Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy

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TABLE OF CONTENTS

I. INTRODUCTION ........................................................ 480
   A. THE THEORETICAL PERSPECTIVES OF THE RIGHT TO PRIVACY: NATURAL LAW AND CONVENTIONAL MORALITY AS A BASIS FOR THE LEGAL RIGHT TO PRIVACY .......... 481
   B. ON PRIVACY AND PERSONHOOD: BLOU-STEIN, FEINBERG, BENN AND THE E.T. HYPOTHETICAL ........................................... 485

II. GENERAL FEATURES OF THE LEGAL RIGHT TO INFORMATIONAL PRIVACY ...................................................... 487
   A. THE HUMAN DIGNITY RESPECT FOR PERSONS THEORY OF PRIVACY: A LINKAGE BETWEEN INFORMATIONAL PRIVACY RIGHTS IN TORT AND CONSTITUTIONAL LAW........ 490
   B. THE ENCUMBERED CONSTITUTIONAL INFORMATION PRIVACY RIGHT: THE FOURTH AMENDMENT PROSCRIPTION AGAINST UNREASONABLE SEARCHES AND SEIZURES ..... 492
   C. INFORMATIONAL PRIVACY RIGHTS INDEPENDENT OF THE FOURTH AMENDMENT: THE INITIAL BREAK IN YORK V. STORY...... 495
   D. IMPLICIT RECOGNITION OF THE CONCEPT BY THE SUPREME COURT: NIXON V. ADMINISTRATIVE SERVICES AND WHALEN V. ROE. 496

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E. ACCEPTANCE AND JURISPRUDENTIAL ELABORATION OF THE CONCEPT: LOWER FEDERAL AND STATE COURT DEVELOPMENTS.................................................. 501

III. CHARACTERISTICS OF THE EMERGING CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY ................................................. 502

A. CENTRAL FEATURES OF THE BALANCING TEST WHEN INVASIONS OF PRIVACY OCCUR BY GOVERNMENT ACQUISITION OF INFORMATION................................. 505

1. The Threshold Question: Is the information acquired “intimate” or of a “personal nature”? 505

2. Is the intrusion into privacy justified: The flexible weighing of interest test .......................... 508

B. THE UNITED STATES V. WESTINGHOUSE ELEC. CORP. TEST FOR JUSTIFIABLE INVASIONS OF PRIVACY............................................. 509

C. REQUESTS FOR INFORMATION ON HIV STATUS AND FOR INFORMATION DISCLOSED IN PSYCHOTHERAPY ........................................... 510

D. FINANCIAL DISCLOSURE LAWS ............................................................................. 513

E. COMPELLED DISCLOSURE OF INFORMATION ON CHILD ABUSE ........................................... 516

F. DISSEMINATION OF HIGHLY PERSONAL OR INTIMATE INFORMATION BY THE GOVERNMENT ______________________________________________ 517

IV. CONCLUSION ............................................................................................................. 519

I. INTRODUCTION

On January 23, 1990, in the first month of the centennial year of the article by Samuel D. Warren and Louis D. Brandeis entitled, The Right to Privacy,1 a federal court held that the Borough of Barrington, New Jersey violated a resident’s constitutional right of privacy when an agent of the Borough published the fact that the resident was infected with HIV, the virus that causes AIDS. Doe v. Borough of Barrington2 is one of a handful of federal court cases

that have found violations of the constitutional right to privacy in the dissemination of information about a person by the government. *Doe* and other decisions that have found privacy violations under the Constitution in the dissemination and compelled disclosure of information by the government reflect a new branch of the right to informational privacy that Warren and Brandeis forcefully advocated a century ago. These decisions are part of an incipient development in our legal system which grants constitutional protection for invasions of informational privacy by the government when the invasion does not occur by methods that constitute a "search" within the meaning of the fourth amendment. Since the right involved in these cases limits access to information by the government, and since the right is independent of the fourth amendment, I refer to the right throughout this article by the rather encumbering title of, *the unencumbered constitutional right to informational privacy*.

This important, emerging right is linked to the intellectual tradition, rights theory and concept of privacy that are reflected in *The Right To Privacy*, Warren and Brandeis’ essay of a century ago. Connecting this privacy rights development to *The Right to Privacy* will proceed by: first, examining the enduring jurisprudential features of that article; second, tracing how Louis Brandeis and Edward Bloustein bridged tort and constitutional informational privacy rights through the jurisprudence that developed from the article; and, third, examining the features and implications of the emerging unencumbered constitutional right to informational privacy.

A. THE THEORETICAL PERSPECTIVES OF *THE RIGHT TO PRIVACY*: NATURAL LAW AND CONVENTIONAL MORALITY AS A BASIS FOR THE LEGAL RIGHT TO PRIVACY

In this centennial year of the publication of the Warren and Brandeis article there will likely be many celebrations in academic publications. This is as it should be; the article has acquired legendary status in the realm of legal scholarship. It is likely that *The Right To Privacy* has had as much impact on the development of law as any single publication in legal periodicals. It is certainly one of the most commented upon and cited articles spoke of the right “of” privacy; Warren and Brandeis referred to the right “to” privacy in the title of their article. I will use the right of privacy and the right to privacy interchangeably throughout this article. The possible significance of this semantical difference will not be addressed in this article.
in the history of our legal system. It is difficult to imagine a more successful piece of scholarship. The article has acquired a special place in the fantasies of those who toil in the dusty basements of law libraries or sit bleary-eyed in front of a computer screen researching and writing with the hope that their efforts will produce insights that will dramatically shape legal history. The official history of the legal right of privacy, as expressed in numerous publications, springs the right eo instanti from the pen of Warren and Brandeis in 1890.

The call for legal recognition of a right to privacy by Warren and Brandeis has been said to be the birth of the legal right to privacy in so many legal periodicals and judicial opinions that it has become an academic cliche.

The dearth of legal literature on the subject of privacy, and of privacy as an explicit ground for relief in case law prior to 1890, is one of the reasons that the historic birth of the right of privacy is traced to the Warren and Brandeis article. However, as others have observed, this view underplays the treatment of privacy issues in literature and philosophy that predated the article and the legal precedent construing the fourth and fifth amendments that provided protection for privacy. Placing the historical beginning of the legal

3. Numerous scholars have made this observation. See Davis, What Do We Mean By "Right to Privacy"?, 4 S.D.L. REV. 1, 3 (1959); Bloustein, Privacy, Tort Law and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?, 46 TEX. L. REV. 611, 612 (1968); Prosser, Privacy, 48 CALIF. L. REV. 383, 383 (1960); J. T. McCarthy, The Rights of Publicity and Privacy, 1-8 (1989); see also, summary of authors characterizing importance of the article and textual discussion in, Barron, Warren & Brandeis, The Right To Privacy, 4 Harv. L. Rev. 193 (1890): Demystifying A Landmark Citation, 13 SUFFOLK UNIV. L. REV. 875, 876 and accompanying footnotes (1979) [hereinafter Barron].

4. For examples of courts tracing the right to privacy to the article, see Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46 (1931); Daily Times Democrat v. Graham, 162 So. 2d 474, 476 (1964); Nader v. GMC, 255 N.E.2d 765, 767 (N.Y. 1970).

5. For accounts of the historical, cultural and social context in which Warren and Brandeis wrote the article and an analysis of influences on the article see D. Pember, Privacy and the Press, 3 (1972); Barton, supra note 3; Schoenmen, Privacy: Philosophical Dimension, 21 AM. PHIL. Q., 199, 202-04 (1984). The earliest discussion of privacy in appellate court opinions appears to be in 1881 by a Michigan court in Demay v. Roberts, 46 Mich. 160, 9 N.W. 146 (1881); Judge Cooley a year earlier in his intitial treatise on the Law of Torts included the "right to be let alone" as a class of tort rights. In addition, Sir James Fitzjames Stephen in 1873 published the first explicit philosophical exposition on privacy, J.F. Stephen, Liberty, Equality, Fraternity (1873).

right to privacy at the time of the Harvard Law Review publication also understates the significance of the groundswell of moral rights, of which the authors were undoubtedly sensitive.

Warren and Brandeis recognized that it was time for the legal system to expressly recognize and protect privacy rights which had long been valued in the moral and social relations of persons in society. Harry Wellington has observed that the article was, "extraordinary . . . especially for its attempt to fashion a legal principle from changes in moral perception . . . ." Warren and Brandeis suggested that the core principle at stake in privacy cases was the principle of "inviolate personality." Wellington's view is that Warren and Brandeis drew this core principle from conventional morality. As such, the argument for recognition of a right to privacy was ultimately grounded on natural law philosophy. But it was natural law in the general and contemporary sense, where morality that develops from social interaction and everyday moral discourse is an appropriate source for common law legal rights. The article refers to "invasions of privacy" numerous times. The concept of "invasion of privacy" is employed without explication. Such is not necessary because its meaning is plain. The reader understands the term to mean what it does in ordinary life situations and in conventional morality. References to privacy in the article were invitations to courts to incorporate their intuitive sense of losses or invasions of privacy in the elaboration of common law privacy rights.

The jurisprudential tradition of the article has also been traced to natural law views of a more classic kind by James Barron in an article that contends that the conceptual foundation for the argument advanced by Warren and Brandeis was laid by E.L. Godkin, in an article published in Scribner's Magazine. Godkin's article considered "the right to decide how much knowledge . . . of [an individual's] own private . . . affairs . . . the public at large shall have" to be a natural right. The natural law foundation for the right to privacy advocated in the article was fully affirmed by the first high court to recognize the right to privacy as part of that state's common law.

8. See Barron, supra note 3, at 887; Godkin, The Rights of the Citizen: IV.-To His Own Reputation, 8 SCRIBNER'S MAGAZINE 58, 65 (July 1890). Godkin considered that a legal tort remedy for invasions of privacy by the press was impractical; he apparently held that belief and was unpersuaded by the arguments in the article in support of recognition of a tort right to privacy. Id. Warren and Brandeis cited to the Godkin article twice.
Endorsing the reasoning of the article, the Georgia Supreme Court concluded that the "right of privacy has its foundation in the instincts of nature . . . and . . . is therefore derived from natural law." 9

The article focused a good deal of space on the excesses of the press and the loss of privacy that can be caused by the publication of information and images. Dean Prosser irreverently suggested that inspiration for the article was prompted by a gossip column in a Boston paper that detailed a social affair of the Warrems in Boston. Recent scholarship has demonstrated that it is unlikely that this was the motivation for the article and has offered alternative explanations for the article's genesis. However inauspicious the origins of the article may have been,10 the discussion by the authors about the essential nature and foundations of the right to privacy has endured and played an important role in the evolution of the right over the last century.

The article contains a theoretical perspective that is an offshoot of the natural law foundations of the right to privacy. The discussion by the authors of the content and essence of the right has provided a basis for an approach to privacy that permeates opinions and scholarly writings both in law and in other disciplines. The core theoretical concepts and assumptions employed in the article view privacy as a condition and right that is essentially tied to human dignity, the principle of equal respect for persons, and the notion of personhood itself. These views were expressed as part of the thesis that privacy is

9. See Pavesich v. New England Life Insurance Co., 122 Ga. 190, 50 S.E. 68 (1905). There are numerous brands of natural law philosophy. A full discussion is beyond the scope of this article. Natural law is a view of law that recognizes that a central source of law is in society's view of morality and justice. Under this view it is appropriate for a judge to look beyond positive rules and principles to notions of morality in society to decide cases. Natural law philosophy is traceable at least as far back as the Greek philosophers, see generally CHRISTIE, JURISPRUDENCE, (1982). The idea that rights emanate from the nature of man is perhaps the core notion of natural law philosophy. This classic view is reflected in Pavesich. Contemporary natural law writers focus on morality as it develops from social interaction and everyday moral discourse. This conventional morality is a source of the moral principles of contemporary natural law. See, e.g., RICHARDS, THE MORAL CRITICISM OF LAW (1977); Dworkin, Natural Law Revisited, 34 UNIV. FLA. L. REV. 165 (1982); Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 YALE L.J. 221 (1973).

10. Prosser, Privacy, 48 CALIF. L. REV. 383 (1960). For a debunking of Prosser's view, see Barron, supra note 3, and Pember, supra note 5.

Several scholars have viewed the article as a reflection of the social class of the authors. See A. WESTIN, PRIVACY AND FREEDOM 347-48 (1967); Barron, supra note 3; and Pember, supra note 5.
part of a more general right. The more general right was said to be the "right to immunity of person," the "right to be let alone," and the "right to one's own personality." The authors also suggested, in a related observation, that the core principle at stake in privacy cases was the principle of "inviolate personality." Warren and Brandeis thus viewed privacy as an essential part of personhood.

B. ON PRIVACY AND PERSONHOOD: BLOUSTEIN, FEINBERG, BENN AND "THE E.T. HYPOTHETICAL"

The notions advanced by Warren and Brandeis were more fully refined in a very important article written by Edward Bloustein in 1964. Bloustein argued that the recognition of the right of privacy in legal writings and judicial opinions reflects a concern by writers and courts for protecting human dignity and personal autonomy. Bloustein focussed on Warren and Brandeis' view that the principle of inviolate personality was the core value that was protected by privacy. He found that this principle posited "the individual's independence, dignity and integrity; it defines man's essence as a unique and self-determining being." His article further demonstrated that recognition of the right to privacy in judicial opinions reflected a concern by courts for protecting human dignity.

These theoretical perspectives can be illustrated by the following hypothetical. Suppose that an extraterrestrial (E.T.) lands on earth near one of the accredited AALS law schools. E.T. wanders into the law school and runs across Student A. E.T. and Student A begin a casual conversation. Student B approaches them. E.T. points to B and says to A, "That is an interesting bag of skin and bones." Student A responds, "But that is more than a bag of skin and bones, that is a person." E.T., "What is the difference between a bag of skin and bones and a person?" Student A, "A person has a name, an identity, a personality, and certain basic rights as against the government and other individuals." E.T., "What are those rights?" Student A, "The most central are the right to decide fundamental matters for yourself, the right to a minimum amount of respect from the government and other individuals, and the right to privacy. When

12. Id.
14. Bloustein, supra note 13, at 971.
these rights are provided to someone, then we say that individual has human dignity."

Joel Feinberg, the moral philosopher, has also commented upon the essential relationship between rights, human dignity and respect for persons:

Having rights enable us to “stand up like men,” to look others in the eye, and to feel in some fundamental way the equal of anyone. To think of oneself as the holder of rights is not to be unduly but properly proud to have the minimal self-respect that is worthy of the love and esteem of others. Indeed, respect for persons (this is an intriguing idea) may simply be respect for their rights, so that one cannot be the one without the other; and what is called “human dignity” may simply be the recognizable capacity to assert claims.15

An influential voice in explicitly connecting up the right to privacy and respect for persons’ principles has been that of the philosopher Stanley Benn.16 Benn contends that the essence of the wrong that occurs through invasions of privacy from unlicensed observations of someone is lack of respect for the subject as a person.

The respect-for-persons'-human-dignity basis for the right to privacy views privacy as an essential feature of those rights that we hold as persons. As I have suggested, Warren, Brandeis, Bloustein, and Benn view privacy as part of those rights we have as persons, and as rights that preserve the essence of us as persons by granting us respect and preserving human dignity. The right to privacy has been defended by scholars from many fields and by jurists on several additional grounds. Some argue that privacy is an intrinsic good.17 Others argue that privacy is an essential condition for relationships of love, friendship, and trust and for the promotion of personal autonomy and mental health.18

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do not directly address in this article. At this juncture, my contention is simply that the jurisprudential assumptions and features of the Warren and Brandeis article, as embellished by jurists and scholars like Bloustein, has endured and influenced the development of legal rights of informational privacy. This tradition may be loosely summarized as the natural law, respect for persons, human dignity intellectual foundation for the right to privacy.

II. GENERAL FEATURES OF THE LEGAL RIGHT TO INFORMATIONAL PRIVACY

One of the branches of the legal right to privacy that has evolved in the last century concerns itself with the extent to which persons are able to limit access to information about themselves. The right is expressed as a person’s right to “control,”

19. See Fried, supra note 18, at 482.
21. See Briscoe v. Reader’s Digest Association, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971); Restatement (Second) of Torts § 652 B, D.
doctrine, and statutory or regulatory norms that are involved in adjudicating privacy claims. However, it does fit in a general sense much of the law on the legal right to privacy.

In evaluating the features of the legal right to informational privacy it is important to distinguish between informational privacy as a factual condition of life, and informational privacy as a legal right. Privacy is sometimes employed to describe the presence or absence of a factual condition of life. This is the condition of limiting acquaintance with personal affairs. As a factual condition of life, privacy is something that does or does not exist. It is something that may be lost or gained. The sense of privacy as a condition of life is reflected in everyday conversations with expressions like, “Please give me some privacy,” or “I don’t have any privacy,” or “Make the call in the other room so you can have privacy.” An invasion of privacy occurs when the factual condition of privacy has been lost or altered by someone in circumstances where that person is presumptively responsible for the loss of privacy. Whether the invasion of privacy is a violation of the legal right to privacy depends upon whether the legal requirements for establishing violation of a right have been met. The legal right to privacy shares the characteristics of defeasibility that other similar rights possess. The rights consist of prima facie claims of injury and the absence of excusing conditions or defenses. 30

The right to informational privacy entails a claim that someone has acquired or disseminated personal or intimate information about you without your consent. This claim initially involves an assertion by the aggrieved party that the condition of privacy has been lessened or lost (that privacy has been invaded). If this claim is demonstrated, and the party that has caused the invasion of privacy cannot demonstrate a defense or other excusing circumstances, the person’s right to privacy has been violated. Under this view of the right to informational privacy, privacy may be invaded but no legal right to privacy violated. An example of this would be when the police enter and search someone’s home pursuant to a search warrant that has been issued by a court after a showing of probable cause. The person’s privacy has been invaded because intimate, and perhaps personal, information has been acquired about the person without her consent. However, no legal right to privacy has been violated; the government is excused in the circumstances because the search was made pursuant to a properly authorized warrant.

When *The Right To Privacy* was written, dissemination of information through the press was the privacy-invading technology of the day. Therefore, a primary focus of the article was invasions of privacy by publication of information by the print media. The argument for recognition of a common law tort right to remedy this invasion of privacy of course recognized the defeasible nature of the right to privacy. In the article Warren and Brandeis discussed several limitations on the right. These limitations included consent and information that it was in the public interest to know. The tort that ultimately emerged to deal with losses of privacy by dissemination of information by the media is generally referred to as the Public Disclosure tort. Rights under the Public Disclosure tort have been severely limited by first amendment defenses. Other restrictions on the tort right for disclosure of private facts have been developed by the courts that were not anticipated by the authors, although the development itself was.

Invasion of privacy through the unauthorized acquisition of personal or intimate information was not the focus of the Warren and Brandeis article. However, state courts responded to invasions of privacy through the private use of electronic surveillance by invoking Warren and Brandeis and providing common law protection. The tort privacy right that evolved for invasions of privacy by private persons and businesses for the acquisition of information is commonly known as the Privacy Intrusion tort. The Public Disclosure and Privacy Intrusion torts embody the core of our legal system’s tort right to informational privacy.

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31. The major limitations on the right discussed in the article were: (1) publication of information that is in the public interest is not actionable, (2) communications are not actionable if they would be privileged in defamation law, (3) oral publications were not actionable, and (4) consent or publication was a defense. *See* Warren and Brandeis, *supra* note 1, at 214-19.


33. *See* Sidis v. F-R Pub. Corp., 113 F.2d 806 (2d Cir. 1940) (public figures may not recover under public disclosure tort).

34. *See* Rhodes v. Graham, 37 S.W.2d 46 (Ky. 1931) (holding invasion of privacy through tapping of a telephone a wrong for which common law remedy was available). The *Rhode’s* court invoked the article’s reference to technological threats to privacy, writing, “*t*he evil incident to the invasion of privacy of the telephone is as great as that occasioned by unwarranted publicity in newspapers and by other means of a man’s private affairs for which courts have granted the injured person redress.” *Id.* at 47.
In 1960, Dean William Prosser wrote an article on privacy that has been very influential in the formulation of tort privacy rights. He inventoried several hundred appellate court decisions in which privacy had been employed by courts in assessing the validity of the claim for tort damages. From his account of these cases emerged four torts. These include the Public Disclosure and Privacy Intrusion torts mentioned above as well as two others—the False Light and Privacy Appropriation torts. Much has been written about Prosser’s four part disparate tort theory. The question of the sufficiency and usefulness of Prosser’s view is beyond the scope of this article. I only make two contentions: (1) that cases that have come to be viewed as within the appropriate scope of the Public Disclosure and Privacy Intrusion torts involve informational privacy rights, and (2) that courts treat these torts as having origins in the Warren and Brandeis article and as reflections of the human dignity, respect for persons, view of the right of to privacy.

A. THE HUMAN DIGNITY RESPECT FOR PERSONS THEORY OF PRIVACY: A LINKAGE BETWEEN INFORMATIONAL PRIVACY RIGHTS IN TORT AND CONSTITUTIONAL LAW

Federal constitutional rights are rights that individuals have against the government; the federal constitution does not grant rights to persons that are wronged by non-governmental entities such as private persons or businesses. Tort rights are rights that individuals have against private persons and business entities. This distinguishing feature of constitutional and common law tort rights has led some commentators to conclude that there is no significant linkage between the right to informational privacy in constitutional law and tort. The

36. Id. These four torts have been embraced by the Restatement of Torts. See Restatement (Second) of Torts § 652 B, C, D, E.
37. See Gerety, Redefining Privacy, 12 Harv. C.R.-C.L. L. Rev. 233, 247 (1977); Bloustein, supra note 13.
38. See Rhodes v. Graham, 37 S.W.2d 46 (Ky. 1931); Daily Times Democrat v. Graham, 162 So. 2d 474 (Ala. 1964). The modern cases tend to rely more on the four part restatement language than on the reasoning of the article. The article is generally invoked. Interestingly, courts do not recognize nearly as much tension in the Bloustein and Prosser view as philosophers and academics. See, e.g., Nader v. GMC, 255 N.E.2d 765, 768-69 (N.Y. 1970) (invoking the article, Bloustein, Prosser, and the Restatement (Second) of Torts as part of a summary about the tort right to privacy).
39. See, J.T. McCarthy, The Rights of Publicity and Privacy, § 5.7 (B) (1989). McCarthy also suggests that constitutional privacy rights differ from torts in
connection, however, between informational privacy rights in constitutional law and torts is in the nature of the injury and not in the character of the actor that causes the injury. It is the loss of the condition of privacy and the intellectual tradition that is the foundation of privacy rights that links informational privacy rights in tort and constitutional law. Brandeis and Bloustein again were major players in demonstrating this.

Thirty-eight years after publication of the article, Brandeis, as Justice of the Supreme Court, had the opportunity to examine one of the most basic and important questions involving informational privacy in our society. The Court was asked to consider whether the Constitution provides protection for citizens when the government places a wiretap on their telephone and records their conversations. *Olmstead v. United States* came to the Court as a question of construction of the fourth amendment concept of "search." A majority of the Court applied a property-trespass view of the fourth amendment and concluded that, since there was no physical entry onto Olmstead's property, he was not searched by the electronic surveillance of his conversations. Brandeis dissented in an influential opinion that has been cited almost as often as the article; the dissent was an extension of the core ideas of the article to this latest technological threat. The authors of the Constitution, he wrote, conferred as against the government "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." The Brandeis dissent established a linkage between tort and constitutional informational privacy rights. Each protects individuals against invasions of privacy, a right we have as persons under the constitution and common law.

Bloustein persuasively argued that *Olmstead* established this linkage. He found that the "parallelism" between the article and Brandeis' dissent in *Olmstead* suggested that Brandeis believed that the principle of inviolate personality was intended to be protected under the fourth amendment. The electronic surveillance by the government that was at issue in *Olmstead* shared a characteristic with the electronic surveillance by private persons that was protected by the common law that the latter protects against the dissemination of information where the former does not. As the later sections of this article indicate, informational privacy interests are implicated in some circumstances by the dissemination of information by the government.

40. 277 U.S. 438 (1928).
41. Id. at 478.
42. Id.
of torts; both were directed at a similar wrong — the invasion of informational privacy.

A further linkage between constitutional and tort information privacy rights is found in the extent to which there are natural law underpinnings to both. The proscription against unreasonable searches and seizures is part of those liberties that are viewed as fundamental because they are recognized in longstanding traditions of morality in Anglo-American law. Brandeis argued for Supreme Court recognition that wiretapping by the government constitutes such a significant invasion of privacy that it violates the fundamental liberties of each person who is protected by the Constitution and the fourth amendment concept of "search."43

B. THE ENCUMBERED CONSTITUTIONAL INFORMATION PRIVACY RIGHT: THE FOURTH AMENDMENT PROSCRIPTION AGAINST UNREASONABLE SEARCHES AND SEIZURES

The role of the fourth amendment in protecting informational privacy is often ignored. In law schools the law of search and seizure is compartmentalized in the curriculum, and in the minds of many faculty and students, as exclusively a part of criminal law involving criminal procedural rights. Lawyers that work with search and seizure issues every day probably recognize that government searches of the home and electronic surveillance of conversations are invasions of privacy. But they are not in the habit of speaking (or thinking) of an "unreasonable search" as violating that person's constitutional right to informational privacy.

This is surprising because privacy has explicitly been spoken of as a core reason for constitutional limitations on government searches for nearly a century.44 The current standard for whether government

43. Bloustein, supra note 13, at 976-77.
44. Perhaps the first fourth-amendment case to invoke the concept of privacy was Boyd v. United States, 116 U.S. 616 (1886) (holding that government compelled production of a person's private papers violated the fourth and fifth Amendments). Justice Bradly speaking of the historical principles employed in Entick v. Carrington and Three Other King's Messengers, 19 Howell's States Trials, 1029 (1765) (where the seizure of private books and papers under a general search warrant was found to be actionable in trespass for damages) stated that the principles of Entick "apply to all invasions on the part of the government and its employ[ee]s of the sanctity of a man's home and the privacies of life." It probably is the case that the fourth amendment is the legal norm that has most been spoken of by appellate courts as protecting persons against "invasion or losses of privacy." Boyd at 630.

An illuminating example is in Justice Harlan's dissent in United States v. White, 401 U.S. 745 (1971). In White the Court held that the surreptitious recording of a
action constitutes a "search" four times, and, in considering whether many searches are reasonable, the Court has adopted a standard that explicitly requires an assessment of the extent to which the search invades the subject's privacy.46

In a previous section of this article, I suggested that it is useful to think of the legal right to informational privacy as expressed through claims brought by individuals against private persons, and government and business entities, who have caused them to lose the condition of informational privacy. If the search and seizure cases are viewed from this perspective, they clearly are expressions of the constitutional right to informational privacy. The electronic surveillance of conversation, the extraction of blood, and the entry into and physical examination of persons and the content of a home, constitute governmental invasions of privacy. The condition of limiting acquaintance with personal affairs has been lost because the government has acquired personal and intimate information about the individual. The legal protection against these losses of informational privacy is provided for under the Constitution. The protection mostly takes the form of judicially-crafted remedies flowing from construction by courts of the restraints imposed on the government by the proscription against unreasonable searches and seizures. Traditional remedies for compensatory damages are regularly sought in constitutional tort actions when informational privacy rights are violated under the fourth amendment.47

conversation by a participant who was wearing a concealed transmitter was not a "search" of the speaker because he had no "reasonable expectation of privacy" in the conversation. Harlan dissented. He argued that the holding was wrong because it failed to treat a significant invasion of privacy by the government as a "search" and therefore "mis[ed] the mark" of the warrant requirement which was to distribute the risk of loss of privacy to those persons that an impartial magistrate determined probably engaged in illegal activity. By taking participant monitoring bugging cases out of the fourth amendment, the Court had shifted the burden of loss of privacy to any citizen that law enforcement officials chose to monitor. White, 401 U.S. at 789-90.

45. See United States v. Miller, 425 U.S. 435 (1976) (search determined by whether person had "legitimate expectation of privacy in information", both a "subjective" and "reasonable" expectation of privacy required before expectation is "legitimate").

46. New Jersey v. T.L.O., 469 U.S. 325 (1985) (whether non-law enforcement "search" is reasonable requires weighing governmental interests with personal privacy that is invaded by search).

47. Section 1983 of Title 42 of the United States Code provides for a civil cause of action in federal court for violations of the Constitution. Violations of the fourth amendment are a major source of civil litigation under § 1983, See also S.
For these reasons, I think it is useful and appropriate to speak of fourth amendment restraints on government action in particular cases as expressions of the constitutional right to informational privacy. However, the extent of constitutional protection against invasions of privacy by the government is encumbered by the threshold fourth amendment requirement that the information be acquired by the government through a search. Traditionally, the search requirement encumbered the scope of the right to informational privacy in two ways: the right was limited to government invasions of privacy by specific methods that were employed as part of the enforcement of the criminal law. The application of the fourth amendment to invasions of privacy through testing of employees for drug and alcohol use by the government extended informational privacy rights beyond those limited activities which acquired information as part of criminal law enforcement. 48 However, the informational privacy right was still encumbered by the search requirement.

The restriction of constitutional informational privacy rights to government searches leaves a large area of governmental invasions of privacy that are beyond the reach of the Constitution. Under current construction of the Constitution much of the information that a person discloses to someone may be acquired by the government without a search of the person within the meaning of the fourth amendment. 49 Therefore, the gathering and use of most information that is acquired from a source other than the individual would be immune from constitutional protection. This would be the case irre-

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49. In Smith v. Maryland, 442 U.S. 735 (1979); United States v. Miller, 425 U.S. 435 (1976); and United States v. White, 401 U.S. 745 (1971), the Court held that information acquired by the government from bank records (Miller), telephone records (Smith) or electronic surveillance of a conversation with one party's consent (White) was not a "search" within the meaning of the fourth amendment. These decisions were based upon the principle that if someone voluntarily discloses information to someone then that party has no reasonable expectation of privacy with respect to that information. As a consequence of this trilogy, the acquisition of information by the government from someone who has received it from the subject generally would not constitute a search. Some state courts have not adopted the voluntary disclosure theory. They adopt a broader expectation of privacy principle in interpreting their state constitutional proscriptions against unreasonable searches and seizures. See, e.g., People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1975) (one-party-consent transmission monitoring of conversation a "search" under Michigan Constitution); State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982) (government accessing billing records a search of telephone customer).
spective of the nature of the information. Substantial invasions of privacy by the acquisition and dissemination of personally sensitive or intimate information by the government escape the reach of a constitutional right to privacy if the right is limited to governmental activities that constitute searches.

For most of the twentieth century protection for informational privacy under the Constitution was limited to invasions of privacy by the government that occurred through searches of a person or her house, papers or effects. The acquisition of information by the government by means other than what satisfied the technical requirements of a search were not subject to constitutional restraints; nor was dissemination or publication of information by the government prohibited since those activities are clearly not "searches."

C. INFORMATIONAL PRIVACY RIGHTS INDEPENDENT OF THE FOURTH AMENDMENT: THE INITIAL BREAK IN YORK V. STORY

The Ninth Circuit was the first appellate court to squarely hold that governmental encroachment on informational privacy by means that did not constitute a search violated the constitutional right to informational privacy. *York v. Story* is one of those cases in our legal system which provides support for the proposition that "hard facts make new law." The case presented the Ninth Circuit with factual allegations of a most serious invasion of privacy by the government and of an outrageous abuse of power. Angelynn York claimed that she was required to strip and have photographs taken of her in the nude by a male police officer when she filed charges in connection with a complaint of assault and battery. Additional prints of the pictures were made by other police officers with police equipment and distributed to the personnel of the police department. York contended that the actions of the officers constituted an unreasonable search and seizure and also violated her general constitutional right to be free from governmental invasions of privacy that was part of "liberty" under the fourteenth amendment.

In overruling the lower court's dismissal of her complaint, the court held that the distributions of the pictures did not amount to a fourth amendment search but constituted an "intrusion upon the security of her privacy . . ." in violation of the due process clause.

50. 324 F.2d 450 (9th Cir. 1963).
51. This is a variation of the notable quotation by John Campbell when serving as Chief Justice of the Queen's Bench. He wrote in *Ex parte Long* (1854) 3 W.R. 19 (1854), "hard cases, it is said, make bad law."
52. York v. Story, 324 F.2d 450, 456 (9th Cir. 1963).
of the fourteenth amendment. The Constitution provides citizens with rights against significant invasions of privacy by the government even if the invasions did not occur through a search. Judge Hamley wrote:

We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity. A search of one's home has been established to be an invasion of one's privacy against intrusion by the police, which, if "unreasonable," is arbitrary and therefore banned under the Fourth Amendment (citation omitted). We do not see how it can be argued that the searching of one's home deprives him of privacy, but the photographing of one's nude body, and the distribution of such photographs to strangers does not.53

There is an unmistakable Brandeisian tone and content to this language—the right to privacy promotes self-respect and protects personal dignity. There is also unmistakable parallelism in the basic reasoning: the constitutional right to privacy is a general right, the right to be free from "every unjustifiable intrusion by the Government upon the privacy of the individual . . . ."54

D. IMPLICIT RECOGNITION OF THE CONCEPT BY THE SUPREME COURT: NIXON V. ADMINISTRATIVE SERVICES AND WHALEN V. ROE

*York v. Story* was an exceptional case and much ahead of its time. It was decided two years before *Griswold v. Connecticut*,55 the first Supreme Court case to explicitly recognize a right to privacy under the Constitution independent of the fourth amendment. However, *Griswold* did not validate the notion of an independent right to informational privacy. The privacy right articulated by the Court in *Griswold* was the right to personal autonomy or independence of decisionmaking with respect to relationships like marriage. For over a decade the constitutional rights analysis of *York* was not followed by other federal circuits.56

53. Id. at 455.
55. 381 U.S 479 (1965).
56. The Ninth Circuit initially refused to extend *York* beyond its facts. In *Baker v. Howard*, 419 F.2d 376 (9th Cir. 1969), the constitutional privacy argument was rejected by the Ninth Circuit in a case where the police released a police report
It was not until the 1977-78 term that the Supreme Court gave impetus to the idea that informational privacy was a constitutionally protected right in non-search cases. In that term, the Supreme Court handed down the only two decisions in which it has squarely faced the question of whether invasions of privacy by government action, other than a search, violate the Constitution. In both cases, the Court assumed as a basis of its decision that such a right to privacy enjoyed protection under the Constitution. However, the Court found in the particular circumstances of the cases that the right to informational privacy had not been violated. In *Nixon v. Administrative Services*, the former President argued that the acquisition, storage and public access to his taped conversations and private papers under the Presidential Recordings and Materials Preservation Act (Act), violated his constitutional right to privacy. The Court recognized that the President’s expectation of privacy in the acquired and disseminated information was one that was protected under the Constitution. However, the interests furthered under the Act by public accessibility to the information were found to justify the invasion of privacy.

In *Whalen v. Roe*, patients and doctors challenged a statutory scheme in New York that required copies of prescriptions for certain drugs to be recorded and stored in a centralized governmental computer as violating their constitutional right to privacy. The Court rejected this claim on the particular facts of the case, but a majority of the Court assumed that in appropriate circumstances the acquisition and disclosure by the government of health care information might violate the constitutional right to privacy of patients. Justice Stevens, writing for a majority of the Court, identified informational privacy as one of two branches of the constitutional right to privacy: “The cases sometimes characterized as protecting ‘privacy’ have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.”

indicating the plaintiff was suspected of involvement with a crime after the police department had concluded that he was not. The court distinguished *York* on the basis that the invasion of privacy in the case was not as “flagrant” as in *York*.

59. Id. at 598-600. There were two concurring opinions in *Whalen* by Justice Brennan and Justice Stewart. Justice Stewart concurs with the understanding that he does not read the majority opinion, nor *Griswold*, to recognize a “general interest in freedom from disclosure of private information” in the Constitution, id. at 609.
Whalen was the first case in which the Court explicitly recognized there were two branches to privacy rights under the Constitution: the right to informational privacy (in avoiding disclosure of personal matters) and the right of privacy-autonomy (independence of decisionmaking). It is especially significant that the authority cited by the Court for the informational privacy branch included Brandeis' dissenting opinion in Olmstead and his reference to a concept that united the general theory of the right to privacy in the article—the right to be let alone.\(^{60}\) An official linkage by the Court to the article and the unencumbered informational privacy right occurs because the majority in Whalen viewed the informational right to privacy as not limited to the fourth amendment. This conclusion must necessarily be drawn from the Court's discussion of the right to privacy as it applied to the informational gathering activities under the New York statutory scheme. Justice Stevens again:

We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files . . . . The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme . . . evidence[s] a proper concern with, and protection of, individuals . . . .\(^{61}\)

Neither Whalen nor Nixon held that the acquisition or dissemination of information by the government by means that did not constitute a search violated the constitutional right to privacy. Yet the decisions did not close the door on the recognition of an unencumbered right to privacy under the Constitution. On the contrary, the decisions might properly be interpreted as suggesting that it would be appropriate for federal and state courts to find violations of the constitutional right to privacy in circumstances where the government invasion of privacy was significant and unjustified. This is precisely what federal and state courts have done.\(^{62}\)

\(^{60}\) Brandeis' dissent in Olmstead characterized "the right to be let alone" as "the right most valued by civilized men." Whalen v. Roe, 429 U.S. 589, 599 n.25 (1977) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928).

\(^{61}\) Whalen, 429 U.S. at 605.

\(^{62}\) See Barry v. City of New York, 712 F.2d 1554, 1559 (2d Cir. 1983) ("Most
The most notable exception has been the Sixth Circuit Court of Appeals. This court has viewed an earlier Supreme Court decision, *Paul v. Davis*,63 to significantly limit *Whalen*. In *Paul*, a closely divided court held that publication of a false and defamatory statement about Paul by the Louisville police department did not deprive him of a liberty that was protected under the fourteenth amendment. Paul had been referred to in a flyer as an "active shoplifter" although he had been acquitted of the crime. Justice Rhenquist, writing for a bare majority of the Court, characterized Paul's major argument as a "classic claim for defamation actionable in the courts of virtually every state." Concluding that violation of state law by a government agent did not by itself implicate federal rights protected under the fourteenth amendment, the majority rejected Paul's procedural due process argument.65 The majority also rejected Paul's argument that the publication violated Paul's constitutional right to privacy because none of the Court's substantive privacy decisions had held that the publication of "a record of an official act such as an arrest,"66 violated the Constitution.

Relying upon *Paul v. Davis* in *J.P. v. DeSanti*,67 the Sixth Circuit held that the post adjudication dissemination of social histories of juveniles did not violate their constitutional right to privacy.68 The court in *DeSanti* found that the dissemination in the two cases, of
social histories and of an arrest, were indistinguishable. The sounder view is that *Paul v. Davis* does not at all speak to the informational privacy right that has been recognized in *Whalen* and *Nixon*. The informational privacy claims in *Whalen* and *Nixon* were entirely different from the constitutional claim in *Paul*.

A major contention in *Paul* was that the government action violated Paul's fourteenth amendment procedural due process right to a fair hearing. The scope of the fourteenth amendment concepts of "property" and "liberty" for purposes of procedural due process was not at issue in *Whalen* or *Nixon*. Paul's substantive due process claim was viewed by the Court as essentially based upon a state common law defamation theory. In *Whalen* and *Nixon*, the parties challenging the government action did not argue that because the government agent had committed a tort a constitutional right had been violated. The central feature of *Paul* that makes it not controlling, or relevant to cases involving governmental invasions of informational privacy, is the nature of the information that was the gravamen of the alleged constitutional injury. The defamation in *Paul* consisted of a statement which falsely embellished information that had appeared in a public record.70 Privacy interests fade and are almost extinguished for information that has appeared in a public record.71 Because of the public character of such information, no cognizable constitutional privacy right claim is raised by its dissemination.

For these reasons, other federal circuit and district courts that have considered the question of information disclosure by the government have not adopted the reasoning of the Sixth Circuit.72 They have

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71. See Cox v. Cohn, 420 U.S. 469 (1975) (holding first amendment bars imposing tort liability on media for publishing rape victim's name when it was part of judicial record in criminal proceedings). In *Cox* the Court noted: "even the prevailing [tort] law of invasion of privacy generally recognizes that the interests of privacy fade when the information involved already appears on the public record." *Id.* at 494-95 (relying on the Tentative Draft of the *Restatement (Second) of Torts*: There is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public.) *Restatement (Second) of Torts* § 652 D, comm. c (Tent. Draft No. 13, 1967).

viewed *Paul* as holding that the constitutional right to privacy does not apply to the dissemination of information by the government that is on the public record. The decisions that have dealt with informational privacy claims based upon governmental acquisition of information have generally not considered *Paul v. Davis* to be pertinent to this type of governmental invasions of privacy.

E. ACCEPTANCE AND JURISPRUDENTIAL ELABORATION OF THE CONCEPT; LOWER FEDERAL COURT AND STATE COURT DEVELOPMENTS

In contrast to the tentative reception by the Supreme Court, lower federal and state appellate courts have generally embraced the notion that informational privacy is protected from governmental encroachments that do not amount to searches. The right is recognized as to both the acquisition and dissemination of information by the government. The California and Alaska cases developing the independent informational privacy right have grounded it on the explicit right to privacy in the California and Alaska Constitutions. For the most part, state and federal courts have found the informational privacy right to be part of those important rights that are implicit in the concept of "liberty" under both federal and state constitutions.

Substantive limitations on government action that invades informational privacy is therefore imposed by judicial construction of the due process clauses of federal and state constitutions.

The richest development has been in cases where the government compelled disclosure by individuals of personal or intimate information about themselves or others. Many of these decisions have involved judicially compelled disclosure of health care information through subpoena of health records or the threat of contempt to health professionals who refuse to testify about health care information that is relevant to civil and criminal proceedings. The effect of recognizing the patient's or client's constitutional right to privacy in health care information in these instances is to create a constitutionally based evidentiary or testimonial privilege. Other instances where the inde-

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74. See *supra* note 62 and accompanying text; *see also infra* note 95 and accompanying text.

pendent right has been raised has been in challenges to disclosure requirements that are a condition to public employment or required of appointed or elected public officials.\textsuperscript{76} The right has also surfaced in challenges to laws which require the reporting of information like child abuse to governmental agencies.\textsuperscript{77}

Employment of the right to challenge the publication or dissemination of information by the government has been less frequent, and the jurisprudence is less developed, than it is in the instances where the acquisition of information has been challenged as violating the constitutional right to privacy. However, the dissemination by the government\textsuperscript{78} of nude photographs of the victim of a crime\textsuperscript{79} and the HIV status of citizens has been found to violate the subject’s right to privacy. Other attempts to challenge the dissemination of information within governmental agencies on the basis that it violates the right to privacy have been less successful, even though the basic notion that constitutional privacy interests are implicated in government disclosure has been generally accepted by the courts before which the arguments were made.\textsuperscript{80}

III. CHARACTERISTICS OF THE EMERGING CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY

Although the unencumbered right to informational privacy has been firmly planted in the field of constitutional rights by the judiciary, its contours are still being defined. The right has emerged during a period of constitutional history where the conceptual framework and philosophy about the appropriate role of the judiciary in elaborating constitutional rights is in transition. The Burger Court inherited the Warren Court’s legacy of judicial activism and expansion of constitutional rights. The Warren Court’s elaboration of constitutional rights reflected three major themes. One was nationalization of historic fundamental rights;\textsuperscript{81} another was the extension of fundamental rights to changes in society;\textsuperscript{82} the third was construction of the

\textsuperscript{76} See Barry v. City of New York, 712 F.2d 1554 (2d Cir. 1983); Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978).

\textsuperscript{77} See Pesce v. J. Sterling Morton High Sch. Dist. 201, 830 F.2d 789 (7th Cir. 1987).

\textsuperscript{78} See supra notes 1-2 and accompanying text.

\textsuperscript{79} See supra notes 50-54 and accompanying text.

\textsuperscript{80} See, e.g., Smith v. City of Artesia, 772 P.2d 373 (N.M. App. 1989); Davis v. Bucher, 853 F.2d 718 (9th Cir. 1988).

\textsuperscript{81} See Duncan v. Louisiana, 391 U.S. 145, 148 nn. 4-12 (1968).

\textsuperscript{82} See Katz v. United States, 389 U.S. 347 (1967).
Constitution in view of egalitarian values.\textsuperscript{83} The themes manifested themselves in application of criminal procedure rights to the states through the selective incorporation doctrine, extension of first amendment and privacy rights, and expansion of limitations on the state and federal government by principles of justice that are embodied in the equal protection clause.

The conceptual framework that evolved from the elaboration of rights by the Warren Court was one that required the sorting of rights in due process cases into "fundamental" and "nonfundamental" categories, and the sorting of legislative classifications in equal protection cases into those that were formally directed at "suspect" groups and those that were not. This sorting was done to determine the appropriate role of the Court in interpreting challenges to government action that were made on due process or equal protection grounds. If the government action significantly affected "fundamental rights" or constituted a "suspect classification," the Court's role was to "strictly" scrutinize the government action to determine whether important government interests were furthered in the most efficacious manner. If they were not, the government action was unconstitutional. If the laws in question did not significantly effect fundamental rights or involved formal classifications that were not "suspect," the Court's role was not to review the importance or efficacy of the government action but rather to defer to the express or implied justifications of the government and uphold the constitutionality of the law. A consequence of this approach was the calcification of rights into a caste system. There were preferred rights that, if implicated, almost always overrode the government action and there was an underclass of rights that, if implicated, never did.\textsuperscript{84}

The Burger Court included a number of Justices who embraced a more conservative political and judicial philosophy than their predecessors. So too with the Rehnquist Court today. However, until very recently the Court has been fragmented and without a philosophical consensus. Initially, the Burger Court adopted the two-tier caste system approach to consideration of due process and equal protection claims. However, the Court froze the categories that would license strict judicial scrutiny and in some instances retarded the


This perpetuated the rigid classification system and further calcified the caste system of rights. The political conservatism of the Burger and Rehnquist Courts resulted in an expansion of rights into areas different than those that had developed in the period of the Warren Court. There has been a shift from personal rights to economic rights. This is most dramatically illustrated by the elevation of commercial speech to first amendment status by the Burger Court. When the Burger and Rehnquist Courts went off on their own in elaborating rights, they did so by adopting more flexible tests for evaluating the constitutionality of government action. Under this philosophy a court’s role in scrutinizing laws is more varied. Individual and government interests are examined, but without the preassigned weights that operate under the two-tier system. Rights are decided on a more ad hoc basis.

This movement away from the rigid preferred rights approach toward the flexible balancing of interest approach continues especially where courts are going in new directions with rights. It is in this sense that rights analysis and elaboration under the Constitution is in a state of transition. The independent constitutional right to informational privacy is an example of this development. The scope of the right is generally determined by the flexible balancing of interest test.

A. CENTRAL FEATURES OF THE BALANCING TEST WHEN INVASIONS OF PRIVACY OCCUR BY GOVERNMENT ACQUISITION OF INFORMATION

The unencumbered right to informational privacy has special force when the government significantly invades the privacy of indi-


88. See Barry v. City of New York, 712 F.2d 1554 (2d Cir. 1983) ("An intermediate standard of review seems in keeping both with the Supreme Court's reluctance to recognize new fundamental interests requiring a high degree of scrutiny for alleged infringements, and the Court's recognition that some form of scrutiny beyond rational relationship is necessary to safeguard the confidentiality interest"). Id. at 1559; see also Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978).
individuals by compelling disclosure of intimate or highly personal information about them. Much of the jurisprudence that has developed involves compelled disclosure of health care information or information in financial records. These cases adopt the general principle from Brandeis' dissent in *Olmstead* that intrusions into an individual's privacy must be justified by the government. This general principle defines the broad contours of the balancing of interest test that determines whether the right to informational privacy has been violated in a particular case. 89 Initially, the extent to which privacy has been invaded by the government is evaluated, then the governmental need for the information is evaluated to determine whether the invasion of privacy is justified.

1. The Threshold Question: Is The Information Acquired "Intimate" or of a "Personal Nature"?

Modern society is characterized by information exchange relationships. As a condition for receiving virtually all forms of government largess, persons are required to provide the government with a considerable amount of information. In performing their legitimate functions and obligations, government officials need to have access to certain information about individuals. A great deal of information must be acquired and disseminated in order for the government to work the way it is supposed to in a democracy. Any concept of a right to limit the acquisition and disclosure of information by the government must take into account the central role of information acquisition and dissemination activities in our constitutional system. It is an understanding of this that has contributed to the care with which the judiciary has dealt with informational privacy right claims. The courts have rejected invitations to construe the Constitution as embodying a type of national privacy act that generally restricts disclosure of information by federal, state and local governmental entities. 90

89. See United States v. Westinghouse, 638 F.2d 570, 578 (3d Cir. 1980) ("Thus, as in most other areas of the law, we must engage in the delicate task of weighing competing interests. The factors which should be considered in deciding whether an intrusion into an individual's privacy is justified are ... ").

90. See Bedford v. Sugarman, 112 Wash. 2d 500, 772 P.2d 486 (1989). After summarizing the cases that have endorsed the right to informational privacy the court stated:

From these cases, it appears that the right of confidentiality the Supreme Court first articulated in *Whalen v. Roe*, in its broadest application, protects against disclosure only of certain particularized data, information or pho-
For the constitutional right of informational privacy to be a credible concept it is necessary to differentiate, in a principled way, between those acquisitions and disclosures of information by the government that violate the Constitution and those that do not. This requires, initially, that the right only be implicated in cases where the information acquired or disseminated by the government is the kind that has been recognized by legal and social norms as significantly implicating privacy. The extent to which specific types of information implicate privacy is a by-product of two interrelated factors: the intrinsic and the consequential features of the information. By “intrinsic” features, I am referring to the degree of intimacy of the information. “Consequential” features refer to the potential for harmful consequences to the subject if information is disclosed.

Intimate information is information about a person that is intrinsically tied to personhood; it is information that reflects an extension or expression of the person and deals with the very essence of that person. The paradigm of intimate information would include information about the naked body and other individual physical features and one’s medical condition; it would include information about mental processes and states, fantasies, fears, anxieties, illnesses and family relationships, caring relationships and sexual activities. Non-consensual acquisition or publication of such information demonstrates a lack of respect to the person and constitutes an affront to the subject’s human dignity.91

Some intimate information, if disclosed, could have harmful consequences to the subject. This might be the case with regard to medical information such as a person’s HIV status, or treatment for mental illness or drug and alcohol abuse. The potential for adverse consequences from disclosure, however, is not the core privacy concern with intimate information. It is that the acquisition or dissemination of such information provides access to the subject as a person. Dissemination of all sorts of information that is not potentially damaging would tend to cause substantial concern and anxiety to a reasonable person. There are countless examples. Information that expresses good or bad feelings toward others, or that exposes a whole range of personal preferences ranging from sexual pleasures to sleeping habits, are thought to be “no one’s business.” Such information is a
tographs describing or representing intimate facts about a person. The case law does not support the existence of a “general right to nondisclosure of private information.

Id. at 511-12, 772 P.2d at 492.
91. See supra note 15.
part of you and you have the right to decide whether someone will have access to it.92

The special privacy concerns that are raised by intimate information are reflected in numerous social and legal norms in society. We think it is only appropriate to do many things with our family, lovers and friends outside of the public glare. Concerns about privacy have produced numerous state and federal laws which provide strict confidentiality for health information about drug and alcohol abuse, mental health treatment, and the condition of being infected with HIV.93 The ethical and licensing standards of health professionals contain proscriptions against betrayal of secrets.94

Information of a personal nature may not be intimate but may still implicate privacy values because the subject reasonably perceives that harmful or undesirable consequences, including embarrassment, will flow from disclosure. The paradigm of information that implicates privacy because of its consequential features is probably much of the information found in arrest or financial records. Information that someone has been arrested would not generally say much, if anything, about the health or personal or family relationships of the subject. Yet, because disclosure could cause embarrassment and have adverse consequences to the individual, disclosure could raise serious privacy concerns.95 Similarly, much information about financial transactions

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92. See generally Schoeman, Privacy and Intimate Information, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 403, 406 (F.D. Schoeman ed. 1984) ("I think that what makes things private is in large part their importance to our conceptions of ourselves and to our relationships with others. . . . Selective self-disclosure provides the means through which people value personal experiences which are intrinsically or objectively valueless.").

93. See supra notes 21-29 and accompanying text.

94. See AMERICAN MEDICAL ASS’N, PRINCIPLES OF MEDICAL ETHICS § 9 (1957); Ethical Principles of Psychologists, 36 AM. PSYCHOLOGISTS 633 (June 1981); AMERICAN HOSPITAL ASS’NS, HOSPITAL MEDICAL RECORDS 4-8 (1972); see also U.S. v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3rd Cir. 1980) ("It has been recognized in various contexts that medical records and information stand on a different plane than other relevant material" (comparing Federal Rules of Civil Procedure, rules 35 and 26(b); citing exemption for medical files under the Freedom of Information Act, 5 U.S.C. § 552(b)(6))).

95. A number of courts have found that arrest records constitute such a significant threat to privacy because of the consequences of disclosure that the constitutional right to privacy affords the subject the right to expunge the record or to some other type of relief. See Davison v. Dill, 180 Colo. 123, 503 P.2d 157 (1957); Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971). But see Tosh v. Buddies Supermarkets, Inc., 482 F.2d 329 (5th Cir. 1973) (disclosure of criminal histories of union organizers by police to business person does not violate constitution because
is not intimate. But disclosure of information about assets or liabilities could result in unwanted solicitation from various sources and encourage lawsuits or other harassing activities, including the possibility of being subject to extortion or kidnapping. Because of the consequential features of information involving one's financial status or exposure to the criminal justice system, such information is highly personal in the sense that a perception of embarrassment or possible harmful consequences from disclosure would be reasonable and is recognized in legal norms. Compelled disclosure of highly personal information constitutes a sufficiently serious threat to privacy to satisfy the threshold requirement in challenges grounded in the constitutionally based informational privacy right. It is the acquisition by the government of intimate information or information of a highly personal nature, in the sense above described, that implicates the constitutional right to informational privacy.

2. Is The Intrusion Into Privacy Justified: The Flexible Weighing of Interest Test

As previously mentioned, the standard of judicial review for informational privacy claims is flexible. The threshold determination is that the nature of the information is such that a significant invasion of privacy will occur if there is compelled disclosure by the government. Courts have been most receptive to informational privacy rights claims when such claims have been raised to block governmental requests for health care information which, if publicly disclosed, would constitute a significant invasion of privacy. As previously discussed, intimate information about someone's physical condition, and her family and personal relationships, embody the most basic subject of privacy. Non-consensual disclosure of such information violates our sense of self-respect, human dignity and personhood. Once the threshold determination is satisfied in respect to requests

of legitimate need to know). See also United States Dep't of Justice v. Reporters Comm., 109 S. Ct. 1468 (1989). Section 552(b)(7)(c) of the Freedom of Information Act (FOIA) excludes from disclosure records or information compiled for law enforcement purposes "to the extent that the production of such law enforcement records or information... could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) (1988). In Reporters Committee, the Court held that this section precludes disclosure of FBI "rap sheets" under FOIA because the compilation of information in these arrest records implicated significant privacy interests of the subject. Reporters Committee, 109 S. Ct. at 1485.

96. See generally discussion by the California Supreme Court in City of Carmel-by-the-Sea v. Young, 466 P.2d 225 (1970).
for health care information, a flexible weighing of interests test is utilized to determine whether the invasion of privacy is constitutionally justified.

This approach of weighing the competing interests, as in other areas of intermediate review in constitutional law, contributes to ad hoc, fact sensitive determinations of violations of constitutional rights. However, it would be a mistake to conclude from these intrinsic features of intermediate review that there is no bite to the standard. A significant burden is in fact placed upon the government to justify serious invasions of privacy through compelled disclosure of health care information. In some instances the invasion of privacy may be so significant that privacy will override important interests that are furthered by disclosure. At the very least there is a force to the demonstration of loss of privacy that requires that important interests in fact be furthered and that where privacy may be preserved or protected the government be required to do so.

The flexibility of the weighing of interest concept facilitates taking into account the multiple values and policies that are at stake when health care information is sought by the government. Concerns about limiting access to health care information reflect both the need to protect the privacy of the patient and the policy of preserving the integrity of the professional-patient relationship so that there will be unfettered communication between the patient and professional. In some instances, therefore, the weighing process involves multiple values competing against the government interest that is asserted to be furthered by disclosure.

B. THE UNITED STATES V. WESTINGHOUSE ELEC. CORP. TEST FOR JUSTIFIABLE INVASIONS OF PRIVACY

When the Director of the National Institute for Occupational Safety obtained a federal court subpoena ordering an employer to disclose information that was contained in the medical records of employees, the employer argued that such disclosure violated the constitutional right to informational privacy of the employees. This contention was rejected by the district court and the third circuit court of appeals. However, the third circuit's decision in United States v. Westinghouse97 has been viewed as a standard for evaluation of constitutional informational privacy claims. In Westinghouse, the third circuit concluded no violation of the constitutional rights of employees occurred upon compelled disclosure because the invasion

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97. 638 F.2d 570 (3rd Cir. 1980).
of privacy was justified. The third circuit described the factors to be considered in determining whether the intrusion into privacy is justified as: (1) the type of health record and the type of health care information that is requested; (2) the potential for harm in any subsequent non-consensual disclosure of the information; (3) the injury from disclosure to the relationship in which the record was generated; (4) the adequacy of safeguards to prevent unauthorized disclosure; and, (5) the degree of need for access.98

The Westinghouse five part analysis reflects, in a general way, the basic features of the constitutional right to informational privacy as it has evolved. On the non-disclosure side, the analysis considers intrinsic and consequential features of the health care information requested to determine the significance of the invasion of privacy that is involved by the disclosure, the risk of further invasions of privacy, and the importance of preserving the integrity of the relationship. On the disclosure side, the government's need to know is to be evaluated in terms of the strength of public policy as expressed in both explicit statutory norms and other governmental interests. An important factor in the Westinghouse calculus is the extent to which the government has secured the health care information that has been acquired against unjustifiable access and dissemination.99 Some discernible trends have emerged from consideration of these factors when health care information is requested by the government and challenged on informational privacy grounds.

C. REQUESTS FOR INFORMATION ON HIV STATUS AND FOR INFORMATION DISCLOSED IN PSYCHOTHERAPY

The richest development of the constitutional right to informational privacy has occurred when intimate and personal health care

98. Id. at 578.
information has been sought by courts, grand juries, or other government agencies. Where courts or grand juries seek such information and the constitutional right to privacy is raised to block disclosure, if the claim of right prevails, the right functions as a constitutionally based evidentiary or testimonial privilege. Several states have recognized this privacy based constitutional privilege. 100

The greatest weight is given to privacy claims when the health care information sought is that which was acquired in psychotherapy, or is medical information about whether a person has been infected with HIV. The special force of privacy arguments in these instances is based upon both the intrinsic and consequential features of such information. Psychotherapy involves revelation by the patients of their innermost thoughts: their fantasies, fears, and anxieties of the person in the most intimate sense—their inner psychic realities. Public disclosure of such information may have harmful consequences not only because antisocial attitudes may be expressed that will not be understood, but also because a stigma may still attach to someone being treated in psychotherapy. Beyond that, compelled disclosure arguably causes greater harm to the therapeutic relationship than to other professional patient or client relationships. This is because "the talk is the treatment" in psychotherapy and promoting a relationship of trust is necessary for the open disclosure that is a sine qua non for treatment itself. 101

The intrinsic and consequential feature of HIV-related information strongly implicate privacy. AIDS is a communicable, incurable,


101. See generally R. Slovenko, Psychotherapy, Confidentiality and Privileged Communication (1966). Professor Slovenko states the crucial role of communications in psychotherapy to be as follows:

In psychotherapy, however, every statement is a link in a chain. Thus, all statements are relevant to treatment, and require confidentiality. All physicians may discuss matters with their patients which have no relevance to illness, but in psychotherapy, almost all, if not all, statements are pertinent to and essential for treatment.

Id. at 33.
sexually transmitted disease that is viewed by many members of the society as significantly associated with homosexual activities and drug abuse. There continues to be mounting evidence that those perceived as being infected with HIV, the virus that causes AIDS, are treated with ostracism, discrimination and violence. Given these medical and social facts about AIDS, public disclosure of HIV related information constitutes the most serious invasion of privacy. In the case of HIV related information, protecting the privacy of the patient also promotes the policy of protecting the public health by encouraging voluntary testing.  

Where the request for health care information arises in formally initiated litigation and is based upon a determination that the information is relevant to issues before the court, disclosure is justified on behalf of the interest in truth-seeking that would be furthered by disclosure. This is a powerful government interest that is given great weight in the face of constitutional privacy claims. The success of the claims in the weighing process turns, in some instances, upon whether the request for the information arises in a lawsuit that was initiated by the patient. Where this is the case, the privacy interest is diminished either under the view that the patient has impliedly consented to disclosure by the suit or under the view that it would not be fair to allow the patient to bring the issue of his or her medical condition into a lawsuit and then shield relevant evidence from the court or the opposing party.

When the request for health care information is made as part of a formally initiated lawsuit that is not brought by the patient or client, or the requested information is pursuant to a grand jury investigation, careful attempts to weigh the competing interests are made. In this weighing of interests, if the privacy interests are strong, they may trump or override the interest in truth-seeking. At the very least, if the interest in truth-seeking may be furthered by alternative means that do not require that the subject's privacy be invaded, these alternatives must be utilized.

The paradigm of weighing the governmental interest in truth-seeking with strong privacy interests at stake is Rasmussen v. South


Florida Blood Service. In Rasmussen, the Florida Supreme Court responded to a request for disclosure of a list of blood donors named in a negligence action. The request was made of a blood bank with the view that the donor list was relevant to prove negligence on the part of a physician and hospital in administering blood contaminated by HIV to the plaintiff. The Rasmussen court denied access to the donor list because disclosure would deprive the donors of their constitutional right to informational privacy and chill prospective blood donors from participating in the voluntary blood supply system. In Rasmussen the right to informational privacy and the policy of preserving a voluntary blood supply combined to trump the interest in truth-seeking. Other courts that have considered the informational privacy claim in cases where HIV status is sought to determine negligence in administering contaminated blood have accommodated the competing interests by disclosure under circumstances where privacy would be substantially protected. In some instances general information has been disclosed without disclosing the identity of the individual. Other courts have disclosed the identity of the donor to the plaintiff and assumed that confidentiality would be adequately protected by appropriate directions to the plaintiff restricting further unnecessary disclosure.

D. FINANCIAL DISCLOSURE LAWS

Numerous challenges to laws requiring disclosure of financial affairs by government employees and officials have been made on the

105. 500 So. 2d 533 (Fla. 1987).
106. Id. at 537 ("Our analysis of the interests to be served by denying discovery does not end with the effects of disclosure on the private lives of the fifty-one donors implicated in this case. Society has a vital interest in maintaining a strong volunteer blood supply. . . ." The court then concluded that the disclosure sought implicated constitutionally protected privacy interests).
107. See Doe v. American Red Cross Blood Services, 125 F.R.D. 646 (D.S.C. 1989) (patient who had contacted HIV from contaminated blood not entitled to discover identity of donor or to take "veiled disposition" of donor in order to establish blood supplier’s negligence).
108. See Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675 (Tex. 1987) (patient who had contracted HIV from contaminated blood entitled to donor’s name but directed not to directly contact donor nor undertake further discovery regarding donor until permitted to do so by court); see also Belle Bonfils Memorial Blood Center v. District Court, 763 P.2d 1003 (Colo. 1988). In Belle Bonfils the court authorized the plaintiff to submit written questions to the donor through the clerk of the court. The clerk was provided with the identity of the donor for purposes of communicating the questions and receiving the written answers. The plaintiff received the written answers but was not provided with the identity of the donor. Id. at 1014.
basis that such disclosure violates the right to privacy of the covered persons. Courts have generally accepted the initial premise of these challenges and found that the compelled disclosure of this information implicates the informational right to privacy.\footnote{109} Most disclosure laws have been found to be justified invasions of privacy on the basis that such disclosures further important interests. The privacy analysis in financial disclosure cases has largely focused on the consequential features of such information. Public disclosure of information about a person’s financial affairs is viewed as creating a threat of kidnapping for ransom, as well as subjecting the person to unwarranted and irritating solicitations, and potential embarrassment by disclosing excesses in lifestyle or poverty.\footnote{110} These privacy interests have generally been viewed as significant.\footnote{111} But then so have the interests asserted in justification of disclosure.

Disclosure laws applicable to government employees are generally justified as furthering governmental interests in deterring corruption and conflicts of interest and enhancing public confidence in the integrity of government.\footnote{112} Where financial disclosure laws are directed

\begin{footnotesize}
\footnotetext{109. See Belle Bonfils, 763 P.2d at 1014 (Colo. 1988).}\\
\footnotetext{110. See City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 466 P.2d 225, 233, 85 Cal. Rptr. 1 (1970).}\\
\footnotetext{111. See Plante v. Gonzalez 575 F.2d 1119, 1135 (5th Cir. 1978).}\\
\footnotetext{Ranged against these important interests are the senators’ interest in financial privacy. Their interest is substantial. For better or for worse, money too makes the world go round. Financial privacy is important not only for the reasons the California Supreme Court accepted: the threat of kidnapping, the irritation of solicitations, the embarrassment of poverty . . . . (citation omitted) When a legitimate expectation of privacy exists, violation of privacy is harmful without any concrete consequential damages. Privacy of personal matters is an interest in and of itself, protected constitutionally . . . and at common law.}\\
\footnotetext{Id.}\\
\footnotetext{In Barry v. City of New York, 712 F.2d at 1563.}\\
\footnotetext{The court correctly noted that there is greater invasion of privacy in the public inspection provisions of financial disclosure laws than in the requirement for initial disclosure to the government. Barry, 712 F.2d at 1561. However, the court concluded that governmental interest in preventing corruption and conflict of interests outweighed the invasion of privacy that occurred from public inspection. Citing the press, the court concluded that public access furthered the interest in preventing corruption beyond the self policing that limiting disclosure of financial information to a government agency would involve. In addition it found the argument that public access to this information reasonably furthered the state’s interest in enhancing public confidence in the integrity of government. Barry, 712 F.2d at 1563.}\\
\footnotetext{112. See Barry v. City of New York, 712 F.2d 1554 (2d Cir. 1983); Plante v.}\\
\end{footnotesize}
at public officials, an additional governmental interest in participatory democracy by informing the electorate is asserted. Public officials are also found to have less constitutional protection for informational privacy than private employees. There is general agreement among courts that the governmental interests that are furthered by financial disclosure laws are weightier than the privacy interests of governmental employees or public officials.

There are a few exceptions. In City of Carmel-by-the-Sea v. Young, the California Supreme Court found that a financial disclosure law applicable to public officials constituted a violation of the federal constitutional right to informational privacy. The Carmel court imposed a greater burden of justification on the government for the invasions of privacy that occur from financial disclosure laws than is generally the case. Four years later the California Supreme Court upheld a financial disclosure statute that was more narrowly written to further the state's interest in avoiding conflict of interests, in County of Nevada v. MacMillen.

Gonzalez, 575 F.2d 1119 (5th Cir. 1978); Duplantier v. U.S., 606 F.2d 654 (5th Cir. 1979).

113. See Plante v. Gonzalez, 575 F.2d 1119, 1135-36 (5th Cir. 1978).
115. City of Carmel-by-the-Sea, 466 P.2d at 232 which applied a strict standard of review to invalidate general requirement of disclosure by public officers and candidates and their spouses and families of investments in excess of $10,000 unconstitutional because disclosure was not limited to investments that might involve potential conflict of interest. See Barry v. City of New York, 712 F.2d 1554, 1563 (2d Cir. 1983) (rejecting the argument that the $30,000 salary requirement that triggered the broad disclosure was unconstitutional because it was both overinclusive and underinclusive:

We recognize that full disclosure is burdensome, and that some City employees earning less than $30,000 might have opportunities for corruption, while others earning more than $30,000 might not. Moreover, we agree with the district court that the statute would be better if it specified the “particular job categories” that should be subject to disclosure, and defendants themselves concede that “it may not be the time” to consider raising the threshold for reporting “to take into account the effect of inflation since 1979.” Nonetheless, we cannot say that the statute must therefore fall. Ordinarily, legislative classifications of this sort must stand unless “very wide of any reasonable mark.”

Id.

116. 11 Cal. 3d 662, 522 P.2d 1345, 114 Cal. Rptr. 345 (1974) (statute provided in part that certain officials were to disclose only financial interests that might effect decisions of officials).
E. COMPelled Disclosure of Information on Child Abuse

The national child abuse scandal has caused many states to enact statutes that require educators and health professionals to report evidence of child abuse to governmental agencies. These laws generally restrict the government from further disclosure of the information about alleged child abuse under rigid confidentiality rules. Such compulsory disclosure laws raise serious questions of informational privacy rights. If the information of child abuse was acquired in a psychotherapy-client relationship, important losses of informational privacy occur by compulsory disclosure. Disclosure laws further the most important interest in protecting young persons who are unable to protect themselves from physical and emotional harm and death. The child abuse disclosure laws present courts with a brutal collision between privacy and preserving the physical and mental health of children. In Pesce v. Sterling Morton High School District 201, Cook County II., the Seventh Circuit, sitting en banc, considered the applicability of the emerging constitutional right to informational privacy to the compelled disclosure of health care information involving child abuse.

In Pesce, a tenured teacher, who was also a psychologist, failed to promptly report evidence of sexual abuse of a student by a teacher in violation of the Illinois Abuse and Neglected Child Reporting Act. The school board suspended Pesce for five days without pay and demoted him. He contested the action on the basis that it violated his constitutional right to privacy. Judge Cudahy, speaking for a unanimous court, held that the interest in protecting "one of the most pitiable and helpless classes in society—abused children," overrode the interest in privacy that was implicated by the compelled disclosure.


118. 830 F.2d 789 (7th Cir. 1987).

119. The Pesce court found that the psychologist had standing to raise the right to informational privacy because the patient's and the psychotherapist's constitutional right to privacy are basically "coextensive" in the context of the case. Pesce, 830 F.2d at 797. The court cited cases that involve the personal autonomy branch of the constitutional right to privacy, for example, Griswold v. Connecticut, supra note 55. The right of health professionals and health care facilities to raise the informational privacy rights of patients have been recognized in other cases where compelled disclosure of health care information was in issue. See supra note 95 and cases cited therein.

120. The court concluded that the state's interest in protecting abused children
F. DISSEMINATION OF HIGHLY PERSONAL OR INTIMATE INFORMATION BY THE GOVERNMENT

If the Warren and Brandeis article launched the legal right to privacy in our legal system, then recent decisions finding a violation of the constitutional right to privacy for the dissemination of information constitute a logical thrust of this right. The cases that have found constitutional violations have all involved serious invasions of privacy by the government's dissemination. *York v. Story*\(^\text{121}\) involved distribution of pictures of the naked body; *Woods v. White*\(^\text{122}\) and *Doe v. Barrington*\(^\text{123}\) disclosure of someone's HIV status; and *Carter v. Broadlawns Medical Center*\(^\text{124}\) disclosure of health records to non-medical personnel. Under the circumstances of these cases, the disclosures resulted in actual access to intimate information by numerous members of the public and potential access by many others. There was no justification for the dissemination in any of the cases. In *York v. Story*, the dissemination was for the purely private use of government agents in pursuit of personal titillation;\(^\text{125}\) in *Woods*\(^\text{126}\) and was compelling and the compelled disclosure would be constitutional even under the strict scrutiny standard of review. See *Pesce v. J. Sterling Morton High School*, 830 F.2d 798 (1987) ("Abused children can carry physical and emotional scars for a lifetime... the state bears a special responsibility to protect children who are unable voluntarily to choose their own course of action.").

\(^{121}\) 324 F.2d 450 (9th Cir. 1963).

\(^{122}\) 689 F. Supp. 874 (W.D. Wis. 1988).


\(^{125}\) York v. Story, 324 F.2d 450 (9th Cir. 1963). This is clearly the case regarding the dissemination of the photographs. Dissemination of the photographs to other officers in *York* would not be of aid in the identification or arrest of the criminal. The taking of the photographs in these circumstances was not essential to prosecution of the case; proof of the assault might have been demonstrated without them.

\(^{126}\) In *Woods* the allegation was made that medical personnel had discussed the plaintiffs HIV status with other inmates and staff members at the prison. The state made no claim that important state interests were furthered by the disclosure. *Woods*, 689 F. Supp. at 876. This is understandable given the emerging consensus among the medical and scientific community about the modes of transmission of the virus and the need for strict confidentiality of HIV related information. The basis of the factual allegations in the case and the disclosures would not be justifiable on the basis of protecting persons against physical harm from infection of the virus. See *Glover v. Eastern Nebraska Community Office of Retardation*, 686 F. Supp. 243, 251 (D. Neb. 1988), aff'd, 867 F.2d 461 (8th Cir. 1989) (mandatory testing of employees that come in contact with retarded children was an unreasonable search of employees in violation of the fourth amendment because given the medical facts about transmission of AIDS the risk of infection of the children was, "extremely low... approaching zero").
Barrington, the recipients of the information about the HIV status had no valid right to know—they were not at risk from infection through transmission, nor were they involved in treatment of the subject. In Carter, the chaplain who was given access to the health records was not directly involved in treatment and his consulting services could have been fulfilled by general information that did not require full access to the details of the health record.

The sparsity of precedent holding that government dissemination constitutes a violation of the constitutional right to privacy is a reflection in part of the recentness of the non fourth amendment informational privacy rights development. It is also a reflection of the judiciary's reluctance to commit its resources to a general review of whether the dissemination of information by the government is justified. Yet unlimited authority by the government to disclose what it knows about individuals would constitute an intolerable threat to that individual as a person and an affront to human dignity. This proposition is reflected in numerous legal norms in our system. Freedom of Information and Right to Know Acts contain provisions that prevent general dissemination of much highly personal and intimate information in the possession of the government. Statutory proscriptions against unjustified disclosure of such information are also commonplace.

The constitutional right to informational privacy as it applies to dissemination of information reflects a residual safety valve function of constitutional protection for immunity from access by the government to us as persons. The right is a general response to the failure of the government to demonstrate proper respect for confidentiality and privacy for the information that it acquires about a person. When it is shown that the government has acquired information that if publicly disseminated would seriously implicate privacy because of its

127. In Barrington, police officers told a neighbor of someone that had AIDS, that he had the disease and that his wife was likely to have the disease. He did not know if, nor was there any evidence that, anything but casual conduct had occurred between the AIDS sufferer and the neighbor. Barrington, 729 F. Supp. at 378.

128. In Carter, a county hospital established a "chaplain" position at the hospital to provide patients and their families with counseling for the grief that accompanied the hospitalization. The court concluded that general information about the condition of the patient would provide the chaplain with sufficient information for counseling and that by making the records available to non health personnel, the county hospital did not properly respect a "patient's confidentiality and privacy." Carter, 667 F. Supp. at 1282-83.

129. See supra notes 24 and 26 and statutes cited therein; see also supra note 90; cf. supra note 25.
intrinsic and consequential features, and dissemination of that information occurs because of inadequate security of the information, courts find the constitutional protection against invasions of privacy to be implicated.\textsuperscript{130} The essence of the constitutional right to informational privacy for dissemination of information is expressed in the incipient development of this concept by the fact that all of the cases have involved highly personal or intimate information that has been disseminated for purely private purposes or that is unrelated to the public purpose that is asserted as a justification for the invasion of privacy.

IV. Conclusion

In 1975 the Supreme Court referred to the Warren and Brandeis publication as the "root article"\textsuperscript{131} of the right to privacy. In the century since the publication of that article, several branches of the legal right to privacy have sprouted. A major trunk of the legal right to privacy is the right to decide who shall have access to highly personal or intimate information about persons. Branches of the right to informational privacy include rights that are protected in tort and constitutional law. Warren and Brandeis argued for recognition of a common law privacy right for the unjustified dissemination of information by the press to the general public. The theoretical foundations of their argument for recognition of a tort right to privacy provided an intellectual base for recognition of a more general right to informational privacy. The base was that privacy is viewed as an important value in conventional morality and that privacy was a part of those essential rights that we hold as moral and legal persons in society. Numerous philosophers, jurists and scholars have embellished upon the bareboned ideas that were expressed in the article on the conceptual and intellectual foundations of the right to privacy. It has also been demonstrated that the general views expressed in the article may not have originated with Warren and Brandeis.

Even if that is the case, recognition in our legal system of informational privacy rights in a broad range of areas is a kind of societal celebration of the article. These developments are a reflection of the tradition generated by the article of recognizing the need to provide legal protection for invasions of privacy. Support for the right is found in conventional morality and the basic notion that

\textsuperscript{131} Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 487 (1975).
privacy is an essential ingredient of personhood; the scope of the right is limited by an assessment of the sufficiency of the justification for the invasion of privacy by the government, private individuals or business entities.

In the evolution of privacy rights that I have focussed on in this article, state and federal constitutions have been construed to protect individuals from unjustifiable invasions of privacy that occur when highly personal or intimate information is acquired or disseminated about them by the government. This incipient constitutional right is triggered by government action that does not constitute a search within the meaning of the fourth amendment. The constitutional informational privacy right is part of constitutionally protected liberties that are independent of the fourth amendment. For this reason I refer to the right as the unencumbered constitutional right to informational privacy.

This emerging branch of the constitutional right to informational privacy provides a basic protection for the immunity of us as persons. It is a recognition of the inviolability of each moral personality as this idea has evolved from the intellectual tradition that has flowed from the article by Warren and Brandeis. The right has functioned to provide a basic protection for the immunity of us as persons by recognizing that highly personal and intimate information about us ought not be acquired and disseminated by the government unless it furthers a valid governmental function and efforts are made to prevent gratuitous and excessive public access to the information.