PRIVACY AS AN ASPECT OF THE FIRST AMENDMENT: THE PLACE OF PRIVACY IN A SOCIETY DEDICATED TO INDIVIDUAL LIBERTY

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I. INTRODUCTION

In Board of Directors of Rotary Intl v. Rotary Club of Duarte, the Supreme Court addressed the right of members of a large private association to exclude women from membership. While the Court held against the organization, it strongly suggested that more intimate relationships among a few individuals or even within small organizations may be deserving of first amendment protection. In Rotary, the Supreme Court acknowledged, for the first time, that the first amendment right to privacy extends constitutional protection beyond "expressive association" and includes the right to "intimate association". The right of "intimate association" was viewed, until Rotary, as a derivative of substantive due process or a "fundamen-

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2. The Court observed that the exact sorts of relationships given constitutional protection had not yet been clearly delineated. It went on to observe: Of course, we have not held that constitutional protection is restricted to relationships among family members. We have emphasized that the first amendment protects those relationships, including family relationships, that presuppose "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." Id. at 1945 (citing Roberts v. United States Jaycees, 468 U.S. 609 (1984)).
tal” right not specifically mentioned in the Constitution. Yet Justice Powell’s reference to the first amendment was not merely en passant; his majority opinion referred specifically to the “First Amendment” freedom of private association on four different occasions. Surprisingly, this rather expansive view of first amendment right of privacy passed without much fanfare, largely unnoticed by legal scholars and, as yet, by the courts. Still, the potential impact of a “zone of privacy” related to “intimate association” is deserving of special attention.

In Rotary, the Court declined to articulate the precise manner in which more intimate relationships (those which, at first glance, would not appear to significantly impact the marketplace of ideas) might command first amendment protection. It is this article’s objective to explore the first amendment right to privacy alluded to in Rotary as both the guardian and promoter of free speech at the political level. Specifically, this article seeks to identify a first amendment basis for the individual’s right to control information about himself or herself reasonably believed hidden from the rest of the world. Neglect for this right to privacy persists in spite of the overwhelming significance privacy has assumed with regard to fundamental tenets of the American system of government expressed in, and derived from, the first amendment. In fact, this right of privacy remains so inherent in American social and political structure as to have been assumed, taken for granted, and practically overlooked in American legal theory.

Technological innovation and government’s coincident capacity to intrude upon even the most personal activity commands heightened awareness of the individual’s right to privacy. More than a little concern must be expressed if such rights are not to be involuntarily encroached upon, relinquished, or relegated mere perfunctory protections in the name of “national security” or the “general welfare.” If first amendment freedoms of speech, press, and association are ever to yield those desirable political effects which they were designed and intended to produce, then the freedoms of private speech, private thought, and private interaction must also be

5. Alan Westin describes privacy as “the claim of an individual to determine what information about himself or herself should be known to others. This also involves when such information will be communicated or obtained and what uses will be made of it.” A. Westin, Privacy and Freedom (1967).
recognized and protected for the vital contribution each makes toward the development of society and its ideas.

II. The Evolution of Individuation

This paper shall refer to the process of expressing one's individuality as "individuation." I suggest that the source for individuation in modern society derives from the realm of privacy. Privacy protects and provides for the individual's ability to distinguish himself or herself from the rest of society and to keep such deviation free from the socialization process and public obloquy.

In The Human Condition, Hannah Arendt observed the ancient Greek city-state. Arendt pointed out that individuation was originally found in the public sphere of life, while the private realm was reserved for dealing with life's necessities. Later, when activities within the private realm took on more public significance, this private sphere began to hold far greater import for the society as a whole. Arendt wrote that with the coming of the Romans:

The emergence of society - the rise of housekeeping [life's necessities], its activities, problems, and organized devices - from the shadowy interior of the household into the light of the public sphere, has not only blurred the old borderline between private and political, it has also changed almost beyond recognition the meaning of the two terms and their significance for the life of the individual and the citizen.⁶

Today, it is the private realm, supplanting public life, which fulfills the significant role once played by the ancient Greek city-state. Modern man realizes individuation in solitude and in revelations made in the context of intimate relations. The public realm no longer functions in this capacity. Arendt noted:

[S]ociety, on all its levels, excludes the possibility of action, which formerly was excluded from the household. Instead, society expects from each of its members a certain kind of behavior, imposing innumerable and various rules, all of which tend to 'normalize' its members, to make them behave, to exclude spontaneous action of outstanding achievement.⁷

In The Presentation of Self in Everyday Life,⁸ Erving Goffman detailed one consequence of this fundamental alteration in the way modern

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⁷. Id. at 41.
society interacts: specifically, the fashion in which the individual is able to publicly express his or her individuality has been circumscribed. Goffman's insightful analysis of the facades we outwardly project contemplates an unsettling possibility, namely, that genuinely original self-expression is nonexistent in modern public life.

The spontaneity or individuality that society might react to, and thereby benefit from, is merely the secondary expression of some previously "rehearsed" private experience. Genuine, raw expression of one's individuality is no longer proper as a public process. Thus, it is the private realm to which one retires in order to "recharge his or her batteries" before attempting another foray into the marketplace of facades. Unfortunately, the modern political state is ineluctably reducing even this last bastion of individuation.

Over one hundred years ago, the astute political observer, Alexis de Tocqueville described the suppression of intellectual individuality by American society. He wrote:

At the present time, the most absolute monarchs in Europe cannot prevent certain opinions hostile to their authority from circulating in secret throughout their dominions, and even in their courts. It is not so in America; as long as the majority is still undecided, discussion is carried on; but as soon as its decision is irrevocably pronounced, every one is silent, and the friends as well as the opponents of the measure unite in assenting its propriety. . . .

. . . The authority of a king is physical, and controls the actions of men without subduing their will. But the majority possesses a power which is physical and moral at the same time, which acts upon the will as much as upon the actions, and represses not only all contest, but all controversy.

I know of no other country in which there is so little independence of mind and real freedom of discussion as in America. . . . there is no country in Europe so subdued by any single authority, as not to protect the man who raises his voice in the cause of truth from the consequences of his hardihood. . . . But in a nation where democratic institutions exist, organized like those of the United States, there is but one authority, one element of strength and success, with nothing beyond it.

9. F. Shoemann, Remarks made at a lecture on Privacy, UC Berkeley, Fall 1982. Professor Shoemann commented on the individual's need to retire and seek respite from the constant posing and posturing of everyday life and to regain contact with the real individual beneath the various socially prescribed "presentations of self." It seems that one must maintain some contact with one's real self if an effective and unaltering facade is to be put forward for any length of time. Interludes of privacy allow for such self-awareness to occur.
In America, the majority raises formidable barriers around the liberty of opinion: within these barriers, an author may write what he pleases; but woe to him if he goes beyond them. Not that he is in danger of an auto-da-fe, but he is exposed to continued obloquy and persecution.  

De Tocqueville suggests that a difference exists between political opinion which is acceptable to express, and a social consensus which is no longer susceptible to contradiction. Further, he questions the value of free speech in a society where individuals decline to express any thoughts or ideas which might challenge generally accepted sociological or political ideology. Perhaps most interesting about De Tocqueville’s observation is that distinction he perceives between those traditional, agrarian European societies, characterized by a free and genuine public exchange of ideas, and the urbanizing and opinion-stifling American society. 

Industrialization exacerbated the movement of individuation from the public to the private realm. Intimate contacts between persons other than those in one’s own immediate family have diminished in the urban environment, and privacy among personal relationships has increased. In every developing country, the affairs of individuals have been made to come more closely together. 

As enhanced technology has permitted the welfare state to grow increasingly more responsible to its citizenry, so too has it encroached upon our private lives. An increase in state activity related to record-keeping and surveillance has developed in tandem with

11. Shils, Privacy: Its Constitution and Vicissitudes, 31 Law & Contemp. Probs. 281, 289 (1966). Shils describes how the anonymous and segmental nature of relations among urban neighbors, as well as increasing concerns with other matters, diminished the interest neighbors had previously demonstrated with the affairs of neighboring households. This is in contrast to the situation in villages where everyone knew everyone else and could not escape the scrutiny of, or contact with, these neighbors.
12. Increasingly anonymous town life in the eighteenth century United States “spawned a commensurate appreciation of, and insistence on, personal privacy.” Hirsch, From Pillory to Penitentiary, 80 Mich. L. Rev. 1179, 1232 (1982). Another observation of the difference in interpersonal relation between rural and urban societies suggests that the incidence of types of crime may reflect the differing types of interpersonal relations existing in each society. In the static, rural life, crimes against the person were more frequent and theft more unusual. In the urban center, the impersonal crime of theft increased. L. Shelley, Crime and Modernization (1981).
the capacity to collect data.\textsuperscript{14}

Of course the state has always manifested a desire to know certain details about the lives of its citizenry - the ability to detect and control subversive activity in the interest of national security is clearly enhanced by this knowledge. However, only recently has technology made practical the state's pursuit of this "national interest" with a sort of casual innocence that may belie the quantity, nature, and significance of the intrusion.

Once privacy is invaded by society or by its manifestation in the state, there may be no sanctuary to which individuation can retreat (except to that relatively small space between one's ears).

In 1984, George Orwell considered the demise of individuation and the effects upon private life when encroached upon by the procrustean forces of society. In that society, intimate relationships and the opportunity to "recharge one's batteries" diminished in fearful reaction to intrusive government surveillance upon the lives of individuals.\textsuperscript{15} In fact, displays of individuality, in whatever minimalist form they occurred, would result in reprisal by the state.

III. THE SOCIAL SIGNIFICANCE OF PRIVACY

Kai Erikson describes how the individual contributes to social stability by helping the society define its own identity and increase its solidarity.\textsuperscript{16} Deviance is regarded by him as performing a necessary service by drawing the social body together in a common posture of anger and indignation. Erikson writes:

The deviant act, then, creates a sense of mutuality among the people of a community by supplying a focus for group feeling. Unless the rhythm of group life is punctuated by occasional amounts of deviant behavior, presumably social organization would be impossible.\textsuperscript{17}

He concludes:

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\textsuperscript{14} Mellers, Governments and the Individual - Their Secrecy and His Privacy, in Privacy 92 (Young ed. 1978).

\textsuperscript{15} G. ORWELL, 1984 (1964). Orwell's fictional account of the therapeutic effects of privacy are very much in accord with what is described by Jourard, supra. The discovery of a place free from surveillance and an involvement in an intimate relationship for Orwell's frustrated, sickly and neurotic protagonist results in new found health. More drastically, Orwell perceives privacy as engendering a desire to engage in revolutionary activity.


\textsuperscript{17} K. ERIKSON, WAYWARD PURITANS 3-18 (1966).
Deviant forms of behavior, by marking the outer edges of group life, give the inner structure its special character and thus supply the framework within which the people of the group develop an orderly sense of their own cultural identity.¹⁸

So individuality may be regarded as serving a boundary-maintaining function which, by evoking negative social reaction, reflects the point where acceptable behavior becomes unacceptable. Without individual initiative, such a social-condemnation and boundary-defining process would not be possible. The society’s values would not be reinforced, and people would not know how and when to limit their behavior. Furthermore, values could not adapt to reflect environmental changes and boundaries could not be redefined to accommodate such change.

The expression of one’s individuality may, therefore, be regarded as serving a significant social function. Social stagnation is social death, and it is the cathartic effect of individual conflict within the social order which actively serves as a stimulus to prevent this stagnation.

If the social consequences of individuation are to provide society with guidelines for patterning behavior, then the process by which individuation occurs must be, at the very least, maintained, and perhaps even protected and compensated for.¹⁹

Glenn Negley²⁰ contends that, while the fundamentals of American democratic theory lie in the notion that the political structure derives from and depends upon the private, independent judgments of its members, and therefore, presumes that privacy must be an integral and essential right protected by law, scarcely any political thought or actual legal recognition of this presumption exists. Neg-

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¹⁸. Id.

¹⁹. According to Coser, where the oppressive society allows hostile or aggressive dispositions to accumulate, these may be discharged in three possible ways: “(1) direct expression of hostility against the person or group which is the source of frustration, (2) displacement of such hostile behavior onto substitute objects, and (3) tension-release activity which provides satisfaction in itself without need for object or object substitute.” L. COSER, THE FUNCTIONS OF SOCIAL CONFLICT 41 (1964).

It has been noted that chronic conformity to prescribed social roles “will not yield only social approbation; physical sickness and ‘mental disease’ (the refusal or inability to continue to fulfill roles in the expected ways) are also outcomes of role-conformity. . . . Those who remain chronically well, though apparently role-abiding, have found arenas for safe, guilt-free expression of stifled experience.” Jouard, Some Philosophical Aspects of Privacy, 31 LAW & CONTEMP. PROBS. 399 (1966).

ley arrived at his conclusion that this presumption of privacy exists from what he termed a "casual" analysis of the political theory. An effort will be made here to put a little more meat on the skeletal bones left by Negley.

The freedom of speech and press embodied in the first amendment might be aptly characterized as the legal recognition and application of Erikson's principles relating to the essential social role of the individual, to the political process. The individual is vitalized as a component of the body politic. The essence of the requirement of freedom of speech is the assumption that the political system will benefit by being subject to a competition of individual ideas and the introduction of new attitudes and ideas. The machinery of the political system cannot optimally function unless it provides for a few loose cogs in the gearbox. Freedom of speech is designed to allow the system to function by providing "squeaking wheels".

The purpose of the first amendment may be regarded as that of allowing such expression in spite of the hidden prerogatives and innate myopia of those in power. Allowing free speech does not produce free speech. Obviously, the model political system loosely described here can only operate where citizens are willing and capable of expressing their views on political matters. Such a system assumes the existence of other conditions: an educated and politically involved populace. In other words, the American political system is premised upon individuality being actively and publicly expressed. If individuality originates in the private realm, privacy must be protected and nurtured as a prerequisite to the expression of individuality in the public realm.

John Stuart Mill and Harriet Taylor, the great sages of political liberty, considered the importance of individuality and found it to be crucial to the political system. They termed a lack of eccentricity, "the chief danger of the time." 21 Two essentials to individuality and, therefore to human development are recognized in On Liberty: freedom and a variety of situations.22

What the authors actually meant by "variety of situations," was privacy. Far from a recommendation that the reader should go out and try tennis that weekend instead of golf, the concern was with the

21. J.S. Mill, On Liberty 67 (A. Castrell ed. 1947). Mill was primarily concerned with the beneficial effects individuality would have upon what he perceived to be a "transitional" phase in a societal evolutionary process. For the purpose of applying these ideas to American political theory which has been established as a permanent system, however, this presents no analytic difficulty.
22. Id. at 73.
avoidance of the individual’s assimilation into a commonality as a result of being subjected to pervasive “influences hostile to Individuality”. What was being advocated, was the avoidance of common influences, common experiences, personal contact and communication with the same people and ideas, and with the wet-blanket of public opinion. Individuality is the product of privacy and socially valuable free speech the product of individuality.

Clearly, a potential problem exists for the effective functioning of the political system described above, where individuality and public expression exist in a direct relationship to the amount of privacy provided among the citizenry. It should be understood that American society at the time of the drafting of the first amendment bore a much greater resemblance in its pertinent aspects to the “face-to-face” society of ancient Greece than to modern, faceless, urban society. No source of individuality was pinpointed by the Bill of Rights; its existence was taken for granted.

The social changes brought about by the industrial revolution could hardly have been anticipated. The private realm was not always subject to those threats posed by the modern world. Nor was privacy as essential to individual public expression at a time when a greater degree of individuation was permitted in the public arena.

In modern American society, by contrast, privacy has become a prerequisite to politically viable free speech and its loss would be tantamount to the failure of the political system. Justice Brandeis was quite correct, therefore, in his assessment of the right to privacy as preeminent over freedom of speech. He merely failed to carry the assessment which he and Warren made of the value of privacy for human dignity beyond recognizing its personal significance. Had he done so, he might have concluded that it is privacy’s relevance for free speech, rather than for the favorable pursuit of happi-

23. *Id.* at 74. Certainly de Tocqueville’s impressions of the stifling of opinion in urbanizing American society are similar to these ruminations upon the disappearance of individuality in urbanizing England.

24. *Neagle*, *supra* note 27, at 322. “[F]ace to face” refers to a term coined by Peter Laslett.

25. *Olmstead v. United States*, 277 U.S. 438, 471 (1928). The concern expressed in Justice Brandeis’ dissent is with the “intrusive” character of privacy invasion, rather than the “disclosure” aspect, which was the focus of the famous law review article he co-authored with Warren (see *infra* note 36). In both of these types of privacy invasion, however, Brandeis singles out the protection of the same human interest—“the right to be let alone”. The *Olmstead* dissent is of interest here because in it Brandeis contended that the validity of individual rights must be assessed in terms of the unique conditions of the age.

ness, which lends it such primary importance. Edward Bloustein wrote:

I believe that what provoked Warren and Brandeis to write their article was a fear that a rampant press... would destroy individual dignity and integrity and emasculate individual freedom and independence. If this is so, Dean Prosser's analysis of privacy stands clearly at odds with 'the most influential law review article ever published'... 27

Interestingly enough, the great dearth of writing on freedom of expression has generally focused upon the effects of efforts by others to restrain or retaliate against a speaker. Significance has been placed upon preserving this public aspect of the speaker's life. Yet little attention has been paid to protecting those individuals who express themselves in unpopular manners, who do not wish such expressions to be exposed to the public. 28 Freedom of speech is at least as vulnerable in this private aspect as it is in its public manifestation. The effects of the erosion of this private sphere are much more insidious, however: The right to engage in free speech is not attacked, but the ability to engage in free speech is destroyed and this renders the right obsolete.

IV. THE INTRUSIVE TECHNOLOGY

When one thinks of maintaining the national security, one generally thinks of military defense measures taken against another country. However, surveillance techniques, initially designed for defense purposes, are readily adaptable to other uses, such as scrutinizing the activities of ordinary citizens. Furthermore, if one is willing to extend the legitimate objectives of national security and defense to the monitoring of suspects, dangerously dissident persons and groups, the distinction between lawful and unlawful surveillance may become unrecognizable. The application of COINTELPRO (domestic monitoring devices for covert purposes) portends the scrutiny to which all citizens may be subjected depending simply upon the legal definition of the word "dissident".

Satellite technology allows identification and observation of individuals and modern bugging technologies enable the interception of telephone communications from microwave transmissions including the capacity to identify parties to an intercepted conversation. The anxiety over electronic eavesdropping has given rise to an expanding countersurveillance industry.29

Moreover, computer databases contain voluminous quantities of information on individuals.30 This information is increasingly susceptible to access and use for purposes other than those for which these databases were originally created.31 The federal government has agreed to share information with credit agencies on persons delinquent in repaying government loans32 and already engages in extensive data sharing among its own agencies. For example, the Selective Service System, even with its limited funding, has already extensively collated various records and compiled an astonishingly complete "peacetime" database on young American males. The FBI has approved plans to expand its national computer network, which already contains over 17 million arrest records, in an effort to allow the tracking of persons merely suspected of crimes.33

Pressure has been placed upon state governments to computerize records and allow public employees to review personal and financial records of nearly all Americans.34 Legislative proposals for a comprehensive system of national I.D. cards and, more recently, identification cards for non-citizens are potentially critical invasions of privacy and clearly subject to abuse.

30. Arthur R. Miller sees computers as constituting the greatest threat to privacy. He writes, "as capacity for information-handling increases there is a tendency to engage in more extensive manipulation and analysis of recorded data which, in turn, motivates the collection of data pertaining to a larger number of variables." RULE & McADAM, POLITICS OF PRIVACY: PLANNING FOR PERSONAL DATA SYSTEMS AS POWERFUL TECHNOLOGIES 8 (1980) quoting A. R. MILLER, ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, & DOSSIERS (1971). Moreover, Miller claims that such developments are generally accompanied by a "predilection toward centralization. . . ." quoted in Mellers, Governments and the Individual - Their Secrecy and His Privacy, in PRIVACY 95 (Young ed. 1978).
34. San Francisco Examiner, Oct. 12, 1986, (This World Supplement, "Big Brother Makes A Date"), at 8.
Several years ago, the federal government had amassed 4,015,527,828 separate records on U.S. residents. Credit agencies already contain a tremendous volume of files. Trans Union and TRW both maintain files on more than 120 million persons. Bank of America has issued over 4 million credit cards and has taken applications for many more. Sears has issued 40 million cards and shares its information with credit bureaus.  

Furthermore, it now is possible to tap into all of these databases by intercepting the incidental radio waves which emanate from all computers.

Telephone companies engaging in the practice of eavesdropping for the purpose of detecting toll fraud have been known to share information with authorities, which they have gleaned in the course of their investigative activity. The Privacy Act of 1974 has, in many respects, been largely ineffective in preventing access to federal information and is representative of the ineffectiveness of other such measures.

Technological developments such as cellular telephones, interactive computers and cable television harbor tremendous potential for the invasion of privacy. Closed circuit television monitoring and the use of security devices capable of divulging the contents of one's knapsack, purse or briefcase are now commonplace. In light of the foregoing, it is no wonder that Willis Ware, the former vice chairman of the United States Privacy Protection Study Commission bluntly stated: "[t]he technology is present. The opportunities are present. All you need is an evil-minded bureaucrat or a bureaucrat who thinks he can exploit some of this technology to do a better job."
V. LEGAL ANALYSIS

In spite of the monumental increase in intelligence gathering and surveillance capabilities, recent developments in the constitutional law of privacy demonstrate an unfortunate disinclination on the part of the United States Supreme Court to protect the concept of personal intimacy per se. The Supreme Court has, by a bare majority, indicated that intimacy deserves protection only so far as it fits into what the Court perceives as "traditionally" protected social norms. Furthermore, the Supreme Court has cast doubt on whether even this "traditional" zone of privacy will protect the individual from questionable intrusive techniques which may be employed by the state. Rotary affords the Supreme Court an opportunity to develop constitutional protections simply by proclaiming and further defining a standard by which citizens may reasonably expect the quality and nature of certain activities to lie within the first amendment "zone of privacy." Until such rights are clearly defined, privacy remains unprotected.

In Olmstead v. United States,41 Justice Brandeis' dissent expressed concern with the "intrusive" character of privacy invasion, rather than the "disclosure" aspect. In both of these types of privacy invasion, however, Brandeis singled out the protection of the same human interest - "the right to be let alone." The Olmstead dissent is of interest because, in it, Brandeis contends that the validity of individual rights must be assessed in terms of the unique conditions of the age. Ruth Gavison notes that approaching privacy from a sociological perspective tends to emphasize its significance. Whereas, an analysis of privacy which proceeds entirely upon past judicial decisions tends to reduce the description of privacy and to overlook its significance within the changing social landscape.42

The United States Supreme Court has accepted and proceeded from a reductionist approach resembling the one articulated by William Prosser. Prosser's approach to privacy threatens the underlying foundations of individuality and human dignity by shifting the focus from broad considerations to narrow civil and tort considerations of property interests, enforcement of contracts, emotional distress, and copyright.43 These concerns are not really connected to human inviolability and dignity.

41. 277 U.S. 438, 471 (1928); See Warren & Brandeis, The Right to Privacy, 4 HARV. L. REV. 198 (1890).
42. Gavison, Privacy and the Limits of Law, 89 YALE L.J. 421, 460 (1980).
Prosser's four-part dissection of privacy in civil actions was adopted by the American Law Institute. In *Cox Broadcasting Corp. v. Cohn*, the Supreme Court accepted this approach to the right of privacy in the analysis of a case dealing with the publication of a deceased rape victim's name. Still, the position argued by Warren and Brandeis is not without its defenders.

Edward Bloustein, in an eloquent refutation of Prosser's position, argued that the injuries upon which Prosser focuses are only one aspect of those harms Warren and Brandeis allude to and deem worthy of protection. For example, Prosser refers to a case involving the intrusion upon a woman in the process of giving birth. Bloustein points out that the notion of privacy related to unwanted onlookers, in such a case, is not concerned merely with protecting one from emotional distress, but turns more appropriately upon the desire to enhance human dignity and individuality. Bloustein agrees that invasion of privacy is a tort, but he perceives its nature as a dignitary one, and not one concerned with freedom from publicity.

The problem with a tort of invasion of privacy is that it may find itself at loggerheads with first amendment considerations such as freedom of the press. The Supreme Court recognized this in *Time, Inc. v. Hill*. Bloustein has argued that first amendment concerns of publishers should be evaluated in terms of the public 'right to know' and weighed against the privacy interests of the individual(s) concerned. This is an adaptation of Alexander Meiklejohn's approach assessing the value of speech in terms of its worth to the listener and defining non-public speech as a property right which may not be protected under the first amendment. The difficulty in

50. Prosser, supra note 50, at 392 n.6.
53. A. Meiklejohn, *Political Freedom* (1965). The Supreme Court has apparently not accepted this analysis. Its recent decision in *Board of Directors of Rotary International v. Rotary Club of Duarte*, supra note 1, indicates that the Court per-
adapting Meiklejohn’s dichotomy between “private” and “public” speech to accommodate privacy considerations is that it is inclined to allow no protection for privacy: where speech is not “public,” it is not protected.

Outside of the tort context, the Supreme Court has protected privacy interests against state intrusion in two distinct areas: the regulation of private morals and police searches. The first major breakthrough in the area of the state regulating private morals was in Griswold v Connecticut.\textsuperscript{54} Justice Douglas, writing for the majority, invalidated a state law regulating contraceptive use by married couples and referred, in broad terms, to the right of “reproductive autonomy” and the right of individuals to be let alone.

Previous cases had developed a right of parents to bring up a child as they desired. Meyer v. Nebraska\textsuperscript{55} struck down a law prohibiting the teaching of a foreign language to school children under the eighth grade. Pierce v. Society of Sisters\textsuperscript{56} established the right of parents to send their children to private schools. The Court balanced the right of parents to select the nature of their child’s education against the state’s need to regulate the quality of education received. Buck v. Bell,\textsuperscript{57} meanwhile, upheld the state’s right to effect involuntary sterilization of a mentally retarded woman over a privacy challenge. Skinner v. Oklahoma\textsuperscript{58} later invalidated a similar statute on equal protection grounds. But, none of these earlier cases specifically upheld a right to privacy. Griswold drew from the penumbra of the ninth amendment and other constitutional rights to hold that there was such a right.

Eisenstadt v. Baird\textsuperscript{59} extended the right to use contraceptives to unmarried persons on equal protection grounds. One analyst has noted:

Up to this point, procreation and marriage were obviously linked. But in Eisenstadt v. Baird, the Court extended the Griswold rule on contraception to unmarried persons on an equal protection theory. Justice Brennan’s opinion in Eisenstadt probably generated more confusion about sexual privacy for the unmarried

\begin{footnotes}
\item[54] 381 U.S. 479 (1965).
\item[55] 262 U.S. 390 (1923).
\item[56] 252 U.S. 239 (1920).
\item[57] 274 U.S. 200 (1927).
\item[58] 316 U.S. 535 (1942).
\item[59] 405 U.S. 438 (1972).
\end{footnotes}
than any other Supreme Court opinion, largely because he did not make it clear whether Eisenstadt extended to single persons the associational intimacy implicit in Griswold's recognition of the marriage relationship, or merely the right of access to contraceptives.60

Since Eisenstadt, Supreme Court decisions have diminished the scope of the privacy right, limiting it to family concerns and marital considerations. This process culminated in the holding in Bowers v. Hardwick,61 which upheld state sodomy regulations over a privacy challenge.

In Stanley v. Georgia,62 the Court referred to the Griswold right to privacy in rejecting state attempts to "control the moral content of a person's thoughts." Stanley concerned the right to privately possess obscene materials and was couched in a first amendment context. The dimension of rights encompassed by the Court's language appeared to support the right of privacy as it relates to freedom of private expression and conduct.

But in Paris Adult Theatre v. Slaton,63 a case dealing with privacy protection of obscene materials outside one's home, the importance of individual autonomy and free expression were contrasted unfavorably with the state's interest in maintaining the quality of life and moral "tone" of society. Of particular note is the Court's continued inability to acknowledge or perceive the first amendment interest in changing the quality of life and fabric of society. Chief Justice Burger's opinion for the majority has been compared to the position taken by Sir Patrick Devlin in the famous debates regarding criminalizing homosexuality in England.64

Whatever impression existed that the judiciary might preserve a totalitarian state interest in controlling the content of individual thought after Minersville School District v. Gobitis65 was eliminated by West Virginia State Board of Education v. Barnette.66 Barnette seemed to put the Court's imprimatur on Justice Douglas' reasoning that, with regard to individual freedoms, there was one area which the state absolutely could not reach:

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63. 413 U.S. 49 (1973).
64. Hafen, supra note 47, at 517.
65. 310 U.S. 586 (1940).
66. 319 U.S. 624 (1943).
[A] catalogue of [the rights retained by the people] includes customary, traditional and time-honored rights, amenities, privileges and immunities that come within the sweep of 'the Blessings of Liberty' mentioned in the preamble to the Constitution. ... First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality. These are rights protected by the first amendment and in my view they are absolute. ... Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, conception, and the education and upbringing of children. These rights, unlike those protected by the first amendment, are subject to some control by the police power. [They] are 'fundamental'... Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll or loaf. These rights, though fundamental, are likewise subject to regulation on a showing of 'compelling state interest.'

Barnette, which dealt with the right of Jehovah's Witness school children not to stand for the flag salute would, under the *Paris* logic, be limited to the right of parental determination rather than individual autonomy. In fact, this analysis supplanted the *Paris* obscenity reasoning in *Ginsberg v. New York*. The *Ginsberg* court contrasted first amendment freedom with the state's interest in protecting the right of parents to privately determine their child's development and in preventing moral impairment of the immature mind.

Subsequently, in *New York v. Ferber*, the Court clearly articulated a willingness to deem some speech less valuable than other speech. In *Ferber*, a case dealing with the inflammatory issue of child pornography, the Court found that the evil to be restricted may so overwhelmingly outweigh expressive interests that a general ban on that sort of speech is appropriate. Obviously where "private" speech is already granted a lesser modicum of constitutional protection, this willingness to examine the content of speech for intrinsic worth bodes ill for any constitutional protection of intimacy.

In *Roe v. Wade*, the Court's concern with reproduction rather than individual autonomy was evident in Justice Blackmun's elaboration of the "zones" of the privacy right. The Court rejected the idea that it was elucidating an unlimited right "to do with one's body as one pleases." At least the abortion cases proclaim the

71. *Id.* at 154.
right to privacy in terms of an individual's choice regarding certain
intimate matters and refer to a woman's right to make a choice con-
cerning marriage and whether to bear children.

In Zablocki v Red hail,72 the Court found a right to marry pre-
vented the state from restricting decisions to enter into the marital
relationship. The Court spoke in broad terms of protecting indi-
vidual liberty, but did not extend constitutional protection beyond family
concerns. Other cases dealing with intimate associational activity
have not provided room for an individual right of choice outside the
family and marriage context. The ordinance involved in Village of
Belle Terre v. Boraas,73 was distinguished from that invalidated in
Moore v. City of East Cleveland74 because the ordinance in Boraas af-
fected unrelated individuals who choose to live together. By con-
trast, the regulation in Moore was found to intrude on the family and
the Court pointed to the long-recognized freedoms of personal
choice in matters of marriage and family life which are rooted in the
nation's history and tradition.

Those decisions related to abortion have expressed a right of
personal choice extending to unmarried and even minor women.75
The Court certainly seems to be protecting an individual right here
not encompassed by a state interest in preventing the birth of chil-
dren out of wedlock. The concern is to delineate the woman's right
of control over her own body from the state's right to protect her
health and safety and its interest in a potential citizen.

Carey v. Population Services International,76 a post-Roe contracep-
tive case, indicates that the Court will protect an individual's rights
on matters of childbearing from unjustified intrusion by the state.
The Court's willingness to extend protection to minors from irra-
tional state infringements indicates that the Court is protecting
"childbearing"-related choices. Still, non-marital sexual intimacy
would be unlikely to fall under this rubric.

Justice O'Connor, in her dissent in Akron v. Akron Center for Rep-
roductive Health,77 argued that a due process right such as the right
to choose an abortion should be framed from fairly immutable prin-
ciples. This language reflects the new Court majority's proclivity to
bury its head in concrete and its unfortunate willingness to adopt

legal reasoning which cannot anticipate or may not accommodate change. Judicial obsession with tradition regarding such important issues ignores the fact that there remain areas of our lives which we consider "private" and which are subject to change. The nuclear family, for example, developed in the late sixteenth and early seventeenth centuries, and replaced the open-lineage system of extended kinship ties.\footnote{L. Stone, The Family, Sex & Marriage in England, Fifteen Hundred to Eighteen Hundred 218 (1977).}

The Court's majority has willingly left the state room to regulate private sexual conduct in areas of non-family or marital matters where there is no recent tradition or history of such conduct. The Court has, therefore, relegated such determinations to those history books sitting on its library shelves.

In \textit{Roberts v. United States Jaycees},\footnote{468 U.S. 609, 617-18 (1984).} the Court recognized that "certain intimate human relationships must be secured against undue intrusion by the state because of the role such relationships play in safeguarding individual freedoms central to our constitutional scheme." But the Court did not apply this reasoning to afford the Jaycee's constitutional protection. Instead, membership in the Jaycee's fell within the first amendment right of freedom of association. In an analysis not unlike that of \textit{Rotary}, the Jaycees' freedom of intimate association was not abridged by allowing women in the club, because the group was basically unselective about its membership anyway. Thus, the freedom not to associate with women was not being interfered with by the state regulation.\footnote{See Abood v. Detroit Board of Education, 431 U.S. 209 (1977). See also the Court's recent application of this analysis in Board of Directors of Rotary International v. Rotary Club of Duarte, \textit{supra} note 1. The decision by Justice Powell held that California's Unruh Act, which prevents businesses from discriminating on the basis of sex, did not interfere with Rotary Club members' freedom of private association.}

Justice Brennan's broad definition of a right of intimate association in \textit{Jaycees} did not, however, encompass sexual privacy or negate his concession in \textit{Eisenstadt} that the legislature had "a full measure of discretion in fashioning means to prevent fornication."\footnote{405 U.S. 438, 449 (1972).} While the Court had upheld sodomy statutes against challenges of vagueness,\footnote{Wainright v. Stone, 414 U.S. 21 (1973); Rose v. Locke, 423 U.S. 48 (1975).} it had avoided deciding the precise issue of unmarried sexual intimacy.\footnote{Doe v. Commonwealth, 403 F. Supp. 1199 (E.D. Va. 1975), \textit{aff'd mem.}, 425 U.S. 901 (1976).} The reason for avoiding this issue has been attributed,
in part, to the fact that such contact between consenting adults is not prosecuted:

If homosexuals are not prosecuted, there is no need to decide whether such conduct between consenting adults in private can constitutionally be prohibited. If people can keep their individual judgments known only to a group of like-minded individuals, there is no need to deal with the problem of regulating hostile reactions by others. It is easier, at least in the short run and certainly for the person making the decision, to conceal actions and thoughts that may threaten an important relationship. Thus, privacy reduces our incentive to deal with our problems.\(^{84}\)

The Court finally did decide this question against protecting private intimacy in *Bowers v. Hardwick*.\(^{85}\) Laurence Tribe expressed his concern regarding the Court’s limiting privacy rights to “traditional” areas of protection in the face of social transformation.\(^{86}\) But, he failed to convince a majority of the Court of this difficulty in *Bowers*.

The difference between the approach taken by the *Bowers* Court majority and the rationale offered by the dissenting opinion reflects the difference between reductionist and sociological analytic approaches. The majority characterized the issue as “whether the federal Constitution confers a fundamental right upon homosexuals to engage in sodomy...”\(^{87}\) The dissent, conversely, stated: “the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution’s protection of privacy.”\(^{88}\)

A reductionist legal analysis which gives short shrift to the need to protect individuality can most certainly be expected to prevail in the Court’s opinions for the foreseeable future. Where the social significance of privacy is granted diminished recognition in the eyes of the law, the power of the state to encroach on intimate aspects of the individual’s existence is augmented.

The threat presented by the *Bowers* analysis may not be so much from the green light it gives to the state to enact regulations concerning intimate conduct as from the go ahead it gives the state to act to detect such conduct and to enforce such regulations.

\(^{84}\) Gavison, *supra* note 29, at 452-53.
\(^{85}\) 478 U.S. 186 (1986).
\(^{87}\) 478 U.S. 186, 190 (1986).
\(^{88}\) *Id.* at 208.
The second area of concern is searches by the government, specifically the police. Even the married couple may not be free of state intrusion into the privacy of the home under the Supreme Court’s reductionist tact. Justice Douglas expressed horror in *Griswold* at the very thought of the police snooping about in the “sacred marital bed chamber.” But in *California v. Ciraolo*, the Supreme Court adopted an approach which allows for considerable breadth in governmental intrusion into even such “traditional” private activity on the basis that a fourth amendment reasonable expectation of privacy may not be met. *Ciraolo* dealt with police use of an airplane to engage in surveillance of a suspected marijuana cultivator’s yard - an area which the Court acknowledged was protected. The yard was surrounded by a high fence which the police could not see over from the ground. The Court accepted the state’s argument that “if there is an opening, the police may look.”

Prior to *Katz v. United States*, state invasions of privacy in violation of fourth amendment rights depended upon a physical trespass upon individual property rights and did not encompass intangible matters such as verbal communication. *Katz* held that a physical trespass was not required and established that protection could be conferred only where the individual had a “reasonable expectation of privacy” and had not “assumed the risk” of being seen or overheard. The Court has, in effect, abrogated the flexible *Katz* reasonableness test in certain instances and has adopted a per se approach for such situations.

Professor Kamisar has expressed the view that, since *Katz*, the Supreme Court has been building up the notion that there is rarely a legally recognized search or seizure in order to emasculate the exclusionary rule. Kamisar views the *Ciraolo* case as expanding the

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89. 476 U.S. 207 (1986).
90. Id. at 210.
idea of "assuming the risk" to ridiculous lengths in this effort.94

The majority's reductionist perception of the Ciralo facts focuses upon the genuine possibility of someone detecting illegal conduct by "simple visual observations from a public place." The Court stated:

Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.95

The analytic gap in this approach is, however, that someone casually glancing down from an airplane into the property and land below is not scrutinizing the conduct of the individuals below for illegality. The police activity in Ciralo, on the other hand, was intrusive. In terms of a sociological analysis, this is clear.

Moreover, the Ciralo dissent noted, "[r]eliance on the manner of surveillance is directly contrary to the standard of Katz, which identifies a constitutionally protected privacy right by focusing on the interests of the individual and of a free society...the presence or absence of physical trespass by the police is constitutionally irrelevant..."96

The Court's analysis does little to protect against police that employ technologically sophisticated telescopic visual aids to peer into bedroom windows where the shades have been left up an inch or two. The argument has been made that both the surveillance technique employed and the reasonable expectation involved should be considered in determining whether a search has occurred.97 The type of scrutiny utilized by police is not presently considered in the Court's analysis of police investigations. Indeed, the Court in United States v. Knotts,98 rejected such an analysis and stated that "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory facilities bestowed upon them at birth with such enhancement as science and technology afforded them in this case."

The concern with inquiring into "whether the government's in-

trusion infringes upon the personal and societal values protected by
the Fourth Amendment"\(^99\) has been forsaken for an analysis pro-
ceeding from the inquiry as to whether it is possible to somehow see
the conduct from a public place. The conclusion which must be
drawn from this is that judicial recognition of the social significance
of privacy and the constitutional protection of intimate relations
from state intrusions are a long way off. Legislative protection ap-
ppears to be a more viable approach, in spite of the existence of nu-
merous dusty old blue laws.

VI. Conclusion

The most sinister aspect of invasions of privacy is that an actual
invasion need not occur at all for the effect of an invasion to be felt.
If privacy is to truly exist in a social vacuum - a place free from the
social pressures which increasingly surround the individual and pre-
vent him or her from expanding and exploring the uniqueness dis-
tinguishing him or her from society - the mere possibility or threat
of societal intrusions will be enough to prevent individuation.

In Orwell's 1984 there was of course no way of knowing
whether one was being watched at any given moment. How often or
on what system the "Thought Police" plugged in on any individual
was guesswork. One lived based on the assumption that every
sound made was overheard, and, except in darkness, every move-
ment scrutinized.\(^100\)

It might be suggested that the individual will become ac cus-
tomed to being subjected to constant scrutiny and will become in-
ured to and unaffected by intrusiveness. It seems more plausible,
however, that the individual should instead become inured to the
subtle changes within him or herself - the adjustments made to
maintain a constant facade. When one constantly operates upon the
premise that he or she is being observed, one must constantly per-
form. It is this premise which the new intrusive technology increas-
ingly makes a part of the individual's life.

It is unsettling that the Supreme Court has effectively san-
tioned the acclimatization of America's youth to a world in which
constant surveillance and state intrusion is the norm. The determi-
nation in New Jersey v. T.L.O.,\(^101\) that students in public schools have
a lesser right to privacy is particularly disturbing since the extent to

\(^100\) Orwell, supra note 15, at 6-7.
which these young impressionable minds are exposed to state intrusion would seem to set social patterns for a lifetime. It is doubtful that this atmosphere will contribute to the significant values of individuality and freedom which should be instilled in the minds of America's youth.

The individual operating without any assurance of secured privacy is deprived of the opportunity to "recharge batteries" and regain contact with the real self behind assumed facades. Any proclivity towards individuation is "chilled". Therein lies the threat to freedom of speech and the American political system. Assuming that the principles underlying freedom of speech are still as valid for modern American society as they were over 200 years ago, there is cause for concern over the development and deployment of increased intrusive technological capabilities. It is of paramount importance that the disturbing threat posed by this technology be countered by offering the individual citizen safety in privacy. It is time to enunciate clear safeguards for individuation in the form of an unambiguous right to privacy.

Leadership should be taken by state courts and by legislatures to avert further erosion of our understanding of privacy and to protect it for the significant role it plays in American society. State courts are not precluded by rulings of the United States Supreme Court from finding that certain acts violate provisions of individual state constitutions. Justice Brennan has noted an increasing willingness of state supreme courts to expand their constitutional protections beyond those found by the United States Supreme Court in the United States Constitution. Where states have a right to privacy stated in their constitutions, the difficulties the United States Supreme Court has struggled with in finding a penumbral right may be avoided.102 The California Supreme Court has been a leader in this federalism, spearheaded by Justice Stanley Mosk.103

The California Supreme Court has held that bank depositors have a reasonable expectation of privacy in their bank records to prevent disclosure to the state.104 The United States Supreme Court found no such protection under the federal constitution.105

The constitutionality of state sodomy statutes, like the one in Bowers, has been narrowed by state courts, and with the Court's change in direction from the Warren era, independent use of state constitutional law looms large.\textsuperscript{106} Legislatures are in a position to fill the gaps in privacy rights recognized by the Supreme Court. In particular, state use of sophisticated electronic surveillance and information technology to intrude into socially recognized personal aspects of citizen's lives should be addressed.

Three sources of privacy invasion presently threaten the individual. Public and private agencies have been considered a threat to privacy. Additionally, the media\textsuperscript{107} may be regarded as a quasi-public threat to privacy, since it is regarded as serving a valuable function of informing the public. Different considerations affect how courts and legislatures regard each of these, but immediate attention should be focused upon the threat posed by government agencies.

Government invasion of individual privacy interests presently constitutes the far greatest threat. The government's tremendous resources are only part of the reason for this. It should be quite apparent from America's experience with the HUAC proceedings that government efforts to intrude upon individual privacy can claim far greater legitimacy in the minds of the general populace than can efforts of the media or private organizations. Moreover, government intrusions are much more irreproachable because they are made in the name of the general welfare and national security. Furthermore, an intrusion by the impersonal forces of the government is likely to have a far more "chilling" aspect to it than an intrusion by a more tangible entity such as a business rival, newspaper reporter or neighborhood gossip.

The first amendment's command is directed against the state. Consequently, where encroachments upon privacy would fall within the protection of the first amendment, it should, in theory, be less difficult to place restrictions upon public entities than upon individuals. The public entity's disclosure of private information should be regarded as unentitled to the more permissive standard which may exist for disclosures concerning public figures. This distinction

\begin{footnotesize}
\footnote{107. One interesting and convoluted problem dealing with the importance of privacy for freedom of speech is that one could end up arguing that privacy must be preserved at the expense of freedom of speech in order to preserve freedom of speech!}
\end{footnotesize}
which exists in defamation law and is alluded to in privacy cases\textsuperscript{108} serves to provide for the public's interest with regard to certain information.

The groundwork has been laid in the courts for legislative enactment of a privacy right of the individual vis-a'-vis the state as constituting more than a property right. Case law has delineated the areas of concern to which constitutional protection has not been extended. Popular support exists for recognition of the individual's right to remain free from intrusive state regulation of private concerns. Government surveillance has been faced with increasing regulation,\textsuperscript{109} and the enactment of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 has guaranteed judicial supervision of electronic surveillance.\textsuperscript{110}

The progressing threat to the individual freedom of expression and to American society will not reverse course and go away by itself. Judicial and legislative leadership in carving out a substantial right to privacy has already been asserted and this effort must be extended and maintained if American law is to continue to protect the invaluable social and political role of the individual.

\textsuperscript{108} Time, Inc. v. Hill, 385 U.S. 534 (1967), held that a public figure must prove the defendant exhibited reckless disregard for the truth in order to prevail in a "false-light" case. But neither \textit{Time} nor Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974), held that a lesser standard would be allowed for the private figure.

\textsuperscript{109} It should be noted that in spite of more restrictive laws, the Reagan administration has increased its surveillance orders by 280\%.

\textsuperscript{110} \textit{Decker} and \textit{Handler}, \textit{Electronic Surveillance: Standards, Restrictions and Remedies}, 12 Cal. W.L. Rev. 60 (1975). This article traces the American law's treatment of electronic surveillance from \textit{Ohnstead}, to \textit{Katz}, 389 U.S. 347 (1967), and on to its present regard for privacy as protecting persons rather than property.