIDE STRICTER LIMITS ON
LENDERS"

C. ELECTRONIC FUND TRANSFERS

Because such systems necessarily involve central computers with links to and between merchants and banks, with access to bank customers' financial and other personal information, as well as information regarding what one is purchasing and from whom, electronic fund transfer systems pose a serious threat to the personal privacy of consumers.

REPORT, page 260.

As such systems become more prevalent, the need for protection becomes more critical, and such protection should minimally include:

Supplement Four, "Transcript of Public Hearings," pages SF/86 - SF/87.

(1) strict licensing of EFTS data banks, requiring the tightest control possible on access;

(2) outlawing of bifurcation and "piggy-backing" so as to minimize the data base, eliminating the details of transactions; and

(3) requiring full disclosure to the customers of the privacy risks in using an EFTS.

*
* THE COMMISSION RECOMMENDS that the California Legis-
* lature take immediate action to protect Californians
* against the threat to privacy that these systems
* pose. Furthermore, the Commission recommends that
* the minimum safeguards outlined above be incorporated
* into such protective legislation.
*

REPORT, page 262.

"REGULATE ELECTRONIC FUND TRANSFER SYSTEMS"

XIV. Family Matters

A. DEFINING FAMILY

Recent Supreme Court decisions have recognized that the term "family" actually encompasses a wide diversity of relationships for the people of this state:

The definition of a "family" in our society has undergone some change in recent years. It has come to mean something far broader than only those individuals who are united in formal marriage. Many individuals are united by ties as strong as those that unite traditional blood, marriage and adoptive families.

REPORT, pages 125-127.

In re Cummings (1982) 30 Cal.3d 870, 874-875.

*
* THE COMMISSION RECOMMENDS that the California Legis-
* lature enact procedures allowing members of
* California's "alternative families" (persons who are
* domiciled in the same household and who consider
* themselves to be a family unit, regardless of whether
* they are related by blood, marriage, or adoption)
* officially to declare their family status. A docu-
* ment evidencing such official declaration should be
* produced so that all Californians who are members of
* families can equitably share state and local re-
* sources. Such procedures would assist all family
* members to participate in benefit programs such as
* employment programs offering medical, dental, or
* other benefits to members of an employee's family.
*

REPORT, page 127.

"DECLARATION OF FAMILY STATUS"

B. TAXES

The state Controller recently commissioned a consultant to study the area of inheritance taxation and alternate families. The resulting report recommended that the "Controller's office take a leadership role in investigating how these changes [in the make-up of families and households] affect the whole area of taxes and taxation." The specific recommendation was for a "special commission to investigate the matter of taxes and social change with the objective of achieving an equitable tax structure that meets the needs of our changing times."

Supplement Four, "Transcript of Public Hearings," pages SF/44 - SF/48.

Foster, J., "The California Inheritance Tax and Alternative Relationships," July 13, 1981, prepared at the request of Controller Kenneth Cory.

*
* THE COMMISSION RECOMMENDS that the state Controller
* propose legislation to rectify the inequities identi-
* fied in the report entitled "California Tax Laws and

REPORT, page 295.

"AMEND TAX LAWS FOR ALTERNATE FAMILIES"

* Alternate Families." This report may be found in the *
 * Supplements to the Commission's Report. *
 * *
 * THE COMMISSION FURTHER RECOMMENDS that the Legisla- *
 * ture amend Section 17044 of the Revenue and Taxation *
 * Code so as to delete subdivision (a). The result of *
 * such an amendment would be that a taxpayer with a *
 * recognized dependent could file a state income tax *
 * return as "head of household" whether or not the *
 * taxpayer and the dependent are related by blood, *
 * marriage, or adoption. *
 * *
 * * * * *

C. FAMILY PLANNING

Various departments within the Executive Branch of state government have issued guidelines, rules, regulations, or policy statements with respect to personal privacy protection. For example, the Advisory Board to the Office of Family Planning adopted a resolution at its meeting in San Diego on March 5, 1981, supporting the sexual privacy rights of teenagers. The Advisory Board expressed opposition to the proposed regulation of the Secretary of the United States Department of Health and Human Services that would require any state, local, or private agency operating with federal funds to notify the parents of teenagers before providing information or services for family planning. The Commission subsequently received a letter from the Director of California's Department of Health Services asking this Commission to oppose the regulation.

REPORT, page 295.

Family planning information and decisions, especially pertaining to contraception and abortion, are protected by the right of privacy in both the state and federal Constitutions. Teenagers do not forfeit their constitutional rights merely because of their minority status. Some parents are already involved in ongoing dialogues with their teenagers on the subject of family planning. For these teens the notice requirement imposed by federal regulations will not have an adverse impact. But many adolescents live under conditions in which their sexuality is a subject for neither discussion nor expression. The Commission notes that there is a large class of teenagers whose freedom of choice in family planning, for all practical purposes, will be denied by the federal notice requirement. While the Commission encourages open discussion on sexuality between teens and their parents, the fact remains that many parents have created virtually insurmountable barriers to such a dialogue. Present law in California provides for confidentiality for these teenagers in matters of family planning, contraception, and abortion, should they find such privacy necessary.

REPORT, page 296.

State and local family planning agencies should not be coerced by a federal regulation and its concomitant "power of the federal pursestring" to withdraw privacy rights that have already been extended to teenagers.

The Commission finds that the Health and Human Services Agency regulation requiring parental notification before any family planning services are provided to teenagers (42 C.F.R., Part 59, sub. a) is incompatible with the broad privacy protections that teenagers enjoy under California's constitutional right of privacy.

The Commission also finds that the regulation is inconsistent with the President's platform of states' rights and federalism in that states that, under state law, have recognized privacy rights for teenagers which are broader than privacy rights afforded under the federal Constitution, should not be compelled to reduce privacy for teenagers to the minimal federal standards. Federal regulations should be revised to allow for the right of a state in its wisdom, to give teenagers more privacy protection than the federal government deems wise.

*
* THE COMMISSION RECOMMENDS that this regulation be
* eliminated because it interferes with the rights of
* states, such as California, to be more protective of
* the privacy of teenagers than would the federal gov-
* ernment.
*

REPORT, page 296.

"PRIVACY AND TEENAGE
FAMILY PLANNING RULES"

D. SEX EDUCATION

*
* THE COMMISSION RECOMMENDS that the Legislature re-
* peal Section 51550 of the California Education Code.
* This statute has provisions which treat sex education
* differently than any other aspect of the curriculum
* in public schools. The provision of this statute that
* prohibits a student from attending sex education
* classes if his or her parent requests non-attendance,
* is particularly offensive to the student's right to
* learn and constitutes an overly broad infringement on
* the student's freedom of academic choice.
*
* THE COMMISSION FURTHER RECOMMENDS that the state
* Department of Education mandate age-appropriate
* "Family Life / Parenting / Sex Education / Human
* Relations" as a required course for all public pri-
* mary and secondary students. The Department of Edu-
*

REPORT, page 297.

Also see Supplement One,
"Recognizing Sexual Ori-
entation Within the Se-
condary School Curricu-
lum."

"REPEAL SCHMITZ ACT ON SEX
EDUCATION"

"MANDATE SEX EDUCATION"

* cation should establish a permanent Division of *
 * Family Life and Sex Education, with adequate staff *
 * and budget, which would have responsibility for cre- *
 * ating educational materials for use in such courses *
 * throughout the state. *
 * *
 * * * * *

E. INSTITUTIONALIZED CHILDREN

* * * * *
 * *
 * THE COMMISSION RECOMMENDS that the departments of *
 * Mental Health, Corrections, Youth Authority, Social *
 * Services, and Developmental Services require adequate *
 * and appropriate training in human sexuality and *
 * sexual orientation for all staff and ancillary per- *
 * sonnel who counsel or oversee children and ado- *
 * lescents in state operated institutions. *
 * *
 * * * * *

REPORT, page 297.

"TRAINING FOR STAFF IN YOUTH INSTITUTIONS"

XV. Medical and Mental Health

A. PATIENTS' RIGHTS

A summary of the statutes and cases that govern the area of medical decision-making for adult patients establishes these guidelines:

REPORT, pages 209-245.

* Absent an emergency, medical treatment may be rendered only with the patient's "informed" -- that is, after reasonable disclosure regarding treatment to be used, the risks, and available alternatives -- consent.

Cobbs v. Grant (1972) 8 Cal.3d 229, 242.

* In an emergency, a doctor may perform medical services without obtaining informed consent from anyone; the law implies patient consent under such circumstances.

* The parent, or, if a "conservator of the person" has been appointed, such conservator of an incompetent adult patient has the right to give informed consent for that adult's medical treatment.

* If a patient is incompetent or otherwise unable to give informed consent, a doctor may proceed with the consent of the "closest available relative."

* If a parent or relative or conservator is not available, or if the doctor refuses to proceed with their consent, a relative or friend or other interested party may be authorized by a superior court to give informed consent on behalf of the incompetent adult patient.

Probate Code Section 3200 et seq.

California's new Uniform Durable Power of Attorney Act, effective January 1, 1982, gives a principal the power to appoint an agent who can perform virtually every act, during the principal's incapacity, that the principal could perform were he or she not incompetent. However, absent a clear legislative statement regarding the validity of using a durable power of attorney for medical decision-making, some authorities advise hospitals not to substitute a power of attorney for the other informed consent rules stated above.

REPORT, page 213.

Civil Code Sections 2400-2423.

An amendment to the Durable Power of Attorney Act is needed to clear up any ambiguities in present law as to the legality of a principal's delegating medical decision-making authority to an agent of his or her choice. One public policy served thereby is preserving one's

right to make one's own medical decision; another is one's right to delegate medical decision-making authority; yet another is fostering efficiency and economy in health care services. Clarification would benefit a number of classes of individuals, including: (1) college students whose parents live a great distance away; (2) elderly persons who live alone and whose parents are deceased; (3) unmarried persons who have a "significant other" who is willing to accept such responsibility; and (4) a divorced parent who would like to designate which one of his or her several children should have primary responsibility for making such decisions.

*
* THE COMMISSION RECOMMENDS that the Durable Power of
* Attorney Act (Civil Code Sections 2400-2423) be
* amended to specify that a durable power of attorney
* may be used to delegate medical decision-making au-
* thority to an agent of the principal's choice. The
* Commission further recommends that such a delegation
* pursuant to a durable power of attorney be required
* to be witnessed and notarized.
*

REPORT, page 216.

"AMEND DURABLE POWER OF
ATTORNEY ACT FOR MEDICAL
PURPOSES"

For minors, medical decision-making regarding treatment requires the consent of a parent or adult guardian except when the minor: (1) is married; (2) is on active duty with the armed forces; (3) is seeking medical services for prevention of or treatment regarding pregnancy; (4) has been sexually assaulted; (5) is over 15 years old and is financially independent and living separately from the parents; or (6) is over 12 years old and (a) an attending professional believes the minor to present a serious danger without outpatient mental health services, (b) a victim of incest or child abuse seeking outpatient mental health services, (c) seeking diagnosis or treatment for a communicable or sexually transmitted disease, (d) a victim of rape seeking hospital or surgical or medical services, and (e) seeking diagnosis or treatment of a drug or alcohol-related problem.

REPORT, page 217.

Civil Code Sections 25.6, 25.8,
25.9, 34.5, 34.6, 34.7, 34.8,
34.9, 34.10.

Visiting rights -- access to the patient by loved ones, family, and friends -- seem to be a matter of local hospital policy and not of state law. Hospital policies often give preferential visiting status to certain blood relatives to the exclusion of others, perhaps demoting persons who actually have a more intimate association with the patient. Implementing freedom of intimate association in a hospital setting should not be left to the unbridled discretion of each hospital or to the possible prejudice of hospital staff.

REPORT, page 220.

* THE COMMISSION RECOMMENDS that freedom of patient choice in hospital visiting privileges be deemed a personal right protected by the California Civil Code. A new statute on patient visiting rights should provide that:

(1) if the patient is competent, the patient and not the hospital should have the right to designate whether someone is a member of the "immediate family" for visiting purposes;

(2) if a hospital has a legitimate need to limit the number of visitors, a competent patient should be permitted to choose which individuals are to be given priority; and

(3) if the patient is temporarily incompetent due to some disabling factor, a visitor presenting a declaration of visiting priority, previously executed by the patient, would receive priority status as specified in the declaration, notwithstanding hospital policies which establish different standards for priority.

Such legislation should also require as a routine admitting procedure, that hospitals notify patients of visiting restrictions and provide patients with a standard form for designating priority visiting privileges for persons who are not given priority under existing hospital policies and practices.

REPORT, page 221.

"FREEDOM OF PATIENT CHOICE IN VISITATIONS"

The so-called "Patients' Bill of Rights," adopted by the Legislature for persons receiving mental health care, applies to persons involuntarily detained for treatment, voluntarily admitted for treatment, or developmentally disabled persons committed to a state hospital. Under the provisions of the Lanterman-Petris-Short Act, such patients maintain basic rights, which must be posted in the facility and otherwise brought to the attention of patients, including the following personal privacy rights:

REPORT, page 223.

- (1) storage space for private use;
- (2) visitors each day;
- (3) confidential telephone calls;

Welf. and Inst. Code Sections 5325, 5325.1.

- (4) unopened correspondence;
- (5) dignity, privacy, and humane care; and
- (6) social interaction.

The Act also provides that treatment shall always be provided in ways that are least restrictive of the personal liberties of the individual.

Welf. and Inst. Code Section 5325.1(a).

For these patients, the law authorizes limited participation in the decision-making process by a "responsible relative" of the patient's choosing. The Commission has found the definition of "responsible relative" as it appears in the Welfare and Institutions Code to be discriminatory and an invasion of privacy in that it is limited to certain blood relatives. Some patients have been raised all of their lives in foster homes with loving and caring foster parents. Others might favor a loved and trusted distant relative; still others may be members of the hundreds of thousands of California's "alternate families."

REPORT, page 225.

Welf. and Inst. Code Sections 5326.6 and 5326.7.

 *
 * THE COMMISSION RECOMMENDS that the phrase "responsible relative of the patient's choosing" as used in Welfare and Institutions Code Section 5326 et seq. be replaced with the phrase "family member of the patient's choosing." For this purpose, the term "family member" should be defined as "any person related to the patient by blood, marriage, or adoption, or any person the patient has declared to be a member of his or her family." Section 5326 et seq. establish a procedure for obtaining informed consent to psychiatric treatment and now require the treating physician to make the signed consent form available to a responsible relative of the patient's choosing. This amendment would broaden the class of persons that patient could designate as authorized to have access to the signed consent form. Such an amendment would protect the patient's freedom of family choice by removing arbitrary restrictions on whom may be considered a member of the patient's family.
 *

REPORT, page 225.

"REDEFINE 'PATIENTS' FAMILY'"

Members of the Commission have studied in some depth the problems of medical and mental health care patients, both in and outside of institutions. The Commission found existing statutory and administrative protections of the personal privacy rights of such patients to be inadequate.

REPORT, page 237.

THE COMMISSION RECOMMENDS that the Legislature take the following actions with respect to the privacy rights of patients:

(1) Amend the Welfare and Institutions Code, particularly sections dealing with patients' rights, to specify that patients have a right to have private communications each day, both with visitors and with other patients, in rooms or areas designed to achieve the degree of privacy and intimacy that one would reasonably expect in a non-institutional setting.

(2) Amend the Welfare and Institutions Code to require that at least one privacy room be set aside in each unit of each state hospital for private use by the patients, for social, recreational, or other lawful purposes.

(3) Adopt a statewide policy setting standards for conducting searches, especially strip-searches, of patients. Los Angeles County has recently adopted standards requiring "probable cause" for such searches. Statewide standards are necessary so that patients' privacy rights are not dependent on the unbridled discretion of local administrators or service providers.

(4) Enact legislation requiring all key personnel in departments that (a) provide either medical or mental health services, (b) license or regulate such providers, or (c) administer health programs, to participate in ongoing educational programs pertaining to the personal privacy rights of patients. Included in this category would be the following personnel: licensed health care professionals, patients' rights advocates, departmental investigators, security personnel, program directors, and maintenance personnel who have access to areas normally considered private.

THE COMMISSION FURTHER RECOMMENDS that the State Department of Health Services promulgate regulations amending the declaration of rights of patients in licensed health care facilities, community care facilities, and continuing care facilities, as listed in Title 22 of the California Administrative Code, as follows:

REPORT, page 238.

"AMEND PATIENTS' RIGHTS STATUTES"

REPORT, page 241.

Also see Supplement Two, "Report of the Committee on Aging and Disability" and "Report of the Task Force on Aging."

* amending Title 22 of the California Administrative
* Code to support the following legislatively mandated
* rights:

* (1) every adult person has the right to
* engage in consensual sexual conduct in the
* privacy of one's home or other private loca-
* tion;

* (2) every mentally ill and every develop-
* mentally disabled adult has the same rights as
* every other adult of the same age regardless
* of disability, unless medically contraindi-
* cated;

* (3) every patient and other adult resident
* of licensed facilities have basic privacy
* rights;

* (4) a residential facility is reasonably
* considered to be the temporary or permanent
* home of an individual residing therein. Spe-
* cific regulations are needed to articulate the
* following rights:

* (a) Freedom of Association and Communica-
* tion: amend sections or subsections of
* the declaration of patient's rights per-
* taining to freedom of association and
* communication for all licensed facilities
* (skilled nursing facilities, intermediate
* care facilities, intermediate care facili-
* ties for the developmentally disabled,
* acute psychiatric hospitals, community
* care facilities, and foster homes), such
* as Sections 72423(a)(12), 73523(a)(12),
* 76525(a)(24), and 71507(a)(3), to read,
* "To associate and communicate privately
* with persons of one's choice and to send
* and receive personal mail unopened unless
* medically contraindicated, and to be free
* from ridicule or criticism by staff for
* choice of association, frequency or dura-
* tion of the visits or communications."

* (b) Privacy in Intimate Associations:
* amend Section 72523(a)(15) of Skilled
* Nursing Facilities declaration of patient
* rights to read, "Regardless of marital
* status, to be assured privacy for visits
* by a person or persons of one's choosing,
* and if they are patients in the facility,
* to be permitted to share a room, unless
* medically contraindicated." Amend or add

REPORT, page 242.

"INTIMATE ASSOCIATION/PRI-
VATE COMMUNICATION"

* take the following actions:

* (1) require reviewers to utilize a comprehensive patients' rights checklist during the annual or periodic review of client/patient progress conducted for state licensed programs or facilities;

* (2) require reviewers to utilize the department-approved checklist in the following manner: (a) each right specified in statutes and administrative regulations (as indicated on the checklist) should be individually communicated to the client; (b) after each right is so communicated, the reviewer should ask the client if this right has been denied or limited in any way since the last review; and (c) the reviewer should record the client's response separately for each right.

* The Clients'/Patients' Rights Advocates within each of these departments should prepare a standard checklist to be used for the periodic reviews required by the department. The checklist should clearly indicate each patient right which has been legislatively or administratively declared. Routine use of such checklists should begin no later than January 1, 1984.

B. ACCESS TO INFORMATION

A newly enacted bill gives a patient a right of access to both medical and mental health records; either the patient or the patient's representative may inspect and copy such records. The statute now defines "patient representative" as a parent or guardian of a minor patient or the guardian or conservator of an adult patient. The Commission finds this definition too restrictive.

* THE COMMISSION RECOMMENDS that the definition of "patient's representative" as used in Statutes of 1982, Chapter 15 (AB 610) be amended to include "any other adult designated by the patient." To protect against possible fraud, it is also recommended that the law require the instrument designating such representative and signed by the patient for this purpose to be witnessed.

REPORT, page 243.

"ANNUAL PATIENTS' RIGHTS REVIEWS AND CHECKLISTS"

REPORT, page 218.

AB No. 610; Stats 1982, Ch. 15 (adding chapter 6.7 to Division 20 of Health and Safety Code).

REPORT, page 226.

"REDEFINE 'PATIENT'S REPRESENTATIVE'"

Under the Lanterman-Petris-Short Act, information and records obtained in the course of providing services to voluntary and involuntary mental health patients are confidential. However, upon request by a member of a patient's family or other person designated by the patient and with the patient's prior authorization, a public or private mental health care facility must disclose (a) the patient's presence in the facility, (b) any diagnosis as well as medication prescribed and any side effects, and (c) the patient's progress and the seriousness of illness.

REPORT, page 226.

Welf. and Inst. Code Section 5328.

Welf. and Inst. Code Section 5328.1.

If no such person is designated and the patient is unable or refuses to consent to disclosure, the facility must disclose the patient's presence in the facility only to a "spouse, parent, child, or sibling of the patient." The Commission finds the class of persons who must be so informed to be too limited. Persons sharing a household with the patient are as likely to be alarmed by an unexplained absence as would relatives who do not reside with the patient.

REPORT, page 228.

*
* THE COMMISSION RECOMMENDS that section 5328.21 of the
* Welfare and Institutions Code be amended. The class
* of persons who must be informed as to the presence of
* a patient in a mental health care facility should be
* expanded to include the "spouse, parent, child, sib-
* ling, and household member, as well as any person
* authorized by the patient to receive such informa-
* tion."
*

REPORT, page 228.

"INFORMATION TO PATIENTS'
HOUSEHOLD MEMBERS"

The penalties provided in the Lanterman-Petris-Short Act and the Confidentiality of Medical Information Act for unauthorized disclosures of patient information or records, are extremely unrealistic and would not satisfactorily "punish" would-be offenders in order to provide a deterrence, or adequately compensate a victim of such a wrongful disclosure for the consequences of such a disclosure, including anxiety, embarrassment, and potential future economic loss.

REPORT, page 228.

*
* THE COMMISSION RECOMMENDS that section 56.35 of the
* Civil Code be amended in the following ways to cure
* defects the Commission perceives in the damages sec-
* tions of the Confidentiality of Medical Information
* Act. First, the law should provide for a minimum of
* \$500 in damages for any negligent or intentional
* violation of this Act. Second, the present ceiling
*

REPORT, page 229.

"INCREASE DAMAGES FOR VIO-
LATION OF LAWS"

* of \$3,000 punitive damages for willful violations *
 * should be eliminated; instead, the trier of fact *
 * should assess the appropriate amount of any punitive *
 * damages to be imposed. Third, patients who prevail *
 * in litigation arising under this Act should be en- *
 * titled to recover attorney fees and costs of litiga- *
 * tion. *
 *

* THE COMMISSION FURTHER RECOMMENDS that the damages *
 * sections of the Lanterman-Petris-Short Act (Section *
 * 5330 of the Welfare and Institutions Code) also be to *
 * provide that patients who prevail in litigation under *
 * this Act should be entitled to recover attorney fees *
 * and litigation costs. *
 *

C. TRAINING FOR PROVIDERS AND STAFF

* THE COMMISSION RECOMMENDS that the Governor issue an *
 * Executive Order creating an Inter-Agency Committee on *
 * Personal Privacy in Health and Social Services. The *
 * Inter-Agency Committee should consist of representa- *
 * tives from the following departments: Aging, Social *
 * Services, Health Services, Developmental Services, *
 * Rehabilitation, and Mental Health. The Director of *
 * one of these departments should serve as Chairperson, *
 * as designate by the Governor. The Inter-Agency Com- *
 * mittee, with appropriate staffing, should perform the *
 * following functions: *

* (1) Training: (a) develop, conduct, and *
 * evaluate training programs for service pro- *
 * vider agencies regarding personal privacy *
 * rights, freedom of intimate association, in- *
 * cluding lawful sexual conduct, and protections *
 * against sexual orientation discrimination; (b) *
 * develop standardized training and materials *
 * that allow for updating as laws and regula- *
 * tions change, that are thorough in the areas *
 * identified; and (c) prepare the materials in *
 * the languages of the persons receiving the *
 * training if they are not conversant in the *
 * English language but are providing direct *
 * patient care. *

* (2) Regulation: (a) monitor the practices *
 * of providers as they impact consumers in the *
 * areas of privacy, sexuality, and sexual orien- *
 * tation; (b) receive, investigate, and remedy *
 * complaints arising from invasions of privacy *
 * and sexual orientation discrimination; and (c) *

REPORT, page 239.

"CREATE INTER-AGENCY
 COMMITTEE"

D. ALCOHOL AND DRUG PROGRAMS

*
 * THE COMMISSION RECOMMENDS that the Department of
 * Alcohol and Drug Programs require state licensed or
 * funded programs to include the following procedures
 * during the initial interview with a prospective
 * client:
 *
 * (a) provide all prospective clients with
 * written information regarding personal rights,
 * and the process for filing complaints should
 * their rights be violated;
 *
 * (b) provide information to all prospective
 * clients about local programs targeted for
 * special groups, including programs for les-
 * bians and gay men.
 *
 * THE COMMISSION FURTHER RECOMMENDS that the Department
 * of Alcohol and Drug Programs should require each
 * state licensed or funded program to provide a private
 * area for client intake interviews. Such an area
 * should accommodate the need for confidentiality while
 * maintaining sufficient safety standards for the in-
 * take interviewer.
 *
 * THE COMMISSION RECOMMENDS that the Department of
 * Alcohol and Drug Programs require that all telephone
 * calls regarding a client's case which involve person-
 * nel at a state licensed or funded program must be
 * documented with the following information: name and
 * position of the caller/receiver and the facility
 * represented; name of person releasing client infor-
 * mation; date; and summary of information released.
 * This safeguard will provide a safety check on the
 * indiscriminate release of personal information con-
 * cerning a client.
 *
 * FINALLY, THE COMMISSION RECOMMENDS that the Depart-
 * ment of Alcohol and Drug Programs study and monitor
 * the assignment and use of client identification num-
 * bers by local ADP-funded agencies. Agencies which
 * assign identification numbers to clients, especially
 * those using computerized systems, should be required
 * to certify annually the security methods which are
 * taken to insure confidentiality and privacy for
 * client information and records.
 *
 * *****

REPORT, page 244.

Also see Supplement Two,
"Report on Privacy in Al-
cohol and Drug Programs."

"PRIVACY IN ALCOHOL AND
DRUG PROGRAMS"

XVI. Immigration

Three years ago, the United States Attorney General wrote a memo to the Acting Commissioner of the Immigration and Naturalization Service:

REPORT, page 362.

. . . Congress has required under §212 of the Immigration and Nationality Act of 1952 . . . the exclusion of homosexual aliens from the United States. Enforcement of the Act's exclusionary provisions is a joint responsibility of the Immigration and Naturalization Service (INS) and the PHS [Public Health Service]. The INS performs examinations other than mental or physical examinations of all arriving aliens . . . and administratively adjudicates the admissibility of aliens in doubtful cases, 8 U.S.C. §1226. Upon referrals from INS officers, the PHS conducts physical and mental examinations of arriving aliens, and certifies "for the information of [INS officers], any physical or mental defect or disease observed" in aliens so examined. Since 1952, the exclusion of homosexual aliens has been enforced both unilaterally by the INS, e.g., relying on an alien's admission of homosexuality, and jointly, subsequent to a certification by the PHS that particular aliens are afflicted with a "mental defect or disease," i.e., homosexuality. . . .

On August 2, 1979, Dr. Julius B. Richmond, Surgeon General of the PHS and Assistant Secretary for Health of the Department of Health, Education and Welfare (HEW), issued a memorandum declaring that "homosexuality per se will no longer be considered [by the PHS] to be a 'mental disease or defect,'" and "the determination of homosexuality is not made through a medical diagnostic procedure," and indicating that INS officers will be advised to stop referring aliens to the PHS for mental examinations solely on the ground of suspected homosexuality.

You have questioned the Surgeon General's authority to make these determinations and have inquired concerning the effect of his memorandum on the enforceability of the Act. For reasons stated below we conclude:

(a) Congress clearly intended that homosexuality be included in the statutory

phrase "mental defect or disease," and the Surgeon General has no authority to determine that homosexuality is not a "mental defect or disease" for purposes of applying the Act;

(b) If the Surgeon General has determined, as a matter of fact, that it is impossible for the PHS medically to diagnose homosexuality, the referral of aliens to the PHS for certification of homosexuality would be unhelpful;

(c) The INS is statutorily required to enforce the exclusion of homosexual aliens, even though the Surgeon General has directed the PHS no longer to assist in this enforcement.

Because the Surgeon General has concurred with the American Psychiatric and Psychological Associations that homosexuality is not a mental defect or disease, the Public Health Service will not participate with the INS in so categorizing lesbians and gay men. The ability of the INS to act on its own in gay-exclusion cases, at least temporarily, has been suspended due to a federal court injunction.

REPORT, page 363.

Memorandum from Surgeon General Julius Richmond, August 2, 1979.

Lesbian/Gay Freedom Day Committee v. INS, cited above.

* THE COMMISSION RECOMMENDS that members of California's congressional delegation support legislation (such as H.R. No. 3524, 97th Congress (1982)) to amend the Immigration and Naturalization Act to indicate that a person's sexual orientation shall be neither a bar to admission nor a ground for exclusion under the Act. Exclusion and deportation of all known lesbians and gay men are not only reminiscent of "McCarthyism" but are inconsistent with the rights of American citizens to associate with lesbians and gay men from around the world. Furthermore, the continuation of this archaic policy detracts from our foreign policies on the subject of human rights. It is hard to rationalize America's "world vision" and international humanitarian concerns when our own domestic policies are riddled with violations of human rights such as the immigration policy under discussion.

REPORT, page 363.

"AMEND IMMIGRATION AND NATURALIZATION ACT"

PART FOUR: CONCLUSION

XVII. Public Policy of the State

The Commission has researched and analyzed hundreds of statutes and court decisions involving various dimensions of privacy. The study of personal privacy is also an ongoing venture for other agencies, groups, and individuals concerned about the encroachment of technology on the right most valued in our modern civilization. Even as the Report of the Commission was being prepared, the body of privacy-related law was expanding with new regulations and interpretations by legislatures and appellate courts in California and throughout the nation.

REPORT, page 433.

The spirit and letter of the law are together reflected in what is often called the "public policy" of the state. This term seems to imply a compilation, accumulation, and synthesis of legal principles, constitutional provisions, statutes, and court interpretations, generously mixed with an historical perspective and a general sense of fairness and justice. As a practical matter, public policy on any specific topic may be discovered in a concrete and systematic way.

Fundamental public policy is declared in the Constitution, and when the Constitution defines specific public policies, such policies must be paramount, although statutes may be to the contrary. For example, inclusion of privacy in the California Constitution as an "inalienable" right and similar provisions in other state constitutions underscore that public policy favors protection of personal privacy in those states.

72 Corpus Juris Secundum, Policy, page 214.

Public policy may also be gleaned from legislative enactments. When the Legislature speaks on a particular subject over which it has the power to legislate, its utterance is the public policy of the state, and such statements are conclusive unless they contravene some constitutional provision.

There are, however, many details not specifically treated either by constitutional provisions or by statutes, and, as to these, the public policy of the state is declared by the court of last resort.

In addressing the definition and scope of public policy, the California Court of Appeal has stated:

The public policy of a state is found in its constitution, acts of the legislature, and decisions of its courts. . . . By the same

Peterman v. International Brotherhood of Teamsters (1959) 174 Cal.App.2d 188, 222.

token, where the federal Constitution and the decisions of the United States Supreme Court are made applicable to the states, the public policy there embodied becomes that of the states.

Officials often rely and depend upon general public policy -- that is, broad principles drawn from the rationale and spirit underlying explicit law -- to guide them when they are confronted with a particular problem not specifically addressed in constitutional provisions or in legislative or judicial precedents. Both in exercising vested discretion and in interpreting general or ambiguous language, decision-makers in the executive and judicial branches of government are properly guided by explicit declarations of public policy contained in constitutional and legislative enactments within the general field, as well as the implicit principles culled therefrom.

REPORT, page 433.

The Commission recognizes from its study and from all of the materials contained in this Report that it is the public policy of the State of California to protect and defend the personal privacy of all its inhabitants and to encourage the elimination of discrimination based upon sexual orientation.

* * *

At its public hearings, the Commission heard testimony regarding a great number of issues involving invasions of privacy and sexual orientation discrimination. Specific recommendations have been made regarding a substantial number of those issues.

Primarily due to its 18-month lifespan, the Commission was unable to address every problem brought to its attention. The Supplements to the Commission's Report, including the Transcript of Public Hearings, are valuable documents in that they explore some specific subjects which the Commission as a whole was unable to research thoroughly. Many of these subjects are deserving of additional study and the problems mentioned worthy of resolution.

The Commission dedicates this Report to those with responsibility for finding solutions to the ever more complex problems faced by people in our multi-faceted society, trusting that justice and wisdom in decision-making may be enhanced by a wider context of knowledge and understanding of existing law and public policy.

Commission on Personal Privacy
December, 1982

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APPENDICES TO THE EXECUTIVE SUMMARY

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[APPENDIX A]

Executive Department
State of California

EXECUTIVE ORDER B74-80

WHEREAS, California must recognize the full human potential of all its citizens as its most valuable resource; and

WHEREAS, to safeguard this human potential, it is necessary to protect the fundamental right to personal privacy against the threat of discrimination for reasons of an individual's sexual orientation, which discrimination contravenes the policy of this State; and

WHEREAS, there exist certain stereotypes relating to sexual minorities which are held in common by many people; and

WHEREAS, stereotypes result in an individual being judged without regard for that individual's own qualities and merits; and

WHEREAS, 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 so that legislative and administrative action and public attitudes may be based upon accurate information, thus encouraging protection of the civil rights of all Californians against arbitrary and unjust discrimination;

NOW, THEREFORE, I, Edmund G. Brown Jr., Governor of the State of California, by virtue of the power and authority vested in me by the Constitution and statutes of the State of California, do hereby issue this Order to become effective immediately:

1. There is established the Commission on Personal Privacy. Said Commission shall be composed of not more than twenty-five (25) members representative of the law enforcement, business, labor, and educational communities, as well as other interested groups. The Governor shall appoint not more than fifteen (15) of the members, one of whom shall be designated Chairperson. The Speaker of the Assembly shall appoint not more than five (5), and the Senate Rules Committee shall appoint not more than five (5).
2. Members of the Commission shall serve without compensation but may be reimbursed for their actual expenses. The Commission is authorized to receive and disburse funds which may be available to finance its work.
3. The Commission shall 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

Executive Department
State of California

PAGE TWO

forms the problems are manifested, noting existing remedies, and making recommendations for legislative, administrative, and other action where appropriate.

4. A final report of its findings and recommendations shall be submitted by the Commission to the Governor and the Legislature by December 1982. The Commission may issue such interim reports as it deems appropriate.
5. All state agencies, departments, boards, and commissions are hereby directed to assist and cooperate with the commission in carrying out its responsibilities.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 9th day of October, 1980.

/signed/ Edmund G. Brown Jr.
Governor of California

ATTEST:

THE GREAT SEAL
OF THE STATE
OF
CALIFORNIA

/signed/ March Fong Eu
Secretary of State

by /signed/ Michael S. Gagan
Deputy Secretary of State

(APPENDIX B)

OTHER DOCUMENTS PRODUCED BY THE COMMISSION

In addition to the Report and this Executive Summary, other documents have been produced by the Commission on Personal Privacy. Those documents are listed below by title and author. Each of these supplements is available for purchase. For further information, contact: State Personnel Board, Policy and Standards Division, 801 Capitol Mall, Sacramento, CA 95814 / (916) 445-3721 - ATSS 485-3721.

Supplement One:

This supplement document contains topical reports and surveys that pertain to sexual orientation discrimination or alternate family relationships. Authors and titles of these materials are listed below:

Title: Recognizing Sexual Orientation and Gay People Within the Secondary Curriculum: What Role for Schools?

Author: Dickson J. Hingson, Ph.D.

Title: Report of the Committee on Family Relationships

Author: Ellen McCord

Title: California Tax Laws and Alternate Families

Author: Pat Wakayama

Title: "Family" and "Household" Use Survey: How Government Agencies Use These Terms in Operating Their Programs

Author: Conducted by the Institute for Local Self Government and Menkin-Lucero & Associates for the State Personnel Board

Title: Discrimination Against Lesbians and Gay Men in Private Employment

Author: Donna J. Hitchens and Linda Barr, Lesbian Rights Project

Title: Child Custody Disputes and the Homosexual Parent

Author: Commissioner Roberta Bennett

Title: Sexual Harassment in State Employment

Author: Pat Wakayama

Title: Sexual Harassment Survey of State Government Employers

Author: Conducted by the Institute for Local Self Government and Menkin-Lucero & Associates for the State Personnel Board

Supplement Two:

This supplemental document contains topical reports and surveys that pertain to privacy in medical and mental health services, as well as issues of particular concern to elderly and disabled persons. Authors and titles of these materials are listed below:

Title: Report of the Committee on Aging and Disability
Author: Commissioner Nora J. Baladerian

Title: Report of the Task Force on Aging
Author: Commissioner Nora J. Baladerian

Title: Privacy Rights in Alcohol and Drug Programs
Author: Kieran Prather and Mike Cronen

Title: Continuing Sex Education for Physicians
Author: Commissioner Wardell B. Pomeroy, Ph.D.

Title: Personal Privacy and Hospital Visitors
Author: Commissioner Audrey Mertz, M.D.

Title: Survey and Report on Privacy in Medical and Mental Health Care in State Facilities
Author: Martha O. Acevedo

Supplement Three:

This supplemental document contains topical reports and surveys that pertain to government information policies and practices. Authors and titles of these materials are listed below:

Title: Annotated Subject Index to California Informational Privacy Statutes
Author: Commissioner Gary Cooper and Ms. Diane Josephs

Title: Department of Motor Vehicles File Systems and Client Personal Privacy
Author: Richard Donohoe

Title: Invasion of Juror Privacy: Survey and Report on the Jury Systems in California's Municipalities
Author: Commissioner Godfrey D. Lehman

Title: The Unconstitutionality of Voir Dire, Peremptory Challenges and Jury Books in Jury Selection
Author: Commissioner Godfrey D. Lehman

Title: Report of The Corrections Committee (with Appendix on The Family Visiting Program in California Institutions by Martha O. Acevedo)
Author: Commissioner Lester Pincu, D.Crim.

Supplement Four:

Transcript of Public Hearings conducted by the Commission on Personal Privacy. See Table of Witnesses at Public Hearings, Appendix C, below.

(APPENDIX C)

LOS ANGELES PUBLIC HEARING -- FRIDAY, NOVEMBER 13, 1981

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TABLE OF WITNESSES

(Page numbers refer to location of testimony in Supplement Four)

<u>Witness:</u>	<u>Topic:</u>	<u>Page:</u>
MICHAEL BALTER Coordinator, Comm. on Police Repression, Los Angeles, CA	PERSONAL PRIVACY: Police Intelligence Gathering on Lawful Political Activity, etc.	LA/70
EDITH BERG Federation of Feminist Women's Health Centers, Los Angeles, CA	PERSONAL PRIVACY: Surveillance of Health Centers by State Agencies	LA/88
RALPH BOCHES, Esq. Hollywood Youth Defense and Research Association, Hollywood, CA	PERSONAL PRIVACY: Criminal Law; Age-of-Consent Laws; Decriminalization of Prostitution	LA/83
DANIEL BRZOVIC, Esq. Western Law Center for the Handicapped, Los Angeles, CA	PERSONAL PRIVACY: Rights of the Disabled; Marriage Penalty in Benefits Programs	LA/80
VIRGIL CARPENTER Los Angeles County Dept. Mental Health Services, Patient's Rights Section, Los Angeles, CA	PERSONAL PRIVACY: Patient's Rights; Confidentiality of Records and Mail; Privacy Rooms; Private Communications; Searches	LA/30
TIM CURRAN Student, U.C.L.A., West Los Angeles, CA	SEXUAL ORIENTATION DISCRIMINATION: Dismissal by Boy Scouts of America Organization	LA/96
DOCTOR "D" Los Angeles, CA	SEXUAL ORIENTATION DISCRIMINATION: Adoption of Children	LA/47
E.H. DUNCAN DONOVAN A.C.L.U., Gay Rights Chapter, Los Angeles, CA	PERSONAL PRIVACY: Criminal Law; Registration of Sex Offenders in California	LA/102
JIMMY E. Los Angeles, CA	PERSONAL PRIVACY: Rights of Disabled; Marriage Penalty in Benefits Programs	LA/79

EXECUTIVE SUMMARY

CALIFORNIA COMMISSION ON PERSONAL PRIVACY

FERNANDO GARCIA, Esq. California Department of Fair Employment & Housing, Los Angeles, CA	SEXUAL ORIENTATION DISCRIMINATION: Housing Discrimination; Unruh Act Amendment; DFEH Policies	LA/21
CECILY GREEN International Professional Surrogates Foundation, Studio City, CA	PERSONAL PRIVACY: Sexuality and Disability; Medical Assistance/Benefits Programs	LA/32
HAROLD GREENBERG, Esq. Los Angeles, CA	SEXUAL ORIENTATION DISCRIMINATION: Criminal Law Problems; Enforcement; Sex Registration; Professional Licensing	LA/17
DAVID HALL Community Health Educator, Los Angeles, CA	PERSONAL PRIVACY: Sex Education for Youth	LA/83
WILLIAM HANDEL, Esq. Surrogate Parent Foundation, No. Hollywood, CA	PERSONAL PRIVACY: Surrogate Parenting	LA/4
ROBERT HENDERSON Private Citizen, Simi, CA	PERSONAL PRIVACY: Employment Discrimination Because of Marital Status	LA/91
Rev. ROBERT H. ILES Episcopal Priest and Instructor/Counsellor, Pasadena, CA	PERSONAL PRIVACY: Sex Education for Youth	LA/24
STEVE KELBER, Esq. West Hollywood, CA	SEXUAL ORIENTATION DISCRIMINATION: Inheritance and Estate Tax; Housing	LA/41
JAMES LONG Consultant, Calif. Dept. of Mental Health, Los Angeles, CA	SEXUAL ORIENTATION DISCRIMINATION: Employment Discrimination; Public Assistance Programs	LA /110
CHRISTINE MASTERS, Esq. United States Government, Equal Employment Opportunity Commission, Los Angeles, CA	PERSONAL PRIVACY: Sexual Harassment in Employment	LA/38
RICK MARTIN California Association for the Physically Handicapped, Los Angeles, CA	SEXUAL ORIENTATION DISCRIMINATION: Military Exclusion and Investigation; Disabled; Aging	LA/53

EXECUTIVE SUMMARY

CALIFORNIA COMMISSION ON PERSONAL PRIVACY

<p>SUSAN MCGRIEVY, Esq. Staff Attorney, A.C.L.U., Los Angeles, CA</p>	<p>SEXUAL ORIENTATION DISCRIMINATION: Use of Polygraphs by Law Enforcement Agencies in Screening Employment Applicants</p>	<p>LA/66</p>
<p>Dr. SHARON RAPHAEL Prof. Sociology/Gerontology, Cal State University, Dominguez Hills, CA</p>	<p>SEXUAL ORIENTATION DISCRIMINATION: Problems of Older Lesbians/Gay Men</p>	<p>LA/58</p>
<p>BETTY R. Los Angeles, CA</p>	<p>PERSONAL PRIVACY: Rights of Disabled; Marriage Penalty in Benefits Program</p>	<p>LA/79</p>
<p>MINA ROBINSON Gerontologist, Orange County, CA</p>	<p>SEXUAL ORIENTATION DISCRIMINATION: Problems of Older Lesbians/Gay Men</p>	<p>LA/62</p>
<p>BERNARD SHERWIN, Esq. Surrogate Parent Foundation, No. Hollywood, CA</p>	<p>PERSONAL PRIVACY: Surrogate Parenting</p>	<p>LA/5</p>
<p>DONNA SMITH Los Angeles, CA</p>	<p>SEXUAL ORIENTATION DISCRIMINATION: Problems of Older Lesbians/Gay Men</p>	<p>LA/55</p>
<p>S. THOMAS TODD, Esq. Van Nuys, CA</p>	<p>SEXUAL ORIENTATION DISCRIMINATION: Employment Benefits Discrimination</p>	<p>LA/11</p>
<p>JOHN VANDURIS Geneologist, United Lesbian and Gay Christian Scientists, Los Angeles, CA</p>	<p>SEXUAL ORIENTATION DISCRIMINATION: Discriminatory Policies and Practices of Churches</p>	<p>LA/107</p>
<p>HAROLD W. Los Angeles, CA</p>	<p>SEXUAL ORIENTATION DISCRIMINATION: Criminal Law; Sex Registration for Disorderly Conduct; Discriminatory Enforcement</p>	<p>LA/114</p>

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SAN FRANCISCO PUBLIC HEARING -- FRIDAY, NOVEMBER 20, 1981

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TABLE OF WITNESSES

(Page numbers refer to location of testimony in Supplement Four)

<u>Witness:</u>	<u>Topic:</u>	<u>Page:</u>
ROBERTA ACHTENBERG Co-Chairperson, Bay Area Lawyers for Individual Freedom, San Francisco, CA	SEXUAL ORIENTATION DISCRIMINATION: Employment; Discriminatory Enforcement of Criminal Laws	SF/110
STEVE BLOCK Lecturer, Law School, U. of C. Berkeley, CA	PERSONAL PRIVACY: Definition and Scope of Privacy	SF/146
PATTY BLOMBERG Family-Life Coordinator, Dept. of Developmental Svcs., Sacramento, CA	PERSONAL PRIVACY: Sexual Rights of the Disabled	SF/61
BARBARA BLOOM "Centerforce", San Quentin, CA	PERSONAL PRIVACY: Prison Family Visiting Program and Discrimination Against Alternate Families	SF/129
SUSAN CRONENWETT Program Specialist, Unified School District, Sacramento, CA	PERSONAL PRIVACY: Sex Education in the Secondary School System	SF/116
LAWRENCE CRUZ Director, "Esperanze House", San Francisco, CA	SEXUAL ORIENTATION DISCRIMINATION: Sexual Minority Youth	SF/158
JAMES A. EMBREE Superintendent, Preston School of Industry, Calif. Youth Authority, Ione, CA	PERSONAL PRIVACY: Audio Surveillance of Juvenile Wards; Visual Surveillance by Opposite-Sex Guards	SF/26
ROBERT FORMICHI Reporter of Decisions, Supreme Court of California, San Francisco, CA	PERSONAL PRIVACY: Appellate Opinions and Use of Litigants' Initials	SF/68
JAMES FOSTER Special Consultant to the Chairman, Democratic National Committee, San Francisco, CA	PERSONAL PRIVACY: Alternate Families and Tax Discrimination	SF/44

EXECUTIVE SUMMARY

CALIFORNIA COMMISSION ON PERSONAL PRIVACY

MARGARET FRAZIER, Esq. Client's Rights Assurance Prgm., Dept. of Developmental Services, Sacramento, CA	PERSONAL PRIVACY: Protection of Disabled Clients	SF/60
DONNA HITCHENS, Esq. Lesbian Rights Project, San Francisco, CA	SEXUAL ORIENTAION DISCRIMINATION: Employment; Child Custody	SF/63
DORRWIN JONES Gerontologist; Exec. Director of "Meals on Wheels of San Francisco, Inc.", San Francisco, CA	SEXUAL ORIENTATION DISCRIMINATION: Aging and Personal Privacy Problems	SF/149
JUSTIN KEAY Manager, California Office of Information Practices, Sacramento, CA	PERSONAL PRIVACY: Informational Privacy and Government Records	SF/124
SUSAN KNIGHT Director, U. of C. Program: Sex and Disability, San Francisco, CA	PERSONAL PRIVACY: Sexuality and Disability	SF/55
ARTHUR LAZERE, C.P.A. President-Elect, Nat'l Assn. Business Councils, San Francisco, CA	SEXUAL ORIENTATION DISCRIMINATION: Employment and Professional Licensing	SF/11
WESLIU LEUKENS Private Citizen, Alameda, CA	PERSONAL PRIVACY: Juror Privacy	SF/95
THOMAS MEYER, Esq. Regional Counsel, National Jury Project, Oakland, CA	PERSONAL PRIVACY: Investigation and <u>Voir Dire</u> of Prospective Jurors	SF/101
CAROL MIGDEN Exec. Dir., Operation Concern, Pacific Medical Center, San Francisco, CA	SEXUAL ORIENTATION DISCRIMINATION: Psychiatric Health Care for Lesbians and Gay Men	SF/80
Hon. MARY MORGAN Judge, Municipal Court, San Francisco, CA	SEXUAL ORIENTATION DISCRIMINATION: Child Custody	SF/5
PAT NORMAN Coordinator, Gay/Lesbian Health Svcs., Dept. of Public Health, San Francisco, CA	SEXUAL ORIENTATION DISCRIMINATION: Health Services for Lesbians and Gay Men	SF/81

EXECUTIVE SUMMARY

CALIFORNIA COMMISSION ON PERSONAL PRIVACY

Dr. WILLIAM PAUL Task Force on Sexual Orientation, American Psychological Assn., San Francisco, CA	SEXUAL ORIENTATION DISCRIMINATION: Educational Problems and Social Costs	SF/154
DAVID PAYNE Student, Stanford University, Stanford, CA	PERSONAL PRIVACY: Informational Privacy and Draft Registration	SF/85
WILLIAM PETROCELLI, Esq. Author of <u>Law Profile</u> (McGraw-Hill, 1982), San Francisco, CA	PERSONAL PRIVACY: Privacy	SF/85
ANTHONY SILVESTRE Chairperson, Governor's Council on Sexual Minorities, Harrisburg, Pennsylvania	SEXUAL ORIENTATION DISCRIMINATION: Need for Implementation Mechanisms for Privacy Commission's Report to be Effective	SF/133
DANIEL R. SIVIL House Civil Rights Committee Task Force on Family & Sexuality, Detroit, Michigan	SEXUAL ORIENTATION DISCRIMINATION: Aging and Nursing Home Protections	SF/138
DON SPECTOR, Esq. Prison Law Office, San Quentin, CA	PERSONAL PRIVACY: Prisoner's Privacy	SF/49
LEO SPIEKERMAN Manager, Legislative Affairs, TRW Information Services, Los Angeles, CA	PERSONAL PRIVACY: Informational Privacy; Credit Reporting Services	SF/15
KEVIN WADSWORTH Private Citizen, San Francisco, CA	SEXUAL ORIENTATION DISCRIMINATION: Political Discrimination Against Lesbians and Gay Men	SF/152
Dr. ARTHUR WARNER Chairperson, National Committee for Sexual Civil Liberties, Princeton, New Jersey	PERSONAL PRIVACY: Decriminalization of Private Sexual Conduct; National Overview	SF/141
WILLIAM WELLS Program Administrator, Intensive Treatment Program, Preston School of Industry, Ione, CA	PERSONAL PRIVACY: Psychiatric Treatment of Wards	SF/39
JUDY WILLIAMS Coordinator, Program for Education/Rehabilitation of Hearing-Impaired, Sonoma Developmental Center, Sonoma, CA	PERSONAL PRIVACY: Sex Education for Developmentally Disabled Clients	SF/75

[APPENDIX D]

RECOMMENDATIONS -- LISTED BY ADDRESSEE

	EXECUTIVE SUMMARY	COMMISSION REPORT
<u>UNITED STATES</u>		
Executive/Administrative Branch:		
PRESIDENT:		
Request President to Establish Task Force and Council	47	68
DEPARTMENT OF HEALTH AND HUMAN SERVICES:		
Eliminate Regulation of State Family Planning Programs	91	296
Legislative Branch:		
CALIFORNIA'S CONGRESSIONAL DELEGATION:		
Congressional Hearings on Sexual Orientation Discrimination	41	354
Amend Federal Privacy Act	46	62
National Privacy Projects	46	64
Establish Federal Privacy Board	47	65
Request President to Establish Task Force and Council	47	68
Eliminate Marriage Penalties in Benefits Programs	100	243
Amend Immigration and Naturalization Act	107	363
<u>STATE OF CALIFORNIA</u>		
Executive/Administrative Branch:		
GOVERNOR:		
Request President to Establish Task Force and Council	47	68
Executive Order Regarding Committee on Privacy in Health Care	103	239
ATTORNEY GENERAL:		
Chair, Local Government Committee Seek Attorney General Opinion on Discrimination	80	412

STATE CONTROLLER:

Propose Amendment to Tax Laws for Alternate Families	89	295
--	----	-----

BOARD OF EDUCATION:

Notify Local Districts Regarding Employment Discrimination	73	423
--	----	-----

BOARD OF GOVERNORS OF CALIFORNIA COMMUNITY COLLEGES:

Update of College/University Employment Policies	73	422
--	----	-----

BOARD OF REGENTS OF UNIVERSITY OF CALIFORNIA:

Update of College/University Employment Policies	73	422
--	----	-----

COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING (P.O.S.T.):

Certified Programs and Materials on Violence	66	384
--	----	-----

Equal Employment Opportunity Standards	71	421
--	----	-----

COMMISSION FOR TEACHER PREPARATION AND LICENSING:

Non-discrimination Statement From Credentials Committee	73	423
---	----	-----

DEPARTMENT OF ALCOHOL AND DRUG PROGRAMS:

Privacy in Alcohol and Drug Programs	105	244
--------------------------------------	-----	-----

DEPARTMENT OF CONSUMER AFFAIRS:

Credit Bureau Permits	85	258
-----------------------	----	-----

Require Health Care Provider Privacy Training	104	240
---	-----	-----

DEPARTMENT OF CORRECTIONS:

Privacy in Correctional Facilities	61	177
------------------------------------	----	-----

Training for Staff in Youth Institutions	92	297
--	----	-----

DEPARTMENT OF DEVELOPMENTAL SERVICES:

Training for Staff in Youth Institutions	92	297
--	----	-----

Annual Patients' Rights Reviews	100	243
---------------------------------	-----	-----

DEPARTMENT OF EDUCATION:

Booklet on Myths about Homosexuality	40	339
--------------------------------------	----	-----

Develop Library Censorship Policies	57	74
-------------------------------------	----	----

Mandate Sex Education	91	297
DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING:		
Jurisdiction in Sexual Orientation Cases	81	412
Update Literature on Housing Jurisdiction	85	431
Educational Projects in Housing Unit	83	431
Exercise Jurisdiction in Renters-With-Children Cases	84	432
DEPARTMENT OF HEALTH SERVICES:		
Add Patients' Rights Protections to Administrative Code	97	241
Annual Patients' Rights Reviews	100	243
Require Privacy Training for Health Care Staff	104	240
DEPARTMENT OF JUSTICE:		
Police Officer Training Regarding Victims of Violence	66	384
DEPARTMENT OF MENTAL HEALTH:		
Training for Staff in Youth Institutions	92	297
Add Patients' Rights Protections to Administrative Code	97	241
Annual Patients' Rights Reviews	100	243
Require Privacy Training for Health Care Staff	104	240
DEPARTMENT OF REHABILITATION:		
Annual Patients' Rights Reviews	100	243
DEPARTMENT OF SOCIAL SERVICES:		
Training for Staff in Youth Institutions	92	297
Add Patients' Rights Protections to Administrative Code	97	241
Annual Patients' Rights Reviews	100	243
Require Privacy Training for Health Care Staff	104	240
FAIR EMPLOYMENT AND HOUSING COMMISSION:		
Advisory Council on Sexual Orientation Discrimination	84	432

LABOR COMMISSIONER:

Create Task Force on Private Sector Privacy	76	254
---	----	-----

STATE PERSONNEL BOARD:

Training for County Personnel Officers	72	421
--	----	-----

New Executive Officer Memo to All Agencies	79	408
--	----	-----

Monitor and Audit All Agencies	80	408
--------------------------------	----	-----

Authorize Funds for Full-Time Sexual Orientation Position	80	408
---	----	-----

SUPERINTENDENT OF PUBLIC INSTRUCTION:

Notify Local Districts Regarding Employment Discrimination	73	423
--	----	-----

TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY SYSTEM:

Update of College/University Employment Policies	73	422
--	----	-----

YOUTH AUTHORITY:

Privacy in Correctional Facilities	61	177
------------------------------------	----	-----

Training for Staff in Youth Institutions	92	297
--	----	-----

Legislative Branch:**LEGISLATURE:**

Amend Law on Causes and Cures of Homosexuality	42	367
--	----	-----

Request President to Establish Task Force and Council	47	68
---	----	----

Amend Privacy Act to Cover Local Government	49	280
---	----	-----

Create Privacy Advisory Council and Research Center	50	281
---	----	-----

Amend Civil Discovery Statutes	54	150
--------------------------------	----	-----

Repeal Law on Seizure of Juror Candidates	57	290
---	----	-----

Police Surveillance of Private Residences	58	172
---	----	-----

Police Surveillance of Lawful Activity	59	181
--	----	-----

Confidentiality of Telephone Conversations	59	207
--	----	-----

Surveillance of Restrooms and Dressing Rooms	60	193
--	----	-----

Privacy in Correctional Facilities	61	177
------------------------------------	----	-----

Repeal Certain Loitering Statutes	63	270
Modify Sex Registration Statute	63	269
Age of Consent for Private Sexual Conduct	64	208
Limit Access to Some Arrest Records	64	282
Sealing of Records for Innocent Arrestees	65	283
Amend Anti-Violence Statute	66/67	385
Limits on Use of Polygraphs in Employment	69	253
Amend Fair Employment Practices Act	76	426
Amend Labor Code to Protect Privacy	76	255
Amend Fair Employment and Housing Act	81	412
Add "Sexual Orientation" to Housing Laws	83	431
Indicate Agency Jurisdiction in Unruh Civil Rights Act	83	431
Amend Consumer Credit Reporting Agencies Act	85	258
Regulate Renter Reporting Services	85	260
Amend Insurance Code to Increase Damages for Violations	86	267
Amend Insurance Code to Provide Stricter Limits on Lenders	87	268
Regulate Electronic fund Transfer Systems	88	262
Declaration of Family Status	89	127
Amend Tax Laws for Alternate Families	89	295
Repeal Sex Education Provision	91	297
Amend Durable Power of Attorney Act for Medical Purposes	94	216
Freedom of Patient Choice in Visitations	95	221
Redefine Patient's Family	96	225
Amend Patients' Rights Statutes	97	238
Redefine Patient's Representative	10	226
Information to Patient's Household Members	10	228
Increase Damages for Violation of Patient Confidentiality Laws	10	229

SENATE:		
Chair, Local Government Committee Seek Attorney General Opinion on Discrimination	80	412
Local Government Committee Survey on Compliance	82	413
Judicial Branch:		
JUDICIAL COUNCIL:		
Use of Initials in Appellate Opinions	55	288
Study on Juror Privacy	56	289
Limit Release of Names of Jurors	57	289
Standard Questionnaire for Juror Candidates	57	290
TRIAL COURTS:		
Limit Release of Names of Jurors	57	289
Local Governmental Entities:		
FIRE DEPARTMENTS:		
No Repercussions Regarding Employees Sexual Orientation	71	416
LAW ENFORCEMENT AGENCIES:		
Police Officer Training Regarding Victims of Violence	66	384
No Repercussions Regarding Employees Sexual Orientation	71	416
PROSECUTORIAL AGENCIES:		
Education Regarding Employment Discrimination	72	421
YOUTH AND ADULT CORRECTIONAL FACILITIES:		
Privacy in Correctional Facilities	61	177
Businesses and Associations:		
CALIFORNIA LIBRARY ASSOCIATION:		
Develop Library Censorship Policies	57	74
THE PRESS:		
Limit Access to Some Arrest Records	64	282

(APPENDIX E)

CONTENTS OF THE MAIN REPORT

Letter of Transmittal..... i

The Tree of Personal Privacy..... v

Commissioners..... vi

Staff and Consultants..... vii

Report Credits..... viii

Acknowledgement..... ix

INTRODUCTION..... 1

 Other Study Commissions on Personal Privacy..... 6

 Study Commissions on Sexuality and Sexual Orientation..... 7

 The Creation and Mandate of the California Commission..... 12

 The Operations of the California Commission..... 14

 The Approach of this Report..... 16

INVASIONS OF THE RIGHT OF PERSONAL PRIVACY..... 19

 Philosophical Underpinnings of Privacy..... 19

 Scope of the Right of Personal Privacy..... 21

 Formal Foundation in Law..... 23

 Invasion of Privacy as a Tort..... 23

 Constitutional Privacy..... 25

 Attempts to Define Personal Privacy..... 27

 Examining Privacy Concepts and Terms..... 33

 Glossary of Working Definitions for Privacy Terms..... 36

A NATIONAL OVERVIEW OF THE RIGHT OF PERSONAL PRIVACY..... 37

 THE ROLE OF THE FEDERAL COURTS IN CURBING UNREASONABLE GOVERNMENT INTERFERENCE..... 37

 Territorial Privacy in Federal Case Law..... 37

 Decisional/Associational Privacy in Federal Case Law..... 41

 A Caveat..... 48

 Informational Privacy in Federal Case Law..... 51

 THE ROLE OF THE FEDERAL COURTS IN BALANCING THE RIGHT OF PRIVACY WITH FREEDOM OF EXPRESSION..... 55

 THE ROLE OF CONGRESS..... 61

 * [Recommendation: Amend Federal Privacy Act]..... 62

 The Privacy Protection Study Commission..... 63

 * [Recommendation: National Privacy Projects]..... 64

 Some Findings of the Federal Commission..... 64

 * [Recommendation: Establish Federal Privacy Board]..... 65

 Congressional Authority to Protect Privacy..... 65

PERSONAL PRIVACY AND THE PRESIDENT.....	67
* [Recommendation: Create Task Force and Council].....	68
THE ROLE OF THE STATES IN PROTECTING PRIVACY.....	69
State Courts and State Constitutions.....	69
Voter Amendments to State Constitutions.....	70
Table of States with Major Constitutional Privacy Protections.....	72
State Legislatures and Privacy Legislation.....	73
* [Recommendation: Library Censorship Policies].....	74
Table of States Decriminalizing Private Sexual Conduct.....	79
Chart of State and Federal Privacy Laws.....	80
PRIVACY AND PUBLIC OPINION IN THE UNITED STATES.....	81
The Dimensions of Privacy.....	81
Personal Dimensions.....	82
Employment Dimensions.....	83
Government Dimensions.....	83
Private Industry.....	84
Protecting Privacy in the Future.....	85
Charts: Survey Results.....	87
PERSONAL PRIVACY IN CALIFORNIA.....	93
Privacy as an Implicit Constitutional Guarantee.....	93
Reasonable Expectations of Privacy.....	95
Privacy Under Article 1, Section 13.....	97
The 1972 Voters' Amendment.....	100
RESOLUTION OF PRIVACY CONFLICTS BY THE CALIFORNIA COURTS.....	105
Territorial Privacy in California Case Law.....	108
Decisional/Associational Privacy in California Case Law.....	113
* [Recommendation: Declaration of Family Status].....	127
Informational Privacy in California Case Law.....	130
Discovery of Personal Information.....	130
* [Recommendation: Amend Civil Discovery Statutes].....	150
Disclosure of Personal Information.....	151
Disclosure as a Tort.....	151
Disclosure as a Constitutional Violation.....	158
Collection of Personal Information.....	165
Police Practices.....	165
* [Recommendation: Police Surveillance of Private Residences].....	172
* [Recommendations: Privacy and Correctional Facilities].....	177
* [Recommendation: Police Surveillance of Lawful Activities].....	181
Other Government Agencies.....	183
Private Searches.....	191
* [Recommendation: Surveillance of Restrooms/Dressing Rooms].....	193
SUMMARY OF JUDICIAL CONSIDERATIONS IN PRIVACY DISPUTES.....	194
LEGISLATIVE PROTECTION OF PERSONAL PRIVACY.....	195
Legislative Findings.....	196
Legislation Against Physical or Sensory Intrusions into Private Areas.....	201

* [Recommendation: Confidential Telephone Conversations].....	207
* [Recommendation: Age of Consent for Private Sexual Conduct].....	208
Privacy in Medical and Mental Health Care.....	209
* [Recommendation: Durable Power of Attorney for Decisions].....	216
* [Recommendation: Freedom of Patient Choice in Visitations].....	221
* [Recommendation: Definition of Patient's Family].....	225
* [Recommendation: Definition of Patient's Representative].....	226
* [Recommendation: Information to Patient's Household Members].....	228
* [Recommendations: Increased Damages for Violations of Laws].....	229
* [Recommendation: Amendments to Patients' Rights Statutes].....	238
* [Recommendation: Create Inter-Agency Committee].....	239
* [Recommendation: Training for Licensed Health Care Providers].....	240
* [Recommendation: Training for Non-Professional Staff].....	240
* [Recommendation: Amend Patients' Rights Regulations/Title 22].....	241
* [Recommendation: Intimate Association/Private Communication].....	242
* [Recommendation: Eliminate Marriage Penalties in Programs].....	243
* [Recommendation: Annual Patients' Rights Reviews/Checklists].....	243
* [Recommendations: Privacy in Alcohol and Drug Programs].....	244
Personal Privacy in Employment.....	246
* [Recommendations: More Limits on Polygraph in Employment].....	253
* [Recommendation: Create Labor Commissioner Task Force].....	254
* [Recommendation: Amend Labor Code to Protect Privacy].....	255
Financial Privacy.....	256
* [Recommendation: Consumer Credit Reporting Agencies].....	258
* [Recommendation: Regulate Renter Reporting Services].....	260
* [Recommendation: Regulate Electronic Fund Transfer Systems].....	262
Insurance Privacy.....	263
* [Recommendations: Increase Damages for Violations of Laws].....	267
* [Recommendation: Stricter Limits on Lenders].....	268
Some Criminal Justice Considerations.....	269
* [Recommendation: Modify Sex Registration Statute].....	269
* [Recommendation: Repeal Certain Loitering Statutes].....	270
Government Records and Information Practices.....	271
* [Recommendation: Extend Privacy Act to Local Government].....	280
* [Recommendation: Privacy Advisory Council / Research Center].....	281
* [Recommendation: Limit Access to Some Arrest Records].....	282
* [Recommendation: Extend Relief for Innocent Arrestees].....	283
* [Recommendation: Use of Initials in Appellate Opinions].....	288
* [Recommendation: Judicial Council Study on Juror Privacy].....	289
* [Recommendation: Limit Release of Names of Jurors].....	289
* [Recommendation: Standard Questionnaire for Juror Candidates].....	290
* [Recommendation: Repeal Law on Seizure of Juror Candidates].....	290
PERSONAL PRIVACY AND CALIFORNIA'S EXECUTIVE BRANCH.....	291
* [Recommendations: Amend Tax Laws for Alternate Families].....	295
* [Recommendation: Privacy and Teenage Family Planning Rules].....	296
* [Recommendation: Repeal Schmitz Act on Sex Education].....	297
* [Recommendation: Sex Education for Public School Students].....	297
* [Recommendation: Training for Staff in Youth Institutions].....	297
SEXUAL ORIENTATION DISCRIMINATION IN CALIFORNIA.....	301
Introduction.....	301
Sexual Orientation Discrimination and Its Connection to Privacy.....	304
Territorial Privacy and Sexual Orientation.....	312
Decisional Privacy and Sexual Orientation.....	313

Informational Privacy and Sexual Orientation.....	315
Sexual Orientation Terms and Definitions.....	320
Underlying Causes of Sexual Orientation Discrimination.....	328
MYTHS AND STEREOTYPES.....	339
* [Recommendation: Booklet on Myths about Homosexuality].....	339
MYTH: Gays are an Insignificant Minority.....	340
MYTH: Gays are not Victims of Discrimination.....	341
* [Recommendation: The Need for Congressional Hearings].....	354
MYTH: Gays are Child Molesters.....	359
MYTH: Homosexuality is a Mental Illness.....	361
* [Recommendation: Amend Immigration and Naturalization Act].....	363
MYTH: Contact with or Exposure to Homosexuals is Dangerous.....	364
* [Recommendation: Amend Law on Cause/Cure of Homosexuality].....	367
MYTH: A Proper Justification for Sexual Orientation Discrimination is that Homosexuality is Unnatural.....	369
ACTUAL MANIFESTATIONS OF DISCRIMINATION.....	375
Violence Against Lesbians and Gay Men.....	375
* [Recommendation: P.O.S.T. Certified Programs and Materials].....	384
* [Recommendation: Additional Peace Officer Training].....	384
* [Recommendation: Amend California's Anti-Violence Statute].....	385
Sexual Orientation Discrimination in Employment.....	386
Employment in the Federal Government.....	386
The State of California as Employer.....	392
Protective Laws and Policies.....	392
Provisions of Law Governing Sexual Orientation Discrimination in State Employment.....	397
Implementation of the Law: Practical Realities.....	398
State Personnel Board Memo on Implementation of Laws and Policies on Sexual Orientation Discrimination.....	400
* [Recommendation: New Memorandum to All State Agencies].....	408
* [Recommendation: SPB Monitoring/Auditing All State Agencies].....	408
* [Recommendation: Authorize Funding for Full-Time Position].....	408
Local Government Employers.....	409
Protective Laws and Policies.....	409
Implementation of the Law.....	410
* [Recommendation: Attorney General Opinion on Discrimination].....	412
* [Recommendation: Amend Fair Employment and Housing Act].....	412
* [Recommendation: Local Government Survey on Compliance].....	413
Law Enforcement Employers.....	414
* [Recommendation: Need for Amnesty Statements for Officers].....	416
* [Recommendation: Commission on P.O.S.T. Involvement].....	421
* [Recommendation: SPB Training for County Personnel Officers].....	421
* [Recommendation: Education of Local Government Attorneys].....	421
Teachers in Public Schools.....	422
* [Recommendation: Update of College/University Policies].....	422
* [Recommendation: State Notification to Local School Districts].....	423
* [Recommendation: Need for Credentials Committee Policy].....	423
Private Employers.....	424
* [Recommendation: Amend Fair Employment Practices Act].....	426
Housing Discrimination.....	427
* [Recommendation: Add "Sexual Orientation" to Housing Laws].....	431
* [Recommendation: Indicate Agency Jurisdiction in Unruh Act].....	431
* [Recommendation: Update D.F.E.H. Literature].....	431

* [Recommendation: D.F.E.H. Educational Projects Needed]..... 431
* [Recommendation: Advisory Council on Sexual Orientation]..... 432
* [Recommendation: D.F.E.H. Should Take "Children" Cases]..... 432

CONCLUSION..... 433

APPENDICES..... 435

 A. Executive Order B-74-80..... 437
 B. Other Documents Published by the Commission..... 439
 C. Table of Witnesses at Public Hearings..... 441

NOTES (Authorities Cited)..... 449

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