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Privacy

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PRIVACY

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INTRODUCTION

In 1960, Dean Prosser[1] published his now famous law review article, *Privacy*,[2] which set forth a new definition of the term "privacy" for the American common law system.[3] In so doing, he drew on the resources provided by previous commentators[4] and court decisions,[5] and concluded that an invasion of one's privacy did not involve one tort, "but a complex of four."[6] He enumerated them as being: 1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; 2) public disclosure of embarrassing private facts about the plaintiff; 3) publicity which places the plaintiff in a false light in the public eye; and 4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[7]

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1. William Lloyd Prosser (b. March 15, 1898, in New Albany, Indiana; d. May 21, 1972, in Berkeley, California) was a prominent legal educator and authority in the field of torts. It is in that field where Prosser's work as a legal educator and scholar is most widely known. Prosser's LAW OF TORTS (1941) and his CASES ON THE LAW OF TORTS (1952), have become classic texts used in the education of law students.

2. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

3. *See id.* at 388-89. Prosser noted that as of 1960, there were over 300 cases on the right of privacy and that as such, the "holes in the jigsaw puzzle [had] been largely filled in." *Id.* at 389.

4. Many legal scholars had written on the subject of privacy before Dean Prosser. A partial list of such articles would include: Anderson, *Origin of Privacy as a Legal Right to U.S.*, 23 NOTRE DAME L. REV. 106 (1946); Dickler, *Right of Privacy: A Proposed Redefinition*, 70 U.S. L. REV. 435 (1936); Feinberg, *Recent Developments in the Law of Privacy*, 48 COLUM. L. REV. 713 (1948); Hurley, *Privacy*, 13 CORNELL L. REV.. 469 (1928); Larremore, *The Law of Privacy*, 12 COLUM. L. REV. 693 (1912); Nizer, *Right of Privacy: A Half Century's Developments*, 39 MICH. L. REV. 526 (1941); Ragland, *The Right of Privacy*, 17 KY. L.J. 85 (1929); Note, *The Right of Privacy: Fifty Years After*, 15 TEMP. L.Q. 148 (1940); Seavey, *Can Texas Courts Protect Newly Discovered Interests?*, 31 TEX. L. REV. 309 (1953); Yankwich, *The Right of Privacy: Its Development, Scope, and Limitations*, 27 NOTRE DAME L. REV. 499 (1952).

5. *See* Prosser, *supra* note 2, at 388.

6. *See id.* at 389.

7. The elements of these four types of invasions of one's right to be left alone are

It was noted that these four torts involved distinct invasions into four different interests of the plaintiff, but were nevertheless tied together by one name.[8] In addition, each represented an interference with the plaintiff's "right to be let alone."[9] This classification was soon adopted by the Restatement of Torts,[10] and in virtually every jurisdiction in the United States.[11] There was no question that Prosser's ap-

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as follows. *Intrusion*: (1) An intrusion, (2) into plaintiff's private life, (3) which would offend a reasonable person. *Disclosure*: (1) publication, (2) of plaintiff's private affairs, (3) which would offend a reasonable person, (4) that is not of legitimate public concern. *False Light*: (1) a falsehood, (2) that is published, (3) that would be offensive to a reasonable person. *Appropriation*: (1) identification of the plaintiff, (2) appropriation of his identity, (3) a benefit received by the defendant. *See generally* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 851-66 (5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS].

8. *Id.*

9. Judge Cooley had, as far back as 1888, coined this phrase. He had taken note of the fact that there was some authority for this proposition. *See* T. COOLEY, COOLEY ON TORTS 29 (2d ed. 1888).

10. *See* RESTATEMENT (SECOND) OF TORTS § 652A (1977).

11. The following states have recognized the independent right of privacy. In alphabetical order they are: Smith v. Doss, 37 So.2d 118 (Ala. 1948); Smith v. Suratt, 7 Alaska 416 (D. Alaska 1926); Reed v. Real Detective Publishing Co., 162 P.2d 133 (Ariz. 1945); Olan Mills Inc. of Texas v. Dodd, 353 S.W.2d 22 (Ark. 1962); Gill v. Curtis Pub. Co., 239 P.2d 630 (Cal. 1952); Rugg v. McCarty, 476 P.2d 753 (Colo. 1970); Korn v. Rennison, 156 A.2d 476 (Conn. Super. Ct. 1959); Barbieri v. News Journal Company, 189 A.2d 773 (Del. 1963); Peay v. Curtis Pub. Co., 78 F. Supp. 305 (D.D.C. 1948); Cason v. Baskin, 20 So.2d 243 (Fla. 1944); Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905); Fergerstrom v. Hawaiian Ocean View Estates, 441 P.2d 141 (Hawaii 1968); Peterson v. Idaho First National Bank, 367 P.2d 284 (Idaho 1961); Eick v. Perk Dog Food Co., 106 N.E.2d 742 (Ill. App. Ct. 1952); Continental Optical Co. v. Reed, 86 N.E.2d 306 (Ind. Ct. App. 1949); Bremmer v. Journal-Tribune Pub. Co., 76 N.W.2d 762 (Iowa 1956); Kunz v. Allen, 172 P. 532 (Kan. 1918); Foster-Milburn Co. v. Chinn, 120 S.W. 364 (Ky. 1909); Itzkovitch v. Whitaker, 39 So. 499 (La. 1905); Berthiaume v. Pratt, 365 A.2d 792 (Me. 1976); Carr v. Watkins, 177 A.2d 841 (Md. 1962); Pallas v. Crowley, Milner and Co., 33 N.W.2d 911 (Mich. 1948); Martin v. Dorton, 50 So.2d 391 (Miss. 1951); Munden v. Harris, 134 S.W. 1076 (Mo. Ct. App. 1911); Welsh v. Pritchard, 241 P.2d 816 (Mont. 1952); Norman v. City of Las Vegas, 177 P.2d 442 (Nev. 1947); Hamberger v. Eastman, 206 A.2d 239 (N.H. 1964); Edison v. Edison Polyform and Mfg. Co., 67 A. 392 (N.J. 1907); Montgomery Ward v. Larragoite, 467 P.2d 399 (N.M. 1970); N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976 & Supp. 1988); Flake v. Greensboro News Co., 195 S.E. 55 (N.C. 1938); Friedman v. Cincinnati Local Joint Exec. Board, 6 Ohio Supp. 276, 20 Ohio Op. 473 (1941); OKLA. STAT. ANN. tit. 21, §§ 839-840 (West 1958); Hinish v. Meier and Frank Co., 113 P.2d 438 (Or. 1941); Bennett v. Norban, 151 A.2d 476 (Pa. 1959); Holloman v. Life Ins. Co. of Virginia, 7 S.E.2d 169 (S.C. 1940); Truxes v. Kenco Enterprises, Inc., 119 N.W.2d 914 (S.D. 1963); Langford v. Vanderbilt University, 287 S.W.2d 32 (Tenn. 1956); Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973); UTAH CODE ANN. §§ 76-4-8, 76-4-9 (1983); VA. CODE § 8-650 (1957); Eastwood v. Cascade Broadcasting Company, 708 P.2d 1216 (Wash. Ct. App. 1986); Roach v. Harper, 105 S.E.2d 564 (W.Va. 1958); Hirsh v. S.C. Johnson & Son, Inc., 280 N.W.2d 129 (Wis. 1979).

The following states have not recognized the independent right to privacy. In al-

proach was a convenient system that brought sense to an area of the law[12] that was often referred to as a "haystack in a hurricane."[13] Its general acceptance is proof of that.

Three significant events, however, have occurred since Prosser's law review article was published which cast serious doubt as to whether this classification is still as appropriate today as it was a quarter of a century ago. One event has been the entry of the Supreme Court of the United States into this area dealing with an individual's right to privacy.[14] The result being that the right to privacy has emerged, not only as a common law right, but a constitutional one as well. The second event is the emergence of the electronic data processing industry as an integral part of the daily life of every man, woman, and child on the face of the earth.[15] The electronics age has arrived, and in so doing has changed our lives as well as our outlook to the future.[16] America has

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phabetical order they are: Frick v. Boyd, 214 N.E.2d 460 (Mass. 1966); House v. Sports Films & Talents, Inc., 351 N.W.2d 684 (Minn. 1984); Brunson v. Ranks Army Store, 73 N.W.2d 803 (Neb. 1955); Volk v. Auto-Dine Corp., 177 N.W.2d 525 (N.D. 1970); Kalian v. People Acting Through Community Effort, Inc., 408 A.2d 608 (R.I. 1979).

There is no case law in Vermont on the subject of an individual's right to privacy. Although there is no case law in Wyoming, some writers believe that Wyoming would recognize the tort should the issue ever be presented. *See* Note, *Truthful Libel and Right of Privacy in Wyoming,* 11 WYO. L.J. 184 (1957).

12. *See* Note, *Protecting the Dignity of Privacy Law: The Need for Connecticut to Reexamine Its Adoption of the Restatement,* 18 CONN. L. REV. 621, 626 (1986).

13. The state of the law referring to an individual's right of privacy was first described in this manner in Ettore v. Philco Television Broadcasting Co., 229 F.2d 481, 485 (3d. Cir. 1956).

14.

> Not long after 1950, the Supreme Court of the United States began, in cases of criminal prosecutions raising questions about improper actions of government officers, to talk of a "constitutional" right of privacy which protected the individual against such acts. These were cases of what might fairly be called "intrusions," but in Griswold v. Connecticut, in 1965, the Court held unconstitutional a statute prohibiting the giving of contraceptive information on the ground that it deprived married couples of a "right to privacy" guaranteed by the Constitution. The "zone of privacy," so to speak, that is now safeguarded by the Constitution when state action is involved has been enlarged in recent years. It embraces not only the interests protected by the common law action . . . but it also protects to a considerable extent the autonomy of the individual to make certain important decisions of a very personal nature. This latter interest—the personal autonomy interest—generally relates to matters of marriage, procreation, contraception, family relationships, child rearing, and education.

PROSSER & KEETON ON TORTS, *supra* note 7, at 866.

15. *See* Note, *Privacy, Computerized Information Systems, and the Common Law—A Comparative Study in the Private Sector,* 18 GONZ. L. REV. 567 (1982-83).

16. *See* A. TOFFLER, THE THIRD WAVE 26-27 (1980). Toffler argues that today we are viewing the impact of the third tidal wave of change in our history; the first was launched by the agricultural revolution; the second, by the industrial revolution; and

become a nation wherein the dissemination of information is big business,[17] and as a result individuals need protection now more than ever before to insure their right of privacy. The third event is the creation of new causes of action for an invasion of one's privacy due to technological advances and changes in the American lifestyle.[18] For example, suits involving an employer's right to test an employee's urine for drugs or alcohol are beginning to appear.[19] Is this an invasion to one's right to

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the third is the impending revolution brought about by the electronics age.

> Until now the human race has undergone two great waves of change, each one largely obliterating earlier cultures or civilizations and replacing them with ways of life inconceivable to those who came before. The First Wave of change—the agricultural revolution—took thousands of years to play itself out. The Second Wave—the rise of industrial civilization—took a mere three hundred years. Today history is even more accelerative, and it is likely that the Third Wave will sweep across history and complete itself in a few decades. We, who happen to share the planet at this explosive moment, will therefore feel the full impact of the Third Wave in our own lifetimes.
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> Tearing our families apart, rocking our economy, paralyzing our political systems, shattering our values, the Third Wave affects everyone. It challenges all the old power relationships, the privileges and prerogatives of the endangered elites of today, and provides the backdrop against which the key power struggles of tomorrow will be fought.
>
> Much in this emerging civilization contradicts the old traditional industrial civilization. It is, at one and the same time, highly technological and anti-industrial.
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> The Third Wave brings with it a genuinely new way of life based on diversified, renewable energy sources; on methods of production that make most factory assembly lines obsolete; on new, non-nuclear families; on a novel institution that might be called the "electronic cottage;" and on radically changed schools and corporations of the future. The emergent civilization writes a new code of behavior for us and carries us beyond standardization, synchronization, and centralization, beyond the concentration of energy, money, and power.

Id.

17. *See, e.g.*, Note, *supra* note 15, at 568-70.

18. *See, e.g.*, Note, *Workers, Drinks, and Drugs: Can Employers Test?*, 55 U. CIN. L. REV. 127, 131 (1986):

> As with federal law, the right to privacy under state law does not extend to all situations in which an individual's privacy is affected. Under most states' laws, an individual can state a cause of action for tortious invasion of privacy by showing that his private affairs were publicized or by showing that someone intruded into his private affairs in such a manner as to outrage a reasonable man of ordinary sensibilities. However, where drug and alcohol testing is conducted confidentially and for a legitimate business purpose, courts may be reluctant to find an invasion of privacy.

The author then cites Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359, 1369 (D.S.C. 1985) wherein the South Carolina federal district court held that an employee had not established a cause of action when he alleged an invasion of privacy due to a urine test. The court held that there was no publicity of the employee's private affairs because only a small group of people knew of the test results and there was no evidence of mental suffering or humiliation.

19. *See* Note, *supra* note 18.

be left alone, and if it is, can the injured party recover for his invasion of privacy? Some commentators are saying that the present state of the law does not cover this type of cause of action,[20] and as a result a new standard for determining an invasion of privacy is needed.

The premise of this Article, therefore, is that a new definition pertaining to an individual's right to be left alone should be formulated. The new standard that should be adopted in determining whether an individual's right of privacy has been violated is that of the reasonably prudent person. In other words, whether the conduct or activity in question constitutes an invasion of one's right to live a life free of interference from outside agencies should depend upon the reasonableness of the conduct or activity under the circumstances in question.

I. HISTORICAL BACKGROUND

Before 1890, the idea that one had a right to privacy was virtually unheard of in the United States. The concept had gained acceptance in continental Europe,[21] but across the waters in the United States, and in England, the common law was concerned with other ideas. Writers of the day were more concerned with the concept of liberty for all people rather than with the concept of liberty for the individual; furthermore, society had not yet become so complex that the individual's right to be left alone was in danger of encroachment.[22] The issue of an individual's right to privacy had been presented in courts of law and in many instances relief was granted. Such relief was, however, always granted on other generally accepted principles even though there was a feeling by some writers that the right to privacy should be recognized on its own merits.[23] Apparently, the reason for skirting the issue was that both of

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20. *Id.*

21. *See preface* to S. HOFSTADTER, THE DEVELOPMENT OF THE RIGHT OF PRIVACY IN NEW YORK (1954).

22. *See* Nizer, *supra* note 4. Nizer stated that the right of privacy was not discussed in the works of the great 17th and 18th century political philosophers—Hobbs, Locke, Rousseau, Montesquieu, Spencer, and Paine. *Id.* at 526. Theorizing on various topics such as "natural rights," "the state of nature," "social contract" and "the inalienable rights of man," these writers were concerned only with the capacity of the state to deprive the liberties of the people; society had not yet evolved to the state where the individual's privacy was in danger of encroachment. *Id.*

23. *See* Pound, *Interests of Personality,* 28 HARV. L. REV. 343, 363 (1915), arguring that:

> [A] legal right of privacy . . . [had] not been recognized . . . . For the most part the interest [had] been secured incidentally, as it were, by taking account of infringement thereof as an element of damage where well-recognized legal rights [had] also been violated, rather than by establishing a legal right of privacy a violation whereof should constitute a cause of action. But while the law is slow in recognizing this interest as something to be secured in and of itself, it would seem that the aggressions of a type of unscrupulous journalism, the invasions of privacy by reporters in competi-

these common law countries were, at the time, enjoying what can best be described as a rural civilization.[24] For better or worse, there was no need for a cause of action designed to protect an individual's right to be left alone; and as has been shown, when such an injury did occur, it could be resolved on the basis of some other generally accepted principle such as a property interest.[25]

With the approach of the Twentieth Century, however, the face of the world began to change. The Industrial Revolution as well as the development and employment of a wide reaching railroad system took effect in both England and the United States. Great urban centers were emerging. There was, at first, a slow move from rural areas to the cities. In time this move was accelerated, and as a result, the lifestyle in America began to change. Individuals were having to adapt themselves to their new complex surroundings; life was no longer slow and easy. Society had reached a point in which the communications systems—especially news printing—allowed almost everyone to know almost everything about almost anyone. It was in light of these changes that Samuel Warren and Louis Brandeis collaborated on the writing of their now famous law review article concerning the right of privacy.[26]

In a relatively small amount of space, twenty-eight pages, these two individuals set out their premise, argument, and conclusion as to a wrong which up to that time had not been recognized in a common law court. They began with the basic proposition that political, social, and economic changes require the recognition of new rights, and that the common law, while adhering to precedent, is an ever-changing demand of society. In supporting this premise, they noted that in its earliest form the law gave a remedy only for physical interference to life and property. From this point, the law grew to consider man's spiritual nature, so that in time there was not only an action for battery but for assault as well. It was due to this recognition of man's feelings, his intellect, and his nature in general, that caused the law to evolve so as to recognize actions for nuisance, libel, slander, and alienation of spousal affection. As the law advanced, it also expanded its legal conception of property; from corporeal property to incorporeal issues such as goodwill, trade secrets, and trademarks. From this basic premise,

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tion for a "story," the activities of photographers, and the temptation to advertisers to sacrifice private feelings to their individual gain call upon the law to do more in the attempt to secure this interest than merely take incidental account of infringements of it. A man's feelings are as much a part of his personality as his limbs. The actions that protect the latter from injury may well be made to protect the former by the ordinary process of legal growth. The problems are rather to devise suitable redress and to limit the right in view of other interests involved.

24. *See* D. FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND 1 (1972).

25. *See* Pound, *supra* note 23, at 363-64.

26. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

Warren and Brandeis concluded that the right to life had come to mean the right to enjoy life—the right to be left alone.[27] In particular, these two gentlemen were arguing for the right to be left alone from newspapers and their unscrupulous reporting of the "news."[28]

At first this article had little impact upon the law,[29] but then, little by little, the idea that an individual was entitled to a certain amount of privacy began to gain acceptance. In fact, three lower courts in New York and a federal court in Massachusetts appeared quite ready to accept this premise.[30] This trend, however, was brought to a temporary halt when the Supreme Court of Michigan rejected the idea,[31] and to a standstill when the high court in the State of New York refused to

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27. *Id.*

28. *Id.* at 196. The authors state:

> Of the desirability—indeed of the necessity—of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.

Id.

29. *See* Prosser, *supra* note 2, at 384.

30. *See id.* at 385.

31. Atkinson v. John E. Doherty & Co., 80 N.W. 285 (Mich. 1899) (where a brand of cigars were named after individual, whom the court designated as public figure, no cause of action existed).

acknowledge that an individual was entitled to a right of privacy.[32] Three years later, however, the Supreme Court of Georgia recognized the independent and distinct right of privacy and in so doing, issued a decision that became the leading case on the subject.[33]

Fifteen years after the publication of the Warren and Brandeis article, the issue of one's right to privacy had been considered by three courts of last resort in the United States, and as shown, the answer was divided. This division was indicative of the cases that were to follow; for every decision that subsequently recognized such a right, there was another which denied it. Finally in 1939, the Restatement of Torts[34] adopted the idea espoused half a century earlier by Warren and Brandeis, and slowly but surely the tide turned strongly in favor of recognition; the decisions rejecting recognition began to be outnumbered, and in 1955 the *Index of Legal Periodicals* inserted the heading entitled *Privacy*. This was the final impetus. Today the tort is recognized in one form or another in virtually every jurisdiction in the United States.[35]

The road to recognition, however, was paved with a certain amount of inconsistency and confusion. As the issue was presented in the various states for the first time, the courts seemed to have scattered in deciding what did in fact constitute an invasion of privacy. There was, for example, no uniformity on whether or not malice had to be proven,[36] although Warren and Brandeis had said it was not an ele-

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32. Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902). Defendant flour company in this case used the picture of the plaintiff, a young lady, to advertise his product with the legend: "Flour of the Family." *Id.* The court refused to allow her recovery when she sued for invasion of privacy saying that it was forced to take this position on the basis of lack of precedent, the purely mental character of the injury, the risk of the flood of litigation should an action like this be allowed, the difficulty in distinguishing between public and private figures, and the fear of undue limitations on the constitutional freedom of the press. *Id.* at 443-47.

33. Pavesich v. New England Life Insurance Co., 50 S.E. 68, 68-69 (Ga. 1905). In *Pavesich*, defendant insurance company used plaintiff's picture in one of its advertisements that appeared in a newspaper. Plaintiff brought suit alleging an invasion of his privacy, and was allowed to recover. *Id.* at 81. The court took note of the fact that prior to 1890, every adjudicated case which involved a right of privacy was decided on some other ground such as supposed right of property, a breach of trust or confidence, or the like, but that the time had come to recognize this new and independent right by its own name. *Id.* at 75. Finding precedent in the natural law, Roman law and principles of municipal law, the court concluded that the Constitution of the United States and the Constitution of Georgia guaranteed the right of privacy within certain limits to all its citizens. *Id.* at 71-72. The court went on to note the conflict of its decision with *Roberson*, but concluded that their decision was by far the most compelling, the most logical and the one most likely to stand the test of time. *Id.* at 81.

34. RESTATEMENT OF TORTS § 867 (1939) (liability will ensue for unreasonable publication of another's affairs and/or likeness).

35. *See supra* note 11.

36. *See, e.g.*, Humiston v. Universal Film Mfg. Co., 178 N.Y.S. 752, 757 (N.Y. App. Div. 1919). Humiston's picture had been used in an advertisement by the defendant, and the lower court had held that defendant's motive in so doing was important in

ment to be considered. Likewise, there was no uniformity on the issue whether the plaintiff had to establish special damages,[37] although Warren and Brandeis had said that they did not. Also, while all agreed that the right to privacy had to be limited to "ordinary sensibilities,"[38] there was no consensus of opinion on how this was to be defined.[39] In addition, questions regarding elements of truth,[40] public interest,[41] and third persons[42] began to arise. These issues along with others caused some courts to be perplexed when it came to defining the cause of action and determining what elements were required for an invasion of privacy suit. Along with the courts, legal writers seem to have shared in this difficulty and contributed to the confusion.[43] Finally, the prevailing

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disposing of the case. *Id.* at 753. On appeal, however, the court held: "It matters not what may be the motive in the publishing of these films, whether instructive, or whether to satisfy the morbid curiosity, any more than it matters what may be the motive in the publishing of actual news items in a newspaper." *Id.* at 757.

37. *See, e.g.*, Munden v. Harris, 134 S.W. 1076, 1079 (Mo. Ct. App. 1911) (although no specific loss is required to recover general damages, proof of malice may be necessary to recover exemplary damages).

38. *See* Pound, *supra* note 23, at 363 (even though invasion of one's privacy is mental and subjective, liability must be premised upon ordinary sensibilities).

39. *See, e.g.*, Atkinson v. John E. Doherty & Co., 80 N.W. 285, 289 (Mich. 1899):

> All men are not possessed of the same delicacy of feeling, or the same consideration for the feelings of others. These things depend greatly upon the disposition and education. Some men are sensitive, some brutal. The former will suffer keenly from an act or a word that will not affect the latter. Manifestly, the law cannot make a right of action depend upon the intent of the alleged wrongdoer, or upon the sensitiveness of another.

40. *See* Brents v. Morgan, 299 S.W. 967, 970 (Ky. 1927) (neither truth of matter published nor absence of malice affords defense when dealing with unwarranted invasion of right of privacy).

41. *See, e.g.*, Smith v. Suratt, 7 Alaska 416, 423 (D. Alaska 1926). In *Smith*, plaintiff was the director in charge of an expedition attempting to fly over the North Pole. Defendant had threatened to accompany plaintiff, take pictures and sell them for profit. As a result, plaintiff brought suit seeking an injunction on the basis that his privacy was going to be invaded. The court held that there was no cause of action because the undertaking was of public interest.

> While there is an irreconcilable conflict of judicial authority on the proposition of the right of privacy, and while it is not necessary for this court to decide whether such a right in fact exists or not, an enterprise of this public character, financed as it may be by private individuals, who are necessarily units of the public, there can be no right of privacy adhering to it.

Id.

42. *See* Metter v. Los Angeles Examiner, 95 P.2d 491, 495 (Cal. Ct. App. 1939). The *Metter* court held that a cause of action grounded in the invasion of an individual's right of privacy is a personal one. Therefore, in order to recover one must allege and prove an unreasonable invasion of his own right of privacy. *Id.* "In this connection it becomes unnecessary to discuss the cases cited by appellant wherein the courts have allowed recovery for the publication of a photograph where such publication was a breach of contract, or violation of a confidential relation." *Id.*

43. There seems to have been some question as to what a cause of action for the

law achieved a state that, as previously mentioned, resembled "a haystack in a hurricane."[44] This is where Dean Prosser entered the foray. Prosser told us that the action involved was not one, "but a complex of four;"[45] and as a result of the widespread adoption of his classification,[46] the waters settled. The entrance of the Supreme Court of the United States into this arena, the subsequent emergence of a penumbral right of privacy, the widespread use of the computer in our modern electronics age, and changes in the American lifestyle, however, appear to have out-distanced Prosser's solution.

II. CONSTITUTIONAL RIGHT OF PRIVACY

During the time that a cause of action was being developed in the common law area of tort, decisions were being rendered in the sphere of constitutional law along a parallel plane. The trend started with cases involving criminal prosecution. The Supreme Court of the United States, as early as the late 1940's, began to talk about a constitutional right of privacy regarding improper methods of securing evidence, in particular, the improper search and seizure of an individual's premises or body.[47] Since these early decisions, for the most part, involved the

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invasion of one's privacy was suppose to cover. Writers, for example, did not always agree on the scope of protection afforded by such a tort. *See, e.g.,* D. FLAHERTY, *supra* note 24, at 1 ("The meaning of privacy concerns the desire or right of an individual to choose freely under what circumstances, and to what extent, they would expose themselves, their attitudes, and their behavior to others."); A. MILLER, THE ASSAULT ON PRIVACY 5 (1971) ("Privacy, like most concepts of fundamental value, is a relative indeterminate concept that is not easily converted into a workable legal standard."); A. WESTIN, PRIVACY AND FREEDOM 31-32 (1967) ("Privacy actually embodies several different states of psychological and physical relationships between an individual and the persons around him, which can be categorized as solitude, intimacy, anonymity and reserve. The four states can be envisioned as varying facts of the privacy that individuals experience in their daily lives."). *See also* Nizer, *supra* note 4, at 540:

> As the right of privacy has come to be an accepted branch of law, the formless generalities with which it was launched have been crystallized into recognizable legal principles. As more and more cases are placed on one side or the other, the line of demarcation comes into sharper focus. This gradual accretion of individual instances has built up a set of rules which are now applied with sufficient consistency to make them useful not merely as shorthand summaries of past decisions, but also as guide-posts for future conduct.

Mr. Nizer then listed his five categories of privacy: matters of public interest; advertising or trade purposes; types of names and pictures; privacy after death; and consent. *Id.*

44. *See supra* note 13.

45. *See supra* note 6.

46. *See supra* notes 10-11.

47. *See* Wolf v. People of the State of Colorado, 338 U.S. 25, 27-28 (1949). Wolf was convicted of conspiring to commit abortions. He alleged in part that the evidence secured against him had been acquired unlawfully. The Supreme Court of the United States affirmed the Supreme Court of Colorado's conviction. *Id.* The decision is important to this discussion in that the Court addressed itself to the issue of privacy:

> The security of one's privacy against arbitrary intrusion by the po-

obtaining of evidence in an illegal manner, they could properly be classified as *intrusion* cases, and as such would fit into one of Dean Prosser's aforementioned categories.

Other cases, however, not involving illegal search and seizure were beginning to arise and were eliciting dissenting opinions concerning an individual's right to privacy. In an early case, for example, a state statute prohibiting the use of contraceptives was attacked on constitutional grounds. The majority of the Court dismissed the suit, but in a strong dissent Justice Harlan stated: "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."[48] Once this idea was stated, it did not take long for the Supreme Court to take the final step and develop the theory that we are all endowed with an inalienable right to be left alone.

This principle was established in 1965, when the Supreme Court held in *Griswold v. Connecticut* that a state statute which prohibited the giving of contraceptive information was unconstitutional in that it deprived married couples of the right of marital privacy guaranteed by

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lice—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in the "concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples. Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.

Id. See also Rochin v. People of California, 342 U.S. 165, 172 (1952). Rochin was convicted of possessing an illegal drug (morphine). The evidence was obtained when a deputy sheriff entered an open door of his house, forced open the door to the bedroom and forcibly attempted to extract capsules which the accused had swallowed. Rochin was subsequently taken to a local hospital where his stomach was pumped. As a result of this induced vomiting, two capsules containing morphine were obtained and were later introduced as evidence. As to the method employed in securing this evidence the Court said:

> [W]e are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

Id.

48. Poe v. Ullman, 367 U.S. 497, 539 (1961) (Harlan, J., dissenting).

the Constitution. In so holding, the Court laid the foundation for the idea that all individuals are entitled to a "zone of privacy." In addition, the Court stated that this penumbral right was older than the Bill of Rights itself.[49]

From this position, it was easy to project a civil right of privacy which would come to include other areas of a person's life such as the right of privacy in transmitting telephone messages,[50] the right of an individual to obtain an abortion,[51] the right to marry a person of another race,[52] and the right to die.[53] Some writers have taken the posi-

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49. Griswold v. Connecticut, 381 U.S. 479, 485 (1965):

> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.

50. *See* Katz v. United States, 389 U.S. 347, 353 (1967). In *Katz*, the government listened to and recorded defendant's conversation while he used a public phone. The Court held that:

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

Id.

51. *See* Roe v. Wade, 410 U.S. 113, 153 (1973). *Roe* held that a Texas statute prohibiting abortions at any stage of pregnancy except to save the life of the mother, was unconstitutional in that it was an unreasonable invasion of the mother's right of privacy. *Id.* "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.*

52. *See* Loving v. Commonwealth of Virginia, 388 U.S. 1 (1967) (the Supreme Court struck down a Virginia antimiscegenation statute on the basis that it violated the Equal Protection and Due Process clauses of the fourteenth amendment).

53. *See* In re Quinlan, 355 A.2d 647, 663 (N.J. 1976), *cert. denied,* 429 U.S. 922 (1976). Quinlan's father sought to be appointed the guardian of the person and property of his 21 year old daughter who was in a persistent vegetative state, and sought the express power authorizing the discontinuance of all extraordinary procedures for sustaining the daughter's vital processes. The court held that the patient's

tion that the right of privacy guaranteed by the Constitution is very personal in nature; that it extends only "to matters of marriage, procreation, contraception, family relationships, child rearing, and education."[54] In fact this very position has been stated by the Supreme Court itself.[55] Other cases, however, make it clear that the right of privacy is not limited to these familial matters, but in fact extends to many other areas in an individual's life.[56]

There is some inherent risk in attempting to summarize forty years of constitutional law in such a short space, but in final analysis it can be said that the constitutional right of privacy protects a person from unwanted state regulation in their consensual transactions.[57] More specifically, it can be said that while the common law right of privacy protects a person from other individuals, the constitutional right of privacy protects a person from *unreasonable* interference from the State. It should be emphasized that this right is not expressly granted by the Constitution, but instead has been derived from case law, and as such is affected by the prevailing philosophy of the Court. This mood tends to vary. The pendulum may swing from a liberal ap-

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right of privacy gave her the right to decline medical treatment.

> Although the Constitution does not explicitly mention a right of privacy, Supreme Court decisions have recognized that a right of personal privacy exists and that certain areas of privacy are guaranteed under the Constitution . . . . [T]his right is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions.

Id.

54. PROSSER & KEETON ON TORTS, *supra* note 7, at 866-67.

55. *See* Roe v. Wade, 410 U.S. 113, 152 (1973):

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as . . . [1891] . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution . . . . These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," . . . are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, . . . procreation, . . . contraception, . . . family relationships, . . . and child rearing and education.

Id. at 152-53.

56. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967) (holding that unauthorized eavesdropping of an individual's conversation on a public phone was an invasion of his privacy).

57. *See* Stanley v. Georgia, 394 U.S. 557, 564 (1969). Under authority of a warrant to search Stanley's home for evidence of his alleged bookmaking activities, the police found films in his bedroom. The films were projected and deemed to be obscene and appellant was arrested for their possession. *Id.* at 558. The Court held that obtaining the evidence in this manner violated Stanley's right of privacy guaranteed to him by the Constitution. *Id.* at 564.

proach to one that is conservative,[58] but in each case the underlying issue is whether the invasion by the government is an unreasonable one.

III. ELECTRONIC TECHNOLOGY

The age of electronic technology did not arrive on the scene in full bloom. It has, however, enjoyed a phenomenal period of development and advancement during the last several decades. In the 1940's and 1950's, for example, an average computer with its vacuum tubes took up the space of a small room. With the subsequent invention of the transistor, computers became much smaller; however, it was the next generation that enjoyed a multi-faceted quantum leap forward. This was attributable in large part to the introduction of the silicon chip. An inch-square "miracle chip" which can be mass produced by just about any country in the world today, now has the calculating capabilities of an entire roomful of computer hardware of the 1940's and 1950's. Not only has the equipment decreased in size, but it has also become less expensive and much more efficient. For example, a million dollar computing capacity of three decades ago now costs a mere twenty dollars and, in addition, is 100,000 times quicker.[59] In fact, the technological developments have been so drastic that it is extremely difficult for individuals of our generation to comprehend them. Two thousand pieces of information, for example, can now be stored on a silicon chip the size of the head of a pin, and the cost of this maneuver has declined more than eighty percent in the last two years.[60] When one considers that next to oxygen, silicon is the most abundant element on Earth,[61] it boggles the mind to consider the tremendous changes that these technological advancements will bring upon society as we know it today.

As computers continue to become more advanced, elaborate, and

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58. *See, e.g.*, Bowers v. Hardwick, 106 S.Ct. 2841, 2843-44 (1986). Hardwick, who was discovered committing an act of sodomy in his bedroom with another consenting adult male, was charged with violating a Georgia criminal statute. *Id.* at 2841. The lower court held that the statute violated his fundamental rights because the homosexual activity was a private and intimate association that was beyond the reach of state regulation. *Id.* at 2843. However, the Supreme Court of the United States held that an individual's right to privacy did not extend to homosexual activity. *Id.* "We first register our disagreement with the Court of Appeals and with respondent [defendant] that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case." *Id.* The Court then cited cases dealing with child rearing and education, family relationships, procreation, contraception and abortion and concluded "[w]e think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case." *Id.* at 2844.

59. *See* Linowes, *Must Personal Privacy Die in the Computer Age?*, 65 A.B.A. J. 1180, 1182 (1979).

60. *Id.* at 1181.

61. *Id.*

versatile, they will continue to have profound effects on events in our daily lives.[62] They will be used to store not only that information which is already in the public domain, but also increasingly to store sensitive information about one's personal life.[63] This penchant for record keeping has, oddly enough, been brought about by our own society. The record-keeping capabilities of the computer age has induced the government as well as private industry to keep what up to now would have been considered unimaginable and voluminous records of the various activities of individuals.[64] This impetus has been attributable to three sociological factors of our modern day society: 1) a tremendous expansion in the use of credit; 2) the unparalleled mobility of our population; and 3) the enormous increase in the work force.[65] In fact, an argument could be made that without the technology of the computer age, these three phenomena could not have taken place. It is because of modern day computers that we can use charge cards anywhere in the world, moving from place to place and still have credit where no one has first-hand knowledge of our financial resources. No one can dispute the fact that these activities have brought armies of individuals into the work force, which in turn has enabled more individuals to seek credit and move about at will.[66] The circle is endless.

The point to be made, however, is that this tremendous increase in record-keeping capabilities has greatly increased the potential for abuse. Now that it is easier, cheaper, and in some cases profitable,[67] to

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62. *See* Asimov, *The Next 70 Years for Law and Lawyers,* 71 A.B.A. J. 56, 59 (1985). Asimov reasons that as computers become more elaborate and versatile and can cope with the complexities of the law, there will be fewer appeals, fewer strategies of delay, faster and shorter trials, more settlements and fewer cases brought to trial in the first place.

63. *See* Freedman, *The Right of Privacy in the Age of Computer Data and Processing,* 13 TEX. TECH. L. REV. 1361, 1363 (1982) ("Under the onslaught of the escalating spiral of data processing, dossier-building, and record-keeping, the individual is steadily losing control over personal information.").

64. *Id.* at 1368.

65. *Id.* (citing a 1977 study compiled by the United States Privacy Protection Study Commission as the authority for this statement).

66. *See* Comment, *The Use and Abuse of Computerized Information: Striking a Balance Between Personal Privacy Interests and Organizational Information Needs,* 44 ALB. L. REV. 589, 589 (1980):

> Prior to the evolution of computerized record-keeping, most business decisions concerning such benefits as credit, insurance, and medical care were based upon personal knowledge of the individuals involved and upon the limited types of information which could be obtained from friends, associates and a decentralized system of public records. The inefficiency of these sources and methods of information collection operated to preserve a measure of individual privacy. The details of a person's life were maintained, if at all, in the manual files and memories of the persons and organizations with whom he had dealt, creating considerable obstacles for one seeking to compile a detailed dossier on an individual.

67. *See* Note, *supra* note 15, at 570 (the author states that in addition to the

gather and store such vast amounts of information, there is greater risk that this information will be misused, and the privacy of the individual invaded. For example, since the 1920's, the FBI has maintained files on certain individuals and has made most of this information available to authorized agencies and institutions.[68] That most of this information is now computerized in one central criminal data system at the National Crime Information Center makes its abuse highly probable.

For one thing, the computer system is subject to electronic penetration as well as other forms of illegal access.[69] In addition, because the information is abbreviated and entered in abstract form, it is more likely that it will be misunderstood.[70] Finally, since there is no opportunity for anyone to correct or delete erroneous data, the label of "criminal" becomes inescapable even for those who have been rehabilitated and seek to lead normal lives,[71] as well as for those who were innocent. In fact, this last situation is a problem of concern and one that has caused a great deal of controversy.[72] Arrest records, for example, which contain no disposition, or arrest records of persons who have been acquitted or against whom charges have been dismissed continue to be carried.[73] As a result, a mere arrest, or an arrest followed by complete exoneration may continue to have a disastrous impact on an individual's life, career, and future.[74]

A second example of potential misuse of computerized information is in the area of personal medical records. No patient would decline to accede to a doctor's or hospital's request for detailed information concerning not only their physical condition, but their ability to pay as well. And no one under these circumstances would ever think of inquiring as to either the necessity for the compilation of this data or the existence of any provisions for its secure storage and subsequent use.[75] Generally, doctors and hospitals generate this type of medical data primarily for use in the treatment of the patient as well as for research, subsequent planning, and evaluation of that individual's care.[76] This personal medical information, however, has become an increasingly val-

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federal government, several industries in the private sector maintain extensive computerized data files which in some instances are provided by other companies).

68. *See* Hemphill, *Protection of Privacy of Computerized Records in the National Crime Information Center,* 7 U. MICH. J.L. REF. 594 (1974).

69. *Id.* at 599.

70. *Id.* at 599-600.

71. *Id.* at 600.

72. *See* Comment, *Privacy, Law Enforcement, and Public Interest: Computerized Criminal Records,* 36 MONT. L. REV. 60, 65-66 (1975).

73. *Id.* at 65.

74. *Id.* at 66.

75. *See* Note, *Electronic Data Processing in Private Hospitals: Patient Privacy, Confidentiality and Control,* 13 SUFFOLK U. L. REV. 1386, 1387 (1979).

76. *Id.* at 1390.

uable commodity in today's marketplace.[77] It can be sold for a profit.[78] This data is highly valued by such institutions providing unrelated health care services as life insurance companies, future employers and credit bureaus.[79] Once again, the fact that former patients do not have the opportunity to correct or delete outdated or erroneous material, and the fact that they do not know into whose hands this information will ultimately come, makes an intrusion into one's privacy highly probable.

The other side of the argument, however, is that privacy in an organized civilization such as ours cannot be absolute; instead, it must be balanced against the other needs of society.[80] In other words, there may be, in some situations, a legitimate use for information of this kind. For example, it would be naive to think that FBI or other law enforcement information never reaches prospective employers.[81] And although a patient's legitimate expectation of privacy regarding his medical records should be maintained, it is equally clear that many legitimate and worthwhile uses are made of this data.[82] These uses, for example, would include medical research; public health emergencies such as the isolation of carriers of Legionnaire's Disease, AIDS, and other epidemics; audits of institutions which receive Medicare, Medicaid, and other federal or state health subsidies; review by insurance companies for eligibility and determination claims processing; investigations by welfare and other social service agencies in order to provide needed services; and analyses by professional accrediting agencies to evaluate the quality of services being rendered.[83] These uses would be seriously impaired, or in some cases rendered impossible, by any rule which would create an absolute right of privacy for each individual. In many instances, the public good must outweigh the individual's right to privacy, and these would be examples of such a situation. In fact, if we demand more services, it is only reasonable to expect that this type of "personal" information will become even more sought after. The result will be that the abuse of one's right to privacy will become more and more of a certainty.[84]

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77. *Id.* at 1386.
78. *See supra* note 64.
79. *See* Note, *supra* note 75, at 1390.
80. *See* Farley, *Computers-Data-Privacy: A Mobius Effect,* 47 PENN. B.A. Q. 545, 547 (1976).
81. *See supra* note 72, at 67.
82. *See* Freedman, *supra* note 63, at 1371.
83. *Id.*
84. *See* Linowes, *supra* note 59, at 1182:

> From government we expect social security, unemployment compensation, guaranteed mortgage loans, and all levels of welfare. From business, we expect credit cards that give us instant credit approval any place in the world and the ability to make plane reservations in a matter of minutes for any kind of trip to anywhere.
>
> Administrators responsible for furnishing these services must satisfy

IV. SITUATIONS WHEREIN THE EXISTING RULE DOES NOT APPLY

The pattern is clear. The government and private industry, due to advancements in electronic technology, have unlimited opportunities to violate what was once described as "the right to be left alone."[85] If the culprit in these instances is the government, there is no question that if the interference is unreasonable, the injured party has a civil action.[86] The problem arises in the area of the person's common law right to relief. In some instances as we have seen, the rights of the individual must be balanced against the needs of society, and as a result the injured plaintiff may go without a remedy. In other cases, the formula derived by Dean Prosser[87] regarding an invasion of privacy does not fit. Due to technological advances in the last two to three decades, fact situations are arising wherein the existing four classifications of privacy do not apply. The situations discussed above regarding dissemination of computerized criminal and medical records are examples of such inapplicability. If, for instance, one's criminal record were disclosed to a future employer, or if one's medical record were disclosed to a prospective insurance carrier, there is a general consensus that the existing tort law does not provide a remedy.[88] Of the four classifications created by

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themselves of a person's eligibility by demanding and getting much personal, often sensitive, information. So more and more confidential data [is] being injected into the stream of government and business, never to be destroyed.

. . . .

Applying for life insurance, buying something on credit, opening a bank account, filling out various forms in order to get hospitalization or insurance benefits—all these add personal information to the network.

. . . .

. . . Some insurance companies, employers and others are a market for this information. When you deal with organizations that use these services, they may know more about your medical condition that you, since medical ethics do not allow a patient to see his own records. Laws are inadequate to protect against this kind of behavior that apparently is sponsored throughout the country by some of the largest companies.

It should be noted that when a person applies for insurance, in most cases the authorization form he signs is a "search warrant without due process," as characterized by one insurance executive. It authorizes any organization to release all information, not just medical data, it may have about the person; it has no expiration date; and it indicates that a copy is as valid as the original.

To be sure, insurance companies need information about a prospective insured. They need it to calculate risk and to guard against fraud. The kind of information they need is sensitive and personal. Adequately safeguarding this information from abuse is complex and not always within the control of the insurance companies.

85. *See supra* note 9.

86. *See supra* notes 59-84 and accompanying text.

87. *See supra* note 7.

88. *See* Note, *supra* note 75, at 1404:

Actions for the tort of invasion of privacy generally cover four situa-

Dean Prosser, only one may appear to be on point—public disclosure of private facts; this action, however, requires that the defendant disseminate the information to the public at large.[89] Since this element, in our fact situations, would be lacking, the cause of action would be inapplicable. However, even if a privacy action were available, the defense of qualified privilege would still bar the action.[90] This makes it clear that the existing law is not adequate to protect an injured plaintiff. Modern technology has outdistanced the rule of law.

In addition, other modern day activities, not necessarily created by our electronic technology, are mentioned at this point to underscore the need for a revision of our privacy laws. These activities are centered on the changes that have come about in the American lifestyle. For one, the rights of nonsmokers versus smokers has in many instances created a great deal of discussion. Any airplane, restaurant, work place, or public building, for example, now has restricted areas for smoking. In other situations nonsmokers have attempted to prohibit this activity[91] alleging an invasion of their privacy only to be overruled by the court.[92] Apparently, the law does not yet offer a blanket protection to an individual from smoke filled air.

Another example of where changes in the American lifestyle call for a change in our existing law involves drugs and alcohol. They have

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tions, only one of which might apply to disclosures of medical record information: public revelation of the details of an individual's private life. This privacy action, however, requires that the defendant communicate the private information to the public at large. Moreover, the cases recognizing a tortious invasion in the health care area have dealt either with public disclosure concerning unusual illnesses or with medical research which publicized the identities of the subjects. Medical record disclosures typically are not made to the general public, thus rendering inapplicable an invasion of privacy action.

89. *See generally* RESTATEMENT (SECOND) OF TORTS § 652D comment a (1977) (communication to single person or even to small group of individuals is not actionable as invasion of privacy).

90. This defense is usually associated with a cause of action involving defamation. It is also applicable, however, in actions for an invasion of privacy. *See* RESTATEMENT (SECOND) OF TORTS § 596 (1977) (conditional privilege applies where person with common interest in alleged plaintiff shares information with another).

91. *See, e.g.*, Gasper v. Louisiana Stadium and Exposition District, 418 F. Supp. 716 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979) (plaintiff nonsmokers brought action against operators of Louisiana Superdome to enjoin use of tobacco smoking in superdome during events staged therein).

92. *Id.* at 721:

> The plaintiffs herein contend that the right to be free from hazardous smoke fumes caused by the smoking of tobacco is as fundamental as the right of privacy recognized in the *Griswold* decision. This Court does not agree. To hold that the First, Fifth, Ninth or Fourteenth Amendments recognize as fundamental the right to be free from cigarette smoke would be to mock the lofty purposes of such amendments and broaden their prenumbral protections to unheard-of boundaries.

in some areas become more common, and as a result employers are beginning to ask their employees to submit to blood tests and/or urinalysis for drug testing. If this is an invasion of one's right to be left alone, employers are justifying their conduct on four generally accepted grounds. First, studies have shown that individuals who are involved in alcohol or drug abuse have greater health care needs, are absent more often, are more likely to be involved in work-related accidents, and are more likely to require disciplinary action.[93] Second, recent cases more often than not hold an employer liable for the conduct of their employees.[94] Whether the employer failed to investigate an applicant's criminal record,[95] or sent home an intoxicated employee,[96] there is a tendency on the part of our judicial system to impose liability on the employer for this alleged negligence.[97] Third, security problems in the work place have broadened from concern about theft of office supplies, production line goods, and articles belonging to other employees, to concerns about theft and subsequent disclosures of confidential information and trade secrets.[98] Finally, a philosophical change appears to have occurred in the work place. The idea used to be that whatever an employee did on his own time was his business. Now the concept seems to be that employees represent their employers twenty-four hours a day and therefore are accountable to their employers during nonworking time.[99] As a result, there is an increasing concern over alcohol and substance abuse, and as shown, this concern exhibits itself during the employment process.

If an employee must submit to a test, and if the result is communicated to another individual, does this constitute an invasion of privacy, and if so, may the injured party sue for relief? The answer to both questions under existing law appears to be no.[100] As in those cases in-

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93. *See* Lehr & Middlebrooks, *Work-Place Privacy Issues and Employer Screening Policies,* 11 EMPL. REL. L.J. 407, 407 (1986).

94. *Id.* 407-08.

95. *See supra* note 81.

96. *See, e.g.,* Otis Engineering Corp. v. Clark, 668 S.W.2d 307, 308 (Tex. 1983) (employer could be held liable for automobile accident and resulting death of plaintiff's wife caused by intoxicated employee, who had history of drinking at work and was intoxicated on night in question).

97. *See* Lehr & Middlebrooks, *supra* note 93, at 407-08:

> A second factor used to justify screening is that, more and more frequently, employers are being held responsible for the actions of employees. The subjects of recent litigation range from alleged negligence during the pre-employment screening process in failing to inquire about an applicant's criminal record to negligence in sending home an intoxicated employee who subsequently became involved in an automobile accident. In such cases, the employer's duty to the public at large regarding the actions of its employees has been expanded.

98. *Id.* at 408.

99. *Id.*

100. *See supra* note 18.

volving disclosure of criminal misconduct,[101] and disclosure of medical records,[102] the law of privacy does not protect an individual in this sort of situation. The reasoning for this position is twofold. First, the test itself is not an unreasonable intrusion into an individual's seclusion.[103] As discussed above, there is in many instances a need for an employer to know whether or not an employee is dependent upon drugs or alcohol.[104] Consequently, such a test would not offend a reasonable person, and as a result there would be no invasion of privacy under the existing law.[105] Secondly, if only the employer or a small group of people are aware of the test results, there would be no public disclosure of embarrassing private facts about the plaintiff and there would therefore be no cause of action.[106] Once again the injured plaintiff would be left without a remedy.

V. THE NEED FOR A NEW RULE

In light of the new grievances that may arise due to advancements in the field of electronic technology and the changes in our American lifestyle, a new definition pertaining to an individual's right to be left alone should be formulated. As shown by the previous discussion, these advancements and changes have outdistanced the rule advanced by Dean Prosser in 1960. The new standard that should be adopted in determining whether an individual's right of privacy has been violated is that of the *reasonably prudent person.* In other words, whether the conduct or activity in question constitutes an invasion of one's common law right to be left alone, free of interference from outside agencies, should depend upon the reasonableness of the conduct or activity under the circumstances in question.

This position is justified on five grounds. First, this rule would align the law of privacy with various other torts. The reasonableness of defendant's behavior in many instances is the test for determining

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101. *See supra* notes 88-90.
102. *Id.*
103. *See supra* note 7.
104. *See supra* notes 93-97.
105. *See supra* note 7.
106. *See, e.g.,* Rycroft v. Gaddy, 314 S.E.2d 39, 43 (S.C. Ct. App. 1984). In *Rycroft*, plaintiff's bank records were subpoenaed and viewed by the opposing party and his attorney. The court held that this did not constitute an invasion of privacy since there was no publicity.

> The disclosure of private facts must be a public disclosure, and not a private one; there must be, in other words, publicity. It is publicity, as opposed to publication, that gives rise to a cause of action for invasion of privacy. Communication to a single individual or to a small group of people, absent a breach of contract, trust, or other confidential relationship, will not give rise to liability.

Id. (citations omitted).

whether or not a plaintiff has a cause of action. This is true, for example, in the area of negligence,[107] medical malpractice relating to informed consent,[108] the duty owed by occupiers of land,[109] good faith in retaining property in conversion cases,[110] parent-child cases wherein the doctrine of parental immunity has been abolished,[111] private nuisance,[112] malicious prosecution,[113] defamation,[114] and products liability cases.[115] The concept of reasonableness can also be found in mental anguish,[116] assault and battery,[117] false imprisonment,[118] and fraudu-

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107. *See* Lovell v. Oahe Electric Cooperative, 382 N.W.2d 396, 398 (S.D. 1986) ("Under common law, negligence is the failure to exercise ordinary care under the circumstances. Ordinary care is that which an ordinarily prudent or reasonable person would exercise under the same or similar circumstances.").

108. *See* Woolley v. Henderson, 418 A.2d 1123, 1132 (Me. 1980) ("Under the objective test, a causal connection exists between the defendant's failure to disclose and the plaintiff's injury only if a reasonable person in the position of the plaintiff would have declined the treatment had he been apprised of the risk that resulted in harm.").

109. *See* Limberhand v. Big Ditch Company, 706 P.2d 491, 498 (Mont. 1985) ("The apartment owners owed a duty in this case to use ordinary care to have their premises reasonably safe or to warn of any hidden or lurking danger.").

110. *See* Universal C.I.T. Credit Corporation v. Shepler, 329 N.E.2d 620, 624 (Ind. Ct. App. 1975) ("Therefore, the good faith should be further subject to the test that the determination thereof would have been one made by a 'reasonable man' under the same set of facts or circumstances.").

111. *See* Anderson v. Stream, 295 N.W.2d 595, 601 (Minn. 1980) (overruled the doctrine of parental immunity replacing it with the rule that liability should be established on basis of whether a parent acted as reasonable and prudent individual under like or similar circumstances).

112. *See* Prah v. Maretti, 321 N.W.2d 182, 187 (Wis. 1982):

> This state has long recognized that an owner of land does not have an absolute or unlimited right to use the land in a way which injures the rights of others. The rights of neighboring landowners are relative; the uses by one must not unreasonably impair the uses of enjoyment of the other.

113. *See* Board of Education of Miami Trace Local School District v. Marting, 185 N.E.2d 583 (Ohio 1961). In determining whether the plaintiff had probable cause in brining suit, the court stated: "The reasonable man test is applicable in determining probable cause, namely, would a reasonable man have believed and acted under the same circumstances existent at the time as did Marting and his counsel herein." *Id.* at 594.

114. *See* Jadwin v. Minneapolis Star and Tribune Company, 367 N.W.2d 476, 491 (Minn. 1985) ("We hold that a private individual may recover actual damages for a defamatory publication upon proof that the defendant knew or in the exercise of reasonable care should have known that the defamatory statement was false.").

115. *See* Alm v. Aluminum Company of America, 717 S.W.2d 588, 591 (Tex. 1986) ("Alcoa had a duty to warn of the hazards associated with its closure technology if a reasonably prudent person in the same position would have warned of the hazards.").

116. *See* Moore v. Lillebo, 722 S.W.2d 683, 688 (Tex. 1987) ("In the court's charge in wrongful death cases, mental anguish shall be defined as the emotional pain, torment, and suffering that the named plaintiff would, in reasonable probability, experience from the death of the family member.").

117. *See* Jahner v. Jacob, 233 N.W.2d 791, 798 (N.D. 1975), *cert. denied*, 423 U.S. 870 (1975) ("This necessarily means that the defendant must have some reasona-

lent misrepresentation,[119] as well as in other areas of tort.[120]

Second, if this rule of reasonableness governing the right of privacy were adopted, it would coincide with its constitutional counterpart.[121] There is no urgency in having an individual's civil right of privacy governed by the same rule as his common law right to be left alone, but there is some advantage to uniformity. Under the proposed rule, whether the defendant is the government or an agency thereof, or an individual who has interfered with the plaintiff's daily life, the rule would be the same.

Third, a test of reasonableness would create a standard for determining whether one's privacy had been invaded which is simple, flexible, and easy for a jury to apply. It is a test with which our judicial system is well acquainted.[122] As one court has said: "Our system of justice places great faith in juries . . . . "[123] In other words, whether an individual has sustained an injury to his right to be left alone would no longer involve four different types of tests, but in all cases would come down to a question of fact.

Fourth, this standard of reasonableness could offer an injured plaintiff a remedy where the existing rules of law do not. As we have seen from the above discussion, there are some events wherein a plaintiff's right to privacy has been invaded and the existing law does not offer a remedy.[124] Whether one's prior criminal record is shown to a

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ble basis for believing himself to be in danger. It does not permit mere conjuration or imagination of being in great danger without a reasonable basis therefore, and it does not permit responding with unnecessary great or devastating force.").

118. *See* Butler v. W.E. Walker Stores, Inc., 222 So.2d 128, 130 (Miss. 1969) (construing a state statute providing that proprietor could stop and search someone if plaintiff's activities were such as would tend to arouse suspicion of reasonable person under same or similar circumstances).

119. *See* Cook v. Brown, 393 So.2d 1016, 1019 (Ala. Civ. App. 1981):

> Although a plaintiff alleged to have been injured by a defendant's misrepresentation must have in fact acted upon it to his injury believing it to be true to maintain his action for fraud against the defendant, if he had prior knowledge of its falsity or if the circumstances surrounding the pronouncement of same would have aroused suspicion as to its validity in the mind of a reasonable person, he cannot be said to have reasonably relied upon the misrepresentation and, therefore, cannot obtain damages or other relief from defendant.

120. *See, e.g.*, Bartlett v. Taylor, 174 S.W.2d 844, 850 (Mo. 1943) (holding that even though the landlord owed no duty to the tenant to repair the premises, once he undertook to do so, he must exercise reasonable care).

121. *See supra* notes 59-84 and accompanying text.

122. *See supra* notes 107-20.

123. Anderson v. Stream, 295 N.W.2d 595, 600 (Minn. 1980) (wherein the court was concerned with replacing the doctrine of parental immunity with a test of whether the parent had acted in a reasonable manner under the circumstances in question).

124. *See supra* notes 18, 88, 92.

prospective employer,[125] or an individual's medical history is shown to someone outside the field of medicine,[126] the reasonableness of this disclosure would now govern a plaintiff's right to recover, and not the required element of publicity.[127] In other words, a plaintiff might be compensated if such invasion were unreasonable even though the information in question was not brought to the attention of a large segment of the public.

Finally, this proposed standard of reasonableness would offer a plaintiff a remedy in new areas not contemplated when Dean Prosser set forth his rule. Changes in the American lifestyle have brought about new opportunities to violate an individual's right to be left alone, and as seen, the existing law does not offer a remedy.[128] The reasonableness of the defendant's behavior in these situations would offer a plaintiff more protection.

CONCLUSION

There have been dramatic changes in the areas of technology, business and our daily lives since Warren and Brandeis first published their law review article dealing with an individual's right to privacy.[129] These gentlemen are responsible for bringing about the recognition of an individual's right to be left alone even though the common law did not recognize the tort. As is often the case, this new position brought about much confusion[130] until Dean Prosser set forth his new rule in 1960.[131] Since then, however, the entry of the Supreme Court of the United States into this area,[132] as well as advancements in the field of electronic technology[133] and changes in our American lifestyle[134] have brought about a need for an additional modification of our current law. Replacing the existing law with a standard of reasonableness for determining whether one's right to privacy has been violated, is a change that will bring this tort into a proper perspective for the Twenty-First Century.

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125. *See supra* note 81.
126. *See supra* note 82.
127. *See supra* note 89.
128. *See supra* notes 18, 88, 92.
129. *See* Warren & Brandeis, *supra* note 26.
130. *See* Ettmore v. Philco Television Broadcasting Co., 229 F.2d 481, 485 (3d Cir. 1956) (the state of the law was described as resembling "a haystack in a hurricane").
131. *See* Prosser, *supra* note 2.
132. *See supra* notes 47-58.
133. *See supra* notes 15-17.
134. *See supra* note 18.