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Right to Privacy- Direct Injury Must Be Shown Before A Court May Grant Relief From General Governmental Surveillance

Right of Privacy—DIRECT INJURY MUST BE SHOWN BEFORE A COURT MAY GRANT RELIEF FROM GENERAL GOVERNMENTAL SURVEILLANCE—*Laird v. Tatum*, 408 U.S. 1 (1972).

The right of privacy is an aggregate of many separate rights, each of which is guaranteed in the Bill of Rights.[1] Although the right of privacy was not recognized per se at common law,[2] today it is acknowledged by a majority of jurisdictions as a separate actionable legal right.[3]

The concept underlying the right of privacy is one[4] which has consis-

1. "Various guarantees create zones of privacy." Griswold v. Connecticut, 381 U.S. 479, 484 (1965). Privacy is impliedly protected from governmental intervention by the first amendment through the right of association, and the third amendment's prohibition against the peacetime quartering of soldiers in private homes without the consent of the owner. The right of the people to be secure from unreasonable searches of thir persons, houses, papers and effects is explicitly affirmed by the fourth amendment, and "the Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment." *Id.* The right of privacy is protected also by the ninth amendment which shields other nonenumerated rights retained by the people from possible implied denunciation. *Id.*

For a discussion of the right of privacy see A. WESTIN, PRIVACY AND FREEDOM (1967); Ervin, *Privacy and The Constitution*, 50 N.C.L. REV. 1016 (1972).

2. Warren and Brandeis were the first to theorize the right of privacy as a separate cause of action which could be protected by the courts. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). ". . . [I]t is most often stated that this law review article served as the catalyst in recognition of the right of privacy." Comment, *Thoughts Concerning the Status of the Right of Privacy in Texas*, 23 BAYLOR L. REV. 117 (1971).

Prior to the Warren and Brandeis article, the courts did not recognize a separate actionable right of privacy. Privacy was protected by other rights such as property and contract rights. 62 AM. JUR. 2d *Privacy* § 2 (1972). Before the Warren and Brandeis article, the courts specifically addressing the right of privacy did so only in cases involving tortious factual situations arising from the invasion of privacy by private individuals or concerns.

3. W. PROSSER, LAW OF TORTS § 117, at 802 (4th ed. 1971). Prosser has determined that the invasion of privacy is not one tort but four:

(1) wrongful appropriation, for the defendant's benefit or advantage, of the plaintiff's name or likeness;

(2) wrongful intrusion upon the plaintiff's physical solitude or seclusion;

(3) wrongful public disclosure of private facts;

(4) wrongful publicity which places the plaintiff in a false light in the public eye. *Id.* at 804, 807, 809, 812.

Protection from tortious invasion of a person's general right of privacy has been held to be analogous to protection of property and life, and is therefore left largely to the law of the individual states. Katz v. United States, 389 U.S. 347, 350-51 (1967).

The Supreme Court in a number of criminal cases involving fourth amendment protection against unreasonable search and seizure has indicated that the constitution sanctifies a right of privacy. Katz v. United States, 389 U.S. 347 (1967); Mapp v. Ohio, 367 U.S. 643 (1961); Frank v. Maryland, 359 U.S. 360 (1959); Boyd v. United States, 116 U.S. 616 (1886). In Miranda v. Arizona, 384 U.S. 436 (1966) and Escobedo v. Illinois, 378 U.S. 478 (1964), the Supreme Court endeavored to protect privacy as guaranteed by the fifth amendment.

4. *See* Doss & Doss, *On Morals, Privacy, and the Constitution*, 25 U. MIAMI L. REV. 395,

tently evaded adequate definition. While a literal definition of "privacy" requires the utmost secrecy in all aspects of one's life, a more rational approach provides that "[p]rivacy is not simply an absence of information about us in the minds of others; rather it is the *control* we have over information about ourselves."[5] Thus, in order for privacy to be enjoyed, and the right to be invoked, citizens must be able to regulate the access of others to knowledge about their personal lives.[6]

In a modern technological environment, privacy is subjected to numerous infringements.[7] Predominant among infringements upon one's right of privacy are the intrusions occasioned by the general surveillance utilized by law enforcement agencies and other governmental bodies to combat potential criminal activity.[8] The government has continuously asserted an

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396 (1971) who contend that ". . . the concept of privacy arises from the proposition that the reach of civil and criminal laws should not be co-extensive with moral laws; rather, there should be a realm of individual thought and action—a zone of privacy—beyond the law."

5. Fried, *Privacy*, 77 YALE L.J. 475, 482 (1968).

6. *Id.*

7. It is compromised by the just exercise of rights by others, the politically sanctioned but questionable exercise of rights by others, the uncondoned conduct of others which society is unwilling or unable to control, and the obviously wrongful aggressions and invasions by others. *Id.*

8. "General Surveillance" is governmental observation and recordation of the acts of private citizens, who are not suspected of specific criminal activity, while engaged in their everyday affairs.

> As of the 1960's, the new surveillance technology is being used widely by government agencies of all types and at every level of government, as well as by private agents for a rapidly growing number of businesses, unions, private organizations, and individuals in every section of the United States. Increasingly, permanent surveillance devices have been installed in facilities used by employees or the public. While there are defenses against "outside" surveillance, these are so costly and complex and demand such constant vigilance that their use is feasible only where official or private matters of the highest security are to be protected. . . . [S]cientific prospects for the next decade indicate a continuing increase in the range and versatility of the listening and watching devices, as well as the possibility of computer processing of recordings to identify automatically the speakers or topics under surveillance. A. WESTIN, PRIVACY AND FREEDOM, 365-66 (1967).

Computers and comprehensive data repositories make the information obtained by government agencies instantaneously obtainable and widely distributable. The most comprehensive of all data repositories is the Federal Bureau of Investigation, Identification Division. The Identification Division employs 3,300 persons who maintain 200,000,000 sets of fingerprints. Menard v.Mitchell, 328 F. Supp. 718, 721 (D.C. Cir. 1971). According to 28 U.S.C. 534(a)(2) (1969), F.B.I. records are only allowed to be given to "authorized officials." However, a regulation promulgated by the Attorney General greatly broadens the field of eligible recipients by providing that the director of the Federal Bureau of Investigation shall:

> Conduct the acquisition, collection, exchange, classification, and preservation of identification records, including personal fingerprints voluntarily submitted, on a mutually beneficial basis, from law enforcement and other governmental agencies, rail-

almost unlimited right to monitor the activities of citizens when its surveillance does not involve wiretapping or any other clearly unconstitutional intrusion.[9] However, such unregulated general surveillance stands at odds with the concept of privacy implicit in the constitution. Increasingly, the courts are being summoned to determine whether or not privacy can be protected from general governmental surveillance under existing law.[10] Thus far courts have not determined this issue because they have failed to advance beyond the threshold question of injury.

In *Laird v. Tatum*,[11] respondents alleged that they represented a class whose rights were being invaded by the very existence of the Army's data-gathering system and its surveillance of lawful and peaceful political activity. Respondents submitted that their exercise of constitutional rights had been "chilled"[12] by this surveillance and that they were entitled to declaratory and injunctive relief. The United States Supreme Court, in a five to four decision, held that because the respondents failed to show concrete evidence of direct harm or threat of direct injury in the future, they did not present a justiciable controversy.[13] "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm . . . ."[14] The Court indicated that

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road police, national banks, member banks of the Federal Reserve System, FDIC-Reserve-Insured Banks, and banking institutions insured by the Federal Savings and Loan Insurance Corporation. . . . 28 C.F.R. § 0.85(b) (1970).

Unfortunately, "[t]he overwhelming majority of F.B.I. records do not tell a complete story." Hoover, *The Confidential Nature of F.B.I. Reports*, 8 SYRACUSE L. REV. 1, 4 (1956).

9. *Hearings on Federal Data Banks, Computers and the Bill of Rights Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 597 (1971) (statement by W.H. Rehnquist). Furthermore, the administration holds that in order to insure that the government does not abuse its power to use surveillance, the people of America must rely on the "self discipline . . . of the executive branch." *Id.* at 603.

10. Laird v. Tatum, 408 U.S. 1 (1972); Finley v. Hampton, 473 F.2d 180 (D.C. Cir. 1972); Donohoe v. Dulling, 330 F. Supp. 308 (E.D. Va. 1971), *aff'd*, 465 F.2d 196 (4th Cir. 1972); *But see* Books, Inc. v. Leary, 291 F. Supp. 622 (S.D. N.Y. 1968).

11. 408 U.S. 1 (1972).

12. Recently the Supreme Court has held in numerous cases that violations of constitutional rights may arise from the deterrent, or "chilling" effect of governmental regulations and practices which do not otherwise constitute a direct curtailment of the exercise of first amendment rights. *E.g.*, Baird v. State Bar, 401 U.S. 1 (1971); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964).

13. In so doing, the *Laird* court relied on *Ex parte* Levitt, 302 U.S. 633 (1937) (per curiam decision) which held:

> It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public. *Id.* at 634.

14. Laird v. Tatum, 408 U.S. 1, 13-14 (1972).

had respondents presented "claims of judicially cognizable injury resulting from military intrusion into the civilian sector . . . ,"[15] a different result could have been reached.[16]

Similarly, the plaintiffs in *Donohoe v. Duling*,[17] allegedly representing a class, sought a declaratory judgment as to their rights and injunctive relief to prohibit the police in Richmond, Virginia, from photographing people engaged in political demonstrations and from retaining such photographs.[18] The plaintiffs argued that the presence of police photographers "had a 'chilling effect' upon their presence, as well as on others who may have wished to participate."[19] The district court ruled that, because the leaders of the groups staging the demonstrations had advised the news media of the time and location of such demonstrations, they could not later complain of the police photographing the activities.[20] Additionally, the court determined "that the practices of the Richmond police as heretofore described are not only permissible and constitutional, but they are also commendable and should be encouraged."[21] The fourth circuit affirmed *Donohoe*,[22] reasoning that the appellants failed to show they had been directly injured or "chilled" in their exercise of constitutional rights, and thus lacked standing to maintain an action representing a class of people who allegedly had been adversely affected in that manner.[23]

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15. 408 U.S. 1, 15-16 (1972).

16. We, of course, intimate no view with respect to the propriety or desirability, from a policy standpoint, of the challenged activities of the Department of the Army; our conclusion is a narrow one, namely, that on this record respondents have not presented a case for resolution by the courts. *Id.* at 15.

. . . [F]ederal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied. *Id.* at 16.

17. 330 F. Supp. 308 (E.D. Va. 1971).

18. The court found that "[i]t has long been the policy in Richmond and other places throughout the nation to photograph persons participating in vigils, demonstrations, protests and other like activities whether peaceful or otherwise. *Id.* at 309.

19. *Id.* at 309-10.

20. They knew, in taking such action, that photographers would be present to take pictures of the assembled group, especially the leaders. They knew, or could fairly assume, that photographs taken by news and television media are readily available to law enforcement authorities upon request or order of any court. They invited the publicity and must stand the consequences. *Id.* at 310.

21. *Id.* at 311.

22. 465 F.2d 196 (4th Cir. 1972).

23. . . . [T]here was a complete absence of testimony that any of the plaintiffs had ever sustained any "specific present objective harm" or had ever been personally restrained, or "chilled" in the exercise of his or her first amendment rights. . . . At

In both *Laird* and *Donohoe* the courts failed to traverse the threshold question of the existence of direct injury, present or imminently future, and thus were unable to determine the legality or illegality of the governmental activity in controversy. *Laird* indicated that the lack of direct injury to respondents resulted in an absence of justiciable controversy; and *Donohoe* determined that the lack of direct injury to appellants left them without a justiciable claim and thus deprived them of the ability to represent persons alleged to be harmed.

Dissenting in *Laird*,[24] Justice Douglas argued that "[t]he claim that respondents have no standing to challenge the Army's surveillance of them and the other members of the class they seek to represent is too transparent for serious argument."[25] He further asserted that it is not necessary to wait to bring suit until one's reputation is defamed or his job lost.[26] "To withhold standing to sue until that time arrives would in practical effect immunize from judicial scrutiny all surveillance activities, regardless of their misuse and their deterrent effect."[27] Relying on *Baker v. Carr*,[28] Justice Douglas reasoned that a litigant has standing to seek relief when he has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[29] Thus, he concluded, the controversy was real, tangi-

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best, they asserted that they were "annoyed" or "felt uncomfortable" or "nervous". . . . [T]here is . . . nothing in this record to establish harm or injury actually sustained by the plaintiffs themselves. *Id.* at 199.

Judge Winter in his dissent concluded that the plaintiffs had standing to sue and that the police had no valid justification for intimidating all participants in any demonstration in order to photograph the alleged leaders who were already well known to police before the demonstration.

24. 408 U.S. 1 (1972) (Douglas, J. dissenting, with whom Marshall, J. concurs).

If Congress had passed a law authorizing the armed services to establish surveillance over the civilian population, a most serious constitutional problem would be presented. There is, however, no law authorizing surveillance over civilians, which in this case the Pentagon concededly had undertaken. The question is whether such authority may be implied. One can search the Constitution in vain for any such authority. *Id.* at 16.

25. "The surveillance of the Army over the civilian sector—a part of society hitherto immune from their control—is a serious charge." *Id.* at 24.

26. *Id.* at 26.

27. *Id.*

28. 369 U.S. 186 (1962).

29. 408 U.S. 1, 26 (1972) *quoting* Baker v. Carr, 369 U.S. 186, 204 (1962).

Flast v. Cohen, 392 U.S. 83 (1968) held that ". . . in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. *Id.* at 101. The legal relations of the parties in litigation must have adverse legal interests. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937).

ble, and therefore judiciallycognizable.

In their separate dissents,[30] Justices Brennan, Stewart, and Marshall also argued "that a justiciable controversy exists and that respondents have stated a claim upon which relief could be granted."[31] Adopting the argument of the court of appeals,[32] they concluded that "[b]ecause the evil alleged in the Army intelligence system is that of overbreadth, *i.e.*, the collection of information not reasonably relevant to the Army's mission to suppress civil disorder, and because there is no indication that a better opportunity will later arise to test the constitutionality of the Army's action, the issue can be considered justiciable at this time."[33]

The *Ex parte Lévitt* test[34] followed by the majority in *Laird*[35] requires that a citizen demonstrate that he has sustained or is in immediate danger of sustaining a direct injury in order to establish a justiciable controversy. However, the factual situation before the court in *Lévitt* is signifi-

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Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justicable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action. Flast v. Cohen, 392 U.S. 83, 95 (1968).

Standing is an aspect of justiciability and, as such, the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability. . . . The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issue he wishes to have adjudicated. *Id.* at 98-99.

30. 408 U.S. 1, 38 (1972).

31. *Id.*

32. 444 F.2d 947 (D.C. Cir. 1971).

33. 408 U.S. 1, 39 (1972) *quoting* Tatum v. Laird, 444 F.2d 947, 954-56 (D.C. Cir. 1971).

34. *See* note 13, *supra.*

35. 408 U.S. 1, 13 (1972). Although the court in *Laird* recognized that it had found "[i]n a number of cases that constitutional violations may arise from the deterrent, or 'chilling' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights," it distinguished these cases from *Laird*:

> In none of these cases, . . . did the chilling effect arise merely from the individual's knowledge that a government agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some *other* and additional action detrimental to that individual. Rather, in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulation, proscriptions, or compulsions that he was challenging. *Id.* at 11.

The court concluded that although these decisions do ". . . recognize that governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights," they have in no way eroded the principal expounded in *Lévitt. Id.* at 12, 13.

cantly distinguishable from that presented by *Laird* and *Donohoe*. In *Lévitt*, an interested citizen questioned the appointment of Mr. Justice Black to the Supreme Court. "The motion papers disclose no interest upon the part of the petitioner other than that of a citizen and member of the bar of this Court. That was insufficient."[36] Thus, the Court in *Lévitt* did not attempt to establish guidelines for determining what would be sufficient to constitute a judicially cognizable injury. It is submitted that the direct injury standard contemplated by the *Lévitt* Court could possibly include the injuries alleged in *Laird* and *Donohoe*. The inability to demonstrate the manifest injury, as required by *Laird* and *Donohoe*, should not prevent the exercise of judicial determination in such cases where there is a strong possibility of future direct injury and where the proponents meet the *Baker v. Carr* test of having a personal stake in the outcome of the controversy.

In cases involving general surveillance, the threshold of direct injury is difficult to traverse. Because the product of the surveillance is customarily in the possession of the surveillant, and its possible uses are known only to him, injury may be impossible either to specify or prove.[37] This does not mean that injury is or will be nonexistent.

Under our present law, an anomalous situation has evolved. A person totally innocent of crime may not invoke civil, criminal, or injunctive remedies to protect himself from governmental invasion of his privacy by general surveillance unless he has proof of tangible injury. But, a person indicted for criminal activity may be able to invoke the exclusionary rule to prevent information collected in violation of his constitutional rights from being used against him.[38]

Present encroachments on privacy inflicted by general governmental surveillance represent so grave a danger to constitutional guarantees that society should not be forced to remain without adequate protection while courts capable of providing protection fail to do so. If the right of privacy is to be enjoyed citizens must be able to regulate the access of others to knowledge about their personal lives. In the area of electronic surveillance,

36. 302 U.S. 633, 634 (1937).

37. Indeed, in Donohoe v. Duling, 330 F. Supp. 308, 312 (E.D. Va. 1971), the court denied a motion by the plaintiff requesting production of the reports, notes, and files in the possession of the Richmond Bureau of Police pertaining to parades, demonstrations, meetings, picketings, and vigils.

38. *E.g.*, Katz v. United States, 389 U.S. 347 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Blue, 384 U.S. 251 (1966); Wong Sun v. United States, 371 U.S. 471 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960); Kremen v. United States, 353 U.S. 346 (1957); Nardone v. United States, 308 U.S. 338 (1939); Weeks v. United States, 232 U.S. 383 (1914).

Congress has attempted to limit the powers of government through procedural regulations in Title III of the Omnibus Crime Control and Safe Streets Act.[39] The courts have not determined the legality or illegality of general governmental surveillance. Since the threshold question of direct injury is likely to continue to artificially prevent litigants from reaching the question of the legitimacy of such surveillance, similar guidelines and remedies are currently overdue in the vast area of general governmental surveillance.[40]

H.S.L.

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39. 18 U.S.C. §§ 2510-20 (1968). Title III "authorizes the use of electronic surveillance for classes of crimes carefully specified in 18 U.S.C. § 2516." United States v. United States District Court, 407 U.S. 297, 301, 302 (1972).

> Such surveillance is subject to prior court order. Section 2518 sets forth the detailed and particularized application necessary to obtain such an order as well as carefully circumscribed conditions for its use. The Act represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression. *Id.* at 302.

See generally Christie, *Government Surveillance and Individual Freedom: A Proposed Statutory Response to Laird v. Tatum and the Broader Problem of Government Surveillance of the Individual*, 47 N.Y.U.L. REV. 871 (1972).

40. For a proposed statute see Christie, *supra* note 39.