CONSTITUTIONAL RIGHT OF PRIVACY AND INVESTIGATIVE CONSUMER REPORTS: LITTLE BROTHER* IS WATCHING YOU

*by Marsha Morrow McLaughlin and Suzanne Vaupel***

I. The Problem

A. Introduction

Mr. X was on his way to a promising career in sales. He was hired by a large manufacturing firm after he scored higher than anyone had ever scored on the battery of intelligence and aptitude tests. His good recommendations and successful interview had assured him success. Suddenly everything turned sour. His manager asked him repeatedly "Why don't you come clean?" and began expressing obvious lack of confidence in Mr. X's character. After several months of pressure, Mr. X resigned. He was interviewed at numerous other large companies and was always told he was a fine candidate and would probably be hired. But the offers never came. After six years, Mr. X discovered a preemployment report on himself in the files of a consumer investigating agency. The report stated that he had been dishonorably discharged from the army and that six years earlier he had hosted a wild party and had verbally abused an elderly lady who had complained about the noise. In reality, Mr. X had received an honorable discharge. The elderly lady whom he was supposed to have abused lived in the apartment directly beneath him and was a known crank. She had often made unreasonable demands, insisting one time that Mr. X and his wife keep their shoes off when in their own apartment.[1]

Mr. X had been a victim of adverse decisions based on false information in an investigative consumer report.[2] These reports are

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* "'Little Brother' is the hard-to-reach private organization that determines whether or not you are a good retail credit risk." Safire, *Three Brothers* (essay), N.Y. Times, Jan. 10, 1974, at 37, col. 5.

** Members, second year class.

1. *Hearings on H.R. 16340 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 91st Cong., 2d Sess., at 78-81 (1970).

2. "The term 'investigative consumer report' means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal

often part of a routine investigation of an applicant's reliability for credit, insurance or employment, and they involve personal information which is often inaccurate or irrelevant to the purposes for which the reports are made. These reports, like the less damaging consumer reports,[3] are made by consumer reporting agencies. In order to make informed decisions, businesses have become increasingly dependent on their services. Consumer reporting has emerged as a multimillion dollar industry with files on a vast number of Americans.[4]

This note will focus on investigative consumer reports as an invasion of the constitutional right of privacy. Part II will discuss judicial remedies for the resulting harm. Part III will evaluate existing legislative controls and will propose principles necessary to prevent the privacy-invading aspects of investigative consumer reports.

B. Privacy and "Information Prisons"

The concept of privacy has been considered at great length in

characteristics or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information." Fair Credit Reporting Act § 1681a(e), 15 U.S.C. § 1681 (1970) [hereinafter cited as 15 U.S.C. § 1681].

3. "The term 'consumer report' means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. . . ." 15 U.S.C. § 1681a(d).

4. OPERATING STATISTICS FOR 5 LARGE INVESTIGATIVE REPORTING FIRMS

Company	Number of files, 1972	Total Number of investigative reports, 1972	Insurance reports, 1972	Credit reports, 1972	Employment reports, 1972	Inspector man-years, 1972	Consumer interviews since April 1971
Retail Credit	46,000,000	13,731,049	12,537,328	152,437	1,041,284	(1)	135,662
Service Review	50,000	3,396,812	3,375,889	(2)	20,923	738	(1)
Hooper-Holmes	2,500,000	1,443,661	1,368,439	25,734	49,488	361	5,708
O'Hanlon	4,000,000	492,298	492,298	(2)	(2)	(1)	1,299
American Service Bureau	1,970,000	784,379	781,241	(2)	3,138	1,160	980
Total	54,520,000	19,848,199	18,555,195	178,171	1,114,833		

[1] Not available.
[2] Negligible.
Source: Data submitted to Subcommittee on Consumer Credit by each firm.

Hearings on S.2360 Before the Subcomm. on Consumer Credit of the Senate Comm. on Banking, Housing and Urban Affairs, 93rd Cong., 1st Sess., at 886 (1973) [hereinafter cited as *1973 Proxmire Hearings*].

Retail Credit Company [hereinafter Retail Credit], the largest of these firms, claims to make 35 million reports each year. Retail Credit employs more than 11,300 full-time salaried people, in more than 2,000 localities across the continent. Retail Credit Company, *What We Do & Do Not Do*, Form 15869, June, 1972.

The total value of Retail Credit has been estimated to be $40 million. Yearly profits are about $9 million. Roemer v. Retail Credit Co., 44 Cal. App. 3d 926, 937, 119 Cal. Rptr. 82 (1975).

philosophical, psychological and sociological contexts. Professor Charles Fried of Yale has defined privacy as "the necessary context for relationships which we would hardly be human if we had to do without —the relationships of love, friendship and trust."[5] Privacy is not simply the hiding of unsavory facts about one's self; "rather it is the *control* we have over information about ourselves."[6] If that control is taken away, the individual loses a significant aspect of his or her humanity. Privacy, therefore, is an essential sociological phenomenon which allows a person to explore himself, let down his defenses and express his innermost feelings.

The twentieth century has seen individual privacy increasingly abused by modern information-gathering techniques, of which wiretaps, bugging devices and the polygraph are only a few. Additionally, the computer now can be used to file and store great quantities of data.[7]

While the gathering of separate facts can be annoying, information systems which collect unrelated and seemingly insignificant facts are more serious invasions of privacy.[8] Senator Sam Ervin referred to information systems as " 'information prisons' in which the individual is forever contsrained by his past words and actions."[9] Justice Douglas graphically described this increasing governmental use of personal information files:

> We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from

5. Fried, *Privacy*, 77 YALE L.J. 475, 484 (1968) [hereinafter cited as Fried]. *See also*, A. MILLER, THE ASSAULT ON PRIVACY 40-53 (1st ed. 1971) [hereinafter cited as MILLER]; A. WESTIN, PRIVACY AND FREEDOM 8-63 (1st ed. 1967) [hereinafter cited as WESTIN]; Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964) [hereinafter cited as Bloustein].

6. Fried, *supra*, note 5, at 482.

7. It will soon be technically feasible to store a twenty page dossier on every single American on a piece of tape less than 5,000 feet long. 120 CONG. REC. S1296 (daily ed. Feb. 5, 1974) (remarks of Senator Ervin).

Retail Credit bragged of the centralization of its credit bureau computer functions. "Now a customer, regardless of location can secure information in about 2½ seconds." Retail Credit Company Management Newsletter, Sept. 1971. *See also* MILLER, *supra* note 5, at 83-105.

8. "The maxim that 'knowledge is power' takes on new meaning in an age of computers. Data banks of personal information bestow on youthful indiscretions an embarrassing permanence. . . ." 106 SCIENCE NEWS 296 (1974). *See generally* MILLER and WESTIN, *supra* note 5. A survey of fifty federal agencies revealed the existence of 750 databanks of personal files. The Office of Emergency Preparedness (OEP) reported the existence of what Senator Ervin termed "the ultimate in governmental data banks." This databank contains files on approximate 5,000 individuals. Short of emergency circumstances however, the OEP does not have access to the databank, nor does it know what information is contained therein. The databank is utilized and kept current by authorized specialists in the Personnel Operation staff of the White House. 119 CONG. REC. S15471 (daily ed. Aug. 2, 1973) (remarks of Senator Ervin).

9. *Id.* at S15472.

> government. The aggressive breaches of privacy by the Government increase by geometric proportions. Wiretapping and "bugging" run rampant, without effective judicial or legislative control.
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> . . . The dossiers on all citizens mount in number and increase in size. Now they are being put on computers so that by pressing one button all the miserable, the sick, the suspect, the unpopular, the offbeat people of the Nation can be instantly identified. . . . These examples and many others demonstrate an alarming trend whereby the privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps. Taken individually, each step may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen—a society in which government may intrude into the secret regions of man's life at will.[10]

The private sector also collects and maintains pervasive personal information systems. One writer described the personnel practices of government and large-scale corporate enterprises as "contemporary tendencies in the direction of stripping the individual naked of his human dignity by exposing his personal life to public scrutiny."[11]

C. Abuses of Investigative Credit Reporting

Of all the personal information systems being kept, the files of credit bureaus are among the most potentially harmful, since decisions based on this information control nearly every aspect of a person's economic activity.

Credit reports fall into two categories: the file operation and the investigative operation.[12] File operations are limited to factual information easily subject to verification, such as name, residence, employment, financial and public record data.[13] Investigative operations supply this hard data, but their reports also contain subjective information concerning the applicant's character, general reputation, mode of living and associates. This information is obtained from neighborhood checks and personal interviews with neighbors, friends, associates and others who may have information on the applicant. Investigative reports consist of value judgments and interpretations of the tenor of the interview, the type of neighborhood in which the applicant resides and

10. Osborn v. United States, 385 U.S. 323, 341-43 (1966) (Douglas, J., dissenting).

11. Bloustein, *supra* note 5, at 1006.

12. *1973 Proxmire Hearings, supra* note 4, at 956.

13. The vast majority of credit reporting agencies are file operators. John Spafford, president of Associated Credit Bureaus, testified that 98% of the members of A.C.B. are strictly concerned with credit reporting. *Hearings on S.823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong., 1st Sess., at 162 (1969).

the condition of his home. Users of these reports, chiefly insurance companies, employers and landlords, request that investigative reports contain as much personal information as possible. One individual who has studied the consumer reporting industry concluded that:

> [T]he need for character, habits, morals information—reputational information—has not been established by any systematic study of the situation . . . .
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> They work on sort of a Gestalt theory that the more information they have about an individual, the better able they will be to rate that individual in terms of the risk he presents to the company. . . .[14]

The subjectivity of these reports leaves them peculiarly vulnerable to error and misinterpretation.

During the 1960's, concern over abusive credit reporting practices developed. When industry self-regulation failed to correct the abuses, the Fair Credit Reporting Act (hereinafter FCRA)[15] was passed. The act, which went into effect in April, 1971, attempted to curb abusive practices by the credit reporting industry without infringing upon its ability to satisfy the legitimate needs of business for information.

Despite the passage of the FCRA, there is strong evidence that abusive practices continue. Inaccurate information continues to find its way into credit bureau files.[16] Although human fallibility is in part responsible for these inaccuracies, the problem is magnified by hiring practices[17] and by credit industry policies emphasizing quantity of production over quality of reports, and encouraging the development of adverse information. The Federal Trade Commission [hereinafter FTC] has filed a complaint against Retail Credit,[18] in which some of these

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14. *1973 Proxmire Hearings, supra* note 4, at 678 (testimony of Albert Foer).

15. 15 U.S.C. § 1681.

16. In fact, credit bureaus' standard forms disclaim accuracy. For example, the standard contract form for Retail Credit Company states: "Recognizing that information is secured by and through fallible human sources and that for the fee charged you cannot be an insuror of the accuracy of the information . . . we release you and your affiliated companies . . . from liability for any negligence in connection with the preparation of such reports. . . ." Retail Credit Company public relations material, *Helping Business Serve Consumers*, "Agreement for Service" (last page), Form 15956 October, 1974.

17. Advertisements for investigators indicate that to qualify an individual need only have a high school diploma and a car. *E.g.*, Miami Herald, June 11, 1974, at 18-E; Miami Herald, Apr. 15, 1971, at 19-C; Washington Post, Mar. 25, 1971, at K-4.

18. Complaint, *In Re* Retail Credit Co., No. 8954 (F.T.C., Feb. 21, 1974) [hereinafter cited as FTC Complaint against Retail Credit Co.]. For a summary of FTC activities in enforcing FCRA, and the problems that have arisen, see Feldman, *The Fair Credit Reporting Act—From the Regulators Vantage Point*, 14 SANTA CLARA LAW. 459 (1974).

abuses are detailed. An overview of these abuses follows.

1. Unrealistic Production Goals

Four former investigators for Retail Credit Company testified before a Senate subcommittee that they had been required to meet reporting goals of eighteen to twenty-two reports per day. If an inspector does not meet his quota for three months running, he is dismissed. Additionally, an investigator's salary is based upon his production. Bonuses are granted for surpassing the production quota.[19]

Witnesses testified that it is not possible to meet production goals over a period of time and still comply with procedures outlined in the company manual. They estimated that only eight to twelve cases a day could be completed if investigators were to follow prescribed procedures.[20]

The pressure to meet high production goals forces investigators to develop shortcuts, of which a variety exist. They include extensive use of the telephone for interviewing rather than personal contacts,[21] listing sources not actually contacted,[22] and not asking certain questions or asking them in such a way as to elicit a negative reply in order to avoid prolonging the interview.[23] The word "zinging" has been coined by investigators to refer to some shortcuts. It includes using material from an older file on the subject, filling in information from that given by insurers and completing the form by guessing.[24]

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19. *Hearings on Amending the Fair Credit Reporting Act Before the Subcomm. on Consumer Credit of the Senate Comm. on Banking, Housing and Urban Affairs*, 93d Cong., 2d Sess., at 4, 8, 22, 39, 40, 41 (1974) [hereinafter cited as *1974 Proxmire Hearings*]. Former investigator, William F. Boaz, testified, "I have been told by the manager, length of service with Retail Credit Co. means nothing, you will maintain the required volume of cases, you will meet company standards regarding protective and decline cases or you will get another job." *Id.* at 3.

The part-time employee is paid on a straight percentage basis. The full-time employee is paid a salary, however his production must account for his salary and leave a specified percentage of net profit to the company. As a result, whenever a salaried employee is granted a raise, the number of daily reports which he must complete increases. *Id.* at 16-17.

FTC alleges that Retail Credit's maintenance of a salary/production system constitutes a violation of the FCRA requirement that it establish procedures to assure the maximum possible accuracy of information. FTC Complaint against Retail Credit Co., *supra* note 18, at 9-10.

20. *1974 Proxmire Hearings, supra* note 19, at 22, 40.

21. *Id.* at 40. *See also* FTC Complaint against Retail Credit Co., *supra* note 18, at 10.

22. *1974 Proxmire Hearings, supra* note 19, at 19-20. *See also* FTC complaint against Retail Credit Co., *supra* note 18, at 10.

23. *1974 Proxmire Hearings, supra* note 19, at 40.

24. One investigator defined "zinging" as follows: "A 'zing' means you do nothing, you do not contact the investigatee. One does not go out on the streets and investigate

The "crystal ball system" is another type of shortcut used by investigators to meet daily production goals. This entails simply looking at an inquiry to determine if the individual "looks OK," and then dictating the report.[25] Finally, investigators resort to pretext as a means of maintaining volume.[26] The company manual, for example, recommends the use of the "indirect interview," and suggests that investigators identify themselves as employees of the customer rather than of Retail Credit.[27]

2. *Quotas on Adverse Information*

The former investigators also testified that they had been required to produce a certain percentage of reports containing adverse information.[28] Adverse information is emphasized because it is regarded by insurance companies as an indication of the thoroughness of the investigative reporting company.[29] The investigators stated that Retail Credit requires declinable[30] information in approximately 10 percent of all investigations. In addition, Retail requires 50 to 60 percent of all reports to contain protective information.[31] Each investigator is required to fill out a daily Form 930, on which he lists the number of cases he has investigated and the percentage of these which include declinable and protective information. This report is reviewed weekly to determine if the investigator is meeting his quotas. Failure to meet

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the report. He utilizes whatever information was supplied by the insurance company and hopefully looks up the insured in the phone book to assure that he lives there: then you just fill in the form, which is mostly boxes that one checks off yes or no.

. . . .

"The entire report would be faked." *Id.* at 11.

25. *Id.* at 6.

26. *Id.* at 23.

27. *Id.* at 26. The FTC complaint against Retail Credit alleges misrepresentation by the company's investigative personnel. Allegedly the investigators misrepresent that:

> (1) They are agents of the company to which the consumer has applied for a benefit, and
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> (2) certain investigations are "routine credit checks," when the actual purpose is to evaluate the validity of the consumer's claim under an existing insurance policy.

FTC complaint against Retail Credit Co., *supra* note 18, at 4-5.

28. *1974 Proxmire Hearings, supra* note 19, at 3, 5, 17, 39, 40. *See also* FTC complaint against Retail Credit Co., *supra* note 18, at 9.

29. *1974 Proxmire Hearings, supra* note 19, at 18.

30. Information which is sufficiently derogatory to cause an insurance company to deny an application for insurance. *Id.* at 4.

31. *1974 Proxmire Hearings, supra* note 19, at 5. Protective information is information which would be of value to the insurance company, but is not bad enough to cause them to decline the subject. A company manual sets forth the guidelines for determining what kinds of information constitute declinable and protective information. *Id.* at 42.

quotas leads to probation and ultimately to dismissal.[32] In addition, each Retail Credit office maintains statistics on the percentage of adverse information contained in reports by its investigators. The different offices compete with one another as to which can maintain the highest level of protective and declinable information.[33]

The emphasis on filling quotas forces investigators to lay greater stress on adverse information than on accurate information. A variety of techniques is used to develop negative data. Adverse information in old files is copied without reconfirmation.[34] Persons interviewed are baited with leading questions[35] and often inspectors neglect to verify adverse information through a second source.[36] Frequently irrelevant negative information is entered in files in order to maintain protective information percentages.[37]

The emphasis on adverse information over accurate information is also apparent in Retail Credit Company's policy regarding reinvestigations. The FTC charges that Retail Credit does not pay an inspector for a reinvestigation if it reveals that he failed to discover an item of adverse information in the first investigation, or if he is unable to confirm adverse information contained in the first investigation.[38] As in their initial investigations, investigators often use shortcuts when reinvestigating reports. For example, they frequently do not seek new sources in a reinvestigation, but rely on the same sources used in prior investigations.[39]

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32. *Id.* at 5, 17.

33. *Id.* at 32.

34. *Id.* at 5.

35. *Id.* at 33.

36. *Id.* at 20-21. Retail Credit Company promises its customers that each item of adverse information is verified by at least two sources. The former investigators, however, estimated the percentage of one-source checks ranges from 50 to 95 percent. Where the investigator is unable to obtain two sources, he "zings" or makes up a name. "You just pull them out of the hat . . . or if you have the time, look up neighbors in an address directory." *Id.* at 19-20.

37. *Id.* at 26. The FTC alleges that Retail Credit incorporates all information into the same filing system, making no attempt to segregate consumer report information from claims report information. Furthermore, the complaint alleges that investigators misrepresent that information will be used exclusively by the company to which the consumer has applied for a benefit. FTC Complaint against Retail Credit Co., *supra* note 18, at 7. In actuality, FTC alleges all information, including medical information, is retained in Retail's files and is used in subsequent reports. *Id.*

38. The FTC complaint alleges that Retail Credit violates those sections of the FCRA which require the establishment of procedures to assure the maximum possible accuracy in that it credits an investigator for reinvestigations only if it is proven that he was accurate in his initial investigation. *Id.* at 9.

39. *See 1974 Proxmire Hearings, supra* note 19, at 20.

3. Inaccurate Public Record Information

Information from public records such as newspapers and court records is a major source of inaccuracy. Investigators rely heavily on these records, but due to lack of time and their desire for adverse information, they do not verify this information.[40] Name mixups are a major problem. Often derogatory public record information is entered in the file of the wrong person because his name is the same as or similar to someone else's.[41] In addition to outright errors, there are distortions of fact due to incomplete data. While arrests and the filing of civil suits are systematically collected by credit agencies, the dismissal of charges or civil suits is not included in credit reports.[42] Furthermore, because most consumers are not aware that they are responsible for updating court records after they have satisfied a judgment against them, credit bureaus frequently do not have current information on the status of judgments.[43]

4. Evasion of the Fair Credit Reporting Act

The FCRA has established important consumer rights regarding credit reports,[44] but its effectiveness in curbing abuses is highly questionable. Former investigators testified that the FCRA has had minimal impact on the credit reporting industry.[45]

In the first nine months after the act took effect, the FTC received more than a thousand complaints against credit reporting agencies,

40. *Id.* at 5.

41. Indeed credit bureaus have been accused of using a "shotgun" approach to recording judgments; that is, entering a judgment on all records bearing the same name as the defendant's, or a similar name, without determining which individual actually was involved. *1973 Proxmire Hearings, supra* note 4, at 963.

42. One investigator stated that it is common practice to state, for example, that an individual is suspected of poor driving habits on the basis of a motor vehicle report which reflects three or four accidents in two or three years, but which does not indicate disposition, fault, or even whether the individual was charged. *1974 Proxmire Hearings, supra* note 19, at 20.

43. *1973 Proxmire Hearings, supra* note 4, at 983.

44. 15 U.S.C. § 1681. The strongest provisions of the act (1) require users to notify consumers of the name and address of the consumer reporting agency whenever adverse action is taken on the basis of a report, § 1681m(a); (2) give the consumer a right to be fully informed of the nature and substance of all information on him, § 1681g; and (3) require reinvestigation and verification by the agency of all disputed information, § 1681i(a).

45. One investigator stated, "We were constantly informed at the weekly office meetings that the company 'can live with it [FCRA] as Mr. Burge [president, Retail Credit Company] helped to formulate the requirements of the act.'" *1974 Proxmire Hearings, supra* note 19, at 7. He further testified, "At first there was quite a bit of change, and I think it was a wait-and-see policy. I think they waited long enough and they saw nobody was bothering them, so they went back to the old way." *Id.* at 29.

most of which were prompted by a lack of disclosure. The act does not entitle the consumer to inspect, to copy or to handle his file. Instead, he must rely on the agency's interviewer to disclose the substance of the report. An FTC investigation revealed that credit bureaus frequently withhold information from the consumer concerning his character, reputation or morals.[46] Additionally, a number of complaints accused credit reporting firms of hindering consumers' efforts to obtain disclosure by putting off inquiries with excuses such as, "the man who handles that sort of thing isn't here right now,"[47] or by telling consumers that disclosure is only available at certain offices, and that they can obtain disclosure only if they appear in person.[48]

Furthermore, a number of credit bureaus require consumers to fill out lengthy identification forms before disclosing the contents of their file. These forms often contain a clause which authorizes the credit bureau to investigate the consumer and which authorizes any business or organization to release full information and records about him to the credit bureau. The forms sometimes require the consumer to waive any right to sue the agency for libel, invasion of privacy or negligence in reporting false information. Other consumers have reported that they were charged fees as high as $25 to learn the contents of their files.[49] Complaints about charges for reinvestigations of disputed information were also made. The FTC alleges that one credit bureau would reinvestigate disputed information only if the consumer paid a fee of $10 per hour, with a fifteen hour minimum payable in advance.[50] In addition, the FTC has received complaints regarding obsolete information[51] and impermissible uses.[52]

46. *1973 Proxmire Hearings, supra* note 4, at 659 (statement of Lewis A. Engman, chairman of the Federal Trade Commission). The FTC complaint alleges that Retail Credit does not always disclose the nature and substance of all information in its files to the consumer as required by the FCRA. FTC Complaint against Retail Credit Co., *supra* note 18, at 10.

47. The Wall Street Journal, Dec. 29, 1971, at 1, col. 6 (statement by Salvatore Sangiorgi, assistant director of FTC's New York regional office).

48. FTC Complaint against Retail Credit Co., *supra* note 18, at 10.

49. The Wall Street Journal, Dec. 29, 1971, at 12, col. 5.

50. *Id.* In its complaint against Retail Credit the FTC alleges that in certain instances Retail Credit fails to:

(1) reinvestigate;
(2) record the current status of such information and to promptly delete information which can no longer be verified;
(3) clearly and conspicuously disclose to the consumer his right to request notification of a deletion or of the inclusion of a statement prepared by the consumer;
(4) provide notification to recipients of previous reports when requested to do so by consumers, as required by the act.

FTC Complaint against Retail Credit Co., *supra* note 18, at 11.

51. FTC alleges that Retail Credit reports the existence of obsolete adverse information through the use of certain stock sentences ("In compliance with the Fair Credit

D. Approaches to Curbing Abuses

The harm from investigative consumer reports is unlikely to be corrected in the immediate future by any single solution. The progress that has been made has been the result of increasing consumer awareness that credit investigating agencies are gathering and profiting from information on their private lives.[53] Although sometimes unsuccessful,[54] the aggregate of consumer pressure has been felt. In 1974 Re-

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Reporting Act no additional information can be reported from this former employer covering employment experience prior to seven years ago") *Id.* at 9, and by furnishing photocopies of motor vehicle reports reflecting masked out or obliterated driving violations which antedate the report by seven years or more. *Id.*

52. FTC alleges that Retail Credit Co. provides a "Voluntary Follow-Up Service" to its customers. This service consists of the submission of additional unsolicited adverse information about consumers upon whom previous consumer reports have been made. FTC complains that when such information is furnished, Retail has no reason to believe it will be used in connection with a legitimate business transaction as required by the FCRA. *Id.* at 8.

53. Some of the most effective work has been accomplished by private individuals. David Weinberger of Miami, Florida, has been waging a crusade against Retail Credit Company for sixteen years, ever since that company wrote "a very unfair" report on him. See note 161, *infra*. He has testified at public hearings, drafted legislation and given college lectures. His home has become a clearinghouse of materials on consumer investigating agencies and privacy issues. He also played an important part in the passage of the Dade County Ordinance. See note 273 *infra*. At age forty-six, Weinberger completed law school to become a more effective advocate. Interview (telephone) with David Weinberger, Nov. 12, 1974. *See, e.g.*, Herman, *Suing Retail Credit Co. is Career and Pastime for David Weinberger*, The Wall Street Journal, Jan. 16, 1974, at 1, col. 1.

Paul Polin of Tulsa, Oklahoma has also built a reputation by battling Retail Credit since an unfavorable report was written on him. Once, after Polin accompanied a man to the Tulsa office of Retail Credit to find out why the man had been denied insurance, the man received a call from the manager of the branch office who said, "If you stop associating with Paul Polin, we'll make sure you have an A-1 report." *1973 Proxmire Hearings, supra* note 4, at 637 (testimony of John H. F. Shattuck, staff counsel, American Civil Liberties Union). Polin has also entered law school. Interview (telephone) with Paul Polin, Nov. 23, 1974.

54. The credit reporting industry has actively opposed consumer measures. When a tough credit reporting ordinance was being considered in Dade County, Florida, Retail Credit was successful in persuading the originator of the bill that they could not live with such restrictions. *See, e.g.*, Lucoff and Gjebre, *Cain bows to insurors, may drop snooping ban*, The Miami News, Aug. 28, 1974 at A-1, col. 1; Dauthat and Lucoff, *Credit firm threatens to leave Dade*, The Miami News, Sept. 4, 1974, at 5A, col. 1. When the ordinance was passed, Retail Credit filed suit against it less than two hours after the vote. Retail Credit Co. v. Dade County, Florida, Civ. No. 74-1104 (S.D. Fla., filed Sept. 3, 1974).

While a consumer credit bill was being considered in New Hampshire, Assemblyman Tony Smith, who owns an insurance company and supported the bill, received threatening calls and attempted bribes. Interview (telephone) with Tony Smith, Nov. 16, 1974.

A letter from Retail Credit addressed "To Our Fellow Oklahomans" was used in an attempt to defeat Oklahoma consumer reporting legislation. Letter from H.E. Dun-

tail Credit reported that it was responding to about twenty-five consumer suits a year.[55] In 1975 the directors of Retail Credit decided on a new name, Equifax, to replace the name they had so proudly linked with "the whole industry" in 1968.[56] In 1974 Retail Credit voluntarily began allowing consumers to see their own files,[57] a measure they had strongly opposed in the past.[58]

Presently the abuses of investigative consumer reports are being attacked from many different angles: newspapers are reporting the cases of harm inflicted on individuals;[59] legislative hearings are investigating the credit reporting industry;[60] and unprecedented numbers of bills

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ham, District Sales Manager, "To Our Fellow Oklahomans," March 1, 1972 on file with David Weinberger, West Miami, Florida.

55. BUSINESS WEEK, Nov. 16, 1974, at 106.

56. "We have retained the name Retail Credit Co. because it is somewhat of a household word . . . especially in the insurance industry where the term 'a retail credit report' has become a generic term, synonymous with the activity of business reporting." *Hearings on Retail Credit Co. Before the Special Subcomm. on Invasion of Privacy of the House Comm. on Government Operations*, 90th Cong., 2d Sess., at 4 (1968) (testimony of W. Lee Burge, president, Retail Credit Co.) [hereinafter cited as *Retail Credit Hearings*].

57. The New York Times, April 25, 1974, at 58, col. 2.

58. "So, as a matter of practical experience, either access to the file or giving the person a copy of the file would create more problems. . . ." *Retail Credit Hearings, supra*, note 56, at 16. *See also* Retail Credit Co. flyer, *Hazards in Giving Subject a Copy of Report, as cited in* Foer, *The Personal Information Market: An Examination of the Scope and Impact of the Fair Credit Reporting Act*, 2 LOYOLA L. STUDENTS CONSUMER J. 37, 62 n.122 (1974) [hereinafter cited as Foer].

59. *E.g.*, Lewis, *"Unmarried Woman Sues Insurer on Privacy Invasion,"* The Washington Post, Jan. 7, 1974, § A, at 5, col. 5; Sesser, *"Prying for Pay: How Credit Bureaus Collect and Use Data on Millions of Persons,"* The Wall Street Journal, Feb. 5, 1968, at 1, col. 6; Auerbach, *"Credit Probers: Consumer's Past Still Fair Game,"* Los Angeles Times, Aug. 22, 1972, at 1, col. 1.

60. Thirteen congressional investigations were held between 1965 and 1971:

Year	Committee	Subject of Inquiry
1965	Senate, Judiciary	Invasions of Privacy
1965	Senate, Judiciary	Psychological Tests and Constitutional Rights
1965	House, Government Operations	Invasions of Privacy
1966	House, Post Office & Civil Service	Census Questions
1966	House, Government Operations	Computers and the Invasion of Privacy
1967	Senate, Judiciary	Computers and Privacy
1967	Senate, Judiciary	Right of Privacy Act of 1967
1967	House, Post Office & Civil Service	Questions in the Census
1967	Joint Economic Comm.	Coordination and Integration of Government Statistical Programs

have been introduced into Congress and state legislatures.[61]

Additionally, a variety of judicial remedies is being considered and applied to the injuries created by investigative consumer reports. It has been suggested that credit reporting agencies should be held liable for ordinary negligence in the preparation of consumer reports.[62] Alternatively, a "reasonable care" standard could be applied through the law of product liability. Professor Alan Westin has suggested that personal information be treated as a property right and thus protected as a fundamental right under the due process clause of the Fourteenth Amendment.[63] Advocates of this theory point to court treatment of personal information in bank records as a property right of the depositor.[64]

Other approaches which are somewhat more limited could remedy specific injuries. When inaccurate, irrelevant or misleading personal information in an investigative consumer report results in higher insurance rates or denial of coverage, the consumer could look to state

1969	House, Post Office & Civil Service	1970 Census Legislation
1969	Senate, Judiciary	Privacy, The Census & Federal Questionnaire
1971	House, Government Operations	Federal Personnel Records
1971	Senate, Judiciary	Federal Data Banks, Computers and Bill of Rights

In February, 1974, three congressional investigations were underway:

—The House Committee on Government Operations is conducting hearings into the need for legislation governing Federal Personnel record keeping.

—The House Judiciary Committee is considering the Criminal Justice Information Systems Act of 1974.

—The Senate Judiciary Committee is completing a survey of Federal data banks which contain personal data about individuals. Press Release, Office of White House Press Secretary Feb. 23, 1974, at 10.

61. In June, 1974, Congress had pending before it over 140 bills dealing with privacy issues. Remarks by Vice-President Gerald R. Ford, Georgia State Bar Association, June 7, 1974. In the first six months of 1974, over sixty-five measures governing privacy had been introduced in state legislatures. Letter from Vice-President Ford to the Judiciary Subcomm. on Constitutional Rights of the Sen. Government Operations Comm., *as cited in* Statement of Philip W. Buchen, executive director, Domestic Council Committee on the Right of Privacy, June 19, 1974.

62. *E.g.*, Note, *Panacea or Placebo? Actions for Negligent Noncompliance Under the Federal Fair Credit Reporting Act*, 47 S. CAL. L. REV. 1070 (1974); Note, *Consumer Protection: Regulation and Liability of the Credit Reporting Industry*, 47 NOTRE DAME LAW. 1291 (1972); Retail Credit Co. v. United Family Life Ins. Co., 130 Ga. App. 524, 203 S.E.2d 760 (1974) (action by insurance company against credit reporting company based on alleged negligence, motion to compel discovery sustained).

63. *See* WESTIN, *supra* note 5, at 324-25.

64. *See, e.g.*, Zimmermann v. Wilson, 81 F.2d 847, 849 (3d Cir. 1936); Brex v. Smith, 104 N.J. Eq. 386, 390, 146 A. 34, 36 (Ch. 1929). *See also* Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 GEO. L.J. 509, 519-20 (1969) [hereinafter cited as *Credit Investigations*]. *But see* California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974).

regulation of insurance companies. A measure against "unfair or deceptive practices" or similar provision might provide a remedy.[65] Federal use of investigative consumer reports might be enjoined under the Pinkerton Act of 1893, which provides that, "[a]n individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the government of the District of Columbia."[66]

II. Judicial Remedies

The traditional theories under which an action on credit reports is brought are the tort theories of defamation and privacy. In 1965, the Supreme Court recognized for the first time a constitutional basis for the right of privacy.[67] Although no court has yet decided whether or not investigative consumer reports are an invasion of the constitutional right of privacy, several cases are currently being litigated on this issue.[68]

A. Defamation

Most of the cases involving consumer credit reports have been libel suits. The requirements of a libel action, however, severely limit the usefulness of this remedy for investigative consumer reports. The allegedly defamatory statement must be false and must injure the reputation of the plaintiff or diminish the esteem, respect, goodwill or confidence in which the plaintiff is held.[69] Credit reporting companies can assert the defenses of qualified privilege, absolute privilege and truth.[70] The majority of American jurisdictions apply the qualified privilege to consumer credit reports, recognizing them as a useful business service for those who have a legitimate interest in obtaining the information.[71] To defeat the qualified privilege, the consumer must

65. *E.g.*, CAL. INS. CODE § 790.06(a) (West 1972):

> Whenever the commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this State in any method of competition or in any act or practice . . . [that] is unfair or deceptive and that a proceeding by him in respect thereto would be in the interest of the public, [he may hold a hearing] for the purpose of determining whether the alleged methods, acts or practices or any of them should be declared to be unfair or deceptive within the meaning of this article.

66. Pinkerton Act, 5 U.S.C. § 3108 (1967).

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

68. *See, e.g.*, Thompson v. Aetna Cas. Co., Civ. No. 14,733 (D. Conn., filed Jan. 11, 1974); Cranz v. State Farm Ins. Co., Civ. No. 1858-73 (D.N.J., filed Jan. 4, 1974).

69. W. PROSSER, LAW OF TORTS 737-9 (4th Ed. 1971) [hereinafter cited as PROSSER].

70. *Id.* at 776-801.

71. *E.g.*, H.E. Crawford Co. v. Dun & Bradstreet, Inc., 241 F.2d 387 (4th Cir. 1957); Erber & Stickler v. R.G. Dun & Co., 12 F. 526 (C.C. E.D. Ark. 1882); Wetherby

prove malice[72] or prove that information was released to the general public or to persons who have no legitimate business interest in the information.[73]

A constitutional privilege was recognized for the first time in *New York Times Co. v. Sullivan.*[74] The Court found that the First Amendment guarantee of freedom of speech protects publication of information about public officials. The constitutional privilege was extended to protect publications of matters of public concern in *Time, Inc. v. Hill.*[75] Credit reporting agencies have asserted that a credit report is constitutionally protected since its contents are a matter of general or public concern. The Third, Fifth and Tenth Circuits, however, have thoroughly refuted this assertion.[76]

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v. Retail Credit Co., 235 Md. 237, 201 A.2d 344 (1964); Shore v. Retailers Commercial Agency, Inc., 342 Mass. 515, 174 N.E.2d 376 (1961); Barker v. Retail Credit Co., 8 Wis. 2d 664, 100 N.W.2d 391 (1960); Annot. 30 A.L.R.2d 776 (1953).

The English courts do not apply the qualified privilege. "It is only right that those who engage in such a business, touching so closely very dangerous ground, should take the consequences if they overstep the law." MacIntosh v. Dun [1908] 18 A.C. 390, 400 (P.C. 1908).

Two American jurisdictions have also refused to apply the qualified privilege to credit reports. Johnson v. Bradstreet Co., 77 Ga. 172 (1886); Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 139 P. 1007 (1914).

In Hood v. Dun & Bradstreet, Inc., 486 F.2d 25, 32 (5th Cir. 1973), *cert. denied,* 415 U.S. 985 (1974), the court cited two reasons for reaffirming the refusal to grant a privilege. First, credit information is readily available in states where no conditional privilege is recognized and the credit reporting industry is thriving there. Second, there has been a shift in emphasis from the protection of the credit reporting agency to the protection of the individual.

72. *E.g.,* H.E. Crawford Co. v. Dun & Bradstreet, Inc., 241 F.2d 387 (4th Cir. 1957); Hooper-Holmes Bureau v. Bunn, 161 F.2d 102 (5th Cir. 1947); Roemer v. Retail Credit Co., 3 Cal. App. 3d 368, 83 Cal. Rptr. 540 (1970); 44 Cal. App. 3d 926, 119 Cal. Rptr. 82 (1975).

73. Watwood v. Stone's Mercantile Agency, 194 F.2d 160 (D.D.C. 1952); Trussell v. Scarlett, 18 F. 214 (Cir. Ct. Md. 1882); Pollasky v. Minchener, 81 Mich. 280, 46 N.W. 5 (1890); King v. Patterson, 49 N.J.L. 417, 9 A. 705 (Ct. Err. & App. 1887); Hales v. Commercial Bank of Spanish Fork, 114 Utah 186, 197 P.2d 910 (1948); Cook v. Gust, 155 Wis. 594, 145 N.W. 225 (1914). *See also Credit Investigations, supra,* note 64.

74. 376 U.S. 254 (1964) (newspaper advertisement on conduct of an Alabama police commissioner during racial disturbance held privileged).

75. 385 U.S. 374 (1967) (review of a play which was based on a fictionalized account of a family's ordeal as hostages of escaped convicts held privileged). *See also* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

76. "[M]atters of general and public interest do not include libelous and defamatory publications of such a commercial nature as credit reports." Hood v. Dun & Bradstreet, Inc., 486 F.2d 25, 29 (5th Cir. 1973); Grove v. Dun & Bradstreet, Inc., 438 F.2d 433 (3d Cir. 1971), *cert. denied,* 404 U.S. 898 (1971); Kansas Elec. Supply Co. v. Dun & Bradstreet, Inc., 448 F.2d 647 (10th Cir. 1971), *cert. denied,* 405 U.S. 1026 (1972). *See also* Roemer v. Retail Credit Co., 44 Cal. App. 3d 926, 119 Cal. Rptr. 82 (1975).

Truth is an absolute defense to an action for libel.[77] Because many investigative reports cause great harm to the individual by reporting information which is true, but irrelevant to the purpose of the report, the consumer injured by such a report must seek another legal theory to obtain a remedy.

B. Tort of Invasion of Privacy

The origin of the tort of invasion of privacy is commonly traced to an article by Warren and Brandeis in the Harvard Law Review of 1890.[78] Warren and Brandeis were concerned with the invasion of privacy by newspapers.[79]

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.[80]

Their concern also extended to other encroachments by the "modern" society of 1890:

> If we are correct in this conclusion [the existence of a right to privacy based on an inviolate personality], the existing law affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or *the possessor of any other modern device for recording or reproducing scenes or sounds.*[81]

They rejected the defamation theory as a remedy for invasion of privacy because it dealt only with rights that are "in their nature material rather than spiritual."[82] Warren and Brandeis wanted to define a larger concept which:

> secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. . . . The existence of this right does not depend upon the particular method of expression adopted.[83]

Early in the twentieth century the American courts began to

77. PROSSER, *supra*, note 69, at 797.

78. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) [hereinafter cited as Warren and Brandeis].

79. Samuel Warren had become exceedingly annoyed over the journalistic accounts of the personal details of his daughter's wedding. He turned to his friend and former law partner, Louis D. Brandeis, who joined him in writing the article. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

80. Warren and Brandeis, *supra* note 78, at 196.

81. *Id.* at 206 (emphasis added).

82. *Id.* at 197.

83. *Id.* at 198-99.

recognize a right of privacy,[84] and in 1939 this tort action was recognized in the Restatement of Torts.[85] Presently, the right of privacy is acknowledged by the courts in the overwhelming majority of states and by statute in other states.[86]

Defenses to this tort action fall into two categories—consent and privilege. The privilege defenses are identical to those in defamation discussed above. Consent is a complete defense. It can be express or implied, but if consent is a matter of contract, it is normally irrevocable.[87] Because of the notice requirement of the FCRA, credit agencies can claim that applicants have consented to the investigation.[88]

In 1960 Dean Prosser, leading American authority in the field of torts, distinguished four tort actions for invasion of privacy.[89] The first of these, "intrusion," applies most directly to the abuses perpetrated by investigative consumer reports. The concept of "intrusion" has expanded from physical intrusions[90] to nonphysical invasions such as wiretapping,[91] microphones,[92] peering through windows,[93] persistent and unwanted telephone calls[94] and unauthorized prying into plaintiff's bank account.[95] In *Pearson v. Dodd*,[96] the District of Columbia Circuit approved the extension of the intrusion tort to "instances of in-

84. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

85. RESTATEMENT OF TORTS § 867 (1939).

86. N.Y. Civ. Rts. Law §§ 50-51 (McKinney 1948); Okla. Stat. Ann. tit. 21, §§ 839-40 (1958); Utah Code Ann. §§ 76-4-8 and 76-4-9 (1953); Va. Code Ann. § 8-650 (1957).

87. *E.g.*, Lillie v. Warner Bros. Pictures, 139 Cal. App. 724, 34 P.2d 835 (1934); Long v. Decca Records, 76 N.Y.S.2d 133 (Sup. Ct. 1947).

88. Notice required under FCRA: "In compliance with The Fair Credit Reporting Act we are informing you that as part of our routine procedures an investigative consumer report may be prepared whereby information is obtained through personal interviews with your neighbors, friends and others with whom you are acquainted. The inquiry includes information as to your character, general characteristics and mode of liv ing." *1973 Proxmire Hearings, supra* note 4, at 289.

89. 1. Intrusion upon the plaintiff's seclusion or solitude or into his private affairs.

2. Public disclosure of embarrassing private facts about the plaintiff.

3. Publicity which places the plaintiff in a false light in the public eye.

4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

90. *Cf.* DeMay v. Roberts, 46 Mich. 160, 9 N.W. 146 (1881) (intruding at childbirth); Young v. Western & A. R. Co., 39 Ga. App. 761, 148 S.E. 414 (1929) (search without warrant); Welsh v. Koehm, 125 Mont. 517, 241 P.2d 816 (1952) (landlord moving in on tenant).

91. Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46 (1931).

92. McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939).

93. Moore v. New York Elevated R. Co., 130 N.Y. 523, 29 N.E. 997 (1892).

94. Carey v. Statewide Finance Co., 3 Conn. Cir. Ct. 716, 223 A.2d 405 (1966).

95. Brex v. Smith, 104 N.J. Eq. 386, 146 A. 34 (1929).

96. 410 F.2d 701 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 947 (1969) (newspa-

trusion . . . into spheres from which an ordinary man in a plaintiff's position could reasonably expect that the particular defendant should be excluded."[97] Objectionable snooping techniques used by consumer reporting companies such as the "welcome wagon," asking leading questions of neighbors and gaining entrance to the subject's home by misrepresentation, could be considered such an intrusion.

Prosser's second category, "public disclosure," also applies to investigative consumer reports, but in more limited circumstances. As defined in the leading case of *Melvin v. Reid*[98] there must be a public disclosure of private facts which is offensive and objectionable to the reasonable person. The requirement of public disclosure is seldom found in investigative consumer reports which are confidential by nature, unless the consumer can show breach of contract, trust or confidential relation.[99]

The categorization of the privacy tort into four groups has been influential in the development of the law of privacy, but Prosser's analysis has not been universally accepted. Professor Edward Bloustein strongly disputed Prosser's conclusions, arguing that "the tort cases involving privacy are of one piece and involve a single tort."[100] The consideration behind that tort is the preservation of individual dignity.[101] Bloustein traced the "human dignity" concept of privacy to the article by Warren and Brandeis. Through this analysis Bloustein provides a conceptual link between the privacy tort and the Fourth Amendment protection from unreasonable searches and seizures, foreshadowing the *Griswold*[102] decision.

C. Constitutional Theory

1. Griswold

The Supreme Court declared the right of privacy to be constitutionally protected in *Griswold v. Connecticut*.[103] Although there ap-

per columnists who received copies of documents which were removed by others from office of a senator and which were photocopied at night and returned to files were not liable for conversion of physical documents).

97. *Id.* at 704. *See also* Nader v. General Motors Corp., 25 N.Y.2d 560, 255 N.E. 2d 765, 307 N.Y.S.2d 647 (1970) (unauthorized wiretapping and eavesdropping by mechanical and electrical means stated a cause of action for invasion of privacy); MILLER, *supra* note 5, at 190-92.

98. 112 Cal. App. 285, 297 P. 91 (1931).

99. *E.g.*, Copley v. Northwestern Mut. Life Ins. Co., 295 F. Supp. 93 (S.D.W. Va. 1968); Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284 (1961); Berry v. Moench, 8 Utah 2d 191, 331 P.2d 814 (1958); *cf.* Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831 (1920).

100. Bloustein, *supra* note 5, at 1000.

101. *Id.* at 995.

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

103. *Id.*

peared to be little agreement among the seven concurring judges on the theory,[104] it is clear that privacy was recognized as a fundamental right which is protected by the due process clause of the Fourteenth Amendment.

Justice Douglas, speaking for the Court, found the right of privacy among the penumbras of the Bill of Rights "formed by emanations from those guarantees that help give them life and substance."[105] He cited *Boyd v. United States*,[106] wherein the Fourth and Fifth Amendments were described as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life."[107] Douglas also referred to *Mapp v. Ohio*[108] in which the Court spoke of the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people."[109] Furthermore, Justice Douglas found that zones of privacy are protected by the First, Third and Ninth Amendments.

Justice Goldberg, who was joined by Chief Justice Warren and Justice Brennan, found the right of privacy to be one of the additional fundamental rights protected by the Ninth Amendment.[110] Justice Harlan based his concurring opinion[111] on the due process clause of the Fourteenth Amendment. Justice White also relied on the due process clause of the Fourteenth Amendment, citing from *Prince v. Massachusetts* that there is a "realm of family life which the state cannot enter."[112]

2. *Subsequent Decisions on Privacy and Principles Derived from Them*

Analysis of the subsequent cases on privacy suggests that four basic factors are considered by the courts in determining whether or not there has been an unconstitutional invasion of privacy. These considerations are: a) invasion of personal privacy or privacy of the home; b) actual harm; c) balancing of other interests, and d) existence of less restrictive alternatives.

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104. *See* Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965).

105. 381 U.S. at 484.

106. 116 U.S. 616 (1886).

107. *Id.* at 630, *cited in* 381 U.S. at 484.

108. 367 U.S. 643 (1961).

109. *Id.* at 656, *cited in* 381 U.S. at 485.

110. 381 U.S. at 486 (Goldberg, J., concurring). "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

111. 381 U.S. at 500 (Harlan, J., concurring).

112. Prince v. Massachusetts, 321 U.S. 158, 166 (1944), *cited in* 381 U.S. at 502.

a. Invasion of Personal Privacy and Privacy of the Home

The thrust of the *Griswold* decision was a strong belief that the home is a sacrosanct area which the state cannot enter. In criminal actions, the home has long been protected from unreasonable search and seizure by the Fourth Amendment.[113] With *Griswold,* the Court invoked a similar protection for noncriminal proceedings. Similarly, the Court protected the sanctity of the home in *Stanley v. Georgia*[114] where the Court found that a state law prohibiting the possession of obscene material in one's own home was an invasion of privacy.

Later cases indicate that the Court has broadened the interpretation of privacy to a more general personal privacy. In *Eisenstadt v. Baird*[115] a state ban on distribution of contraceptives to unmarried persons was found to invade the privacy of the individual. In *Roe v. Wade* the Court concluded that "the right of personal privacy includes the abortion decision. . . ."[116]

In a limited number of cases, the Court has refused to find an invasion of the fundamental right of privacy. The Court held in *Wyman v. James*[117] that the home visits required for welfare were not an unwarranted invasion of personal privacy.[118] The majority opinion, however, was careful to insure the "propriety" of the home visit. The Court seemed to be saying that the purpose of the home visit was simply to verify actual residence and the physical presence of the children in the home and that further investigation should be limited:

> Outside informational sources, other than public records, are to be consulted only with the beneficiary's consent. Forcible entry or entry under false pretenses or visitation outside working hours or snooping in the home are forbidden.[119]

In *Village of Belle Terre v. Boraas*[120] the Court found that a zoning ordinance which limited the number of unrelated persons living in a single household was not an invasion of privacy.[121] Justice Marshall

113. *E.g.,* Boyd v. United States, 116 U.S. 616 (1886).

114. 394 U.S. 557 (1969).

115. 405 U.S. 438 (1972).

116. 410 U.S. 113, 154 (1973).

117. 400 U.S. 309 (1971).

118. *But see* Douglas dissent, questioning "whether the government by force of its largesse has the power to 'buy up' rights guaranteed by the Constitution." Wyman v. James, 400 U.S. 309, 328 (1971) (Douglas, J., dissenting).

119. *Id.* at 321.

120. 416 U.S. 1 (1974).

121. *But cf.* United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973). The Court held that a provision of the Food Stamp Act limiting participation to households of related people, thereby denying participation to nonrelated households, violated the due process clause.

dissented, basing his disagreement on the First Amendment freedom of association and the constitutional right of privacy.

While the Supreme Court decisions on the constitutional right of privacy have involved a limited number of subject areas, the lower courts have faced a wider range of issues. It appears that the decisions of *Griswold, Eisenstadt* and *Roe* are being extended to protect all aspects of personal privacy, especially in sexual relations,[122] unless the privacy has been violated by the subjects themselves or is outweighed by a state interest. The courts also seem to be in agreement that one's private sexual relationships or practices cannot be the basis for dismissal from employment[123] unless they would interfere with the performance of duties.[124]

The courts have protected the privacy of the home and family relationships against invasion by the overzealous gathering of information. In *Merriken v. Cressman*[125] the court balanced the right of privacy against the need for a drug abuse program in the public schools and found that the balance struck in favor of individual privacy. The program was to be initiated through a questionnaire which asked highly personal questions.[126]

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122. "[T]he apparent trend of recent decisions would indicate that such a right [to engage in deviant sexual conduct] among or between consenting adults does exist." United States v. Brewer, 363 F. Supp. 606, 607 (M.D. Pa. 1973). "In short, private conduct which is not harmful to others, even though it may violate the personal moral code of most of us, does not violate public morality. . . . To hold otherwise would be to encourage governmental inquisition into an applicant's purely personal private temperament and habits . . . even though such attitudes or conduct would not harm others." *In re* Labady, 326 F. Supp. 924, 927-28 (S.D.N.Y. 1971).

Personal privacy is not protected, however, when it is violated by plaintiff. Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973) (subjects photographed their sexual acts and allowed the pictures to fall into their children's hands).

123. *E.g.*, Drake v. Covington County Board of Educ., 371 F. Supp. 974 (M.D. Ala. 1974) (unmarried teacher improperly dismissed for becoming pregnant where only evidence of pregnancy was solicited from her own physician); Fisher v. Snyder, 346 F. Supp. 396 (D. Neb. 1972) (teacher's contract wrongly terminated when basis of termination was inferences of "improper" conduct in her associations in her own home); Mindel v. United States Civil Service Comm'n, 312 F. Supp. 485 (N.D. Cal. 1970) (post office clerk wrongly terminated when investigation disclosed he was living with a young lady without the benefit of marriage).

124. *E.g.*, Gayer v. Schlesinger, 490 F.2d 740 (D.C. Cir. 1973) (homosexual activities can be inquired into for security clearance); Acanfora v. Board of Educ. of Montgomery County, 359 F. Supp. 843 (D. Md. 1973) (dismissal of homosexual upheld when he made his own case a matter of public controversy); Richardson v. Hampton, 345 F. Supp. 600 (D.D.C. 1972) (reasonable inquiry valid to determine whether homosexual conduct will affect suitability for federal civil service where there was evidence of a sexual advance on a minor in the building where employed).

125. 364 F. Supp. 913 (E.D. Pa. 1973).

126. The student was asked whether his family is "very close, somewhat close, not too close, or not close at all"; whether his parents "hugged and kissed him good-night

In *Galella v. Onassis*[127] the district court held that the actions of a self-styled "investigative reporter" violated Jacqueline Onassis' right to privacy:

> The rationale [of the right of privacy] extends to protect against unreasonably intrusive behavior which attempts or succeeds in gathering information . . . and includes, but is not limited to, such disparate abuses of privacy as the unreasonable seeking, gathering, storing, sharing and disseminating of information by humans and machines.[128]

Other decisions have indicated the willingness of the courts to protect personal privacy.[129]

The issue of whether the privacy doctrine would protect substantive personal information which has been recorded and filed has not yet been decided. Two cases have presented the question of protecting medical information from required disclosure to state officers. The United States District Court of Connecticut found that a statute compelling psychiatrists to report names and other information about drug-dependent persons to the Commissioner of Health did not violate the right to privacy.[130] In a similar case, however, the Second Circuit reversed an order of dismissal and left open the possibility of protecting medical records:

> 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 [sic] the continuum.[131]

On remand, the three-judge district court denied the motion for preliminary injunction, but held that the plaintiff should be given the opportunity to explore the "outer reaches" of the right to privacy and to submit detailed analysis of the competing interests involved. The court outlined a three-part test which plaintiffs must meet:

> Specifically, the plaintiffs must be afforded the opportunity to demonstrate that the computerization of names is not necessary for

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when he was small"; whether they told him how "much they loved him or her"; whether the parents "seemed to know what the student's needs or wants are"; and whether the student "feels that he is loved by his parents." *Id.* at 918.

127. 353 F. Supp. 196 (S.D.N.Y. 1972), *reh. denied*, 487 F.2d 986 (1973).

128. *Id.* at 232. On appeal, the decision was upheld, but on more narrow grounds.

129. Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974) (protection against involuntary sterilization by the United States Dept. of Health, Education and Welfare); Roberts v. Clement, 252 F. Supp. 835 (E.D. Tenn. 1966) (operation of nudist colonies and persons engaged in nudist practices protected).

130. Felber v. Foote, 321 F. Supp. 85 (D. Conn. 1970).

131. Roe v. Ingraham, 480 F.2d 102, 108 (2d Cir. 1973) (statute requiring patient's name and prescription for certain drugs).

> the accomplishment of the state's goals, that the controls developed by the state are inadequate to protect against unauthorized disclosure of the computerized information and that the injury to the plaintiffs resulting from the implementation of this system of centralized filing is sufficiently serious to overcome any competing state interest.[132]

In other cases where substantive personal information was divulged, courts have found extraneous reasons for not protecting the information with the privacy doctrine. Records of a dentist were not protected, since they would reveal nothing that would not be divulged by looking into the person's mouth.[133] Official immunity was found to protect members of Congress, their staff and school system employees from suit regarding a report which included names, absentee records, test papers and disciplinary records of certain students in the District of Columbia.[134]

b. Actual Harm

In cases where a violation of privacy has been found, plaintiffs have shown actual harm. The harm has been either a denial of personal freedoms, or denial of a benefit such as employment or citizenship. In *Roe v. Ingraham*, the Court suggested that the injury must be sufficiently serious to overcome any competing state interest.[135]

c. Balancing Other Interests

When an invasion of privacy is found on the facts of the case, it will be balanced against the opposing interests to determine which, in the given instance, must be accorded the greater value. The courts use different standards of review depending on the type of interest involved. Justice Stone first alluded to these differences in his opinion for the Court in *United States v. Carolene Products Co.*,[136] where a presumption of constitutionality was applied to state regulation of economic rights.[137] In an oft-quoted footnote to that case, Justice Stone

132. Roe v. Ingraham, 364 F. Supp. 536, 546-47 (S.D.N.Y. 1973).

133. *In re* Verplank, 329 F. Supp. 433 (C.D. Cal. 1971).

134. Doe v. McMillan, 412 U.S. 306 (1973). The appellate court had denied injunctive relief, but an agreement was made whereby the school district suspended further publication or distribution of the report and instituted new policies regarding the release of confidential information.

135. See text accompanying note 132 *supra*.

136. 304 U.S. 144 (1938).

137. *See also* Nebbia v. New York, 291 U.S. 502 (1934), ("[T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Id.* at 525); and West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) ("Liberty [freedom to contract] under the Constitution

suggested that a stricter standard of review would be appropriate where fundamental rights are involved:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.[138]

Later cases have further established the preferred status accorded fundamental rights.[139] The right of privacy was included among the fundamental rights by a majority of the Court in *Griswold*, and thus was afforded the higher standard review.

Individual privacy has not been protected by the courts when it was found to be outweighed by the public interest.[140] Two courts have stated that the right of privacy does not protect the social security number when used as a means of identification.[141] Similarly, courts have upheld mandatory fingerprinting of employees of stock exchange firms,[142] and of mental patients.[143]

While these decisions are disturbing in the inability of the courts to foresee the potential abuses inherent in universal identifying factors, it is significant that the information required (social security numbers and fingerprints) is not in itself "private" in the same sense as is information on a person's sexual habits.

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is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." *Id.* at 391).

138. 304 U.S. 144, 152 n.4 (1937).

139. Dennis v. U.S., 341 U.S. 494 (1951); Pennekamp v. Florida, 328 U.S. 331 (1946); West Virginia State Board of Educ. v. Barnette, 319 U.S. 624 (1943); Jones v. Opelika, 316 U.S. 584 (1942); Bridges v. California, 314 U.S. 252 (1941); Schneider v. State, 308 U.S. 147 (1939).

140. Smayda v. United States, 352 F.2d 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966) (privacy in public restroom not protected when used for homosexual activities); Doe v. Norton, 365 F. Supp. 65 (D. Conn. 1973) (legal enforcement of familial monetary obligation outweighs individual privacy invaded by requiring disclosure of father's name); United States v. Maiden, 355 F. Supp. 743 (D. Conn. 1973) (right to use marijuana in the home not protected); Pratz v. Louisiana Polytechnic Institute, 316 F. Supp. 872 (W.D. La. 1970) (state requirement that students live in a dormitory does not violate right to privacy).

141. Cantor v. Supreme Court of Pennsylvania, 353 F. Supp. 1307 (E.D. Pa. 1973) (upheld requirement that each lawyer submit his or her social security number to the state supreme court). Unreported decision discussed in Conant v. Hill, 326 F. Supp. 25, 26 (E.D. Va. 1971) (upheld state statute requiring submission of social security number to receive a driver's license).

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

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

d. Less Restrictive Alternatives

It is well-established that courts will apply the principle of less restrictive alternatives to fundamental freedoms. Justice Douglas relied on this principle in his opinion for the Court in *Griswold:*

> [A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.[144]

Justice White also spoke to this point in his concurring opinion. Citing from *Shelton v. Tucker*, he stated that statutes regulating sensitive areas of liberty "must be viewed in the light of less drastic means for achieving the same basic purpose."[145] In *Roe v. Ingraham*, the court expressed the desirability of a showing by plaintiffs that a less restrictive alternative was available.[146]

3. Application of Principles to Investigative Credit Reports

Investigative consumer reports are an invasion of the constitutionally protected right of privacy in the following ways. First, investigative credit reports invade personal privacy and privacy of the home. Second, they cause actual harm. Third, the right of privacy outweighs the economic rights it must be balanced against. Finally, there are less restrictive means of accomplishing the same ends which do not cause such grave invasions of a constitutionally protected right.

a. Invasion of Personal Privacy and Privacy of the Home

Investigative credit reports violate personal privacy in that they contain irrelevant and opinionated information from third persons. They violate privacy of the home by reporting information gathered from the consumer's home under false pretenses.

As stated earlier, investigators seek out "opinion" and "hearsay" information concerning the applicant. Questions and instructions on standard report forms invite various invasions of privacy. A report form for O'Hanlon on automobile insurance asks:

> *Do the Following Apply to Any Driver?*
> 18. Common law marriage (initiated past 5 years)?
> 19. Moral reputation not good?
> 21. Undesirable associates?
> 24. Antagonistic—antisocial—uncooperative? (Insured or family members refuses to cooperate, antagonistic to neighbors, etc.)[147]

144. 381 U.S. at 485, *quoting* N.A.A.C.P. v. Alabama, 377 U.S. 288, 307 (1964).
145. 381 U.S. at 504, *quoting* Shelton v. Tucker, 364 U.S. 479, 488 (1960).
146. Roe v. Ingraham, 364 F. Supp. 536 (S.D.N.Y. 1973).
147. *1973 Proxmire Hearings, supra,* note 4, at 856.

An Automobile Insurance Report form for Retail Credit asks if home conditions are questionable. This form also provides a chart for the investigator to complete on applicant's drinking habits. After checking either "Drinks to Intoxication," "Drinks to Boisterousness," or "Drinks to Mild Excess" the investigator is to answer the following: "How often? Where? Last occasion? Drive after drinking? Length of excesses?"[148]

A form entitled "Life Report" of Retail Credit asks:

15. Anything adverse about living conditions or neighborhood?
16. Do any of the following apply to this applicant: Heavy debts? Domestic trouble? Drug habit? Connection with illegal liquor?

. . . .

17. Is there any criticism of character, morals, or general reputation?[149]

Company policies encourage offensive means of gathering information. The president of Hooper-Holmes described the procedure of an inspector who is suspicious of an extra marital affair:

> You go to a neighbor and establish rapport. Then you ask, "What's your opinion of X's home life; how do you think of him as a family man?" This will usually elicit some hint—through the expression on their faces or the way they answer. Then you start digging. You press them as far as they go, and if they become recalcitrant, you go somewhere else."[150]

And on homosexuality, he added:

> Homosexuality is one of the most difficult things to determine. If you have that sixth sense that something is wrong, you dig. The tip-off is their mode of living, their circle of friends and the organizations they belong to.[151]

An interoffice memorandum of Retail Credit encourages investigators to "dig" far into the intimacies of an applicant's sexual life. The memorandum declares:

> *It Makes the Difference*
> *This Doesn't Tell the Story—*
>
> "Lives common law."
> "Lives with Mr. ——— (different name) but sources do not know the relationship."
> "Subject living with woman without benefit of marriage."
> "He is divorced because of his association with other women."
> "He lives with another man and sources suspect them of living in an immoral relationship."
> *We Haven't Done the Job Unless We've Found Out and Reported—*
> Current marital status—

148. *Id.* at 852-53.
149. *Id.* at 850.
150. THE NEW REPUBLIC, April 27, 1968, at 11.
151. *Id.*

If divorced—when, why, whose fault?
If separated—how long, cause, divorce planned?
Past and *present* moral reputation—
If promiscuous—extent, class of partners?
If particular affinity—how long, criticized, partner beneficiary?
If living with partner—how long, children, stable home, criticized, is there living undivorced spouse?
If illegitimate child—how old, circumstances, favorable reputation regained, living and working conditions?
Possible homosexuality—
How determined—living together, demonstrates affection for partner in public, dress and/or manner, criticized, associates with opposite sex?[152]

Credit investigating companies also have a policy of "pumping" doctors for personal information about their patients. A Retail Credit interoffice report entitled "Physician Source File Study" offered these "successful approaches" when physicians refuse to give investigators an interview:

DOCTOR STATES TOO BUSY

. . . .

Obtain as much information as possible from nurse or secretary and contact doctor only briefly for clarification and/or signature. Explain to doctor that in the long run you will save him time. By granting you an interview, he cuts back on clerical and secretarial time required to reply to correspondence.

DOCTOR STATES HE LETS NURSE OR SECRETARY HANDLE PAPER WORK

Agree to obtain information from nurse or secretary and then see doctor only briefly for clarification and/or signature.

DOCTOR STATES HE DISLIKES INSURANCE COMPANIES

Use the "this will help the patient" approach.

DOCTOR STATES HE ALREADY HAS SENT INFORMATION TO INSURANCE COMPANY

Explain that you are only interested in clarifying several important points. . . .[153]

Physician interviews can result in the recording of highly personal information which is irrelevant to any legitimate business purpose. One underwriting medical history report noted "4-6-72 Husband & Wife discussion concerning sexual matters."[154]

Much information is gathered from the consumer under false pre-

152. *1973 Proxmire Hearings, supra* note 4, at 845.

153. Retail Credit Company, "Physician Source File Study (Summary)," Jan. 3, 1968 (unpublished study on file with Warren Leech, Santa Cruz, California).

154. Retail Credit Company Underwriting Medical History Report, Form B 11113, Jan., 1972 (name and policy number confidential) (on file with Warren Leech, Santa Cruz, California).

tenses. Retail Credit's 1964 Inspector's Manual[155] tells how a person's eligibility for auto insurance can be reviewed after an auto accident by going to the person's house under the pretense of inspecting the damaged auto:

> If the insured offers to show you the car, always accept, since this further fixes his idea of a physical inspection . . . in the insured's mind.
> Whether you give out the name of our company depends upon the caliber of person to whom you are talking . . . . If a low-grade or ignorant person, this may not be desirable. With foreign and industrial types, few preliminaries are required.[156]

A typical report on current assets and income stated the following: "We interviewed the subject's father under pretext . . . ."[157]

In its complaint against Retail Credit,[158] the FTC charged, *inter alia*, that agents misrepresent themselves as agents of the company to which the consumer applied for a benefit and that the information furnished by the consumer would be used exclusively by that company. This practice, the complaint continues, leads consumers to divulge more information than they would otherwise elect to provide had they known the true identity of the agent.

The above practices by credit reporting agencies certainly go far beyond the allowable means outlined for welfare home visits in *Wyman v. James*, where the Supreme Court enumerated certain prohibited practices, including "entry under false pretenses" and "snooping in the home." Additionally, the Court specified that "[o]utside informational sources, other than public records, are to be consulted only with the beneficiary's consent."[159]

b. Actual Harm

In many cases the harm resulting from investigative consumer reports has been direct and substantial. First of all, the applicant is denied the benefit applied for. Denial or cancellation of auto insurance is not an uncommon result of investigative reports containing highly personal and irrelevant information.[160] In other cases investiga-

155. This manual was released as a result of a lawsuit.

156. Douthat, *Gossip, hearsay, second-hand facts used in credit reports*, The Miami News, May 3, 1973, at 1A, col. 1.

157. Retail Credit Company Retailers Commercial Agency, Inc., Current Assets and Income Report, Form 4570, September, 1970 (name and claim number confidential) (on file with Warren Leech, Santa Cruz, California).

158. See note 18 *supra*.

159. 400 U.S. 309, 321 (1971).

160. Galen L. Cranz, Princeton University faculty member was denied auto insurance on the basis of a credit report that mentioned she was living with a man to whom she was not married. ACLU Foundation, The Privacy Report, No. 6, Jan. 1974, at 6. She has filed suit, Cranz v. State Farm Mut. Auto. Ins. Co., Civ. No. 1858-73 (D.N.J., filed Jan. 4, 1974).

tive credit reports have resulted in denial of employment opportunities, promotions[161] and business licenses.[162]

Second, since the adverse personal information remains in the credit company's files, the same benefit is denied by other companies to whom the person applies. Insurance companies automatically view with suspicion anyone who has been turned down or cancelled by another insurance company.[163] The result of an adverse report can, therefore, either leave the consumer without employment, insurance or credit, or force the consumer to accept a lower-paying job or less satisfactory insurance at a higher cost.

Beverly Thompson, 43, was denied renewal of her auto insurance policy on the basis of an investigative report that stated her boyfriend "was practically living" with her. Subsequently, she was refused insurance at normal rates by nine other companies. Eventually she settled for an assigned-risk policy with less coverage and higher premiums. *The Angry Consumer*, MONEY, Oct., 1974, at 26. Ms. Thompson is suing Retail Credit Company and ten insurance companies. Thompson v. Aetna Cas. and Sur. Co., Civ. No. 14,733 (D. Conn., filed Jan. 11, 1974).

Nationwide Mutual Insurance Company cancelled the policy on one car belonging to Robert Meisner, whose credit report had grossly understated his and his wife's salaries and had labeled his son a "hippie-type youth" active in antiestablishment concerns. In reality, his son was a model student, letter athlete and had recently campaigned for a Republican candidate. Shaffer, *Consumers Gripe That Credit Reporting Law Doesn't Always Work*, The Wall Street Journal, Dec. 29, 1971, at 1, col. 6.

At age 57, a doctor (also retired colonel, United States Air Force Reserve) was refused auto insurance for the first time in his life. His investigative report stated he was sloppy and slovenly. He was interviewed on the day he was released from the hospital, wearing a bathrobe and surrounded by papers and correspondence. Letter from [confidential] to David Weinberger, West Miami, Florida.

James C. Millstone, an editor of the St. Louis Post-Dispatch, was turned down for auto insurance because a report stated he had "lack of judgment," "undisciplined kids," a prior history of evictions, and a "bad attitude." The report proved to contain inaccurate allegations from a disgruntled neighbor. Millstone has filed a $100,000 punitive damage suit. Millstone v. National Inspection Bureau (O'Hanlon Reports), Civil No. 72-C224-4 (E.D. Mo. filed April 11, 1972).

161. David Weinberger was denied employment at IBM on the basis of a pre-employment character check. The report stated he had been a business partner with a man who was facing charges for illegal use of the mails, when in fact he had merely purchased supplies from the alleged lawbreaker. Interview (telephone) with David Weinberger, Nov. 12, 1974; Herman, *Suing Retail Credit Co. Is Career and Pastime for David Weinberger*, The Wall Street Journal, Jan. 16, 1974, at 1, col. 1. Numerous other examples of denial of employment because of false information in credit reports have been reported. *E.g., 1974 Proxmire Hearings, supra* note 19, at 5; Haigley, *Your credit records may be wrong*, The Miami News, Sept. 17, 1974, at 1, col. 1.

162. Paul Roemer was denied an insurance license on the basis of false and malicious information in his investigative report. The information was given by an ex-business associate whom Roemer was suing. Roemer has sued Retail Credit. The case has been tried and appealed two times, resulting in jury award of $57,500 the first time and $250,000 the second. Roemer v. Retail Credit Co., 44 Cal. App. 3d 926, 119 Cal. Rptr. 82 (1975); Roemer v. Retail Credit Co., 3 Cal. App. 3d 368, 83 Cal. Rptr. 540 (1970).

163. *See* Cranz v. State Farm Mut. Auto. Ins. Co., *supra* note 160.

c. Balancing Other Interests

The invasion of privacy which results from investigative consumer reports must be weighed against the legitimate business interests served by the reports. On the one hand is the need of credit companies, insurance companies and prospective employers to protect themselves against unreasonable risks. In the credit industry alone hundreds of millions of dollars rest upon decisions regarding the extension of credit to individuals. The decisionmakers must be informed about a person's solvency and reliability. Automobile insurers need to know a person's driving record and other pertinent facts before taking the risk of insuring that person. Life insurance companies should know the medical history and the physical condition of the applicant, as well as the hobbies and interests of the applicant if they involve special dangers such as skydiving or mountain-climbing. An employer should know the experience and abilities of a prospective employee and the educational background of the applicant and his characteristics which might determine suitability for a particular assignment. The filing of such information holds certain cost-saving efficiencies which are helpful in the business world. The information thus gathered allows for "statistical stereotyping" as a means of making a large number of decisions in the shortest amount of time.

On the other hand, however, is the individual applicant's fundamental right of privacy. The underlying approach to investigative consumer reports indicates a direct contradiction of the constitutional right of privacy. In a programmed learning course for investigators, this philosophy is clear:

> [W]ould you say that this information touches upon many highly personal aspects of the insured person's life? . . . We feel that it does. That is the nature of insurance.[164]

The bias of the reporting industry appears again in a summary of the lesson:

> 4. Information, to be reliable, must be obtained from, or verified through, unbiased sources.
> 5. The best sources of information concerning general aspects of an insurance applicant's personal life are usually neighbors, though other types of sources are often necessary for specialized information.[165]

The practice of gathering irrelevant information is fostered by the reporting industry:

> The amount of protective information is an indicator of the quality of the report, overall.

164. Retail Credit Company, "This Business of Ours," Programmed Learning Course 2, at 12.

165. *Id.* at 23.

> We get it drummed into [our] heads that we must protect our customer—to protect him from the deadbeats.[166]

The result is the collection of an inordinate amount of information which is irrelevant to any legitimate business purpose.[167] Actual cases in the files of Retail Credit display these irrelevancies.[168]

False information also gets into the files. In some cases false information is included by mistake, but in other cases it is intentionally recorded. The intent can spring from a source who does not like the

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166. Douthat, *Credit bureaus pry into millions of lives*, The Miami News, May 2, 1973, at 4A, col. 1.

167. See note 160, *supra*. In the cases of Beverly Thompson and Gail Cranz, the denial of auto insurance was based on their private lives rather than their driving records. The Thompson investigative report contained no criticisms on driving habits, drinking habits or personal habits. After the comment that Ms. Thompson "was practically living with her boyfriend," the report itself emphasized the irrelevancy of this information:

> AGAIN, IT MUST BE REPEATED THAT IN SPITE OF A BELIEF THAT THEY WERE LIVING TOGETHER, THE SUBJECT AND HER FRIEND ENJOYED GOOD PERSONAL REPUTATIONS. Exhibit A, Thompson v. Aetna Cas. and Sur. Co., Civ. No. 14,733 (D. Conn., filed Jan. 11, 1974).

Health insurance companies justify the prurient interest in a person's sexual life by making it a risk factor. In a table of "debit" and "credit" factors for life insurance, "[s]exing too much" is listed as a debit. H. DINGMAN, INSURABILITY, PROGNOSIS, AND SELECTION 180, *as cited in* E. FAULKNER, HEALTH INSURANCE 334 (1960).

Sen. Proxmire questioned Lee Burge, President of Retail Credit, on the relevancy of extraneous factors. Regarding a question on "type of associates," the senator asked:

> Sen. Proxmire: Now what does all of this have to do with life insurance?
>
> Mr. Burge: Well, in the first place, a man who might have underworld connections or poor associates, or exposures—
>
> Sen. Proxmire: What are poor associates?
>
> Mr. Burge: Poor associates—people who have a high incidence of crime.
>
> Sen. Proxmire: Who can determine that in a 20 or 30 minute investigation?

Hearings on S.823 Before the Subcomm. on Financial Institutions of the Sen. Comm. on Banking and Currency, 91st Cong., 1st Sess., at 206 (1969).

168. The file of an attorney applying for life insurance reported that "ex-wife was suspected of infidelity." No source was cited. *Id.*

Several investigative reports were released by Retail Credit Co. in connection with litigation. Miami News v. City of Miami, No. 74-12503 (11th Jud. Cir., Dade County, Fla., filed May 3, 1974). One report stated, "This source stated that she was the maid at the [Y] residence. She stated that she knew who [Mr. X] was, but did not know anything about him. She said that he was president of some big business."

It continued, "We were unable to interview your claimant. We made an attempt on 8-28-73 at 12:30 p.m. and found two cars parked in the driveway of his house, one 1973 Cadillac, 1973 Ford. This is a very large, very expensive home that would probably sell at today's market prices for $150-175M. There appeared to be some people in the house but no one answered the door."

Another report stated, "This source told us that Mr. [X] is no longer living at the address in question and that the person living there now is Mr. [Y] who is married to Mr. [X's] former wife."

After listing three more unsuccessful attempts to establish an address, the investigator wrote, "We are closing this report as we have used all authorized time."

applicant or who is otherwise unreliable,[169] or from an investigator who is trying to save time by "zinging" cases.

The amount of false information in consumer reports is substantial. Recently, TRW, a credit investigation company which deals only with hard data, reported that "only" one-third of the inquiries from consumers resulted in correction of error.[170]

Thus, the court must "balance" business' need for information against the injury caused by the use of highly personal information which is often false or irrelevant. In some cases the right of privacy clearly outweighs the other side. One such case involved a Senate aide who had helped draft legislation which was opposed by the prescription drug industry. Using the pretext of a preemployment investigation, a large drug company retained Retail Credit to make an investigative consumer report on him.[171] A similar case involved a lobbyist in Minnesota who had opposed the interests of Burlington-Northern Railroad. Counsel for Burlington ordered a "character report" on her from Retail Credit.[172]

Even where there is a legitimate business need for an investigative consumer report, the potential for harm outweighs the need for information. The claim that insurance companies require such information is unsubstantiated. No actuarial tables exist as to the additional risks in insuring homosexuals or unmarried couples living together.[173] No need has been documented for such personal information which these reports seem to thrive on. The "Gestalt theory" upon which the in-

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169. A former Retail Credit Co. investigator testified as to a report which caused an applicant's auto insurance to be denied: "The report stated, without qualification, that the subject's neighbors knew her to be a 'lady of the evening,' that she had visitors come and go very late at night, that she drove fast, and that she was a heavy drinker. . . . When I went to the subject's neighborhood, I talked to no less than 10 persons, all of whom held the subject in high respect. All of them also told me that the neighborhood 'nut' lived next to her." *1974 Proxmire Hearings, supra* note 19, at 11-12.

170. Bride, *Definition of Privacy Needed Before Action Can Start,* COMPUTERWORLD May 15, 1974, at 6. It is probable that the soft data in investigative credit reports would be even more susceptible to error.

171. 116 CONG. REC. 32,839 (1970) (remarks of Sen. Long). M. MINTZ & J. COHEN, AMERICA, INC. 323-24 (1974); Washington Post, July 21, 1969, at A5. *See also* Nader v. General Motors Corp., *supra* note 97.

172. *E.g.,* Minneapolis Tribune, Feb. 6, 1974, § B; St. Paul Pioneer Press, Feb. 7, 1974, at 17; St. Paul Dispatch, Feb. 7, 1974.

173. The insurance industry has been unable to furnish Senator Proxmire's Consumer Credit subcommittee with any actuarial figures showing how a person's morals or housekeeping habits affect his longevity. *1973 Proxmire Hearings, supra* note 4, at 283-86.

There are no statistics correlating risks and information on morals and character. Interviews (telephone) with Mark Kaikee, chief, Rate Regulation Division, Cal. Dept. of Insurance, Dec. 23, 1974, and William Empwistle, Life Underwriting Division, Occidental Life Ins. Co., Dec. 23, 1974.

vestigative reports are based appears to be an unnecessarily vague approach to getting information.

d. Less Restrictive Alternatives

As indicated above, the courts require that the least restrictive alternative be used where fundamental freedoms are invaded. Thus, if a less restrictive alternative is available, it must be used regardless of the results of the balancing test.

In the case of investigative consumer reports, many less restrictive alternatives are available. The first and most obvious way to establish the necessary facts is by direct inquiry. The forms filled out by the applicant should be relied on for certain information. Even though some persons may give false information, it should not be assumed that all information on application forms is unreliable.

Second, consumer reports can be used. These reports include the same information as investigative consumer reports, except they are not based on third person interviews. Thus the dangers of hearsay information, opinion and malicious gossip are not present. To evaluate an application for credit, the credit report should be sufficient. It contains all relevant information on the applicant's financial standing and bill-paying habits.[174]

In the case of auto insurance, the applicant's driving record for a limited number of years should be sufficient information to determine the risks involved in insuring the particular applicant. Any additional information regarding the applicant's character, habits and lifestyle is irrelevant if it is not reflected in his or her performance as a driver.

In the case of health insurance and life insurance, a complete medical record is a sufficient basis for evaluating risk factors. Random neighborhood interviews are certainly not a reliable means of establishing additional information on a person's health.

In the case of an application for employment the relevant factors are experience, ability to get along with co-workers and sometimes education. These factors can be evaluated sufficiently by documenting the information given by the applicant. Relevant character traits could be investigated through interviews with references and past employers.

D. Problem of Finding Governmental Action

The Bill of Rights protects individual freedoms against interfer-

174. Consumer reports are also subject to abuse and harm resulting from false information and outdated information. Since they do not incorporate information gath-

ences by the federal government. The Fourteenth Amendment protects fundamental personal rights from interference by state governments.[175] Purely private conduct abridging fundamental liberties, however, remains beyond the scope of constitutional protection.[176] Thus, the foregoing argument for holding that investigative credit reports are an invasion of the constitutional right of privacy rests upon the assumption that the requirements for governmental action are satisfied.

1. Principles of Governmental Action

In 1883 the Supreme Court decided the Civil Rights Cases,[177] which established the principle that a violation of the Fourteenth Amendment occurred only when state legislation denied individual rights to citizens, or when an action had been taken by a state official if, and only if, that act could be imputed to the state.

Since that decision, the concept of state or governmental action has been expanded considerably. The court now recognizes that "[c]onduct that is formally 'private' may become so entwined . . . with a governmental character as to become subject to the constitutional limitations placed upon state action."[178] Government action has been found in a variety of forms of government involvement, the limits of which are difficult to define.

The most obvious category is formal action by government or its agents, and includes state legislation and municipal ordinances,[179] the activities of state officials operating "under color of law" though unauthorized by the state[180] and judicial enforcement of private agreements.[181]

A second line of cases identifies government action in the activities of a nominally private individual where the government directly or indirectly exercises control. Under this reasoning, substantial government financing may subject the organization to constitutional limitations, at least where such financing is essential to the operation of the

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ered from third person interviews, however, consumer reports are suggested as a preferable alternative to investigative consumer reports.

175. The Fourteenth Amendment provides that "[no state] shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

176. The Court has reaffirmed this distinction on numerous occasions: Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948).

177. 109 U.S. 3 (1883).

178. Evans v. Newton, 382 U.S. 296, 299 (1966).

179. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1880).

180. Screws v. United States, 325 U.S. 91, 108 (1945); *Ex parte* Virginia, 100 U.S. 339, 346-48 (1880); Crews v. United States, 160 F.2d 746, 749-50 (5th Cir. 1947); Catlette v. United States, 132 F.2d 902, 905-06 (4th Cir. 1943).

181. Shelley v. Kraemer, 334 U.S. 1 (1948).

organization.[182] Significant government regulation[183] may likewise be sufficient for a finding of government action, although mere licensing is not enough.[184]

Government action may also be found where private parties carry on a public function ordinarily performed by governmental agency. Thus, company towns that maintain public thoroughfares,[185] shopping plazas that replace municipal business districts,[186] nominally private organizations operating formerly public parks,[187] and party primaries that are an integral part of the state's elective processes[188] are considered state instrumentalities.

The test for government action as devised in *Burton v. Wilmington Parking Authority* looks to the sum of the various indicia of government involvement. Recognizing the impossibility of formulating a precise test for determination of government responsibility, the Court stated, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[189] The court added together all of the activities, obligations and responsibilities of the parking authority; the mutual benefits arising out of the lessor-lessee relationship; and the fact that the restaurant was operating as an integral part of a public building. It held that these facts, along with the inaction of the parking authority in the face of discriminatory practices by its lessee, led to the conclusion that the state had "so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."[190]

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182. *E.g.*, Griffin v. State Bd. of Educ., 239 F. Supp. 560 (E.D. Va. 1965); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945).

183. Public Util. Comm'n. v. Pollak, 343 U.S. 451, 462 (1952).

184. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

185. Marsh v. Alabama, 326 U.S. 501 (1946).

186. Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). *But see* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (denial of right to distribute antiwar leaflets by privately owned shopping center held not to constitute state action).

187. Evans v. Newton, 382 U.S. 296 (1966).

188. Terry v. Adams, 345 U.S. 461 (1953).

189. 365 U.S. 715, 722 (1961).

190. *Id.* at 725. Since this note was written, the Supreme Court decided *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), in which it held that there was insufficient state involvement in the operation of a private utility to support a finding of state action. Writing for the majority, Justice Rehnquist rejected the plaintiff's contention that the defendant utility company had violated the due process clause of the Four-

2. Finding State Action in Investigative Consumer Reports

An analysis of the involvement of state and local government in credit investigations leads to the conclusion that the requirements of significant state involvement are satisfied.

a. Direct State Involvement

There is an exchange of information between the state and the credit agencies. States and municipalities hire credit investigatory companies to investigate prospective employees.[191] The states have also used the agencies to discourage welfare fraud.[192] The exchange of information goes in both directions. In many cities police departments make their records available to consumer reporting agencies with or without charge.[193] Similarly, Retail Credit Company encour-

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teenth Amendment by terminating service without a hearing. Rather than using the "sum of the various indicia" test for state action, he considered seriatim each factor of state involvement and rejected each individually as being insufficient. This case represents a rejection of state regulation and of public function as bases for finding state action. The utility company was heavily regulated by the state. In addition, it enjoyed a partial monopoly in providing essential public services. Nevertheless, the Court found that neither of these factors was a sufficient indication of state involvement for purposes of the Fourteenth Amendment.

It is possible that an action based on invasion of privacy by a credit reporting agency is distinguishable from *Jackson*. A symbiotic relationship such as the one between government and credit reporting agencies, as evidenced by an extensive exchange of information, was neither present nor discussed in the *Jackson* case. The fact that government benefits from and participates in the activities of the reporting agencies could very well be a decisive factor in finding state action, especially in light of growing public concern over loss of individual privacy in today's technological society.

191. Interview (telephone) with Lee Lester, Attorney for Retail Credit Co., Nov. 22, 1974. For example, the City of Miami hired Retail Credit Co. to investigate retired city employees regarding claims for disability benefits. Miami News v. City of Miami, Civ. No. 74-12503 (11th Jud. Cir., Dade County, Fla., filed May 3, 1974).

192. In Cincinnati, Ohio, a welfare agency gave Retail Credit Co. a list of its hardest-to-find absent welfare fathers. The firm's investigators located 30 percent of the missing men. The Wall Street Journal, July 12, 1972, at 1, col. 5. After a state representative charged that erroneous and fraudulent welfare payments were totaling $23 million, Florida launched a crash program of interviewing all welfare cases. The Miami Herald, Jan. 21, 1972, at 8-C. When the state determined it could not handle the increased work load, it hired Hooper Holmes, a consumer reporting agency, to investigate all welfare applicants. The Miami Herald, Nov. 25, 1971, at 1-B.

193. The Wall Street Journal, Jan. 27, 1971, at 9, col. 5. Some of the nation's largest detective agencies and Retail Credit Co. were fined for paying policemen and other New York City employees for confidential records and personnel information. The Wall Street Journal, Feb. 22, 1971, at 7, col. 4. In Massachusetts several state policemen were recently investigated for unlawful sale of criminal records to credit reporting agencies. In response, investigative agencies mounted a campaign to obtain legal authorization for access to such files. COMPUTERWORLD, Mar. 20, 1974, at 1.

ages its investigators to obtain the maximum amount of information from state and local agencies.[194]

194. In an interoffice memorandum, investigators were urged to "[d]o all that is possible to open closed Police and Traffic Record information sources in your territory." The message emphasized the importance of such information: "[I]t provides our customers with factual 'actionable' information; it should be furnished whenever possible." Interoffice Memorandum (Police and Traffic Record Availability), from Retail Credit Operating-Service Dept. to All Managers and Sub-offices, Nov. 24, 1970.

A five-page internal memorandum of Retail Credit's Los Angeles metropolitan office rated various local and state government agencies as to their degree of cooperation:

CITY OF LOS ANGELES

(1) Central Receiving Hospital: "Of value in securing records of Emergency Treatment. . . . POLICE & FIREMAN'S CLINIC is located here, of value on health problems of those employees who get most of their treatment here, plus annual physical examinations, etc."

(2) Los Angeles Police Department: "[W]e can purchase TRAFFIC ACCIDENT REPORTS, DEATH REPORTS, AND CRIME REPORTS for $2.00 each.

. . . .

"Under a new set-up . . . we may personally interview arresting officers on certain type cases. Of particular value on Claim Cases of all types."

(3) Department of Missing Persons: "In [sic] the Los Angeles Police Department will cooperate on Disappearance cases."

Regarding other city departments, the memorandum stated, "Almost all departments are cooperative to a certain degree."

LOS ANGELES COUNTY

(1) Coroner's Office: "Full record review is available on questionable or accidental deaths. We may look at or purchase almost any document needed."

(2) Assessor's Records: "Here are the entire County Tax Rolls for Property Tax; property ownership can be determined, lien-holders and tax-liens. Of particular value on Subrogation type loss-claims, or on location problems."

(3) Criminal Court Records: "Full review of any record is possible. Of particular value in pinning down derogatory information and getting exact details on Criminal Activities. Records often include a Probation Officer's Report which will give full background, marital picture, employment picture, past arrests."

(4) Civil Court Records: "We can pull files and personally review them. . . ."

(5) Probate Court Records: "On deceased persons we may pull file—gives good run-down on financial picture, business background, heirs, etc."

(6) Psychiatric Commitments: Los Angeles General Hospital: "We can . . . get all details of Psychiatric commitments by the Court."

(7) Sheriff's Department: "Various departments here are fairly cooperative, with Homicide Detail the most cooperative. We may personally review their Death Reports and Z-Files (Investigation Reports)."

Other county resources include: New Hall of Records (Birth and Death Certificates), County Health Department, Los Angeles General Hospital, Probation Department and Voter's Registrar.

STATE OF CALIFORNIA

(1) Highway Patrol: "Traffic Accident Records . . . are available at all Branch Units . . . . These may be picked up . . . or we can order them by letter for $2.00 each.

(2) Industrial Accident Commission: "These records cover those persons injured on the job whose claims are disputed by an employer or compensation carrier. We can personally pull the file and review it, can photostat the record, or order copies."

(3) Office of Administrative Procedures and Department of Vocational Standards:

b. Indirect State Involvement

State regulation of the credit investigative agencies may be a second basis for finding state action. Prior to the passage of the FCRA only one state had passed regulatory legislation for credit bureaus.[195] Several states regulated investigations by private detective agencies, but most exempted agencies investigating applicants for credit or insurance.[196] Several of these states restrict the exemption to investigations of the personal habits and financial or credit responsibility of applicants for insurance or commercial credit. If the agency participates in other activities proscribed by the act, it will be treated as a detective agency.[197] Since the passage of the FCRA, however, several states have supplemented its provisions with their own regulatory legislation.[198] In other states, regulation of insurance companies[199] may impart state action to those companies. Since an investigatory agency is generally considered to be an agent of its client[200] this would be sufficient to bring it with the ambit of state regulation.[201]

"These two offices maintain records on all licensed vocations. . . . We can check with this Department for licenses, disciplinary problems, etc."

(4) Corporation Commission: "We can pull the file, and get a full run-down on listed officers, number of shares issued (and value), plus other details on the business."

(5) Department of Mental Hygiene: "Have records on those people registered as having had Mental Hygiene problems, commitments to sanitariums, or mental hospitals. Normally fairly cooperative, will furnish some details without a medical release, but full details are available with a release."

Other State resources include: Department of Alcoholic Beverage Control, Appellate Courts, State Board of Equalization, Motor Vehicle Department, Division of Paroles, Department of Public Health, Public Utilities Commission, State Athletic Commission, and "many other departments which are very cooperative, but too numerous to list." From Record Sources Available in the Los Angeles Civic Center Area, on file with David Weinberger, West Miami, Florida.

195. OKLA. STAT. ANN. tit. 24, §§ 81-85 (1955).

196. *E.g.*, ARK. STAT. ANN. § 71-2110 (5) (Supp. 1973); CAL. BUS. & PROF. CODE § 7522(c) (West 1964); IND. CODE § 25-30-1-5(2) (1974); PA. STAT. ANN. tit. 22, § 25 (1955).

197. *E.g.*, N.Y. GEN. BUS. LAW § 70(3) (McKinney 1968); PA. STAT. ANN. tit. 22, § 25 (1955).

198. For a full discussion of state legislation, see text accompanying notes 249-73 *infra.*

199. State insurance regulations control many areas of the insurance industry, including premium rates, commissions, investments, appointment of agents, and marketing practices and arrangements. *See, e.g.*, R. KEETON, INSURANCE LAW § 8.3 (1971).

200. *Hearings on Commercial Credit Bureaus Before the Subcomm. on Invasion of Privacy of the Comm. on Government Operations*, 90th Cong., 2d Sess., at 20-22 [testimony of Alan Westin, Professor of Public Law and Government, Columbia University]; *id.* at 108 [testimony of John L. Spafford, executive vice president, Associated Credit Bureaus] (1968).

201. The Supreme Court has approved the theory that a private organization can

c. Other Theories for Finding State Action

It might also be argued that the failure of states to regulate activities of credit investigating agencies lends sufficient state authorization to those activities to satisfy the Fourteenth Amendment. A number of courts have held that a state's refusal to exercise its authority to protect the constitutional rights of individuals amounts to state action.[202] This analysis has been taken one step further to suggest that failure to pass and enforce regulatory legislation to limit consumer reporting agencies whose practices invade individuals' constitutional rights likewise constitutes state action.[203] A finding of state action could also be based on the pervasiveness of the credit investigating agencies' activities.[204]

3. Finding Federal Action in Investigative Consumer Reports

The involvement of the federal government in credit investigations likewise is sufficiently extensive to support a finding of governmental action violating the Bill of Rights.

a. Direct Federal Involvement

The exchange of information that exists at the state level is equally pervasive at the federal level. Prior to the enactment of the FCRA, use of credit investigative reports was extensive.[205] Since the

be an agent of the state for purposes of the Fourteenth Amendment. *See e.g.*, Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319-20 (1968); Evans v. Newton, 382 U.S. 296, 299 (1966); Terry v. Adams, 345 U.S. 461, 469 (1953); Marsh v. Alabama, 326 U.S. 501, 506 (1946); Smith v. Allwright, 321 U.S. 649, 663 (1944).

202. Lynch v. U.S., 189 F.2d 476, 479-80 (5th Cir.), *cert. denied*, 342 U.S. 831 (1951); Picking v. Pennsylvania R.R. Co., 151 F.2d 240, 250 (3d Cir. 1945), *cert. denied*, 332 U.S. 776 (1947); Catlette v. U.S., 132 F.2d 902, 907 (4th Cir. 1943).

203. *See* Peters, *Civil Rights and State Non-Action*, 34 NOTRE DAME LAW. 303 (1959).

204. According to one commentator, "the existence of sufficient economic power concentrated in this vehicle to invade the constitutional right of an individual to a material degree" will subject a state-created corporation to the same constitutional limitations as those placed upon a governmental entity. Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 943 (1952).

205. "Another area of interest to this committee . . . is the relationship between Retail Credit Co. and various executive departments and agencies of the U.S. government. A number of agencies, such as the Agency for International Development, Civil Service Commission, Federal Housing Administration, and Veterans' Administration, have established arrangements with our company substantially like those which we have . . . with our nongovernment customers.

They relate to a business-type transaction which involves directly or indirectly the commitment of Government funds or credit or, in some instances, the investigation of prospective employees. In addition, Retail Credit Co. for many years has cooperated

passage of the FCRA, use of investigative agencies has declined to some extent[206] due to provisions restricting permissible purposes for which such reports can be used.[207] However, their use has by no means been discontinued. The Justice Department continues to obtain credit reports for employment purposes.[208] The Civil Service Commission which investigates prospective employees for Atomic Energy Commission, National Aeronautics and Space Administration, Peace Corps, United States Information Agency and United States Arms Control and Disarmament Agency, routinely checks with credit bureaus in most cases.[209] The Federal Housing Administration makes extensive use of credit reports in granting mortgage insurance,[210] as does the Veterans' Administration in processing G.I. loan applications.[211] The Veterans' Administration also uses investigative credit bureaus to locate G.I.s who were overpaid while in the service or while attending school.[212] A number of agencies are required by statute to consider an applicant's financial responsibility.[213] This information usually is obtained from

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with such investigative agencies of the U.S. Government as the Federal Bureau of Investigation and the Internal Revenue Service by making available to authorized representatives of such agencies information which may be in our files." *Retail Credit Hearings, supra* note 56, at 22-23 (testimony of W. Lee Burge, president, Retail Credit Co.).

The Treasury Department disclosed that its Internal Revenue Service agents use approximately 25,000 credit reports a year. These reports "save many hours of investigative effort in locating and identifying persons and providing leads to financial transactions that are relevant and material to tax inquiries." The Wall Street Journal, Apr. 13, 1970, at 21, col. 2.

206. Foer, *supra* note 58, at 76.

207. The FCRA specifies the purposes for which a consumer report may be furnished to a governmental unit. The permissible purposes requirement is satisfied if the information is to be used:

(1) in connection with an application for credit, employment or insurance;

(2) to determine his eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider the applicant's financial status; or

(3) for an otherwise legitimate business need.

A credit report may also be furnished to a governmental body in response to a court order, or in accordance with the written instructions of the consumer. 15 U.S.C. §§ 1681b and f (1970).

208. Letter from Ralph Erickson, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Albert Foer, Mar. 21, 1972, in Foer, *supra* note 58, at 126-28.

209. Interview with Charles Rice, assistant chief—Investigative Division, San Francisco Regional Office, United States Civil Service Commission, in San Francisco, Nov. 27, 1974.

210. Letter from R. David Lasure, Director, Management & Operations, Assistance Division of FHA, to Albert Foer, Jan. 14, 1972, in Foer, *supra* note 58, at 122-23.

211. Letter from Howard Denney, Assistant General Counsel for the Veterans' Administration, to Albert Foer, Feb. 17, 1972, in Foer, *supra* note 58, at 124-25.

212. *1974 Proxmire Hearings, supra* note 19, at 26.

213. *E.g.*, Export-Import Bank of Washington [12 U.S.C. §§ 635 *et seq.* (1970)];

credit agencies. Again the exchange of information goes in both directions with credit investigative agencies making extensive use of federal sources of information.[214]

b. Indirect Federal Involvement

1. Regulation of Industry

The FCRA itself constitutes extensive federal regulation of the credit investigating industry, limiting the purposes for which the information can be gathered and persons to whom the information can be sold. It also provides that the consumer must be notified of any adverse action taken on the basis of reports and be given an opportunity to correct any mistaken information. In effect, it extends government approval of privacy-invading activities of such agencies.

2. Authorization of Investigatory Activities

Section 1681h(e) of the Fair Credit Reporting Act denies the consumer the right to:

> [B]ring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency . . . except as to false information furnished with malice or willful intent to injure such consumer.

The effect of this provision is to suspend the consumer's fundamental constitutional right of privacy as it relates to such investigatory reports.[215] To deny the consumer a remedy for invasion of his right of

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Federal Home Loan Banks Board [12 U.S.C. §§ 1424 *et seq.*, § 1701c(c) (1970)]; Federal Deposit Insurance Corporation [12 U.S.C. §§ 1811 *et seq.* (1970)]; Department of Interior (U.S. Fish & Wildlife Service) [16 U.S.C. §§ 742A *et seq.* (1970)]; Department of State (Agency for International Development) [22 U.S.C. §§ 2151 *et seq.* 1970)]; Veterans' Administration [38 U.S.C. §§ 210 *et seq.* (1970)]; Department of Health, Education and Welfare (Public Health Service) [42 U.S.C. §§ 294 *et seq.* (1970)].

214. A five-page internal memorandum of Retail Credit's Los Angeles metropolitan office rated various federal agencies as to their degree of cooperation with investigators:

> (1) Bankruptcy Records: "Entire file may be pulled and examined. Portions may be purchased. They are of particular value in pinning down financial difficulty, running down creditors and of use in business background.
>
> (2) Criminal Records: "Of use in confirming Criminal Activities on Location cases.
>
> (3) Veterans' Administration: "With proper medical authorization, we may review full medical files. . . ."

The memorandum concludes: "Various sources within the Federal Government are cooperative, such as the State Department, and other agencies. Others are not, such as the FBI and Treasury Department." From Record Sources Available in the Los Angeles Civic Center Area, on file with David Weinberger, West Miami, Fla.

215. *See generally* Comment, *Fair Credit Reporting Act: Constitutional Defects of the Limitation of Liability Clause*, 11 HOUST. L. REV. 424 (1974).

privacy is to stamp the activity with a seal of governmental approval. Such approval can only encourage the investigatory practices that lead to invasions of privacy.

In the "open housing" case, *Reitman v. Mulkey*,[216] the Court upheld a finding of state action based on an amendment to the California constitution which prohibited government restriction of the right of private citizens to convey real property. The Court found that the amendment would significantly encourage and involve the state in private discrimination contrary to the Fourteenth Amendment. "Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market."[217] The provisions in the FCRA denying a remedy for invasion of privacy similarly authorizes and encourages actions violating the Constitution of the United States.

c. Delegation of Duties

The delegation of activities from governmental to private bodies can, under some circumstances, convert the private body into an instrumentality of the government, and subject it to the same constitutional limitations.[218] Investigations of prospective employees and applicants for licenses, loans and other governmental benefits, clearly come within this definition.

3. Alternative to Finding Government Action: 18 U.S.C § 241

Even in the absence of a finding of state action, 18 U.S.C. section 241[219] presents a possible alternate means of preventing privacy-invading activities by consumer credit reporting agencies. The Court has yet to recognize congressional power to legislate against any and all private conspiracies to interfere with the constitutional rights of others. Nevertheless, Congress' power to regulate interstate commerce justifies the extension of section 241 penalties to invasion of the constitutional right of privacy by consumer credit reporting agencies.[220] Although

216. 387 U.S. 369 (1967).

217. *Id.* at 380-81.

218. The Supreme Court has adopted this position in Evans v. Newton, 382 U.S. 296, 299 (1966); Terry v. Adams, 345 U.S. 461, 469 (1953).

219. 18 U.S.C. § 241 reads in part: "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . . [t]hey shall be fined not more than $10,000 or imprisoned not more than ten years, or both. . . ."

220. *Cf.* United States v. Guest, 383 U.S. 745 (1966) (federal commerce power

the original intent of the statute was to protect the black population of the South against outrages committed by the Ku Klux Klan, its scope has been greatly enlarged.[221] Several cases have held that section 241 protects all rights granted under the Constitution of the United States[222] regardless of whether the particular mode of injury for which the defendant is indicted was known at the time of the adoption of the statute.[223] It is not necessary that the right in question be specifically mentioned in the Constitution; the conspiracy statute applies with equal force to implicit constitutional rights.[224]

The power of Congress to enact legislation to protect individual liberties guaranteed by the federal Constitution from interference by private conspiracies has been upheld in a number of cases.[225] Thus it is unnecessary to allege actions under color of state law for purposes of applying section 241. It is essential, however, that the requisite specific intent be satisfied. Under section 241 proof that the actors actually knew it was a constitutional right they were conspiring against is not necessary. It must be established, however, that the acts which violate constitutional rights were the primary purpose of the conspiracy, rather than an incidental side effect.[226]

Under section 241 there must be a finding of conspiracy to deprive a citizen of his constitutional rights. Conspiracy has been defined as a combination of two or more persons for an unlawful purpose or

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supports the extension of section 241 to protect freedom of interstate travel against interference by private conspiracies).

221. In *United States v. Mosley*, 238 U.S. 383 (1915), Mr. Justice Holmes commented on section 6 of the Enforcement Act of 1870, 16 Stat. 141, *as amended*, now 18 U.S.C. § 241: "Just as the Fourteenth Amendment . . . was adopted with a view to the protection of the colored race but has been found to be equally important in its application to the rights of all, [section 241] had a general scope and used general words that have become the most important now that the Ku Klux have passed away . . . . [W]e cannot allow the past so far to affect the present as to deprive citizens of the United States of the general protection which on its face [the statute] most reasonably affords." 238 U.S. at 388.

222. United States v. Johnson, 390 U.S. 563 (1968); United States v. Price, 383 U.S. 787 (1966); United States v. Waddell, 112 U.S. 76 (1884).

223. United States v. Classic, 313 U.S. 299 (1941).

224. *In re* Quarles, 158 U.S. 532 (1895); Logan v. United States, 144 U.S. 263 (1892); United States v. Pacelli, 491 F.2d 1108 (2d Cir. 1974).

225. *E.g.*, United States v. Guest, 383 U.S. 745 (1966) (private interference in right to freedom of interstate travel); United States v. Classic, 313 U.S. 299 (1941) (private interference in federal primaries); *In re* Quarles, 158 U.S. 532 (1895) (right to inform federal officials of violations of federal laws); Logan v. United States, 144 U.S. 263 (1892) (conspiracy to injure someone in the custody of a United States marshall); United States v. Waddell, 112 U.S. 76 (1884) (statutory right to make homestead upon unoccupied public lands); *Ex parte* Yarbrough, 110 U.S. 651 (1884) (right to be free from private interference in federal elections).

226. United States v. Guest, 383 U.S. 745 (1966).

to effect a lawful purpose by unlawful means. A combination requires that the parties have reached agreement. Agreement need not be formal, however; it is enough that the parties tacitly come to an understanding in regard to the unlawful purpose. This may be inferred from sufficiently significant circumstances. Unlawful, includes whatever is punishable as an offense by statute or at common law.[227] The agreement between a consumer reporting agency and the user of the report satisfies the definition of conspiracy. A combination between the credit reporting agency and the user is demonstrated by the standard investigation forms used by the largest consumer reporting agencies[228] during investigations of applicants for life, automobile and accident and health insurance. Each form requests information as to the applicant's character or reputation. Specifically they request the investigator to give details of any evidence that any of the following apply to the applicant: heavy debts, domestic trouble, drug habit, irregular beneficiary, illegal activities, questionable business practices. Every form has a catchall question as to any criticism of applicant's character, morals or associates.[229] Additionally, some consumer reporting agencies require their investigators to meet production quotas for protective and declinable information.[230] In Retail Credit's Manager's Manual, protective information is referred to as "the 'meat' of the report—the basis upon which we sell our service."[231] That insurance companies agree with this assessment is apparent from the fact that they award their contracts to the company developing the highest percentage of adverse information.[232] Likewise, the requirement that the actors combine to effect an unlawful purpose is satisfied by intent to invade the privacy of the home.

C. Summary

In summary, it can be seen that investigative consumer reports are an invasion of the individual's constitutional right of privacy and often result in actual harm. The right of privacy outweighs the need for such information when competing interests are balanced against each other. Additionally, there are less restrictive and more reliable alternatives for gathering the information needed. The requirement of

227. R. PERKINS, PERKINS ON CRIMINAL LAW 629 (2d ed. 1969).

228. The largest national insurance inspection bureaus include American Service Bureau, Hooper-Holmes Bureau, National Inspection Bureau (O'Hanlon's Reports), Retail Credit Company and Service Review. Foer, *supra* note 58, at 51.

229. *1973 Proxmire Hearings, supra* note 4, at 839-72.

230. *See generally, 1974 Proxmire Hearings, supra* note 19.

231. *1973 Proxmire Hearings, supra* note 4, at 973.

232. *1974 Proxmire Hearings, supra* note 19, at 18.

government action is satisfied by reason of the involvement of government in investigative consumer reporting. Additionally, 18 U.S.C. section 241 provides a possible remedy for the consumer when his constitutional right of privacy has been invaded by investigative consumer reports.

III. Legislative Remedies

Until recently, personal information data banks were allowed to grow unchecked. As their potential for harm has become apparent, they have become a source of international concern. Legislation dealing with personal information data banks has been enacted in Sweden,[233] Canada[234] and Australia.[235] Recently an international symposium, sponsored by the Organization for Economic Cooperation and Development, considered the problems created by personal information data banks.[236] In the United States, concern for the potential dangers of personal information systems developed around 1960.

233. The Swedish Data Act provides that a personal register may not be started or maintained without permission of the Data Inspection Board. Such permission shall be granted only if there would be no undue invasion of the privacy of individuals. It also specifies that permission to keep certain types of information (criminal record, treatment for mental condition, state of health, receipt of social assistance, treatment for alcoholism, political or religious views) shall not be granted except under special circumstances. *See Hearings on Federal Information Systems and Plans—Implications and Issues Before a Subcomm. of the House Comm. on Government Operations,* 93d Cong., 2d Sess., pt. 3, at 1095-1102 (1974).

234. Canada has responded to the growth of the consumer reporting industry with strong legislation regulating how such information may be obtained, maintained and used. Five provinces—Manitoba, Saskatchewan, Nova Scotia, Ontario and British Columbia—have passed legislation regarding credit reporting agencies. Quebec is considering similar legislation.

Ontario's Consumer Reporting Act (The Consumer Reporting Act of 1973, ONT. REG. 251/74 (Can.)), like those of other provinces, distinguishes between credit agencies which report bill-paying records, and credit reporting agencies which investigate the consumer's character for insurance companies and employers. The act requires personal information investigators to register. It gives consumers the right to inspect their files and to correct inaccuracies. It forbids files to be kept for more than seven years, and bans data on race, color, sex, creed, ancestry or origin. Consumers must be notified in advance if a report is requested and, if adverse action is taken on the basis of a report, they must be told the source of the information. The act imposes a maximum fine of $2,000 on individuals and $25,000 on corporations for furnishing false information.

235. In Queensland, Australia, the Invasion of Privacy Act of 1971 limits credit reporting agents to a moderate extent. The strongest provision requires credit reporting agents to apply for a license and go through a stringent screening process. The license must be renewed every year and is subject to cancellation for various reasons. *See generally* Whalan, *The Creditor-Granting Aspects of the Invasion of Privacy Act 1971,* 7 U. QUEENSLAND L.J. 428 (1972).

236. A summary statement was drafted to guide governments considering privacy legislation. It recommended:

(1) Standards for the operations of personal registers should be established,

Congressional concern over the credit reporting industry culminated in the passage of the FCRA, which went into effect in 1971. Since that time, a number of states have supplemented its provisions with legislation of their own. In addition, Congress has considered a number of proposed amendments to the FCRA as well as legislation dealing with other privacy issues.

A. Federal Legislation: FCRA and Proposed Amendments

The FCRA was enacted "to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy."[237] The act requires consumer reporting agencies to adopt reasonable procedures to ensure the confidentiality, accuracy and the proper use of such information.[238]

The chief requirements which the act places on consumer reporting agencies and the users of the reports follow.

1. Accuracy of Information

The consumer reporting agencies must follow reasonable procedures in preparing their reports to assure maximum possible accuracy of the information.[239]

2. Permissible Purposes

A consumer reporting agency may furnish a consumer report about an individual only: (a) in response to a court order; (b) in response to the written instructions by the individual to whom it relates; (c) in order to determine the individual's eligibility for credit, insurance or employment; (d) for a license or other benefit granted by a governmental instrumentality which is required by law to consider the applicant's financial responsibility; and (e) to meet a legitimate business need for a business transaction involving the individual.[240] A consumer reporting agency must take steps to ensure that its reports will be used only for permissible purposes.[241]

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following assessment of likely developments with adequate protection for individual privacy.

(2) Each citizen should have the right to inspect information about him in all public and private records and to correct or challenge incorrect data.

(3) Nations should co-operate to harmonize minimum protective standards, and should use great care in implementing programs involving data collected on all citizens. 106 SCIENCE NEWS No. 19, Nov. 9, 1974, at 296.

237. 15 U.S.C. § 1681(a)(4) (1970).

238. *Id.* § 1681(b).

239. *Id.* § 1681e(b).

240. *Id.* § 1681b. Government agencies, however, can obtain identifying information (name, address and places of employment) for nonbusiness uses. *Id.* § 1681f.

241. *Id.* § 1681e(a).

3. Notice to Individuals

Whenever adverse action is taken, wholly or partly because of information in a consumer report, the user of the report must notify the individual and furnish him with the name and address of the consumer reporting agency. Adverse action is defined as the denial of credit, insurance or employment, or the increasing of charges for credit or insurance.[242]

Whenever a consumer reporting agency includes in its report public information which may have an adverse effect, it must so notify the individual, and furnish him with the name and address of the person to whom the information is to be supplied, or, in the alternative, it must maintain strict procedures designed to ensure that whenever public record information is used, it is complete and up-to-date.[243] Whenever an investigative report, obtained through personal interviews with neighbors or acquaintances, is to be prepared, the individual must be notified in advance unless the report is for employment for which the individual has not applied.[244]

4. Individual Right of Access

The individual has a right to be clearly, accurately and fully informed of the nature and substance of all information in the consumer reporting agency's file excepting medical information and the sources of an investigative consumer report. He also has a right to be informed of all persons who received a copy of such report within the two prior years for employment purposes, and within the last six months for any other permissible purpose.[245]

5. Right to Contest Information

If the accuracy or the completeness of the information is disputed, the consumer reporting agency must reinvestigate and record the current status of that information. It must delete the information if it is found to be inaccurate or cannot be verified. If reinvestigation does not resolve the dispute, the individual has the right to file a brief statement, which can be limited to 100 words, explaining the dispute. Unless there are reasonable grounds for believing the statement to be frivolous or irrelevant the agency must thereafter note the dispute and provide at least a clear summary of the individual's statement.[246]

242. *Id.* § 1681m.
243. *Id.* § 1681k.
244. *Id.* § 1681d(a).
245. *Id.* § 1681g.
246. *Id.* § 1681i.

While the FCRA has provided consumers with some protection, it nevertheless suffers from a number of shortcomings. After three years of administering the act, the FTC concluded that it is an ineffective tool for achieving desired goals. The commission proposed a sweeping revision[247] which has been incorporated into Senate Bill 2360. Although these amendments have been tabled by committee, they are important as an indication of those weaknesses of the FCRA most likely to be corrected. The amendments would:

(1) require the user to disclose the reason for the adverse action;
(2) require the user to provide the consumer with a copy of the report relied upon;
(3) permit a personal, visual inspection of the file and grant the consumer the right to a copy;
(4) require consumer authorization before an investigative consumer report can be made;
(5) broaden the definition of consumer reporting agency to include governmental agencies which prepare investigative reports for other agencies or subdivisions of the government, such as the Civil Service Commission;
(6) repeal section 1681h(e), which denies a consumer a right of action for defamation, invasion of privacy or negligence except in cases of willful or negligent noncompliance;
(7) require that a consumer report be in writing, that the sources of all information be identified, and that the file be retained by the consumer reporting agency for at least one year;
(8) impose minimum punitive damages of $1000 for willful noncompliance, and minimum actual damages of $100 for each item of erroneous information in cases of negligent noncompliance;
(9) give the FTC rulemaking authority.[248]

Although the amendments to the FCRA would substantially strengthen the protection to the consumer, important gaps would still exist. Most importantly, the FCRA, as amended, would continue to protect only the accuracy of the report and would place no limits on the type of information that could be gathered and sold. The only way that an applicant could avoid investigations of a higly personal nature would be to forego the benefit for which he is applying. A second

247. *See* Feldman, *The Fair Credit Reporting Act—From the Regulators Vantage Point*, 14 SANTA CLARA LAW. 458, 470 (1974).
248. S. 2360, 93d Cong., 1st Sess. (1973).

weakness is that the consumer has no control over the dissemination of his file after giving his permission for an investigation. After the consumer reporting agency completes a file, it is regarded as the agency's property to be disseminated to anyone who desires it for a permissible purpose. Finally, the amendments do not deal with the problems created by the use of public record information.

B. State Legislation

As of March, 1974, thirteen states had passed credit reporting legislation to supplement the federal Fair Credit Reporting Act.[249] Among the provisions of these laws are several significant measures for dealing with the abuses of investigative consumer reports. Generally these provisions fall into four categories: information which is conveyed to the subject of the report, information which is included or excluded from these reports, uses to which the reports can be put, and penalties for violations of the law.

1. Information Disclosed to the Subject

The most effective means so far provided by legislation to curb the abuses of investigative consumer reports has been to require disclosure of all sources of information. Arizona requires that the names of all sources of information be furnished the consumer upon request.[250] Retail Credit has adamantly fought this provision, saying it would cut off their confidential sources of information.[251] The legislators who have considered this argument in congressional hearings have consistently maintained that information from an anonymous source is not of sufficient reliability to be included in credit reports.[252]

Another important provision regarding disclosure is the requirement that the actual contents of the report be shown to the subject. Although the FCRA stops short of this, at least four states require disclosure of the contents.[253] One state requires that any opinion on financial or credit rating be mailed to the subject before being given to a retailer.[254]

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249. 1 CCH CONSUMER CREDIT GUIDE, C & SC. Charts § 680, at 2909-16 (1973).

250. ARIZ. REV. STAT. ANN. § 44-1693(A)(4) (Cum. Supp. 1974).

251. *Retail Credit Hearings, supra* note 56, at 13 (testimony of W. Lee Burge, president, Retail Credit Co.).

252. *See generally id.* at 3-46.

253. ARIZ. REV. STAT. ANN. § 44-1693(A)(4) (Cum. Supp. 1974); MASS. GEN. LAWS ANN. ch. 93, § 56 (1972); N.H. REV. STAT. ANN. § 359-B:9(III) (Supp. 1973); N.H. STAT. ANN. § 50-18-2(B) (Supp. 1973).

254. OKLA. STAT. ANN. tit. 24, § 82 (1955).

2. Information Which is Included or Excluded

Several states have placed certain restrictions on the allowable information. Kentucky law provides that no consumer reporting agency may maintain any information relating to a criminal charge in a Kentucky court which has not resulted in a conviction.[255] New Mexico provides that any criminal record must be deleted immediately upon pardon or failure to convict.[256]

Several states have offered safeguards regarding disputed and inaccurate information. Arizona requires that upon receiving written notice of an inaccuracy, the consumer reporting agency has fifteen days to admit, deny the inaccuracy or to state it has not had sufficient time to complete the investigation. If the inaccuracy is admitted or unverified, the agency must correct its files as claimed by the consumer and notify any person to whom the item was reported.[257] The Connecticut Consumer Credit Reports Law states that a credit rating agency must correct any misinformation contained in its files upon satisfactory presentation of proof of error.[258] New Mexico requires a credit bureau to give the consumer forms upon which to designate errors.[259] This law also requires the bureau to make any necessary reinvestigation, updating and correcting at no cost to the consumer if he or she has been denied credit as a result of a report.[260] Florida prohibits a collection agency from disclosing information about the existence of a disputed debt without also disclosing the fact of the dispute. Additionally, the debtor must be informed that the dispute will be noted in the report.[261] Oklahoma requires that the credit agency attempt to obtain from the subject a statement of his assets and liabilities.[262]

3. Permissible Uses

A more indirect method of protecting the consumer is to regulate the permissible uses of investigative consumer reports. The FCRA limits the permissible uses to "legitimate business needs." Several states limit uses further. New Mexico requires credit bureaus to make service contracts in which the user certifies that inquiries be made only for proper purposes. Bureaus must refuse service to anyone who will

255. Ch. 119 [1974] Ky. Acts 224.
256. N.M. STAT. ANN. § 50-18-6(A)(5) (Supp. 1973).
257. ARIZ. REV. STAT. ANN. § 44-1694 (Cum. Supp. 1974).
258. CONN. GEN. STAT. ANN. § 36-432(b) (Cum. Supp. 1975).
259. N.M. STAT. ANN. § 50-18-2(E) (Supp. 1973).
260. *Id.* § 50-18-2(C).
261. FLA. STAT. § 559.72 (3) & (6) (Cum. Supp. 1975). *See also* MASS. GEN. LAWS ANN. ch. 93, § 58 (1972).
262. OKLA. STAT. ANN. tit. 24, § 81 (1955).

not so certify and discontinue service for failure to honor a contract.[263] Additionally New Mexico requires credit bureaus which furnish personnel reporting services to adopt rigid safeguards to keep separate all specialized information other than credit information. Such information may not be incorporated in credit reports or furnished except in connection with personnel investigation.[264] Florida law prohibits collection agencies from publishing deadbeat lists.[265] New York law requires written authorization by the subject before a report can be furnished to anyone other than the subject, a creditor, law enforcement agency, licensing agency, another credit bureau or upon court order. This statute also delineates the permissible purposes for which the report can be used. A creditor or credit bureau may use a report only for the purpose of extending credit, reviewing accounts or collecting delinquent accounts. A licensing agency may use a report only for considering financial status or responsibility. A law enforcement agency is limited to use for law enforcement purposes or national security.[266]

4. Penalties

A fourth legislative approach to protecting the consumer is to give him or her a specific means of enforcement. Several states specify civil liabilities for certain violations.[267] These liabilities are important to overcome the conditional privilege often granted credit reports. Several states specify damage amounts.[268] Additionally, several states provide criminal penalties for violation of fair credit reporting.[269]

5. Pending Legislation

New legislation on credit reporting is being considered in numerous state legislatures. In December, 1973, a list of bills which had been introduced in state legislatures was submitted to the Senate Subcommittee on Foreign Operations and Government Information, listing forty-five bills in twenty-five states.[270] In six states study commissions

263. N.M. STAT. ANN. § 50-18-4 (Supp. 1973).

264. N.M. STAT. ANN. § 50-18-5 (Supp. 1973).

265. FLA. STAT. § 559.72(14) (Cum. Supp. 1975).

266. N.Y. GEN. BUS. LAW. § 373(1) & (2) (McKinney Supp. 1973).

267. ARIZ. REV. STAT. ANN. § 44-1695(C) (Cum. Supp. 1974); N.M. STAT. ANN. § 50-18-7 (Supp. 1973); OKLA. STAT. ANN. tit. 24, § 83 (1955).

268. CAL. CIV. CODE § 1747.70 (West 1971); N.Y. GEN. BUS. LAW § 376(1) (McKinney Supp. 1973).

269. ARIZ. REV. STAT. ANN. § 44-1696 (Cum. Supp. 1974); CONN. GEN. STAT. ANN. § 36-435 (Cum. Supp. 1975); KAN. STAT. ANN. § 50-720 (Cum. Supp. 1973); N.M. STAT. ANN. § 50-18-8 (Supp. 1973); N.Y. GEN. BUS. LAW § 376(3) (McKinney Supp. 1974); TEX. REV. CIV. STAT. art. 9016(2) & (3) (Cum. Supp. 1974).

270. *Hearings on Federal Information Systems and Plans—Implications and Issues,*

were proposed.[271] Two state legislatures were considering active "right of privacy commissions" to deal with invasions of that right.[272] In Maryland, a bill was introduced to state that the right of privacy shall not be abridged without due process.[273]

C. Proposal

1. Prohibited Information

Information which invades a person's "sphere of privacy" should never be collected, recorded, filed, sold or used as a basis for making decisions concerning that person. This idea is simply the fruition of the conceptual theory first enunciated by Warren and Brandeis, reiterated by Bloustein and followed by *Griswold*—namely the preservation of human dignity. Legislation applying this theory to investigative credit reports, as well as to all personal information systems, is necessary to protect the individual's constitutionally recognized right to privacy in the modern world of data files and computers.

The first legislative principle, therefore, must be to prohibit certain information from being gathered, recorded or entered into files.[274] Guidelines for defining prohibited information follow. The first four deal with specific information which must be strictly prohibited.

> a) *Any direct or indirect indication of race, color, ethnic background or racial heritage.* Since such information is often gleaned from other facts, any references to type of neighborhood or type of associates of the subject should be prohibited. This guideline is consistent with the government policy of equal rights.[275]

Before the Subcomm. on Foreign Operations and Government Information of the House Comm. on Government Operations, 93rd Cong., 2d Sess., pt. 3, at 830-31 (1974).

271. Alaska (HCR 44); Illinois (H743); New Jersey (SCR 12); Ohio (SR 199); Texas (HSR 158); Vermont (JRS 17).

272. Illinois (H468) and Massachusetts (H1417).

273. Md. H150. For a summary of proposed legislation in California, *see* Note, *The California Consumer Reporting Agencies Act: A Proposed Improvement on the Fair Credit Reporting Act*, 26 Hastings L.J. 1219 (1975). A local ordinance imposing tight restrictions on consumer reporting was passed in Dade County, Florida (Dade County, Fla., Ordinance Pertaining to Fair Investigative Consumer Reporting and Disclosure, No. 74-87, Oct. 15, 1974). Several provisions have been invalidated by a recent decision. Retail Credit Co. v. Dade County, Civ. No. 74-1104 (S.D. Fla., filed Mar. 31, 1975).

274. Alternatively, legislators could undertake to enumerate the specific types of information which could be allowed in investigative consumer reports and other personal information systems.

275. Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d (1971). "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

b) *Any reference to political or religious beliefs or activities.* This provision also carries out the policy of equal rights. An identical provision has been included in the federal Privacy Act of 1974.[276]

c) *Any reference to arrest, indictment or civil litigation which has not resulted in conviction or judgment against the subject. Information on less than a final disposition must be updated each time it is used.* This principle is presently included in the credit reporting laws of Kentucky[277] and New Mexico.[278] In a modified form, it is incorporated in National Criminal Information Center legislation.[279] It is also included in the proposed Comprehensive Right to Privacy Act.[280]

d) *Any information from interviews with third persons other than with persons named as references by the subject and past employers.* This provision attacks the hearsay and opinion which is the basis for much of the harm caused by investigative consumer reports.

The remaining guidelines should be used to evaluate all other information in investigative consumer reports. Any data which fits into these categories should also be strictly prohibited.

e) *Any information which invades the privacy of the home or of the person.* This category would exclude all information or reference to a person's family relationships, sexual relationships, personal associations and activities, possessions, habits, hobbies and weaknesses where there is no legitimate business purpose for gathering such information. This provision codifies the ideas underlying *Griswold.*

f) *All other irrelevant information, with the burden of proof on defendant to demonstrate the relevance of the particular piece of information to the purpose of the report.* This category would exclude otherwise permissible information which has no bearing on the particular purpose of the report. Thus the amount of stored information would be reduced, as would the danger of obsolete information. It would also ensure that only relevant considerations be applied to a particular decision, thus keeping other biases of the decisionmakers from creeping into the decisionmaking process.

276. Privacy Act of 1974, § 552a(e)(4), PUB. L. No. 93-579, 88 Stat. 1896 (Dec. 31, 1974).

277. Ch. 119 [1974] Ky. Acts 224.

278. N.M. STATS. ANN. § 50-18-6(A)(5) (Supp. 1973).

279. H.R. 15527, 93d Cong., 2d Sess. (1974); S.3633, 93d Cong., 2d Sess. (1974).

280. H.R. 15527, 93d Cong., 2d Sess. (1974).

2. Safeguards

In light of the consumer reporting industry's resistance to limitations on the gathering, use and dissemination of personal information, any law which merely prohibits certain information from being recorded will be ineffective. The following minimum safeguards are essential to ensure that prohibited information is excluded from consumer files.

a) *Right of consumer to physical access to his report and to copy all information therein. Right to receive a copy of report prior to dissemination.* This provision is necessary to ensure that the consumer can discover the exact contents of his file and to determine whether or not prohibited information appears in his report.[281]

b) *Consent of the consumer prior to each release of the information in his file.* Consent by the consumer to access by one user cannot be regarded as consent to all subsequent requests for information about him.

c) *An accurate and complete record of all persons and organizations which have requested and received the file.* This listing should also record the purpose for which the information was used.[282]

281. In an analogous area, the Family Educational Rights and Privacy Act of 1974 grants parents and students over age 18 the right to inspect all official school records, files and data directly related to the student. PUB. L. No. 93-380, § 2, 88 Stat. 571 (Aug. 21, 1974).

This was later amended, permitting schools to deny disclosure to students of medical records, financial records of parents and recommendations pertaining to admission to an educational institution, employment applications or the receipt of an honor received prior to Jan. 1, 1975. PUB. L. No. 93-568, § 2(a)(3)(B), 88 Stat. 1855 (Dec. 31, 1974).

The Privacy Act of 1974 requires all federal agencies which maintain a system of records to permit an individual to review any records pertaining to him and to have a copy made of all or any portion thereof in a form comprehensible to him. PUB. L. No. 93-579, § 2, 88 Stat. 1896 (Dec. 31, 1974).

Other databank legislation currently under consideration also would grant the right to visually inspect files containing identifiable personal information. The Comprehensive Privacy Act would grant a right of access to any files maintained by any federal, state, local or territorial government, or by any public or private entity engaged in industrial, commercial or other similar business. (H.R. 15527, 93d Cong., 2d Sess. (1974). A substantially similar Senate bill would apply only to federal, state and local governmental agencies. S.3633, 93d Cong., 2d Sess. (1974).

282. The Family Educational Rights and Privacy Act requires that such a record be kept permanently in students' files. PUB. L. No. 93-380, § 513, 88 Stat. 571 (Aug. 21, 1974). The Privacy Act of 1974 contains a requirement that such a record be maintained for a period of five years or the life of the record, whichever is longer. PUB. L. No. 93-579, 88 Stat. 1896 (Dec. 31, 1974). The Comprehensive Right to Privacy Act [H.R. 15527, 93d Cong., 2d Sess. (1974)] and its sister bill, the Government Data Bank Right to Privacy Act [S.3633, 93d Cong., 2d Sess. (1974)] propose similar requirements.

d) *Segregation of information in the files according to purpose.* Certain kinds of information are relevant as to some business transactions but irrelevant as to others. For example, an insurance company is justified in requesting general medical information for health or life insurance. The same request would not be justified, however, in relation to an application for credit. Similarly, a prospective employer is justifiably interested in evaluations by previous employers as to an applicant's effectiveness on the job, whereas such information would have no relevance to an application for auto insurance.[283]

e) *Minimum civil damages for each act of negligent noncompliance plus minimum punitive damages for each act of willful noncompliance.* These minimum damages should not be less than those provided in the proposed amendments to the FCRA.[284] Burden of proof must be on the agency to show that its noncompliance was neither negligent nor willful. These provisions are important to assure the consumer a remedy when actual financial damage is slight or speculative. Furthermore, such a provision would supply a monetary incentive for compliance.

f) *Establishment of a federal privacy board to enforce compliance with these provisions.* A privacy board is necessary to concentrate the attention of a single agency on the problems of privacy invasion by consumer reporting agencies. This body could be organized within the FTC or as a separate executive department.

While not exhaustive, these suggested safeguards are the minimum necessary to protect the American consumer against invasions of privacy by consumer reporting agencies.

Conclusion

It has been shown that investigative consumer reports constitute an invasion of the constitutional right of privacy. This intrusion into

283. The Privacy Act of 1974 requires consent by the individual before any federal agency can disclose personally identifiable records except for certain specified routine purposes. PUB. L. No. 93-579 § 2 (Dec. 31, 1974). Proposed legislation would impose similar restrictions. The Comprehensive Privacy Act [H.R. 15527, 93d Cong., 2d Sess. (1974)] and the Government Data Bank Right to Privacy Act [S.3633, 93d Cong., 2d Sess. (1974)] provide that personal information collected for one purpose should not be used for another purpose without the consent of the individual.

284. The proposed amendments to the FCRA would set minimum damages of $100 for each item of erroneous information and $1000 for each act of willful noncompliance. S.2360, 93d Cong., 1st Sess. (1973).

personal privacy is not outweighed by the legitimate need for information, since all necessary information can be obtained through less intrusive means.

Government involvement in credit investigations is sufficiently extensive to support a finding of governmental action on the local, state and federal levels. The pervasiveness of government involvement becomes apparent from the aggregate of facts and circumstances: (1) the mutuality of benefits reflected in the exchange of information between credit bureaus and all levels of government; (2) the regulation of credit investigations by local, state and federal governments; (3) the public function aspect of credit bureau services; and (4) the authorization of privacy-invading practices reflected in the denial of a remedy to individuals injured by such investigations.

In the alternative, 18 U.S.C. section 241 provides a possible vehicle for imposing criminal penalties on credit investigating agencies for invasion on the constitutional right to privacy.

Judicial relief would be possible, therefore, where there is a showing of actual harm. The appropriate remedy would include an injunction to prohibit further use of the investigative consumer report and actual damages.

While some judicial relief is available to individuals who have been harmed by investigative consumer reports, strong legislation is necessary to proscribe these injuries. Present federal and state statutes make a start towards curtailing the abuse of investigative reports, but stronger regulation of the industry is needed. Information which invades a person's sphere of privacy should be absolutely prohibited from investigative consumer reports. Additionally, certain safeguards must be enacted to assure the consumer access to his file, a means of correcting false information and to keep information from being used for improper purposes. A right of action for noncompliance should be reserved to the consumer. General enforcement of privacy legislation should be entrusted to a separate entity which will focus on safeguarding the individual's right of privacy.