State Legislatures and Privacy Legislation

Robert Ellis Smith, publisher of the Privacy Journal, produced a small pamphlet in 1975 containing a compilation of state privacy statutes. Today, that compilation consists of a two-volume set, containing over two hundred pages of material.[159] Obviously, state legislatures all across the country have responded to the public's demand for more protection by enacting hundreds of pieces of legislation on various aspects of personal privacy.

The staff of the California Commission on Personal Privacy has reviewed Mr. Smith's Compilation, as well as several other helpful sources to determine what action legislatures are taking throughout the country to protect personal privacy. The complexity of the issues and the volume of material are overwhelming. This Report will devote only a few pages to state privacy legislation outside California, in order to give a brief synopsis of legislative responses and trends.

Just a few years ago, a special report was issued by the federal Privacy Protection Study Commission entitled "Privacy Law in the States."[160] That Report not only examined the role of the states in protecting personal privacy, it also summarized major privacy legislation that was in effect in each state in 1976.

Search Group Inc., a National Consortium for Justice Information and Statistics, has published a number of booklets on various aspects of informational privacy and criminal justice. One booklet produced for the United States Department of Labor, Privacy and the Private Employer, is an excellent resource regarding issues, competing interests, law, and trends with respect to the right of an employer to have access to criminal record histories of employees and applicants, as well as the privacy rights of members of the labor force.[161] Search Group also published a concise and valuable booklet entitled Trends in State Security and Privacy Legislation.[162]

In addition to considering these and other relevant materials, this Commission has noted the recent publicity about particular threats to personal privacy in the areas of library privacy and two-way cable television.

Members of this Commission attended a presentation by Robert P. Doyle, representing the Office of Intellectual Freedom of the American Library Association. Mr. Doyle discussed two major threats to personal privacy that affect libraries, students, teachers, and library users. The first concerns an alarming increase in incidents of library censorship in this country. Local

school boards and other municipal officials, usually in response to community pressure incited by small but carefully orchestrated special interest groups, are engaging in blatant and obvious censorship. Sometimes it takes the form of making access to certain books difficult if not impossible and other times library officials are simply instructed to remove books or to discontinue purchases.

The right of personal privacy implies the freedom of choice of individuals as to what they will or will not read. In order for both youth and adults to make informed decisions in those areas deemed fundamental by the Supreme Court, including marriage, family, and sexuality, they must have access to points of view that both support and differ with "mainstream" thought. The Commission has taken note of the fine work of the American Library Association on behalf of the individual's freedom of choice in what he or she reads.

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.

It should be pointed out that there is a great difference between official censorship and the right of special interest groups to include in their public teachings that certain books are inconsistent with their view of morality. John Stuart Mill draws this distinction in the quote from his treatise, On Liberty, cited at pages 19 and 20 of this Report, when he suggests that a person "cannot rightfully be compelled to ... forbear because it would be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. These are good reasons for remonstrating with him or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise."

The second threat presented to members of this Commission by the American Library Association deals with the publication of circulation records. For a variety of reasons, including the desire to intimidate those who might choose to read books containing unpopular or minority viewpoints, some groups have attempted to gain access to library circulation records. If these groups can determine who is reading what, they can apply pressure to stifle diversity of thought on specific controversial issues.

In a letter to the Attorney General of Texas, urging confidentiality for library records, the general counsel of the American Library Association wrote:[163]

> The question of whether or not library circulation records are open to the public is not new. It is a question with which the ALA and its 30,000 member libraries, library trustees, and library employees have been concerned for many years.
>
> Since 1970 the ALA has had a policy (a) that library circulation records are confidential in nature; and (b) should not be made available to any party except pursuant to an appropriate order issued by a responsible authority upon a showing of good cause.
>
> The basis of this policy may be simply stated: ALA believes that the reading interests of library patrons are and should be private and that any attempt to invade such privacy without a showing of direct and legitimate need constitutes an unconscionable and unconstitutional invasion of the right of privacy of library patrons and the "right to read" implicitly guaranteed by the First Amendment.
>
> To grant access to library circulation records to any person desiring such access is to authorize and make practical a public surveillance of the reading habits of citizens. When, in 1970, the Internal Revenue Service attempted such surveillance, it prompted the following reaction from Senator Sam J. Ervin, Jr., Chairman of the Senate Subcommittee on Constitutional Rights, and renowned authority on the federal Constitution:
>
> > I know that many members of Congress share my concern that practices so contrary to the Constitution of the United States and so inimical to intellectual freedom could be allowed or authorized by any federal department for any purpose. This is so because throughout history official surveillance of the reading habits of citizens has been a litmus test of tyranny.[164]

In 1975, the Texas Attorney General issued an opinion noting that there was no Texas statute or court decision on this issue. However, he stated it was his opinion that the courts would hold public disclosure of library circulation records violative of the United States Constitution. Attorney General John L. Hill added, "If by virtue of the First and Fourteenth Amendments, '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,' Stanley v. Georgia, supra, at 565, then neither does the state have any business telling that man's neighbor what book or picture he has checked out of the public library to read or view in the privacy of his home."[165]

Fortunately, the California Legislature in 1980 amended the state's Open Records Act to exempt such records from mandatory disclosure.[166]

• • •

A more ominous and immediate threat on the horizon which commands quick attention by state legislatures is two-way cable television.

The following statement, prepared by the New York Attorney General's Office, describes some of the major threats to personal privacy which are posed by the emergence of two-way cable television:[167]

> In recent years there have been striking advances in cable television technology, including the emergence of interactive, or two-way, cable television systems. Unlike traditional cable television systems for which subscribers are merely passive viewers, interactive cable television systems will allow subscribers -- using a small console attached to the home television set -- to "talk back" by electronically conveying information over the cable television system back to the cable company. By simply collecting and storing this "feedback" information in a computer, the cable television company will soon have easy access to vast amounts of personal information about its subscribers. . . .
>
> The potential uses of interactive cable television systems are virtually unlimited. One study recently done for the Federal Trade Commission has identified at least sixty-five different services that could conceivably be offered, including home banking and shopping, electronic polling and energy load management, remote medical alert and burglar alarm protection systems.

While the personal information collected by cable television companies may be used to provide valuable services to cable subscribers and their households, the collection of this information nevertheless poses serious threats to the personal privacy of state residents. One such threat to personal privacy arises from the possible collection in one central location, and subsequent unauthorized use and disclosure, of large amounts of individually identifiable information about subscribers and their households. Although many business institutions maintain data bases with considerable personal information, the virtual unlimited variety of services that will be offered over the new, interactive cable television systems promise to make the cable television companies the largest collectors of personal information. A further threat to personal privacy derives from the danger of unauthorized interception of personal information being transmitted via cable television systems.

On September 28, 1982, California Governor Brown signed into law a bill described by the Privacy Journal as "the nation's most far reaching law to protect the privacy of cable television subscribers."[167a] According to the "Legislative Counsel's Digest" summarizing this legislation:[168]

Existing law does not expressly prohibit a cable television corporation from (1) using any electronic device to record, transmit, or observe events or listen to, record, or monitor conversations which take place inside a subscriber's residence, workplace, or place or business; or (2) providing any person with individually identifiable information regarding a subscriber.

This bill [adding §637.5 to the Penal Code] would expressly prohibit the actions described above by any cable television corporation, as defined; would generally prohibit a cable television corporation from making individual subscriber information available to governmental agencies; would require a cable television corporation to make any individually identifiable subscriber information gathered by the company available to the subscriber, upon request; would make the violation of these prohibitions by any person a misdemeanor

punishable by a specified fine or imprisonment in the county jail, or both; would permit any aggrieved person to commence a civil action for damages for invasion of privacy; and would specify that the above remedies and penalties are cumulative.

The bill would require a cable television system to inform subscribers, upon application for cable television service, including interactive service, as defined, of the provisions of law added by this bill and would specify that the provisions of the bill are intended to establish minimum statewide standards for the protection of privacy of subscribers.

Library privacy laws and cable television bills, of course, are only the tip of the legislative iceberg. In recent years, state legislatures have enacted bills on a host of privacy-related topics. One example is the trend involving consenting-adults legislation. Since the Illinois Legislature decriminalized private sexual conduct between consenting adults in 1961, many other state legislatures followed suit. When two state legislatures refused to decriminalize such private behavior, their state supreme courts voided criminal laws on constitutional privacy grounds. Thus, Pennsylvania and New York were added to the list of reformed jurisdictions. Two other legislatures reformed their criminal laws on private sexual behavior, but later rescinded that action: Idaho, prior to the effective date of the reform; Arkansas, by re-criminalizing private homosexual conduct only, after two years of both heterosexual and homosexual decriminalization.

While about half of the states have yet to decriminalize private sexual conduct between consenting adults, a check of the 1980 census figures indicates that a majority of the population in this country now resides in jurisdictions recognizing that government has no business invading the privacy of the bedroom.

The Privacy Journal's compilation of privacy laws shows significant legislative agendas, all across the country, on a wide range of problems, including: Arrest Records, Bank Records, Computer Crime, Credit Practices, Justice Information Systems and Government Data Banks, Employment Records, Insurance, Mailing Lists, Medical Records, Polygraph Testing, Evidentiary Privileges, School Records, Tax Records, and Wiretaps.

On the following pages, we present a tabulation of state privacy legislation.

STATES DECRIMINALIZING PRIVATE SEXUAL CONDUCT *

Alaska

California

Colorado

Connecticut

Delaware

Hawaii

Illinois

Indiana

Iowa

Maine

Nebraska

New Hampshire

New Jersey

New Mexico

New York

North Dakota

Ohio

Pennsylvania

South Dakota

Vermont

Washington

West Virginia

Wyoming

* This chart is limited to areas not involving commercial sexual conduct or adulterous cohabitation.

Note: Pennsylvania and New York had their statutes voided by judicial decisions. The remaining states decriminalized through the legislative process. While criminal sanctions have not formally been removed from the law in Massachusetts, the Supreme Judicial Court has indicated that private consensual conduct is beyond the legitimate interest of the state. This state as well as 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 the statute which criminalizes private homosexual conduct in that state, unconstitutional. The case is presently on appeal.[168a]

STATE AND FEDERAL PRIVACY LAWS

	ARREST RECORDS	BANK RECORDS	COMPUTER CRIME	CREDIT REPORT. AND INVEST.	CRIM. JUSTICE INFO. SYSTEMS	DATA BANKS IN GOV'T.	EMPLOYMENT RECORDS	INSURANCE	MAILING LISTS	MEDICAL RECORDS	MISCELLANEOUS	POLYGRAPHING IN EMPLOYMENT	PRIVACY STAT./ STATE CONST.	PRIVILEGES	SCHOOL RECORDS	SOC. SECURITY NUMBERS	TAX RECORDS	TELEPHONE SOLICITATION	WIRETAPS
ALABAMA		X								X	X			X					X
ALASKA		X			X					X		X	X	X			X	X	X
ARIZONA	X		X	X	X				X	X		X	X.		X		X		X
ARKANSAS					X	⊗				X						X			X
CALIFORNIA	X	X	X	X	X L	⊗ L	X	X		X	X L	X	X		X			X	X
COLORADO	X		X		X	X				X				X	X		X	X	X
CONNECTICUT	X	X		X	X	⊗	X			X		X		X	X				X
DELAWARE	X									X		X	X	X	X		X		X
D.C.	X									X		X							X
FLORIDA	X	X	X	X L					X	X			X		X	X		X	X
GEORGIA					X					X			X	X		X	X		X
HAWAII	X	X			X					X	X	X	X				X		X
IDAHO		C			X					X		X		X	X		X		
ILLINOIS	X	X	X		X	X		X		X	X		X		X			X	X
INDIANA	X				X	⊗			X	X	X			X		X			
IOWA		X			X		X			X					X			X	X
KANSAS				X	X					X							X		X
KENTUCKY				X		X				X	X			X	X		X		X
LOUISIANA	X.	X			X			X		X	X.		X	X	X		X		X
MAINE				X	X	X	X			X			X		X	X	X		X
MARYLAND	X	X	•	X	X		X	X		X		X		X	X		X	X	X
MASSACHUSETTS	X			X	X	⊗	X			X	X	X	X	X	X		X		X
MICHIGAN			X		X		X			X		X		X	X			X	X
MINNESOTA	X	X			X	⊗			X	X		X		X	X		X		X
MISSISSIPPI										X				X	X				
MISSOURI	X									X				X					
MONTANA				X	X				X	X		X	X	X	X				
NEBRASKA											X		X	X	X		X	X	X
NEVADA	X								X	X				X	X				X
NEW HAMPSHIRE		X		X	X	X				X									X
NEW JERSEY	X	C						X		X		X		X	X				X
NEW MEXICO	X		X	X	X					X		X		X					X
NEW YORK	X			X		X	X		X	X	X	X	X	X	X		X		X
NORTH CAROLINA		C	X		X	X L	X			X				X	X		X	X	X
NORTH DAKOTA										X	X				X		X		X
OHIO	X					⊗ L	X			X				X			X		X
OKLAHOMA		X		X	X	X				X			X	X	X	X	X		X
OREGON	X						X			X	X	X		X	X		X		X
PENNSYLVANIA							X			X		X	X						X
RHODE ISLAND	X		X							X		X	X	X	X		X		X
SOUTH CAROLINA	X				X			X					X				X		
SOUTH DAKOTA										X				X	X		X		X
TENNESSEE	X				X					X				X	X		X		
TEXAS				X		L				X				X	X				
UTAH	X	X	X		X	⊗				X			X	X			X		
VERMONT										X	X	X					X		
VIRGINIA				X	X	⊗		X		X	X		X	X	X	X	X	X	X
WASHINGTON	X				X	X			X	X		X	X	X	X		X		X
WEST VIRGINIA	X									X							X		
WISCONSIN							X			X	X		X	X	X		X	X	X
WYOMING										X				X	X				
FEDERAL LAW		X		X	X	⊗	X	X	X	X	X				X	X	X		X

X = state law on the books

⊗ = "Fair Information Practices Acts."
C = significant court decision affecting privacy.
L = local ordinance within the state.

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PERSONAL PRIVACY AND PUBLIC OPINION IN THE UNITED STATES

In a 1973 survey of American young people, there was nearly a consensus among both college and non-college youth that "people's privacy is being destroyed" by our society.[169]

Several years later, a survey of a representative cross-section of the adult American population showed that the overwhelming majority of Americans are concerned about threats to personal privacy.[170]

A discussion of personal privacy in America would not be complete without looking at public attitudes on this subject. A number of polls and surveys conducted in recent years have contained questions concerning privacy. The staff of this Commission has examined many of them, and a few significant results are presented in the tables on the following pages.[171]

The Dimensions of Privacy

The most comprehensive national opinion research survey the Commission staff was able to locate on privacy in America was commissioned several years ago by Sentry Insurance Company. The results of this $600,000 research project were published in 1979 in a study book entitled The Dimensions of Privacy. The information in this section of our Report is based on the Sentry survey, which was conducted by the independent national opinion research firm of Louis Harris and Associates.

The primary focus of the study was to learn to what degree privacy can and should be protected in an intensely service-oriented, technologically-based society -- a society whose collective "marketplace" is fundamentally fueled by the collection, storage, and use of personal information about its citizens.[172]

A representative cross-section of 1,513 American adults was interviewed, including 618 representatives from ten selected leadership groups; 42 law enforcement officials, 33 state insurance commissioners, 53 federal regulatory officials involved with privacy-related regulation, 77 Congress people who have been involved with privacy legislation; nearly 300 executives speaking on behalf of employers, computer companies, life insurance companies, banks, and credit card companies.

Sentry's study singled out five general areas for exploration:

- The Personal Dimensions of Privacy -- how Americans, as individuals, perceive privacy today and the degree to which they feel their privacy has been eroded in recent years.

- The Employer/Employee Relationship -- how Americans assess their privacy at work and what privacy rights they feel they should have at work.

- The Privacy-Intensive Industries -- how Americans view the degree to which industries such as insurance, credit, medical, computer, etc., have invaded their privacy.

- Government and Privacy -- how Americans feel about the way federal, state and local government agencies collect and use personal information about individuals.

- How to Protect Privacy -- what the public wants protected by law and by private enterprise to ensure a fair balance between the desire for privacy and the need for personal information to obtain various services and benefits.

Personal Dimensions

According to the Harris survey, one out of every three Americans believes that our society is very close to or already like the type of society described by George Orwell in his book 1984, a society in which "virtually all personal privacy had been lost and the government knew almost everything that everyone was doing."

One in two Americans is worried about how government is using personal information it has collected, as well as how private businesses are using such information.

When speaking of invasions of privacy in the private sector, people believe that finance companies, credit bureaus, insurance companies, credit card companies, and the media are the biggest invaders of privacy. Regarding the public sector, people believe that the I.R.S., C.I.A., F.B.I., government welfare agencies, and the Census Bureau are the greatest violators.

For the most part, a majority of Americans believes that "non-public" activities involving a "moral" issue should be left to the individual to decide

and should not be decided by law. For example, most believe that homosexual relations in private between consenting adults (70%) and heterosexual relations between unmarried adults (79%) are areas of private choice that should be left to the individual and not regulated or forbidden by law. A smaller group, but still a majority, feels similarly about an individual's decision to have an abortion (59%) and to smoke marijuana (55%).

Employment Dimensions

The survey further indicated that the public and leadership groups are adamant that employers should not ask job applicants about the kinds of friends they have, the type of neighborhood they live in, or for information about their spouses or their membership in political or community organizations.

Over half of the public and leaders surveyed feel that employers should not collect information such as race, credit standing, records of arrest that did not result in a conviction, or results of psychological tests.

By an 84% to 14% majority, employees feel that the practice of listening in on conversations of employees to find out what they really think about supervisors should be forbidden by law. Of the employees, 69% feels that installing closed circuit television to check on employee performance should also be forbidden by law; 65% believes that the law should prohibit employers from even asking a job applicant to take a lie detector test.

A large majority of the public believes that an employee should have the right to review and question information contained in the employee's file.

83% feels that it is "very important" that an employer should inform an employee prior to releasing any personal information from employee files. 92% believes that employers should have a specific company policy designed to safeguard the information contained in employee personnel and medical files.

65% states that a law should be passed to specify what rights employees have regarding access to their personnel files.

Government Practices

Over 80% of the public feels that a court order should be required prior to police opening mail, tapping a telephone, or looking into bank records.

Although law enforcement is nearly evenly divided in its opinion, 72% of the public feels that police should not be able to stop anyone on the street to demand identification, unless the law has been violated.

Even though it may be extremely costly and time consuming to the government, the public insists (85%) that individuals have access to any records that the government keeps about them.

Private Industry

A growing issue with the public involves the increasing use of computers by businesses and the inherent dangers to personal autonomy. Those who feel that computers are a real threat to privacy jumped from 37% in 1976 to 54% in 1978.

One in four consumers says that he or she has been refused credit. Of those who have been refused, a majority claims that the denial was based upon unfair and incomplete information.

With respect to companies offering health or life insurance, a majority of the public believes that companies should not be permitted to ask for information regarding the applicant's lifestyle (77%), the applicant's moral character (71%), his or her income (70%), or criminal record (60%). Respondents feel that these companies should not be allowed to: (1) investigate an applicant's personal life to see if he or she is frequenting dangerous bars or sections of town (85%); or (2) use a central computer to find out if the applicant has ever been turned down for life or health insurance (68%).

As for automobile insurance carriers, the public believes that they should not have the right to information on an applicant's moral character (71%), credit standing (53%), or length of time the applicant has lived at his or her present address (51%).

With respect to homeowners' insurance, 73% would oppose any on-site company inspection of their home to determine which contents would be covered.

The public and the insurance industry are in disagreement as to who should determine what information may be collected by insurance companies. While 79% of the insurance company respondents feels that this should be left up to the insurance industry, 65% of the public states that it should be determined by law.

Only a small minority of respondents is critical of the information practices of doctors and hospitals. 91% feels that patients should have the legal right to see their medical records. 87% wants their doctor to tell them all the relevant information about an illness, even if it were to mean one might be told that one were dying.

When questioned about the media, large majorities of both the public and leadership groups feel that publication of the following items would be an invasion of privacy: (1) the details of an extramarital affair that a public official was having with another person; (2) the names of people on welfare; and (3) a photograph of a well known politician entering a pornographic book store. But a majority in these groups also feel that publication of the following information would not violate personal privacy: (1) names of doctors who receive large sums of money under Medicare and Medicaid; (2) names of people arrested for drug possession; and (3) contents of confidential government documents that would reveal incompetence or dishonesty of public officials. A majority of the public favors the confidentiality of a journalist's notes and sources, but also insists that the press should respect the privacy of juveniles who have only been accused of committing a crime but who have not been convicted.

Protecting Privacy in the Future

The Harris survey further revealed that when members of the public think about life in the United States a few years from now, they feel we will have lost much of our ability to keep important aspects of our lives private from the government. Sometimes the public sees government as a privacy invader, sometimes as a privacy protector.

When asked who had primary responsibility in the battle to protect privacy from continuing erosion, more people stated that "the people themselves have a major responsibility for protecting privacy" than those who were satisfied to rely merely on the courts, Congress, state governments, or the President. However, the public does not want to fight the battle without some assistance from a government agency designed to handle privacy complaints, preferably an agency at the state rather than the federal level.

84% states that it is very important that only essential information be collected by private industry, namely, information that is necessary to make a proper decision. 88% believes that private businesses should be required to

disclose, in advance, how they will use the personal information they collect. 74% goes even further and would require that these companies explain in writing why information is needed. 91% state that it is very important that their permission be secured before personal information is released by a company to other organizations or to government. 85% considers it very important that individuals have access to files on them in order to verify their accuracy.

The public wants additional legislation to protect against privacy invasions in health care, insurance, employment, mailing lists, credit, and phone records. People want to stem the tide of some serious privacy-invading trends.

Although public opinion is only one factor in creating a comprehensive privacy protection policy through legislation or administrative regulation, it is an important consideration. Privacy surveys clearly indicate that the public feels threatened by the continuing erosion of privacy in America.

Through both research and direct contact with the public, the Commission on Personal Privacy has found that threats to personal privacy are a major concern not only to Californians, but to all Americans.

The Commission commends Sentry Insurance Company for its substantial contribution to privacy research. The Dimensions of Privacy has assisted this Commission in developing a better understanding of the dynamics of personal privacy invasions and of the public's determination to have meaningful privacy protection. The Commission urges organizations in the private sector to conduct and support further research and educational projects concerning the right of personal privacy.

ISSUE:	YEAR:	POLLSTER:	QUESTIONS POSED:	RESPONSE:
DATA COLLECTION AND DISSEMINATION				
Government Records	1981	Lou Harris	Do you favor or oppose cutting back on the access people have to government records about themselves and public officials under the Freedom of Information Act?	Favor: 33% Oppose: 63%
Census Records	1978	NBC	By law, census information is strictly confidential. Do you think that, in spite of this, high government officials have access to census information about individuals?	Yes: 68% No: 22%
F.B.I. Records	1978	Roper	What type of information about you should the FBI have or not have?	
			• sexual history	Should have: 15% Should not have: 81%
			• neighbors' opinions as to your moral character	Should have: 15% Should not have: 81%
			• which periodicals you subscribe to	Should have: 16% Should not have: 80%
			• your credit rating	Should have: 26% Should not have: 70%
			• your tax returns	Should have: 30% Should not have: 65%

ISSUE:	YEAR:	POLLSTER:	QUESTIONS POSED:	RESPONSE:
DATA COLLECTION AND DISSEMINATION				
Private Enterprise	1974	Roper	These are some suggestions to control the flow of personal information about you. Do you think there should be a law or one isn't needed to achieve these results?	
	consumer or client consent		• any organization that has personal information about you should be required to get your permission before passing it on to others	Should be law: 89% Law not needed: 7%
	fairness		• anyone should have the right to have his criticisms or corrections included in a file about him	Should be law: 86% Law not needed: 8%
	disclosure		• if a firm has a file on you it should be required to let you know what types of information it has	Should be law: 83% Law not needed: 13%
	personal access		• for small service charge, anyone should be able to get a copy of his file from any organization that has one on him	Should be law: 81% Law not needed: 13%
Social Security #	1974	Roper	No one should be required to give his SS # to anyone unless the law specifically requires it.	Should be law: 67% Law not needed: 27%

ISSUE:	YEAR:	POLLSTER:	QUESTIONS POSED:	RESPONSE:
DATA COLLECTION AND DISSEMINATION				
Mailing Lists	1974	Roper	With respect to the selling of mailing lists, do you think that the following groups you are associated with or do business with should be allowed to give your name and address to others, or should there be a law against it?	
			• magazine you subscribe to - - -	Be allowed: 18% Law against: 70%
			• mail order store or company - -	Be allowed: 17% Law against: 70%
			• company where you have a credit card - - - - - - - - - - -	Be allowed: 16% Law against: 72%
			• charitable organization you contributed to - - - - - - - - -	Be allowed: 18% Law against: 70%
			• Department of Motor Vehicles -	Be allowed: 15% Law against: 71%
			If you wanted to stop the use of your name and address in this way now, do you think it would be possible?	Yes: 33% No: 51% Unknown: 16%
T.V. News Media	1981	ABC	It's okay for TV news to invade the privacy of ordinary people while gathering a news story.	Agree: 18% Disagree: 79%

ISSUE:	YEAR:	POLLSTER:	QUESTIONS POSED:	RESPONSE:	
NATIONAL IDENTIFICATION CARD	1977	Gallup	Do you believe everyone in the U.S. should be required to carry an identification card containing, among other things, his picture and his fingerprints?	Yes: No:	45% 50%
			How about an identification card such as a social security card?	Yes: No:	65% 30%
	1977	Roper	Would you like to see a national identity card issued to all citizens, which would be shown to an employer to get a job, a policeman on request, and which would help cut down on illegal immigration?	Yes: No: Mixed Feelings:	51% 33% 12%
	1979	Roper	Do you think that security problems will require U.S. citizens to carry a national i.d. card by 1990?	Likely: Not likely:	42% 51%
	1980	Gallup	Do you believe that everyone in the U.S. should be required to carry an identification card, such as a social security card?	Yes: No:	62% 33%
	1981	LA Times	Do you think that every worker should be required to have some kind of national i.d. in order to be able to get a job?	Yes: No:	54% 41%

ISSUE:	YEAR:	POLLSTER:	QUESTIONS POSED:	RESPONSE:
GOVERNMENT EFFORTS TO PROTECT PRIVACY		Roper	Should government be making a major effort, some effort, or no effort to seek ways to protect the privacy of individuals in our society?	
	1974			Major effort: 54% Some effort: 31% No effort: 11%
	1975			Major effort: 56% Some effort: 32% No effort: 8%
	1976			Major effort: 56% Some effort: 31% No effort: 9%
	1977			Major effort: 51% Some effort: 34% No effort: 12%
	1978			Major effort: 44% Some effort: 36% No effort: 15%
	1979			Major effort: 46% Some effort: 37% No effort: 13%
	1980			Major effort: 43% Some effort: 38% No effort: 15%

Over 80% of the people consistently wanted a government effort to seek ways to protect the privacy of individuals in our society.

ISSUE:	POLLSTER & YEAR:	QUESTIONS POSED:	RESPONSE:
PRIVACY AND YOUTH	Yankelovich, Skelly and White	• Privacy is an important personal value:	
		College Youth	
		1969	62% agree
		1973	71% agree
		Non-college Youth	
		1969	74% agree
		1973	78% agree
		• Welcome more acceptance of sexual freedom:	
		College Youth	
		1969	43% do
		1973	61% do
		Non-college Youth	
		1969	22% do
		1973	47% do
		• Abortion is morally wrong	
		College Youth	
		1969	36% agree
		1973	32% agree
		Non-college Youth	
		1969	63% agree
		1973	48% agree
		• Casual premarital sex is wrong	
		College Youth	
		1969	34% agree
		1973	22% agree
		Non-college Youth	
		1969	58% agree
		1973	34% agree

PERSONAL PRIVACY IN CALIFORNIA

Tuesday, November 7, 1972, was an historic day for the rights of privacy. By nearly a two-to-one margin, approximately five million California voters determined that the state Constitution would be amended to include "privacy" among other inalienable rights.[173]

Prior to this amendment, privacy had received piecemeal protection from California courts, either through the development of the common-law tort of invasion of privacy, or through constitutional limitations on searches and seizures conducted by the police. In hindsight, it appears that the voters' mandate was a demand for comprehensive, rather than patchwork, protection of privacy.

The election pamphlet, which explained that year's ballot measures and presented arguments for and against them, stated:[174]

> Privacy is not now guaranteed by our state constitution. This simple amendment will extend various court decisions on privacy to ensure protection of our basic rights.

Although there had been no prior express privacy provision in the Constitution, some, but not all, aspects of privacy were already protected by other constitutional provisions as they had been interpreted by the California courts.

Privacy as an Implicit Constitutional Guarantee

The first major privacy case in California was decided in 1931 by the Court of Appeal. The plaintiff alleged that a movie producer had invaded her privacy by basing portions of a movie on true facts dredged up from her remote past, thereby subjecting her to ridicule and shame within her community. One of her causes of action was based upon the "right of privacy."[175] The trial court dismissed her complaint as failing to state a cause of action, there having been no statutory or judicial precedent for such a cause of action in California.

In that case, Melvin v. Reid, the Court of Appeal noted that the law of privacy was of recent origin and that the question was a new one in California.[176] After reviewing the law of other jurisdictions, the court concluded that, in practically all jurisdictions in which the courts have refused to recognize the right of privacy, the decisions were based upon the

lack of a statute on the subject. Although there was no privacy statute in California, the Court found a stronger basis for protecting privacy, namely, the provision in article 1, section 1, which listed "the pursuit of happiness" as a fundamental right. The Court wrote:[177]

> In the absence of any provision of law we would be loath to conclude that the right of privacy as the foundation for an action in tort, in the form known and recognized in other jurisdictions, exists in California. We find, however, that the fundamental law of our state contains provisions which, we believe, permit us to recognize the right to pursue and obtain safety and happiness without improper infringements thereon by others. . . .
>
> The right to pursue and obtain happiness is guaranteed to all by the fundamental law of our state. The right by its very nature includes the right to live free from the unwarranted attack of others upon one's liberty, property, and reputation. Any person living a life of rectitude has that right to happiness which includes freedom from unnecessary attacks on his character, social standing, or reputation.
>
> . . . We believe that the publication by respondents of the unsavory incidents in the past life of appellant after she had reformed, coupled with her true name, was not justified by any standard of morals or ethics known to us and was a direct invasion of her inalienable right guaranteed to her by the Constitution, to pursue and obtain happiness. Whether we call this a right of privacy, or give it any other name is immaterial because it is a right guaranteed by our Constitution that must not be ruthlessly and needlessly invaded by others.

Thus, the right of privacy became rooted in California jurisprudence and has developed and flourished ever since. However, this "implicit guarantee" of article 1, section 1 of the state Constitution never received application to situations outside of tort law. The California courts used either the federal Constitution and its implicit privacy protections, or the state Constitution's seach-and-seizure provisions to check governmental privacy infringements.

California privacy cases decided after Melvin v. Reid but before the 1972 Voter's Privacy Amendment, fall into one of three categories: (1) use of common law tort principles to support privacy lawsuits against the media or private organizations; (2) use of the federal Constitution and its implicit privacy protections to limit government regulation of personal decisions and associations; and (3) use of state and federal search-and-seizure amendments to combat intrusive police practices.

It wasn't until the Fifties that the California Supreme Court gave its blessing to the doctrine announced by the Court of Appeal in Reid. In the case of Gill v. Curtis Publishing Company, the Supreme Court made its first privacy pronouncements:[178]

> Recognition has been given of a right of privacy, independent of the common rights of property, contract, reputation and physical integrity, generally described as "the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In short it is the right to be let alone." [citing Reid.]
>
> . . . There are more states which have recognized such a right than have not, and the former represents the modern trend. . .
>
> We believe the reasons in favor of the right are persuasive, especially in the light of the declaration by this court that "concepts of the sanctity of personal rights are specifically protected by the Constitution, both state and federal, and the courts have properly given them a place of high dignity, and worthy of especial protection."

Reasonable Expectations of Privacy

In addition to torts, the other area of privacy law that received substantial judicial attention before the 1972 Voters' Amendment is commonly known as search-and-seizure law. Article 1, section 13 (formerly article 1, section 19) of the California Constitution contains a prohibition against unreasonable searches and seizures much like the Fourth Amendment to the United States Constitution.

In 1963, the California Supreme Court discussed the requirement of judicial involvement prior to the police search of a home, noting that the

purpose is to preserve personal privacy:[179]

> 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.
>
> . . . "[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."

Just a few years earlier, California courts were faced with a most difficult task -- deciding how to enforce the restrictions against unreasonable searches and seizures. In the mid-fifties, the exclusionary rule was adopted as the most effective measure to restrict unbridled police misconduct.[180] On any number of occasions, the California courts have explained the purpose of the exclusionary rule. The exclusionary rule is a judicial device that prevents evidence from being introduced into a court proceeding if that

evidence was illegally obtained by the police. This remedy was fashioned in order to preserve judicial integrity by preventing complicity of a judge in illicit police conduct. The courts also knew that most innocent parties would never have an opportunity to challenge illegal police spying because, if someone is not arrested or prosecuted, the person lacks either knowledge of the illegal search or an expedient forum in which to complain. One such comment on the exclusionary rule was delivered by the Court in 1973 in a case in which the police had systematically and surreptitiously spied on numerous patrons of a public restroom:[181]

> 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.

Privacy Under Article 1, Section 13

As a safeguard against unreasonable searches or seizures by the police, the California Constitution provides protection that is similar in purpose, but quite independent in force, from the Fourth Amendment to the United States Constitution. Privacy law in California has developed steadily under article 1, §13 (formerly article 1, §19), which reads:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.

This provision of the California Constitution has been held to protect individuals against unreasonable governmental actions only, not against purely private intrusions.[182]

Although early California cases indicated that the privacy protection afforded by this section of the California Constitution was "essentially identical" to the rights secured by the Fourth Amendment, later cases have departed from that principle.[183] With the blessing of the United states Supreme Court, the California courts retain the power, in interpreting the state Constitution, "to impose higher standards on searches and seizures than required by the federal Constitution."[184] In a considerable number of cases, the California courts have provided more personal privacy protection than the United states Supreme Court would have done, under similar circumstances. This principle is often referred to as the doctrine of "independent state grounds." Technically speaking, any court in California is free to invoke "independent state grounds" in making its decision in a case. However, only this year, one Court of Appeal expressed reservations about this principle, stating, "[W]e believe that the issue of whether independent state grounds should be invoked is one primarily for the Supreme Court of California and not an intermediate appellate court."[185]

Just as the protections of the Fourth Amendment are not limited to searches and seizures that invade the privacy of the home, neither are the protections under article 1, §13 so limited. In discussing the broad protection afforded by this section of the California Constitution, the California Supreme Court has noted:[186]

> The crucial fact . . . [is] neither the manner of observation alone nor the place of commission alone, but rather the manner in which the police observed a place -- and persons in that place -- that is ordinarily understood to afford personal privacy to individual occupants. Of course, clandestine observations by police officers of premises devoted to common use by the general public -- such as, for example, the shopping areas and public hallways and elevators of the department store here involved -- is not prohibited by our decision . . . .
>
> But it is equally clear that authority to maintain clandestine surveillance of common use public places and persons therein is not the equivalent of license to surreptitiously invade the right of personal privacy of persons in private places. Man's constitutionally protected right of personal privacy not only abides with him while he is the householder within his own castle but cloaks him when as a

> member of the public he is temporarily occupying a room — including a toilet stall — to the extent that it is offered to the public for private, however transient, individual use.

Usually the privacy protection of article 1, §13 is raised in a criminal setting by someone whose privacy rights are directly invaded, but sometimes a criminal defendant invokes the "vicarious exclusionary rule," that permits a vindication of the rights of someone whose privacy was violated but who, for some reason, is not on trial.[187] Furthermore, according to the California Court of Appeal, it appears that article 1, §13 may also be invoked in non-criminal settings:[188]

> [T]he United States Supreme Court in Katz v. United States [citation] added a new dimension to search and seizure law. The individual is protected under the Fourth Amendment to the federal Constitution from government intrusion where (1) he has exhibited a reasonable expectation of privacy, and (2) that expectation had been violated by an unreasonable government intrusion. The Katz concepts parallel similar reasoning with roots in the California Constitution (art. 1, § 13) prohibiting unreasonable searches and seizures. While the Katz rule grows from a criminal setting, these parallel constitutional provisions protect the individual in as yet unmeasured, unexplored noncriminal fact settings where the individual has a reasonable expectation of privacy from state intrusion.

The test for determining whether the restrictions of article 1, §13 have been violated has three components: (1) Did the individual claiming the violation subjectively have an expectation of privacy? (2) Was that expectation objectively reasonable under the circumstances? and (3) Was the intrusion accomplished by unreasonable governmental action?[189]

Thus, the legal principles that apply to personal privacy as it is protected by article 1, §13 of the California Constitution have been generally spelled out by the courts. This provision of the California Constitution:

- Prohibits governmental action, not private action.
- Is similar in purpose to the Fourth Amendment.
- Gives more protection than its federal counterpart.

- Affords the exclusionary rule as the remedy.
- Can be invoked in criminal and non-criminal cases.
- Protects objectively reasonable privacy expectations.
- Prohibits unreasonable governmental intrusions.

These preliminary pages on personal privacy in California have concentrated on privacy developments distinct from the 1972 Voters Amendment. By now it should be clear that the California courts could have fashioned comprehensive privacy protections, even without the 1972 Amendment that added the word "privacy" to the state Constitution. Privacy was considered implicit in the constitutional protection of "the pursuit of happiness" and, thus, privacy found a place in tort law in California jurisprudence. This tort prohibits invasions of privacy caused by individuals and private organizations. Unreasonable governmental action is prohibited by article 1, §13 and its prohibition against unreasonable searches and seizures. This provision can be invoked in both criminal and non-criminal settings.

The 1972 Voter Amendment

Although the voters specifically amended article 1, §1 of the California Constitution in November 1972, it was not until March 1975 that this new privacy provision was interpreted by any California appellate court.

White v. Davis involved a taxpayer's suit seeking to enjoin a Los Angeles Police Department covert intelligence gathering operation. The suit alleged that, with the chief's authorization, members of the department, serving as secret informers and undercover agents, registered as students at a state university, attended classes, and submitted reports of class discussions involving no illegal activity to the police department, all in violation of the right of privacy.

After the trial court dismissed the lawsuit and entered a judgment for the police department, the Supreme Court reversed that decision and sent the case back for a trial on the merits, holding that if the allegations were true, they constituted a prima facie case for invasion of privacy in violation of this new privacy provision in article 1, §1.[190]

The Supreme Court noted that although the "general concept of privacy relates, of course, to an enormously broad and diverse field of personal action and belief," the moving force behind this new privacy provision was a

more focused privacy concern "relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society." Thus, the Court acknowledged that the new provision's primary purpose was to afford individuals some measure of protection against this most modern threat to personal privacy.[191]

Resorting to the state's election brochure and the ballot argument in favor of the amendment as the only "legislative history" available, the Court quoted from it at some length, and then distilled the "principal mischiefs" at which the amendment was directed:[192]

> (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.

Writing for a unanimous Court, Associate Justice Tobriner also stated that this amendment was "self-executing," needed no enabling legislation, and "creates a legal and enforceable right of privacy for every Californian."[193]

The 1972 privacy amendment differs from traditional privacy principles in at least two major ways. The first distinction pertains to the reach of constitutional privacy protections. The 1972 amendment distinguishes the scope of the California Constitution from that of the federal Constitution. The federal Constitution protects individuals against invasions of privacy caused by government agencies only, but not against infringements caused by other individuals or by businesses. This distinguishing factor was emphasized by the Court of Appeal in the next major privacy case decided under the 1972 amendment. Porten v. University of San Francisco held that:[194]

> Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone.

The Porten case also emphasized the second area in which the 1972 amendment differed from previous privacy principles, namely, a departure from traditional tort law. In this case, the plaintiff sued the university for disclosing to the State Scholarship and Loan Commission, without his consent, the grades he had received at an out-of-state school prior to transferring to San Francisco. He alleged in his complaint that he had been assured by the University that those grades would be used solely for the purpose of evaluating his application for admission, that they would be kept confidential, and they would not be disclosed to others without his express permission. He further alleged that the State Scholarship and Loan Commission did not ask the University to send Porten's transcript from Columbia University and that the Commission did not have a need for that information.

The University answered these allegations with a demurrer, stating that even if these allegations were true, they did not state a cause of action for invasion of privacy. The University relied on settled principles of tort law that, "[e]xcept in cases of physical intrusion, the tort must be accompanied by publicity in the sense of communication to the public in general or to a large number of persons as distinguished from one individual or a few."[195]

The Court of Appeal acknowledged that, under tort law, the gravamen is unwarranted publication of the details of someone's life. In this case, since the University's communication had been to only a few people, there could be no cause of action under the usual tort theories. However, the Court also held that, if true, there would be liability under article 1, §1.

Referring to the four principal mischiefs articulated in the case of White v. Davis, the Porten Court stated, "Appellant's complaint obviously involves a far different factual situation from that before the court in White; appellant contends that the allegedly unauthorized transmittal of his Columbia University transcript to the State Scholarship and Loan Commission falls within the proscribed third 'mischief' — '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.'"[196]

While the first cases involving the 1972 amendment presented questions concerning its protection of informational privacy, the California courts were soon faced with conflicts involving decisional and associational privacy interests, in which the litigants sought protection under article 1, §1.

When the National Organization for Reform of Marijuana Laws invoked the privacy amendment before the Court of Appeal as a basis for enjoining

the enforcement of the state's marijuana laws, the Attorney General argued that the plaintiff organization lacked standing to claim protection from the privacy amendment because this amendment was limited to protecting informational privacy rights. In a decision upholding the constitutionality of California's marijuana laws, the Court of Appeal held that privacy protections emanating from the 1972 amendment were not confined to informational privacy rights. The Court noted that previous Supreme Court decisions involving that amendment had never purported to constrain its application to the area of informational privacy.[197]

Any remaining doubts were cast aside in 1980 when the Supreme Court held that the privacy provision in article 1, §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."[198] In their dissent from that holding, Justices Richardson and Clark made it clear that they would have restricted the protection afforded privacy under this 1972 amendment to cases involving only the four principal informational privacy mischiefs.

Subsequent cases coming before the California Supreme Court in which the Court has voided regulations infringing upon decisional and associational privacy rights, clearly indicate the comprehensiveness of the 1972 amendment.[199] That amendment has served one of the key purposes stated in the 1972 election brochure -- to extend various court decisions on privacy to ensure protection of our basic rights.

On a related note, on more than one occasion the California Supreme Court has held that the 1972 amendment provides greater protection for decisional/associational privacy rights than does the federal Constitution.[200]

The addition of "privacy" to article 1, §1 in 1972, was intended to supplement existing privacy protections, not to swallow them up. The protection of privacy afforded under the provisions of article 1, §13, which prohibit unreasonable searches and seizures and which provide the exclusionary rule as a device for enforcing that prohibition, should not be confused with the features of the 1972 amendment. Some litigants have been rebuffed by the courts when they have failed to keep these distinctions in mind.

Article 1, §13 operates against state action in a search-and-seizure context -- not against private action, and probably not against other types of privacy infringements caused by government activities. The remedy for a violation of privacy under article 1, §13 is the exclusion of illegally obtained

evidence from being used in a court proceeding. Apparently, the courts not only will provide monetary or injunctive relief for violations of the 1972 amendment, but will also invoke the exclusionary rule in appropriate cases where police conduct has violated its privacy protections.[201] A private cause of action or even a taxpayers' suit may be used to implement article 1, §1. Successful litigants may recover attorney fees under the private attorney general doctrine.[202]

It seems that the one common feature of both article 1, §1 and article 1, §13 may be the test employed by the courts as to whether a violation has occurred. The test as to whether there has been a violation under §13 and its search-and-seizure restrictions is whether a person has exhibited a reasonable expectation of privacy, and, if so, whether that expectation has been violated by unreasonable government intrusion. Although the 1972 amendment broadened the scope of protection considerably, the California Court of Appeal, in discussing distinctions between these two independent privacy provisions, held that "the constitutional amendment did not alter the fundamental rule that an individual's expectation of privacy must be objectively reasonable before he can complain of any intrusion."[203]

Thus, the contours of the 1972 amendment have been partially revealed and can be summarized as follows:

- The provision is self executing.
- Private as well as state action is restricted.
- Unreasonable information practices are prohibited.
- Personal decisions and associations are protected.
- One remedy is a private cause of action.
- The exclusionary rule may be invoked for police transgressions.
- It provides more protection than under federal law.
- Objectively reasonable privacy expectations are required.
- Methods of intrusion must not be unreasonable.

RESOLUTION OF PRIVACY CONFLICTS BY THE CALIFORNIA COURTS

Before examining recent California legislative and administrative activity on privacy-related issues, we pause to consider how the California state courts have been resolving privacy conflicts. Because so many controversies involving personal privacy will find their way into the California judicial system, it is necessary to analyze the applicable rules and guidelines that have emerged for judicial resolution of such conflicts so that future policies and practices on privacy will survive judicial scrutiny.

This section of the Report will discuss judicial duties and constitutional priorities, touchstones for judicial determination of a privacy conflict, and will present an overview and categorization of major privacy cases arising under article 1, §1 and other privacy protections.

An examination of the cases passing through the California judicial system, particularly at the appellate level, shows that there has been a sharp increase in the number of cases in which privacy arguments have been raised and considered by the courts. Excluding search-and-seizure cases decided under the Fourth Amendment or the equivalent section of the California Constitution, there were only a few privacy cases in California prior to the 1972 Voter Amendment.

The first significant privacy case to be heard by the California appellate courts was decided in 1931. Other than that case, Melvin v. Reid, the Thirties saw only one other privacy case and in that case, privacy was mentioned only in dicta.[204] Our research uncovered no significant appellate case during the Forties. The Fifties saw two tort cases involving the motion picture industry.[205] In addition to the usual run of search-and-seizure cases, the Sixties saw a sprinkling of privacy conflicts dealing with the media, grooming standards for students and teachers, and freedom of choice in family planning (viz., voluntary sterilization and abortion).[206] The early Seventies produced a number of privacy conflicts, all decided on grounds other than the 1972 Voter Amendment. Confidential communications between therapist and patient, grooming standards for job seekers, and parental rights in sex education controversies, were all issues that arose between 1970 and 1975.[207] Again, eliminating the search-and-seizure cases, less than a dozen significant privacy cases were published by the California appellate courts in the forty-four years following the Reid case.

White v. Davis, as it was discussed earlier in this Report, was the first

case to be decided under the 1972 amendment to article 1, §1. In the three years immediately following the decision in White, the number of privacy cases decided by the California appellate courts matched the number that had been decided during the previous four and one-half decades.[208]

Eighteen appellate cases involving the privacy provision of article 1, §1, were decided in 1979 alone. Nine cases involving that privacy provision were published in 1980. Another nine cases were decided during 1981 and the first few months of 1982. Thus, after eliminating the search-and-seizure cases, some 61 privacy cases remain in the body of California law. Of this total, 20% was decided before the 1975 decision of White v. Davis (covering a span of 44 years), and 80% was decided during the past 7 years. There can be no doubt that the amount of privacy litigation in California has significantly increased since the voters categorized privacy as an "inalienable" right.

The bulk of privacy cases decided 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. A few of the cases were determined solely under the right of privacy as it is implicitly protected in the federal Constitution.[209] Some cases grounded the protection in both the state and federal Constitutions, and others did not specify whether the decision was based on state or federal grounds.

The most recent articulation regarding judicial responsibilities in resolving privacy disputes is found in the case of Committee to Defend Reproductive Rights v. Myers.[210] The problem in that case concerned the amount of protection the right of privacy would afford to the matter of procreative choice. The precise question in Myers was "whether the state, having enacted a general program to provide medical services to the poor, may selectively withhold such benefits from otherwise qualified persons solely because such persons seek to exercise their constitutional right of procreative choice in a manner which the state does not favor and does not wish to support."[211]

The California Supreme Court used the Myers case to "reiterate the basic principles of federalism which illuminate [the Court's] responsibilities in construing our state Constitution."[212] Referring to the 1975 case of Peoplev. Brisendine, the Court stated:[213]

In emphasizing, in People v. Brisendine [citation] "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, we affirmed in Brisendine that state courts, in interpreting constitutional guarantees contained in state constitutions, are "independently responsible for safeguarding the rights of their citizens."

Contrary to the Attorney General's rhetoric, such independent construction does not represent an unprincipled exercise of power, but a means of fulfilling our solemn and independent constitutional obligation to interpret the safeguards guaranteed by the California Constitution in a manner consistent with the governing principles of California law. As we explained very recently . . . "just as the United States Supreme Court bears the ultimate responsibility for determining matters of federal law, this court bears the ultimate judicial responsibility for resolving questions of state law, including the proper interpretation of provisions of the state Constitution. In fulfilling this difficult and grave responsibility, we cannot properly relegate our task to the judicial guardians of the federal Constitution, but instead must recognize our personal obligation to exercise independent legal judgment in ascertaining the meaning and application of state constitutional provisions."

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."[214]

Territorial Privacy in California Case Law

Tort law, search-and-seizure law under the Fourth Amendment of the United States Constitution and under article 1, §13 of the California Constitution, as well as article 1, §1 of the California Constitution, have all contributed to a body of case law in this state protecting personal privacy against unreasonable physical or sensory intrusions.

The use of force to restrain an individual's freedom of movement would, of course, be a clear violation of personal privacy.[215] Likewise, activities that cause an intrusion into the physical solitude or seclusion of another may give rise to a privacy lawsuit.[216] One such case occurred when the Los Angeles Free Press printed a sexually inviting advertisement that identified a woman's name and address. After having received numerous indecent letters from prisoners and other persons, and having been subjected to personal visits to her home by "unsavory characters," the woman sued the newspaper, claiming that the advertisement caused her privacy to be invaded. She alleged that she had not placed the ad and that it appeared without her knowledge and without her consent. Her young daughter joined in the lawsuit, also suing the Free Press for invasion of privacy. Responding to the defendant's argument that only the mother could sue for the privacy invasion because privacy is a personal right and generally cannot be raised by anyone other than the person whose interest is directly invaded, the court concluded, "Frankie does not seek to recover based upon the derogatory information implied about Norma in the advertisement. Frankie seeks to recover for the physical intrusion by various unsavory characters on her own solitude in her own home. As stated by Prosser, 'plaintiff's right is a personal one, which does not extend to members of his family, unless, as is obviously possible, their own privacy is invaded along with his.'"[217]

Several leading cases in California have focused on the sanctity of the home and restrictions against unreasonable intrusions that violate this most respected sanctuary of privacy. Search-and-seizure restrictions imposed by the state and federal Constitutions require that, except in extremely narrow circumstances, neither an arrest nor a search may occur inside a home unless a warrant has been obtained in advance.[218] General principles allowing a search or seizure based upon probable cause ordinarily do not apply to intrusions into a home. The Supreme Court has stated that "[t]he 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."[219] Similarly, on another occasion the Court noted:[220]

> 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 envisaged by the Constitution. It is essential that the dispassionate judgment of a magistrate, an official dissociated from the "competitive enterprise of ferreting out crime" [citation], be interposed between the state and the citizen at this critical juncture. 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 portentious power to be left to the uninhibited discretion of the police alone.

Police officers have sometimes used subterfuge in order to avoid the requirements for a warrant prior to an arrest or a search inside a home. When the police used fraudulent tactics in order to gain "consensual" entry, the Supreme Court of California declared that the entry was unlawful and that the evidence obtained was subject to the exclusionary rule.[221] A contrary conclusion was reached in two cases decided by the California Court of Appeal wherein the police used a ruse to trick the occupants into leaving their homes.[222] In one case, the Court of Appeal reached its decision "with certain reservations and invite[d] the California Supreme Court to consider the validity of such a ruse in light of the right of privacy . . . . 'The right of privacy is the right to be left alone.' [Citation.] It might be argued that appellant's right to be left alone in his home was violated when the police telephoned him."[223]

A number of California cases dealing with territorial privacy rights has involved situations outside the home but where the individuals nonetheless had legitimate complaints about sensory intrusions into private areas.

In Britt v. Superior Court, a police officer secreted himself in an area adjacent to toilet stalls in a public restroom and spied on anyone who happened to come in. Eventually he arrested a man who engaged in sexual activity. The Supreme Court later held that the officer's visual search

violated reasonable expectations of privacy, thereby excluding the evidence from use at trial, under the exclusionary rule.[224]

Responding to the decision in Britt, several police departments made arrangements with parks and recreation departments to remove the doors from the toilet stalls in men's restrooms in many locations. This strategy was intended to foreclose any claim as to the reasonableness of any subjective expectations of privacy an occupant might assert. Eventually, the courts rejected the theory that there could be no reasonable expectation of privacy under such circumstances. In People v. Triggs, a doorless-stall case, the police hid in a plumbing area and spied on the occupants of a restroom through an opening in the attic.[225] The Supreme Court of California was unanimous in its opinion that the testimony of the police officer as to what he observed was secured as a result of an illegal search and should have been excluded at trial. In passing judgment in this case, the Court noted that "clandestine observations of restrooms do not fall from the purview of the Fourth Amendment merely through the removal of toilet stall doors."[226]

Other cases falling into this category of privacy conflicts have involved the use of one or more methods to aid the senses during the surveillance. People v. Arno involved the use, by the police, of optical aids, namely, binoculars and telescopes, to conduct visual surveillance of an office building where they suspected obscene films were being stored and prepared for distribution.[227] A police officer positioned himself on a hilltop about 300 yards away from the office building, and, for a period of some six hours, he observed activities in the building with a set of high powered binoculars. The drapes were open in the particular office where the defendants conducted their business. Later the officer placed the defendants under arrest for possession of obscene materials with intent to distribute them. The defendants' motion to suppress the officer's optically aided view was denied and they appealed. On appeal, the Court discussed the general principles of law pertaining to such sensory invasions of privacy:[228]

> Some California decisions have noted but not finessed the issue of the validity of optically aided views in the context of the protection of the right of privacy guaranteed by the Fourth Amendment as explicated in Katz v. United States. [Citations.] To our knowledge, however, no California decision has addressed the issue. Neither have we found any reported California case considering the impact of article 1, section 1, of the California Constitution upon the problem.

We start then with Katz v. United States [citation]. . . . The Katz court rejected a prosecution argument founded on the proposition that the phone booth was partially constructed of glass so that the defendant could be seen inside it. It said: "But what [the defendant] sought to exclude when he entered the booth was not the intruding eye -- it was the uninvited ear."

Given today's state of technology, it is impossible to conceptualize a legally significant difference between electronically aided aural perceptions and optically aided visual view. As electronic bugs and remote microphones have made it possible to intrude upon private conversation surreptitiously in an Orwellian degree, so have modern optics made possible the same sort of visual intrusion. Employment of today's technology of sophisticated optical systems, infrared process, and computer image enhancement carry the range of eyesight far beyond that of the spyglass. It can hardly be argued that the late unlamented activity of the break-in to the premises of the Democratic National Committee in the Watergate complex would have been less intrusive had the sought-after results been achieved by modern technology located outside the building.

The federal constitutional right against intrusion into the reasonable expectation of privacy is amplified by the specific right of privacy guaranteed by article 1, section 1, of the California Constitution. The California constitutional guarantee is motivated by concern against contemporary society's accelerating encroachment upon personal freedom and security caused by increased surveillance and data collection. [Citation.] It seems virtually tailored to meet the situation here involved.

We thus view the test of validity of the surveillance as turning upon whether that which is perceived or heard is that which is conducted with a reasonable expectation of privacy and not upon the means used to view it or hear it. So long as that which is viewed or heard is perceptible to the naked eye or unaided ear, the person seen or heard has no reasonable expectation of privacy in what occurs. Because he

> has no reasonable expectation of privacy, government authority may use technological aids to visual or aural enhancement of whatever type available. However, reasonable expectation of privacy extends to that which cannot be seen by the naked eye or heard by the unaided ear. . . .
>
> Here the activity seen through Johnson's 10-power binoculars within suite 804 was not observable to anyone not using an optical aid. It was as much protected from the uninvited eye as was Katz's conversation from the uninvited ear. We hence conclude that the municipal court erred in denying defendants' motion to suppress the product of Johnson's observations.

Thus, California privacy law protects the individual against physical 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, §1 of the 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, §13 affords the protection of the exclusionary rule for governmental violations of settled principles of search-and-seizure law.

These are the existing remedies for physical or sensory intrusions into private areas. The Commission on Personal Privacy 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 this 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 right of personal privacy, under both the state and federal Constitutions, protects certain personal decisions and associations from unwarranted interference. In this sense, personal privacy can be equated with personal autonomy, that is, freedom of choice over basic aspects of daily living and over one's personal destiny. The major legal conflicts that have arisen in California concerning this aspect of privacy seem to fall into four major categories: sexual privacy and reproductive rights; cohabitation and alternate families; personal appearance and grooming standards; medicine and drugs.

• • •

As to whether the federal constitutional right of privacy protects one's decisions regarding one's personal appearance, the United States Supreme Court once noted, "[W]hether the citizenry at large has some sort of 'liberty' interest within the Fourteenth Amendment in matters of personal appearance is a question on which this Court's cases offer little, if any, guidance."[229] Six years have elapsed since the Court issued that statement, and over those years no significant pronouncements have been made by the Court on this subject. The degree to which the right of privacy protects decisions regarding personal appearance can only be gleaned from decisions of the lower federal courts and from opinions of the California appellate courts.

The California cases in which grooming standards have been challenged have usually involved students, teachers, and those seeking unemployment benefits. Out-of-state litigation has involved police grooming standards as well.

Notwithstanding some pronouncements by state and federal judges that freedom to wear one's hair at a certain length (and to make determinations regarding one's personal appearance) is constitutionally protected, student legal challenges to school grooming standards have usually failed when balanced against competing interests.[230] Courts have been especially receptive to arguments of school officials who have introduced evidence in court to show that the wearing of beards or long hair, as a matter of actual experience, constituted a disruptive influence on the educational process. In answering one student's argument that such policies violated his right of privacy, the Court of Appeal stated:[231]

> It is next urged that because a beard cannot be donned and doffed for work or play as wearing apparel generally can . . . the

> Board's ruling has the effect of extending into petitioner's home life, thereby violating his right of privacy. . . . This argument has been advanced before . . . [T]he answer was stated thusly: "[T]he domain of family privacy must give way insofar as a regulation reasonably calculated to maintain school discipline may affect it. The rights of other students, and the interests of the teachers, administrators and the community at large in a well-run and efficient school system are paramount."

Out-of-state cases on this subject have been mixed. A United States Court of Appeals has held that in Tennessee a high school principal's enforcement of a school board regulation prohibiting male students from wearing excessively long hair did not violate the constitutional right of privacy of the students or their parents.[232] The same result was reached by a federal appellate court in Texas.[233] A contrary result was reached in a case involving a school district in Pocatello, Idaho.[234] The Alaska Supreme Court has held that the right to be let alone, including the right to determine one's own hairstyle in accordance with individual preferences and without interference from government officials or agents, is a fundamental right under the Alaska Constitution.[235] Thus, whether a grooming standard will survive judicial scrutiny will usually depend on whether decisions regarding personal appearance are considered a part of the fundamental right of privacy in any particular jurisdiction. If the right of privacy applies, then the regulations are unlikely to meet the "compelling state interest" test. If personal appearance decisions are not protected by the right of privacy, then a regulation of appearance may be upheld if the schocl board is able to produce evidence showing that the regulation is based upon a rational objective.

Both the federal district court and the United States Court of Appeals for Wisconsin have recognized the importance of personal decisions regarding one's physical appearance. The Court of Appeals has held that the right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution, and the protection is applicable to states through the due process clause of the Fourteenth Amendment.[236] The federal district court in Wisconsin recognized that:[237]

> Freedom of an adult male or female to present himself or herself physically to the world in the manner of his or her choice is a highly protected freedom, and an effort to use the power of the state to impair that freedom must bear "a

substantial burden of justification" whether the attempted justification be in terms of health, physical danger to others, obscenity, or "distraction of others from their various pursuits."

The most recent case expounding on the issue of personal appearance rights involved an unemployed auto mechanic who had let his hair grow thirteen inches in length and had kept it tied behind his head in a "ponytail. He also wore a mustache and a full beard, which extended three or four inches below his chin. The Employment Development Department conducted a survey of auto mechanics in the region where the applicant lived and found that only about 10 percent of them would even consider hiring someone with such an appearance. The Department then denied his benefits on the ground that he had voluntarily disqualified himself by making himself "unavailable for work." Benefits were ordered withheld until the disqualifying conditions ceased to exist. In reviewing his appeal, the California Court of Appeal held:[238]

> The right to wear his hair and beard as he chooses is a "liberty" protected by the due process clauses of the state and federal Constitutions, and "although probably not within the literal scope of the First Amendment itself" is nevertheless entitled to its "peripheral protection." . . .
>
> And, as contended by Chambers, only a "compelling state interest" will justify a substantial infringement of such a constitutional right. . . .
>
> We observe no substantial distinction between an unemployed person who for one reason or another voluntarily renders himself unavailable for work, and another who refuses to work when it is offered. In each case the unemployed person has a clear constitutional right to do, or not to do, as he has chosen. But few would argue that the exercise of one's right not to work, somehow creates a constitutional right to unemployment relief.
>
> Essential to the integrity of California's unemployment relief program is the requirement that unemployed persons, when possible, render themselves available for work, for otherwise benefits would be paid to those who could be working, but chose not to, thus defeating the fundamental

purpose of the statute.

> We are therefore impelled to, and do, hold that California has a "compelling state interest" in requiring one seeking unemployment relief shall keep himself available for employment. It follows that such "peripheral" First Amendment or other right as Chambers may have to retain his selected hair styling must in the public interest, if he wishes unemployment benefits, yield to the dictate of [the code].

An earlier California case upheld the right of a teacher to wear a beard. In discussing the meaning of the word "liberty" contained in the Fourteenth Amendment, the Court of Appeal asked, "[M]ay appellant's right to wear a beard while assigned to classroom teaching at John Muir High School be properly deemed one of these constitutionally unnamed but constitutionally protected personal liberties under the due process provisions of the federal and state Constitutions?" In the next breath, the Court answered, "We believe that it may, and that it should be."[239] Because there was nothing in the record to show that, as a matter of actual experience, the wearing of beards by teachers at the school in question disrupted or impaired classroom discipline or the teaching process, the teacher's constitutionally protected right of personal appearance prevailed.

Thus, freedom of choice in matters of personal appearance is a constitutionally protected right in California, subject to overriding business or societal interests according to the circumstances of each case.

• • •

A second major area involving decisional/associational privacy concerns sexual privacy and reproductive rights. Soon after Griswold was decided by the Supreme Court of the United States, the California courts began applying Griswold principles to family planning. In 1967, the Court of Appeal held that voluntary sterilization was not against public policy in this state and was probably protected under the rationale of Griswold.[240] Two years later, the California Supreme Court made it clear that the right of privacy protects decisions relating to "marriage, family, and sex."[241] In that case, the Court upheld a woman's right to choose whether to bear children or not, thus placing the abortion decision within her personal control.

In 1973, a group of students and student organizations brought suit challenging statutory provisions that prohibited the mailing of information concerning abortion and unsolicited advertisements of birth-control devices,

making such mailings crimes. In voiding the statute, the federal district court in Los Angeles stated:[242]

> Individuals have a fundamental right to privacy and personal choice in matters of sex and family planning, and this right encompasses not only the abortion decision, but also the decision regarding whether and what types of methods of contraception and family planning may be used to prevent conception. . . . [B]irth control and abortion are topics of extreme importance to the people of this country and the world, about which there should be open discussion and dissemination of ideas. No interference with the rights involved can be justified without a significant governmental interest.

On a more restrictive note, in 1976, the California Supreme Court held that the state could legitimately require those who assist in childbirth to have valid medical licenses, thus upholding the authority of the state to prosecute those who practice "midwifery" without a professional license:[243]

> Plaintiffs assert that if section 2141 is construed to prohibit attending and assisting a pregnant woman in childbirth, it violates the expectant mother's right of privacy. They argue that a woman's right to privacy encompasses the liberty to choose whomever she wants to assist in the delivery of her child.
>
> In recent years the constitutional right to privacy, derived from the First, Fourth, Fifth, Ninth and Fourteenth Amendments, has been substantially expanded to protect certain personal choices pertaining to child-rearing, marriage, procreation and abortion. [Citations.] However, the right of privacy has never been interpreted so broadly as to protect a woman's choice of the manner and circumstances in which her baby is born. Indeed, Roe, supra, appears specifically to exclude the right to make such choices from the constitutional privacy right. In Roe, the United States Supreme Court held expressly that the state may proscribe the performance of an abortion at any stage of pregnancy by a person who is not a licensed physician. [Citation.] More significantly, the court held that at the point of viability of the

> fetus, the state's interest in the life of the unborn child supersedes the woman's own privacy right, and at that point (the beginning of the third trimester) abortion may be prohibited except where necessary for preservation of the mother's life or health. [Citation.]
>
> It is true that the Legislature has never attempted to require women to give birth in a hospital or with a physician in attendance, just as it has not generally sought to compel adults to obtain medical treatment. But the state has a recognized interest in the life and well-being of an unborn child. [Citations.] For the same policy reasons for which the Legislature may prohibit the abortion of unborn children who have reached the point of viability, it may require that those who assist in childbirth have valid licenses.

Because the Legislature decriminalized private sexual conduct between consenting adults in 1976, the California Supreme Court was never faced with the ultimate decision as to whether criminal statutes prohibiting such conduct were violative of the right of privacy in the California Constitution. However, in a roundabout way, the California Court of Appeal has on more than one occasion indicated that sexual autonomy is protected by the right of privacy.

In 1979, two appellate cases were decided in which lower courts were ordered to restrict their previously issued discovery orders so as not to conflict with the right of sexual privacy. In Fults v. Superior Court, a paternity suit brought by the district attorney, the Court of Appeal ordered the trial court to vacate its discovery order with respect to defendant's inquiries into plaintiff's sexual activities unrelated to the possible period of conception.[244] The Court of Appeal discussed this aspect of privacy:[245]

> Although it has barely been six years since the people elected to place privacy among the inalienable rights expressly guaranteed in the Declaration of Rights, traditional principles of constitutional law inform its application. Before 1972, privacy had been identified as a fundamental liberty implicitly guaranteed by the federal Constitution. [Citations.] As a fundamental liberty, it is protected even from incidental encroachment absent the demonstration of some compelling interest that is both legitimate and overriding.

> The right of privacy may be invoked by a litigant as justification for refusal to answer questions which unreasonably intrude on that right. . . .
>
> The right of privacy does not come into play simply because some litigant would rather not reveal something. But just as the interrogatories in Britt v. Superior Court . . . dealt with the recognized right of associational privacy [citation] and the interrogatories in Valley Bank of Nevada v. Superior Court [citation] dealt with the recognized expectation of privacy in personal financial affairs [citation] these interrogatories deal with a well established "zone of privacy," one's sexual relations. . . .
>
> Answers to questions about petitioner's sexual relations, therefore, may not be required absent a compelling state interest that is promoted by requiring her response. There is just such an interest here, "the historically important state interest in facilitating the ascertainment of truth in connection with legal proceedings. [Citation.] Where paternity is the issue, petitioner cannot refuse to answer all questions about her sexual activity on the plea that it is a private matter. But she has not done so. She has answered the questions about her sexual relations during the period of conception and the period surrounding that time. That question, unlike the challenged interrogatories, could not [but] help, in the nature of things, from eliciting a productive answer. The very gravamen of petitioner's suit provided foundation for the inquiry. But questions about petitioner's sexual life during periods totally removed from the possible period of conception cannot stand on their own. Their scope is not tailored to fit the purpose.

Because the interrogatories were not narrowly drawn to elicit information about a relevant period of time, and because they probed into the most intimate aspects of petitioner's sexual life, the court held that the questions were constitutionally overbroad and ordered the trial court to modify its discovery order.

The other case decided that year pertaining to sexual privacy involved a wrongful-death action by a father and his three minor children to recover

damages resulting from the death of his wife. The question before the court in Morales v. Superior Court was "whether a plaintiff in a wrongful-death action may be compelled to disclose information regarding his extramarital sexual activities during the period of his marriage to decedent."[246] This question had not previously been answered in California.

In exploring the issues, the Court noted that this was not simply a fishing expedition because there was evidence that the plaintiff possibly had frequent sexual relations with other women during his marriage to the decedent. Evidence of such conduct would be relevant, the court said, to the very nature of the personal relationship and thus as to whether there was any loss of love, companionship, comfort, affection, society, solace, moral support or enjoyment of sexual relations (as was alleged in the complaint filed by plaintiff). However, in a wrongful-death action, the appropriate inquiry is the nature of the relationship at the date of the death. Thus, the court held that what happened ten years before the death may or may not be relevant. Since the trial court limited its discovery order to relations that occurred within two years of the death, the Court of Appeal felt this was not improper or unreasonable for discovery purposes only. However, the Court finally held that the right of privacy of other women who might have been sexually involved with plaintiff precluded plaintiff from being ordered to surrender their names, addresses, and phone numbers in the discovery proceedings. In discussing the right of sexual privacy, the Court wrote:[247]

> [P]rivacy was identified as a right protected by the federal Constitution in Griswold v. Connecticut . . . and its application to sexual matters has been steadily expanded. . . . We follow the holdings that there is a right of privacy in sexual matters and that it is not limited to the marital relationship. However, we believe that the right is not absolute. . . . Because of the constitutional interests at stake, however, the authorities establish that private associational affiliations and activities . . . "are presumptively immune from inquisition . . ." [citation] and thus the government bears the burden of demonstrating the justification for compelling disclosure.

After reviewing the standards requiring a compelling state interest before privacy rights are invaded, the Court stated, "We believe the same principle and the same tests apply to privacy in sexual matters."[248] The

outcome of the case finally turned on the fact that the privacy of the possible sexual partners was also at stake and that they had not waived any of their rights, as the plaintiff had, by filing a lawsuit that brought into question these sexual activities. Therefore, the court held that the plaintiff could be required to disclose the nature and the number of such relationships during the two years preceding his wife's death but should not disclose the names, addresses, and phone numbers, as he had been requested to do.

An interesting sexual privacy case was decided by the Court of Appeal in 1980. In Lasher v. Kleinberg, a woman brought a paternity suit against her newborn's natural father to establish his paternity and for child support.[249] The father counter-sued on the theory that the mother had committed the tort of misrepresentation and should be liable to him in damages for any amounts he might have to pay in child support. He claimed that she had deliberately lied to him when she had told him she was using contraceptives. Relying on this misrepresentation, he had intercourse with her that later resulted in the birth of this child. The Court of Appeal had to determine whether this misrepresentation was an actionable tort. In its opinion, the Court of Appeal denied any legal basis for recovery on the theory of misrepresentation, relying on the right of privacy as a basis for keeping the courts out of such a controversy.[250]

> The claim of Stephen is phrased in the language of the tort of misrepresentation. Despite its legalism, it is nothing more than asking the court to supervise the promises made between two consenting adults as to the circumstances of their private sexual conduct. To do so would encourage unwarranted governmental intrusion into matters affecting the individual's right to privacy. In Stanley v. Georgia [citation] the high court recognized the right to privacy as the most comprehensive of rights and the right most valued in our civilization. Courts have long recognized a right of privacy in matters relating to marriage, family, and sex. . . .
>
> We reject Stephen's contention that tortious liability should be imposed against Roni, and conclude that as a matter of public policy the practice of birth control, if any, engaged in by two partners in a consensual sexual relationship is best left to the individuals involved, free from any governmental interference.

The most recent and probably the most elaborate opinion exploring the right of sexual privacy was decided only last year by the California Supreme Court. The Budget Acts of 1978, 1979, and 1980, passed by the California Legislature, excluded funds for payment for elective abortions under the Medi-Cal program. In Committee to Defend Reproductive Rights v. Myers, the decision noted that similar federal funding restrictions had been upheld by a closely divided United States Supreme Court. Being bound by the federal precedent insofar as the right of privacy in the federal Constitution was involved, the Court looked to article 1, §1 of the state Constitution to decide this controversy. The Court discussed traditional principles of federalism, the doctrine of "independent state grounds," and the impact of the 1972 Voters' Amendment on the development of privacy law in California. The Court also noted its own leadership role in protecting personal privacy, such as its decision in 1969 that brought procreative choice within the ambit of privacy protections -- some four years before the United States Supreme Court reached the same conclusion.

The outcome of the Myers case turned upon whether the funding restriction could pass the so-called "Danskin-Bagley Test." This test was created by the California courts to measure whether restrictions contained in a public benefit program were constitutional or not. Under this test, the government bears a heavy burden to justify restrictions that exclude participation in such a program on the basis of a would-be recipient's not exercising a constitutional right, or exercising it in a particular manner. Under this test, (1) the state must establish that the imposed conditions relate to the purpose of the legislation that confers the benefit or privilege, and (2) the conditions annexed to the enjoyment of the publicly conferred benefit must reasonably tend to further that legislative purpose, and the utility in imposing the conditions must manifestly outweigh any resulting impairment of constitutional rights, and (3) the state must establish the unavailability of less offensive alternatives and demonstrate that the conditions are drawn with narrow specificity, restricting the exercise of constitutional rights only to the extent necessary to maintain the integrity of the program that confers the benefit.[251]

The funding restrictions on abortions failed to satisfy this test and, therefore, the legislation was declared unconstitutional as violating the right of privacy contained in article 1, §1.

Another line of cases on decisional and associational privacy involves cohabiting couples and alternate families. Most of these cases have arisen over the past several years and concern employment rights, housing rights, child custody and visitation, or public benefits programs.

In 1967, after having been hired as a postal clerk in San Francisco, Mr. Mindel was called in for an interview with his employer because an investigation had disclosed that he had been living with a woman without the sanctity of marriage. He was later terminated from employment because the Civil Service Commission determined he was guilty of "immoral conduct" and was therefore unsuitable for employment in the federal service. Mindel appealed through all available administrative channels, but to no avail. On March 30, 1970, the United states District Court for the Northern District of California issued its decision and order reinstating him:[252]

> Even if Mindel's conduct can be characterized as "immoral," he cannot constitutionally be terminated from government service on this ground absent a rational nexus between this conduct and his duties as a postal clerk. . . .
>
> It should be well established today that no person can be denied government employment because of factors unconnected with the responsibilities of that position. . . .
>
> The government cannot condition employment on the waiver of a constitutional right; [citation] even in cases where it has a legitimate interest, it may not invade "the sanctity of a man's home and the privacies of life. [Citations.] Here, of course, the Post Office has not even shown a rational reason, much less the "compelling reason" required by Griswold, to require Mindel to live according to its special moral code.

Two years later, the federal courts held that the states cannot, in the name of morality, infringe on the rights to privacy and freedom of association in the home.[253] Thus, restrictions on food stamp eligibility for cohabiting indigent couples were voided.

In 1976, the California Court of Appeal invalidated, on privacy grounds, Kern County's public housing policy of excluding unmarried couples from participating in that program.[254]

The past two years have produced a number of cases involving the privacy rights of unmarried cohabiting couples and the rights of persons who

choose to form and maintain an "alternate" family. In the Wellman case, the Court of Appeal invalidated a lower court visitation order that stated:[255]

> Petitioner shall have no overnight visitation with a member of the opposite sex, in the presence of the children, until or unless she is married to that individual.

Wellman was a dissolution proceeding in which the parties entered the trial court with a stipulation on all issues except spousal support and attorney fees. Mrs. Wellman was to have custody of the three children, ages 8, 10, and 13. During questioning regarding her need for spousal support, mention was made of the fact that she had been associating with another man. At this point, the trial judge took over further questioning and began interrogating Mrs. Wellman regarding the frequency and location of her sexual relationships with the man and about the possibility of her marrying him. The trial judge inquired of her whether she thought it was inappropriate to have an overnight gentleman guest when the children were home, to which she replied that the only time they had sexual relations was when they were certain the children were asleep. In addressing the rights of parents as to the manner of raising children, the Court of Appeal stated:[256]

> [T]he state has no general authority to dictate to parents the manner in which they should raise their children. "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'" [Citations.] The right to "raise one's children" has been characterized as "essential" and a "basic civil [right]." [Citations.] The "right to parent," if it can be called that, is of course subject to limitations.

In reversing the lower court's order, the Court of Appeal concluded:[257]

> We do not mean to suggest that a person's associational or even sexual conduct may not be relevant in deciding a custody dispute, where there is compelling evidence that such conduct has significant bearing upon the welfare of the children objectively defined. Here, however, the parents had

> no dispute between them as to physical custody; the court took it upon itself to raise the issue of appellant's relationship with Mr. Silver; there was no investigative custody report and no evidence in the record as to the impact of that relationship upon the children; and the trial court declined to hear the only evidence that was offered. Assuming arguendo that the trial court had jurisdiction to consider custody in such a situation, and that its jurisdiction to consider custody included jurisdiction to issue supplemental orders vital to the children's interest, the order in question on this appeal is so intrusive upon the privacy and associational interests of the mother and so lacking in evidentiary support in terms of the interests of the children that it cannot be sustained.

The rights of those who choose to form and maintain "alternate families" have received the attention of the California Supreme Court on two occasions in the past two years. In the first case, City of Santa Barbara v. Adamson, the Supreme Court voided, on privacy grounds, a single-family zoning ordinance that prohibited the occupancy of residences by household members who were not related by traditional family ties, namely, blood, marriage, or adoption. Twelve adults shared a 24-room, 10-bedroom, 6-bathroom house owned by Adamson. The occupants included a businesswoman, a graduate biochemistry student, a tractor-business operator, a real estate woman, a lawyer, and others, all in their late 20's or early 30's. After moving in, they became a close group, with social, economic, and psychological commitments to each other. They shared expenses, rotated chores, and had evening meals together. Two of them had contributed over $2,000 each to improving the house. Emotional support and stability were provided by the members to each other; they enjoyed recreational activities together; they chose to live together mainly because of their compatibility. But they did not fit the description of "single family" contained in the local zoning law, notwithstanding the fact that they regarded their group as a "family" and shared several values of conventionally composed families. Thus, the Supreme Court termed them an "alternate family."[258]

Finding the definition of "family" contained in the ordinance to be irrational and intrusive into family lifestyle decisions, the Court held that the rights of privacy and the pursuit of happiness contained in article 1, §1 of the state Constitution comprehend "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.[259]

The Adamson decision, coupled with the public benefits decision in Myers previously discussed, could have far reaching effects on the way in which state and local government programs treat the millions of people living in California's "alternate" families.[260] Public benefits programs that provide services or benefits to the conventional blood-marriage-adoption family but exclude "alternate" families from equal or similar treatment may be subject to constitutional challenges by those who are denied full participation. The theory, which has already been advanced in one case, is as follows: Although the government may not be constitutionally obliged to provide certain services or benefits to families, once it sets up a benefits program it may not limit participation in the program only to those who choose to maintain a conventional family. In other words, once the fundamental constitutional right to form and maintain an "alternate" family has been acknowledged, then direct or indirect governmental attempts to channel benefits toward only "traditional" families become constitutionally "suspect" and require a showing of "compelling state interests" to survive judicial scrutiny.

Just this year, the California Supreme Court handled an "Adamson/Myers" challenge to the family visiting program run by the California Department of Corrections.[261] Although a plurality of the justices upheld the department's exclusion of "alternate families" from the visiting program, there was no majority opinion in the case. Justices Richardson, Mosk, and Kaus formed the lead opinion, and avoided the application of the Adamson and Myers cases by holding them inapposite because those cases concerned the personal privacy rights of nonprisoners. "Rights of privacy," they stated, "like associational rights, are necessarily and substantially abridged in a prison setting."[262] Justices Bird and Broussard concurred in the result but not the reasoning of the majority. The concurring opinion raises administrative problems which, if overcome, could make the difference as to whether government benefits programs will survive the Adamson/Myers test in future litigation:[263]

> 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.

> However, the very diversity of the groups of people now commonly referred to as "families" highlights the difficulty that would be created if the prison authorities were required to grant family visits to prisoners who were not married. The prison authorities do have a security interest in prohibiting visits by transients, whose ties to the prisoners may be fleeting or tenuous at best. In the absence of a marriage certificate or a valid out-of-state common law marriage, it would be extremely difficult for prison officials to distinguish between valid long-term commitments that constitute a "family" and transient relationships. . . .
>
> In the absence of any reasonable alternative to distinguish between families and nonfamilies, the limitation of family visits to those who are married under the laws of this or another state is a valid restriction.

In a dissenting opinion, Justices Newman and Tobriner concluded that under the Adamson/Myers test, the distinction between traditional and extended families on the one hand, and alternate families on the other, should be declared invalid under article 1, §1 of the California Constitution. Had society provided an efficient mechanism for members of California's alternate families to declare their family status, it may be that Justices Bird and Broussard would have joined Justices Newman and Tobriner in forming a majority. Likewise, had the discrimination occurred in other than a prison setting, the lead opinion may have come to a different conclusion.

THE COMMISSION RECOMMENDS that the California Legislature enact procedures allowing members of California's "alternate 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 document evidencing such official declaration should be produced so that all Californians who are members of families can equitably share state and local resources. 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.

• • •

In 1979, the California courts resolved the extent to which the right of privacy's protection of personal decision-making, would prohibit the state from proscribing or regulating the personal use of medicine and drugs. The authority of the state to regulate in matters of health was affirmed in four cases.

In People v. Privitera, the California Supreme Court upheld the felony convictions of a medical doctor and others who were prosecuted for selling and prescribing Laetrile for the alleviation or cure of cancer.[264] Almost mirroring past decisions of the United States Supreme Court, the state high court noted that when it comes to matters of health, the government has very broad powers to regulate. Indeed, in many cases the state has exercised this power to prohibit entirely the use of certain drugs. Dr. Privitera invoked the right of privacy, under both the federal and state constitutions, in an attempt to heighten the burden of the prosecution from needing to show a mere "rational basis" for the regulation to having to meet the higher standard of a "compelling state interest." But the Supreme Court undercut this strategy and noted, "[E]ven statutes restricting exercise of a right found by the United States Supreme Court to be a fundamental privacy right are reviewed under the rational basis standard when the danger to health is significant."[265] Furthermore, the Court added:[266]

> However, a fundamental privacy right is not at stake here. The interest defendants allege is, apparently, "the interest in independence in making certain kinds of important decisions." [Citation.] But the kinds of "important decisions" recognized by the high court to date as falling within the right of privacy involve "'matters relating to marriage, procreation, contraception, family relationships, and child rearing and education,'" [citations], but do not include medical treatment.

Turning next to the state Constitution, particularly the 1972 Voters' Amendment, the Court examined its history and found no evidence of voters' intent to create within the state Constitution a "right of access to drugs of unproven efficacy."[267] The Court concluded:[268]

> In the absence of any evidence that the voters in amending the California Constitution to create a right of privacy intended to protect conduct of the sort engaged in by defendants, we have no hesitation in holding that section 1707.1 does not offend that constitutional provision.

Chief Justice Bird, herself a victim of cancer, saw the matter quite differently. In her dissent, the Chief Justice reviewed relevant state and federal law concerning the right of an individual to accept or reject medical treatment. She noted that this right-of-choice-of-medical-treatment concept has been the basis for judicial approval of personal decisions to choose apparently suicidal courses of treatment, to refuse treatment, or to discontinue extraordinary life sustaining treatment, thereby resulting in death.[269] She also examined California case law that considered as "axiomatic" the right to choose one's own lawful treatment.[270] The California Supreme Court has stated, "[A] person of adult years and in sound mind has the right, in the exercise and control over his own body, to determine whether or not to submit to lawful medical treatment."[271] Thus, the Chief Justice concluded in her dissent:[272]

> This state-protected right of privacy encompasses a fundamental and compelling interest of the cancer patient to choose or reject his or her own medical treatment on the advice of a licensed medical doctor. This right can be abridged only where there is a compelling need.

The following month, the California Court of Appeal held that "the criminalization of the personal use and possession of cocaine in the home does not constitute an invalid infringement on the right of privacy."[273] The Court upheld the authority of the Legislature to proscribe drug possession and sale and to fix penalties therefor. The Court found no constitutionally protected right to engage in the use of euphoric drugs.

Two marijuana cases were decided later in the year. The first was a suit brought by the National Organization for the Reform of Marijuana Laws. In its first cause of action, the plaintiff alleged that the statutes prohibiting use and possession of marijuana by adults violated the federal and state constitutional right of privacy. Noting that Alaska stands alone in its protection of marijuana-smoking in the privacy of the home, the Court held:[274]

> In our judgment, it follows that the right of privacy does not guarantee adult Californians the privilege of smoking a possibly harmful drug, even in the privacy of their homes.

In the second marijuana case decided that year, the Court of Appeal upheld the discipline of a police officer, on the ground that it was not unreasonable for a law enforcement agency to discipline for off-duty conduct by its officers which violates penal laws.[275]

Informational Privacy in California Case Law

In addition to the eighteen California cases dealing with decisional or associational privacy rights, and the eight cases involving physical or sensory intrusions into private areas, the Commission's staff has analyzed thirty-nine published opinions of the California appellate courts pertaining to informational privacy rights. Nearly half of these data-collection-and-dissemination cases addressed the relevance of the 1972 Voters' Amendment to information practices of the government or private enterprises.

These additional cases fall into three major groupings: (1) disclosure of personal information; (2) collection of personal information; and (3) discovery of personal information pursuant to administrative or judicial proceedings.

Discovery of Personal Information

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

Privacy invasions occur in a variety of discovery contexts: sometimes in an administrative hearing pertaining to a state-issued business or professional license; othertimes they occur in the course of a criminal prosecution; often discovery accompanies civil litigation. Discovery may be requested in purely private litigation, that is, where both adversaries are private parties. It may also be sought in cases where one party is the state.

The Fifth Amendment to the United States Constitution and its requirement that no person "shall be compelled in any criminal case to be a witness against himself" is one limitation on compelled disclosures, as is the corresponding section of the California Constitution.[276] These constitutional provisions were adopted as a means of limiting the almost unlimited power of government to compel the production of personal information and, of course, go hand-in-hand with the presumption of innocence.

In addition to the prosecution of criminal defendants, the government may be involved, directly or indirectly, in compelling the disclosure of personal information in other contexts. This section of the Commission's Report will explore the extent to which discovery practices have affected

personal privacy and the types of limitations judicially imposed on those who employ this powerful mechanism.

The United States Supreme Court, the ultimate authority on the First Amendment, has held that publication of accurate facts obtained by resorting to the public record is not actionable as an invasion of privacy.[277] In such cases, the First Amendment overrides state privacy laws. As a consequence, compelled disclosure pursuant to discovery proceedings can make personal information a matter of public record for a lifetime, either because the disclosure occurs in a public forum where members of the media or the public have a right to be present, or because the personal information finds its way into government records that are accessible to the public through subsequent discovery proceedings or under the California Public Records Act.[278] Sometimes even the intimate details of a person's life become generally known facts because personal information was subject to compelled disclosure through discovery.[279] Thus, discovery practices pose a significant danger to personal privacy in California.

An analysis of this area of law must include the 1970 case of In re Lifschutz.[280] Dr. Lifschutz was imprisoned for contempt of court for refusing to obey an order instructing him to answer deposition questions and to produce records relating to communications with a former patient. The order was issued in a lawsuit brought by the former patient against another individual for an alleged assault. During the course of his own deposition, the patient revealed that he had received psychiatric treatment some ten years earlier. This disclosure resulted in Dr. Lifschutz's being deposed. After Dr. Lifschutz asserted the psychotherapist-patient privilege as a ground for his refusal to disclose information about the plaintiff, the trial court overruled his objections because of a patient-litigant exception created by the confidentiality statute. After being held in contempt for refusing to answer and imprisoned therefor, the doctor sought a writ of habeas corpus from the Supreme Court of California. The Court granted a hearing but ultimately denied his petition, holding that there was no absolute privilege concerning all psychotherapeutic communications and that the patient, not the therapist, was the holder of the privilege.

Justice Tobriner, after noting that "a large segment of the psychiatric profession concurs in Dr. Lifschutz's strongly-held belief that an absolute privilege of confidentiality is essential to the effective practice of psychotherapy," replied for a unanimous Court:[281]

We recognize the growing importance of the psychiatric profession in our modern, ultracomplex society. The swiftness of change — economic, cultural, and moral — produces accelerated tensions in our society, and the potential for relief of such emotional disturbances offered by psychotherapy undoubtedly establishes it as a profession essential to the preservation of societal health and well-being. Furthermore, a growing consensus throughout the country, reflected in a trend of legislative enactments, acknowledges that an environment of confidentiality of treatment is vitally important to the successful operation of psychotherapy. California has embraced this view through the enactment of a broad, protective psychotherapist-patient privilege.

The nature of the actual interests involved in this case can only be properly evaluated against the California statutory background. Although petitioner, in pressing for judicial acceptance of a genuine and deeply held principle, seeks to cast the issue involved in this case in the broadest terms, we must properly address, in reality, a question of more modest dimensions. We do not face the alternatives of enshrouding the patient's communication to the psychotherapist in the black veil of absolute privilege or of exposing it to the white glare of absolute publicity. Our choice lies, rather, in the gray area.

Properly viewed, the broadest issue before our court is whether the Legislature, in attempting to accommodate the conceded need of confidentiality in the psychotherapeutic process with general societal needs of access to information for the ascertainment of truth in litigation, has unconstitutionally weighted its resolution in favor of disclosure by providing that a psychotherapist may be compelled to reveal relevant confidences of treatment when the patient tenders his mental or emotional condition an issue in litigation. . . .

. . . [W]e conclude that, under a properly limited interpretation, the litigant-patient exception to the psychotherapist-patient privilege, at issue in this case, does not unconstitutionally infringe the constitutional rights of privacy

> of either psychotherapists or psychotherapeutic patients. As we point out, however, because of the potential of invasion of patient's constitutional interests, trial courts should properly and carefully control compelled disclosures in this area in the light of accepted principles.

Relying on Griswold v. Connecticut as a foundation for his claim, Dr. Lifschutz argued for a constitutional privacy right for psychotherapists, independent of the rights of individual patients. To this the Court responded:

> It is the depth and intimacy of the patient's revelations that give rise to the concern over compelled disclosure; the psychotherapist, though undoubtedly deeply involved in the communicative treatment, does not exert a significant privacy interest separate from his patient. We cannot accept petitioner's reliance on the Griswold decision as establishing broad constitutional privacy rights of psychotherapists.[282]

To his argument that a requirement to reveal confidential matters would unconstitutionally impair the practice of his profession, the Court stated:[283]

> Legal requirements prescribing mandatory disclosure of confidential business records are of course regular occurrences [citations] and although all compelled disclosures may interfere to some extent with an individuals performance of his work, such requirements have been universally upheld so long as the compelled disclosure is reasonable in light of a related and important government purpose. [Citation.] In order to facilitate the ascertainment of truth and the just resolution of legal claims, the state clearly exerts a justifiable interest in requiring a businessman to disclose communications, confidential or otherwise, relevant to pending litigation.

As to the psychotherapist's claim of privilege, the Court concluded:[284]

> Although . . . Dr. Lifschutz on his own behalf can claim no constitutional privilege to avoid disclosure, he may in some circumstances assert the statutory privilege of his patient.

Justice Tobriner spent the rest of the opinion of the Court discussing the patient's right of privacy and the legal bases for its protection. The Court held that the patient's right of privacy and confidentiality falls within the zones of privacy acknowledged by Griswold and subsequent privacy cases. Therefore, protections for the confidentiality of psychotherapeutic sessions are not limited to statutory provisions.

The Court then interpreted the patient-litigant exception in a manner it deemed consistent with constitutional privacy considerations:[285]

> In light of these considerations, the "automatic" waiver of privilege contemplated by section 1016 must be construed not as a complete waiver of the privilege but only as a limited waiver concomitant with the purposes of the exception. Under section 1016 disclosure can be compelled only with respect to those mental conditions the patient-litigant has "disclose[d] . . . by bringing an action in which they are in issue." [Citation.] Communications which are not directly relevant to those specific conditions do not fall within the terms of section 1016's exception and therefore remain privileged. Disclosure cannot be compelled with respect to other aspects of the patient-litigant's personality even though they may, in some sense, be "relevant" to the substantive issues of litigation. The patient thus is not obligated to sacrifice all privacy to seek redress for a specific mental or emotional injury; the scope of the inquiry permitted depends upon the nature of the injuries which the patient-litigant has brought before the court.

The Court then established some guidelines for trial judges who handle these claims of confidentiality and counterclaims of exceptions. First, the burden is on the patient-litigant initially to submit some showing that a given confidential communication is not directly related to the issue he has tendered to the court. In determining whether the communications sufficiently relate to the mental condition at issue so as to require disclosure, the court should heed the basic privacy interests involved in the privilege; generally, the privilege is to be liberally construed in favor of the patient.[286] Next, even if the confidential communication is directly relevant to a mental condition tendered by the patient and is therefore not privileged, the court should consider ordering other protections that are available in

safeguarding the patient's privacy. Such protective orders include: (1) prohibiting certain matters from inquiry; (2) limiting the examination to certain matters, books, documents; (3) prohibiting anyone other than parties or their attorneys from being present at the examination; or (4) sealing of deposition or other records after discovery is permitted. With respect to examination at trial itself, the danger of publicity and embarrassment is increased. With respect to this problem, the Supreme Court also offered suggestions to trial courts. If the evidence is not directly relevant to a material issue in the case, the question can be disallowed on this ground. The court also retains discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice. . . ."[287]

Thus, using federal constitutional privacy law as a measuring stick, the California Supreme Court narrowed by interpretation the California statute creating the patient-litigant exception to the psychotherapist-patient privilege. This established a precedent in California that the courts will initially look to relevant legislation as a starting point in their analysis of a privacy conflict. But consistent with their duty to uphold the United States Constitution as the supreme law of the land, courts must measure such legislation against the minimum privacy-protection standards established pursuant to federal constitutional privacy principles. Otherwise, state legislation is subject to judicial invalidation or limitation by construction.

In another information practices case involving privacy claims, the California Supreme Court held that customer information voluntarily disclosed by a bank to law enforcement officers without a customer's knowledge or consent constituted the product of an unlawful search and seizure under article 1, §13 of the California Constitution. In that 1974 decision, the Court held:[288]

> It cannot be gainsaid that the customer of a bank expects that the documents, such as checks, which he transmits to the bank in the course of his business operations, will remain private, and that such an expectation is reasonable. . . .
>
> A bank customer's reasonable expectation is that, absent compulsion by legal process, the matters he reveals to the bank will be utilized by the bank only for internal banking purposes.

Thus, as a result of this decision, California bank customers can rely on the fact that law enforcement investigators are required to obtain a warrant prior to reviewing customer bank records, save an exception where the bank initiates an investigation for alleged fraud against the bank itself. Because of a 1976 United States Supreme Court ruling, bank customers may not rely on the protection afforded under the Fourth Amendment to the United States Constitution.[289] According to that decision, bank customers do not have a reasonable expectation of privacy in financial documents in the possession of the bank because the customers have lost their proprietary and possessory interest in those papers. This is another example of how California privacy law affords a greater degree of protection than do the minimum standards adopted pursuant to federal law.

In December 1975, the California Supreme Court handed down its second decision under article 1, §1 of the California Constitution. In Valley Bank of Nevada v. Superior Court, the Court considered under what circumstances a litigant may, through ordinary civil discovery procedures, obtain from a bank information disclosed to it in confidence by a customer.[290] The opinion held that "although such information is discoverable in a proper case, nevertheless the bank must first take reasonable steps to locate the customer, inform him of the discovery proceedings, and provide him a reasonable opportunity to interpose objections and seek appropriate protective orders."[291]

In this case, the bank had sued certain individuals to recover the balance on a promissory note. These individuals asserted a defense which they claimed required access to certain financial documents concerning non-parties to the lawsuit which were in the bank's possession. After the bank objected to disclosing these documents in the discovery proceedings, the trial court held a hearing and ordered them produced, on the ground that they were relevant to the litigation and were not covered by any legislative privilege. The bank sought a writ from the Supreme Court to prevent the disclosure.

The Supreme Court acknowledged that the requested records were "relevant" to the defense in this action. Also, under discovery statutes, information is discoverable if it is unprivileged and is relevant to the subject matter of the action or is reasonably calculated to reveal admissible evidence. Reviewing evidentiary privileges created by the Legislature, the Court found none covering bank-customer relationships. Writing for a unanimous Court, Justice Richardson stated:[292]

> [I]t is clear that the privileges contained in the Evidence Code are exclusive and the courts are not free to create new privileges as a matter of judicial policy. [Citations.] Nevertheless, despite the exclusivity of the Evidence Code on the subject of privileges and the absence of either a common law or statutory authority, overriding constitutional considerations may exist which impel us to recognize some limited form of prctection for confidential information given to a bank by its customers.

Referring to the 1972 Voters' Amendment that elevated the right of privacy in this state to an "inalienable right," Justice Richardson added, "we may safely assume that the right of privacy extends to one's confidential financial affairs as well as to the details of one's personal life."[293] Therefore, according to the opinion, courts should engage in a careful balancing of the right of civil litigants to discover relevant facts, on the one hand, with the right of bank customers to maintain reasonable privacy regarding their financial affairs, on the other. But under the statutory scheme in force at that time, no attempt was made to achieve such a balance. Pursuant to existing law, the bank had no obligation to oppose such discovery on behalf of its customers who generally were not aware of the proceedings, and so the disclosures often took place. The court found the existing statutory scheme inadequate to protect the bank customer's right of privacy, which is constitutionally founded. After adopting the discovery rules set forth above, the Court mentioned some protective measures to be considered when ordering such disclosures:[294]

> [C]ertain procedural devices which may be useful . . . to accommodate considerations of both disclosure and confidentiality . . . include deletion of the customer's name . . . ordering that the information be sealed . . . and the holding of in camera hearings. There may well be others which ingenious courts and counsel may develop.

In 1977, the Supreme Court considered arguments that its 1974 decision protecting bank customer records against disclosure to law enforcement officials without a warrant should be made retroactive to litigation pending on the date of that decision. In the case of People v. Kaanehe, the Court discussed the possibility of giving retroactivity to its former decision in Burrows v. Superior Court, stating:[295]

> Defendant argues that . . . Burrows did not establish any new legal principle. He relies upon People v. Krivda (1971) 5 Cal.3d 357. That case held that a householder maintains a reasonable expectation of privacy with respect to trash placed on the sidewalk for pickup. The People argued that the case was essentially an application of People v. Edwards (1969) 71 Cal.2d 1096, in which the court had previously held that there was a reasonable expectation of privacy in trash barrels kept within the yard of a private residence. Edwards had been decided after the search in [Krivda] was conducted, and the People argued that . . . Edwards should not be applied retroactively. The court concluded that the "reasonable expectation of privacy" test was not a new legal principle, and therefore [Krivda] presented no retroactivity problem. . . .
>
> We do not agree that any decision turning upon the "reasonable expectation of privacy" test must be applied retroactively because it does not establish new law. There is a vast array of possible circumstances in which a person may or may not have a reasonable expectation of privacy. These questions cannot be deemed to be settled merely because the general framework for evaluating them has been established.

The Court in Kaanehe declined to give retroactive application of the Burrows decision because Burrows was essentially a new application of the law, albeit an established general principle, of the law. Thus, it appears that the Court will ensure that government officials and private enterprises are given sufficient notice of their obligations under reasonable-expectation-of-privacy standards before imposing penalties for violations of such standards.

The next major discovery case involving potential privacy infringements was decided by the Supreme Court in 1978. Britt v. Superior Court involved actions brought by 936 owners and residents of homes located near a public airport seeking compensation for damages caused by the operation of the airport.296

Through discovery, the defendant sought information concerning the political affiliations and associations of the plaintiffs, as well as the complete medical history of each plaintiff. Plaintiffs objected and sought protection from the Supreme Court to stop the impending disclosures. After hearing all

arguments, the Supreme Court issued a preemptory writ of mandate directing the trial court to vacate its discovery order with respect to defendant's inquiries into plaintiffs' private associational affiliations and activities and their lifetime medical histories.

Justice Tobriner, writing for the Court, outlined how peaceful and lawful associational activity is an aspect of associational privacy protected under the state and federal Constitutions, and, as such, enjoys special safeguard from government interference. To defendant's argument that the discovery order was not subject to constitutional attack because it did not prohibit the exercise of any constitutional activities, the Court's opinion replied:[297]

> As both the United States Supreme Court and this court have observed time and time again, however, First Amendment freedoms, such as the right of association, "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." [Citations.] Indeed, numerous cases establish that compelled disclosure of an individual's private associational affiliations and activities, such as that at issue in the instant case, frequently poses one of the most serious threats to the free exercise of this constitutionally endowed right.

Defendant's attempt to distinguish such "associational privacy" cases on the theory that they had been applied only to associations with groups espousing dissident beliefs and which were generally unpopular with the public, was met with a broader application of privacy law:[298]

> The facts of the present case demonstrate the propriety of affording constitutional protection to the privacy interests of all politically oriented associations. Although the aims of the local associations involved in this case may find general support among San Diego residents, an individual's participation in such advocacy organizations could nonetheless raise the ire of municipal authorities or other individuals or business entities who have substantial interests in the maintenance or expansion of current airport operations. . . . If the constitutional protection of associational privacy were to be completely withheld from selected organizations simply because they were not sufficiently unpopular, the inevitable

> effect would be to deter many individuals, particularly those who may be most vulnerable to retaliation by those opposed to such organizations' aims, from participating in such constitutionally protected activities.
>
> Accordingly, we reject defendant's contention that the "nondissident" nature of the private associations in question immunizes the present discovery order from First Amendment attack.

Based upon associational privacy principles, the Court held that private affiliations and associational activities such as those at issue in this case are "presumptively immune from inquisition." Required disclosure must serve a compelling state purpose and such purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

To defendant's claim that these principles do not apply because the compelled disclosure is pursuant to a private lawsuit, the Court retorted that since "judicial discovery orders inevitably involve state-compelled disclosure of presumptively protected information, the principles have equal application to purely private litigation."[299]

The defendant also raised the principle that the state interest in facilitating the ascertainment of truth in connection with legal proceedings is a compelling state interest, and, therefore, the First Amendment associational privacy interests must give way. The Court pointed out, however, that "the identification of [such a] legitimate interest is just the beginning point of analysis . . . , not, as defendant suggests, the conclusion."[300] The Court then demonstrated how this further argument of defendant was really a double-edged sword, because "the threat to First Amendment rights may be more severe in a discovery context, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual may prefer to keep confidential."[301] Accordingly, the fact that the state-compelled disclosure may arise in litigation-oriented discovery does not in itself exempt such a discovery order from general First Amendment principles.

Defendant then claimed that a theory of "waiver" applied because the litigants claiming the protection were plaintiffs and not defendants. By bringing the lawsuit, they argued, they should be held to have waived their

right to associational privacy. The Court partially agreed that plaintiffs may waive a claim of confidentiality by filing a lawsuit, but that in this case such a doctrine could not justify the extensive discovery sanctioned by the trial court. Thus, on this point, the Court held:[302]

> . . . [W]e conclude that while the filing of a lawsuit may implicitly bring about a partial waiver of one's constitutional right of associational privacy, the scope of such "waiver" must be narrowly rather than expansively construed, so that plaintiffs will not be unduly deterred from instituting lawsuits by the fear of exposure of their private associational affiliations and activities. [Citation.] When such associational activities are directly relevant to the plaintiff's claim, and disclosure of the plaintiff's affiliations is essential to the fair resolution of the lawsuit, the trial court may properly compel such disclosure. [Citation.] Even under such circumstances, however, the general First Amendment principles noted above dictate that compelled disclosure be narrowly drawn to assure maximum protection of the constitutional interests at stake.

Applying these standards to the case at hand, the Supreme Court then disallowed the questions asked concerning plaintiffs' associational activities and affiliations.

With respect to the medical disclosures that were requested in the discovery, the Supreme Court applied the standards it set down in Lifshutz, supra, and held that the trial court obviously erred in ordering plaintiffs to disclose to defendant their entire medical histories, thereby ordering the trial court to vacate this aspect of the challenged discovery order.

During 1979, the California appellate courts further expanded privacy law in the course of deciding several discovery cases. In Cobb v. Superior Court, the trial court entered discovery orders directing the defendants to answer certain questions pertaining to their financial affairs and net worth. The justification for seeking the financial information was based on allegations of fraud and malice in the complaint and a prayer for punitive damages. Defendants argued that the information sought violated their constitutional right of privacy and argued that plaintiff was not entitled to engage in such financial discovery until he had first obtained a judgment for damages and a special verdict that he was entitled to punitive damages. The Court of Appeal held that the trial court had correctly refused to bifurcate

to determine a proper amount for an award of punitive damages. However, the Court also held that the trial court failed to properly exercise its discretion by failing to consider factors relevant to framing an appropriate protective order, including the consideration of whether plaintiff should be required to establish a prima facie case for punitive damages before proceeding with the financial discovery.[303]

Two other discovery cases decided in 1979 involved sexual privacy and privacy in one's intimate associations. Because the decisions in Fults v. Superior Court and Morales v. Superior Court were discussed in the section of this Report on "Decisional/Associational Privacy in California Case Law," we need not address them further at this point.[304]

In Craig v. Municipal Court, the Superior Court had issued a writ of mandate directing the municipal court to vacate a discovery order, obtained by a defendant in a misdemeanor prosecution for resisting arrest and battery on highway patrol officers, for production of names and addresses of all persons arrested by the officers on similar charges during the preceding two years. The Superior Court determined that the usefulness to defendant of arrestees' names and addresses was of minimal, speculative, and remote value and violated the privacy of the arrestees. After the defendant appealed the Superior Court's order, the Court of Appeal affirmed, stating:[305]

> A showing . . . that defendant cannot readily obtain the information through his own efforts will ordinarily entitle him to pretrial knowledge of any unprivileged evidence, or information that might lead to the discovery of evidence . . . if it appears reasonable that such knowledge will assist him in preparing for his defense. . . . [Citation.] Although the defendant need not demonstrate that the evidence he seeks would be admissible at trial, he must make a showing that the requested information will facilitate ascertainment of the facts and a fair trial.
>
> In the final analysis a motion for discovery by an accused is addressed to the sound discretion of the trial court, which has the inherent power to order discovery in the interests of justice.
>
> Our review here is of the superior court's action in issuing its writ of mandate. The trial court's discretion has

been overtaken by the action of the superior court. The question before us is whether there was an abuse of discretion by the superior court.

The defendant asserts that he cannot procure the requested information through his own efforts and his position is that there is a possibility that other persons arrested by the same officers would testify to a pattern of violent conduct which would be relevant to his defense.

Defendant does have the benefit of an order which requires disclosure of all material concerning complaints that have been made against these officers for the excessive use of force. What he seeks additionally is the names and addresses of persons arrested by these officers over a two-year period for charges similar to those lodged against defendant in the outside chance that there are persons among the group who were mistreated but failed to complain. It must be emphasized that this group includes, in addition to persons arrested and convicted, persons who were arrested but not prosecuted or if prosecuted not convicted.

After discussing the leading discovery cases in California and noting that the declarations filed by the defendant in support of his requests for this information left much to be desired, the Court then linked the denial of the arrest information sought to the 1972 Voters' Amendment on privacy, starting with the issue of the standing of the Commissioner of the California Highway Patrol to raise the privacy rights of the arrestees:[306]

The constitutional provision for privacy is self-executing in creating an enforceable right [citation] and the statutory scheme restricting access to criminal history records imposes a duty enforced by sanctions, on public officials to prevent unauthorized disclosure. [Citations.]

A person who is the subject of an arrest report or other type of criminal history record generally has no way of knowing of its disclosure until after the fact. It would be absurd to require that the arrestees whose names were ordered disclosed by the trial court here, personally appear in court to assert any right of nondisclosure they might have.

> In the case of a record which is compiled without a person's consent, or with his consent because of some legal requirement and where the subject of the record has a right that access to that record be restricted, the relationship between the custodian of the record and the person who is the subject of the record is analogous to that of attorney-client.
>
> The custodian has the right, in fact the duty, to resist attempts at unauthorized disclosure and the person who is the subject of the record is entitled to expect that his right will be thus asserted.

In 1980, the Court of Appeal resolved another privacy/discovery dispute. This was an action against the state arising out of a traffic accident occurring on a state highway. The trial court entered a discovery order requiring the state to produce documents of prior accidents in the area, allowing the state to delete the names of the parties involved in those accidents. The state then sought a writ to overturn the discovery order, on the ground that the records were confidential.[307]

In this case the Court of Appeal reviewed the provisions of Vehicle Code §20012 which provided for confidentiality of accident reports, noting that its purpose was to "encourage parties and witnesses to report accidents completely and truthfully."[308] The Court elaborated on the application of confidentiality to accident reports:[309]

> Although . . . the incentive of confidentiality may have been in large part dissipated by allowing discovery of the reports to persons involved in the accident as was done by the Legislature in 1965, the purpose is still furthered by not allowing the reports to be used in evidence. A further purpose of the statute may well be one of protecting the privacy of persons involved, not merely as an aid to obtaining reports, but also as an end in itself. At least, the section achieves an element of privacy which, since the passage of the statutory scheme, has been recognized in California as a constitutional right (Cal.Const., art. I, §1) and is cognizable in discovery matters.

Because the state could not assert a good reason for keeping its knowledge as to the number of prior accidents confidential, the Court of Appeal ordered production of that information. Such knowledge could lead to a conclusion that the state was negligent in failing to take corrective measures. Thus, the Court said, the state cannot hide behind a shield of confidentiality to protect itself from possible liability for negligence. However, the identities of the parties involved in the accidents, including the witnesses, were held to be confidential and not discoverable in this action.

A more difficult conflict between discovery and confidentiality was decided by the Court of Appeal in 1981 in the case of Board of Trustees v. Superior Court.[310] In the course of a lawsuit filed by a university professor against the Board of Trustees of the university and a department chairman, the trial court ordered discovery so that the professor could have access to his personnel, tenure, and promotion files, as well as all documents and communications, including grants, contracts, and awards made to or by the university and others in respect to the professor and medical research performed by him at the university. The basis of the lawsuit was certain malicious acts and publications by a former medical research professor of the university and the university's republication of certain of his publications that contained defamatory material. The trial court also granted the plaintiff professor discovery of all documents and communications considered by the university's committees that investigated him after complaints to the university as to his alleged misconduct.

In balancing the competing interests of the privacy rights of those who had submitted confidential information about the professor to the university, on the one hand, and the right of the professor to discovery, on the other, the Court of Appeal stated:[311]

> Article I, section 1's "inalienable right" of privacy is a "fundamental interest" of our society, essential to those rights "guaranteed by the First, Third, Fourth, Fifth, and Ninth Amendments to the U.S. Constitution." [Citations.] But another state interest lies in "facilitating the ascertainment of truth in connection with legal proceedings." [Citation.] The constitutional right of privacy is "not absolute"; it may be abridged when, but only when, there is a "compelling" and opposing state interest.
>
> In an effort to reconcile these sometimes competing public values, it has been adjudged that inquiry into one's

private affairs will not be constitutionally justified simply because inadmissible, and irrelevant, matter sought to be discovered might lead to other, and relevant evidence. [Citation.] "When compelled disclosure intrudes on constitutionally protected areas, it cannot be justified solely on the ground that it may lead to relevant information." [Citations.]

And even when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must be a "careful balancing" of the "compelling public need" for discovery against the "fundamental right of privacy." [Citations.] . . .

"The custodian [of private information] has the right, in fact the duty, to resist attempts at unauthorized disclosure . . . and, of course, the custodian . . . may not waive the privacy rights of persons who are constitutionally guaranteed their protection."

Even where the balance, because of a "compelling state purpose," weighs in favor of disclosure of private information, the scope of such disclosure will be narrowly circumscribed; such an invasion of the right of privacy "must be drawn with narrow specificity." . . . "Where it is possible to do so . . . the courts should impose partial limitations rather than outright denial of discovery."

Applying these principles, the Court reviewed the plaintiff professor's request for access to the personnel files of his adversary (defendant professor). Based on a lack of direct relevance between the allegations of the defamation action and the confidential information contained in the defendant professor's personnel files, the balance was struck by the Court in favor of nondisclosure.

The Court then considered the plaintiff professor's request for access to his own personnel file, including peer-evaluation letters which had been submitted to the administration by fellow professors, after they were given a guarantee of confidentiality. Because peer evaluations were important to the running of the university and because honest evaluations could be obtained only when a guarantee of confidentiality was tendered, as had been done here, the Court held that the peer-evaluation records were "manifestly within the Constitution's protected area of privacy."[312]

With respect to other matters in the plaintiff-professor's personnel file, including letters of reference, the Court noted:[313]

> The instant dispute appears to concern conflicting rights of privacy, i.e., Dr. Dong's right of access to private information about himself, vis-a-vis that of those whose confidential communications are in Dr. Dong's personnel, tenure, and promotion files. The privacy interest of such latter persons has often been considered. Their rights not to have their "names, addresses and phone numbers" divulged "also deserves protection."

After balancing these competing privacy interests, the Court concluded that the plaintiff had a right to inspect his own personnel file, but that the names and other identifying information of those who had submitted information to that file with an expectation of confidentiality should be deleted prior to his access.

Another hotly contested discovery/privacy dispute was decided in 1981 in Rifkind v. Superior Court.[314] During a marriage dissolution proceeding, the trial court ordered the husband to produce federal and state tax returns for three partnerships of which the husband was a member, as well as the husband's law corporation. The trial court also ordered financial records of employees who were shareholders in the corporation to be disclosed.

With respect to confidentiality of tax returns, the Court stated:[315]

> Ever since [1957] . . . it has been the law of California that the disclosure of the contents of an income tax return may not be coerced for the benefit of a private litigant. The purpose of this rule is "to facilitate tax enforcement by encouraging a taxpayer to make full and truthful declarations in his return, without fear that his statements will be revealed or used against him for other purposes. [Citations.]
>
> The . . . rule is not a prohibition against disclosure as such, but an immunity from coerced disclosure. Thus the taxpayer is free to disseminate copies of his tax return, or disclose its contents, as far as he sees fit to do so. The rule exists not for the benefit of the taxpayer, but because it benefits the tax collector to give the taxpayer immunity from coercion.

The fact that the returns were corporate returns rather than the individual returns of the husband had no bearing on this issue of confidentiality. Likewise, the fact that the party seeking disclosure was the taxpayer's wife did not affect the rule.

With respect to the financial records of non-parties to the lawsuit, the Court stated:[316]

> [A] court must not generously order disclosure of the private financial affairs of non-parties without a careful scrutiny of the real needs of the litigant who seeks discovery. It does not appear that any such balancing process occurred in the proceeding which is here under review.
>
> The adoption of the constitutional right of privacy emphasizes the duty of the courts to protect both parties and nonparties against unnecessary intrusion into matters which people ordinarily consider to be private. [Citations.]
>
> In the matrimonial action which is under review here, the trial court should carefully consider whether disclosure of the financial dealings of nonparties, even if shown to be relevant, may not be better deferred until the court has resolved other issues which might make the disclosure unnecessary.

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 right of privacy will be asserted. Furthermore, the custodian of the records may not waive the privacy rights of persons who are constitutionally guaranteed 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.

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 herown 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.

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.

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.

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

TENTH: Rather than totally denying discovery on privacy grounds, courts should consider formulating protective orders so that 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 legislation amending civil discovery statutes which would incorporate the above-mentioned constitutional protections of privacy recently articulated by the California appellate courts.