1977

Privacy

Paul Marcus
William & Mary Law School, pxmarc@wm.edu

Privacy

Harry D. Krause & Paul Marcus***

The protection of privacy in the United States takes many forms and manifests itself in tort law, criminal law, family law and a host of other substantive areas. Depending on the subject matter, protection may be available on the State *or* Federal levels or on *both* levels. Beyond tangible protections, the American "political psychology" of privacy has expressed itself, to provide but one striking example, in Congressional failure, after careful consideration in Committee, to enact or even seriously propose legislation involving an identification system of U.S. citizens or legal residents—and that in the face of the substantial economic and social problems caused by the presence in the United States of an estimated 8 million *illegal* immigrants (probably more than the total current number of unemployed).

The right to privacy in its various forms protects against actions of private citizens as well as actions by local, state and Federal governmental agencies. In the limited space available for this report we propose to discuss only a few major, and quite varied, aspects of the multi-faceted American right of privacy. Our analysis will focus attention ultimately on what is, in the General Reporter's[1] words, the "irreducible zone of privacy."

We shall deal with, in order, the right of privacy (I) in the law of torts, (II) in the law governing criminal procedure, (III) as expressed in various Federal and State statutes seeking to protect the citizen against incursions into his private sphere by an ever-growing government and (IV) as it is newly developing in the context of sexual expression and in relation to the family.

I. Development of the Right of "Privacy" in the Law of Torts

If privacy as a concept of law in the United States could be given a concrete time of birth, it would be 1890. That was the year attorneys Samuel Warren and Louis Brandeis[2] wrote their highly influential article, "The Right to Privacy."[3] Although the authors focused primarily on what they viewed as the shocking behavior of the press,[4] they called for a "principle of

---

* Professor of Law, University of Illinois College of Law.
** Associate Professor of Law, University of Illinois College of Law.
The excellent research assistance of third year student Nancy Abrahams is gratefully acknowledged.

1. Professor Pierre Patenaude, Faculté de droit, Université de Sherbrooke Quebec.
2. Later, of course, Brandeis served with great distinction on the United States Supreme Court, 1916-1939.
3. Warren and Brandeis, "The Right to Privacy," 4 Harv. L. Rev. 193 (1890).
4. "The press is overstepping in every direction the obvious bounds of propriety and of decency." *Id.* at 196.

. . . an inviolate personality,"[5] and a general "right 'to be let alone'".[6]

In 1909, New York set an example by adopting § 50 of its Civil Rights Law.[7] It provides:

> Right of privacy—A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

Section 51 of the Civil Rights Law provides for injunctions to prevent such use or for recovery of damages (actual and punitive) if the unauthorized use occurs. Most states did not enact such statues, but developed a right to sue in tort for various violations of privacy through case law.[8] Dean Prosser[9] divided these cases on privacy into four separate actions, a division which has been generally adopted[10] and will be utilized below. The first is *appropriation*, for defendant's benefit, of the plaintiff's name or likeness.[11] The second is publicity which places the plaintiff in a *false light* in the public eye.[12] Third is *publicity of private information* about the plaintiff.[13] Finally, there is *intrusion* upon the plaintiff's solitude or seclusion.[14]

The general outlines of this aspect of the right to privacy resemble but are not identical with the concept of the "right to personality" defended in some civil law systems such as West Germany.[15]

A. *Appropriation*

Any advertising agency in the United States would probably agree that products about, or endorsed by celebrities (movie stars, performers, athletes) are very popular with the public. Appropriation occurs when the person's name, picture, or endorsement, is used without consent. The defendant in *Palmer v. Schonhorn Enterprises, Inc.*,[16] manufactured and sold the "Pro-AM Golf Game," which contained a "Profile and Playing Chart" on twenty-three famous golfers. The plaintiffs, Arnold Palmer, Gary Player, Jack Nicklaus and Doug Sanders, all well known professional golfers, sued to enjoin the use of their names in connection with the game, even though the charts listed accurate information about their professional careers.[17]

---

5. *Id.* at 205
6. *Id.* at 195 *quoting* from *Cooley on Torts*, 2d ed. 1888, at 29.
7. This was in response to the Court of Appeals decision in Roberson v. Rochester Folding Box Company, 171 N.Y. 538, 64 N.E. 442 (1902) denying recovery for the unconsented use of plaintiff's picture for advertisement of a product. *See* Prosser, Torts, Fourth Edition 1971 at 803.
8. The leading early case was Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).
9. Prosser, *supra*.
10. *See*, Restatement Second of the Law of Torts.
11. *See*, Part IA, *infra*.
12. *See*, Part IB, *infra*.
13. *See*, Part IC, *infra*.
14. This includes non-physicial intrusion, such as wire tapping. Part ID, *infra*.
15. *See*, Krause, "The Right to Privacy in Germany—Pointers for American Legislation," 1965 Duke L.J. 481 (1965).
16. 96 N.J. Super. 72, 232 A.2d 458 (1967).
17. 232 A.2d at 459.

The defendant claimed that the use of the names and information did not infringe on the plaintiffs' right of privacy, since they had waived any such right by being well-known and, as such, had invited publicity into their lives to further their careers.[18] The court, however, rejected that argument and held for the plaintiffs on the ground that a person has the right to capitalize on his own identity without unjustified interference. The fact that the plaintiffs' accomplishment had been highly publicized did not convey a *general* right to such exploitation.[19]

Difficulties for the courts in this area are heightened when the celebrities are deceased and their photos or names are used in connection with games, clothing or toys. This issue was faced squarely in *Price v. Hal Roach Studios, Inc.*,[20] which involved the rights to the names and likenesses of Stanley Laurel and Oliver Hardy ("Laurel and Hardy"), the famous comedians. The plaintiffs, widows of Laurel and Hardy, and sole beneficiaries under their wills, claimed to have exclusive rights to their names and likenesses.[21] The defendant asserted that because the comedians were now dead, their names and likenesses were part of the public domain.[22] The rights involved in the instant case, however, were more than mere rights of privacy, according to the court, which *would* terminate at death; these were *property* rights which were assignable, and lived on.[23] The court then decided that it might have been possible for the performers to have waived some of their rights to privacy when alive, by being so well known, but property rights in one's own name are not waivable.[24] The court ultimately concluded that these rights passed as property to the plaintiffs by action of their husband's wills.[25]

---

18. *Id.* at 460.

19. . . . although the publication of biographical data of a well-known figure does not per se constitute an invasion of privacy, the use of that sama data for the purpose of capitalizing upon the name by using it in connection with a commercial project other than the dissemination of news . . . does.

Id. at 462.

20. 400 F. Supp. 836 (S.D.N.Y. 1975).

21. The facual situation was more complex than herein described because both the plaintiffs and the studio executives had assigned their respective "exclusive" rights to other parties. Moreover, the defendant claimed that Laurel and Hardy had assigned these rights to the studio, as employer, in certain movie contracts. The court first declared that the defendant only had the right to specific photographic reproductions made from the movies to which the contractual agreement applied. Although the defendant was given exclusive rights to *those* movies, there was not conferred a general right to use the names and likenessess of Laurel and Hardy in *every* context. *Id.* at 840-41.

22. *Id.* at 843.

23. *Id.* at 843-44. "The protection from intrusion upon an individual's privacy, on the one hand, and protection from appropriation of some element of an individual's personality for commercial exploitation, on the other hand, are different in theory and in scope."

24. *Id.* at 846, 847.

25. In Lugosi v. Universal Pictures Co., Inc. 172 U.S.P.Q. 541 (Cal. Superior Ct. 1972) the court made a similar decision about the character of Dracula as portrayed by Bela Lugosi. Because the deceased actor had given the role his own individual interpretation, it became ". . . a property right of such character and substance that it did not terminate with his death but descended to his heirs." 172 U.S.P.Q. at 551. This case is not without criticism, however, *see Price*, 400 F. Supp. at 845.

B. *False Light*

"Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life . . ."[26] This brief quote may generally sum up the crux of the problem so often faced today. It does not, however, explain the interplay between two very different concepts, false light privacy and defamation. False light privacy consists of "publicity which places the plaintiff in a false light in the public eye."[27] Because such false information need not necessarily be reputation injuring, it is not always overlapping with the concept of defamation. Still, because both actions are based on false information, publicized, the courts have tended to consider them together and we shall do so here.

The area of defamation, as illustrated by recent United States Supreme Court cases, involves a battle between two protected values: freedom of the press and certain individual rights. The media won a clear victory in *New York Times Co. v. Sullivan*,[28] where the issue was the newspaper's liability for printing criticism of a government official.[29]

Under then Alabama law, if words were published "of and concerning" someone that would "tend to injure . . . his reputation . . .", it was libel *per se*, general damages were presumed, and the only defense was absolute truth.[30] The issue, according to Justice Brennan, speaking for the Court, was ". . . whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments."[31] Abridgement was found because the defense of truth was not enough to protect the press when erroneous statements were honestly made, and fear of such libel judgments would thus lead to self-censorship.[32] The Court fashioned a test for determining liability when a public official seeks to recover damages for defamatory falsehoods made concerning his official conduct: it must be shown that the statements were made with "actual malice," *i.e.*, either knowledge of falsity or reckless disregard for whether false or not.[33] The decision below, therefore, was reversed.[34]

---

26. Warren and Brandeis, *supra*, at 195.
27. Proser, *supra*, at 812.
28. 376 U.S. 254 (1964).
29. On March 29, 1960, there was published a full-page ad in the *Times* entitled "Heed Their Rising Voices," which asked for monetary support to aid the civil rights movement in the Southern United States. It alleged a "wave of terror" against student demonstrators at Alabama State College by the police, and persecution of Dr. Martin Luther King, Jr. L.B. Sullivan was an elected Commissioner in Montgomery, Alabama, and supervisor of the police department. He claimed that although never actually mentioned by name, the word "police" could be interpreted as referring to him. Therefore, due to admittedly incorrect statements of fact contained in the ad, he sued the newspaper's publishers for libel, and was awarded $500,000 in the Alabama court system. *Id.* at 256.
30. *Id.* at 267.
31. *Id.* at 268. The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." The Fourteenth Amendment, referring to "due process of law" has been interpreted to apply these guarantees to the States.
32. 376 U.S. at 278-79.
33. *Id.* at 279-80. This is the famous *New York Times* test that is the focal point for cases such as *Gertz*, *Time v. Hill* and others, *infra*.
34. Justices Black, Douglas and Goldberg concurred, although they believed the words "Congress shall make no law" from the First Amendment conferred an absolute right of freedom of the press and of the citizenry to free debate. *Id.* at 293-305.

The battle between individual rights and the press becomes more marked when the individual is not a public official and the issue involves privacy instead of defamation, such as in *Time, Inc. v. Hill.*[35] Justice Brennan, again for the majority, stated that although Hill was not a public official, the opening of a new play, which was tied to an actual situation, was a matter of public interest. Once that was decided, the Court held the *New York Times* standard was appropriate even in false light privacy cases.

> . . . the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matter of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.[36]

Life in a civilized society required the exposure, to some degree, of the self to others; and this risk was necessary in a society which placed such value on First Amendment rights.[37]

Defining terms such as "public officials" and "public figures" for purposes of applying the strict *New York Times* test caused the Court some difficulty in *Gertz v. Robert Welch, Inc.*[38] Falsehoods printed about the plaintiff[39] prompted him to sue for defamation, but he was denied recovery by the lower courts. Although it was decided that Gertz was neither a public official nor a public figure, the Court of Appeals applied the *New York*

---

35. 385 U.S. 374 (1967). In 1952, James Hill and his family had been held captive for nineteen hours by three escaped convicts. The family was treated well, and was released unharmed. A book, *The Desperate Hours* by Joseph Hayes, was later written, loosely based on the experience, and was made into a play in 1955. Unlike the actual experience, however, the convicts in the book and play were physically and verbally abusive to the portrayed family. Life Magazine, published by Time, Inc., contained an article about the play which named the Hill family and strongly suggested that it was an accurate representation of the true occurrence. The article even went so far as to have the actors photographed at the former Hill home. Hill sued for invasion of privacy under the New York Civil Rights statute §§ 50 and 51, and was awarded $30,000 in compensatory damages. 385 U.S. at 379-80.

36. *Id.* at 387-88.

37. *Id.* at 388. The case was remanded in order for a jury to determine if there had been actual malice, the *New York Times* test, as extended to this case. *Id.* at 398. Justices Black and Douglas again concurred, but with the same reservations as in *New York Times*. Justice Harlan concurred in part, disagreeing as to "the proper standard of liability to be applied on remand." *Id.* at 402. The Chief Justice and Justice Clark joined Justice Fortas in dissent, finding no need for a remand. *Id.* at 417. For an excellent discussion of *Sullivan* and *Hill*, *see* Nimmer, "The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy," 56 Cal. L. Rev. 935 (1968).

38. 418 U.S. 323 (1974).

39. Elmer Gertz, an attorney, was hired by the family of a youth named Nelson, who had been killed by a policeman in Chicago in 1968. The officer, Richard Nuccio, was convicted of second-degree murder, and the Nelson family brought a civil suit against him. Robert Welch, Inc. published American Opinion, the magazine of the John Birch Society, which in 1969 printed an article entitled "Frame-Up: Richard Nuccio and The War On Police." The article falsely labeled Gertz a "Communist-fronter," a "Leninist," and an advocate of violent overthrow of the U.S. government. *Id.* at 326. It also contained a picture of the attorney with the caption "Elmer Gertz of Red Guild harrasses Nuccio," keyed to Gertz's past membership in the National Lawyers Guild. *Id.* at 327.

Times test, and held that actual malice had not been shown.[40] The test was applied because the *discussion* was of a "public issue."[41]

The Supreme Court, through Powell, J., declared that a plaintiff's status must be determined in light of his participation in the controversy that gave rise to the defamation.[42] Powell then explained that the State had a greater interest in protection of a private individual than of a public figure, due to increased vulnerability. Therefore the *New York Times Standard* should not be applied with private figures; instead the State should be allowed to define its own standards.[43] The Court did not declare a new test for the State, but it did set the outer limits: the State may allow liability for defamatory falsehoods about a *private* individual, like Gertz, with less demanding proof than under *New York Times*[44] but more than mere strict liability would have to be shown.[45] The *New York Times* test must be satisfied, however, for any award of punitive damages.[46]

C. *Private Information*

If information concerning family or personal secrets is distributed to the public, does the aggrieved party have a privacy claim against the individual publisher? Yes, said the California court in the famous case of *Melvin v. Reid*.[47] There the plaintiff prevailed when she showed that a motion picture had disclosed her former, private life: she had been a prostitute and had been the defendant in a murder trial. While the dissemination of such information may thus properly lead to a privacy action, in recent times the focus in this area has been on the dissemination of such arguably private information by government authorities. See, for example, the opinion written by Justice Douglas, writing for the Supreme Court, in *Wisconsin v. Constantineau*.[48] The police had posted notices of a ban against sale of alcohol to the plaintiff.

---

40. 418 U.S. at 327-32.

41. *Id.* at 329.

42. *Id.* at 352. Being the family lawyer was held not enough to make Gertz a public figure.

43. *Id.* at 344.

44. *Id.* at 348.

45. *Id.* at 347.

46. *Id.* at 349. The case was remanded for a determination of liability and damages. Burger, C.J. and Justices Douglas, Brennan, and White vigorously dissented. *See also*, Time, Inc. v. Firestone, 424 U.S. 488 (1976). Time Magazine published in its "Milestones" section:

> DIVORCED. By Russell A. Firestone Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32 his third wife; . . . on grounds of extreme cruelty and adultery; . . . The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, "to make Dr. Freud's hair curl."

Id. at 452. The last line was taken from the court opinion which had granted the divorce, but, since the judge had never actually stated whether adultery or extreme cruelty was the basis for his divorce decree, the Milestones item arguably was false. *Id.* at 458. Because Mrs. Firestone, of the well known tire family, was then declared a *private individual* by the Supreme Court, she would be allowed to recover if she proved that Time, Inc. was at fault only under the lesser *Gertz* standard. Justices Brennan, White and Marshall dissented. For earlier cases in this area, *see*, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) and Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

47. 112 Cal. App. 285, 297 Pac. 91 (1931).

48. 400 U.S. 433 (1971).

The Supreme Court struck down the state statute that allowed the police to forbid the sale or gift of liquor to persons deemed to be alcoholics,[49] saying that this posting was ". . . such a stigma or badge of disgrace that procedural due process require[d] notice and an opportunity to be heard."[50] The plaintiff must be given the chance to defend herself against such a "badge of infamy."[51]

In balancing the peace of the community against being labeled publicly an alcoholic, the Court tipped the scales toward privacy in *Constantineau*. When the opposing interest is freedom of the press, as in the defamation cases, however, the weight recently seems to be on the other side. *Cox Broadcasting Corp. v. Cohn*[52] dealt with disclosure of the name of a rape victim.[53] A reporter for the defendant used the raped girl's name in a televised news report. Her father then brought suit alleging invasion of his privacy, and violation of a Georgia statute.[54] The Supreme Court declared it had jurisdiction,[55] and found for the defendant when it framed the issue narrowly, as: ". . . whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from . . . judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection."[56] The commission of a crime and subsequent prosecution and judicial proceedings are matters of legitimate public concern which the press has the responsibility to report. The fact that this was a matter of public record illustrated that Georgia must have believed it was of valid interest to the community.[57]

---

49. Wisconsin Statute § 176.26 (19670, which the Court stated provided in pertinent part that:

> . . . designated persons may in writing forbid the sale or gift of intoxicating liquors to one who "by excessive drinking" produces described conditions or exhibits specified traits, such as exposing himself or family "to want" or becoming "dangerous to the peace of the community."

400 U.S. at 434. Sale or gift of liquor to such person in violation of the statute was a misdemeanor. *Id.* at 435, n. 2.

50. *Id.* at 436. The reference is to the Fourteenth Amendment to the Constitution which states in part that States shall not ". . . deprive any person of life, liberty, or property, without due process of law . . ."

51. *Id.* at 437. The Chief Justice and Justices Black and Blackmun dissented, not for the reason that the law passed constitutional muster, but because the State courts should have first been given an opportunity to construe their own law.

52. 420 U.S. 469 (1975).

53. In August of 1971 Cohn's daughter, Cynthia, was raped and killed. At a hearing in 1972, five youths pleaded guilty to the rape. A reporter for Cox Broadcasting Corp. learned the victim's name by attending the court proceeding and examining the indictments.

54. Ga. Code Ann. § 26-9901 (1972) made it a misdemeanor to broadcast the name or identity of a rape victim. 420 U.S. at 471-472.

55. *Id.* at 476-487. The only dissenter, Justice Rehnquist, believed the case should have been dismissed for want of jurisdiction. *Id.* at 501-512.

56. *Id.* at 491.

57. *Id.* at 495-496. *See also*, Oklahoma Publishing Company v. District Court In and For Oklahoma County, 425 U.S.—, 97 S. Ct. 1045 (1977) where an 11-year old boy was charged by the juvenile authorities with the second-degree murder of a railroad switchman. His photograph and name were printed in newspapers and broadcast on television, in defiance of the trial judge's order not to divulge such information. The U.S. Supreme Court, in a short *per curiam* opinion, held that because the youth's picture and identity had been publicly revealed in a criminal prosecution they could be published under the

Private information from other than formal judicial proceedings may also be disclosed to the public, according to *Paul v. Davis*.[58] Police in Kentucky circulated a flyer to merchants in the Louisville area which contained pictures and names of persons considered to be "active shoplifters." The respondent, Davis, was included in this flyer, although he had never been found guilty of the crime.[59] Relying on *Wisconsin v. Constantineau*, the Court of Appeals found this procedure to be violative of Davis's due process rights, due to damage to his reputation.[60] However ". . . reputation alone . . ." said Justice Rehnquist for the Court ". . . apart from some more tangible interests such as employment, is [not] either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause."[61] Respondent was not guaranteed enjoyment of his reputation by the State of Kentucky, and because the arrest was an official act, the State had the right to publicize it even without any hearing or trial.[62]

D. *Intrusion*

This section concentrates on intrusion into the plaintiff's solitude. Once again, intrusion by private individuals may well lead to a privacy action, as in the well known suit of consumer advocate Ralph Nader against General Motors where he claimed that G.M. agents had been harassing him and listening in on his telephone conversations.[63] Still, the major concern in the United States for at least the past decade has been with intrusions by the government or by governmental agents. Such intrusion may take many forms: wiretaps, searches and seizures, preparation of files and dossiers. Only a few representative cases will be discussed here.

United States v. United States District Court[64] required interpretation of Title III of the Omnibus Crime Control Act [65] and proved that a system of checks and balances was indeed at work with regard to privacy interests. Three individuals had been charged with conspiracy to destroy Government

---

protection of the First Amendment, citing *Cox Broadcasting*. 425 U.S. at—, 97 S. Ct. at 1047. *But see*, Briscoe v. Reader's Digest Assn., 93 Cal. Rptr. 866, 483 P.2d 34 (1971) involving the publication of an earlier conviction.

58. 424 U.S. 693 (1976).

59. He had at one time been arrested, but the charge was still outstanding, leaving guilt or innocence undetermined. Later the charge was dismissed. *Id.* at 696.

60. Such a finding had to be made for Davis to be successful, as he was seeking damages for the violation of a "right secured to him by the Constitution of the United States," under 42 U.S.C. § 1983. 424 U.S. at 696.

61. *Id.* at 701. The Court distinguished *Constantineau*, by relying on the privilege which had been taken away there. *Id.* at 708-709.

62. *Id.* at 710-711. Justice Brennan, joined by Justices Marshall and White, dissented, urging vigorously that a person's interest in his good name should fall within the Fourteenth Amendment concept of "liberty," and should be entitled to due process protection.

See also, Wahlen v. Roe, 425 U.S.—, 97 S. Ct. 896 (1977) which allowed New York State to keep a computer file of persons using certain drugs, obtained by perscription, that have legitimate and illegitimate markets. Other cases involving Government files, dossiers, etc., are contained in Part D.

63. Nader v. General Motors Corp., 25 N.Y. 2d 560, 255 N.E.2d 765 (1970). The wiretap was apparently a product of fear of Nader's soon-to-be published book *Unsafe at Any Speed*.

64. 407 U.S. 297 (1972).

65. 18 U.S.C. § 2500. *See*. footnotes 95-98 and accompanying text, *infra*.

property. In order to obtain evidence of the crime, the Attorney General, without court approval, tapped the phone of one of the defendants. The District Court of Appeals held this violated his Fourth Amendment rights,[66] and require disclosure of the overheard conversation.[67]

The Government claimed that this action was a reasonable exercise of the President's power (through the Attorney General). Even without prior court approval, it was proper, in order to protect against danger to the existing structure of the Government.[68] Justice Powell observed for the entire Court[69] that nothing in the Act *confers* any power on the President, it ". . . merely provides that the Act shall not be interpreted to limit or disturb such power as the President may have under the Constitution."[70] The Court then noted that electronic surveillance is extremely important for protection of the Government and the people, and therefore did not completely bar its use.[71] The ultimate holding, however, was that the Fourth Amendment required *prior* judicial approval in order to protect a citizen's privacy. Both the impartial magistrate and the police officer must be involved; discretion cannot rest in the Executive Branch alone.[72]

When the government collects and stores information on its citizens, often more than just the Fourth Amendment and privacy interests are at stake. A "chilling effect" on the exercise of First Amendment[73] rights was alleged in *Anderson v. Sills*.[74] Sills, the New Jersey Attorney General, had created two forms for local law enforcement officers to fill in when there were civil disorders, such as riots. The first related to information about the incident and the second concerned the individuals involved.[75] The plaintiffs alleged that the existence of these forms would deter people from lawfully speaking and assembling. The Court found such fears to be hypothetical and speculative, and acknowledged instead that the police have the responsibility to *prevent* crimes (and riots), as well as apprehend past offenders.[76] Because the plaintiffs were not subject to criminal sanctions, the police would be allowed any information relevant to this function, and the Court believed that it was a matter best handled by their expertise, not judicial intervention.[77]

---

66. The Fourth Amendment to the Constitution states:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to

67. 407 U.S. at 301.

68. Citing § 2511(3) of Title III.

69. Justices Douglas and White concurred separately, but both agreed with the Court on this issue.

70. 407 U.S. at 303.

71. *Id.* at 310-312.

72. *Id.* at 316-317.

73. Quoted in part in footnote 31, *supra*. At issue in the instant case also was the guarantee that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

74. 56 N.J. 210, 265 A.2d 678 (1970).

75. Information such as what organization was involved, names of members, parental background, financial information, spouses, etc. 265 A.2d at 681-683.

76. *I2.* at 684.

77. *Id.* at 687, 689. On remand, for additional facts,the Superior Court, Chancery Division, dismissed the case for failure to state a claim on which relief could be granted.

When the Government's files may have an *economic* effect on an individual, such as in future employment possibilities, one court took a different position. In *Menard v. Mitchell*,[78] the plaintiff sued the U.S. Attorney General, John Mitchell, and the Chief of the F.B.I., J. Edgar Hoover, to force the F.B.I. to remove from its files a notation about plaintiff's detention by the California police. Menard had been arrested for burglary, held for two days, and released when the police determined there was insufficient evidence to make a criminal complaint. The entry in the file of plaintiff's "detention" was ambiguous, and the court feared serious repercussions from this system of classification which lumped the innocent with the guilty.[79] Where, as here, a person had been exonerated,the court found it ". . . difficult to see why he should be subject to continuing punishment by adverse use of his 'criminal' record."[80]

II. Privacy & Criminal Procedure

Intrusion by the government becomes a most important issue when information so obtained is to be used as evidence in a criminal prosecution. As indicated above, the Fourth Amendment requires a warrant, which must be based on very particular information, before a person's home may normally be searched. In *Spinelli v. United States*,[81] the F.B.I. applied for, and was granted, a warrant to search what they believed was a bookmaking (gambling) establishment. Evidence was obtained during the search which was used to convict the defendant. Their application for the search warrant was based on 1) The F.B.I. observation of Spinelli, whom the F.B.I. knew to be a gambler, frequenting a certain apartment in St. Louis, 2) Registration, under the name of a woman who did not live in the apartment, of two phones which 3) Had been identified by a "reliable informant" as involved in wagering.[82] After the warrant was issued, the apartment was searched, the evidence was seized, and Spinelli was arrested. Harlan, J., for the Supreme Court, held that the informant's tip was the key to finding probable cause, and, unless supported by other corroborating evidence, did not alone pass constitutional muster. The F.B.I. affidavit was found to be defective because it did not state how the informant knew this information, nor why he was considered "reliable" by the F.B.I.[83] Because there was nothing necessarily suspicious about having two phones and being in St. Louis, the Court decided that the F.B.I. belief that Spinelli was a gambler did not give enough additional weight to these insufficient facts, and excluded the evidence and reversed the conviction.[84]

---

143 N.J. Super. 432, 363 A.2d 381 (1976). The Chancellor relied on Laird v. Tatum, 408 U.S. 1 (1972), where it was held that the mere existence of governmental investigative and data-gathering activity was not enough to create a "chilling effect" on First Amendment rights. *Id.* at 11. Justices Brennan, Douglas, Marshall and Stewart dissented.

78. 430 F.2d 486 (D.C. Cir. 1970).

79. *Id.* at 492.

80. *Id.* at 494 [footnote omitted]. The case was remanded for further findings. The court ultimately ordered the information removed completely, Menard v. Saxbe, 498 F.2d 1017 (1974).

81. 393 U.S. 410 (1969).

82. *Id.* at 414.

83. *Id.* at 416. This is the two-part test of Aguilar v. Texas, 378 U.S. 108 (1964).

84. *Id.* at 418-419. Justice Black vigorously dissented, complaining of overly technical applications of the warrant requirement that chip away at police effectiveness. *Id.* at 433.

In some instances, deciding if there has ever been an intrusion can itself be a difficult question, as illustrated by *Katz v. United States*.[85] Katz was convicted of transmitting wagering information by phone from California to other states. Accepted into evidence at trial were record:ings of the defendant's end of conversations, obtained by electronic devices attached to the outside of the public phone booth from which he made his calls. The Court of Appeals affirmed the conviction, stating that since there had been no actual physical intrusion into the booth there could not have been a "search" within the meaning of the Fourth Amendment.[86] Justice Stewart, for the majority, disagreed:

> The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device . . . did not happen to penetrate the wall of the booth can have no constitutional significance.[87]

Once classified as a "search," prior judicial approval was required; without it, the intrusion became *per se* unreasonable under the Fourth Amendment, and the conviction was reversed.[88]

It is possible that nothing is as clearly within a zone of privacy as our physical selves, our bodies; yet there are occasions when the Government may justifiably intrude even there without a warrant. *Terry v. Ohio*[89] teaches that a police officer has the right to "stop and frisk." This right exists without a warrant and with less than probable cause to believe that a crime is being committed, in order to protect the officer's safety. Chief Justice Warren, writing for the majority, decided that a "stop and frisk" procedure[90] amounted to a "search and seizure" under the Fourth Amendment; it was not a "petty indignity" to be taken lightly.[91] However, the Fourth Amendment only prohibited "unreasonable" searches and seizures. Reasonableness must be evaluated in light of whether the officer was warranted in believing he was in danger, based on his inferences of the facts from a perspective of his experience.[92] Applying this test to the circumstances of the instant case, the

---

Two other Justices dissented. ***But see***, United States v. Harris, 403 U.S. 573 (1971) which then chipped away at *Spinelli*, much to Justice Black's delight. *Id.* at 585.

85. 389 U.S. 347 (1967).

86. *Id.* at 349.

87. *Id.* at 353. Justice Harlan's concurrence summarized what he believed to be the majority holding, including that the defendant's expectation of privacy was one society was prepared to recognize as "reasonable." *Id.* at 361.

88. *Id.* at 357. Justices Douglas, Brennan and White also concurred. Justice Black dissented. *See also*, Berger v. New York, 388 U.S. 41 (1967) which held the New York permissive eavesdrop statute unconstitutional.

89. 392 U.S. 1 (1968).

90. A policeman on patrol in downtown Cleveland, Ohio, had noticed defendant Terry and others acting in a suspicious manner. They would look in a shop window, walk away and return to the window in a pattern that caused the policeman to fear a potential burglary. He approached them and identified himself, but when he asked for their names, he was answered with mumbling. He then patted the outside of Terry's coat, and, only after detecting what felt like a weapon, reached under the outergarments to indeed find a gun.

91. *Id.* at 16-17.

92. *Id.* at 27.

Court concluded that this search and seizure was reasonable within the confines of the Fourth Amendment so that "any weapons seized may be properly introduced in evidence against the person from whom they were taken."[93]

III. Federal Privacy Statutes

Many recent Federal statutes deal with privacy.[94] Recent cases rely heavily on these statutes, thus it may be useful to summarize them here.

Title III, Omnibus Crime Control and Safe Streets Act of 1968[95] applies to the controversial area of wiretapping and eavesdropping. The main thrust of this statute is that it is unlawful for any person to intercept and disclose wire or oral communications unless law enforcement officials and/or federal agents,[96] operate with prior judicial approval[97] when investigating certain specified offenses.[98]

The Bank Secrecy Act[99] also involves the government using private information as an aid to crime prevention and detection. The Congress was concerned with citizens who use foreign bank accounts and other devices to avoid American taxes.[100] The Act requires that banks maintain extensive records on customers' identities, microfilm checks, and develop other safeguards.[101]

Many of the Federal privacy statutes are not concerned with the giving of information to the government but rather the release of information the government already has. See, for instance, the Federal Privacy Act[102] which deals with federal agencies which maintain records on individuals. It bars disclosure of such records to persons outside the agency except in particular situations.[103] The primary purpose of the Act is to allow an individual access to his or her own records, to make corrections, and to request a review by the head of the agency in the event of disagreement with items in the record.[104] The agencies are also directed to record only relevant information, and to

93. *Id.* at 30, 31. Justice Douglas dissented, stating that searches and seizures should *never* be valid under the Fourth Amendment unless made with probable cause to believe a crime had been or would be committed. *Id.* at 35-36. It should also be noted that the most extreme sort of "seizure," the arrest, need not be made pursuant to a warrant, so long as there is probable cause to believe that the defendant committed the criminal act, and the arrest is made on the street. United States v. Watson, 423 U.S. 411 (19760.

94. This is not to say that there are *only* Federal laws in this area. Many states also have legislatively entered into the area—e.g. Illinois Revised Statutes Chapter 38 Article 108-A dealing with wiretapping. Nevertheless, the Federal rules clearly dominate, so the discussion here is limited to such statutes.

95. 18 U.S.C. § 2510 *et seq.* (1968).

96. 18 U.S.C. § 2511.

97. 18 U.S.C. § 2516.

98. § 2516, § 2518.

99. 12 U.S.C. §§ 1829b, 1951-1959, 31 U.S.C. §§ 1051-1143 (1970).

100. 12 U.S.C. § 1829b(a).

101. The Act was held constitutional in California Bankers Association v. Shultz, 416 U.S. 21 (1974).

102. 5 U.S.C. § 552a (Pocket Part 1976). § 552 of the same code is the Federal Freedom of Information Act (1967, amended 1974).

103. 5 U.S.C. § 552a(b), such as to Congress or the Comptroller General, or as required by § 552.

104. 5 U.S.C. § 552a(d).

collect such data in the most reliable way practicable.[105] An Act similar in scope to the Privacy Act is the Family Educational Rights and Privacy Act of 1974,[106] which focuses on student educational records. It forbids the general release of information contained in such records, without consent.[107] These records, however, must be made available to the student (or parents) for inspection and correction, although this may be waived.[108]

IV. The (Federal) Constitutional Right of Privacy in the Context of Family and Individual Sexual Privacy

The Tenth Amendment to the United States Constitution holds that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people". This had long been thought to put family law under the exclusive jurisdiction of the States. The traditional view was expressed by the late Justice Black in 1971: "The power of the States over marriage and divorce is complete except as limited by specific constitutional provisions"[109] and "the power to make rules to establish, protect and strengthen family life * * * is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State. Absent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws".[110]

Subject-matter "jurisdiction", however, is involved only indirectly in the important State-Federal conflict in the family law area. More precisely, the State-Federal conflict has centered on the issue of State regulation vs. individual rights, with the United States Constitution generally taking the side of the individual. To understand that better, it is essential to be aware that the United States Constitution contains *no* provision protecting or, indeed, dealing with the *family* as a social institution. Instead, the constitutional "actors" are *individuals*.

It therefore seemed a revolutionary step when, in 1965, the U.S. Supreme Court, (through Justice Douglas) invoked the "emanations" and "penumbras" of the 1st, 3rd, 4th, 5th, 9th, and 14th Amendments to construct a right of marital privacy to protect a married couple's right to birth control advice and devices against Connecticut's statutes which made the use of such devices a criminal offense. In Justice Douglas' opinion, the right recognized in *Griswold*[111] seemed clearly based in the *Marital* relationship. He said: "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of

105. 5 U.S.C. § 552a(e).
106. 20 U.S.C. § 1232g (1974).
107. 20 U.S.C. § 1232g(b).
108. 20 U.S.C. § 1232g(a). The penalty for non-compliance with these provisions is withholding of federal funds to the institution, whereas in the Federal Privacy Act the remedy is a civil suit for damages, 5 U.S.C. § 552a(g), or even criminal sanctions, § 552a(i). *See also*, the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (1970), which allows individuals to inspect records used to determine their credit ratings.
109. Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L.Ed.2d 113 (1971).
110. Labine v. Vincent, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971).
111. Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

being sacred. It is an association that promotes a way of life, not causes; a harmony in living not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." While the Court had referred to the importance and implied constitutional dimensions of marriage and the family in earlier opinions, at least by dictum, it had never before "discovered" so broad and basic a right to "family privacy".[112]

In 1972, however, the Supreme Court seemed to retreat from this newly found *family* orientation. It returned to its more accustomed role as champion of the individual, in a case involving *unmarried* persons and their right of access to birth control: "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child".[113]

Since then, various cases involving the right to abortion were decided. The *mother's* "right to privacy", drawing on *Griswold* and related decisions, was the most important basis for these holdings.[114] The conclusion essentially was that, during the first three months, no countervailing interests exist to inhibit the mother's right to privacy and her physician's right to decide on abortion. After that the State's interest in the mother's health is sufficiently strong to permit reasonable regulation of the abortion procedure, but that the State may effectuate any interest in the life of the fetus only after viability has been reached after roughly six months of pregnancy.

Especially in the light of the 1976 decision all but excluding husbands and parents of minors from the abortion decision,[115] the abortion cases appear to strengthen the conclusion that the Court considers that it is dealing with *individual* sexual privacy, rather than with any right inherent in marriage. Other cases which could (but need not be) read as de-emphasizing the relevance of marriage in constitutional terms are more than a dozen illegitimacy cases that have been decided by the U.S. Supreme Court since 1968 and have essentially equalized the legal status of legitimate and illegitimate children.[116]

---

112. *E.g.*, Maynard v. Hill, 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654 (1888); Pierce v. Soc. of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). But compare "Equal Protection" cases, *e.g.*, Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).

113. Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972).

114. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973); Bigelow V. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975); Singleton v. Wulff, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976).

115. Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.E2.22 788 (1976); Belotti v. Baird, 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976).

116. *E.g.*, Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972). Generally, see H.

Yet other cases appear to signal reservations about *Eisenstadt*: There is Justice Douglas' decision in which the Court upheld a zoning ordinance that forbade a "commune" from establishing itself in a residential area.[117] (Since the zoning ordinance did not forbid *two* unmarried persons from living together, that case might be reconciled with *Eisenstadt*.) More importantly, in 1976, the Court affirmed a Virginia sodomy conviction involving consenting male adults.[118] The lower court's majority opinion had stressed that the *Griswold* right to privacy was based on marriage, whereas the homosexuals in question were, of course, not married and, accordingly, not entitled to protection. The dissenting opinion protested that the marital/non-marital distinction emphasized by the majority had fallen under *Eisenstadt*. Unfortunately, the Supreme Court did not address itself to this issue. It simply affirmed the lower court's decision without providing any clarifying opinion.

Needless to say, confusion concerning the scope of the right to privacy as applied to these questions now reigns in the lower courts and state supreme courts. For instance, *Eisenstadt* has been applied in a federal district court case which struck down a zoning ordinance that prohibited two unmarried persons from living together.[119] Even (or especially) after *Commonwealth*, the marital/non-marital distinction would seem to prevent (and in several courts has prevented) prosecution of a *married* couple for sodomy or other consensual sexual activity carried on in the privacy of their home.[120] With regard to the latter (and with due apology for the unfortunate subject matter which, for lack of other cases, is the sole vehicle in which this line of analysis may be pursued), two exceptions have been recognized in recent decisions. First, there is the case of forcible sodomy which, of course, merits no protection, constitutional or otherwise, and convictions involving married couples have been upheld.[121] Backtracking from *Griswold*, however, may not necessarily stop at *forcible* sodomy. Concerning the quite different question of consensual marital sodomy *Bateman* concluded:

> Sodomy has been considered wrong since early times in our civilization. Deuteronomy 23:17. Leviticus 18:22-23; 4 Blackstone, Commentaries 215; 2 Pollock & Maitland. The History of English Law 556. The lewd and lascivious acts prohibited in this state have also been traditionally prohibited. The legislature has thus made certain sexual behavior criminal by its power to regulate the health, morals and welfare of its people. This type of activity has not been discussed by the United States Supreme Court. We therefore hold that sexual activity between two consenting adults in private is not a matter of concern for the State except insofar as the legislature has acted to properly regulate the moral welfare of its people, and has specifically prohibited sodomy and other specified lewd and lascivi-

---

Krause, Illegitimacy: Law and Social Policy (1971); H. Krause, Family Law in a Nutshell 130-139, 145-149 (1977).

117. Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974).

118. Doe v. Commonwealth's Atty. for City of Richmond, 403 F.Supp. 1199 (E.D.Va. 1975), *aff'd*. 425 U.S. 901, 96 S.Ct. 14989, 47 L.Ed.2d 751 (1976).

119. O'Grady v. Town of North Castle, (D.C.S.N.Y. 1975).

120. Cotner v. Henry, 394 F.2d 873 (7t8 Cir. 1968).

121. State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976).

> ous acts. While we are very well aware that some of the acts complained of are not universally condemned, we are equally cognizant of our role as the judicial branch of government and not the legislative.

In another case involving consensual sodomy in marriage, the Fourth Circuit Court of Appeals was persuaded that a marital right to privacy may be *waived*. It upheld a married couple's conviction for consensual sodomy because, "once they accept onlookers, whether they are close friends, chance acquaintances, observed 'peeping Toms' or paying customers, they may not exclude the state as a constitutionally forbidden intruder" and "remain protected in their expectation of privacy in their own bedroom". The dissenting judges argued strenuously that the constitutional right of privacy is in no way conditioned on secrecy and applied whether a third party or a camera is present. An unusual feature of the case that may have helped persuade Chief Judge Haynsworth to write for the majority as he did, was that the couple had advertised their wish "to meet people", a man had responded, photographs of the conduct were taken and carelessly exposed to the wife's young (11 and 13 years old) daughters who carried them to school, with predictable results.[122]

A final, perhaps appropriate light, is shed on the continuing controversy by a recent Pennsylvania case which found that the constitutional right of privacy now goes as far as to prohibit actions for tort damages in cases involving adultery, whereas traditional law had allowed the "injured" spouse to sue the partner's paramour. The Court held that "if the plaintiff's wife has a constitutional right to secure contraceptive devices, to undergo an abortion, to undergo a hysterectomy . . . all without the consent of her spouse, it stands to reason that she likewise has the right to engage in voluntary, natural sexual relations with a person of her choice."[123]

This discussion by no means exhausts the subject of "privacy" in family-related contexts. Important issues have arisen and been decided in the area of schooling,[124] freedom of religion,[125] and parental rights regarding their children.[126]

---

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

123. Kyle V. Albert, 2 Fam. L. Rep'tr. 2361 (Pa. Ct. Comm. Pleas, March 16, 1976); cf. Fadgen v. Lenker, 365 A.2d 147 (Pa. Super. Ct. 1976).

124. *E.g.*, *Yoder*, *infra* note 125; *Meyer, Pierce, supra* note 112; *cf.* Tinker v. Des Moines Ind. Comm. School Dist., 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); Baker v. Owen, 395 F.Supp. 294 (M.D.N.C. 1975), *aff'd.*, 423 U.S. 907, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975).

125. Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). *See generally*, Marcus, "The Forum of Conscience: Applying Standards Under the Free Exercise Clause", 1973 Duke L.J. 1217.

126. *E.g.*, Alsager v. Dist. Ct. of Polk Co., Iowa, (Juv. Div.)—F.2d—(8th Cir., Dec. 8, 1976); Matter of J.S. & C., 129 N.J. Super. 466, 324 A.2d 90 (1974); *cf.* In re Green, 448 Pa. 338, 292 A.2d 387 (1972); Hart v. Brown, 29 Conn. Sup. 368, 289 A.2d 386 (1972).