Extending the Constitutional Right to Privacy in the New Technological Age

Robert S. Peck
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A quiet revolution is brewing that will profoundly change the American way of life. Technological developments are creating new jobs and economic patterns that will raise new social and legal issues. This technological revolution will also bring a sea-change in the law that is significant but not unprecedented. Major shifts in constitutional doctrine occurred after the industrial revolution transformed the United States from an agrarian society to a manufacturing giant. As a result of that transition, the scope of the Commerce Clause¹ was expanded to permit regulation of a host of activities never before subject to governmental oversight.² The current metamorphosis into an information-based society, which uses an incredible range of new technologies, will similarly bring forth novel problems that bear on the relationship between individuals and government. Perhaps nowhere will these issues be so important as in the area of privacy.

Today's new technology permits the collection and dissemination of personal information with ease. The computerization of soci-

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1. U.S. CONST. art. I, § 8, cl. 3.

2. See, e.g., United States v. Darby, 312 U.S. 100, 118-23 (1941) (upholding federal regulation making it unlawful to ship goods in interstate commerce if such goods are manufactured in violation of maximum working hours or minimum wage rates, and making it unlawful to require workers to work more than certain maximum hours per day or to pay workers less than a certain minimum wage per hour); Houston E. & W. Tex. Ry. v. United States, 234 U.S. 342, 351-55 (1914) (sustaining congressional authority to reach intrastate rail rates that discriminate against interstate railroad traffic); Southern R.R. v. United States, 222 U.S. 20 (1911) (sustaining a penalty judgment imposed for operating railroad cars equipped with unsafe, defective couplers).
ety has important and possibly unsettling implications for personal privacy that invite a reexamination of the still-emerging constitutional right of privacy. One court recognized the pressing need to explore these issues more than a decade ago:

The increasing complexity of our society and technological advances which facilitate massive accumulation and ready regurgitation of far-flung data have presented more problems in this area, certainly problems not contemplated by the framers of the Constitution. These developments emphasize a pressing need to preserve and to redefine aspects of the right to privacy to insure the basic freedoms guaranteed by this democracy.3

The American public recognizes the privacy implications of today's technological advances, according to a 1983 survey by pollster Louis Harris. Of those questioned, forty-eight percent were “very concerned about threats to personal privacy,”4 an increase of seventeen percent since 1978.5 Seventy percent believed it “likely” that “a government in Washington will use confidential information to intimidate individuals or groups it feels are its enemies.”6 In addition, fifty-eight percent thought it likely that the information “will be used to take away the privacy, the freedom and the liberty” of Americans.7 Most strikingly, eighty-four percent of those polled agreed that “it would be easy, no problem at all, to put together a file on them that contains all their credit information, employment records, phone calls, where they have lived over the past ten years, their buying habits, their payment records on debts, [and] the trips they have taken.”8

Such fears are not unfounded. The federal government maintains an average of fifteen files on every American,9 and state and local authorities often have collected more information than was necessary for legitimate purposes. In New York, for example, a drunk drivers program required enrollees seeking reinstatement of their licenses to fill out a form that, for no apparent purpose, asked ques-

5. Id.
6. Id.
8. Id.
tions about their sex lives. Other requirements have been equally intrusive.

Today, information collected for one purpose may be shared with other agencies and used for entirely different purposes, since fragments of information about an individual that once might have been filed away in dozens of dusty storerooms now may be assembled into a complete personality profile at the touch of a button. In addition, government agencies have great access to privately-collected information. The federal government, for example, may obtain credit information before it grants loans. A new General Services Administration program designed to prevent fraud and abuse in federal programs will provide nearly 100 federal agencies with a 24-hour direct computer link to seven major credit reporting companies. The instantaneous access to frequently inaccurate credit reports may easily lead to their use for purposes other than checking the creditworthiness of loan applicants.

West Germany is debating a controversial proposal that would establish a national identification card, capable of being read by a computer, that would contain the name, date and place of birth, height, eye color, address, citizenship and an identity number to assist in computer searches for each resident. Some critics have decried this approach as requiring a “human license plate.” One feature of the card would allow a central computer to keep track of every resident’s movements. The concept of a national identifica-

10. Id.
11. See, e.g., Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980) (holding in part that a requirement that police conduct a special investigation into the background of adult bookstore license applicants and all others connected with the business was a violation of the constitutional right of privacy without any legitimate state purpose).
12. The sheer difficulty of putting together information, because of its dispersion in often inaccessible and poorly-cataloged locations, may have been a substantial privacy protection. But even that has evaporated with the development of efficient information retrieval systems. Still, the “collection and storage of data by the State that is in itself legitimate is not rendered unconstitutional simply because new technology makes the State’s operations more efficient.” Whalen v. Roe, 429 U.S. 589, 606-07 (1977) (Brennan, J., concurring).
14. Id.
15. Id.
17. Id. Ironically, proponents of the West German identification card were insensitive to the powerful rhetorical advantage they handed their opponents by seeking to introduce the concept in 1984, the year chosen as the title to George Orwell’s famous novel about a totalitarian world where the state spied on and virtually controlled the lives of its citizenry. G. ORWELL, 1984 (1949).
A similar proposal was abandoned in France in 1983. In the United States, a national identification card has been proposed as a means to verify citizenship or immigration status, thereby closing employment opportunities to illegal aliens.

Moreover, the technology will soon exist for what has been called the "intelligent" or "smart" identification card, that will be more than merely computer readable. This type of card will contain a sophisticated microprocessor that, when plugged into a computer, will reveal personal data, including the medical files and financial records of its owner. It will also be capable of replacing the need for cash or current forms of credit cards by making electronic funds transfers at the point of sale for major purchases, such as homes or stocks, as well as minor purchases, such as groceries.

Other technological innovations with privacy implications include medical sensory implants and interactive cable television. The implants, while serving the important medical purpose of monitoring body functions or providing periodic electrical or drug stimuli, could become a means of depriving an individual of control over his or her body. The two-way capability of the new cable television systems, which allow viewers to participate in programs or make use of their television for non-programming functions, could also provide the programmer with a record of each viewer's television usage.

The conflicting liberating and monitoring aspects of the new technology, while complicating the issues our society must face, do not necessarily require a societal choice between progress or individualism. A computerized society may provide great benefits in terms of increased efficiency, leisure time, and progress in mass communication and education. The late political science professor Ithiel de Sola Pool put forth the thesis that the revolution in "electronic technology is conducive to freedom." His claim, that the exercise of free speech is actually enhanced by the new communications systems, was based on two developments. First, consumers can enjoy a wide variety of informational and entertainment choices using com-

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21. Id. at 21.
computerized networks through which data can be compressed and transmitted in forms that can be read by home terminals. Second, the accessibility to data processing capabilities made possible by powerful personal computers has a decentralizing impact, taking informational power away from government and large business organizations and giving it to a newly computer-literate populace.24

Despite these freedom-generating prospects, the scientific advances in data accumulation remain a double-edged sword. If the new technology is properly used, society benefits; if it is abused, it can become a tool of enslavement by those who control the data flow.

A number of states have been especially sensitive to the privacy needs of their citizens in this new information age. Several have adopted constitutional provisions to protect privacy,25 while others have gone the statutory route.26 In addition, many federal statutes also establish privacy policies.27 The statutory approach, however,

24. Id. at 226-47.

25. The following states have adopted a constitutional right to privacy, most in recent years: ALASKA CONST. art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed."); ARIZ. CONST. art. 2, § 8; CAL. CONST. art. I, § 1 ("inalienable rights" include "pursuing and obtaining . . . privacy"); FLA. CONST. art. I, § 23 ("Right of Privacy—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein."); HAWAII CONST. art. I, § 6; ILL. CONST. art. I, § 12; LA. CONST. art. I, § 5; MASS. GEN. LAWS ANN. ch. 214, § 1(b) (West 1974); MONT. CONST. art. II, § 10 ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."); S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7.

26. Most state statutes concerned with privacy are directed at narrow and readily discernible threats to privacy. But see Right of Privacy Act, Wis. STAT. § 895.50 (1979) ("The right of privacy is recognized in this state."). Recently, the New York State Assembly passed a package of 12 bills designed to give greater privacy protection. They included: limits on the collection and use of information through interactive cable television technology; access by patients to their own medical records; a prohibition against the revelation of a customer's banking transactions by a bank unless served with a warrant or a subpoena; a prohibition on the use of lie detectors as a condition of employment; and an exemption from the state freedom of information law for computer access codes. The package was given little chance for passage in the state senate. N.Y. Times, Mar. 25, 1984, at 35, col. 1.


The Privacy Act of 1974 also declares that privacy "is a personal and fundamental right
leaves loopholes that rapidly changing technologies can enlarge. For example, the federal wiretap law, enacted in 1968,28 fails to cover the interception of information transmitted by computerized “digital bits” that are being used more frequently in sophisticated communications and electronic mail systems.29 While statutes will remain an important source of legal protection in this area, the right of privacy will be secure only if recognized as a basic liberty within the constitutional pantheon.

The degree to which privacy is valued becomes critical when we try to balance the benefits of data accumulation and accessibility against the potential threats to individual liberties. Only when the right to privacy is elevated to a fundamental constitutional principle will the interest of the individual in withholding personal information withstand the interest of the government in obtaining that information. Public officials would then be obligated to consider the implications of their policies on individual privacy; courts would be required to consider the primacy of this right in deciding privacy questions that fall between the statutory cracks, and in developing appropriate remedies for invasion of personal privacy.

The right to privacy is more than just a vague concept. To disparage this right is to disparage the personal autonomy that has flourished as a result of this nation’s dedication to individual rights and the related concept of human dignity. While some have asserted that people have nothing to fear unless they have something to hide, protection against unwarranted intrusions into personal matters means much more than safety from minor embarrassments, or even possible incrimination. Invasions of privacy have the potential to reveal one’s associations, private enjoyments,30 or personal views, all of which others might look upon with a disdain leading to social ostracism.

The chilling effect of a loss of privacy is the undesirable incen-

protected by the Constitution.” Id. at § 552(a) note. In addition, the Internal Revenue Code, I.R.C. § 1603 (West Supp. 1982), and the Census Act, 13 U.S.C. § 9(a)(2) (1976), restrict disclosure of information collected except for certain limited statutory exceptions.
30. Private enjoyments are more than the sort of pornographic literature that the Supreme Court held could be enjoyed in the privacy of one’s home in Stanley v. Georgia, 394 U.S. 557 (1969). They may also include such socially valueless information as the kind of television shows one watches, favorite sports, or even food preferences, all of which might evoke an undesired reaction from friends and colleagues.
tive to conform to perceived societal norms rather than assert one’s individuality in ways that may threaten to cause a loss in personal or professional associations. Ultimately, what will be lost by this process are the private emotional releases that we all need, the range of human relationships that help us function, and, perhaps most importantly, the creativity that serves human achievement. American culture has been characterized at various times as a rugged individualism, a willingness to accept challenges that test American know-how, and a sense of adventure that seeks out new frontiers to explore. Yet these traits cannot exist if conformity, not privacy, is considered the more important value.

Privacy makes possible individuality, and thus, freedom. It allows us to cope with the larger world, knowing that there is a place where we can be by ourselves and contemplate our more public actions without recrimination. It has been said that “our secrets concern weaknesses that we dare not reveal to a competitive world, dreams that others may ridicule, past deeds that bear no relevance to present conduct, or desires that a judgmental and hypocritical public may condemn.”

The purposes of privacy are “the promotion of liberty, autonomy, selfhood, human relations, and furthering the existence of a free society.”

Privacy, while fundamental to the concept of individual freedom, has proven elusive of definition. Many knowledgeable observers agree that it is “the right to be left alone”—the definition coined by Warren and Brandeis in their seminal law review article of nearly a century ago. Others have written that privacy is another name for personal autonomy, a notion that captures the various libertarian strains that also equate freedom with personal sovereignty. Professor Kurland has approached the definitional problem by identifying three rights within the concept of privacy: freedom from intrusion or observation in one’s private affairs; the right to maintain

34. Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). Warren and Brandeis derived this definition from Judge Cooley’s “right to be let alone.” Id. at 195. See Cooley, Torts 29 (2d ed. 1888). Interestingly, the mundane offense that inspired this masterwork was that Warren was upset by the frequent mention of his family in a Boston newspaper’s gossip column. The article discussed privacy as giving rise to an action in tort.
control over certain personal information; and the freedom to act without outside interference.36

While some criticize the lack of Supreme Court delineation of the nature of the privacy right, and its consequent misapplication in certain instances,37 it should be no more of an obstacle to legal application than the many other valued concepts that are difficult to define.38 Law is not a science in which only the quantifiable are permitted to dwell. We often strive for a tautology that allows us to measure the application of a legal concept, but are disappointed in that search. Legal concepts are values, often measured with an unavoidable arbitrariness against other competing values, and values must be guided by experience.39 If we ascribe a constitutional value to the concept of privacy, we enable ourselves to apply it as a shield against the threats to personal freedom that accompany the benefits of the new technological advances.

The new capacity to store and retrieve information has not so

36. Kurland, The Private I, Univ. of Chi. Magazine 7, 8 (Autumn 1976). Dean Prosser, who took up the Warren-Brandeis cause of establishing privacy as a tort, gave it a four-part definition: 1) intrusion into solitude or personal affairs; 2) public disclosure of embarrassing facts; 3) publicity that puts one in a false light; or 4) appropriation by another of one's name or likeness. Prosser, Privacy, 48 Calif. L. Rev. 383, 389 (1960).


38. Perhaps the best example of a principle that escapes definition, yet is fundamental to the legal system, is the concept of due process. Though uniformly agreed that it is the core of the judicial process, due process remains an elusive goal that courts have struggled to achieve throughout legal history.

39. The Supreme Court noted the importance of experience in a 1910 decision: Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. Weems v. United States, 217 U.S. 349, 373 (1910).

Madison also recognized the value of experience in constitutional decision-making. He wrote: "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." The Federalist No. 37, at 101 (J. Madison) (R.P. Fairfield ed. 1981).
much redefined privacy as it has enhanced its importance. The changing world around us has an important place in determining constitutional doctrine. As Oliver Wendell Holmes declared, "the life of the law has not been logic: it has been experience." Chief Justice Warren also recognized the changing demands on the constitutional system. "Our system faces no theoretical dilemma," he wrote, "but a single continuous problem: how to apply to ever changing conditions the never changing principles of freedom." It is that challenge that faces us today in the privacy area.

It was a set of changed conditions, placing new demands on the law, that provided the impetus for the initial advocates of a right to privacy. Warren and Brandeis wrote:

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.

They further noted:

Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone."

Privacy was a theme that had great appeal to Brandeis. He later came to regard it not only as critically based in the common law, but as possessing an important constitutional dimension as well. In an oft-quoted dissent in *Olmstead v. United States*, the significance of which was later recognized, Justice Brandeis wrote:

43. *Id.* at 195 (footnote omitted).
45. In a speech delivered at the celebration in 1960 of the Centennial of Northwestern University School of Law, Erwin N. Griswold, then the Dean and Langdell Professor of Law at Harvard Law School, characterized Justice Brandeis' phrase "the right to be let alone" as
Can it be that the Constitution affords no protection against such invasions of individual security [as are caused by an unwarranted wiretap]?...

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

When William O. Douglas was appointed to the Brandeis seat on the Court, he seemed to have also inherited the privacy cause. Like Justice Brandeis, he, too, first articulated his vision of the constitutional standing of privacy in a dissent. "Liberty in the constitutional sense," wrote Justice Douglas, "must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom." Douglas, who championed individual rights during his long tenure on the Court, wrote that:

"[T]he strength of our system is in the dignity, the resourcefulness, and the independence of our people. Our confidence is in their ability as individuals to make the wisest choice. That system cannot flourish if regimentation takes hold. The right of privacy...is a powerful deterrent to any one who would control men's minds."

Later, Griswold v. Connecticut presented Douglas with his chance to remove all doubt that the right to privacy was of constit-

being "implicit in many of the provisions of the Constitution and in the philosophic background out of which the Constitution was formulated." Griswold, The Right To Be Let Alone, 55 Nw. U.L. Rev. 216 (1960).

46. 277 U.S. at 474 (Brandeis, J., dissenting).
47. Id. at 478 (Brandeis, J., dissenting).
49. Id. at 469.
50. 381 U.S. 479 (1965).
tional importance. According to one commentator, the majority of justices generally agreed that the disputed statute prohibiting doctors from advising married couples in the use of contraceptives, and the prohibition against use of those contraceptives, was offensive, but disagreed as to the proper constitutional grounds for finding the statute invalid. Justice Douglas won the assignment of writing the opinion by pronouncing the clearest theory of unconstitutionality in conference. However, his first attempt at drafting an opinion rested on the constitutional right of association between married partners. Justice Brennan apparently convinced him to rely instead on privacy grounds. Speaking for the Court, Justice Douglas declared that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy." As a result of such analysis, Douglas found a right to privacy implicit in several constitutional amendments: the first, third, fourth, fifth, and ninth. Justice Harlan used yet another method of analysis in reaching the same conclusion by asserting that the Connecticut statute "infringe[d] the Due Process Clause of the fourteenth amendment [and] violate[d] basic values 'implicit in the concept of ordered liberty.'" This broad-brush approach to constitutional construction has been subjected to much criticism. Perhaps Justice Black's dissent

52. Id. at 577-78.
53. Id. at 578-79. Douglas could have been influenced by Justice Harlan's dissent four years earlier in a challenge to the same Connecticut statute. "I believe that a statute making it a criminal offense for married couples to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life." Poe v. Ullman, 367 U.S. 497, 539 (1961) (Harlan, J., dissenting).
54. B. SCHWARTZ, supra note 51, at 577-80.
55. 381 U.S. at 484 (citation omitted).
56. Id. at 480-86.
57. Id. at 482-84.
58. Id. at 484.
59. Id. at 484-85.
60. Id. at 484.
61. Id. Justice Goldberg expanded on the application of the ninth amendment in his concurrence. He believed that "the right of privacy in the marital relation is fundamental and basic—a personal right 'retained by the people' within the meaning of the Ninth Amendment." 381 U.S. at 499 (Goldberg, J., concurring).
62. 381 U.S. at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
63. See supra notes 33-37.
in *Griswold* expressed it best: "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision." Yet rarely has the Constitution been given the literal interpretation that Justice Black advocated. James Madison, principal author of the Bill of Rights, predicted that "once bills of rights are established in all the States as well as the Federal Constitution, we shall find that, although some of them are rather unimportant, yet, upon the whole, they will have a salutary tendency." Madison's support for considering the rights established "upon the whole" supports not only the ninth amendment theory of those who consider certain rights fundamental even if not specifically articulated, but also the theory that holds them embraced within the concept of due process. Justice Harlan, a believer of the latter theory, stated that

the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . .

Other constitutional rights, not specifically mentioned in the Constitution, have become well-accepted after a period of gestation. For example, the constitutional right of every citizen to travel freely from state to state, like the right to privacy, springs not from any specific constitutional language, but from the document's overall scheme. Courts, since 1849, have experienced difficulty in attaching the right to travel to a particular constitutional provision. That in-

64. 381 U.S. at 510 (Black, J., dissenting).
65. 1 ANNALS OF CONG. 454 (Gales & Seaton ed. 1789).
66. 381 U.S. at 488 (Goldberg, J., concurring).
67. Id. at 493.
ability, however, has neither diminished the right nor made it unusually difficult to apply.

The "zones of privacy" that Douglas found in Griswold\(^{71}\) have been described as places where a person can "be an individual, not a member of the community."\(^{72}\) These zones should serve to protect us from a system "in which government may intrude into the secret regions of man's life at will,"\(^{73}\) and Professor Emerson has described them as areas in which each individual "can think his own thoughts, have his own secrets, live his own life, reveal only what he wants to the outside world. The right of privacy, in short, establishes an area excluded from collective life, not governed by the rules of collective living."\(^{74}\)

Professor Charles Reich has adopted this approach to put forth a property-based theory of privacy. According to Reich, what a person does on his own property "has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference."\(^{75}\) To Reich, a circle is drawn around a zone of privacy "within which the majority has to yield to the [property] owner."\(^{76}\)

Reich's theory properly recognizes the pivotal role of private property in protecting individual freedom. However, for privacy purposes it is perhaps more useful to imagine Reich's single circular zone as only one of a series of concentric circles. While Reich's privacy rights disappear when an individual steps outside the boundaries of his own property, a better view sees the right of privacy as gradually dissipating, rather than immediately disappearing, when one leaves home.

Just as the right of privacy is not absolute even in one's home, since, for example, it must give way to warranted searches, the loss of the right outside the home is also not absolute. Thus, although one's property forms the strongest zone of privacy for government to overcome, it is paralleled by additional zones — concentric circles — where privacy protections become progressively weaker. As one moves from the private realm to a more public one, it naturally fol-

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71. 381 U.S. at 484.
74. T. Emerson, supra note 72, at 545.
76. Id.
lows that his or her expectation of privacy is reduced. Indeed, the courts, in attempting to apply the right of privacy, have placed substantial emphasis on a complainant’s expectation of privacy.

The Supreme Court’s decision in *Katz v. United States* supports such a concentric circle theory that relies for its measure on an expectation of privacy. In *Katz*, a criminal defendant had challenged his conviction, which was based on evidence obtained by unwarranted electronic eavesdropping on conversations conducted from a public telephone booth. In reversing the conviction, the Court declared:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. . . .

. . . [W]hat [the defendant] sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. . . . One who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

The same principles must hold true for other new forms of common communication. However, applying these principles is not easy. In *United States v. Miller*, the petitioner was defeated on expectation of privacy grounds when he challenged the admissibility of microfilmed evidence of checks, deposit slips and other records obtained by subpoena to the two banks maintaining the records. The Court viewed the microfilm as bank business records rather than private papers, and found no fourth amendment violation. The Court concluded that there was no expectation of privacy in the negotiable instruments, and that the fourth amendment provides no protection for information revealed to a third party who then conveys it to the government.

78. Id. at 349.
79. Id. at 351-52 (citations omitted).
81. Id. at 438-43.
82. Id. at 440.
83. Id. at 442-43.
The *Miller* decision illustrates the judicial reluctance to expand the privacy right to modern needs. Still, a society that is becoming more reliant on computer-generated records maintained by third parties must recognize the privacy interests within that exterior circle, and the expectations of privacy that necessarily attend. It is unlikely that government investigators will bother with the cumbersome procedures required to obtain private papers directly, for law enforcement or other purposes, if they can obtain the papers more easily from third parties who have no privacy interest to assert. Because technology has expanded the accessibility of records once kept at home, the law must equally expand the available protections. If it does not, all information concerning an individual may become available for government inspection, and privacy could become a hollow concept.

Despite the result in *Miller*, it is clear that informational privacy will remain on court dockets as new informational demands and new data retrieval techniques continue to generate litigation.\(^84\) Perhaps it is too easy to dismiss the *Miller* case as a product of the present Court's hostility to the use of the protection against unreasonable search and seizure in order to withhold clear evidence of criminality when the government's conduct is not patently offensive; nonetheless, privacy issues that are outside the realm of criminal procedure may receive different treatment.

In 1977 the Supreme Court, in *Whalen v. Roe*,\(^85\) demonstrated great sensitivity to the privacy needs of an information-based society in upholding a statute that required that centralized computer records be maintained on all persons who purchased certain lawfully prescribed drugs for which there was also an illicit market.\(^86\) The statute at issue required that a system be established to protect the records against disclosure, and that the data be destroyed after five years.\(^87\) In addition, public disclosure of a patient's identity was expressly prohibited.\(^88\) The Court found that the security precautions required by the statute sufficiently protected the information against disclosure and thus did not violate the constitutional right to pri-

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84. See, e.g., United States v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980) (involving federal agency request for employee medical records as part of investigation of workplace health hazard).


86. Id. at 600-04.

87. Id. at 593.

88. Id. at 594.
The Court acknowledged the privacy implications of its decision, commenting:

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 collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. 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. . . . [I]n some circumstances that duty arguably has its roots in the Constitution . . . .

The Court was satisfied that a "carefully designed program [with] numerous safeguards intended to forestall the danger of indiscriminate disclosure" would protect personal information gathered for a legitimate state purpose. Yet, without such statutory attention to constitutionally protected privacy interests, it is not clear that the statute could have passed muster. And it should not have. This statute, without its privacy safeguards, might have identified law-abiding citizens as users of illicit drugs, jeopardizing their employment and community standing.

Any violation of personal privacy is a serious affront to individual freedom. The right to privacy should require no less judicial protection than do other constitutional rights. The courts have an obligation to step into the vacuum created between the constitutional principle and the inadequacies of statutory language. As Madison wrote, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights."

To enforce the constitutional right to privacy, the Supreme

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89. Id. at 600-05.
90. Id. at 605 (footnote omitted). Justice Stevens, writing for the Whalen majority, explained that the "constitutionally protected 'zone of privacy' " includes two different types of interests: "the individual interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions." Id. at 598-600 (footnotes omitted). This echoes the definitions of privacy, see supra notes 30-36 and accompanying text, that see it as encompassing both the right to bar public disclosure of embarrassing private matters, and a right of self-sufficiency where one can make personal decisions without governmental intrusions that limit the available choices.
91. Whalen, 429 U.S. at 607 (Brennan, J., concurring).
92. 1 ANNALS OF CONG. 457 (1789).
Court declared in *United States v. United States District Court*, 93 “our task is to examine and balance the basic values at stake,” 94 weighing “the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression.” 95 Applying that test, the Court in *District Court* concluded that judicial approval is required before the government may engage in domestic surveillance of persons thought to pose a threat to national security. 96

If judicial authorization is necessary where the government seeks to investigate acts of subversion, it certainly should be necessary for lesser investigations, and an individual should have a cause of action if the government infringes his or her right of privacy. When the infringement is perpetrated by state or local governments, a cause of action under section 1983 of the Civil Rights Act 97 is available “where official policy is responsible for a deprivation of rights protected by the Constitution.” 98 When the federal government is the source of the offensive conduct, a federal cause of action should be inferred directly from the Constitution, as in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics.* 99 In *Bivens*, the Court created a cause of action for damages to remedy a fourth amendment violation where several agents of the Federal Bureau of Narcotics, acting under color of law, entered plaintiff’s apartment, allegedly without a search or arrest warrant, and manacled him in front of his family while conducting a sweeping search of his home. 100 Similar causes of action must exist for individuals deprived of their privacy by official action.

In *York v. Story* 101 the Ninth Circuit moved in this direction by permitting a section 1983 action for damages against police officers who took and distributed photographs of the plaintiff in the nude under the pretext that the pictures were necessary evidence to investigate the assault charges she had filed. 102 The court found sufficient basis for the lawsuit in the privacy protections afforded by the Due

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94. Id. at 314.
95. Id. at 314-15.
96. Id. at 314-24.
100. Id. at 389.
101. 324 F.2d 450 (9th Cir. 1963).
102. Id. at 451-52.
Process Clause of the fourteenth amendment.\textsuperscript{103}

Similarly, the Fifth Circuit has allowed a private right of action under section 1983 against the State of Florida for abridging the privacy rights of people who had given personal information to the state attorney's office after having been assured that their testimony was absolutely privileged under Florida law.\textsuperscript{104} The court declared that "[a]n intrusion into the interest in avoiding disclosure of personal information will thus only be upheld when the government demonstrates a legitimate state interest which is found to outweigh the threat to the plaintiff's privacy interest."\textsuperscript{105} In \textit{Plante v. Gonzalez},\textsuperscript{106} the Fifth Circuit upheld, on privacy grounds, a challenge by five state senators to certain financial disclosure requirements, declaring that "[t]he constitutionality of the amendment will be determined by comparing the interests it serves with those it hinders."\textsuperscript{107}

A weapon stronger than statutory invalidation and private damage actions may be necessary to protect privacy rights. In the criminal context, the judicially-created exclusionary rule vindicates an accused's privacy rights by excluding unconstitutionally seized objects from evidence.\textsuperscript{108} An extension of the fourth amendment, the rule is designed to deter illegal searches by denying use of the illegally obtained evidence.\textsuperscript{109} A civil version of the exclusionary rule, which would deny the government use of the improperly-gathered information, may be appropriate to combat egregious conduct. Like its criminal counterpart, a civil exclusionary rule would seek to force officials to consider the privacy ramifications of their actions by removing all incentive to disregard them.\textsuperscript{110} As Justice Clark wrote of the crimi-

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\item 103. \textit{Id.} at 455-56.
\item 104. Fadjo v. Coon, 633 F.2d 1172, 1175 (5th Cir. 1981).
\item 105. \textit{Id.} at 1176.
\item 106. 575 F.2d 1119 (5th Cir. 1978), \textit{cert. denied}, 439 U.S. 1129 (1979).
\item 107. \textit{Plante}, 575 F.2d at 1134. The court discussed the "autonomy" and "confidentiality" branches of the privacy right. \textit{See supra} note 90. The court added that "[a]lthough in the autonomy strand of the right to privacy, something approaching equal protection 'strict scrutiny' analysis has appeared, we believe that the balancing test, more common to due process claims, is appropriate here." \textit{Id.}
\item 108. \textit{See} C. WHITEBREAD, CRIMINAL PROCEDURE 14 (1980).
\item 109. The exclusionary rule in federal criminal actions was established in \textit{Weeks v. United States}, 232 U.S. 383 (1914). It was made applicable to state criminal proceedings in \textit{Mapp v. Ohio}, 367 U.S. 643 (1961).
\item 110. In \textit{Menard v. Mitchell}, 328 F. Supp. 718 (D.C. Cir. 1971), the court recognized that restraints may be necessary to curb governmental abuse of its data-gathering powers. The court wrote: A heavy burden is placed on all branches of Government to maintain a proper equilibrium between the acquisition of information and the necessity to safeguard pri-
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nal rule, "it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right."111 It is easy to forget that the protections against unsanctioned searches and seizures apply to the average citizen as well as to the criminal suspect. The adoption of a civil exclusionary rule would prevent the government from using information gathered properly for one purpose but used for another, and would likewise apply to abuses of power.

Still, even a civil exclusionary rule may prove insufficient to induce the government to observe constitutionally protected privacy rights. While it is true that "the extent of those zones [of privacy] and the protections which they are to be accorded must evolve with changing technology,"112 they must also change with the uses made of that technology. Courts may be able to protect fundamental constitutional values only by denying new technology to the government unless its use serves an important state purpose and is accompanied by adequate technical and procedural safeguards. Justice Brennan suggested as much in his concurrence in Whalen v. Roe,113 where he commented that:

"the Constitution puts limits not only on the type of information the State may gather, but also on the means it may use to gather it. The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology.114"

Justice Brennan’s statement poses some interesting dilemmas for the courts in coming to terms with the new technology. While it is impossible to presuppose the types of technologies that will come into being,115 or the uses to which they may be put, the movement in

vac. Systematic recordation and dissemination of information about individual citizens is a form of surveillance and control which may easily inhibit freedom. . . . If information available to Government is misused to publicize past incidents in the lives of its citizens the pressures for conformity will be irresistible. Initiative and individuality can be suffocated and a resulting dullness of mind and conduct will become the norm. . . . In short, the overwhelming power of the Federal Government to expose [citizens' lives to public scrutiny] must be held in proper check. 328 F.Supp. at 726.

112. Utz v. Cullinane, 520 F.2d 467, 482 n.41 (D.C. Cir. 1975).
114. 429 U.S. at 607 (Brennan, J., concurring).
115. It is crucial to note that Brandeis and Warren were sensitive to the privacy implications of the new technologies of their day. This is evident in their famous law review article in
technological innovation is toward the more intrusive. Banning the use of certain technologies is an extreme measure, particularly when such bans would apply only to government and not to foreign powers or private industry; such a remedy, however, may be the only means of forcing the government to adopt adequate privacy safeguards. The mere possibility of the prohibition may, in itself, be enough to assure that privacy is observed. If not, a single use of the banning remedy might obviate the need for a subsequent application.

Privacy is a fundamental freedom guaranteed under our constitutional system of government. This freedom must evolve further as legal doctrine to respond to the new demands placed upon it by the technological advances of our information-based society. As in so many areas of the law, the role of the judiciary will be critical in preserving our liberty. The courts must assume a leading role in addressing newly emerging issues in order to reach a rational accommodation between the benefits of technological progress and the attendant threats to individual freedom. Statutory solutions cannot meet the rapid need for change. The remedies needed to protect privacy may be more far-reaching than ever imagined if technology is to serve, rather than erode, the cause of liberty.

which they expressed concern about the development of mechanical eavesdropping devices, "instantaneous photographs and newspaper enterprise." Warren & Brandeis, supra note 34, at 195. Later, in Olmstead v. United States, 277 U.S. 438 (1928), Brandeis postulated:

The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions.

277 U.S. at 474 (Brandeis, J., dissenting).