Privacy and Property: Can They Remain After Juridical Personality is Lost?

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Today, the difference between the power of institutions and that of the individual is unprecedented, extreme and increasing. Furthermore, the chief support of modern institutional power is a technology for record keeping and transmitting which can "remember," keep and transmit virtually unlimited amounts of information, whether or not it is misleading, erroneous or incomplete. The American Constitution and Bill of Rights have provided a framework for balancing interests between the institution and the individual. Historically, conceptions of property were worked out to mark the boundaries between individual and state. The rise of bureaucratic and administrative units, both public and private, has made these formulations incomplete just as the rise of industrial society has made traditional concepts of property incomplete. The modern concern for a right of privacy reflects the need to formulate new ways of regulating the use of power.

The framework of the Constitution and Bill of Rights can be preserved only if its procedural framework is available to try the growing range of conflicts between administrative units and individuals. The Constitution and Bill of Rights guarantee each individual due process of law, not only in the circumstances of state action, but also when the actions of nominally private organizations which are considered to possess a legal personality affect the individual. All of the procedures which protect the accused in criminal prosecutions should be guaranteed to persons about whom information is collected in contemporary industrial society.

These procedures can protect the individual, however, only if he has an "identity." One who can demand the legal exposure, comparison and judgment of a particular exercise of power which affects him possesses an identity before the law.1 However, if there

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1. Outside the law's scope, one may exist naturally (i.e., physically and biologically) without a legal identity and be subjected to exercises of power which are not restrained by law. An individual may exist in a society with a highly developed
are no known witnesses or records, there will be no way for an individual to show the court that an action was ever taken which affected him. If those who operate bureaucratic and administrative institutions persuade the courts that the exercises of power should not be recorded, or that the records of power-exercising should not be accessible to the courts, the courts cannot act. Substantive legal restraints notwithstanding, if institutional actions cannot be completely reviewed, individuals affected by these institutions lose their legal personalities.

The capacity to be a legal person, that is, to be the subject of legal rights and liabilities, is not limited to human beings. Things such as a "Hindoo idol," ships, and corporations have had legal rights and duties conferred on them. Lawyers and judges assume to clothe inanimate objects and abstractions with the qualities of human beings. . . . not alone to regulate the conduct of the subject on which it is conferred. . . . [but] to regulate also the conduct of human beings towards the subject or toward each other."3 Idols and ships aside, "when a body of. . . men, bind [sic] themselves together to act in a particular way for some common purpose they create a body which, by no fiction of law, but from the very nature of things, differs from the individuals of whom it is constituted."4

Since the sixteenth century, when Henry VIII shrugged off the authority of Rome, expropriated church properties, and established the Church of England's subordination to the crown, to date, international associations notwithstanding, the state has been the predominant juristic person of this type in the Anglo-American legal tradition.5 As long as the chief economic concern continued to be the holding of arable lands, the tension between the interests of the collective juristic person of the state and the individual juristic person was expressed in the debate over rights to property. As industry replaced agriculture as the chief source of wealth, relationships between individual and collective juristic persons which had

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3. Id. at 284-88.
5. See Deiser, supra note 4, at 133-34.
been solely defined in terms of trespass to property became inadequate.

To organize and coordinate industrial efforts, persons involved have found it useful to create another category of juristic person besides individual and state. Administrative units, whether public or private, form a new layer between the state and individual. The function of this new kind of juristic person is to facilitate the production, delivery, and consumption of goods and services in abundance and variety.

As organization, coordination and arrangement into administrative hierarchies have embraced larger numbers of natural persons, the number of natural persons who have legal rights and duties has increased. Industrialization may have arranged men into administrative ranks of bosses and workers, but it also saw the elimination of property holding requirements as a condition of participation in government.

More natural persons possess legal personalities, yet at the same time the opportunities not to be employed by an organization are greatly reduced. Modern society lives with the paradox that all its members are citizens and hence legal equals and yet nearly all are servants or masters at the same time. The independence which property holders in the eighteenth century enjoyed because they owned property and could be threatened only by threats to the property right is enjoyed by practically no one in modern society while the source of one's livelihood is nothing more tangible than one's good name. Thus, no threat is more frightening than the loss of one's reputation for competence as a servant or master.

In order to fit each individual into an appropriate place in the complex relationships of modern society, the various organizations which perform social services request information from individuals and in some cases, such as the census, may take information over an individual's objection. As social relationships become more complex, the amount of information collected increases, and each collection reaches deeper into the individual's privacy.

The information which is collected is not fitted into a grand scheme. Nor as yet are individuals. Individuals may still choose not to be integrated into the social division of labor or they may participate in some parts of it, accepting limited benefits while declining complete involvement. The amount of information which is spread throughout the various administrative institutions about an individual is directly related to the degree of social benefits which an individual desires.
There is nothing astute about the observation that the individual feels naked and vulnerable in modern society. In theory he may choose not to participate but in fact the choice offers the alternatives of Hobbes' highwayman. Against a society demanding to know and see everything, the individual has vainly asserted a right to be anonymous. Some consider the right to be let alone an absolute right derived from a notion of inviolate personality. Others concede the necessity of information gathering but seek rules and commissions to watch the information gatherers and users. Both ignore the realities of judicial administration.

When administrative units can use information to exercise power over natural individuals and when neither the sources, the substance, nor the user's theories about that information can be known without extraordinary difficulty, only with extraordinary difficulty will the law be able to control the exercise of power and be able to preserve the individual as a right and duty bearing unit. There exists a tendency to allow increasing exceptions to judicial review of bureaucratic action which are justified by appeals to "necessity." Eventually, the law may restrain such a small part of the power exercised in society that it becomes totally ineffective. The legal rationales for such a withering of law resemble the "recognized exceptions" to the warrant requirement of the fourth amendment. Outside the criminal justice system, exceptions are the rule.

PRIVACY, PROPERTY, AND TRESPASS

Arguments about the ideas of property and privacy have always tended to confuse the mutually exclusive circumstances of law and philosophy. Attempts to define property or privacy in philosophical terms have always failed and will continue to be fruitless. Legal theories, legal arguments and legal principles are not identical with philosophical hypotheses, logical syllogisms, and conclusions. In The Common Law, Oliver Wendell Holmes warned that attempts to cast the law as a system of logical deductions would fail. Knowledge of law he says, could only come from looking at the history of law which is based on external phenomena. Alone, neither moral standards nor the internal phenomena of conscience are sufficient for a developed legal system. A legal system must have procedures for realizing them in external or objective standards. Social notions of privacy and property grow out of

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8. Holmes, supra note 7, at 35.
moral standards and internal phenomena of conscience and, as purely intellectual concepts, they can endure forever unchanged. However, specific standards of the kind which the law needs in order to function must be adaptable to facts and circumstances.

The language of the intellectual concepts of privacy and property and the external legal standards are etymologically and historically intertwined. This philosophical-legal word confusion is further complicated by a third general term, trespass. Furthermore, wherever a right of property or privacy has been asserted, the law generally called an interference with that right a trespass.

Historically, trespass was the basis of all personal law actions and was a semi-criminal action with roots in criminal law and criminal procedure. Trespass dealt with the relationship of the individual to the community or state as well as the protection of the individual's person and possessions. Thus, trespass encompassed violence to land, the body, or chattels. It is not necessary to trace the procedure of trespass from 1250 to the present, but this quote from F. W. Maitland is important to an understanding of the basic jurisprudential values which have compelled men to assert legal rights of property and privacy:

The old criminal action... was but slowly supplanted by indictment—the procedure of the common accuser set going by Henry II, the appeal on the other hand being an action brought by a person aggrieved by the crime. The appellant had to pronounce certain accusing words. In each case he must say of the appellee "fecit hoc (the murder, rape, robbery, or mayhem) requiter et in felonia, vi et armis et contra pacem Domini Regis." Before an accused could be subjected to stringent measures of social control, it was necessary that he be accused (1) personally and (2) with particularity by a formal procedure. By a general denial (today a plea of not guilty), he could place the entire burden of proving the allegation of wrong on the accuser.
In the Constitution, these two notions are readily apparent in the fourth amendment. Before a warrant may be issued the accuser must name the appellee—"particularly describing the place to be searched, and the person or things to be seized"—and pronounce certain accusing words—"upon probable cause, supported by Oath or affirmation. . . ." The substance of the interests to be protected through both procedures, writ and fourth amendment, is subordinated to procedural requirements of particularity within a formalized structure of accusation.

The fundamental value at the base of the writ of trespass and the fourth amendment is the commitment to treating persons who come before the law on the basis of their individual, particular, uncommon, and odd property and attributes. Juristic procedures which help show the unique characteristics of individuals and actions to the decision-maker provide the factual evidentiary base for legal judgments which avoid abstract moral structures and remain useful as explanations of external phenomena. The history of the application of logic to the ideas of property and privacy supports Holmes' thesis. The failure of philosophy as law is disclosed in the inevitable violence and destruction of legal structures where absolute forms of rights have been embraced.

**Philosophical Debates**

The twentieth century debate on the right of privacy is a logical extension of older debates on the right to agrarian property. The debate's terms are slightly altered today because of the changed perceptions of property, social necessity, and the responsibility of governments, but the arguments remain virtually the same.

At one extreme, theorists assert that individuals have inherent rights under natural law without regard to the existence of an organized political unit. On the other side, some assert that no rights exist without government, that individual rights are established by positive law, and that a legitimate sovereign may change both law and rights without regard to any higher governing moral structure.

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15. U.S. Const. amend. IV.
16. Id.
17. See Kurland, The Private I, U. Chi. Magazine 7, 35 (Autumn 1976). "Gerald Heard once told us why the intellectual demands privacy. 'We can only understand the intellectuals intellectualization of their own emotion when we realize that what they sense and dread is the individuality's destruction.'" See also H. Arendt, The Origins of Totalitarianism (1951); E. Corwin, Liberty Against Government ch. 1 at 1-9 (1948).
The opposition of these notions of rights is ancient. An immediate antecedent to the American constitutional experience is a debate among factions of the parliamentary movement which took place during the seventeenth century English struggle between royal absolutism and parliamentary republicanism.

The Putney Debates

The Leveller party asserted that they would only “be governed by rules and right reason; and though the laws and customs of a kingdom be never so plain and clear against their ways, . . . [would] not submit, but cry out for natural rights derived from Adam and right reason.” Leveller theories generally argued that men are equal by the law of nature and consequently the state should protect equal rights in every case: electoral, legal, economic, and religious. Although Levellers only formally endorsed equality of economic opportunity, they were suspected of hankering after equality of goods, a position advocated by some of their more radical associates. The Leveller position of equality based on natural law rights was debated at Putney in 1647. There, Henry Ireton, Cromwell's son-in-law, opposed the Leveller proposals on the grounds they endangered property.

Ireton denied the existence of natural law and of rights guaranteed by God, and argued that property rights rest on human conventions; to abandon those conventions in order to embrace absolute natural right or “that wild or vast notion of what in every man's conception is just or unjust” would be to abandon the sole rule for distinguishing between “mine and thine” and would open the way to anarchy.

Unresolved at Putney, this external argument was significantly resumed in the next century, by Thomas Paine in his First Principles of Government. Paine attacked the property qualifications of the French Constitution of 1795 and proposed that property remains a right of man, but “not of the most essential kind.

19. Id at 133.
20. Id Schlatter also says,
Gerrard Winstanley, the Digger, wanted to achieve economic equality by abolishing private property altogether. When the Levellers repudiated his communism, he called himself 'the true Leveller', implying that Lilburne (Chief Leveller theorist) and his friends were being false to their own principles . . . Lilburne's conservative opponents, despite his frequent denials, insisted that his theory of natural right did lead straight to equality of ownership.

Id at 134.
21. Id at 136.
22. Id at 176 n.1.
The protection of a man's person is more sacred than the protection of property." Paine's assertion was rebutted vigorously by Edmund Burke who rejected the Rights of Man in favor of the rights of Englishmen which were neither "expressions of abstract law of reason [n]or nature, but the rules which the experience of many generations has established for the good of all."  

**Blackstone and the American Compromise**

Blackstone's *Commentaries*, which had an extraordinary influence on early American legal thought, adopt the substantive claims of natural law theory, but argue that both these claims and the rights guaranteed by the common laws of England are the same. About Blackstone's conception of property, historian Daniel Boorstin says "some of the most obscure—one might say mystical—passages in the commentaries are the description of the right of property." Boorstin says Blackstone's confusion is comparable to Locke's ambiguous position on the right of property and argues that Locke's ambiguity on property became an accepted theory in the eighteenth century because between 1688 and 1776, property as a social fact was undergoing striking metamorphosis. By the middle of the eighteenth century in England, the changes that were to be the Industrial Revolution were under way. The mercantilist system was disintegrating. Forces were at work which would eventually take the country away from the landowners and give it to the shopkeepers and the

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23. *Id* at 177 (citing T. PAINE, FIRST PRINCIPLES OF GOVERNMENT, COMPLETE WRITINGS (Phillip Foner ed. 1945)).
24. *Id* at 178. See also E. BURKE, WORKS, SPEECH ON THE REFORM OF REPRESENTATION 1782 at 94 (ed. 1894, Boston).
25. Blackstone set forth the theories of Grotius and announced the invalidity of positive laws at variance with natural law, but then set forth the immemorial common law rights of Englishmen. When Americans were beginning to think of independence the transition from common law rights of Englishmen, claimed in the Declaration of Rights of the Continental Congress in 1774, to the natural rights of man, claimed in the Declaration of Independence, was an easy one. It is significant that the rights claimed by either title were the same.

R. POUND, DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 74, 75 (1957).
27. See generally E. CORWIN, LIBERTY AGAINST GOVERNMENT 44-57 (1948); Fuller, American Legal Realism, 83 U. PA. L. REV. 429, 452 (1934).
28. 'Locke's Theory of Property,' even according to Locke, thus contained contrary elements. For radicals could, and did, appeal to the concept of nature as the real foundation of private property, and so the justification for revising the existing property-structure; while conservatives could appeal to the state protected status of property as giving all existing property the approval and sanction of Nature herself.

D. BOORSTIN, THE MYSTERIOUS SCIENCE OF LAW 169 (1941).
masters, the manufacturers. Yet... the popular theory of property was hardly changing at all. The England of Adam Smith was surely not the England of John Locke; yet the theory of property of the Wealth of Nations was substantially the theory of the Civil Government... Locke's formulation of the nature of property was accepted... partly because of its many sidedness... it was many things to many men, and Locke became the pseudonym for every man's theory of property.29

Neither Blackstone's nor Locke's theory of property would stand as accepted theories of political philosophy,30 but before they could go out of vogue, common law methods of reconciling "everyman's theory" had been institutionalized in the United States Constitution, the constitutions of the states, and the constitutions of other nations.

In the American revolution, established rules, not abstractions, were asserted against the abuses of royal powers. The Declaration of Rights of the Continental Congress (1774) claimed the rights set forth in the Magna Carta, the Petition of Right, and the Bill of Rights not the rights of man.31 The reconciliation of natural law and positive laws ignored philosophical technicalities32 and was conditioned by the founders' political and legal experience,33 not only their own, but also that which could be gained from political history and the common law.34

That no particular theory of property be established as the law of the land was also consistent with English lawyers' lack of respect for school philosophy.35 Unlike constitutions which have at-

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29. Id. at 167-68 (1941).
30. Utilitarianism would soon replace natural right in English intellectual discussions of politics and economics. See Schlatter, supra note 18, at ch. 9.
32. Blackstone's amalgamation did not end the dispute in European Political Philosophy. Schlatter traces the dispute through the French and Russian Revolutions, Bentham, Hume, Mill, Kant, Hegel, Proudhon, Marx, Spencer, and Lenin and finds it to be still unresolved. Schlatter, supra note 18, at chs. VII-X.
33. [T]o the political thinkers of the seventeenth century... only mathematical laws were thought to be sufficiently irresistible to check the power of despots. The fallacy of this position was... to believe that these mathematical 'laws' were of the same nature as the laws of the community, or that the former could somehow inspire the latter. Jefferson must have been dimly aware of this, for otherwise he would not have indulged in the somewhat incongruous phrase "We hold these truths to be self-evident," but would have said: These truths are self evident... they are not held by us but we are held by them; they stand in no need of agreement. Arendt, On Revolution, 193-94.
34. See id. at 171-72, 175-76, 221-23, 316 n.43.
tempted to define rigid substantive relationships which would inevitably and rapidly become obsolete, the United State Constitution and Bill of Rights allows for changes of circumstances. It simply requires that new positive law relationships between individual and society be discussed openly and be exposed to the light of reason and common sense. The first, fourth, fifth, sixth, ninth, tenth, and fourteenth amendments to the United States Constitution are particularly important because they neither legislate substantive rights nor eternal truths. As a set of maxims for conducting empirical inquiries they build the restraints of pluralism into the process of governing. These maxims had been institutionalized in common law procedure, but by no means were first applied in it.

The procedural structure guaranteed that confrontations between the individual owning property and the society needing to infringe on that right of ownership would be balanced in an objective forum. When there are forums where individual and state can argue the merits of natural right and necessity in the individual's particular circumstance, assertions of individual right may be either exploded or upheld by critical appraisal of the facts.

The constitutional establishment of the legal forum as the place for reconciling the assertions of both individual and government presumed another objective of government besides the balancing of individual interests in self preservation: that government should allow people to distinguish themselves as individuals. In contemporary society, temptations to abandon or reduce the right of an individual to be heard stem from the growing social attitude that the time and energy required for such hearings cannot be spared from satisfying social demands which seem both absolutely necessary and of such magnitude that only unified, carefully coordinated efforts can succeed in preventing social chaos.

Hannah Arendt has observed that the very success of the American Constitution in establishing the principles of liberty caused a decline in concern for further elaboration of that concept. Those who had escaped poverty became preoccupied in-

36. Constitutions which have fallen into these difficulties have been rapidly replaced. See L. Friedman, A History of American Law 100-09, 302-18 (1973).
37. See R. Collingwood, The Idea of History 1-31 (1946). Collingwood discusses cross-examination as a means of testing evidence and theories as it is used in the works of Thucydides and Herodotus.
39. Id. at 64-65.
40. When, in America and elsewhere, the poor became wealthy, they did not become men of leisure whose actions were prompted by a desire to excel, but succumbed to the boredom of vacant time, and while they too developed a taste for 'consideration and congratulation,' they were content to get these 'goods' as cheaply as possible, that is, they eliminated the pas-
stead with acquiring and preserving wealth and this resulted in the legal erection of the concept of property as a divinely ordained barrier against democratic levelling tendencies. Thus, even though Jefferson avoided an inflexible notion of property by substituting “the pursuit of happiness” for “property” in the Declaration of Independence, the pursuit of public happiness was soon subordinated to the private acquisition and retention of property. “A Supreme Court with strong views on the rights of property, became the chief legal barrier to popular demands for the limitation

See Schlatter, supra note 18, at 195-99. Schlatter notes:

Clearly Jefferson was one of the foremost exponents of natural rights; but he was also an exponent of individual independence and equality, and when these seemed to conflict with the natural right of property, his belief in the right wavered. In the American Society of Jefferson's day, where ownership was in fact widespread and where most men could reasonably hope to become proprietors, property did not seem to menace liberty and equality. . . . Even so, he seemed ready to abandon the theory of natural right whenever in practice it led to contrary conclusions. . . .

Id. at 198-99.

Americans knew that public freedom consisted in having a share in public business, and that the activities connected with this business by no means constituted a burden but gave those who discharged them a feeling of happiness they could acquire nowhere else . . . . [W]hat John Adams held to be 'more essential and remarkable' than any other human faculty: 'Whenever men, women, or children, are to be found . . . every individual is seen to be strongly actuated by a desire to be seen, heard, talked of, approved and respected by the people about him, and within his knowledge.' The virtue of this passion he called ' emulation,' the 'desire to excel another,' and its vice he called 'ambition' because it 'aims at power as a mean of distinction.'

H. ARENDT, ON REVOLUTION 115-16 (ed. 1965).

Schlatter describes the decline of Jeffersonian republicanism and the rise of utilitarianism in the opinions of professional theorists, but shows that the idea of natural property rights remains "deeply imbedded in popular thinking," where it was "used or abused in accordance with changing political contexts." Id. at 193. Schlatter's explanation shows that the fifth and later the fourteenth amendments' due process clauses allowed compromises between absolute notions of property.

The ideal of the yeoman farmer, neither feudal lord nor tenant was inconsistent with land possession that did not reserve to the title holder an absolute fee simple. Land leases became commercial contracts, instead of documents of tenure. Except in the South, the assumption of a leasehold was an individual's step towards owning land, not the expression of a permanent relationship between landlord and tenant. In the South, the focus on fee simple ownership had a different result. Semi-permanent tenants found their rights of possession cut out from under them and their status reduced to that of wage laborers. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 372-73 (1973).
of private ownership."\(^\text{44}\) The historian Richard Schlatter notes that in 1795 the Court declared, "it is evident that the rights of acquiring and possessing property and having it protected, is one of the natural, inherent, and inalienable rights of man"\(^\text{45}\) and argues that American juridical thinking expounded the same doctrine.\(^\text{46}\)

The vast expanses of unplatted and relatively unoccupied (by white men) territory in the United States could prolong individual dreams of independence based on mere fee simple possession of land. However, the end of unrestricted ownership as the predominant form of property right in land was evident when, by the end of the nineteenth century, it was clear that the vast tracts were nearly full. Restriction on the individual's use of property began.\(^\text{47}\) Nevertheless, apart from slavery, as late as 1861 Lincoln could reaffirm Jefferson's vision of a free republic based on the functions of property described by Adam Smith: "[Americans] neither work for others nor have others working for them. . . [They] work for themselves, on their farms, in their houses, and in their shops, taking the whole product to themselves, and asking no favors of capital on the one hand, or of hirelings or slaves on the other."\(^\text{48}\)

If Lincoln's description of the American economy was accurate in 1861 it would not long remain so. To the extent Lincoln was accurate, Americans' rights of property and privacy, even the right "to be let alone," were protected by the common law legal devices of trespass and property as applied to physical spaces.\(^\text{49}\) The obso-

\(^{44}\) Schlatter, supra note 18, at 194.
\(^{45}\) Id
\(^{46}\) Id
\(^{47}\) L. Friedman, supra note 43, at 364-66. The hardening of positions on the right of property characterized both sides of the debate on slavery. Both sides claimed that natural law supported their particular position. This double abuse of natural law theory was only eclipsed by the cynical utilitarianism of George Fitzhugh who defended slavery by arguing to capitalists in the North that under natural law not only slave holding but "rent, interest, and profit are stolen from the workman whose labour has created them. I never read Proudhon. If this is what he means when he exclaims, 'Property is a Thief,' he is right." He did not, of course, advocate the abolition of exploitation, but maintained that slavery was a more beneficent and stable method of exploiting, in which each received according to his needs. Schlatter, supra note 18, at 202-03.
\(^{48}\) Speech at Milwaukee, Wis., September 30, 1859; cited in Schlatter, supra note 18, at 204.
lescence of these external standards began shortly after the civil war with the rise of urban industrial society and the relative decline of the importance of agriculture and handcraft industry. 50

THE MANAGEMENT OF MODERN SOCIETY IN CONFLICT WITH THE CONSTITUTION

The position of modern government is extraordinarily difficult. The vast virtually uninhabited lands which made the idea of Jeffersonian democracy possible are mapped, deeded, and populated. The seeming limitless natural resources which invited the individual's exploitation and made minimal government the ideal are in danger of being spoiled or wasted. Yet, together with the perception of a declining natural abundance, the material necessities of individual life are perceived to be much greater and their provision has become the government's primary responsibility.

The demand for more efficient management of the society's material needs places the public servant in the difficult position of being expected to right every wrong and supply all wants, of being given vast amounts of power and resources with which to undertake such tasks, yet of being told that he must constantly guard against overstepping his authority.

In circumstances of alleged violations of privacy, the argument is generally that the public servant has exceeded his authority or abused his discretion. The difficulty is that in modern society the public servants' duties are so complicated and interdependent that they cannot be carried out efficiently if every activity is subject to judicial supervision.

The idea of public servant and public service, however, may be so pervasive as to constitute the worst kind of tyranny. Nevertheless it is not generally the case that persons who extend the public interest are consciously using it as a cover for deeds they know to be contrary to the public interest, but rather that they are unable, unwilling, or unused to dealing with assertions that the public interest does not coincide with their attitudes. Public servants have an obligation to appraise critically the commands they receive in the light of the Constitution and conform their conduct to the law, 51 but usually the rewards for the efficient execution of orders and the punishments for not carrying out orders have a more tan-


gible presence than the joys of liberty which are often enjoyed at the expense of preferment, honors, and material goods.

SOCIETY'S NEED TO KNOW

The cases in the modern development of the fourth amendment which raise problems involve interests and circumstances which would have scarcely existed before the end of the nineteenth century except in commercial or urban circumstances. The exceptions were relatively unimportant because the greatest proportion of the population lived in rural areas and most human activity took place within self-sufficient households. \textsuperscript{52} Traditional governmental interests in the collection of customs duties\textsuperscript{53} and excise taxes\textsuperscript{54} were supplemented with offenses which were designed more to shape and direct the growing amount of social activity taking place outside the traditional household: using the mails to transmit lottery tickets;\textsuperscript{55} possessing illicit narcotics;\textsuperscript{56} internal policing of the Army;\textsuperscript{57} violations of the National Prohibition Act;\textsuperscript{58} labor corruption;\textsuperscript{59} and gambling.\textsuperscript{60}

Both the activities which had long been criminal and the new offenses took place outside of an individual's household but in areas which were not public in the sense that a courtroom is public.

\textsuperscript{52} With the rise of society, that is, the rise of the household (\textit{oikia}) or of economic activities to the public realm, housekeeping and all matters pertaining formerly to the private sphere of the family have become a collective concern. ... \textit{The rise of housekeeping, its activities, problems, and organizational devices ... has changed almost beyond recognition the meaning of the two terms and their significance for the life of the individual and the citizens.}

H. ARENDT, THE HUMAN CONDITION 33 (1958);

In our nineteenth century polity the home was a chief reliance.... Domestic discipline was legally recognized and was a reality.... Likewise neighborhood opinion was effective.... \textit{Pressure of the church group and its opinion ... was exerted upon everyone. Obviously the hold of all of these is much less in the urban industrial society of today.}

\textit{This complete change in the background of social control involves much that may easily be attributed to ineffectiveness of criminal justice, and yet means only that it is called on to do the whole work, where once it shared its task with other agencies and was invoked, not for every occasion, but exceptionally.}


\textsuperscript{53} See Boyd v. United States, 116 U.S. 616 (1886) (general warrants were issued to protect revenue).

\textsuperscript{54} See Amos v. United States, 255 U.S. 313 (1921).

\textsuperscript{55} See Weeks v. United States, 232 U.S. 383 (1914).


\textsuperscript{57} See Gouled v. United States, 255 U.S. 298 (1911).

\textsuperscript{58} See Olmstead v. United States, 277 U.S. 438 (1928).


They were not hidden from any but household members but were not officially exposed to public view. Thus, while courts and court proceedings are open to view by all, business, professional, and social premises, offices and records—while open to anyone with a need to know or legitimate business—are nominally private. Even if such places are not public, within them people willingly expose their activities to a wide range of servants and other users.

Most of these places are to some degree under the direct surveillance of those who operate or maintain them and the fact of that surveillance is known to persons using them. However, good manners and internal administrative regulations are supposed to keep cab drivers, motel managers, telephone operators, and letter carriers from divulging what they cannot help but notice in the course of their duties. In twentieth century mass society, such expectations could not always be realized. The sociologist Edward Shils has noted:

Privacy is also affected by the activities of those who stand at the center of society, in positions of authority in political, administrative, and cultural institutions. Here a very considerable change in the situation of privacy occurred . . . [with] the development of those institutions at the center of society which regard it as their task to intrude on privacy. The main intruders from the center were popular journalism, private police and investigators, the specialists of personnel recruitment in large-scale private business, and the practitioners of psychological and, to a much smaller extent, sociological research.

WARREN AND BRANDEIS: RESPECTABILITY AND INVIOLATE PERSONALITY

An important statement in the modern discussion of privacy is the response of Samuel Warren and Louis Brandeis to an intrusion by the popular press. The Right to Privacy is a confused and confusing protest against overwhelming social change. Although on
its face the article rehearses the common law development of a right to privacy, the authors' fixation with inviolate personality as the basis for that right discloses that the article is an attempt to graft philosophy on to common law. Warren and Brandeis demand an exchange of the law of private property for a philosophy of inviolate personality. It is not clear whether they think property existed before civilization, but inviolate personality is supposed to exist in a civilized state:

From corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and processes of the mind as works of literature and art, goodwill, trade secrets, and trademarks.

This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

The question is of course: What do Warren and Brandeis consider to be the beginning of civilization? They write as if intellectual experience only began to glimmer with the sixteenth century. The experience that is beginning with the circumstances they cite is not civilization, but interdependant commercial, and industrial society with the increasing importance of intangible property and the declining importance of real estate.

Unfortunately, Warren and Brandeis missed the chance to bring the fourth amendment into the twenty-first century. As common law lawyers, Warren and Brandeis were intuitively drawn to cases which, if they had not been distracted by metaphysical legal theory, would have disclosed to them the legal suppositions which

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had come into use in common law, allowing it to adapt to the new industrial society. Because Warren's and Brandeis' arguments are attempts to link an absolute notion of property to an absolute notion of inviolate personality, they had to ignore the reality of life to keep their theories intact. The physical surroundings of a person and the reasonable implications which can be drawn from them—that one may look at a face exposed in a public place—are ignored. All of the circumstances of contractual relationship, implied or express consent, and any other circumstances surrounding an intrusion—whether a face is exposed on the street, on a stage, in a public building, an airport, or kept cloistered—are not in Warren's and Brandeis' opinion relevant to their idea of absolute substantive right.

Preferring ideology to experience, they indulge themselves with propositions no less radical and utopian than the credos of the Levellers or Tom Paine. Common law processes are for them too cautious and they demand a metaphysical expansion of property. "The right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolate personality, affords alone the broad basis upon which the protection which the individual demands can be rested." 67

67. "If you may not reproduce a woman's face photographically without her consent, how much less should be tolerated the reproduction of her face, her form, and her actions, by graphic descriptions colored to suit a gross and depraved imagination." Id at 214.

68. Having ignored consent as a legitimate qualification of natural right Warren and Brandeis could not accept basing rights to privacy on "an alleged breach of implied contract or of a trust or confidence." Id at 207. See id at 207-12 (referring to decisions about students' notes of lectures, printers, photographers, photo-copies, and trade secrets).

69. This process of implying a term in a contract, or of implying a trust (particularly where the contract is written, and where there is no established usage or custom), is nothing more nor less than a judicial declaration that public morality, private justice, and general convenience demand the recognition of such a rule. . . . [s]o long as these circumstances happen to present a contract upon which such a term can be engrafted by the judicial mind, or to supply relations upon which a trust or confidence can be erected, there may be no objection to working out the desired protection through the doctrines of contrast or of trust. Id at 210.

70. Id at 211. But Warren and Brandeis evade the fourth amendment compromising of individual and social interests: "The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands." Id at 220 (emphasis added). Warren and Brandeis do not call for legislation, but they advocate provisions of the French civil code, specifically Loi relative a La Presse, 11 Mai 1868, and set out draft provisions and protocols on a law of privacy. 4 HARV. L. REV. at 214-16.

The choice of that particular law does not reflect well on the Constitutional
In the nineteenth century American context, this kind of radical individualism extends absolute property rights to their metaphysical limits but, unlike earlier arguments, there is little reason to think its purpose was to protect elite interests from mass society. Its discussion of French press law discloses a complete lack of scholarship on that subject which supports Harry Kalven's suggestion that it was not the result of calm reflection. To be fair to Brandeis, one should note that he was the second author.

The views expressed in The Right to Privacy never achieved a connection with reality, have not been adopted, and have only served to foster a politically and legally sterile philosophical debate. Yet so great is the confusion about privacy that these views are always ignored with great civility and respect.

THE FOURTH AMENDMENT AND RIGHTS IN PROPERTY: WARRANT EXCEPTIONS

In contrast to civil law, in the criminal law where the Constitution demanded that the new relationships between the state and the individual be addressed the courts slowly responded to the obvious changes that occurred in the patterns of United States soci-understandings of Warren and Brandeis. Their first principle of privacy-"The right to privacy does not prohibit any publication of matter which is of public or general interest"-raises uncomfortable questions concerning the first amendment. Id at 214.


The law of 11 Mai 1868 can be called a liberal piece of legislation only in the context of previous laws. It abolished the need for prior authorization to found a journal and abandoned the right of government officials to warn, suspend, and suppress journals. I. COLLINS at 148. However, it continued in force the delits d'opinion as well as the extensive list of less objectionable press offenses. These offenses were not triable to a jury until 1870. Id at 162. The delits d'opinion allowed for prosecutions for the vague offenses of inciting to hatred and contempt of the government, for attacks on the idea of property, on freedom of worship, on the laws, or for outrages against the government or against the republic. Id at 182. These offenses were not abolished until 1881. Id If the third empire intended to preserve privacy, that purpose was certainly overshadowed by the prosecution and sentencing of forty-one journalists for seditious libel and the suppression of three newspapers on similar grounds between June and August 1868. Id at 148, 150, 162, 182.

72. "[T]he article came from Warren's irritation over the way the press covered the wedding of his daughter in 1890 . . . so petty a tort (was) spawned by so petty a grievance." H. Kalven, Privacy in Tort Law-Were Warren and Brandeis Wrong? 31 LAW & CONTEMP. PROB. at 329 n.22.

73. Authors credit Brandeis and Warren with the honor of initiating what they then concede to be a nearly hopeless discussion. See e.g, Gerety, Redefining Privacy, 12 HARV. C.R.-C.L. REV. 233, 233 (1977); Parker, A Definition of Privacy, 27 RUTGERS L. REV. 275, 276 n.10, 278 (1974).
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ety in the latter part of the nineteenth century. Absolute theories of property rights broke down in the face of facts and were replaced with compromises conditioned by jurisprudential commonsense.

The development of fourth amendment protection in the twentieth century has exchanged a focus on the ownership of a place or object as the paramount right to be protected for a concentration on securing the lawful possession of a thing or place and one's physical person from unwarranted interference.

Although the fourth amendment protects people, the protection it affords is related to a place. Roscoe Pound noted three distinct kinds of property right:74 (1) custody, the physical holding or control of a thing which is not protected by law (except as the law protects the person through actions for assault, etc.) and describes the relation of a person to a thing independent of law or binding social custom;75 (2) juristic possession, where custody or the ability to create custody is coupled with the intent to hold, a legally protected and maintained capacity to hold, and a "claim to have the thing restored to his immediate control should he be deprived of it";76 (3) ownership, "secures to men the exclusive or ultimate enjoyment or control of objects far beyond their capacity either to hold in or to possess."77

Ownership is a purely legal conception having its origin in and depending on the law. . . juristic possession is a conception of fact and law, existing as a pure relation of fact, independent of legal origin but protected and maintained by law without regard to interference with personality. . . natural possession (custody) is a conception of pure fact in no degree dependent upon law. The legally significant thing is the interest of the natural possessor in his personality.78

Following this analysis, the reasonable expectation of privacy is the expectation or intent to possess that is protected and maintained by law. Its determination must relate the facts and circumstances of individual cases to the legal experience in cases of that general category. For example, mere establishment of who has record title to a particular place will not be sufficient if another asserts a superior right of possession. The phrase, conceptions of pure fact, describes philosophical and psychological notions of pri-

75. Id at 124.
76. Id
77. Id at 125.
78. Id
vacy which are not dependent on the shared legal experience out vary radically according to the beliefs and attitudes peculiar to each individual. By definition such notions cannot be shared.\textsuperscript{79}

Fourth amendment rights are not absolute. The urgent need for fast-reacting social controls which has increased with the growth of complex social interrelationships has led to increasing numbers of circumstances where courts permit exceptions to the requirement that a warrant be obtained from a neutral magistrate \textit{before} a search or seizure is undertaken. On first examination, the exceptions\textsuperscript{80} seem to be simple commonsense moderations of rules that have become impossible. However, the rules for creating exceptions have a distinct base in constitutional theory of how a body politic may adapt its legal devices to new circumstances. The exceptions to the warrant requirement of the fourth amendment fall into three categories: (1) exigent circumstances, (2) consent, and (3) plain view.\textsuperscript{81}

Exigent circumstances covers governmental necessity: those legitimate interests of social control or defense which will be frustrated unless government agents may act without delay. For example, an automobile may be searched if there is probable cause to search and there exists a likelihood that the vehicle could be moved out of the jurisdiction or tampered with while a warrant was being obtained. Similarly, the stop and frisk exception is justified on the grounds that government agents have a right to protect themselves from physical assaults by those whom they must be in close contact with if they are to carry out their assigned duties.\textsuperscript{82}

The broadest general category into which these exceptions fall is that of national security. Although national security debates usually concern narrow categories of intelligence agencies, national security can be said to encompass all of the interests made legitimate by the Constitution, thereby representing the end of the

\textsuperscript{79} Pure conceptions need not be shared nor must they gain the assent of society as represented by those who judge reasonableness. Arguably, an individual's pure conception of fact may gain sufficient assent to be incorporated as the basis of a legal order although the history of philosophies of property has not shown such establishments to be either stable or flexible. Pure conceptions of law are remarkably like pure conceptions of fact, whether the absolute truth is called \textit{the law} or \textit{the facts} is immaterial.


\textsuperscript{82} See, \textit{e.g.}, \textit{Terry v. Ohio}, 392 U.S. 1, 23 (1968).
spectrum of political theory opposite radical individualism and natural law theories of right. The arguments for the national security exceptions are: (1) governmental interests in the security of the polity will be frustrated without immediate action, and (2) the time and procedure necessary to obtain a warrant will allow the object of intended action to escape or frustrate legitimate interests of social control and security.

The great danger lurking behind both the narrowly defined automobile and stop and frisk rules and the broadly asserted (though narrowly accepted) national security wiretap, is that the standard of necessity tends to be translated into a standard of utility.83 Although utilitarian notions of social control are at least arguably predominant in contemporary American society, their basic theses are profoundly alien to the United States constitutional tradition of positive rights.84

Although in our constitutional tradition, government's authority is predicated on the consent of the governed, the United States government is not a sovereign like Hobbes' Leviathan. The people

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83. See generally 5 Intelligence Activities Senate Resolution 21: Hearings Before the Select Senate Committee to Study Governmental Activities with Respect to Intelligence, the National Security Agency and Fourth Amendment Rights 94th Cong., 1st Sess. 83 (1975) (Statement of Attorney General Edward Levi):

Another factor must be recognized. It is the importance or potential importance of the information to be secured. The activity may be undertaken to obtain information deemed necessary to protect the nation against actual or potential attack or other hostile acts of a foreign power, to obtain intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities.

Need is itself a matter of degree. It may be that the importance of some information is slight, but that may be impossible to gauge in advance; the significance of a single bit of information may become apparent only when joined to intelligence from other sources. In short, it is necessary to deal in probabilities. The importance of information gathered from foreign establishments and agents may be regarded generally as high—although even here there may be wide variations. At the same time, the effect on individual liberty and security—at least of American citizens—caused by methods directed exclusively to foreign agents, particularly with minimization procedures, would be very slight.

84. It may well be that a sovereign and representative parliament (one manifestation of positive liberty) will be inclined to protect the area of its electors' negative liberty; "self-government may," as Professor Berlin says, "provide a better guarantee of the preservation of civil liberties than other regimes . . . but there is no necessary connexion between individual liberty and democratic rule. Partly in recognition of this fact it has since the late 18th century been increasingly common in countries calling themselves democracies that certain areas of human activity are declared in a written instrument having the force of law to be peculiarly important and fundamental, and that the freedom of the individual citizen within these areas is defined and guaranteed. In Britain, democracy though it be, negative liberty is still what it says; in Ireland, as elsewhere in the civilised world, it has been in large measure reduced to a series of propositions of fundamental law and incorporated in the written Constitution.

retain the reserve of both rights and powers which were theirs prior to the Constitution and laws. The ninth and tenth amendments restrain utility to necessity by imposing on the government, not absolutely limited powers, but the burden of going forward with the evidence to show that an asserted right to intrude is justified before it takes that action. Thus, all individual citizens have a positive guarantee in the Constitution for their continued status as right and duty bearing units; conduct towards individuals by other units will be regulated by law. Under the fourth amendment, actions by the juristic person of the state are lawful if they are conducted pursuant to a warrant, which is only a certificate by a magistrate that the government has made a prima facie case of probable cause or by the obtaining of an individual's consent.

If the individual did not possess a reserve of sovereignty, then consent would be unnecessary since he would have no rights to give up. The consent exception to the warrant requirement is a renegotiation of details of the constitutional contract. Consent allows the interests of the individual and the society as represented by agents of social control to be reconciled in particular factual circumstances where rigid restraints would frustrate both individual and collective security.

Although the courts have been reluctant to justify broadening the permissible scope of social actions against individual rights on the basis of inherent powers, national security, or exigent circumstances, surveillance and control of individuals by their consent either express or implied is growing almost without restraint. Express consent to disclosure of one's physical person, property, and biography is requested in almost every social circumstance. Such disclosures have taken on an aura of social obligation. Suspicion and hostility are not unusual reactions to either unwillingness or refusal to consent to such requests. Refusal to consent has in certain circumstances been perceived as evidence of criminality.


86. See generally McGinley & Downs, Airport Searches and Seizures-A Reasonable Approach, 41 Fordham L. Rev. 293 (1972). The FAA developed a behavioral profile to select persons as suspected airline hijackers. Such persons were subjected to questioning and in some circumstances a “pat down” search. Id at 301-06. Although now abandoned in favor of a formal Miranda-type warning which conditions airline travel on an individual’s consent to a search of his person and carry on baggage, the hijacker profile is perhaps the best known example of social science officially displacing due process of law and secret theories and evidence replacing
The third major category of exceptions to the fourth amendment warrant requirement is plain view. What a person knowingly exposes to the public, even in his home or office, is not a subject of fourth amendment protection. The key to an understanding of the tremendous scope of plain view is the notion that "[e]xhibits which are in the plain view of an officer in a place where he has a legal right to be are admissible in evidence as they were not discovered as the result of a search. . . ." Thus a traffic officer in a helicopter has a legal right to plainly view thousands of persons. Although plain view discoveries are supposed to be inadvertent—police may not routinely ring doorbells in hopes of catching a glimpse of illegal possessions—police are commissioned to patrol energetically to catch and to find suspected criminals.

Plain view circumvents the fourth amendment warrant requirement in more particular circumstances than any of the other exceptions. That is because very little of what is done in contemporary society is done in areas where some agent of social control does not have a legal right to be. The tasks demanded of social control agencies by the laws so encompass human labor, artistry, action, and speech that the reserve of liberty and the authority not enumerated and delegated to those agencies seems to be exercised only in small exceptional areas.

The assertion of exigent circumstances or national security is an argument directed at the scope of the authority over the territory given to the government in the Constitution. It asserts that the government has a right to interfere as a matter of law with all individual possession and action within its jurisdiction when the general security is at stake, regardless of individual facts and circumstances, because such authority is inherent in the constitution of a sovereign government. The act of consenting to establish a


91. An analogy to the situation of Native Americans is not inappropriate. What land they did not consent to cede by treaty soon became such a small remainder that it remains theirs only because it hasn't yet been taken away by law. Thomas Hobbes' famous choice and theories of negative constitutional rights are particularly apt to describe their history of consent to seizure.
government divested the consentors of all residual authority not to consent. The only alternate to the sovereign's will is rebellion against it. A *plain view* argument asserts less sweeping authority, insisting simply that, in categories of things and actions in question, consent has been formulated into a general rule by either legislative or judicial authority. Finally a *consent* exception argument asserts that although the interference was neither inherently lawful, nor specifically an enumerated power, it was consented to by the individual in the particular circumstances at hand.

These exceptions have grown because less and less of the activity of an individual sought to be controlled by society is confined to the space which that individual owns or possesses permanently, and more and more of such activity is carried on in spaces which are occupied only temporarily. Society has coincidentally asserted increasing interests not only in the condition and upkeep of the temporarily occupied space but also in very nearly all of the activity of the individual within the space of social interest.

**Unpublic, Unprivate Property**

The loss of privacy has not necessarily meant a corresponding increase in what is public. The new sphere for human activity tends to consume both the private and public realms. In terms of this discussion, the erosion of both public and private property is illustrated by Mr. Justice Marshall's opinion in *Food Employees Local 590 v. Logan Valley Plaza, Inc.*

In *Logan Valley*, the Supreme Court takes official notice of the development of non-private, non-public areas. The question before the Court was whether a Pennsylvania court could enjoin picketing by a labor union on the premises of a privately owned shopping center on the grounds that the picketing constituted a trespass to private property. The Court found that respondents' "sole justification offered for the substantial interference with the effectiveness of petitioners' exercise of their First Amendment rights to promulgate their views through handbilling and picketing is respondents' claimed absolute right under state law to prohibit any use of their property by others without their consent." The Court denied that respondents had a meaningful claim to the protection of a right of privacy; "the public has virtually unrestricted access to the property at issue here."

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92. 391 U.S. 308 (1968). Although *Logan Valley* has evidently been overruled, Hudgens v. NLRB, 424 U.S. 507, 517-21 (1976), the Court's wavering on this issue is illustrative of the legal difficulties presented by changing social conditions.

93. 391 U.S. at 324.

94. *Id.* at 321.
The Court recognized that the shopping center owners could regulate the exercise of speech in ways that reasonably protected normal business operation but found no facts to support an absolute prohibition against picketing.\textsuperscript{95} The Court chose as its issue whether activities of individuals in areas which look like "streets, sidewalks, parks, and other similar public places. . .so historically associated with the exercise of First Amendment rights . . ."\textsuperscript{96} and where the public has virtually unrestricted access could, by virtue of naked title,\textsuperscript{97} be subjected to the "absolute dominion" of the owner contrary to the "statutory and constitutional rights of those who use [them]."\textsuperscript{98} The Court looked beyond the purely legal question of ownership to reconcile the interests of individuals and the legal order on the basis of the particular facts of the case. The "functional equivalents of the streets and sidewalks of a normal municipal business district"\textsuperscript{99} are not changed in the light of the Constitution simply because title is vested in a private rather than a municipal corporation.

The Court staked out the boundaries of the public realm of speech without regard to the purely legal niceties of property titles. Simply by moving to suburbs and organizing into clusters of retailers who shared a single privately owned tract, business enterprises could not destroy the sidewalk as a constitutionally protected public forum for protesting to the public an enterprise's substandard working conditions, shoddy or overpriced merchandise or unjust hiring practices.\textsuperscript{100}

Marshall noted that, by 1966, shopping centers numbered between ten and eleven thousand and accounted for thirty seven percent of the total retail sales in the United States and Canada.\textsuperscript{101} These rapidly growing spaces which neither shelter the intimate nor hear the speech of citizens grow at the expense of private and public spaces. If the court had clung to an obsolete purely legal description of trespass, which is more clausem fregit (crossing an imaginary line) than midnight terror, citizens would gradually lose their juristic personalities under the Constitution, and be subjugated like a child, servant, or slave to the dominium of the head of the corporate household instead of the imperium of the body politic.\textsuperscript{102}

95. \textit{Id.} at 321, 324.
96. \textit{Id.} at 315.
97. See 391 U.S. at 324.
98. \textit{Id.} at 325.
99. \textit{Id.} at 319.
100. \textit{Id.} at 324-25.
101. \textit{Id.} at 324.
102. \textit{See generally} R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW
The same problem of how to assure the individual an identity in a non-public, non-private place faced the Court five months earlier in *Katz v. United States*. Unlike the facts of *Logan Valley*, the area and activities which led to Katz's appeal were not historically associated with constitutional protection. In *Katz*, FBI agents used a listening device to hear conversations made on a public telephone. On its face the intrusion by F.B.I. agents did not even amount to *clausem fregit*. Yet, the majority of the Court perceived great dangers in the circumstances of *Katz*. The Court held that search and seizure does not necessarily involve intrusion into a space and that there is a general right to be free from unreasonable searches wherever one happens to be. According to Justice Stewart, "the Fourth Amendment protects people, not places." By all commonsense standards, *Katz* is a *plain view* case. Telephones are common carriers and it was Katz's voluntary decision to speak from a public phone booth where he could be seen and heard. The fact that the government agents used an electronic listening device (which seems to have had a great impact on the court) has no real significance. It is as if a partially deaf agent used a hearing aid or a nearsighted one wore glasses while tailing a suspect. Doubtless police have chosen surveillance teams on the basis of keen eyesight and hearing since the first secret police agency was established. In *Katz*, the Court did not look into the possibility that an agent could have overheard the phone conversations unaided. They appeared to have assumed that because electronic devices were used Katz was not within the plain hearing of the agents even though he was clearly within their plain view. Would the Court have disallowed the use of binoculars by officers if they wished to find out what numbers Katz was dialing simply because he reasonably expected that no one would be standing

110-11 (1922). Unfortunately individuals had already been absorbed into the *dominium* of labor unions and business corporations and it is these latter bodies who are the real citizen litigants in *Logan Valley*. No individual petitioner or respondent is named in the opinion.

104. *Id* at 348.
105. *Id* at 353.
106. *Id* at 359.
107. *Id* at 351. Justice Harlan argues in his concurring opinion the protection of people requires "reference to a place." *Id* at 361. However, his two-part rule depending on 1) an "actual (subjective) expectation of privacy" which 2) "society is prepared to recognize as 'reasonable,'" *id*, cannot be regarded as an adequate substitution for the trespass rule which the majority sadly concedes to be hopelessly obsolete. Harlan still thinks of protecting individual rights in an eighteenth century context if the restraint of a public official turns on that official's estimation of the subjective intent of the person who is the object of his interest all prior restraint of the official's action will be lost.
outside the booth watching him make telephone calls? Such assertions of expected privacy are very similar to assertions that a tent or booth at a market or fair was a mansion whose entry would constitute a burglary.

*Katz* has been understood to have been the death certificate of the trespass doctrine, but the rights of property and privacy are still inextricably intertwined. The decision in *Katz* did not deny 700 years of experience with trespass as a procedure for redressing injuries, but ruled out the possibility that limited definitions of private space which had been worked out in a society made up of a limited class of enfranchised landed gentry and masses without political identities would be sufficient in an age when no individual can be free of close social control even if he is generally free from intrusions of the door crashing, jackbooted variety. Justice Stewart’s statement directs inquiry to the fourth amendment and to the Constitution as a whole, not to find definitions for rights of property or privacy, or even to find a definition of trespass, but rather to find the constitutional basis for compromising individual and social interests.

The Court was faced with a decision either to: (1) allow the wholesale surveillance of individuals in every place outside of houses by extraordinarily perceptive electronics, (2) disallow the use of electronics as a trespass and create a fiction on a fiction (an invisible crossing of an invisible boundary) or (3) set a standard by which the legality of every surveillance of an individual must be tested on the basis of its facts and circumstances. In the first case, freedom from government information gathering is left to Pound’s category of *custody*, the category of pure fact. Only if one can evade or jam electronic devices will he escape their surveillance. This is probably impossible as a practical matter. Electronic invasions of privacy pervade every sphere of contemporary society to such a degree that no one could be said to be free of them.\textsuperscript{108} The second possibility is a pure invention of law like *ownership*. Its external standards could never be more perceptible to the layman (including police agents) than quantum mechanics. The last possibility and the Court's choice allows for the mixed fact-law determination that characterizes Pound's category of *juridical possession*.

At least two of the meanings of *trespass* became confused in the decision of *Katz*. *Clauses fregit*, a technical crossing of a property line was one of the meanings.\textsuperscript{109} Another raised the issue of an unconstitutional interference with an individual by the agents of a powerful social control organization.\textsuperscript{110} It appears that the Court was forced to choose between the two meanings. If the Court upheld the existing external standard defined by *clauses fregit*, the scope of permissible actions by the social control organization would be extended intolerably. The alternative of disposing of *clauses fregit* and restraining the agents by an appeal to the abstraction of a reasonable expectation of privacy has meant that moral standards must again be worked into external phenomena.

An important root of the *Katz* decision, *Hester v. United States*,\textsuperscript{111} has been cited for the principle that a trespass to open fields owned by a defendant will not be a fourth amendment violation where there was no search or seizure.\textsuperscript{112} Revenue officers watching from fifty to one hundred yards away from the defendant's home saw him bring a bottle of moonshine whiskey out of the house to a customer's car.\textsuperscript{113} However, Mr. Justice Holmes was not really interested in trespass. *Hester* is also a plain view case; "[t]he defendant's own acts, and those of his associates, disclosed the jug, the jar, and the bottle. . . ."\textsuperscript{114}

As for trespass, Holmes denies the defendant's assertion that ownership has any significant relationship with the special protection of the fourth amendment. Holmes cites only Blackstone as support for his interpretation of the common law construction of the constitutional language "persons, houses, papers and effects."\textsuperscript{115}

Holmes' reference is to Blackstone's discussion of burglary. Burglary, Blackstone said, is "not a mere legal *clauses fregit* (by leaping over invisible ideal boundaries, which may constitute a civil trespass) but a substantial and forcible irruption\textsuperscript{116} . . . attended with circumstances of midnight terror."\textsuperscript{117} For Holmes, the abuse of governmental authority to be feared is, like burglary,

\textsuperscript{109} 389 U.S. at 348-49.
\textsuperscript{110} \textit{Id} at 351-52.
\textsuperscript{111} 265 U.S. 57 (1924).
\textsuperscript{112} \textit{Id} at 58-59.
\textsuperscript{113} \textit{Id} at 58.
\textsuperscript{114} \textit{Id}.
\textsuperscript{115} \textit{Id} at 59 (citing 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 223, 225-26 (7th ed. 1775)).
\textsuperscript{116} 4 BLACKSTONE, supra note 115, at 226.
\textsuperscript{117} \textit{Id} at 225.
terror and force inflicted on the individual, not the crossing of invisible boundaries.

The common law of burglary protected an individual's right to hold a space of rest undisturbed during the night, not an area he owned or even necessarily his chattels: "For no distant barn, warehouse, or the like, are under the same privileges, nor looked upon as a man's castle of defense: nor is a breaking open of houses wherein no man resides, and which therefore for the time being are not mansion-houses [abiding places]." Like the reasonable expectation of privacy, burglary depended on the facts and circumstances surrounding the area in the individual's actual possession.

Blackstone describes the common law construction of residence:

Neither can burglary be committed in a tent or booth erected in a market or fair; though the owner may lodge therein: for the law regards thus highly nothing but permanent edifices; a house, or church, the wall or gate of a town; and it is the folly of the owner to lodge in so fragile a tenement: but his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted wagon in the same circumstances.

What an individual considers to be his mansion is limited by common law perceptions of where one can reasonably expect to be free of midnight terror.

In contrast to Blackstone's and Holmes' construction of common law burglary, after Katz one is supposed to carry one's mansion around with him to phone booths, taxis, and the like. The only difficulty with such a legal protection is that it tends to become a purely legal construction, and not one which has an identifiable reality. In Blackstone's perceptions of burglary, the law did not protect places, it protected persons. However, it did give both person and would be perpetrator of midnight terror recognizable landmarks (permanent edifices) as barriers between the individual wishing to be let alone and those who but for the fear of the serious legal consequences of burglary or interference with civil rights would disturb their rest (privacy). The difference between these examples is that police agents are obliged to search for crime while they observe the restraints of the fourth amendment. Burglars have neither the right nor duty to burgle; they are only threatened with its consequences.

118. Id
119. Id at 226.
L'ÉTAT CRIMINEL

The Katz decision stands against the destruction of an individual's juridical personality by police agents who, through a practice of deciding for themselves that their conduct is permitted by an exception to the fourth amendment warrant requirement, may effectively prevent their actions from being capable of review in legal forums. When the actions of the agents of social control organizations can be conducted in ways that prevent their being able to be reconstructed in court through witness testimony or public records like warrants, individuals may be injured by the excesses of institutional power and be deprived of remedial procedures. Because they are intended to remain hidden from the law, these actions of social institutions cannot be distinguished from those of criminals. The recognized exceptions to the warrant requirement of the fourth amendment are dangerous because they offer police agents opportunities for rationalizing their unwarranted actions by legalistically and subjectively extending them in syllogisms. In the broader social context, because the recognized exceptions correspond to the fundamental procedures of constituting a political structure, the exceptions rationalize the subjection of individuals to the force of social institutions not now positively restrained by the Bill of Rights.

Justice Stewart's opinion in Katz agrees with earlier dissenting opinions in Olmstead v. United States120 and Goldman v. United States121. In these opinions, concerns about privacy or property are subordinated to the single problem: lawbreaking by police agents who subjectively decide that they must act illegally in order to carry out lawful duties. In the broader context of society, necessity justifies forcible impositions on the individual which are glossed over by abstractions of consent and which have never been permitted as recognized exceptions in the criminal justice system. When the powers exercised against an individual by institutions that are not restrained by the Bill of Rights vastly exceed those which can be used by institutions restrained within due process of law, the rule of law and the juridical personality of the individual are gravely endangered. Historically, terror rules instead of law where unrestrained institutions are backed by the power of the state. In modern circumstances, administrative corporate bodies have been more useful instruments of terror than the traditional processes of criminal justice.

120. 277 U.S. 438 (1928).
121. 316 U.S. 129 (1942).
Police Lawbreaking

The decision of the majority in *Olmstead v. United States* reemphasizes Holmes' commitment to the common law structure of protection against midnight terror. The *Olmstead* majority allowed the introduction of evidence which federal agents had obtained by wiretapping phone conversations. The agents had no warrant and under Washington state law wiretapping was a criminal offense (misdemeanor). Like Blackstone in his discussion of burglary and Holmes in his earlier opinion in *Hester*, the majority did not imagine a terrorizing, forcible, trespassatory irruption possible when actions were taken against individuals outside the house and curtilage. Yet Holmes dissents because, unlike the circumstances of *Hester* where he could find no crime committed by the clause *fregit* of the revenue officers, wiretapping was prohibited by Washington law and, in the circumstances of *Olmstead*, he saw the federal officers as lawbreakers. Justice Brandeis shares Holmes' moral indignation. In his dissent, unlike the *Right to Privacy* thirty-eight years earlier, he pays attention to the actions of the federal officers instead of abstract notions of inviolate personality. He sees in their actions a kind of midnight terror more subtle and more threatening than the force and violence of burglars. Although the majority took refuge in the fifth amendment and the common law rule that pertinent evidence is admissible even if illegally taken, Brandeis sees beyond criminal trials to the new relationship between the "psychic and related science" and potential future government "espionage" of "unexpressed beliefs, thoughts and emotions." He sees that the strangling of liberty can be accomplished, not by truncheon-wielding brutes but through "insidious encroachment by men of zeal, well-meaning but without understanding." Brandeis fears that the lack of understanding which imagines that government officers may break laws when they think it necessary will breed "contempt for law; it invites every man to become a law unto himself; it invites anarchy." It is clear that in 1928, whatever Brandeis felt about inviolate personality as a general ideal, he realized that declarations of substantive rights depend on the restraints of procedural due process for their reality.

122. 277 U.S. at 438.
123. Id at 455.
124. Id at 466-67.
125. Id at 469-70.
126. Id at 474.
127. Id at 479.
128. Id at 485.
In *Olmstead*, the dissenters objected to the majority's tacit condoning of police agents breaking the Washington state law against wiretapping. Similarly, in *Goldman v. United States* the majority refused to look at the allegations that the police agents intentionally committed criminal acts: "trespass or unlawful entry" and upheld without reconsideration the decision of *Olmstead* which allowed evidence to appear in court without regard to its source or the methods used to obtain it. Two federal agents had entered the defendant's office at night and installed a "hard wire" microphone. The next day when they found that this apparatus would not work, they placed a sensitive microphone against a wall of the defendant's office from one adjoining it, and obtained the evidence which defendant sought to exclude.

In both *Olmstead* and *Goldman*, besides their legitimate activities, government agents had intentionally disregarded criminal statutes. Brandeis' fears were well founded. In 1967, twenty-five years after *Goldman* and thirty-nine years after *Olmstead*, police were evading legal requirements they found too restrictive. In *Katz*, Justice Stewart is impatient with FBI agents who took it upon themselves to decide whether their actions observed Katz' fourth amendment rights. He is unsympathetic to the excuse that they acted moderately. Their lack of understanding left out important elements:

The Government urges that, because its agents relied upon the decisions in *Olmstead* and *Goldman*, and because they did no more here than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. . . . [T]he agents . . . acted with restraint. Yet . . . this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized.

Although Brandeis was correct in his perception that information would be gathered by technology rather than force and violence, his dissent in *Olmstead* only discusses the collection of

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129. 316 U.S. at 135-36.
130. Id at 131.
131. 389 U.S. at 356.
evidence for use in a criminal trial and does not take into account social controls outside the formal criminal justice system. Brandeis presumed that some kind of judicial procedure would take place before an intrusion by government into an individual's person, chattels, or land rights. His great fear of "men of zeal, well meaning" using the "advances of the psychic and related sciences...without understanding" is that the totality of an individual's intimacy will be enabled to be exposed to a jury.\textsuperscript{132} Brandeis' dissent would certainly have been sterner had he foreseen the contemporary use of information where individual's rights and liabilities may be effected not only in actions taken by formal public forums but also and in general by the anonymous decisions of minor clerks and small officeholders in bureaucracies and corporations.

In \textit{Olmstead} and \textit{Goldman}, no one questioned the accuracy or relevance of the wiretap evidence. The federal officers were only arrogant, not incompetent or acting from a desire to do evil. In \textit{Olmstead} and \textit{Goldman}, the defendants had notice of the wiretap information, the opportunity to challenge its veracity and admissibility at trial, and obviously the right to appeal what they perceived to be error by the trial court. Whatever privacy of theirs had been invaded—if it were not for the Washington State law prohibiting wiretapping, Brandeis and Holmes may have construed use of the telephone by Olmstead in the same way Holmes construed Hester's bringing whisky out of his house only four years earlier, as a \textit{plain view} exception—their individual identity before the law and their right to be judged on the particulars of their circumstances were scrupulously preserved. The legal disappearance of the individual was never threatened.

Brandeis' reaction to contemporary unchecked information gathering can only be speculated from the remarks of the final paragraph of his dissent: "In a government of laws, existence of the government will be imperilled \textit{[sic]} if it fails to observe the law scrupulously. ... Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."\textsuperscript{133} If the laws which separate the private life of the individual and shelter his intimacies from appearing in the openness of the public area are destroyed, not only will the anonymity of his privacy be destroyed, but the individual's public identity will be destroyed as well.

\textsuperscript{132} 277 U.S. at 474.
\textsuperscript{133} Id. at 485.
Abstract Legalisms and the Destruction of the Juridical Personality

In Logan Valley, the Court found that the facts disclosed that an activity which had been an historically public right, freedom of speech and assembly, was threatened by a nakedly legal assertion of ownership. In Katz, an activity which was historically regarded as highly intimate, a conversation between two persons, was threatened by a nakedly legal assertion of non-ownership to further the duty of the police.

One may only guess about the change in attitudes towards the telephone. In Olmstead, Justice Taft compared their use to that of the highways, like trunk lines used to ship words in bulk. After Katz, a phone conversation can no longer be regarded as having entered the stream of commerce, the participants having never left the intimacy of their homes; in telephone advertising jargon, only their fingers have done the walking. Such a change in attitudes towards intimacy distinguishes between Olmstead and Katz without reference to trespass rules; Justice Taft thinks in terms of separate public and private space, while Justice Stewart can find no clear indication of either space.

What the agents circumvented in both cases were the processes by which their actions would become public and be judged by opinions other than their own. Had they not chosen to confess by bringing the evidence they collected to the United States Attorney for use in prosecution, there would never have been a legal record of the surveillance and legally it would not have taken place. Records are provided only by warrants. When a warrant is issued it must be returned to the court and become a permanent part of the court record, a public record upon which allegations of the abuse of authority can be decided. If objects are seized on the basis of the warrant, the return of service showing the inventory of seized objects provides the basis for disposition of the objects at hearings to decide whether they should be returned to the owner, forfeited as contraband, or held for use as evidence. Without these records, there is no evidentiary basis for the individual to assert that his rights were ever invaded. The criminality feared by Brandeis is that of actions done by persons who know that what they do will never be compared with anyone else's estimation of the facts and law.

134. Id at 465.
135. 389 U.S. at 359.
Without warrants and the right to appear in court to refute their allegations about one's individual conduct, the individual drops from sight. As Hannah Arendt has written:

The first essential step on the road to total domination is to kill the juridical person in man. This was done... by putting certain categories of people outside the protection of the law... placing the concentration camp outside the normal penal system, and by selecting its inmates outside the normal judicial procedure in which a definite crime entails a predictable penalty... The inclusion of criminals is necessary in order to make plausible the propagandistic claim of the movement that the institution exists for asocial elements. Criminals do not properly belong in the concentration camps if only because it is much harder to kill the juridical person in a man who is guilty of some crime than in a totally innocent person.  

In Pound's three apart analysis of property, Arendt's statement of the fundamental civil right to a juridical personality corresponds to the property right of juridical possession. What Pound called ownership, where "the law secures to men the exclusive enjoyment or control of objects far beyond their capacity either to hold in custody or possess" corresponds to both Warren's and Brandeis' notion of inviolate personality and English constitutional protection of rights through parliamentary representation. These are "purely legal conceptions having (their) origin in and depending on law" and have no connection with the real situation of someone who has lost his existence (juridical personality) before the law.

The juridical person guarantees that the facts of a man's actions will be juxtaposed to the generalized statements of a legal structure and some reasonable conclusions drawn therefrom as to his rewards or punishments. For example, a system of rewards and punishments is totally irrelevant to persons held in protective custody because they have been deprived of the capacity to do either criminal or political acts by preventative police measures. In the circumstances of custody the "grotesque haphazardness with which concentration-camp victims were chosen in the perfected..."

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138. See text to note 77 supra.
139. See text to note 78 supra.
140. But cf Note, Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments, 90 Harv. L. Rev. 945, 980 (1977) (the author imagines that police do not conduct searches and interfere with individuals without warrants).
terror state"\textsuperscript{141} no longer baffles the sense of one accustomed to some direct relationship between the law and one's treatment by the state.\textsuperscript{142} Once the juridical personality is lost the person is an outlaw in his own state.\textsuperscript{143} His civil rights are destroyed and it is irrelevant whether he is in a camp, at home, or in a phone booth.

In terms of \textit{Logan Valley} and \textit{Katz}, the complimentary rights of public speech and assembly and freedom from unreasonable search and seizures (the reasonable expectation of privacy) were threatened by arguments that separated facts from law and asked for strictly legal interpretations. Had the respondents in both cases succeeded, both the individual and government by consent of the individual would have nearly ceased to exist since practically nothing would be private and yet nothing would be public. The Constitution would have no reach over the unpublic and the individual would have no place to be left alone in the unprivate.

The modern service state exists in more rational circumstances than the totalitarian frenzy of the Nazi and Stalinist movements. The danger is not so much the loss of juridical personality throughout all the members of the polity, although that is always possible, but rather that within society, there will come to exist "islands where the rule of law is at best uncertain, conjectural, and often non-existant. . . . These islands may connote identifiable geographic areas or specific group relations."\textsuperscript{144} Political scientist Otto Kirchheimer describes the public servant's quandary when Mr. Justice Brandeis' fears become reality:

No pure \textit{état criminel} exist in practice. There is no criminal genius who would be able to cajole, seduce, or force a whole people into absolute obedience. As everywhere else in human society, the elements of freedom and coercion, of enthusiastic, matter of fact, resigned or reluctant obedience, of underhanded obstruction and rebellion are extricably mixed. A modern state organization cannot be run like a concentration camp with an overwhelming majority of the population as its inmates. In order to be workable, even a despotic state organization must serve the basic needs of a sizeable number of the population. Hence the necessity to organize a great number of neutral

\begin{thebibliography}{9}
\bibitem{} H. \textsc{Arendt}, \textit{The Origins of Totalitarianism} 447 (1951).
\bibitem{} See \textsc{Bettelheim}, \textit{Behavior in Extreme Situations}, 38 J. of Abnormal \& Soc. Psych. (1943): Persons who had done nothing were least able to withstand the shock of concentration camp existence. According to \textsc{Arendt}, \textsc{Bettelheim} ascribes this to their middleclass notions of law and justice. H. \textsc{Arendt}, \textit{The Origins of Totalitarianism} 449 n.145 (1951).
\bibitem{} \textit{Id.} at 451.
\bibitem{} O. \textsc{Kirchheimer}, \textit{Political Justice} 322 (1961).
\end{thebibliography}
services closely corresponding to those of any other modern state. But it is not only in their common pursuit of necessary societal functions that a normal and criminal state are inseparable. The very notion of their separability accounts for only part of our contemporary experience. It originates with the Third Reich, whose goals, the forcing into subservience of the people of the European continent, were as evil as the means of killing and enslaving millions of its real or fictitious, present or future enemies.\textsuperscript{145}

Kirchheimer refutes Talleyrand's classic defense of the public servant who is forced to carry out criminal orders yet remains in his office and carries them out. According to Talleyrand, if the illegitimate order:

should draw the country into great danger, into social disorganization, contempt of law, he should not only resist the order but do all in his power to do away with the enemy of his country... when the act only compromises the good name of the principal, with the law of nations, the general state or morality, unaffected, the servant of the state has a right to continue in office. Were it otherwise, government jobs would be deserted by the more capable and generous men. \textellipsis\textsuperscript{146}

This excuse is acceptable only if one can perceive clearly and easily the difference between the occasional aberration within the framework of the social order and the effortless affirmation of the existence of evil incarnate in the workings of the criminal state. Kirchheimer points out that, unlike the Nazi regime, the goals of a state may not be evil even though the means cause great suffering. He says that efforts at raising the material and cultural standards of life in the Soviet Union and in Algeria by the French caused the creation of two sectors of control: that of the legal framework and that of the military and police. Individual and state confrontation in one are scrupulously formal, in the other propaganda has often given way to outright terror.\textsuperscript{147}

Stewart's opinion in \textit{Katz} supports Kirchheimer's thesis. Under the Constitution, public servants are not to be allowed to decide themselves whether an ordered action is illegal but harmless and necessary or whether it is illegal and dangerous to the respect of law and morality. A neutral magistrate must be interposed.\textsuperscript{148} The fact that a public servant has assumed such a deci-

\textsuperscript{145} \textit{Id.} at 321.

\textsuperscript{146} \textit{Id.} at 320 (quoting C. \textsc{Talleyrand-Perigord}, \textsc{Memoires of the Prince of Talleyrand}, 216 (1891)).

\textsuperscript{147} \textit{Id.} at 321-22.

\textsuperscript{148} \textit{See} 389 U.S. at 356-57.
sion by itself makes a *prima facie* case that the contempt for law most to be feared, the public servant’s self-satisfied contempt for the restraints on his authority, is well-established.

In this light, the recognized exceptions to the warrant requirement of the fourth amendment are the arguments used in formal legal procedure to justify, after the fact, a police agent’s decision that an unreasonable search (one without a warrant) was harmless and necessary. In court, each formulation of an exception depends on a mixed fact-law determination. The police or their advocate bear the burden of showing their search to be legally tolerable on the basis of the totality of the circumstances and existing cases and decisions. Because these determinations only take place if the police pursue a case through the normal channels of the criminal justice system which results in trial and appeal, the restraint of mixed fact-law decision and its probing of reality can be circumvented if police search, arrest, harass, or otherwise exercise terror against individuals without intending to pursue them to trial and conviction under a criminal statute. The subtle and regular practice of the police of searching premises secretly and illegally to determine whether anything will be found in a formal warranted search is a mild form of midnight terror trespass. Secret searches prevent futile warrant searches thus enhancing an agent’s professional reputation for efficiency, provide information for giving formal statements of probable cause a basis in fact (if not in law), and save the vast amounts of paperwork and justification required by the law of searches and seizures. Unless the perpetrator of such activities confesses, is caught by police internal investigation agents, or is caught inadvertently by other police or by the victim of the search, this kind of government lawbreaking for the goals of law enforcement remains completely secret. Although police are often caught participating in burglaries, thefts, extortion and other crimes, only illegal searches and seizures offer police a potential for rationalization of their behavior as necessary towards carrying out their duty to the government and people. The temptation to destroy the legal restraints may be overwhelming. If in the minds of the police the victims of secret searches and seizures can be transformed from individuals with rights into criminals, drug traffickers, agents of a foreign power, or other categories deemed hostile, police can rationalize extra-legal repression by some law higher than that recognized in the courts of the jurisdiction.

150. *See generally id.*
Police must expect that they act at their peril if they act without a warrant. Searches without warrants are unreasonable per se. Only when it is successfully argued that a search falls within a recognized exception on the basis of the facts and circumstances, can such searches be justified at law. Thus calculations to obtain consent, to get to a position of plain view, or to create exigent circumstances, like the argument of the government in Katz, are calculations aimed at destroying the mixed fact-law decision process on the strength of legalisms. As the exception "the reasonable expectation of privacy" can never be determined until after the fact of the invasion; no standard is provided police which tells them when they do or do not need a warrant. This situation is more difficult to resolve for the police agent than the issue of disobeying an illegal order is for the public servant in Talleyrand's example because the search without a warrant may be legally justified.

In contemporary society, where virtually all activities are open to view either because they are voluntarily displayed, disclosed, or are subject to social necessity, the police stand an excellent chance of estimating correctly in nearly all circumstances outside the explicit language of the fourth amendment. So long as recognized exceptions exist, they will offer police legal arguments to excuse their intentional avoidance of court supervision. These arguments, like the no-trespass argument in Katz will seek to form rules out of the exceptions with the result that through logical extension the exceptions will grow. Like Kirchheimer's islands of uncertainty, the exceptions to the warrant requirement will invariably continue to exist and the restraints on the actions of social control agencies within their scope will be uncertain and speculative. The degree to which the exceptions are limited, eliminated, or recast in such a way that their shadow activities are exposed to formal legal process will be the degree to which the state avoids becoming an état criminel where government agents exercise power without restraints of legal authority.¹⁵¹

Although the best examples of the nature of the threat posed by island-exceptions of legal uncertainty involve criminal justice agencies, the kinds of harassment which can occur are limited by the overall commitment to trials and punishments meted out on the basis of known criminal statutes. The uncertainty of external standards encourages police agencies to press for wider latitudes of discretion within the law but does not arbitrarily separate the factual exercise of power from the framework of legal restraints. No one has suggested that criminal trials ought to be secret;

¹⁵¹. See Kirchheimer, supra note 144, at 321-22.
though there has been serious debate about the numbers of hearings fairness requires. Elaborate structures of defendants' rights which may lose sight of reality from time to time will not cause the deterioration of the individual's juridical personality, except where their lack of common sense invites contempt. More dangerous is the tendency to concentrate civil libertarian fervor solely on the decision making processes which have a formally recognized legal existence.

The individual in society is subject to the exercise of power by many institutions who, even though they impose no fines or prison sentences, control his actions with equal compulsion. The individual finds himself in the custody of these institutions who simply possess the power to alter his expectations and enjoyment of wealth, preferment, or honors. Although they may hold out that they police themselves through internal ethics codes, they are generally not within the purview of the Constitution although there is no reason why they shouldn't be subject to it. They ask the individual for information on loan applications, survey his activities with photographic and electronic monitors, and justify such evidence gathering as a necessity for their continued existence.

Social institutions who collect information collect it for the same reasons police gather evidence and use it for the same purposes, evidence used in court. Information is collected as the basis for decisions to exercise the power of the institution on behalf of an individual or to withhold that assistance. The evidence collected does not of itself give the institution power over the individual. The individual is already subject to that power either as supplicant or servant. Only one who lives autarkically, raising his food, curing his illnesses, and providing completely for himself can escape the reach of these institutions. The collection and use of evidence legitimizes the use of power. If such evidence does not reduce the arbitrary nature of a decision, it is often equally valuable to the institution when it serves to disguise arbitrary decisions with a mask of objectivity. Where the evidence and decision making process is kept hidden, the institution's announced commitment to fairness hypocritically excludes all perceptions of equity save its own.

The individual in the hands of such institutions finds his juridical personality reduced below that of a child who gets enmeshed in the juvenile courts. Specific penalties or rewards based on a determination of how his specific actions relate to a known legal framework are replaced by the expression of a concern for his overall well-being or interests. The experience of jurists in relat-
ing law statements to real actions is replaced by a commitment to justice in the abstract. Unfortunately, like the rights of man and perceptions of the heritage of “Adam and right reason,” such a commitment offers little to stabilize the essentially ad hoc decision making process. Worse than the loss of the accumulation of substantive wisdom is the loss of the procedural stabilizers of particularity, confrontation, and cross-examination.

The elimination of the juridical personality is not complete until secret decisions about an individual give way to routine categorization of individual on the basis of predetermined criteria. Decisions at this point are no longer made about a real individual but concern the shadow person who appears on paper or computer tapes. This shadow person is the creation of the evidence selector, is dependent on the relative competence of the researcher, and will change with each decision that is made. Regardless of his diligence, the researcher can never get a complete picture of a real individual. Not only is the decision often made about a shadow person, often it also is a shadow. No trace or record can be found which shows who gathered evidence, summarized it, or decided if it should be included in the information files. Such files cannot be examined for competence, nor can they be responsible for perjured statements. When decisions are made by comparing individuals with categorizing profiles, there is often no record of the filing clerk.

The most serious of these shadow actions are those of the unidentified constructor of the evidence criteria, the categorization scheme, and the alternative outcomes. The authority, utility, and reasonableness of the decision-making structure may never be subjected to open debate. Where the structure is based on a perception of reality through the instrumentation of pseudo-science rather than a long sequence of experience, radically individualistic


153. Brown v. Board of Education and its successors mark the fundamental shift of constitutional limitations from protection of individual rights to protection of class rights. They have helped destroy the objective of a classless society which, I believe, was of the essence of a democratic dream. They moved the constitutional concept of equality from Jeffersonian political equality, which was a means, to substantive equality, which is an end. They moved the measurement from equality of opportunity to equality of condition. They spawned what Daniel Boorstin has called, in a
theories may be arbitrarily substituted for experience because they wear the disguises of absolutism: neutrality, objectivity, and inevitability.154


The exercise of unpublic power is not limited by the nominal description of an institution as part of the public or private sector. If an institution possesses the means of force to take an individual or his wealth into custody, or possesses the power to shut off his means of livelihood without redress, it has already destroyed part of his juridical personality. Nominally private and public institutions may share in the campaign against the law and constitution or they may succeed one another. Their efforts are characterized by the use of force to repress the actions of individuals which are not recognized as crimes by the formal legal structure, and the employment of means which avoid the processes of the regular courts.

The avoidance of legal procedures is not a phenomenon of new technological developments, but recurs in human experience like the debates between the advocates of individual rights and the advocates of collective necessity. The 1765 English case, *Entick v.*
Carrington,\textsuperscript{155} marked the end of a two hundred year sequence of press repression by extra-judicial institutions.

The charter granted to the Company of Stationers of London in 1557 made it lawful for the Master and Keepers or Wardens...and their successors for the time being to make search wherever it shall please them in any place, shop, house, chamber, or building of any printer, binder, bookseller whatever within our kingdom of England or dominions of the same of or for any books or things printed, or to be printed, and to seize, take, hold, burn, or turn to the proper use of the community, all and several those books and things which are or shall be printed contrary to the form of any statute, act, or proclamation made or to be made.\textsuperscript{156}

This grant of power was to aid enforcement of press regulations whose chief aim was to secure the property rights of those who had been granted patents, copyrights, and licenses to publish particular works.\textsuperscript{157} The system of regulation had been devised neither by Parliament or the courts, but by the King, his Council, and the Stationers Company.\textsuperscript{158}

In 1556, the Company's powers of search and seizures were extended to include inspection of all incoming cargoes—"packs, dryfats [barrels], maunds [wicker baskets], and other things wherein books or paper shall be contained."\textsuperscript{159} Beginning in 1576, all London printing houses were searched once each week, the searchers filing detailed reports of the works being printed, who they were being printed for, the numbers of impressions made and the number of journeymen, apprentices and presses in operation.\textsuperscript{160} Star Chamber confirmed this authority again in 1586 and further required printers to set up their presses in places where searchers had ready access.\textsuperscript{161} Unlawful use of printing equipment made it subject to seizure, "defacing, burning, breaking, and destroying." The Company was required to return to the owner "the stuff of the same so defaced" to remind him of the conse-

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\item \textsuperscript{155} 95 Eng. Rep. 807 (K.B. 1765), 19 T. Howell, State Trials 1029 (1913). Further citation of this case will be to the unabridged Howell version.
\item \textsuperscript{157} \textit{See} F. Siebert, Freedom of the Press in England 1476-1776, ch. 2 & 3 (1965).
\item \textsuperscript{158} \textit{Id.} at 82.
\item \textsuperscript{159} \textit{Id.} at 83.
\item \textsuperscript{160} \textit{Id.} at 84.
\item \textsuperscript{161} \textit{Id.}
quences of unlicensed printing. Although authority to search was given to the Stationers Company, the clergy and ecclesiastical officers assisted the Company and conducted searches on their own. Outside of London, where the Company was not active, searches and seizures were conducted by royal officers under orders from the Council or by clergy under orders from the ecclesiastical authorities. Anyone who resisted the Company's searches could be imprisoned by the Company for three months and fined one hundred shillings, one half going to the crown and the other half going to the Company. The search and seizure powers of the Stationers Company continued until 1662 when they were transferred to the Secretary of State's office by the Regulation of Printing Act. Secretaries of State continued the practice of issuing warrants to suppress illegal printing. Sometimes the warrants specified who was to be arrested, sometimes they did not.

John Entick was a writer for the Monitor, a weekly newspaper which opposed the Tory government in power in 1762. The government's first reaction to criticism by the Monitor was to begin publication of its own newspaper, the Briton. In reaction, a second opposition paper, the North Briton, was established, which was soon followed by a second government newspaper, the Auditor. After several months, the Secretary of State issued warrants for the arrest of Entick and the editor of the Monitor, Arthur Beardmore. As well known writers for the Monitor, the warrants named Entick and Beardmore. They were arrested, Entick's house was searched and his papers seized on November 11, 1762. A general warrant was issued for the arrest of the authors and publishers of the North Briton, but it was not served. Entick and Beardmore were released from custody a week after their arrests. Although the Monitor suspended publication, the North Briton continued. On April 26, 1763, after the publication of an article criticizing the King's speech opening Parliament, another general warrant was issued for the authors and printers of the North Briton. Forty-eight arrests were made of persons supposed

162. Id. at 85.
163. Id. at 83.
164. Id. at 86.
165. Id. at 83.
166. Id. at 376. Press repression was neglected between 1640 and 1643. John Milton wrote to protest its reimposition. J. Milton, Areopagitica i-xv (Hale ed. 1875).
167. Id.
168. Id. at 376-77.
169. Id. at 377.
171. Siebert, supra note 157 at 377.
to be connected with the *Monitor* including a member of Parliament, John Wilkes. The arrestees immediately brought damage suits for the unlawful arrest of themselves and the unlawful searches and seizures of their papers. They were eventually awarded damages in excess of 100,000 pounds.

In Entick's case, the government argued that the Secretary of State could issue a warrant in the case of seditious libel on four grounds: (1) that the Secretary as a privy councillor had authority to issue warrants, (2) that as a justice of the peace, he also had such powers, (3) that he had in long-continued practice exercised this power which was recognized by the courts, and (4) that such a power was necessary for the safety of the state. Answering these arguments, Lord Camden's opinion distinguished a general authority of privy councillors to order arrests for high treason, denied that the Secretary held the powers of a justice of the peace, and traced the historical growth of the Secretary's powers. He concluded that such powers were contrary to common law even though they had been exercised for over one hundred years. Lord Camden declared that if such authority was necessary it could not be loosely inferred from common law but must be legislated.

The factual question of national security, the purpose for which the arrests and searches was ordered, was not considered to have any bearing on whether the Secretary of State could issue warrants. In one case at least, a jury decided that national security had been endangered. John Wilkes, who was awarded 1,000 pounds in damages as a result of his suit for unlawful arrest, was later convicted of seditious libel on an information by the attorney general and was both fined and imprisoned.

The history of events leading up to *Entick v. Carrington* show that the policies of the Secretary of State resemble the policies of

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172. *Id.* at 378.
175. *Id.*
176. *Id.*
177. *Id.* at 1040.
178. *Id.* at 1046-59.
the Justice Department\textsuperscript{183} leading up to recent congressional debate\textsuperscript{184} on the employment of warrantless electronic surveillance in the interests of national security.\textsuperscript{185} Although \textit{Olmstead} put wiretapping outside fourth amendment protection, until 1931 the Department of Justice maintained the policy Attorney General Sargent set down in 1928 before the \textit{Olmstead} decision. Sargent had prohibited the Bureau of Investigation from wiretapping for any reason. Attorney General William D. Mitchell began to allow the wiretapping of bootleggers on probable cause in January 1931. In December of that year he expanded authorized wiretapping to include exceptional cases: kidnapping, apprehension of dangerous criminals, espionage, and sabotage.\textsuperscript{186} These policies were followed until after the two \textit{Nardone} cases in 1937 and 1939, which construed the Federal Communications Act of 1934 to bar from court overheard evidence and its fruits.\textsuperscript{187} March 15, 1940, Attorney General Robert Jackson imposed a total ban on warrantless wiretapping.\textsuperscript{188} This policy was reversed May 21, 1940, when President Franklin Roosevelt authorized and directed the Attorney General to "secure information by listening devices (directed at) the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies."\textsuperscript{189} On July 17, 1946, Attorney General Tom Clark advised President Harry Truman to continue the policy of wiretapping because of the substantial increase in subversive activities and in crime. Clark said listening devices were necessary in cases "affecting domestic security, or where human life was in jeopardy."\textsuperscript{190} Truman agreed with Clark. Attorney General McGrath refused to approve trespassory microphone surveillance

\textsuperscript{183}. \textit{See generally J. Ellif, Crime, Dissent and the Attorney General} (1971).

\textsuperscript{184}. \textit{See Senate Comm. on the Judiciary, Foreign Intelligence Surveillance Act of 1976, S. Rep. No. 94-1035, 94th Cong., 2d Sess. 11-18} (1976). The Foreign Intelligence Surveillance Act of 1976, S. 3197 was not passed into law. A new bill S. 1566, was introduced May 18, 1977, and reported out of Subcommittee to the full Judiciary Committee July 18, 1977, where it is now pending. A similar bill has been introduced in the House by Representative Rodino but has received no action as yet.


\textsuperscript{188}. \textit{Zweibon v. Mitchell, 516 F.2d 594, 617} (D.C. Cir. 1975).


\textsuperscript{190}. \textit{Id.} at 68.
between February 1952 and May 1954, but with that exception microphone surveillance in the national interest was unrestricted until 1965. Trespassory microphone surveillance was also undertaken against internal threats from organized crime.\textsuperscript{191}

In March 1965, President Lyndon Johnson required that the interception of telephone conversations without the consent of the parties be limited to investigations relating to national security. Johnson specified that the consent of the Attorney General be obtained in each instance,\textsuperscript{192} whereas previously wiretaps could be authorized by concurrence of the Assistant Attorney General in charge of the case in question.\textsuperscript{193} Agencies conducting investigations were instructed to consult with the Attorney General to ensure that their practices were lawful.

In September 1965, the director of the FBI wrote the Attorney General and referred to the "present atmosphere, brought about by the unrestrained and injudicious use of special investigative techniques by other agencies and departments resulting in Congressional and public alarm and opposition to any activity which could in any way be determined an invasion of privacy."\textsuperscript{194} The Attorney General replied:

\begin{quote}
The use of wiretaps and microphones involving trespass present more difficult problems because of the inadmissibility of any evidence obtained in court cases and because of current judicial and public attitude regarding their use. . . .[a]ll such techniques (should) be confined to the gathering of intelligence in national security matters. . . . I will continue to approve all such requests. . . . I see no need to curtail any such activities in the national security field.\textsuperscript{195}
\end{quote}

Between 1963 and 1965, the FBI Director was authorized to approve wiretaps for "intelligence (and not evidentiary) purposes when required in the interests of internal security or national safety, included organized crime, kidnappings and matters wherein human life might be at stake."\textsuperscript{196}

From 1965 to 1975, the entire federal establishment was prohibited from using listening devices or intercepting telephone and wire communications in all instances other than those involving

\begin{footnotes}
\item[191] Id.
\item[192] Id. at 68-69.
\item[193] Id. at 67.
\item[194] Id. at 69.
\item[195] Id.
\item[196] Id. (citing from the Solicitor General's supplemental brief to the Supreme Court in Black v. United States, 385 U.S. 26 (1966)).
\end{footnotes}
the collection of intelligence affecting the national security. The Attorney General was required to authorize each exception.197

In United States v. Schipani,198 the Solicitor General filed a brief which reemphasized that data collected would not be made available for prosecutorial purposes.199 In 1972, the Supreme Court declared that in circumstances involving internal security, where there was no foreign involvement, the fourth amendment required judicial warrants. That decision, United States v. United States District Court, left undecided whether the fourth amendment required a warrant to conduct electronic surveillance for foreign intelligence, exactly as the court had done earlier in Katz.200 Since then, two decisions United States v. Butenko201 and United States v. Brown202 have held that the President of the United States may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence203 justified by “the inherent power of the President with respect to conducting foreign affairs.”204 Although Judge Skelly Wright in Zweibon v. Mitchell seriously questioned the authority for warrantless national security surveillance,205 that decision demands a warrant only when a “wiretap is installed on a domestic organization that is neither the agent of nor acting in collaboration with a foreign power. . . .”206

Reviewing the cases and history of Justice Department wiretap policy, Attorney General Edward Levi stated:

It is fair to say electronic surveillance conducted for foreign intelligence purposes, essential to the national security, is lawful under the fourth amendment, even in the absence of a warrant, at least where the subject of the surveillance is a foreign power or an agent or collaborator of a foreign power. . . .[t]he opinions. . . .stress the purpose for which the surveillance is . . . undertaken, rather than the identity of the subject. This suggests that in their view such surveillance without a warrant is lawful so long as its purpose is to obtain foreign intelligence.207

198. 362 F.2d 825 (2d Cir. 1966).
200. 407 U.S. 297, 321-22 (1972); see 389 U.S. at 358 n.3.
203. 494 F.2d at 605; 484 F.2d at 426-27.
204. 484 F.2d at 426.
205. 516 F.2d at 615-51.
206. Id at 614.
 Appropriately Attorney General Levi's statement reflected his professional opinion about the state of foreign intelligence surveillance cases and statutes. In contrast, the conclusions of the Senate Committee on the Judiciary condemned warrantless wiretapping in a tone much resembling that of Lord Camden's opinion outlawing private warrants:

Thus, after almost 50 years of case law dealing with the subject of warrantless electronic surveillance... engaged in by eight administrations, the validity of such surveillances and the existence of the constitutional limits on the President's powers to order such surveillances remain an open question. Without legislation on the subject, there is a possibility that future administrations will again assert the right to engage in warrantless surveillance, where foreign relations or national security is involved, against targets who may or may not have any link with a foreign power. This wiretapping would again be implemented covertly, outside the view of the Congress and the courts, and a recurrence of past abuses would be likely. Camden's opinion in Entick v. Carrington is pertinent to these issues. Having been told by one of the Secretary of State's messengers that the Secretary bound them by oath to obey his commands implicitly in both limited and general searches Camden notes: "Such is the power. . . ." In Pound's terms, a statement of pure fact, Camden's remark is equally appropriate to warrantless wiretapping in the interests of national security. The Lord Chief Justice continues: "[T]herefore one should naturally expect that the law to warrant it [the power] should be clear in proportion as the power is exorbitant." One who seizes or invades private property must:

Shew by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books, . . . the statute law. . .[and] the principles of the common law. If

208. See id. at 123-25.
211. Id. at 1065-66. But see 5 Intelligence Activities Senate Resolution 21: Hearings Before the Select Senate Committee to Study Governmental Activities With Respect to Intelligence, the National Security Agency and Fourth Amendment Rights, 94th Cong., 1st Sess. 110 (1975). (Statement of Attorney General Edward Levi): "The law in this area, as Lord Devlin once described the law of search in England, 'is haphazard and ill defined.' It recognizes the existence and necessity of the Executive's power. But the executive and legislature are as Lord Devlin also said, 'expected to act reasonably.' "


no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.\textsuperscript{212}

Camden finds no statute by which such practices can be maintained by direct law\textsuperscript{213} and turns immediately to an examination of common law principles.

Camden's discussion of common law principles is conditioned by his decision that acts not authorized by a magistrate are private acts whether they are performed by the King or his lowliest subject. He declares that a secretary of state even though he may be secretary, privy councillor, and the executor of the King's mandate, is by none of these offices either a magistrate or conservator who can legally warrant a search.\textsuperscript{214} That it was a long-standing practice of secretaries of state to issue warrants was not an argument Camden expected in a court of law:

This is the first instance I have met with, where the ancient immemorable law of the land, in a public matter, was attempted to be proved by the practice of a private office.

The names and rights of public magistrates, their power and forms of proceeding as they are settled by law, have been long since written, and are to be found in books and records. Private customs indeed are still to be sought from private tradition. But whoever conceived a notion, that any part of the public law could be buried in the obscure practice of a particular person?

To search, seize, and carry away all the papers of the subject upon the first warrant: that such a right should have existed from the time whereof the memory of man runneth not to the contrary, and never yet have found a place in any book of law; is incredible.\textsuperscript{215}

These officers are private because, like the FBI agents in *Katz*, they are the only witnesses to what they do, and if by their actions they injure an innocent person, "he is as destitute of remedy as the guilty: and the whole transaction is so guarded against discovery, that if the officer should be disposed to carry off a bank-bill, he may do it with impunity. . . ."\textsuperscript{216} Like Arendt and Kirchheimer, Camden understands the mechanisms of the *état criminel*. Powerful institutions use terror to implement their secret decisions.

\textsuperscript{212} 19 HOWELL, *supra* note 155, at 1066.
\textsuperscript{213} *Id.*
\textsuperscript{214} *Id.* at 1059. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971).
\textsuperscript{215} 19 HOWELL, *supra* note 155, at 1068 (emphasis added).
\textsuperscript{216} *Id.* at 1065.
They fine by stealing and imprison by kidnapping.\textsuperscript{217}

The only example at common law which Camden can compare to private searches and seizures is the procedure whereby an owner may search out and seize stolen goods. Even though he finds the legality of this practice is dubious\textsuperscript{218} he finds strict procedural requirements which foreclose abuses of secret acts:

There must be a \textit{full charge upon oath} of a theft committed.—The owner must swear that the goods are lodged in such a place.—He must attend at the execution of the warrant to shew them to the officer, who must see that they answer the description.—And lastly, the owner must abide the event at his peril: for if the goods are not found, he is a trespasser; and the officer being an innocent person, \textit{will be always a ready and convenient witness against him}.\textsuperscript{219}

Camden finds no such proper checks in the private searching done by the Secretary of State.\textsuperscript{220} The final step in his analysis shows that, unlike the court which decided \textit{Brown} and \textit{Butenko}, Camden finds acts legitimized by compliance with legal procedures—not by the motives for which they are undertaken: “\textit{A}ll these precautions would have been long since established by law, if the power itself had been legal, and that the want of them is an undeniable argument against the legality of the thing.”\textsuperscript{221} For Camden, even assuming the existence of a duty to act or an inherent power to protect, no action is legitimate unless the law regulates its exercise. Neither end justifies evading legal processes. “In the criminal law such a proceeding was never heard of; \ldots[w]hether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say.”\textsuperscript{222} Although his personal opinion is clear in this passage, Camden will not say because he distrusts courts who make remarks without “antecedent principle or authority, from whence (their) opinion may be fairly collected.”\textsuperscript{223}

Camden believes a great share of the blame for the illegal searches and seizures could be laid to the opinion of Chief Justice Scroggs in \textit{The Trial of Harris},\textsuperscript{224} which said in part, “all books scandalous to the government may be seized,” when Scroggs

\begin{itemize}
\item \textsuperscript{217} Id. at 1068.
\item \textsuperscript{218} Id. at 1066-67.
\item \textsuperscript{219} Id. at 1067 (emphasis added).
\item \textsuperscript{220} Id.
\item \textsuperscript{221} Id.
\item \textsuperscript{222} Id. at 1073.
\item \textsuperscript{223} Id. at 1071.
\item \textsuperscript{224} 7 HOWELL, supra note 155, at 925, 929.
\end{itemize}
meant to punish only the writer of false news. Scroggs later clarified himself but, since all twelve judges of England had assembled to decide the case by royal command, his careless statement was assumed to be their settled opinion. Like later exceptions to procedural restraints when extended by deduction, his remark about seizure soon left no one's house theoretically safe from search. Camden says powers of search and seizure cannot be legitimized by the simple declaration of twelve judges' opinion that they are permitted: "If libels may be seized it ought to be laid down with precision, when, where, upon what charge, against whom, by what magistrate, and in what stage of the proceeding...before this general proposition can be established."

In both sequences—press control in the eighteenth century and foreign intelligence surveillances in the twentieth—the government could show neither case law nor statutory authority for its actions. Further, neither Parliament nor Congress appear to have been in sympathy with the governments' arguments. Although two attempts had failed to get a parliamentary vote condemning general warrants, on April 25, 1766, with the exception of express acts of Parliament, Parliament declared them illegal. Hargrave, the reporter of Camden's opinion in Howell's State Trials, says that Parliament resisted the early motions pending court decisions of the suits arising from the events of November 11, 1762. The private abuse of public power in the form of unwarranted and unreported electronic surveillance was also condemned by all the members of the Senate Committee on the Judiciary.

The examples of press control and warrantless surveillance of foreign intelligence activities show that while raison d'etat (national security, exigent circumstances) will constitute a category where restraining law procedures may need to be temporarily postponed in order to secure the goals of the legal institution, the necessary exception is as potentially dangerous to the existence of law as the threat which justifies it. Camden did not have to contend with a restraining Bill of Rights which would have subjected

225. 19 Howell, supra note 155, at 1071.
226. Id.
227. Id. at 1072, 1074.
228. Id. at 1073.
229. Id. at 1075.
even an Act of Parliament authorizing general warrants to scrutiny in the light of the precautions worked out by a tradition of Constitutional interpretation. The messengers bound by oath to the Secretary of State were not bound to disobey orders which violate the Constitution. The illegal acts of public servants are no less private where the Bill of Rights imposes positive duty to question the lawfulness of not only the orders of one's superiors, but even the acts of Congress.232

To Camden's understanding, power is like Pound's idea of custody: mere physical control which may exist independently of law or state.233 Thus, the individual in society may in fact be subject to the power of a large number of controllers, who, as private individual persons and private corporations own (exercising dominium) rather than rule them (the exercise of imperium).234 If, like Kirchheimer's "islands of legal uncertainty," the categories of administrative necessity and convenience grow because, as Hannah Arendt argues, the activities of the household—where people live together because they are driven by their wants and needs235—become the preoccupation of public institutions, acting for a national super-household; there is every likelihood that the individual citizen will begin to lose his juridical personality and begin to disappear into obscurity. Then, like household slaves in classical antiquity, citizens may pass away having no trace that they ever have existed. Camden's repeated references to books and records as the basis for ascertaining the lawful exercises of power upon individuals underscores Arendt's observation. It is not the legally adjudicated rewards or punishments of the citizen which are unrecorded and unknown, only those which are bestowed or inflicted on a slave find no place in the lawbooks.

The two categories of fourth amendment warrant exceptions besides exigent circumstances, consent, and plain view, define the circumstances in which the individual chooses to participate in the abundant provisions for wants and needs which is the chief activity and goal of government. Consent operates at two levels: the consent to be governed, implied by the acts of establishing the federal Constitution and state constitutions; and the consent each individual may give to impositions which Congress and legislatures are prohibited from enacting by the Bill of Rights and similar provisions of the state constitutions.

233. See text to note 74 supra.
234. See text to note 98 supra.
The juristic personalities of administrative institutions are created, the institutions' use of power legitimated, and their existence protected by legal structures. No public bureaucracy nor private corporation possess rights or duties except those granted under the various state and federal incorporation acts. Without these laws, the individual persons who exercise the powers of these institutions could only rely on the limited physical energies of their bodies. On this basis, the "service state" would not exist.

The agents of these institutions incessantly request information as the evidentiary basis for decisions to exercise their powers. Those who wish to participate in the benefits which can be provided by these institutions want them to have that information. Press regulation by the Stationer's Company served not only the ends of royal policy but also secured the profits from the privileges and patents of monopoly which had been granted to its rule-abiding membership\textsuperscript{236} (to which was added only sixty-three members between 1560 and 1596).\textsuperscript{237} The established printers were more than willing to use their corporate organization to aid the Crown in suppressing undesirable printing because the Crown lent its power to the maintenance of the printers' profitable monopolies.\textsuperscript{238} Anyone who wished to participate in this mutually beneficial arrangement could do so by submitting to its rules. Of course there was a catch to this proposition. The number of master printers was strictly limited. Would-be master stationers could only wait on the pleasure of the Company's Court of Assistants, a body of twelve to fourteen who directed the Company's affairs.\textsuperscript{239}

Whatever right to consent had been accorded the Company, it did not extend to all the members of that body. They submitted to its rules and acquiesced to its surveillance of their operations or also ran the same risks taken by non-members who printed. The contemporary situation of information gathering and surveillance is very similar. There continues to exist individuals and groups, controlled by the decisions of modern day Courts of Assistants, who would undergo humiliating apprenticeships, and submit to the most intimate surveillance, if they thought that by doing so they would have better chances of being admitted to memberships in the Company.

The threats and benefits which social institutions as administrative juristic persons present to the individual so overwhelm his

\textsuperscript{237}. Id. at 67.
\textsuperscript{238}. Id.
\textsuperscript{239}. Id. at 66-68.
identity that they may only be opposed by the construction of similarly powerful juristic persons. In *Logan Valley*, constitutional rights were adjudicated between a corporation and a labor union not between identifiable individuals.

*Directions for the Procedural Restraints of Contemporary Data Collections*

An individual who declines to consent to a police officer's offer to search his premises, puts to the police the burden of showing probable cause for the search in front of a magistrate who will make a public record of the whole transaction for later leisurely scrutiny. The force which police can legally exert is less than the force brought to bear on an individual who expects to live in society without supplying the information upon which public contracts, welfare payments, university admissions and scholarship aids, bank loans, commercial credit, consumer credit cards, licenses to practice a trade or profession, health care and insurance, building permits, boarding of commercial aircraft flights, drivers licenses, social security benefits, and telephone service and every other beneficial relationship created by the division of labor in society are conditioned. The individual submits to these impositions, which no court would condone if they had been made by criminal justice agencies, or chooses the insecurity of gaining a living outside the system. This is the reality behind the abstraction of one definition of privacy currently popular among self-described civil libertarians: "Privacy has always meant controlling information about oneself, preserving the freedom to choose what another will know about oneself." That definition complicates the choice between freedom and submission because it concedes that some submission to surveillance is necessary: "They call it privacy, but what citizens want is minimal data collection, accuracy, the right to see and correct their own records, notice

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240. *E.g.*, "Where an attempt is made to justify a search and seizure on the basis of consent, the prosecution has the burden of proving by clear and convincing evidence the consent was voluntary and free from duress." State v. Smith, 178 N.W.2d 329, 333 (Iowa 1970).

241. The discussion between Socrates and Euthers in Xenophon's *Memorabilia* (ii.8) is quite interesting: Euthers is forced by necessity to labor with his body and is sure that his body will not be able to stand this kind of life for very long and also that in his old age he will be destitute. Still, he thinks that to labor is better than to beg. Wherupon Socrates proposes that he look for somebody "who is better off and needs an assistant." Euthers replies he could not bear servitude . . . .


242. R. Smith, (Pamphlet written for the Iowa Civil Liberties Union Privacy Project) (1977) at 3.
before data about them is used for a purpose other than the one for which they originally provided it, and the right to know which data banks exist and have information about them."  

These wants have little or nothing in common with the spawn of Judge Cooley's statement about the right to be let alone, Dean William Prosser's notions of privacy as (1) intrusion on physical solitude, (2) public discourse of private facts, (3) being cast in a false light, or (4) appropriation of one's name or image for commercial use, or whatever is guaranteed by the penumbra of rights to which Mr. Justice Douglas alluded in Griswold v. Connecticut. If these authorities constitute the right of privacy under common law and constitutional law, the wants above described have nothing to do with privacy at all, but in comparison make privacy a concern so insignificant as to be hardly worth discussion outside the realm of libel and slander.

These wants describe the what, where, who, and why rules of law which Lord Chief Justice Camden demanded to see settled and in the books before he would justify the private surveillance practices at issue in Entick v. Carrington. They guarantee to the individual not privacy, but a juridical personality. They do not assert that an individual's property, person, personality, or psyche will or should remain inviolate. Like the Bill of Rights they guarantee no particular set of absolute law relationships; being a set of procedural maxims which provide the basis to redress the excesses of powerful social institutions.

The "right to control information about oneself" really means the right to have law restrain those who exercise powers established and protected by laws and control those who gather information as the basis for decisions related to such exercises controlled and restrained by law. The restraint of law guarantees that each individual will be judged as an individual in open forums with processes which accord each accused the dignities of citizenship.

"Minimal data collection" means to place the burden of showing necessity on those institutions who gather and hold data before they begin. Thus the fourth amendment translates as: no record-keeping is justifiable (warranted) except after showing good reasons (probable cause) for the particular project proposed. "Accuracy, the right to see and correct their own records" derives from the sixth amendment guarantees that an accused be "in-

243. *Id.*
formed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . ."246 "Notice before data about them is used for a purpose other than the one for which they originally provided it" and "the right to know which data banks exist and have information about them" has its basis in the sixth amendment guarantees of public trial in the "district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . ."247 Still the author of these demands neglects the rights to an impartial jury, indictment by grand jury, double jeopardy, assistance of counsel, freedom of speech and press, and the basis arrangement of authority provided in articles nine and ten of the Bill of Rights which also need to be given new standards to fit new social arrangements and the technologies whose development they stimulate.

Wherever the issue of privacy has been raised with regard to the facts of data gathering and surveillance, these demands have been made.248 However, legal discussions have generally continued the trend begun by Warren's and Brandeis' 1890 thesis on privacy, which seeks for a definition of privacy249 as a "value (which) can function as a constitutional concept."250 Like the debate on the right of property, thinking about the law of privacy will remain inconclusive and irrelevant to reality to the degree that it forgets that any legal definition is likely to be as temporary as the factual circumstances upon which it is based. This unreality can take the form of a "sententious legal proverb, put in a striking form so as to

246. U.S. Const. amend. VI.
247. Id. (emphasis added).
250. Gerety's quotation from Privacy in Tort Law-Were Warren and Brandeis Wrong?, 31 Law & Contemp. Prob. 326, 327 (1966), comes out of a context which shows that Kalven was also uneasy about the relationships between "values" and "concepts" (although attractive, they appear to be inescapably subjective) and the objective reality of legal decisions and structures.
stick in the memory but vague in the content"—"the right to be let alone"; or "be conceived as a result obtained inevitably from fixed rules and undeviating remedial proceedings"—"the ideal of the unambiguous application of legal rules to situations of fact."

One may usefully speak of a definition of privacy as a legal opinion formed for the specific circumstances of a particular claim of injury. Rehearsals of such opinions, discussions of their relative decline or increase in numbers, and attempts to draw parallels between them have practical uses. They are not an adequate substitute for discussion of how procedural devices made obsolete by changes in social patterns and the development of technologies may be reconstructed so their functions will not also be lost.

If any vestiges of the juridical personality are to be preserved into the next century, this challenge must be faced: can new procedural devices and new technologies be jurisprudentially coordinated to ensure that records will be kept which cannot be easily tampered with, rerouted, lost, or made anonymous, while simultaneously allowing for the changing administrative demands of society?

In Entick v. Carrington, Lord Chief Justice Camden had the opportunity of hearing the testimony of one of the messengers "bound by his oath to pay an implicit obedience to the commands of the secretary of state. . . ." Only with the greatest difficulty could the Secretary have changed the messenger's memory of a command received or an action undertaken in obedience to the Secretary. The messenger could have been bribed or could be disposed of permanently, but whatever course the Secretary might have chosen in an attempt to tamper with live witnesses he would have had a great deal more difficulty than one who wants to tamper with the contemporary electronically recorded information, commands, and executive decisions. These records can be erased, altered temporarily and restored, or altered permanently literally at the speed of light. No system of electronic information storage has yet been developed which has not been vulnerable to the meddling of determined and imaginative information systems technicians or free from careless errors.

252. Id at 49.
253. Gerety, supra note 249, at 296.
254. 19 Howell, supra note 155, at 1065.
255. Berkowitz, The Computer As Master or Servant: Notes on the Uses and Abuses of Data Bases in the Social Sciences, University of Toronto Institute for Policy Analysis Working Paper Series, No. 7806 at 41 (1978); See generally Whiteside,
Camden refused to concede that the execution of the commands of publicly vested power could legitimately be buried in obscurity and declared that the legitimate uses of power are "settled by law... long since written, and are to be found in books and records." The books and records preserve the juridical personality by permanently remembering the actions taken against individuals and the justifications offered for those actions. Electronic messengers are anonymous, may pass without a trace, and are incapable of being cross-examined even if they could be identified. However, electronic messengers can control and coordinate the actions of subordinates to a degree of fineness beyond Camden's dreams and have made paper communications almost obsolete.

The Secretary of State's illicit and obscure warrants still had a corporeal existence. Recent events have shown that even the most carefully guarded paper correspondance always has the capacity to surface and embarrass its authors by subjecting them to the light of public forums. Legally what is needed is the establishment, as a part of the right of procedural due process, of rules which demand that all electronically stored information be first stored in a tangible form. This tangible form must be capable of disclosing the identity of the original data-collecting witness. Because individuals can never match the resources of the evidence collectors to redress the balance, all information about an individual and the identity of the original witness who records such information must be regularly communicated to that individual. The identity of anyone who consults an information system about an individual must also be communicated. In any dispute which arises out of the use of evidence whose source was a data bank or which concerns the accuracy of information about an individual maintained or supplied to a data bank, the burden of going forward with the evidence must rest jointly and severally with the maintainers, depositors, or clients of the data bank.

Part of this proposition has already been recognized about information collections relating to cases in labor relations. In NLRB v. Great Dane Trailer, Inc. The Supreme Court declared that once it has been proved that a discriminatory practice could affect important employee rights to some extent, the burden to prove the

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256. 19 Howell, supra note 155, at 1068.

257. This no longer need be done on paper. Microforms, microfilms reduced 200 times, are capable of direct transmissions to electronic data systems yet are also capable of being authenticated in the same ways conventionally written documents are proved. Telephone conversation with Professor Stephen Berkowitz, University of Toronto (Sept. 19, 1977); letter and materials from J. Ver Hulst, (Sept. 22, 1977).
legitimacy of such practice shifted to the employer because the evidentiary basis for that practice was most accessible to the employer. Like Logan Valley, the Great Dane case recognized that nominally private institutions exercise considerable power over individuals, which power can be abused unless the law compels its exercise to be brought out into the open. As respondents in Logan Valley could not assert that property used as a shopping center was private, neither could information collected from individuals pursuant to business activities be privileged when it is used as the basis for determining what shall be done to an individual within the control of the collecting institution.

CONCLUSION

Whatever a right of privacy may be perceived to be in a particular situation, like the right of property, it can never be set down philosophically or scientifically within the tradition of American Constitutionalism and Anglo-American common law. This tradition has, as a more fundamental ideal, the preservation of the right of the individual to be subjected to the exercise of social control—receiving benefits and penalties—solely on the basis his particular actions, where the qualities of those actions are determined in open forums and in comparison with the known and settled legal experience. While exceptions to this principle must be conceded from time to time, the degree to which an individual is subject to the exercise of power which cannot be reviewed at law is the degree to which he has been deprived of a juridical personality. The degree to which the power of social institutions (who are protected and established by law) is exercised outside the purview of legal controls is the degree to which a society is controlled by private abuse, and the degree to which it may be justifiably described as an état criminel.

The right to due process is the necessary condition to the right of privacy. All the organized juristic units which collect, hold, and use information to administer the supplying of social needs must be subjected to the positive restraints of the Bill of Rights and the Constitution. Should demands to be heard and judged openly before the law, as a right and duty bearing individual, take on a "curious quaintness, . . . an air of injured gentility," the legacy of "public happiness" and political participation will have been lost.