INFORMATIONAL PRIVACY: CONSTITUTIONAL CHALLENGES TO THE COLLECTION AND DISSEMINATION OF PERSONAL INFORMATION BY GOVERNMENT AGENCIES

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When may a person constitutionally challenge the collection of sensitive personal information by government agencies? Under what circumstances does a person have the right to the removal of personal information from official files or the right to require restricted dissemination of personal information? These questions which lie at the heart of an emerging right to informational privacy grow in importance as Americans become increasingly uneasy about the nature and extent of data collected about them by the government.[1]

The average person is likely to be the subject of dozens of separate files compiled by hospitals, educational institutions, criminal justice agencies and tax and financial departments at the federal, state and local level. Among the sensitive data that may be contained in such records are labels such as addicted, arrested, convicted, truant, mentally retarded, delinquent, homosexual and subversive.[2]

Whatever the purposes of governmental recordkeeping, it is usually not too difficult for those gathering information to advance some justifi-

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1. *See generally* A. WESTIN & M. BAKER, DATABANKS IN A FREE SOCIETY 465-85 (1972). Public opinion surveys taken in the early seventies revealed that a substantial minority of Americans perceived some invasion of personal privacy. [hereinafter cited as WESTIN I].

2. *See generally* A. MILLER, THE ASSAULT ON PRIVACY (1971); A. NEIER, DOSSIER (1975); ON RECORD (S. Wheeler ed. 1969); A. WESTIN, PRIVACY AND FREEDOM (1967) [hereinafter cited as WESTIN II]. In the mid-sixties, federal files contained over 3 billion records on individual citizens including 264.5 million criminal histories, 279.6 million mental health records, 916.4 million profiles on alcoholism and drug addiction, and over 1.2 billion financial records. *Hearings on Federal Data Banks, Computers, and the Bill of Rights Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. pt. 1, at 574 (1971). For a more recent survey of the nature and scope of 858 federal data banks *see* STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. OF THE JUDICIARY, 93d CONG., 2d SESS. 1 FEDERAL DATA BANKS AND CONSTITUTIONAL RIGHTS XXXIII-LVIII (Comm. Print 1974).

cation for their activities. Whether the bureaucracy in question is a police department, school, hospital or welfare bureau, the response is likely to be the same—the more known about the people to be dealt with, the greater the likelihood of making an informed decision.[3] But there are several problems with such an answer. Recent studies in information science indicate that too much information can actually inhibit the process of decisionmaking.[4] Information that is irrelevant or only tangentially related to the decisionmaking process may do more harm than good. The potential for misuse is increased by permitting information to fall into the hands of persons either within or without a collecting agency who are not sensitive to the dangers of misinterpretation of the collected data. Scholars and journalists are beginning to supply solid evidence of cases of abuse. The educator whose evaluations are prejudiced as a result of knowing a student's IQ test score[5] or the employer who refuses to hire on the basis of an applicant's raw arrest record[6] are not unfamiliar examples.

The possible adverse consequences to the individual from governmental data collection do not necessarily stop at misuse by others. The impact on an individual's thoughts and actions may by itself be detrimental. Once an individual knows that his activities or thoughts are the subject of a file, his personal creativity and spontaneity may be inhibited.[7] Data gathering activities which involve highly sensitive data may

3. Recent literature classifies records into three basic types: administrative, investigative and statistical. Administrative records contain information relating to a direct transaction between a person and a government agency. Birth records, criminal histories and license records are examples. Investigative records may contain information drawn from administrative records, but usually include additional personal data not relating to governmental transactions. Common examples are personnel files, police intelligence dossiers and probation reports. The primary purpose of investigative files is to assist decisionmaking concerning file subjects. A third type of record, the statistical record, is used to collect information about groups of subjects for planning and management purposes. Census and other public survey files are the most obvious examples. *See* U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS 5-6 (1973) [hereinafter cited as HEALTH, EDUCATION AND WELFARE]. At this writing, the uses and abuses of investigative records by federal intelligence agencies are receiving widespread publicity. *See, e.g.*, COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES, REPORT TO THE PRESIDENT 130-50, 240-50 (1975). This note, however, will not be addressed solely to privacy issues surrounding investigative records, but will extend to administrative and statistical records as well.

4. Ackoff, *Management Misinformation Systems*, 14 MANAGEMENT SCI. B-147 (1967); Altman, *Juvenile Information Systems: A Comparative Analysis*, 24 JUVENILE JUSTICE 2 (Feb. 1974); Bartlett & Green, *Clinical Prediction: Does One Sometimes Know Too Much?*, 13 J. COUNSELING PSYCHOLOGY 267 (1966).

5. *See, e.g.*, Mercer, *IQ: The Lethal Label*, 6 PSYCHOLOGY TODAY 44 (Sept. 1972).

6. *See, e.g.*, H. MILLER, THE CLOSED DOOR: THE EFFECT OF A CRIMINAL RECORD EMPLOYMENT WITH STATE AND LOCAL PUBLIC AGENCIES (1969).

7. Askin, *Surveillance: The Social Science Perspective*, 4 COLUM. HUMAN

engender thoughts or feelings which the subject not only wishes to withhold from others, but that he also is trying to keep from his own consciousness. Personality testing is a specific example of this type of information collection.[8] The anxiety created by knowledge that the state possesses information which, if disclosed, will expose a person to public shame or ridicule cannot be lightly dismissed.[9]

Recent federal[10] and state[11] legislation has granted individuals access to a wide variety of records concerning them, including educational, medical, financial and employment files. As individuals become aware of their right to review the contents of such files, litigation concerning the retention or dissemination of personal data will undoubtedly increase. The purpose of this note is to present a constitutional theory of informational privacy to assist those lawyers and judges who will be faced with such litigation.

I. A Right to Informational Privacy

A. The Supreme Court and the Right to Privacy

Federal Circuit Judge Shirley M. Hufstedler has accurately noted that "[n]o corner of the privacy field is more unkempt than that tended by the United States Supreme Court."[12] Certainly the concept of privacy has been applied in the protection of a variety of interests. But the protection has also been uneven. Consider, for example, the Fourth Amendment which states in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . . ."[13] There is little doubt that the amendment provides considerable protection against indiscriminate rummaging by police through the dwelling places and personal effects of private persons.[14] Indeed, by holding that a violation of the amendment may occur whenever there is an invasion of a

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RIGHTS L. REV. 59 (1972); Benn, *Privacy, Freedom, and Respect for Persons*, in PRIVACY 1 (J. Pennock & J. Chapman eds. 1971).

8. Sherrer & Roston, *Some Legal and Psychological Concerns about Personality Testing in the Public Schools*, 30 FED. B.J. 111 (1971).

9. WESTIN II, *supra* note 2, at 33-34.

10. Freedom of Information Act, 5 U.S.C. § 552 (1970); Privacy Act of 1974, 5 U.S.C.A. § 552a (Supp. I, 1976); 20 U.S.C.A. § 1232g (Supp. I, 1976); 42 U.S.C.A. § 3771 (1973).

11. *See, e.g.*, IOWA CODE ANN. § 749B.5 (Supp. 1975); MINN. STAT. ANN. § 15.165 (Supp. 1975); LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, COMPENDIUM OF STATE LAWS GOVERNING THE PRIVACY AND SECURITY OF CRIMINAL JUSTICE INFORMATION (1975).

12. S. HUFSTEDLER, THE DIRECTIONS AND MISDIRECTIONS OF A CONSTITUTIONAL RIGHT OF PRIVACY 11 (1971) [hereinafter cited as HUFSTEDLER].

13. U.S. CONST. amend. IV.

14. *See, e.g.*, Stanford v. Texas, 379 U.S. 476 (1965).

justifiable or reasonable expectation of privacy[15] the Supreme Court has extended protection far beyond traditional cases of illegal trespass by police.[16]

But the words "searches and seizures" in the Fourth Amendment are, nonetheless, terms of limitation.[17] Governmental information gathering practices which do not involve either a search or seizure are not proscribed by the amendment.[18] This leaves governmental officials considerable freedom to collect information. For example, neither the mere receipt of information from a person who is not an agent of the state,[19] nor the observation of the physical characteristics of an individual in a public place[20] are considered searches or seizures under the amendment. As a general rule, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[21] Consequently, an Internal Revenue summons to an accountant to produce his client's business records does not infringe upon the guarantee of the client's reasonable expectation of privacy.[22] The Fourth Amendment, moreover, is governed by a rule of reasonableness; it proscribes only *unreasonable* searches and seizures.[23] It is not unreasonable, for example, for a congressional statute to require that all foreign currency transactions over $5,000 be reported to the Treasury Department.[24] Finally, Fourth Amendment rights are personal rights which may not be vicariously asserted. A party whose rights are not violated apparently has no standing to contest an illegal search or seizure no matter how detrimental the information collected is to him.[25]

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15. United States v. White, 401 U.S. 745, 751-52 (1971); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

16. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 356-409 (1974).

17. *Id.* at 356.

18. *See* United States v. Dionisio, 410 U.S. 1 (1973). In *Dionisio* the Court held that neither a subpoena to appear before a grand jury nor an order to produce a voice exemplar were seizures under the Fourth Amendment. Therefore, they did not have to meet the amendment's test of reasonableness. *Id.* at 8-15. *But see* Nixon v. Sampson, 389 F. Supp. 107 (D.D.C. 1975), *entry of order stayed sub nom.* Nixon v. Richey, 513 F.2d 427 (D.C. Cir. 1975); see note 109 *infra*.

19. Coolidge v. New Hampshire, 403 U.S. 443, 487-90 (1971).

20. *See* Draper v. United States, 358 U.S. 307, 309-10, 313 (1959).

21. Katz v. United States, 389 U.S. 347, 351 (1967).

22. Couch v. United States, 409 U.S. 322, 335-36 (1973).

23. In many situations search and seizures will be reasonable only if they are pursuant to a valid search warrant. United States v. United States Dist. Ct., 407 U.S. 297 (1972); Katz v. United States, 389 U.S. 347 (1967).

24. California Bankers Ass'n v. Shultz, 416 U.S. 21, 59-63 (1974).

25. Brown v. United States, 411 U.S. 223, 229 (1973). In *Brown* the Supreme Court held that where the defendants were not on the premises at the time of the police

These illustrations are not intended to present a definitive outline of the Fourth Amendment but only to demonstrate that its restraints are limited. Whatever it may become in the future,[26] at present Fourth Amendment law does not encompass a general constitutional right to privacy.[27] Not only does it provide limited protection against the overly broad collection of personal information, but it provides practically no limitation on what officials may do with information they gather by lawful means.

The focus of the Fifth Amendment is narrower still. The privilege against self-incrimination provided by the Fifth Amendment protects only against disclosure of information which would tend to expose a person to a criminal penalty.[28] Its prohibitions do not extend to disclosure of facts which expose an individual to loss of reputation or standing in the community.[29] In addition, the privilege is purely personal and does not apply to information obtained from third parties.[30] As stated by Justice Holmes: "[a] party is privileged from producing . . . evidence, but not from its production."[31] The Fifth Amendment provides no protection where a person is required by statute to submit information unless the disclosure would create a substantial hazard of self-incrimination *and* the statute singles out a select group inherently suspect of criminal activities.[32]

Like the Fifth Amendment, the First Amendment contains significant restrictions on governmental efforts to obtain information, but there are limits to its protection as well. The Supreme Court has adopted the strict scrutiny test in cases involving the governmental collection and

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search nor had any proprietary interest in the premises, they did not have standing to challenge the propriety of the search.

26. Judge Hufstedler has suggested an increased emphasis on the Fourth Amendment's guarantee of security of person so that "any governmental probe, corporeal or incorporeal, designed to uncover or to disclose information about a person would be a 'search.' " HUFSTEDLER, *supra* note 12, at 26. See also text accompanying note 109 *infra*.

27. Katz v. United States, 389 U.S. 347, 350 (1967).

28. Kastigar v. United States, 406 U.S. 441, 444-45 (1972).

29. Brown v. Walker, 161 U.S. 591, 605-06 (1896).

30. Couch v. United States, 409 U.S. 322, 328 (1973).

31. Johnson v. United States, 228 U.S. 457, 458 (1913).

32. California v. Byers, 402 U.S. 424, 427-31 (1971). In *Shapiro v. United States*, 335 U.S. 1, 32-36 (1948), the Supreme Court held that the mandatory preservation of business records for governmental examination to facilitate price regulation did not violate the Fifth Amendment. The Court restricted the scope of *Shapiro* in *Marchetti v. United States*, 390 U.S. 39 (1968), holding that failure to supply certain wagering information in connection with a federal gambling tax was justified under the Fifth Amendment. The Court noted that the information required was not customarily kept, that the records had no public record aspects, and that the requirements were directed at a " 'selective group inherently suspect of criminal activities.' " *Id.* at 57. *See also* Grosso v. United States, 390 U.S. 62, 67-68 (1968).

disclosure of information about the associations of private individuals. Absent a compelling state interest, the government cannot compel an organization to disclose its membership lists[33] or an individual to disclose the organizations[34] to which he belongs. However, these decisions are based on factual situations where the government has required the subject himself to supply the information, and recognize only a right of privacy in one's associations. They do not necessarily bring the collection and disclosure of other types of information obtained from third parties within the ambit of First Amendment protection.[35]

As the foregoing discussion indicates, the Fourth, Fifth and First Amendments guarantee certain individual rights which may not be infringed by the collection and use of information by the government. But the limited scope of these protections raises several unsettling questions. If official practices relating to the gathering and use of personal information do not invade the First, Fourth or Fifth Amendment rights of the subject of the information, may the government collect, store or transmit such information without restriction?

Specifically, may it require an individual to disclose nonassociational, nonincriminating personal information no matter how sensitive?

May it engage in unrestricted collection of personal information from sources other than the subject of the information?

May it maintain and store personal information without taking any special precautions to preserve its confidentiality?

May it engage in the unrestricted dissemination of personal information?

A partial answer to these questions is found in the guarantees of procedural due process of the Fifth and Fourteenth Amendments. In *Wisconsin v. Constantineau*,[36] the Supreme Court held that local officials could not post notices that sales and gifts of liquor to certain persons were forbidden unless these individuals were given adequate notice and hearing. The Court indicated that whenever stigmatizing personal information is publicly disclosed, notice and an opportunity to

33. Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

34. DeGregory v. Attorney General of New Hampshire, 383 U.S. 825 (1966); Shelton v. Tucker, 364 U.S. 479 (1960). Nor may the government absent a legitimate state interest withhold a benefit, such as a license to practice law, for refusal to answer questions about personal associations. Baird v. State Bar of Arizona, 401 U.S. 1 (1971). Although the opinion of the Court in *Baird* did not use the phrase "compelling state interest," it did indicate that the state had a "heavy burden" to show that the inquiry was necessary. *Id.* at 6.

35. See cases cited notes 33, 34 *supra*.

36. 400 U.S. 433 (1971).

be heard may be essential.[37] There will, however, be occasions where personal information should neither be collected nor disseminated irrespective of the adequacy of procedural safeguards. In such situations *Constantineau* is of no assistance to those seeking relief.

A partial answer to these questions is also found in the general constitutional right of privacy first articulated in *Griswold v. Connecticut*.[38] In that case, the Supreme Court struck down a state statute forbidding the private use of contraceptives. In so doing, it held that a constitutional zone of privacy exists in addition to the specific guarantees of the Bill of Rights.[39] Expanding the doctrine in *Roe* v. *Wade*,[40] the Court declared that the decision to have an abortion, at least in the early periods of pregnancy, is within the zone of protected privacy. It stated that fundamental rights of privacy may not be abridged absent a compelling state interest.[41]

Whether the right of privacy is located in the general language of the Ninth Amendment or emanates as a penumbra from the First, Third, Fourth, Fifth and Ninth Amendments, or is inherent in the concept of liberty contained in the Fourteenth Amendment, is a subject of some dispute, as are the precise contours of the right itself.[42] At present, the right includes, but is not necessarily limited to, "the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing."[43] In its privacy decisions the Court has confined itself to the discussion of the right of individual autonomy, and has not addressed the right of informational privacy.[44]

37. Justice Douglas speaking for the Court stated that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Id.* at 439. *Cf.* Doe v. McMillan, 412 U.S. 306, 323-24 (1973). At this writing, the Court has just granted certiorari in another case involving allegedly stigmatizing information. Davis v. Paul, 505 F.2d 1180 (6th Cir. 1974), *cert. granted*, 421 U.S. 909 (1975) (No. 891, 1974 Term). The plaintiff in *Davis* commenced a class action alleging a denial of civil rights as a result of the distribution of a flyer entitled "Active Shoplifter" upon which his name appeared. Relying on *Wisconsin v. Constantineau*, the court of appeals held that "law enforcement officials cannot, consistent with the Due Process Clause, brand a person as an active shoplifter when he has never been tried for the offense." *Id.* at 1184. The outcome of *Davis* could be crucial to the survival of a right to informational privacy. If unfettered dissemination of such damaging and potentially misleading information as raw arrest records is permitted, it will be extremely difficult to sustain any constitutional challenge to the collection and use of personal information.

38. 381 U.S. 479 (1965).

39. *Id.* at 484-85.

40. 410 U.S. 113, 153 (1973).

41. *Id.* at 152-53.

42. *Id.* at 155-56. *See also* Griswold v. Connecticut, 381 U.S. 479 (1965).

43. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65 (1973) (state law prohibiting the viewing of obscene movies in public theatres does not infringe upon the right of privacy).

44. *Id.;* Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973);

Individual autonomy refers to the right to determine for oneself whether one will go through or abstain from certain experiences, such as contraception or abortion.[45] On the other hand, informational privacy is, as so well defined by Professor Alan F. Westin, "[the] claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others."[46] Informational privacy and individual autonomy, nevertheless, share similar characteristics. Neither is explicitly found in the language of the Constitution, but both appear to be implicit in the specific guarantees found in the Bill of Rights and the Fourteenth Amendment. Both would seem to be part of the classic right to be let alone so eloquently described by Mr. Justice Brandeis in his dissent in *Olmstead* v. *United States*:

> 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 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.[47]

B. A Case-by-Case Approach

The initial definition of new constitutional concepts is often articulated in forums other than the Supreme Court. Valuable discussion of informational privacy is to be found in the decisions of lower federal and state courts. Such decisions have involved challenges to the collection of criminal justice, medical, educational, welfare and financial information.

1. *Criminal Justice Information*

York v. Story,[48] which predated *Griswold*, is an important circuit court decision on informational privacy. The factual context of this case presented constitutional violations arising not only from the dissemination of information to third parties, but also from mere collection of the information. *York* involved a female complainant who went to

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Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Georgia, 394 U.S. 557 (1969). *See also* Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670 (1973) [hereinafter cited as *On Privacy*].

45. *See generally* Beardsley, *Privacy: Autonomy and Selective Disclosure* in PRIVACY 56 (J. Pennock & J. Chapman eds. 1971); *On Privacy*, *supra* note 44.

46. WESTIN II, *supra* note 2, at 7.

47. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) *cf.* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

48. 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964).

police to report that she had been assaulted. A male officer insisted that she pose for nude photographs although her bruises would not appear in the photographs, and the photographs would not actually be needed in the prosecution of the case. The officer subsequently distributed the photographs to other officers in the department even though the photographs could not have aided in apprehending the offender.

The Ninth Circuit held that the appellant's allegations, if supported by the evidence, demonstrated a violation of her constitutional right to privacy inherent in the due process clause of the Fourteenth Amendment.[49] According to the court, at least three separate aspects of the police conduct were constitutionally objectionable: 1) the actual exposure of the complainant's nude body to the male police officer; 2) the taking and retention of the photographs; and 3) the dissemination of the photographs to the other officers.[50] At the very least, *York* stands for the proposition that government officials acting under color of law may not collect and disseminate personal information for private as opposed to governmental purposes.

A subsequent Ninth Circuit decision restricted *York* to its facts. In *Baker v. Howard*,[51] police questioned an individual about a suspicious incident but concluded that no crime had been committed. They nevertheless released a police report suggesting that the suspect had committed a crime. A radio station published the report and as a result the suspect lost his teaching position. Distinguishing *York*, the court held that "the invasion of privacy here complained of is not . . . so flagrant that it calls for invocation of the Constitution."[52] Not all courts

49. *Id.* at 456.

50. *Id.* at 455-56.

51. 419 F.2d 376 (9th Cir. 1969).

52. *Id.* at 377. Courts appear to be much more reluctant to find a right of privacy where an individual has been suspected of involvement in crime or has been convicted. In Rosenberg v. Martin, 478 F.2d 520 (2d Cir.), *cert. denied*, 414 U.S. 872 (1973) the court reversed the trial court and dismissed a complaint filed by a person convicted of murder who alleged that police officials disseminated libelous and slanderous information about him before and after he was taken into custody. In Travers v. Paton, 261 F. Supp. 110 (D. Conn. 1966), the district court held that the shooting and subsequent televising of a film of a parol hearing of a state prison inmate did not violate the inmate's constitutional right of privacy. The court distinguished *York* on the grounds that the intrusion was not "shocking." *Id.* at 115. *See also* Mimms v. Philadelphia Newspapers, Inc., 352 F. Supp. 862 (E.D. Pa. 1972); Mattheis v. Hoyt, 136 F. Supp. 119 (W.D. Mich. 1955). However, the constitutional right of privacy has been cited to deny defense counsel the right to administer an anonymous questionnaire to grand jurors for purposes of showing underrepresentation by age and social class. People v. Super. Ct. (Dean), 38 Cal. App. 3d 966, 976, 113 Cal. Rptr. 732, 739-40 (1974); *see also* People v. Norman, 76 Misc. 2d 644, 651, 350 N.Y.S.2d 52, 60 (Sup. Ct. 1973) (discovery of police officers' personnel records for impeachment purposes absent a showing of more than mere speculation by the defense is tantamount to an unconstitutional invasion of privacy); *cf.* United States v. Liebert, 519 F.2d 542 (3rd Cir. 1975).

have taken such a benign view of the information-gathering practices of criminal justice agencies. Indeed, some courts have gone beyond *York* to hold that the mere collection and retention of certain information even without dissemination to private parties may be constitutionally impermissible.[53]

In *Davidson v. Dill*[54] the plaintiff was arrested and tried for loitering but was subsequently acquitted. She then brought an action demanding the return of her arrest record. Reversing a lower court dismissal of her complaint, the Supreme Court of Colorado concluded that a court should expunge an arrest record or order its return when the harm to the individual's right of privacy or dangers of unwarranted adverse consequences outweigh the public interest in retaining the records in police files.[55] The court noted that privacy is a fundamental right, and indicated that police officials must demonstrate a compelling state interest in maintaining arrest records.[56] Remanding the case for adjudication on its merits, the court urged the lower court to consider: "[w]ho has access to these records, what facts are contained in them, how likely and to what extent information in the records may be disseminated, and what justification exists for their retention in the police files. . . ."[57]

In a recent California case, *White v. Davis*,[58] the constitutionality

53. *See, e.g.*, cases cited notes 54, 55, 58 *infra*.

54. 180 Colo. 123, 503 P.2d 157 (1972).

55. *Id.* at 130, 503 P.2d at 161. *Accord*, Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971); United States v. Hudson, 103 Wash. Law Rep. 377 (D.C. Super. Ct. 1975). *See also* Doe v. Commander, Wheaton Police Dept., 273 Md. 262, 329 A.2d 35 (1974). *But see* Monroe v. Tielsch, 84 Wash. 2d 217, 525 P.2d 250 (1974). *Contra*, United States v. Linn, 513 F.2d 925 (10th Cir.), *cert. denied*, 18 Cr. Law Rep. 4013 (U.S. Oct. 8, 1975); Herschel v. Dyra, 365 F.2d 17 (7th Cir.), *cert. denied*, 385 U.S. 973 (1966); United States v. Seasholtz, 376 F. Supp. 1288 (N.D. Okla. 1974); United States v. Dooley, 364 F. Supp. 75 (E.D. Pa. 1973); Coalition of Black Leadership v. Doorley, 349 F. Supp. 127, 130 (D.R.I. 1972); Beasley v. Glenn, 110 Ariz. 438, 520 P.2d 310 (1974).

In *Tosh v. Buddies Supermarkets, Inc.*, 482 F.2d 329 (5th Cir. 1973), local police officials furnished the criminal histories of union organizers to the management of a supermarket which had been the scene of incidents in which the organizers were involved. The court held that the Constitution did not ban a state agency from furnishing such information to the supermarket management since it had a legitimate need for the information. *Id.* at 332.

The general issue of expungement of arrest records and the various approaches toward resolution of the problem is a vast subject beyond the scope of this note. *See generally* Note, *Criminal Procedure: Expunging the Arrest Record When There Is No Conviction*, 28 OKLA. L. REV. 377 (1975); Comment, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. CHI. L. REV. 850 (1971).

56. Davidson v. Dill, 180 Colo. 123, 130, 503 P.2d 157, 161 (1972).

57. *Id.* at 132-33, 503 P.2d at 162.

58. 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).

of police intelligence activity at the University of California at Los Angeles was challenged. Plaintiffs sought a permanent injunction against the Los Angeles Police Department to prevent undercover officers from attending discussions in university classes and in public and private meetings of university-sponsored organizations for the purpose of compiling intelligence reports. A lower court sustained a demurrer to the plaintiffs' complaint and entered judgment for the defendants. Noting that the complaint alleged that the information gathered by the police did not pertain to illegal activity, the California Supreme Court ruled that the lower court erred in sustaining the demurrer.[59] The court held that absent a compelling state interest which was not revealed in the pleadings, the stationing of undercover agents in classrooms and the extensive collection of information about members of the university community violated the First Amendment[60] and a state constitutional right to privacy.[61] It also implied that the police practices violated the federal right to privacy as well.[62] *White* illustrates the potential overlap in protection which the First Amendment and the right of privacy provide when the information collected relates to beliefs or associations.[63] As both *York v. Story*[64] and *Davidson v. Dill*[65] demonstrate, that overlap is not present in every case, since much information collected and retained by criminal justice agencies has nothing directly to do with the exercise of First Amendment rights.

2. *Health and Medical Information*

In *Roe v. Ingraham*,[66] patients and physicians challenged a New York statute which required physicians to file copies of prescriptions for certain drugs with the state department of health. A federal district court dismissed the complaint, which alleged that the statute violated the plaintiff's constitutional right to privacy,[67] for lack of a substantial

59. *Id.* at 760, 533 P.2d at 224, 120 Cal. Rptr. at 96.

60. *Id.* at 772-73, 533 P.2d at 232, 120 Cal. Rptr. at 104.

61. *Id.* at 776, 533 P.2d at 234-35, 120 Cal. Rptr. at 106-07. *See also* CAL. CONST. art. I, § 1.

62. White v. Davis, 13 Cal. 3d 757, 775, 533 P.2d 222, 234, 120 Cal. Rptr. 94, 106 (1975).

63. *See also* Comment, *Police Surveillance of Political Dissidents*, 4 COL. HUMAN RIGHTS L. REV. 101 (1972).

64. See text accompanying notes 48-50 *supra.*

65. See text accompanying notes 54-57 *supra.*

66. 480 F.2d 102 (2d Cir. 1973).

67. *Id.* at 105. In *Felber v. Foote*, 321 F. Supp. 85 (D. Conn. 1970), a case arising prior to *Roe v. Wade*, the district court held that a psychiatrist had no right to declaratory and injunctive relief from enforcement of a state statute requiring him to report the names and other personal information of drug dependent patients to the state department of health. The court concluded that there was no general constitutional right of privacy. *Id.* at 89. The California Supreme Court in *In Re Lifschutz*, 2 Cal. 3d 415,

federal question. The Second Circuit reversed and remanded, holding that the disclosure of the information mandated by the statute presented a substantial constitutional question of invasion of privacy.[68] The court stated:

> If there is anything "obvious" about the constitutional right to privacy at the present time, it is that its limits remain to be worked out in future cases. Should the constitutionally protected zone of privacy be extended beyond the area already recognized, the individual's interest in keeping to himself the existence of his physical ailments and his doctor's prescriptions for them would lie rather close in the continuum. If New York had passed a statute directing that all prescriptions, or even all prescriptions for Schedule II drugs, must be published in the press, we do not think the State would have seriously contended, still less that the district judge would have held, that a constitutional attack was "obviously frivolous."[69]

New York had argued that the central filing of the prescriptions was necessary to detect negligent or intentional over-prescription of dangerous drugs by doctors. While acknowledging that the state had advanced a powerful argument for sustaining the statute, the court nonetheless urged consideration by a three-judge court of how the confidentiality of the information was actually being preserved.

> If it were clear that the State had taken or proposed to take effective steps, by regulation or otherwise, to limit access to the patients' names on the prescription forms as rigidly as is consistent with accomplishment of the asserted statutory purpose, the grounds for constitutional attack might disappear. But the district court was not entitled to dismiss the complaint on the basis of the State's assertions that it has already done this.[70]

The above language strongly suggests that a sharing of the information with other governmental agencies for purposes not related to its collection may be prohibited.

On remand, however, the relevancy of the information rather than safeguards insuring its confidentiality became the critical issue. A

424, 467 P.2d 557, 562, 85 Cal. Rptr. 829, 834 (1970), held that a psychiatrist could not constitutionally refuse to disclose his patient's treatment records in a personal injury suit where the patient failed to challenge such disclosure. The court observed that the psychiatrist's privacy interest apart from that of his patient was not significant. In *Association of American Phys. & Sur. v. Weinberger*, 395 F. Supp. 125 (N.D. Ill. 1975), the district court held that a statute which required physicians to report information on patients to nonprofit professional associations charged with the responsibility of overseeing funds paid under medicare or medicaid did not violate the physician's right of privacy. A critical factor in the court's decision was the statutory provision that the confidentiality of the information be maintained, and that persons seeking unauthorized access to the information be subject to criminal sanctions. *Id.* at 135-37.

68. Roe v. Ingraham, 480 F.2d 102, 109 (2d Cir. 1973).

69. *Id.* at 108.

70. *Id.* at 109.

three-judge federal district court declared that the doctor-patient relationship was within the constitutional zone of privacy, and held that the state's regulatory scheme was unnecessarily broad.[71] The court concluded that the state could determine whether there was over-prescription of dangerous drugs from reports by physicians without knowing the name of the person receiving the drugs.[72] Experience under the prescription reporting program revealed that official knowledge of the patient's name contributed nothing to the objectives of the statute.

Schulman v. New York City Health and Hospital Corp.[73] presents another case involving medical records. In *Schulman*, a gynecologist and a patient who had obtained an abortion at a city hospital center sought to invalidate a city requirement that a pregnancy termination certificate be filed with a central filing registry maintained by the New York City Board of Health. Local health department regulations adopted pursuant to the New York City charter provided that the abortion records would not be subject to subpoena or to inspection by persons other than authorized personnel in the department.

The court noted that the plaintiff possessed a legitimate right of privacy under *Roe*, but held that the assurance of the confidentiality of such information coupled with the state's compelling interest in gathering the information required a rejection of the plaintiff's claim.[74] The principal compelling state interests were 1) to allow followup where medical complications ensue, 2) to enable public health authorities to investigate if proper procedures were followed in an outpatient facility, 3) to provide statistical information as to the effect of multiple abortions on the same woman, 4) to offer public health counseling on family planning and 5) to insure that women who test positive for an Rh negative factor, venereal disease or other factors receive proper counseling and treatment.[75]

In sum, there appears to be little doubt that where the state interest is strong, the collection and retention by appropriate agencies of highly

71. Roe v. Ingraham, 403 F. Supp. 931 (S.D.N.Y. 1975).

72. *Id.* at 938.

73. 44 App. Div. 2d 482, 355 N.Y.S.2d 781 (1974).

74. *Id.* at 486, 355 N.Y.S.2d at 785; *accord,* Planned Parenthood of Central Mo. v. Danforth, 392 F. Supp. 1362, 1374 (E.D. Mo. 1975). In State v. Jacobus, 75 Misc. 2d 840, 348 N.Y.S.2d 907 (Sup. Ct. 1973), the state sought an order enjoining defendant doctors from omitting from certificates of fetal death the name and addresses of parents of aborted fetuses. Such information was used to compile state vital statistics. The court noted that there were no safeguards to insure the confidentiality of the information, which might be subject to subpoena by local district attorneys. For these reasons, the doctors were justifed in their noncompliance with the reporting requirements until the confidentiality of the information could be assured by legislation or other appropriate means. *Id.* at 846, 348 N.Y.S.2d at 913-14.

75. Schulman v. New York City Health and Hospitals Corp., 44 App. Div. 2d 482. 485, 355 N.Y.S.2d 781, 784-85 (1974).

sensitive health and medical records will be permitted.[76] Courts, nevertheless, appear receptive to constitutional arguments that states must take adequate steps to preserve the confidentiality of such records.[77]

3. *Welfare and Educational Information*

In *Merriken v. Cressman*,[78] a mother and her son, a junior high school student, brought an action to restrain the implementation of a school-sponsored drug prevention program. The essence of the program consisted of the administration of questionnaires containing personal questions about parents and family. For example, students were asked whether their parents gave them affection and whether they felt loved by their parents. They were also asked to identify other students who acted unusually, made odd remarks or quarrelled with other students.[79] The findings from the questionnaires were to be utilized at some later time as guide for intervention by school personnel, many of whom were not trained in psychotherapy or psychology. Such intervention was to consist of a form of peer group therapy. The program did not provide specific guidelines for the preservation of the confidentiality of the information which would have been disseminated to various personnel including school superintendents, principals, coaches, PTA officers and school board members.[80] Holding that the program violated the plaintiff's right to privacy inherent in the penumbra of the Bill of Rights,[81] the federal district court noted: "These questions go directly to an individual's family relationship and his rearing. There is probably no more private a relationship, excepting marriage, which the Constitution safeguards than that between parent and child."[82]

In contrast to *Merriken* are decisions involving the constitutionality of statutes which require unwed mothers who receive federal or state assistance to disclose the name of the putative father.[83] The purpose of such disclosure is to enable the state to enforce the father's duty to contribute to the welfare of the child. In such cases plaintiff mothers have objected to disclosure primarily on the ground that it leads to added strain within the home and sometimes results in the permanent separation of the putative father from the rest of the family.[84] Courts in

76. See cases cited note 74 *supra*.

77. *Id.*

78. 364 F. Supp. 913 (E.D. Pa. 1973).

79. *Id.* at 916.

80. *Id.*

81. *Id.* at 922.

82. *Id.* at 918.

83. Doe v. Norton, 365 F. Supp. 65 (D. Conn. 1973), *vacated on other grounds sub nom.* Roe v. Norton, 422 U.S. 391 (1975); Burdick v. Miech, 385 F. Supp. 927 (E.D. Wis. 1974); Saiz v. Goodwin, 325 F. Supp. 23 (D.N.M. 1971).

84. *See, e.g.*, Doe v. Norton, 365 F. Supp. 65 (D. Conn. 1973), *vacated on other*

these cases have held that no fundamental right of privacy prohibits disclosure.[85] The question of preserving the confidentiality of such information once it passes to welfare officials apparently has not been an issue.

4. *Financial and Other Miscellaneous Information*

City of Carmel-By-The-Sea v. Young[86] involved the public disclosure of personal financial information. Plaintiff, City of Carmel, brought an action attacking the validity of a financial disclosure law enacted for the purpose of exposing and minimizing possible conflicts of interest among governmental officials. The California statute required that every public officer and each candidate for state or local office file as a public record a statement describing the nature and extent of his investments, and a similar statement concerning investments in excess of $10,000 owned by his spouse or minor children. The law did not limit disclosure to those financial dealings or assets which could be expected to give rise to a conflict of interest. It mandated disclosure without regard to the nature or location of the assets, or the powers and duties of the officer.[87] The harmful effects of unnecessarily broad disclosure were noted by the court:

> [T]he newspaper publication of a public officer's assets, or those of the spouse or children, can be expected to bring unwanted solicitation from a variety of salesmen and others, could well encourage harassment lawsuits or demands of like nature, and could expose the public officer and family to various criminal elements in our society. Other public officials whose worth or investments do not require disclosure may find that fact understandably embarrassing. The invasion of privacy rights and the chilling or discouraging effect upon the seeking or holding of public office, great or small, or high or low, appears too clear for dispute.[88]

The court declared that the statute violated the United States Constitution.[89] The overly broad compulsory disclosure intruded into the zone of privacy protected by the Fourth Amendment and that "penumbra of constitutional rights into which the government may not

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grounds sub nom. Roe v. Norton, 422 U.S. 391 (1975). The substantial infringement on privacy inherent in the present welfare system is the subject of empirical inquiry in Handler & Hollingsworth, *Stigma, Privacy and Other Attitudes of Welfare Recipients*, 22 STAN. L. REV. 1 (1969).

85. Doe v. Norton, 365 F. Supp. 65, 77 (D. Conn. 1973), *vacated on other grounds sub nom.* Roe v. Norton, 422 U.S. 391 (1975); Burdick v. Miech, 385 F. Supp. 927, 930 (E.D. Wis. 1974); Saiz v. Goodwin, 325 F. Supp. 23, 26 (D.N.M. 1971). *Cf.* Wyman v. James, 400 U.S. 309 (1971).

86. 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970).

87. *Id.* at 269-70, 466 P.2d at 232-33, 85 Cal. Rptr. at 8-9.

88. *Id.* at 270, 466 P.2d at 233, 85 Cal. Rptr. at 9.

89. *Id.* at 272, 466 P.2d at 235, 85 Cal. Rptr. at 11.

intrude absent a showing of compelling need . . . ."[90] A more narrowly drawn statute, however, providing for broad disclosure of assets relevant to the duties of public officers and employees would satisfy the constitutional requirement that the least restrictive means be employed where fundamental liberties are concerned.[91]

Four years after *City of Carmel*, the California Supreme Court upheld a second conflict of interest statute written to meet the objections voiced in the earlier decision.[92] Among other things, the new statute required certain designated officials to disclose only those interests which would have a material effect on decisions by the officials acting within the scope of their public duties.[93]

In other states conflict of interest statutes have been sustained on the grounds that broad public disclosure is necessary to further the state's interest in effective government.[94] Courts sustaining such statutes, however, have refrained from denying the possibility that instances may exist where public dissemination of personal financial data might infringe upon an individual's right of informational privacy. In Illinois, for example, state employees challenged the constitutionality of a governor's order requiring them to file as a public record statements of economic interest which included a complete accounting of assets and liabilities.[95] The Illinois Supreme Court held that the sweeping disclosure requirements did not infringe upon the right of privacy.[96] Unlike the California Supreme Court in the *City of Carmel*, the Illinois court concluded that the required disclosure was necessary to further a compelling state interest.[97] The court, however, did not expressly reject the concept of a right of informational privacy relating to financial data.

In addition to challenges to financial disclosure laws,[98] challenges

90. *Id.* at 268, 466 P.2d at 232, 85 Cal. Rptr. at 8.

91. *Id.* at 272, 466 P.2d at 234, 85 Cal. Rptr. at 10.

92. County of Nevada v. MacMillen, 11 Cal. 3d 662, 522 P.2d 1345, 114 Cal. Rptr. 345 (1974).

93. *Id.* at 668-69, 522 P.2d at 1348-459, 114 Cal. Rptr. at 348-49.

94. Illinois State Employees Ass'n v. Walker, 57 Ill. 2d 512, 315 N.E.2d 9 (1974). Stein v. Howlett, 52 Ill. 2d 570, 289 N.E.2d 409 (1972), *cert. denied*, 412 U.S. 925 (1973); Montgomery County v. Walsh, 274 Md. 502, 336 A.2d 97 (1975); Fritz v. Gorton, 83 Wash. 2d 275, 517 P.2d 911 (1974), *appeal dismissed*, 417 U.S. 902 (1974).

95. Illinois State Employees Ass'n v. Walker, 57 Ill. 2d 512, 315 N.E.2d 9 (1974).

96. *Id.* at 526, 315 N.E.2d at 16-17.

97. *Id.*

98. Reference to the privacy issues associated with the collection of financial information was made in a recent United States Supreme Court Case. California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974) (Powell & Blackmun, JJ., concurring). In *California Bankers* the Court, in a six-to-three decision, ruled that federal statutes and implementing regulations requiring financial institutions to report domestic currency transactions over $10,000, and individuals to report foreign currency transactions over $5,000, did not violate the Fourth Amendment rights of those reporting the information. A con-

to collection and dissemination of various types of administrative data have been made within the last decade. Courts have been unsympathetic to attacks on laws mandating the fingerprinting of stockbrokers,[99] mental patients,[100] realtors[101] and gun dealers and transporters.[102] Similarly, regulations requiring that social security numbers be submitted as a condition of obtaining a license to drive[103] and to practice law[104] have been upheld. As to the question of improper dissemination, at least two courts have held that the sale of motor vehicle registration records to private parties does not violate the right of privacy.[105]

C. Emerging Principles

As the foregoing discussion has illustrated, informational privacy questions cut across a wide variety of governmental agencies, records and data collection practices. Moreover courts are in disagreement as to when the right of informational privacy even exists. The danger of mixing apples with oranges while formulating constitutional standards in this area should not be taken lightly. Some courts have tended to equate the right of individual autonomy protected in *Griswold* and *Roe* with the right of informational privacy,[106] but the interests underlying the two rights are, of course, different.[107] When courts do equate the

curring opinion by Justice Powell, joined by Justice Blackmun, however, cautioned that an extension of the regulations would raise "difficult constitutional questions." *Id.* at 78. In their view, "[a]t some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy." *Id.* at 79. Whether Justice Powell was referring to the type of privacy protected by the First or Fourth Amendment or to the general constitutional right of privacy is not clear. The ambiguity in the opinion, however, leaves the impression that any or all of the above constitutional guarantees might apply depending on the circumstances of the case.

99. Thom v. New York Stock Exchange, 306 F. Supp. 1002 (S.D.N.Y. 1969), *aff'd sub nom.* Miller v. New York Stock Exchange, 425 F.2d 1074 (2d Cir.), *cert. denied,* 398 U.S. 905 (1970).

100. Winters v. Miller, 446 F.2d 65 (2d Cir. 1971).

101. Hamilton v. New Jersey Real Estate Comm'n Dep't of Ins., 117 N.J. Super. 345, 284 A.2d 564 (1971).

102. Burton v. Sills, 99 N.J. Super. 516, 240 A.2d 462 (1967).

103. Conant v. Hill, 326 F. Supp. 25, 26 (E.D. Va. 1971) (citing a previous unpublished decision Conant v. Hill, Civil No. 609-70-R (E.D. Va. Mar. 17, 1971).

104. Cantor v. Supreme Court of Pennsylvania, 353 F. Supp. 1307 (E.D. Pa. 1973).

105. Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880 (S.D.N.Y. 1967) (claim that dissemination violated right of privacy found insubstantial where information was neither vital nor intimate but rather in the category of public record); Chapin v. Tynan, 158 Conn. 625, 264 A.2d 566 (1969) (per curiam opinion not discussing reasons for sustaining lower court's dismissal of an action for an injunction restraining the commissioner of motor vehicles from selling licensing information).

106. *See, e.g.,* Merriken v. Cressman, 364 F. Supp. 913, 917-18 (E.D. Pa. 1973); Davidson v. Dill, 180 Colo. 123, 131, 503 P.2d 157, 161 (1972).

107. See text accompanying notes 38-46 *supra.*

right of informational privacy with the right of individual autonomy, they commit serious error. Individual autonomy is likely to be restricted to a narrow range of situations dealing with home, family and procreation.[108] Confusion of the two rights may result in decisions similarly restricting the right of informational privacy. This would be unfortunate, since the collection of highly personal information unrelated to home, family and procreation may, nevertheless, involve risk of substantial harm to the individual.

As with the right of individual autonomy, the locus of the right of informational privacy is far from clear. The right would seem to lie somewhere between "liberty" protected by the Fourteenth Amendment and the penumbra of the Bill of Rights. Perhaps its ultimate resting place will be an expansion of the guarantees of the Fourth Amendment.[109] Identifying the precise origins of the right, however, may be

108. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65 (1973).

109. *See* Nixon v. Sampson, 389 F. Supp. 107 (D.D.C. 1975), *entry of order stayed sub nom.* Nixon v. Richey, 513 F.2d 427 (D.C. Cir. 1975); HUFSTEDLER, *supra* note 12, at 26. The unique controversy in *Sampson* involved the ownership of and access to former President Richard M. Nixon's tapes and papers. Mr. Nixon sought an order from the federal district court requiring the federal government to comply with the terms of an agreement concluded shortly after Mr. Nixon left office between Mr. Nixon and Arthur F. Sampson, Administrator of the General Services Administration. The agreement provided for transfer to Mr. Nixon of various tapes and papers of his administration left behind in the course of Mr. Nixon's extraordinary departure from the White House. The special prosecutor, an intervenor-defendant, counterclaimed against Mr. Nixon for declaratory relief asserting the right to access to the president's tapes and papers pursuant to an agreement concluded between the special prosecutor and President Ford on November 9, 1974. Mr. Nixon contended that the November 9th agreement providing the special prosecutor with access violated the Fourth Amendment's prohibition against unreasonable searches and seizures. The court, however, held that the tapes and papers were government property in the government's possession, and therefore, any examination by the special prosecutor pursuant to the November 9th agreement did not violate Mr. Nixon's right to be free from unreasonable searches and seizures. *Id.* at 154-55. The court, nevertheless, held that Mr. Nixon had a right to privacy under the Fourth Amendment with respect to his personal papers and conversations which were intermingled with official tapes and papers. *Id.* at 156-57. In accordance with its holding, the court announced various procedures for the segregation of Mr. Nixon's personal materials from his official papers and tapes and the restriction of government access to the latter. The details of those procedures are of no particular concern to this discussion, but the court's views on the Fourth Amendment are. Its holding is a departure from the theory that there is no Fourth Amendment protection of privacy where there is no unlawful search and seizure. See text accompanying notes 17-27 *supra.* The court's decision implies an independent right of information privacy existing within the guarantees of the Fourth Amendment. In the midst of this litigation, Congress passed the Presidential Recordings and Materials Act, PUB. L. No. 93-526, 88 Stat. 1695 (1974). The act provides for government custody of Mr. Nixon's tapes and papers, and requires the Administrator of the General Services Administration to promulgate regulations to insure the protection of the materials and to specify procedures for access to them. The act also specifies that the regulations shall be formulated with the objective of transferring to Mr. Nixon those presi-

less important than clarifying its meaning, since an abridgement of the right of informational privacy may arise any time personal information is collected, maintained or disseminated.

1. *Improper Collection*

Official collection of information which is unrelated, or only tangentially related to a legitimate governmental function, may violate an individual's privacy rights.[110] Specific examples of improper collection have been shown by *White v. Davis*[111] (involving alleged indiscriminate recording by police of college activities) and *City of Carmel-By-The-Sea v. Young*[112] (involving overly broad collection of financial information for conflict of interest purposes). Moreover, although information may be related to a legitimate governmental function when it is first collected, after a period of time it may be of no use to the collecting agency. In such a case retention of the information would logically violate an individual's right of privacy to the same degree that it would if the information did not have any legitimate use in the first place.[113]

2. *Improper Maintenance and Storage*

Even if information is relevant to governmental functions, its improper maintenance and storage may be constitutionally offensive if the

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dential materials which neither have historical significance nor pertain to the Watergate incident. When the act became effective Mr. Nixon brought a second suit challenging its implementation. N.Y. Times, Jan. 8, 1976, at 1, col. 1 (city ed.). Subsequently, the court of appeals stayed the district court's order implementing *Nixon v. Sampson* until a three-judge court could decide whether the Presidential Recordings and Materials Act was constitutional. Nixon v. Richey, 513 F.2d 427 (D.C. Cir. 1975). The three-judge court issued its decision just prior to the printing of this note. It unanimously upheld the act, but left open the question of whether Mr. Nixon owned the materials prior to the effective date of the Act. N.Y. Times, Jan. 8, 1976, at 1, col. 1 (city ed.). The court held that although Mr. Nixon had a reasonable expectation of privacy, the act's infringement of such expectation of privacy was reasonable under the circumstances, particularly in view of its provision reserving to Mr. Nixon the sole custody and use of purely personal papers and tapes.

110. *Cf.* Shelton v. Tucker, 364 U.S. 479, 488 (1960).

111. 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).

112. 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970).

113. *Cf.* DeGregory v. Attorney General of New Hampshire, 383 U.S. 825, 828-29 (1966) (referring to the "staleness" of information as a consideration for justifying refusal by an individual to provide a legislative committee with information on his earlier involvement with the Communist Party). Experts consider it to be a desirable information system practice to either remove from active files (purge) or to destroy dated information which may be misleading. *See, e.g.*, NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON THE CRIMINAL JUSTICE SYSTEM 105-07 (1973) (recommended purging of criminal histories within 5 and 10 year periods depending upon seriousness of the crime).

agencies possessing the information do not establish adequate safeguards for preserving the confidentiality of the information.[114] Professor Charles Fried has written: "privacy is not just an absence of information abroad about ourselves; it is a feeling of security in control over that information."[115] In *Shelton v. Tucker*,[116] the Supreme Court cited lack of adequate security as a reason for holding unconstitutional a statute requring teachers to file with the appropriate hiring authority a list of every organization to which they belonged:

> The statute does not provide that the information it requires be kept confidential. Each school board is left free to deal with the information as it wishes. The record contains evidence to indicate that fear of public disclosure is neither theoretical nor groundless.[117]

Among necessary safeguards for preserving confidentiality would be regulations or legislation restricting access to information and providing appropriate sanctions against those officials who intentionally or negligently permit unauthorized access. It is even conceivable that in certain cases an individual may have a right to insist on certain minimum physical security procedures such as computer programming safeguards and restricted points of entry to areas where files are kept.[118]

3. *Improper Dissemination*

If rights of informational privacy may be infringed by improper collection and maintenance of personal information, obviously overly broad dissemination of such information would also constitute an infringement.[119] Improper dissemination may occur any time informa-

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114. *See* Roe v. Ingraham, 480 F.2d 102, 108 (2d Cir. 1973); State v. Jacobus, 75 Misc. 2d 840, 846, 348 N.Y.S.2d 907, 913 (Sup. Ct. 1973).

115. Fried, *Privacy*, 77 YALE L.J. 475, 493 (1968).

116. 364 U.S. 479 (1960).

117. *Id.* at 486 (footnotes omitted).

118. *See, e.g.*, J. MARTIN & A. NORMAN, THE COMPUTERIZED SOCIETY 481-88 (1970), for a discussion of possible minimum safeguards.

119. The right to restrict dissemination of personal information may sooner or later collide with an emerging constitutional right of the public and press to have access to governmental information. *See generally* Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505 (1974). The right to informational privacy may also conflict with the statutory rights of access to personal information created under state or federal freedom of information acts. *See, e.g.*, Rose v. Department of Air Force, 495 F.2d 261, 267-68 (2d Cir. 1974) (Air Force Academy officials need not turn over case summaries of honor code violations to law review researchers without a prior in camera judicial inspection of the summaries for the purpose of insuring against a violation of privacy); Wine Hobby, USA, Inc. v. United States Bur. of Alcohol, 363 F. Supp. 231, 237 (E.D. Pa. 1973) (release of names of individuals permitted to produce wine for family use to a wine equipment distributor does not violate the constitutional right of privacy).

tion is transmitted to persons who do not possess a "need-to-know" related to a legitimate government function.[120] This is particularly true when information is transmitted for a private rather than a public purpose. The circulation by the police of an assault victim's nude photographs by police in *York v. Story*[121] provides a blatant example. Improper dissemination may also occur whenever the information is provided to persons who are likely to misuse the information either negligently or intentionally. The transmission of psychological records to untrained school personnel in *Merriken v. Cressman*[122] illustrates the problem.

It is likely that courts in the future will be confronted with objections to the dissemination of personal information from one government agency to another. In a recent case,[123] an individual sought damages for violation of his right to privacy as a result of a computer comparison of persons receiving veterans disability benefits with those receiving social security benefits. The plaintiff who received both types of payments incurred a drastic but lawful reduction in his disability pension as a result of the findings of the cross-comparison. The court held that no violation of the individual's right of privacy occurred, but also observed:

> What we have said *supra* is not intended to minimize the problems presented by the interagency transfer of information within the federal government. Nor do we suggest that a constitutional right of privacy might not be found to exist and appropriate relief granted in instances where the government is possessed of highly personal and confidential information which has been given under compulsion of law and with an expectation of privacy and where the disclosure of such information is unnecessary for the advancement or inconsistent with the fundamental purposes for which the data was obtained. Rather, we hold only that, on the facts of this case, Mr. Jaffess has not been deprived of any constitutionally secured privacy right.[124]

D. Fundamental Rights and Sensitive Information

In *Roe* v. *Wade*[125] the United States Supreme Court held that

120. See text accompanying notes 123-24 *infra.*

121. 324 F.2d 450 (9th Cir. 1963), *cert. denied,* 376 U.S. 939 (1964).

122. 364 F. Supp. 913 (E.D. Pa. 1973).

123. Jaffess v. Secretary, Dep't of Health, Ed. & Welf., 393 F. Supp. 626 (S.D.N.Y. 1975).

124. *Id.* at 629-30.

125. 410 U.S. 113, 152-56 (1973). In certain informational privacy decisions where the plaintiff has been successful, a fundamental rights test requiring a compelling state interest has been employed. City of Carmel-By-The Sea v. Young, 2 Cal. 3d 259, 268, 466 P.2d 225, 232, 85 Cal. Rptr. 1, 8 (1970); Eddy v. Moore, 5 Wash. App. 334, 345, 487 P.2d 211, 217 (1971). *See also* Roe v. Ingraham, 480 F.2d 102, 109 (2d Cir. 1973); Merriken v. Cressman, 364 F. Supp. 913, 918 (E.D. Pa. 1973); Davidson v. Dill, 180 Colo. 123, 131, 503 P.2d 157, 161 (1972). Other courts have not used the compel-

privacy was a fundamental right requiring a compelling state interest to justify intrusion by the government. Justice Rehnquist, dissenting, declared that the Court's holding amounted to a return to substantive due process, a legitimation of judicial lawmaking.[126] The justice's concern is understandable. The fundamental rights doctrine is a potentially powerful tool for judicial intervention since it inevitably involves the conscious weighing of competing factors in a manner similar to that of a legislative body. It shifts the burden of persuasion from the individual to the government and requires legislatures to employ the least drastic means in achieving its objectives.[127] Originally forged in equal protection cases,[128] the doctrine was transplanted in *Roe* to the due process clause of the Fourteenth Amendment.[129] Concern over its potential scope influenced the Court in *San Antonio Independent School District v. Rodriguez*[130] to caution against overly broad interpretations:

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.[131]

Whatever the ultimate scope of the fundamental rights doctrine, *Roe* v. *Wade* assures its inevitable invocation whenever privacy interests are the subject of litigation. The prohibitions contained in the First, Fourth and Fifth Amendments indicate the high priority placed on limiting governmental informational gathering in the American political system.[132] A strong argument, therefore, can be made that the right to control highly personal information is a fundamental right implicitly guaranteed by the Constitution.

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ling state interest test, although they have employed close judicial scrutiny of some kind. *See, e.g.*, United States v. Hudson, 103 Wash. Law Rptr. 377 (D.C. Super. Ct. 1975).

126. Roe v. Wade, 410 U.S. 113, 173-75 (1973).

127. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 637 (1969). The origins of the fundamental rights doctrine may be traced to Supreme Court decisions suggesting that stricter standards of review are appropriate where certain basic rights are involved. For example, in *Shelton v. Tucker*, 364 U.S. 479, 488 (1960), a case involving associational privacy, the Supreme Court declared: "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

128. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

129. Roe v. Wade, 410 U.S. 113, 153 (1973).

130. 411 U.S. 1 (1973).

131. *Id.* at 33-34.

132. See text accompanying notes 12-47 *supra.*

In precisely what situations should courts apply the fundamental rights test? There is little specific guidance from the Supreme Court on this question. One answer to this question would be to assume that privacy of whatever type is a fundamental right. Proceeding on this broad assumption could create severe practical problems. There are many areas where the collection and dissemination of information is useful to officials, but not necessarily justifiable by a compelling state interest. Should a police officer, for example, be required to demonstrate a compelling state interest when he asks the name and address of a person in the course of an investigation of a suspicious incident?[133]

A second approach would be to consider as fundamental only those informational privacy questions arising in areas which the court has already indicated are within the zone of general constitutional privacy—"the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing."[134] The disadvantage to this approach is that it would likely exclude other types of information deserving an equally high level of protection, such as certain criminal justice and medical information.[135]

A third and perhaps the most preferable approach would be to recognize that *Roe* dealt with a matter—the decision to have an abortion—which many people would be reluctant to discuss even with their closest friends, let alone a public official. It may be that informational privacy rises to a fundamental right only whenever equally personal or sensitive matters are involved.[136]

While it is beyond the scope of this note to detail what information should be labeled sensitive, it is possible to suggest a general standard. Sensitive information is that which a person desires to keep private and which, if disseminated, would tend to cause substantial concern, anxiety or embarrassment to a reasonable person.[137] Although persons will

133. *See* Township of East Brunswick v. Malfitano, 108 N.J. Super. 244, 260 A.2d 863 (1970) (holding that the constitutional right of privacy does not justify a trespasser's refusal to answer a police inquiry concerning his name and address).

134. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65 (1973).

135. See text accompanying notes 48-77 *supra.*

136. Note, *Constitutional Right of Privacy and Investigative Consumer Reports: Little Brother Is Watching You,* 2 HAST. CONST. L.Q. 773, 792-97 (1975) (argument that the constitutional right of privacy protects against disclosure of "personal" information in credit reports).

137. *Cf.* W. PROSSER, LAW OF TORTS §§ 111, 117 (4th ed. 1971). The Supreme Court, of course, has already recognized the utility in distinguishing certain types of information from others. For example, in *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971), the Court required a hearing where stigmatizing information is publicly disseminated. For those questioning the propriety of an objective standard, it should be noted that the Supreme Court has employed similar standards in resolving other constitutional issues. *See, e.g.,* Miller v. California, 413 U.S. 15 (1973); Katz v. United States, 389 U.S. 347 (1967).

differ on the meaning of sensitive, general classification according to the degree of sensitivity is not an impossible task. Presumably included within this standard would be information relating to those intimate matters already identified by the Supreme Court as coming within the zone of general constitutional privacy.[138] Also included as sensitive information would be certain types of medical, psychological and criminal justice information.[139] Excluded would be much of what has been earlier in this note labeled as administrative information,[140] such as the existence of a driver's license or a passport. Whether financial information would be considered sensitive should depend upon how complete and detailed was the statement of a person's economic affairs.[141]

The sensitivity of information would, therefore, determine whether challenged collection, maintenance or dissemination by public agencies would receive strict judicial scrutiny. If information is sensitive, the state should have to show that any infringements of individual rights concerning the information are necessary to promote a compelling governmental interest. If information is nonsensitive, a less restrictive standard of judicial scrutiny could be employed.

The practical effect of applying a compelling state interest test would be to shift the burden to the state to demonstrate that the collection was *essential* to further an interest which the government is constitutionally entitled to promote or protect.[142] But the burden of the state should not end there. It would also have the burden of demonstrating that the information was maintained in such a manner as to minimize the risk of unauthorized access,[143] and that any dissemination

138. See text accompanying notes 38-44 *supra.*

139. See text accompanying notes 48-71 *supra.*

140. See note 3 *supra.*

141. *Cf.* California Bankers Ass'n v. Shultz, 416 U.S. 21, 78 (1974) (Powell & Blackmun, JJ., concurring).

142. In First Amendment right of association cases where a compelling state interest test was employed, various phrases were used to emphasize the high degree of relevancy of disclosure of the information to a state interest. *See, e.g.*, Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 549 (1963) (must be "essential" or have a "crucial relation" to a governmental purpose); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958) (must be a "controlling justification" for the disclosure).

143. See text accompanying note 114 *supra.* One authority lists six levels of potential protection which appear to be applicable to either manual or automated information systems:

1. Protection against accidental disclosure of secure information.
2. Protection from casual entry by unskilled persons.
3. Protection from casual entry by skilled technicians.
4. Protection against entry by persons who stand to gain financially.
5. Protection against well-equipped criminals.
6. Protection against organizations with massive funds.

J. MARTIN & A. NORMAN, THE COMPUTERIZED SOCIETY 481 (1970). Levels 1 through

was essential to further legitimate governmental functions. A criminal justice agency may, for example, find the retention of arrest records of acquitted persons necessary for the compilation of statistics on criminal careers, but if it disseminates the records to employers, or improperly maintains the records so that they are easily accessible to unauthorized persons, the subject's right of privacy may be violated.

In the case of non-sensitive information courts might turn to a more permissive standard—some type of reasonable relationship test.[144] Once a court was satisfied that the state's information-gathering practices—collection, maintenance, dissemination—were reasonably related to a legitimate governmental purpose, its inquiry would end. In other words, collection and dissemination of nonsensitive information which would directly assist in the furtherance of the public interest would be permissible. Even under this looser standard, however, minimum measures would have to be taken by the state to preserve the confidentiality of the information where public disclosure would not be necessary. The tendency of courts in applying the reasonable relationship test in other contexts has been to give only the scantest attention to the question of state interest.[145] Hopefully that would not happen in this area. Inquiry into whether government data processing activities actually further legitimate ends is possible without a usurpation of legislative functions.[146] Courts, need not, and should not, totally defer to unsupported assertions by officials concerning the value and integrity of their systems.

II. A Threshold Problem: The Case or Controversy Requirement

The Supreme Court has construed the case or controversy clause of Article III, section 2 to require that parties seeking relief in the federal courts must have sustained an injury or be in immediate danger of sustaining one.[147] Recent decisions of the Court raise the question of

5 could conceivably be considered as minimal levels of protection for sensitive data requiring fairly sophisticated system safeguards.

144. *See* Nebbia v. New York, 291 U.S. 502, 525 (1934); Note, *On Privacy, supra* note 44, at 772 n.660.

145. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955).

146. The argument by Professor Gunther and others for stricter judicial scrutiny in areas not involving fundamental rights or suspect classifications may be adaptable to the area of informational privacy. Particularly interesting is Gunther's suggestion that courts should actively inquire into whether the government's means (in this case its information systems) *substantially* further legitimate ends. Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 20-42 (1972). *See generally Forum: Equal Protection and the Burger Court*, 2 HAST. CONST. L.Q. 645 (1975). The difficulty with his suggestion, however, is that it may lead to precisely what the critics of substantive due process fear—an unwarranted intrusion into the province of the legislative branch.

147. California Bankers Ass'n v. Shultz, 416 U.S. 21, 56-57 (1974); Laird v. Tatum,

when the collection and dissemination of personal information by the government creates a threat of injury necessary to establish a constitutional case or controversy.[148] In partial answer to this question, the Court has drawn a distinction between situations where the government compels by summons or subpoena the reporting of certain information, and where it simply goes out and collects the information on its own.[149] Where the government requires self-reporting, the individual apparently has standing to contest disclosure.[150] It is in those cases where information is collected from persons or sources other than the individual to whom the information relates that difficulties may occur.

In *Laird* v. *Tatum*[151] the plaintiffs, political activists, sought a permanent injunction against the maintenance of an intelligence gathering system by the United States Army. The information was gathered by army " 'surveillance of lawful and peaceful civilian political activity.' "[152] It "consisted essentially of . . . information about public activities that were thought to have at least some potential for civil disorder . . . ."[153] The principal sources for the information were the news media and publications of general circulation. The information gathered typically contained such data as the identity of speakers, numbers of people in attendance and whether a public disorder occurred. The information was disseminated to various army posts around the country.

The plaintiffs claimed that the recording of their political activities by army agents had a chilling effect on their First Amendment rights. A majority of the United States Supreme Court, unable to see a connection between the mere existence of the system and the alleged chilling effect, held that there was no justiciable controversy. According to the majority opinion, "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm . . . ."[154]

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408 U.S. 1, 13-14 (1972). The requirement of injury is one of several distinct elements needed to establish standing in the federal courts. Note, *Recent Standing Cases and a Possible Alternative Approach*, 27 HASTINGS L.J. 213 (1975).

148. California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974); Laird v. Tatum, 408 U.S. 1 (1972).

149. California Bankers Ass'n v. Shultz, 416 U.S. 21, 55-56 (1974); *see also* Shelton v. Tucker, 364 U.S. 479 (1960).

150. *See* California Bankers Ass'n v. Shultz, 416 U.S. 21, 55-56 (1974).

151. 408 U.S. 1 (1972).

152. *Id.* at 2.

153. *Id.* at 6. Although the majority opinion by Chief Justice Burger discusses no wider dissemination than within the United States Army, in his dissent Justice Douglas asserts that the information was disseminated to various federal agencies and local police departments. *Id.* at 26-27 (Douglas & Marshall, JJ., dissenting).

154. *Id.* at 13-14; *accord*, Davis v. Ichord, 442 F.2d 1207 (D.C. Cir. 1970).

Although decided more than a week after the burglary of the Democratic Party's national headquarters by members of President Nixon's campaign staff, *Laird* remains essentially a pre-Watergate decision. The Court's opinion exhibits an insensitivity to the dangers of unregulated intelligence gathering which might not have been present had the case been decided one or two years later. As Justice Douglas stated in his dissent: "[t]o withhold standing to sue until [one's job is lost] would in practical effect immunize from judicial scrutiny all surveillance activities, regardless of their misuse and their deterrent effect."[155]

Arguably *Laird* is still sound authority for the proposition that the mere compilation and dissemination of data which is publicly available does not pose a severe enough threat to an individual's First Amendment rights to create a justiciable chill. But the *Laird* Court was not faced with a challenge to the collection of highly personal information. In such cases the risk of harm to the subject of the information is appreciably greater.

Laird v. *Tatum* was followed by *California Bankers Association* v. *Shultz*,[156] a case challenging the constitutionality of a federal statute requiring the reporting and maintenance of financial information. The plaintiffs included banks, individual bank customers, the California Bankers Association and the American Civil Liberties Union (ACLU). Specifically, the statute and its implementing regulations required financial institutions to maintain records of customer transactions in excess of $100.[157] The ACLU challenged this requirement on the ground that such recordkeeping threatened the First Amendment rights of its members by exposing the identities of its members and contributors to possible identification by the government. The Court was not receptive. In a six-to-three opinion, it rejected the ACLU claim observing that the records were not in the hands of the government and that the government had made no attempt to compel production of such records.[158] The threat to First Amendment rights, the Court observed, was much less than that presented by the army's intelligence system in *Laird* v. *Tatum*.[159] The statute and the implementing regulations also required banks to report directly to the secretary of the treasury any domestic currency transactions in excess of $10,000.[160] In addition, individuals involved in foreign transactions of over $5,000 were required to report

155. Laird v. Tatum, 408 U.S. 1, 26 (1972) (Douglas & Marshall, JJ., dissenting).

156. 416 U.S. 21 (1974); Note, *California Bankers Ass'n v. Shultz: An Attack on the Bank Secrecy Act*, 2 HAST. CONST. L.Q. 203 (1975); *see also* notes 91-94 *supra*.

157. California Bankers Ass'n v. Shultz, 416 U.S. 21, 32 (1974).

158. *Id.* at 55-57.

159. *Id.* at 56-57.

160. *Id.* at 39.

similar information themselves.[161] The Court sidestepped depositor's challenges to these requirements by noting that they had not shown that they actually engaged in transactions which would be required to be reported.[162] Consequently, the Court concluded that the depositors had not presented a concrete controversy for adjudication.[163] By so holding, the Court appears to require, as an element of standing, specific allegations demonstrating that the government possesses, or will possess, information relating to the plaintiff.

A. The View from the Lower Courts

Admittedly, one possible interpretation of the Supreme Court's decisions in *Laird* and *California Bankers* is that regardless of who is holding information or what the nature of the information is, its mere collection is not sufficient to create a justiciable case or controversy.

Support for this exceedingly broad interpretation is found in a federal court of appeals decision, *Finley v. Hampton*.[164] In *Finley* a government employee brought an action against members of the Civil Service Commission and the secretary of the Department of Health, Education and Welfare to have expunged from his personnel file a statement that "two of his associates had 'homosexual mannerisms.' "[165] The employee could not show that he had suffered any pay or grade impairment as a result of the information, although his job was reclassified as nonsensitive following the collection of the information. Citing *Laird* v. *Tatum* as authority, the court held that there was no justiciable controversy because no threat of specific future harm resulted from the file's existence. The court noted that allegations of a subjective chilling effect on First Amendment rights of association were not an adequate substitute for "threat[s] of specific future harm."[166] *Finley* represents a significant extension of the case or controversy limitation. Unlike *Laird* or *California Bankers*, the information involved was highly personal containing not only a distinct chilling effect on First Amendment rights of association but also a threat to personal privacy. The information was not in the hands of a private agency such as a bank with a profit incentive to keep it confidential, nor in the hands of a government agency with no legal ability to apply sanctions or rewards to the subject of the file; instead the information was contained in the personnel file of the agency employing the plaintiff.

161. *Id.* at 35.
162. *Id.* at 68, 76.
163. *Id.*
164. 473 F.2d 180 (D.C. Cir. 1972).
165. *Id.* at 182.
166. *Id.* at 185.

Curiously, the same court ruled to the contrary two years later in *Menard v. Saxbe*,[167] a case involving arrest records. The plaintiff in that case had been arrested for burglary and subsequently released by the Los Angeles Police Department. The record of his arrest and his fingerprints were forwarded to the Federal Bureau of Investigation. Menard brought an action to have the arrest record maintained by the FBI expunged. The court of appeal held that Menard had standing to sue, stating that although, "Menard cannot point with mathematical certainty to the exact consequences of his criminal file, we think it clear that he has alleged a 'cognizable legal injury.' "[168]

Is there a logical, factual distinction to be made between the *Menard* and *Finley* decisions—between an arrest record and a personnel record implying that an employee is a homosexual? The answer lies in the original question articulated in *Laird* v. *Tatum*: is there a "claim of specific present objective harm or a threat of specific future harm?"[169] The threat of specific future harm would seem to be as great, if not greater, from the personnel record as from the arrest record. Certainly it can be argued that the adverse economic and psychological consequences are likely to be similar in nature. Yet the court made no attempt to reconcile the *Menard* and *Finley* decisions.

B. Defining a Cognizable Legal Injury

In discussing what constitutes a cognizable legal injury or harm courts have emphasized an identifiable loss (either actual or imminent) of tangible benefits. Courts have found no difficulty in finding a constitutional case or controversy where a person loses a job or some other equivalent benefit as the result of the dissemination of personal information.[170] Similarly, any public disclosure of personal information injurious to one's reputation is likely to provide the subject of the information with standing.[171] But there is a practical problem with limiting the definition of harm to situations where the effect of the information can be directly traced. Once potentially damaging information is in the hands of government officials, it may result in decisions of which the subject may never have knowledge.[172] It is impossible for

167. 498 F.2d 1017 (D.C. Cir. 1974).

168. *Id.* at 1023; *see also* Paton v. LaPrade, D.C. Civil No. 1091-73 (3d Cir., October 14, 1975).

169. Laird v. Tatum, 408 U.S. 1, 14 (1972).

170. *Id.* at 11-12. *See also* Socialist Workers Party v. Attorney General, 419 U.S. 1314 (Marshall, Cir. J., 1974); Handschu v. Special Services Division, 349 F. Supp. 766 (S.D.N.Y. 1972).

171. Philadelphia Yrly. Meet Rel. Society of Friends v. Tate, 519 F.2d 1335 (3d Cir. 1975) (disclosure by city officials over national television that plaintiff was the subject of a police intelligence file is actionable).

172. In one case, a New York Port Authority police detective was observed partici-

an individual to monitor all of the uses of personal information in the hands of public officials.

> On a given person there may be upwards of 100 files maintained in various organizations. These range in visibility from those in which data gathering, use and sharing goes on completely behind closed doors (*e.g.*, intelligence files) to those in which the individual has some knowledge about content and use but little, if any, knowledge about the data sharing which goes on from his file (as in the case of a bank which routinely shares its account experience information with credit bureaus).[173]

When consideration is given to the secondary and tertiary uses of personal information systems, the need for a flexibile definition of harm is easily recognized. The simplest path for the courts to take would be to declare that there is a threat of immediate harm any time public officials possess information which an individual has sought to keep reasonably private. Neither *Laird* nor *California Bankers Assocation* would necessarily bar such an approach. Its utility is readily apparent. It would permit challenges to information before any adverse social or economic consequences could flow from its use or disclosure. The individual need not identify or trace actual adverse effects resulting from the dissemination and use of the information. As a practical matter, however, any extensive broadening of the definition of harm might not be acceptable to the present Court with its rather narrow view on the question of standing.[174] Fear of frivolous suits by a conservative judiciary would pose a significant obstacle to a more permissive definition.

As a second alternative, therefore, plaintiffs in appropriate situations might attempt to employ the distinction between sensitive and nonsensitive information discussed earlier.[175] The distinguishing characteristic of sensitive information as defined in the note is that its public dissemination would tend to cause substantial concern, anxiety or embarrassment to a reasonable person.[176] This characteristic alone raises the threat of harm to a legally cognizable level. The mere fact of collection of sensitive information may involve an inhibiting effect on personal creativity and spontaneity, and create personal anxiety. Legally cognizable harm should be presumed to exist any time sensitive

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pating in picketing out of uniform for higher wages. Despite a satisfactory employment rating, one of his superiors placed a comment in his personnel file indicating that the detective was an irresponsible commander. When the detective retired a few years later, he experienced serious difficulty in obtaining employment because his file had been widely circulated outside the Port Authority. J. RAINES, ATTACK ON PRIVACY 15 (1974).

173. Baker, *Record Privacy as a Marginal Problem: The Limits of Consciousness and Concern*, 4 COLUM. HUMAN RIGHTS L. REV. 89, 92 (1972).

174. *See generally* Note, *Recent Standing Cases and a Possible Alternative Approach*, 27 HASTINGS L.J. 213 (1975).

175. See text accompanying notes 137-41 *supra.*

176. See text accompanying notes 7-9 *supra.*

information is collected by public officials, unless it has been already voluntarily disseminated to the public by the person to whom it refers. The above test would avoid such patently unjust results as found in *Finley v. Hampton.*[177] Yet it also presents a compromise to those on the Court who express concern over a highly liberalized standing policy.

III. Conclusion

Several key generalizations have been emphasized in various portions of this note. First, although the overlap is inevitable, the right of informational privacy is analytically separate from other constitutionally recognized privacy rights. Second, the potential for infringment upon an individual's informational right of privacy exists whenever the government collects, maintains or disseminates information. Third, whether informational privacy is elevated to a fundamental right depends primarily upon whether the information in question is considered sensitive. Fourth, an individual's standing to enforce his right in federal courts requires a flexible definition of the harm needed to establish a justiciable case or controversy.

The informational privacy issues raised in this note are not likely to be resolved quickly or easily. As the problems of an urbanized America assume new dimensions, the demands for detailed personal information are likely to increase. For the purpose of meeting these demands, the physical, behavioral and biological sciences are developing new techniques to gather, process, classify and transmit highly sensitive data.[178] It would be reassuring to know as we move to a post-industrial society that we have not left basic constitutional principles behind.

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177. 473 F.2d 180 (D.C. Cir. 1972). *See also* text accompanying notes 164-66 *supra.* An alternative approach may be suits in state courts. Plaintiffs in states having less restrictive doctrines of standing may be able to circumvent federal standing requirements by making their claims in state courts. *See* White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).

178. *See, e.g.,* Ausubel, Beckwith & Janssen, *The Politics of Genetics Engineering: Who Decides Who's Defective?,* 8 PSYCHOLOGY TODAY 30, 38 (June 1974) (reporting proposal by certain public officials that males with specific "criminal" chromosomes be registered at birth); Wilson, *Computerization of Welfare Recipients: Implications for the Individual and the Right to Privacy,* 4 RUTGERS J. COMPUTERS & L. 163, 165 (1974) (trend toward computerized welfare data banks on city-wide and regional basis); San Francisco Sunday Examiner & Chronicle, Nov. 9, 1975, § A, at 21, col. 1 (controversy over mental health screening accompanying free medical test given to poor families).