STATE OF CALIFORNIA

EXECUTIVE SUMMARY

REPORT OF THE COMMISSION ON PERSONAL PRIVACY

Securing privacy through law and education

DECEMBER, 1982

BURT PINES
CHAIRPERSON

THOMAS F. COLEMAN
EXECUTIVE DIRECTOR

STATE OF CALIFORNIA EDMUND G. BROWN JR., Governor

COMMISSION ON PERSONAL PRIVACY

December, 1982

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

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

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

The People of California:

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

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

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

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

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

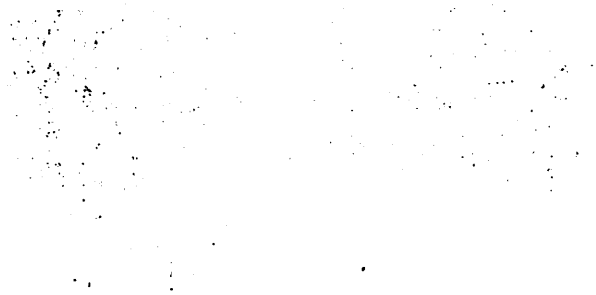
We hope the Report will serve two functions: first, inform and help educate the people of this state and others as to the right of personal privacy; and, second, operate as a catalyst for implementation of whatever protections are still needed to make that right a practical reality.

Sincerely,

Burt Pines
Chairperson, Commission on Personal Privacy

State of California

COMMISSION ON PERSONAL PRIVACY



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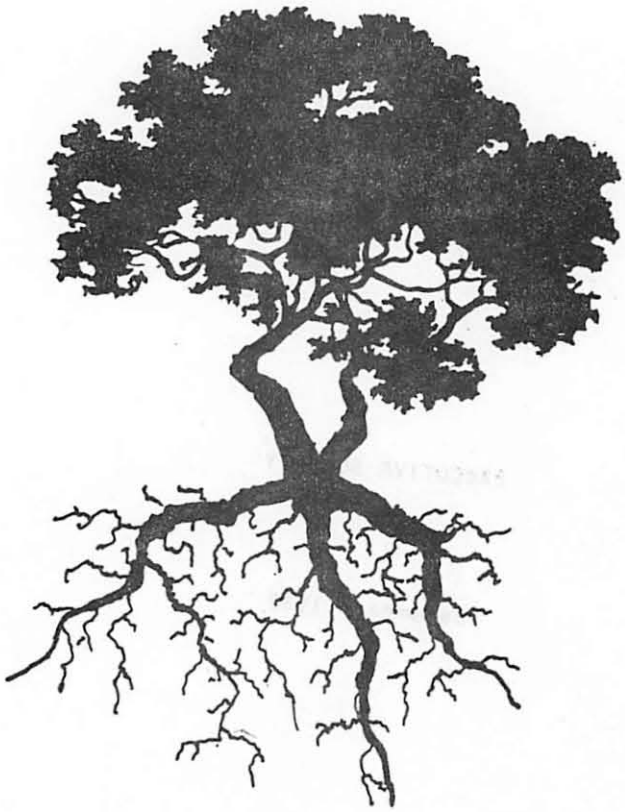

THE TREE OF PERSONAL PRIVACY

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

decisional/associational privacy, sometimes called "freedom of choice," which protects one from interference in one's decisions and inclinations regarding one's personality and one's relationships and in other manifestations of the exercise of autonomy over one's body, mind, and emotions;

territorial privacy, which insulates one from intrusions in specific locations, including one's home and anywhere else one has a reasonable expectation of privacy or reasonable desire to be left alone; and

informational privacy, which shields one from unfair and unnecessary collection and dissemination of personal information.

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

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

constitutional law, for ensuring security from unreasonable governmental encroachments.

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

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

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

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

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

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

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

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

Burt Pines

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THE MAIN REPORT OF THE COMMISSION IS ALSO AVAILABLE

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*

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* * *

PART ONE: INTRODUCTION AND BACKGROUND

I. Approach of the Executive Summary

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

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

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

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

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

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

REPORT, page 16.

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

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

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

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

II. Creation and Mandate of the California Commission

On October 9, 1980, Governor Brown signed an executive order which established the Commission on Personal Privacy. His mandate to the Commission was:

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

REPORT, page 12.

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

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

The Commission is composed of twenty-five members with varied professional backgrounds, including business, education, journalism, labor, law, law enforcement, and psychiatry. The Governor appointed former Los Angeles City Attorney Burt Pines as Chairperson and 14 other commissioners. The Speaker of the Assembly appointed five commissioners. The remaining five appointments were made by the Senate Rules Committee. Commissioners reside in various parts of the state: San Diego, Los Angeles, Ventura, Fresno, Sacramento, and San Francisco.

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

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

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

At its first meeting, on June 19, 1981, in Los Angeles, the Commission unanimously adopted the following statement of purpose: REPORT, page 13.

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

III. Operations of the California Commission

At the first meeting, the following Committees were established: REPORT, page 14.

Aging and Disability

Family Relationships

Youth and Adult Corrections

Criminal Justice

Data Collection and Dissemination

Education and Counseling

Employment Discrimination

Medical and Mental Health Services

During the summer months of 1981, the Commission secured its staffing, the Committees met, and the Commissioners read articles and reports on the topics under study. The second meeting of the Commission was held on August 15, 1981, in Sacramento.

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

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

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

IV. Other Study Commissions on Privacy

REPORT, page 6.

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

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

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

REPORT, page 7.

The most comprehensive study of informational privacy was conducted by a temporary study commission created by Congress pursuant to the Privacy Act of 1974. The Privacy Protection Study Commission's main report, entitled Personal Privacy in an Information Society, documented that:

> * Public opinion data suggest that most Americans treasure their personal privacy, both in the abstract and in their daily lives.
>
> * Privacy encroachments are increasing. It is now commonplace for one to be asked to divulge information about oneself for use by unseen strangers who make decisions about one that directly affect one's everyday life, e.g., transactions involving credit, insurance, medical care, employment, education, and social services.
>
> * There is a real need for ongoing monitoring and coordination of personal privacy

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

V. Other Study Commissions on Sexuality and Sexual Orientation

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

REPORT, page 7.

In 1954, the Secretary of State for the Home Department (London) and the Secretary of State for Scotland created a Committee on Homosexual Offenses and Prostitution. The report of this Committee, known as the "Wolfenden Report" after Sir John Wolfenden, the Committee's chairperson, was presented to Parliament by command of Her Majesty, in September, 1957. As a direct result, private homosexual acts between consenting adults were decriminalized, and private acts of prostitution remain to this day a matter of private morality and not a subject of English penal regulation.

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

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

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

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

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

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

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

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

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

REPORT, page 8.

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

The Oregon Task Force on Sexual Preference was established in March, 1976, by Richard A. Davis, Director of the Department of Human Resources, at the request of Governor Bob Straub. Its directive was to assemble accurate information on homosexual men and women in Oregon and to make recommendations for legislative and administrative policies that would ensure the civil rights of all Oregonians, regardless of sexual preference. The Final Report, submitted to the Governor and the Legislature on December 1, 1978, called for legislation prohibiting sexual orientation discrimination in employment, housing, and public accommodations. There was also a comprehensive and well-documented section on "myths and stereotypes."

REPORT, page 9.

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

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

REPORT, page 10.

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

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

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

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

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

* Over two-thirds opposed any city ordinance prohibiting sexual orientation discrimination.

REPORT, page 10.

A number of major churches in this country have also studied the issue of homosexuality. One of the most comprehensive and well-documented of these studies was conducted by the United Presbyterian Church. Its Task Force Report was presented to the 190th General Assembly of the Church on May 22, 1978. As a result, the Assembly recommended that:

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

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

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

VI. Preliminaries

A. UNDERLYING PHILOSOPHY

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

REPORT, page 19.

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

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

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

REPORT, page 21.

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

Olmstead v. United States (1928) 277 U.S. 438, 478 [48 S.Ct. 564, 5721.

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, by whatever means employed, must be deemed a violation.

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

REPORT, page 22.

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

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

Again, in the context of physiological autonomy, Justice Cardozo stated, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body."

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

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

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

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

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

National opinion research surveys have shown public concern about misuse of personal information by business and government has increased steadily throughout the Seventies and that 3 out of 4 Americans now believe that "privacy" should be akin to the inalienable American right to life, liberty, and the pursuit of happiness.

REPORT, page 2.

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

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

> Individuals need time devoted inwardly, "to observe and deal with ourselves without the distraction of others' input. It is privacy that permits us to carry out self-evaluation, a fundamental process in attaining self-understanding and self-identity."

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

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

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

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

B. THE RIGHT OF PRIVACY vs. FREEDOM OF EXPRESSION

Often, in the name of preserving and enhancing the privacy rights of individuals, government officials pass laws, adopt policies, or take other measures that curb the conduct and speech of organizations or individuals. When these privacy protection measures come before the courts, it is often in the context of a constitutional challenge that has been leveled by someone who feels that freedom of expression has unreasonably suffered in the name of "protecting privacy." Our courts have the duty to uphold and defend the Constitution, and when two constitutional provisions are at odds, the task of balancing and resolving the conflict is a delicate one.

REPORT, page 55.

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

REPORT, page 58.

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

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

REPORT, page 58.

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

One hard and fast rule has been developed by the Supreme Court in these publication-of-information cases. Publication of accurate facts obtained by resorting to the public record is not actionable under the privacy rubric.

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

The Commission urges public policy makers and administrators to keep this First Amendment rule in mind when deciding what information should be requested or collected from individuals; since publication of information that is in the public record is not actionable, the utmost of care should be exercised in determining what becomes a matter of public record. Furthermore, whenever the Public Records Act vests administrators with discretion in disseminating such public record information, or when the terms of the Act are ambiguous, the Commission urges that administrators carefully balance all competing interests before personal information in the hands of public agencies is released or disclosed to the public.

REPORT, page 59.

VII. The Tree of Personal Privacy

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

REPORT, page v.

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

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

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

REPORT, page 23.

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

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

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

Three roots provide the basic grounding for and scope of the right. The root most commonly thought of in the privacy context is **territorial privacy**, which insulates one from intrusions in specific locations, including one's home and anywhere else one has a reasonable expectation of privacy or reasonable desire to be left alone.

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

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

REPORT, pages 63, 130.

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

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

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

A. THE FOUNDATIONS

1. Tort Law

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

REPORT, page 23.

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

Cooley on Torts (1888), page 29.

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

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

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

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

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

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

REPORT, page 24.

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

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

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

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

62 Am.Jur.2d, Privacy, §11.

REPORT, page 24.

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

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

REPORT, page 24.

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

2. Constitutional Law

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

REPORT, page 25.

Griswold v. Connecticut, cited above.

* the First Amendment's guarantee of free speech and press and freedom of association;

* the Third Amendment's injunction against quartering of soldiers during peacetime in any house without the owner's consent;

* the Fourth Amendment's prohibition of unreasonable searches and seizures;

* the Fifth Amendment's privilege against self-incrimination; and

* the Ninth Amendment's reservation to the people of rights not otherwise enumerated in the Constitution.

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

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

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

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

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

> The concept of a constitutional right of privacy still remains largely undefined. There are at least three facets that have been partially revealed, but their form and shape remain to be fully ascertained. The first is the right of the individual to be free in his private affairs from government surveillance and intrusion. The second is the right of an individual not to have his private affairs made public by the government. The third is the right of an individual to be free in action, thought, experience, and belief from government intrusion.

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

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

REPORT, page 25.

> The individual surrenders to society many rights and privileges which he would be free to exercise in a state of nature, in exchange for benefits which he receives as a member of society. But he is not presumed to surrender all those rights, and the public has no more right, without his consent, to invade the domain of those rights which it is necessarily to be presumed that he has reserved, than he has to violate the valid regulations of the organized government under which he lives. The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private, and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law. . . . It may be said to arise out of those laws sometimes characterized as "immutable," because they are natural, and so just at all

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

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

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

REPORT, page 72.

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

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

REPORT, page 93.

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

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

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

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

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

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

REPORT, page 101.

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

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

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

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

REPORT, page 106.

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

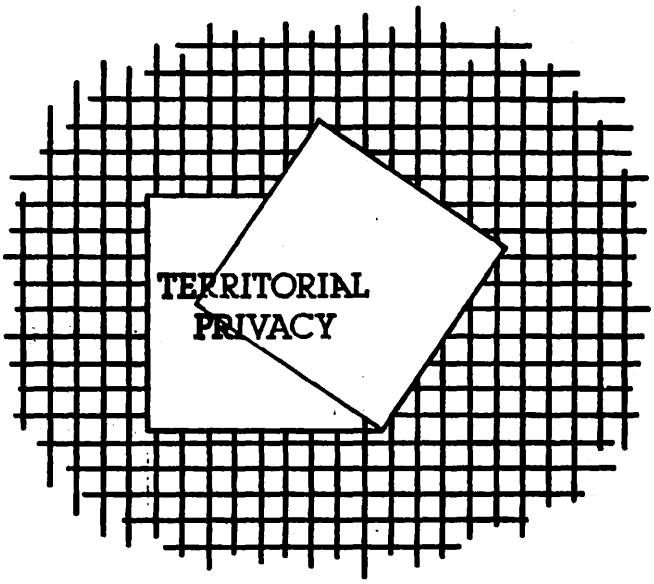
> In emphasizing . . . "the incontrovertible conclusion that the California Constitution is, and always has been, a document of independent force," our court explained that "[i]t is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended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

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

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

REPORT, page 107.

B. THE ROOTS



1. Territorial Privacy

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

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

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

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

> The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

United States Constitution, Fourth Amendment.

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

> The point of the Fourth Amendment, which is often not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.
>
> . . . "[B]oth the United States Constitution and the California Constitution make it emphatically clear that important as efficient law enforcement may be, it is more important that the right of privacy guaranteed by these constitutional provisions be respected. Since in no case shall the right of the people to be secure against unreasonable searches and seizures be violated, the contention that unreasonable searches and seizures are justified by the necessity of bringing criminals to justice cannot be accepted."

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

With respect to the home, the Court has cautioned:

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

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

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

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

It was not until 1961 that the federal Supreme Court recognized that privacy was a freedom implicit in the concept of ordered liberty, resulting in the application of the exclusionary rule to keep illegally seized evidence out of trials in state courts.

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

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

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

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

Early development of the right of privacy as protected by the Fourth Amendment depended largely on concepts of territorial privacy, defined primarily in terms of whether an individual had a proprietary interest in the locus of his or her activities. The closer the connection between one's actions and one's home or other location in which one had an ownership interest, the more likely the privacy claims would be recognized.

REPORT, page 39.

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

Later, the federal Supreme Court recognized that privacy expectations can be reasonable in a whole host of places outside of the home (e.g., a business office, a friend's apartment, a taxicab, or a telephone booth). People, not places, are protected. It is, therefore, not simply the nature of the area (public versus private) on which cases now turn, but rather the relationship between the individual and the place. The test for this relationship involves two elements:

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

(2) societal recognition that such expectation was reasonable.

Katz v. United States, cited above.

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

REPORT, page 40.

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

REPORT, pages 108-112. People v. Spear (1939) 32 Cal. App.2d 165; Vescovo v. New Way Enterprises (1976) 60 Cal.App.3d 582; Agnello v. United States (1925) 269 U.S. 20; People v. Reeves (1964) 61 Cal.2d 268.

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

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

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

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

REPORT, page 112.

* * *

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

REPORT, page 312.

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

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

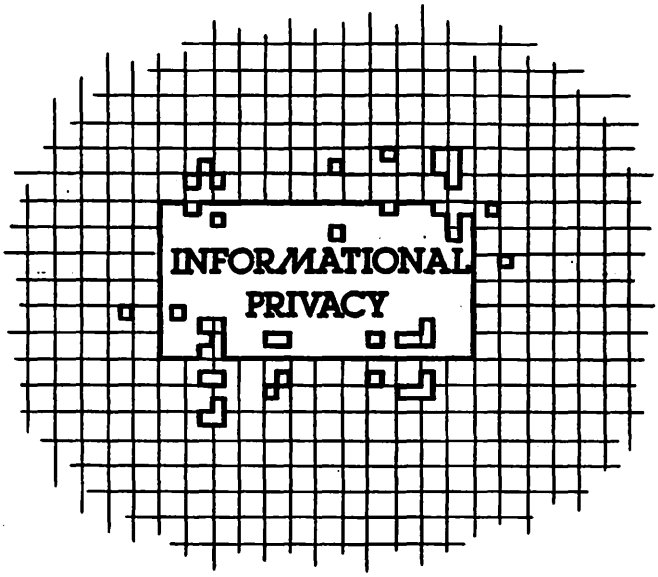
REPORT, page 312.

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

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

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

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



2. Informational Privacy

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

REPORT, page 1.

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

REPORT, pages 51-53.

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

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

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

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

REPORT, page 157.

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

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

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

REPORT, page 161.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REPORT, page 163.

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

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

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

* * *

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

REPORT, pages 314-318.

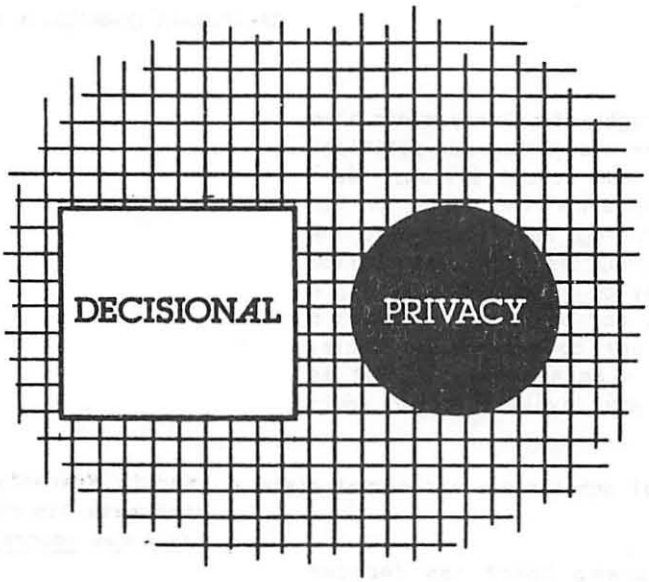
Acanfora v. Board of Education (4th Cir. 1974) 491 F.2d 498; Gaylord v. Tacoma School District (Wash. 1977) 559 P.2d 1340; Gish v. Board of Education (N.J. App. 1976) 336 A.2d 1337.

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

REPORT, page 353.

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

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



3. Decisional/Associational Privacy

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

REPORT, pages 41-53.

Carey v. Population Services, cited above.

The police power is a shorthand way of referring to the authority of government to regulate public health, safety, welfare, and morals. However, this plenary power to regulate is not without its limits. The United States Constitution restricts the police power when it is abusive of the rights of the individual. The Bill of Rights operates directly as a check on overreaching action by the federal government and, through the Fourteenth Amendment, on the activities of state and local government officials and laws.

REPORT, page 41.

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

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

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

Griswold v. Connecticut, cited above.

> We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our decisions.

A leading constitutional scholar has noted that since Griswold:

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

> . . . [t]he Supreme Court has decided about fifty cases dealing with marriage and divorce, family relationships, the choice whether to procreate, and various forms of intimate association outside the traditional family structure.
>
> * * *
>
> By intimate association I mean a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship.

The fundamental right to make personal decisions is stronger still when combined with the territorial privacy of one's home:

Stanley v. Georgia, cited above.

> If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

And the right is strong also when sexual autonomy is involved in the context of decisions regarding having children (contraception):

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

> If the right of privacy means anything at all, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting the person as the decision whether to bear or beget a child.

The realm of decisional and associational privacy

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

Roe v. Wade, cited above.

> . . . [O]nly personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" . . . are included in this guarantee of personal privacy. . . .
>
> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the People, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

The United States Supreme Court has further held that the right of personal privacy includes "the interest in independence in making certain kinds of decisions." And further:

Carey v. Population Services, cited above.

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

Within the area of so-called "alternate lifestyles," the Supreme Court has demonstrated an unwillingness to apply the protections stemming from decisional and associational privacy rights to sexually oriented decisions and associations which are somewhat unconventional or which run against traditional mores. Such judicial avoidance of cases involving unconventional lifestyles or relationships has prompted constitutional evolution in this area to take place most often in the state courts.

REPORT, page 48.

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

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

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

personal autonomy which our Constitution seeks to safeguard.

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

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

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

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

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

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

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

of the laws guaranteed them by the United States Constitution.

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

* * *

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

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

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

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

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

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

REPORT, page 79.

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

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

REPORT, pages 113-116.

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

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

REPORT, pages 116-122.

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

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

REPORT, pages 123-127.

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

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

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

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

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

REPORT, pages 128-129.

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

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

VIII. Relationship Between Personal Privacy and Sexual Orientation

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

REPORT, page 304.

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

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

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

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

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

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

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

REPORT, page 301.

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

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

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

* Sexual orientation discrimination contravenes the policy of this state;

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

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

The Commission agrees with the underlying suggestion, implicit in the Governor's Executive Order, that protection of the right of privacy for all requires vigorous enforcement for even those minorities that may be unpopular to many. The principle that freedoms can remain safeguarded for the majority only by ensuring their protection for the minority can also be seen at work in many other areas of the law. REPORT, page 301.

For example, the chain of protection of personal religious freedom is only as strong -- even for the majority -- as the protection offered the most heretical minority. It is to the credit of many religious leaders that, while they espouse their faith as singularly true, they strongly defend as a principle the right of all to freedom in religious belief. REPORT, page 302

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

The connection between sexual orientation dicrimination and invasions personal privacy has been explained by a federal judge in a recent opinion which ordered the Secretary of the Army to reinstate a woman into the Army Reserves after she had been discharged for "being a homosexual": REPORT, page 304.

<u>benShalom</u> v. <u>Secretary of Army</u>, cited above.

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

> The ". . . autonomous control over the development and expression of one's intellect, interests, tastes, and personality" (emphasis added) are among the most precious of rights protected by the First Amendment.
>
> As stated above, [the Army regulation on homosexuality] effectively "chills" the free association of any soldier with known or suspected homosexuals. The right of association is found in the penumbral zone of privacy created by the First Amendment. . . . Incursion on this right of association, therefore, invades the right to privacy in one's religious, political, economic, or cultural associations. . . .
>
> On a broader scale, the Army's policy of discharging people simply for having homosexual personalities also offends privacy interests in the First Amendment.
>
> One's personality develops and is made manifest by speech, personal expression and association of one's self with certain persons to the exclusion of others. . . . A homosexual personality -- formed genetically or by human experience; the product of deliberate choice or predetermination -- may be displeasing, disgusting and immoral to many. These, however, are social judgments, not ingredients for gauging constitutional permissibility.

REPORT, page 306.

New York Attorney General Robert Abrams recently addressed the connection between privacy and sexual orientation:

> . . . [The right of privacy] conceptually encompasses control over one's body and control over one's decisions about personal lifestyle. It is a right already recognized as a fundamental right by the United States Supreme Court . . . .
>
> Before the police power of the state can be invoked to justify an intrusion into an individual's personal decisions, compelling reasons to do so must be shown. The state clearly has a legitimate interest in protecting its citizens from violence and other clearly defined harm. The state must certainly be involved in protecting children from violence and from situations in which their inability to make mature judgments is manipu-

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

> lated and used against them. But justifications for discrimination against lesbians and gay men, which are based on prejudices, religious dogma, and unsubstantiated, unfounded and false presumptions are not compelling. . . . [It is not] justifiable to deny employment, or housing, or other basic rights to lesbians and gay men because of these prejudices. Nor can such rights be denied because of a presumption that homosexuals molest children when the facts indicate overwhelmingly that it is young girls who are sexually molested, and that they are molested by adult men who are heterosexual and all too often members of the girl's immediate family.
>
> The right of privacy protects not only activities which are private acts between consenting adults, but also private and personal decisions, even if publicly acknowledged. The issue of privacy as broadly-defined should encompass the right to live one's life unhindered, no matter how controversial or unconventional that lifestyle is.

REPORT, page 308.

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

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

> I have decided to sign this bill for one basic reason, to protect one's right to privacy. As one who believes in the fundamental Republican principle that government should have a very restricted involvement in people's private and personal lives, I feel strongly about governmentally sanctioned inquiry into an individual's thoughts, beliefs and feelings.
>
> Discrimination on sexual preference, if allowed, clearly must allow inquiries into one's private life that go beyond reasonable inquiry and in fact invade one's privacy.
>
> No one ought to have the right [to inquire into] and no one ought to be placed in a position of having to reveal such personal information when it is not directly related to an overriding public purpose. . . .

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

REPORT, page 311

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

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

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

REPORT, page 337.

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

REPORT, page 339.

"BOOKLET ON MYTHS ABOUT HOMOSEXUALITY"

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

REPORT, page 340.

MYTH: Gays Are an Insignificant Minority

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

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

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

MYTH: Gays Are Not Victims of Discrimination

REPORT, pages 341-358.

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

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

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

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

REPORT, page 388.

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

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

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

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

REPORT, page 354.

REPORT, page 418.

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

MYTH: Gays are Child Molesters

REPORT, page 359.

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

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

MYTH: Homosexuality is a Mental Illness

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

REPORT, page 361.

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

Bullough, Sin, Sickness and Sanity, cited above.

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

See Bullough, cited above.

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

REPORT, page 363.

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

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

REPORT, page 367.

"AMEND LAW ON CAUSES AND CURES OF HOMOSEXUALITY"

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

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

REPORT, page 368.

MYTH: Contact with or Exposure to Homosexuals is Dangerous

REPORT, page 364.

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

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

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

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

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

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

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

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

REPORT, page 369.

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

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

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

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

REPORT, page 373.

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

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

PART THREE: PRACTICAL IMPLICATIONS AND MANIFESTATIONS

IX. Information Practices and Records

A. FEDERAL STANDARDS

In 1974, Congress enacted the Federal Privacy Act declaring that informational privacy "is a personal and fundamental right protected by the Constitution." Through various means, this Act purports to give individuals some power to limit the collection, maintenance, and dissemination of personal information about them by agencies of the federal government.

REPORT, page 61.

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

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

Guidebook, page 63.

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

Guidebook, pages 45-64.

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

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

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

* The subject of a personal record, not its governmental custodian, is harmed by its disclosure. Yet only the latter may invoke the Freedom of Information Act's privacy exemptions.

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

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

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

REPORT, page 62.

"AMEND FEDERAL PRIVACY ACT"

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

The Commission notes that many personal privacy protections can be delivered only by Congress. Data collection and dissemination practices are carried on daily through both national and international networks; many corporations stretch over state and national boundaries. In many cases, legislation is powerless to check increasing informational privacy abuses.

REPORT, page 63.

REPORT, page 64.

"NATIONAL PRIVACY PROJECTS"

THE COMMISSION RECOMMENDS that California's congressional delegation introduce additional legislation to create a strong and effective national policy on informational privacy.

THE COMMISSION FURTHER RECOMMENDS cooperative efforts between the states in the form of interstate compacts or uniform state laws, as well as joint federal/state projects, in order to keep privacy protections on a par with increasingly complex privacy infringements.

In its report, the federal Privacy Protection Study Commission recommended that the President and Congress establish an entity within the federal government, charged with responsibility for: monitoring and evaluating the implementation of statutes and regulations enacted pursuant to the recommendations of the Study Commission; (2) continuing research of privacy problems; and (3) advising the President and Congress, government agencies, and, upon request, the states, regarding privacy implications of proposed federal or state statutes or regulations. Some of the concerns to be addressed include: international data flows; electronic funds transfers, information pools for the exchange of criminal history information or child-support delinquencies, and credit or insurance information exchanges.

REPORT, page 64.

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

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* THE COMMISSION RECOMMENDS the establishment of a *
* Federal Privacy Board as suggested in the final re- *
* port of the Privacy Protection Study Commission. The *
* Commission supports legislation (such as H.R. 1050 in *
* the 97th Congress) which would accomplish this re- *
* sult. *
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REPORT, page 65.

"ESTABLISH FEDERAL PRIVACY BOARD"

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

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

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

REPORT, page 66.

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* THE COMMISSION RECOMMENDS that the Governor of *
* California, the California Legislature, and *
* California's congressional delegation request the *
* President of the United States, pursuant to the au- *
* thority vested in him by virtue of his Office, to *
* issue an Executive Order creating an ongoing interde- *
* partmental Task Force on the Status of Personal Pri- *

REPORT, page 68.

"REQUEST PRESIDENT TO ESTABLISH TASK FORCE AND COUNCIL"

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

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

B. STATE STANDARDS

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

REPORT, page 271.

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

Gov. Code Section 6250.

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

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

Gov. Code Section 6253.

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

Gov. Code Section 6254.

Gov. Code Section 6254.5.

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

REPORT, page 274.

Civil Code Section 1798 et seq.

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

Civil Code Section 1798.4.

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

REPORT, page 280.

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

REPORT, page 280.

"EXTEND PRIVACY ACT TO LOCAL GOVERNMENTS"

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

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

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

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

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

REPORT, page 281.

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

REPORT, page 281.

"CREATE PRIVACY ADVISORY COUNCIL"

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

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

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

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

"CREATE PRIVACY RESEARCH CENTER"

C. IN THE COURTS

1. Discovery

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

REPORT, page 130.

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

Cal. Const., Art. I, Sec. 15.

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

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

REPORT, page 148.

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

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

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

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

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

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

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

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

their protection.

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

Valley Bank, cited above.

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

Craig v. Municipal Court, cited above.

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

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

Britt v. Superior Court, cited above.

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

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

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

Rifkind v. Superior Court, cited above.

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

Valley Bank, cited above.

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

* *

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

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REPORT, page 150.

"AMEND CIVIL DISCOVERY STATUTES"

2. Litigation -- Use of Initials

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

REPORT, pages 283-288.

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

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

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

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

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

REPORT, page 288.

"USE OF INITIALS IN APPELLATE OPINIONS"

3. Juries

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

REPORT, page 289.

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

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

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

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

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

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

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

REPORT, page 289.

"JUDICIAL COUNCIL STUDY ON JUROR PRIVACY"

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

THE COMMISSION RECOMMENDS that the names of jurors not be released before trial to any person except as necessary to summon jurors: that release of any name be considered a misdemeanor; and that when names of jurors are drawn at the commencement of trial, only the communities of residence, without home address, be announced for the purpose of establishing that the juror candidates are bona fide residents of the designated county, municipality, or judicial district.

REPORT, pages 289-290.

"LIMIT RELEASE OF NAMES OF JURORS"

THE COMMISSION FURTHER RECOMMENDS that the Judicial Council create a standard questionnaire to be sent to prospective juror candidates throughout the state, limited to qualifications to serve or reasons for being excused and any other matters which the Judicial Council deems essential. It is further recommended that the Judicial Council promulgate rules governing the confidentiality of the information received in such questionnaires.

"STANDARD QUESTIONNAIRE FOR JUROR CANDIDATES"

FINALLY, THE COMMISSION RECOMMENDS that the Legislature repeal Section 227 of the California Code of Civil Procedure. This statute authorizes seizure in public areas of citizens for jury service. The Legislature should create a new section initiating a practice of telephoning juror candidates who have previously been advised that they are on stand-by for emergency calls, and allowing a reasonable number of hours to appear at court, and specifying a period of days for such stand-by status.

"REPEAL LAW ON SEIZURE OF JUROR CANDIDATES"

D. LIBRARY CENSORSHIP

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

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

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

REPORT, page 74.

"DEVELOP LIBRARY CENSORSHIP POLICIES"

X. Criminal Justice

A. SURVEILLANCE; SEARCH AND SEIZURE

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

REPORT, pages 165-172.

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

REPORT, page 171.

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

REPORT, page 172

"POLICE SURVEILLANCE OF PRIVATE RESIDENCES"

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

REPORT, page 179.

review procedures in the hands of the Chief of Police.

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

REPORT, page 181.

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* THE COMMISSION RECOMMENDS that the Legislature adopt and enact into law, standards or detailed guidelines which must be met prior to police surveillance of the lawful activities of individuals or police infiltration of organizations not involved in conducting or planning illegal activities.
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REPORT, page 181.

"POLICE SURVEILLANCE OF LAWFUL ACTIVITIES"

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

REPORT, pages 204-207.

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* THE COMMISSION RECOMMENDS that the definition of "confidential communication" contained in Section 632 of the California Penal Code be amended. This amendment should create a presumption that any telephone conversation is confidential and that participants to such a conversation may reasonably expect that the conversation is not being recorded by anyone, unless permission to do so has been expressly requested and granted prior to recording. An exception to this presumption should exist for obscene or harassing phone calls.
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REPORT, page 207.

"CONFIDENTIALITY OF TELEPHONE CONVERSATIONS"

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

REPORT, page 192.

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

Penal Code Section 653n.

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

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

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REPORT, page 193.

"SURVEILLANCE OF RESTROOMS AND DRESSING ROOMS"

B. PRISONERS AND INSTITUTIONS

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

REPORT, page 177.

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

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

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

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

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

REPORT, pages 177-178.

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

"PRIVACY IN CORRECTIONAL FACILITIES"

* be eligible to have private contact visits with the new spouse, a person who adopts or becomes adopted while incarcerated should be eligible for such visits with the newly adopted family member. A person who chooses not to marry or adopt, but who nonetheless has a family relationship with a consenting adult partner, should be considered eligible, prima facie, to participate in the family visiting program upon the filing of a Declaration of Family Status. The declaration would state, under oath, that the inmate and the prospective visitor were domiciled in the same household prior to incarceration, and they consider themselves to be a family unit.

FINALLY, THE COMMISSION RECOMMENDS that the Office of Information Practices investigate the practices of the California Youth Authority relating to collection, maintenance, and disclosure of information about wards. The Office of Information Practices should make recommendations for corrective legislation to protect the privacy rights of CYA wards.

C. OTHER PENAL CODE REFORM

1. Loitering

Penal Code Section 647, Subdivisions (d) and (e) criminalize certain types of loitering. The former subdivision prohibits lingering in or near a public restroom for the purpose of engaging in or soliciting lewd conduct. The latter prohibits lingering in a public place and not having identification satisfactory to the police. REPORT, page 269.

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

The freedom to choose anonymity from time to time is a right of fundamental importance to members of society. REPORT, page 270.

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

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* THE COMMISSION RECOMMENDS that subdivisions (d) and *
* (e) of section 647 of the Penal Code (loitering) be *
* repealed. Such legislative action will maintain the *
* integrity of the criminal law and protect freedom of *
* private thought and movement from unreasonable intru- *
* sions. *
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REPORT, page 270.

"REPEAL CERTAIN LOITERING STATUTES"

2. Sex Offender Registration

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

REPORT, page 269.

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

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

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* THE COMMISSION RECOMMENDS to the Legislature that *
* Penal Code Section 290, which specifies the offenses *
* subject to the sex offender registration require- *
* ment, be amended to delete Subdivisions (a) and (d) *
* of Section 647 of the Penal Code from coverage. *
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REPORT, page 269.

"MODIFY SEX REGISTRATION STATUTE"

3. Age of Consent

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

REPORT, page 208.

THE COMMISSION RECOMMENDS that the California Legislature consider lowering the age of sexual consent to an appropriate age and that the Legislature immediately initiate a study to determine what the appropriate age is.

REPORT, page 208.

"AGE OF CONSENT FOR PRIVATE SEXUAL CONDUCT"

D. ARREST/CASE INFORMATION

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

REPORT, page 282.

"LIMIT ACCESS TO SOME ARREST RECORDS"

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

REPORT, page 283.

Penal Code Section 851.8.

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

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

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

REPORT, page 283.

"SEALING OF RECORDS FOR INNOCENT ARRESTEES"

E. VIOLENCE

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

REPORT, pages 375-385.

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

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

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

REPORT, page 384.

THE COMMISSION RECOMMENDS that the Commission on Peace Officer Standards and Training (P.O.S.T.) develop and certify programs on the handling of cases involving violence against lesbians and gay men for use at academies, basic training, and advanced officer training. P.O.S.T. should develop resource and training materials on this subject.

THE COMMISSION FURTHER RECOMMENDS that the Department of Justice and local law enforcement agencies incorporate into existing procedural handbooks or training materials used for sexual assault cases, sections suggesting sensitive interview approaches and procedures in cases of violence directed against lesbians and gay men. This could serve as a guide for all officers in the state when victims report such violent attacks.

REPORT, page 384.

"P.O.S.T. CERTIFIED PROGRAMS AND MATERIALS ON VIOLENCE"

"PEACE OFFICER TRAINING REGARDING VICTIMS OF VIOLENCE"

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

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

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

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

REPORT, page 385.

"AMEND ANTI-VIOLENCE STATUTE"

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

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* THE COMMISSION RECOMMENDS that, in addition to *
* "sexual orientation," the terms "age" and "dis- *
* ability" be added to section 51.7 of the Civil Code. *
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REPORT, page 385.

"AMEND ANTI-VIOLENCE STATUTE"

XI. Employment

REPORT, pages 246-255.

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

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

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

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

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

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

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

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

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

Labor Code Section 1198.5

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

Civil Code Sections 56.20-56.245.

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