The Right to Privacy in the Pennsylvania Constitution

Seth F. Kreimer

University of Pennsylvania Law School, skreimer@law.upenn.edu

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THE RIGHT TO PRIVACY
IN THE PENNSYLVANIA CONSTITUTION

by Seth F. Kreimer

I. SETTING THE SCENE

As a law professor, let me begin with a hypothetical. Imagine a small city in Pennsylvania with a mayor and city council who are enamored of traditional family values. The city elders feel themselves to be under siege from the outside world; their feelings are exacerbated when one day the local newspaper runs a story on the sexual practices of the youth of the city. According to the newspaper, a number of the young male residents of the town are engaged in heterosexual activities reminiscent of the Spur Posse in California. Moreover, the article recounts the existence of a flourishing and sexually active gay and lesbian sub-culture emerging in the town—albeit behind closed doors.

Let us suppose that the city administration decides to take action against these activities in a fashion that does not require involvement of the criminal justice system. First, the mayor issues an "administrative request for information" purporting to command the three pharmacies in the city to provide the mayor with records of the sales of all condoms and other contraceptives over the last three years, along with the identity of the purchasers.

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* Professor of Law, University of Pennsylvania; J.D., Yale Law School. This Article has benefited from the comments of Ken Gormley, David Rudovsky, and Bob Williams. My grateful acknowledgement of their help should subject them to no blame for any mistakes that remain.

1 The Spur Posse is a group of males at Lakewood High School in California who allegedly engaged in promiscuous sex with and raped female fellow students, while keeping "score" of their victims. See Seth Mydans, High School Gang Accused of Raping for 'Points', N.Y. TIMES, Mar. 19, 1993, at A6.
The reporting requirement imposed on doctors under federal doctrine is not a search or seizure of tangible objects, but simply a demand for information and, therefore, outside of the Fourth Amendment. Nor are the protections of privacy under substantive due process likely to provide a federal shield. Although federal case law has developed protections for certain intimate sexual activities through a series of "zones of privacy" rooted in the Due Process Clause of the Fourteenth Amendment, homosexual encounters have been held to fall outside of these zones. These days, even the protected areas are shielded only against "undue burdens." In its only encounter with similar problems, the United States Supreme Court in Whalen v. Roe refused to establish a right of medical anonymity, and upheld New York's requirement that doctors and pharmacists be required to report prescriptions of certain drugs to a central state computer file. Justice Stevens commented, for a unanimous Court, that "disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice.”

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6 Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992). Casey struck down a requirement that women report their impending abortions to their husbands.

7 Further, Hodgson v. Minnesota, 497 U.S. 417 (1990), seems to have retained a right of minors who seek judicial aid in bypassing parental consent requirements to have their identities shielded from public dissemination, even if they have no right to seek aid anonymously. These seeds might sprout into a federal recognition that to publicize use of contraceptives constitutes an "undue burden" upon the rights of adults and minors. Whether simply reporting these activities to municipal authorities is an "undue burden" is a closer question.

8 States v. Miller, 425 U.S. 435, 442 (1976) (stating that there is no legitimate expectation of privacy in financial records voluntarily conveyed to a bank).
Fearing the mayor's wrath, the pharmacies would comply. Second, the city council adopts an ordinance requiring all doctors in the city to report to the mayor's office any instance of homosexual activity or unwed pregnancy that comes to their attention. Third, using the information gathered from both the pharmacies and the doctors, the mayor publishes a list of "known homosexuals" and "known sexual profligates." Hoping that public opinion will be brought to bear to stifle the offending conduct, the mayor claims as well that the list will enable residents to shield themselves from the threat of AIDS.

Each of these actions—the demand for pharmacy information, the requirement of doctor reporting, and the publication of the list—seems on its face to be an invasion of the right to privacy, which, according to Justice Brandeis, is "the right most valued by civilized men." Taken together, the mayor's actions erect a structure of governmental control that is toxic to a sense of freedom: a kind of cross between The Scarlet Letter "on the Susquehanna" and Orwell's 1984 in 1993. But taken either alone or together, there is only an outside chance that the actions violate the guarantees of the United States Constitution as currently construed.

Under current federal doctrine, although the pharmacies can object to the mayor's demand, there is no violation of the customer's Fourth Amendment rights if a pharmacy chooses to acquiesce. The governing theory is that in order to constitute an unconstitutional search or seizure a government action must violate a "reasonable expectation of privacy." Once the information is shared with others—in this case the pharmacy—there can be no reasonable expectation of privacy by the customers.

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4 See Smith v. Maryland, 442 U.S. 735, 743-44 (1979) (stating that there is no reasonable expectation of privacy in phone numbers called because the numbers were "voluntarily turned over" to the telephone company); United
The final act, dissemination of the data acquired by the city administration, might seem to be a "deprivation of liberty" without due process, because it affixes a potentially stigmatizing brand to individuals without notice or hearing. The current United States Supreme Court doctrine, however, holds that injury to reputation by the government cannot constitute a "deprivation of liberty" unless it changes the citizen's legal status. In Paul v. Davis, the Court held that it was not a "deprivation of liberty" to place a citizen on a list of known shoplifters; it is hard to predict a different answer for a list of known homosexuals or sexual profligates.

Thus, as currently construed, the United States Constitution provides very limited protection against this kind of an assault on privacy. The question I will address is whether the Pennsylvania Constitution fares any better.

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11 Sunlight, Secrets, and Scarlet Letters makes the case under federal law for some additional protection of "intimate" information. Kreimer, supra note 8, at 137-38.
II. Searches, Seizures, and Expectations: Same Text, Different Emphasis

Let us begin with the demand for pharmacists' records. Like the Fourth Amendment, Article I, Section 8 of the Pennsylvania Constitution provides explicit protection against unreasonable searches and seizures. It provides that "[t]he people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause." 13

As a matter of ordinary use of language, an official demand for medical records certainly seems as if it could be a search or seizure. Under federal law, however, it is not. In United States v. Miller, 14 the United States Supreme Court held that a bank customer had no reasonable expectation of privacy in his bank records. According to the Court, "[t]he depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." 15

Although there are minor textual differences between Pennsylvania's Article I, Section 8 16 and the Fourth Amendment, the operative phrases "persons, houses, papers," "unreasonable searches and seizures," and "probable cause," and the term "warrants" are identical. 17 Nonetheless, for the past fifteen years, the Supreme Court of Pennsylvania has been willing to deviate from the United States Supreme Court's search and seizure

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15 Id. at 443 (citing United States v. White, 401 U.S. 745, 751-52 (1971)).
16 Section X of the 1776 Declaration of Rights differed more extensively from the Fourth Amendment. It provided: "That the people have a right to hold themselves, their houses, papers and possessions free from search and seizure, and therefore warrants, without oaths or affirmations first made, affording a sufficient foundation for them . . . ought not to be granted." Pa. Const. of 1776, ch. I (Decl. of Rights), § 10. The adoption in 1790 of Article IX, Section 8, however, largely paralleled the federal version. The 1790 provision has remained unchanged to the present.
17 The difference between "possessions" and "effects" is a bit slim to form the basis for any doctrinal structure.
jurisprudence in enforcing Article I, Section 8. The Pennsylvania courts, in construing this provision, have made their determination based both on their own readings of the practical demands and potential for abuse in particular policies, and on the belief that Article I, Section 8 is "tied into the implicit right to privacy in this Commonwealth"—thus allowing state courts to give more weight to the demands of individual privacy than the federal courts give in parallel circumstances.

Pennsylvania courts have long declined to view Article I, Section 8 as a disembodied command, but rather have approached it as part of a fabric of protections for privacy encompassing the

18 Commonwealth v. DeJohn, 403 A.2d 1283, 1291 (Pa. 1979) (citation omitted); see, e.g., Commonwealth v. Martin, 626 A.2d 555, 563 (Pa. 1993) (Cappy, J., concurring) (relying on "human dignity and privacy so preciously preserved by our founding fathers" and an "unwavering belief in the sanctity and integrity of personal privacy" to interpret Article I, Section 8); Commonwealth v. Edmunds, 586 A.2d 887, 897 (Pa. 1991) (stating that Article I, Section 8 "is meant to embody a strong notion of privacy, carefully safeguarded in this Commonwealth for the past two centuries"); Lunderstadt v. Pennsylvania House of Representatives, 519 A.2d 408, 414 (Pa. 1986) (quoting DeJohn, 403 A.2d at 1283).

Earlier Pennsylvania cases often relied on federal precedents protecting "privacies of life" under the Fourth Amendment to interpret Article I, Section 8. See, e.g., Annenberg v. Roberts, 2 A.2d 612, 617 (Pa. 1938) (relying on Boyd v. United States, 116 U.S. 616, 621 (1886), to interpret Article I, Section 8). Although the protection provided for privacy at the federal level has waned, Pennsylvania courts have often retained the earlier and more protective federal rules. Lunderstadt, 519 A.2d at 413-15 (relying on Annenberg despite the narrowing of federal protections); cf. Edmunds, 586 A.2d at 887 (declining to adopt the federal innovation of the good faith exception to the exclusionary rule); Commonwealth v. Sell, 470 A.2d 457 (Pa. 1983) (refusing to follow the federal substitution of "expectation of privacy" for "automatie standing" to assert violations of search and seizure guarantees).

Article I, Section 8 was revised in 1790 to a text that more closely parallels the words of the Fourth Amendment. Thus, there may be some reason to give weight to federal interpretation in the Fourth Amendment arena. Still, when the state court is confronted with two inconsistent federal precedents, there is no particular reason to believe that the later one is the "true" interpretation that the state court should follow. The state court can honor the parallelism of state and federal wording by choosing the more protective federal interpretation, rather than the most recent one.
"inherent and indefeasible rights" protected by Article I, Section 1, the common law, and the Fourth Amendment. In weaving this fabric, Pennsylvania's courts have relied on the insights under one constitutional provision to give texture to cognate rights. Thus, in interpreting Article I, Section 8's protection against searches and seizures, the Pennsylvania Supreme Court in Commonwealth v. Edmunds relied on the commitment to privacy expressed in Denoncourt v. Commonwealth, State Ethics Commission, a case that interpreted Article I, Section 1 as protecting against regulations requiring financial disclosures by public officials. Denoncourt, in turn, cited precedent under Article I, Section 8 to illuminate the meaning of Article I, Section 1. More recently, in construing the right to privacy under Article I, Section 1, the Supreme Court of Pennsylvania has taken into account both Article I, Section 8 and Pennsylvania's common-law protection of the

19 E.g., Commonwealth v. Murray, 223 A.2d 102, 109-10 (Pa. 1966) (Musmanno, J.) (plurality opinion) (stating that the right to privacy is rooted in the Article I, Section 1 protection of "inherent and indefeasible rights" and in Article I, Section 8); id. at 112 (Roberts, J., concurring) (stating that "[a] jealous regard for individual privacy is a judicial tradition of distinguished origin, buttressed in many areas by the imperative mandate of constitutional guarantees"); Commonwealth v. Palms, 15 A.2d 481 (Pa. Super. Ct. 1940). The Palms court recognized the power and duty of the state to take steps to ... protect the privacy ... of its inhabitants. Centuries before freedom of conscience and freedom of speech were established in England it was the proud boast of an Englishman that his home was his castle .... That right is implied in both our Federal and State Constitutions ....

Id. at 485; see also Annenberg, 2 A.2d at 617. The court in Annenberg stated: It would seem scarcely necessary to marshal authorities to establish, as a proposition of constitutional law, that a witness cannot be compelled, under the guise of a legislative study ... to reveal his private and personal affairs, except to the extent to which such disclosure is reasonably required for the general purpose of the inquiry.

Id.

20 Edmunds, 586 A.2d at 897.


22 Id. at 946.

23 Id. at 948-49 (citing Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979); Annenberg, 2 A.2d 612 (Pa. 1938)).
right to privacy. This is not a blurring of categories, but a recognition that the constitution of our Commonwealth embodies a commitment to principles that manifest themselves in a coherent pattern of protection of individual privacy. The Supreme Court of Pennsylvania has thus retained what the United States Supreme Court suggested in *Griswold v. Connecticut*, but has largely set to one side. Pennsylvania's jurisprudence seeks to acknowledge the constant "gravitational pull" of the ideal of privacy in a variety of areas.

Over the past decade and a half, the Supreme Court of Pennsylvania has rejected federal precedents regarding automatic

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The clearest example of this approach is seen in the opinion of Justice Mandarino in *In re B.*, 394 A.2d 419, 424 (Pa. 1978). That opinion relied on the recognition of a general "right of privacy" in Pennsylvania's tort law as a part of "American jurisprudence" to ground a constitutional right to prevent disclosure of information revealed to a psychotherapist. *Id.* at 424-25. Justice Mandarino quoted the Supreme Court of Pennsylvania in *In re Mack*, 126 A.2d 679 (Pa. 1956).

"The court below, as are all courts, was charged with a duty to protect the right of privacy of the prisoner. It cannot be doubted that the prisoner was powerless to do so by any means within his control; and in such case the court has an inherent duty to use all reasonable means to safeguard that right."

*In re B.*, 394 A.2d at 425 (quoting *In re Mack*, 126 A.2d at 683).

Pennsylvania's common-law right to privacy was earlier recognized in *Thomas v. Brohm*, 47 A.2d 244, 245 (Pa. 1946) (declining to grant a judgment for defendants in a case alleging violation of a woman's right to privacy during labor); and *Waring v. WDAS Broadcasting Station*, 194 A. 631 (Pa. 1937) (Maxey, J., concurring) (recognizing right to privacy against eavesdropping and unconsented observation).

25 381 U.S. 479 (1965) (striking down a statutory prohibition of the use of birth control because it would require a search of the marital bedroom).

26 For discussions of the "gravitational force" of legal principles in one area of the law on interpretation in other areas, see, e.g., GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 85-86 (1982); R. DWORKIN, TAKING RIGHTS SERIOUSLY 113-24 (1978).
standing to assert search and seizure violations, the good faith exception to the warrant requirement, the requirement that the state obtain warrants before placing pen registers, the scope of legislative investigations, and the status of drug-sniffing dogs as searches.

Although Pennsylvania's emerging constitutional jurisprudence under Article I, Section 8 manifests a heightened interest in privacy, it does not reject the framework of federal search and seizure doctrine and start from scratch. The basic issues of probable cause and reasonable expectations of privacy are framed in terms similar to those used by federal courts. The state

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30 Lunderstadt v. Pennsylvania House of Representatives, 519 A.2d 408, 415 (Pa. 1986) (requiring probable cause to believe that records sought by legislative subpoena contain evidence of civil or criminal wrongdoing; rejecting federal case law that legislative subpoenas may be issued upon a lesser showing).
31 Commonwealth v. Martin, 626 A.2d 556 (Pa. 1993) (rejecting the federal rule and requiring probable cause and a warrant before drug sniff of a person); Commonwealth v. Johnston, 530 A.2d 74 (Pa. 1987) (rejecting federal determination that a drug sniff was not a search and requiring articulable suspicion before a drug sniff of property).
32 See, e.g., Commonwealth v. Blystone, 549 A.2d 81, 87 (Pa. 1988) (relying on the "reasonable expectation" analysis established in Katz v. United States, 389 U.S. 347 (1967), in construing Article I, Section 8); see also Commonwealth v. Copenhefer, 587 A.2d 1353 (Pa. 1991) (holding that the Katz "reasonable expectation of privacy" was not present in computer files that the defendant attempted to delete); Commonwealth, Dep't of Envtl. Resources v. Bloenski Disposal Serv., 566 A.2d 845, 850 (Pa. 1989) (stating that an Article I, Section 8 analysis of the "heavily regulated industries" exception to warrant requirement is the same as in the Fourth Amendment to the United States Constitution); Commonwealth v. Gray, 503 A.2d 921 (Pa. 1986) (adopting the federal "totality of circumstances" analysis with respect to probable cause under Article I, Section 8).

In Commonwealth v. Oglialoro, 579 A.2d 1288 (Pa. 1990), the court seemed to accept the proposition that a helicopter flying fifty feet off the ground over a house was not a "search," unless the helicopter endangered the persons below. The court founded its decision in the Fourth Amendment, but made no reference to the Pennsylvania Constitution. Commonwealth v. Brundidge, 620 A.2d 1115 (Pa. 1993), refers to both the Fourth Amendment and Pennsylvania's
courts, however, undertake the responsibility to strike its accommodation independently among competing concerns in light of Pennsylvania's constitutional commitment to a "strong notion of privacy." 33

Most relevant for the analysis of our hypothetical mayor's actions is Commonwealth v. DeJohn. 34 In that case, the Supreme Court of Pennsylvania, with only Justice Larsen dissenting, rejected the reasoning of the United States Supreme Court in United States v. Miller 35 regarding demands for bank records.

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33 Commonwealth v. Edmunds, 586 A.2d 887, 896, 898 (Pa. 1991); see, e.g., Commonwealth v. Sell, 470 A.2d 457, 467 (Pa. 1983) (stating that "the survival of the language now employed in Article I, Section 8 through over 200 years of profound change . . . demonstrates . . . the paramount concern for privacy"). Thus, Commonwealth v. Kohl, 615 A.2d 308 (Pa. 1992), which struck down warrantless drug tests of drivers, seemed to diverge from the balancing approach adopted by the United States Supreme Court in its drug testing cases. Further, Commonwealth v. Rodriguez, 614 A.2d 1378 (Pa. 1992), declined to balance away protections against personal seizures in the vicinity of a searched premises.

Commonwealth v. Blouse, 611 A.2d 1177 (Pa. 1992), in evaluating warrantless road blocks, seemed to have adopted a "balancing" approach analogous to the federal analysis, albeit a balance that is struck independent of the specific outcomes of federal precedent. Blouse also imposed requirements of administrative authorization for roadblocks that do not flow from federal law. See also Commonwealth v. Tarbert, 535 A.2d 1035, 1042 (1987) (stating that the court undertakes its inquiry "with the caveat that the privacy interest guaranteed by Article I, Section 8 must be accorded great weight").

When the Supreme Court of Pennsylvania finds in favor of defendants on contestable Fourth Amendment grounds, it often undertakes a parallel "suspenders and belt" state constitutional analysis to preserve "independent state grounds" and to immunize its determination against federal review. See, e.g., Commonwealth v. Kohl, 615 A.2d 308 (Pa. 1992) (invalidating "implied consent" to blood testing under both federal and state constitutions because of a lack of probable cause requirement); Commonwealth v. Rodriguez, 614 A.2d 1378 (Pa. 1992) (holding that detention violated both the Fourth Amendment and Article I, Section 8).

34 403 A.2d 1283 (Pa. 1979).

35 425 U.S. 435 (1976) (holding a depositor does not have a protected
The Supreme Court of Pennsylvania viewed the *Miller* approach as "a dangerous precedent, with great potential for abuse." It sensibly repudiated the proposition that an individual's expectation of privacy is a bursting bubble like an evidentiary privilege that dissipates on emerging from total isolation. Instead, our court adopted the California Supreme Court's reasoning that a customer's disclosure to the bank for the limited purpose of "facilitat[ing] the conduct of his financial affairs," did not waive an expectation of privacy with regard to further exposure to government searches and seizures.

Just as the bank customer in *DeJohn* supplied information to the bank "upon the reasonable assumption that the information [would] remain confidential," the customers of the pharmacists in the hypothetical might reasonably rely on the discretion of their druggists. Thus, under the Pennsylvania Constitution, the fact

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privacy interest in the records of depositor's account that the bank is required to monitor under the Bank Secrecy Act).

36 *DeJohn*, 403 A.2d at 1289.
37 Id.
38 Id. at 1290 (quoting Burrows v. Superior Court of San Bernardino County, 13 Cal. 3d 238, 247 (1974)).
39 Id.
40 Id.
41 The issue is, however, not cut and dried. In *Commonwealth v. Blystone*, 549 A.2d 81 (Pa. 1988), the court accepted the United States Supreme Court's conclusion in *United States v. White*, 401 U.S. 741 (1979), that recording of a conversation by a party to the conversation was not a search or seizure because "a thing remains secret until it is told to other ears, after which one cannot command its keeping." *Blystone*, 549 A.2d at 87. This holding is in some tension with the recognition in *DeJohn* that disclosure to a single individual for one purpose is not tantamount to a waiver of the expectation of privacy for all purposes.

*Blystone* may be reconcilable with *DeJohn*. *DeJohn* rested on the court's acceptance as "reasonable" the customers' assumption that banks would retain information as confidential. In *Blystone*, the court may simply have viewed a similar expectation of prison acquaintances as not equally reasonable, particularly because the Pennsylvania legislature had specifically approved "participant monitoring" by law enforcement officers in specified circumstances. This analysis finds support in *Commonwealth v. Melilli*, 555 A.2d 1254, 1258-59 (Pa. 1989), in which the Supreme Court of Pennsylvania relied on *DeJohn* (with only Justice McDermott dissenting) to reject the United States Supreme
that the mayor sought to obtain private information from third parties did not divest him of constitutional constraints. Whether consumers' "expectation of privacy" in pharmacist's records is as reasonable as that, certainly their expectations in bank records would be the nub of the discussion under the Pennsylvania Constitution.

III. REPUTATION, INFORMATION, AND PRIVACY: DIFFERENT TEXT, DIFFERENT COMMITMENTS

Let us now turn to the doctor reporting requirement. Initially, it is harder to define a statutorily required report as either a search or seizure, so the constraints of Article I, Section 8 may not be directly relevant. The courts of Pennsylvania have emphasized, Court's position in Smith v. Maryland, 442 U.S. 735 (1979), that sharing the phone number one dials with the telephone company waives any expectation of privacy vis-a-vis government "pen registers."

The question in this analysis thus becomes whether a pharmacy is more like a bank and a telephone company, or like a personal acquaintance in terms of the "reasonableness" of an expectation of privacy. One element that has caught the attention of the court seems to be the degree of intrusion of the search into bodily privacy or intimate activities. More intrusive searches are generally less likely to be judged reasonable. Commonwealth v. Martin, 626 A.2d 556 (Pa. 1993); Commonwealth v. Kohl, 615 A.2d 308 (Pa. 1992); Commonwealth v. Kean, 556 A.2d 374, 380-82 (Pa. Super. Ct. 1989).

A second relevant factor is the extent of the information gathered. In DeJohn, the court emphasized the vulnerability of privacy to "one stop shopping" by law enforcement officers who could uncover a virtually complete biography by obtaining financial records; more targeted searches might be considered more reasonable.

Third, the "reasonableness" of reliance on confidentiality might turn on the degree to which that reliance is effectively compelled. The court might have distinguished Blystone because the "realities of modern life" do not effectively require personal confidences in the same way that they require dependence on banks and telephones. This, however, suggests some odd psychology: sharing with friends seems to be at least as much a psychological necessity as reliance on banks is a financial necessity.

42 But see John M. v. Paula T., 571 A.2d 1385, 1386 (Pa. 1990) (characterizing the court's requirement of a paternity test as an "unreasonable search and seizure"); Lunderstadt v. Pennsylvania House of Representatives, 519 A.2d 408, 413 (Pa. 1986) (treating a legislative subpoena as a violation of
however, that Pennsylvania’s search and seizure protections are part of a broader commitment to privacy. Courts refer to other elements of Pennsylvania’s constitutional scheme on this point, using the privacy protected by Section 8 as a landmark.\(^43\)

Pennsylvania lacks the explicit constitutional language regarding privacy contained in some other state constitutions.\(^44\) However, Article I, Section 1 provides that "[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."\(^45\) This seems like a promising opening, as it contains a textual recognition of "inherent and indefeasible rights" accruing to all, which include, but extend beyond "life," "liberty," "property," and "reputation."

There may be some temptation to read this broad, natural rights language as merely "descriptive rather than normative," setting forth "principles of government" that are not subject to judicial enforcement.\(^46\) The structure, context, and judicial

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\(^44\) During the 1970s, a number of states incorporated broad and free-standing guarantees of privacy into their state constitutions. See, e.g., ALASKA CONST. art. I, § 22; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. I, § 6; MONT. CONST. art. II, § 10. Between 1968 and 1974, a number of states also amended their search and seizure provisions to include protections against invasions of privacy. See, e.g., HAW. CONST. art. I, § 7; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; S.C. CONST. art. I, § 10. The original turn-of-the-century constitutions of Arizona and Washington guaranteed a right for one not to be "disturbed in his private affairs ... without authorization of law." See ARIZ. CONST. art. II, § 8; WASH. CONST. art. I, § 7; Gormley & Hartman, supra note 12, at 1282-83.

\(^45\) PA. CONST. art. I, § 1.

\(^46\) Gormley & Hartman, supra note 12, at 1282-83 (internal quotations omitted); see also Robert F. Williams, Equality Guarantees in State Constitutional Law, 63 TEX. L. REV. 1195, 1205 (1985) (citing Grad, The State Bill of Rights, in CON-CON: ISSUES FOR THE ILLINOIS CONSTITUTIONAL
construction of Article I, Section 1, however, point in the opposite
direction.

The "equally free and independent" language originally
appeared as the first section of the Declaration of Rights of
Pennsylvania's 1776 constitution. Section 46 of the 1776 Frame of
Government provided that the Declaration of Rights was to be "a
part of the constitution of this commonwealth [that] ought never to
be violated on any pretence whatsoever." 47

Pennsylvania's 1790 constitution included a slightly modified
version of the 1776 "equally free and independent" section as the
first section of its Declaration of Rights. 48 The 1790 constitution
added an express statement that "[t]o guard against transgressions
of the high powers which we have delegated, we declare that every
thing in this article is excepted out of the general powers of
government, and shall for ever remain inviolate." 49 No distinction
was made between the first section and the rest of the Declaration
of Rights with regard to inviolability. Both the reference to
"inherent and indefeasible rights" and the establishment of
inviolability have been retained in identical language in every
subsequent Pennsylvania Constitution. 50

At its inception, Pennsylvania shared the "equally free and
independent" provision with the constitutions of Massachusetts and

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47 PA. CONST. of 1776, ch. II (Frame of Gov't), § 46. Section 47 of the
1776 Frame of Government provided for the establishment of a "council of
censors" to review the constitutionality of actions of the legislative and executive
branches. Id. § 47.

48 In contrast to the 1790 Declaration of Rights, the 1776 Declaration of
Rights characterized the rights as "inherent and inalienable" rather than "inherent
and indefeasible." PA. CONST. of 1776, ch. I (Decl. of Rights), § 1. The 1790
Declaration of Rights added explicit recognition of the right of "acquiring,
possessing and protecting" one's reputation. PA. CONST. of 1790, art. IX, § 1.
Further, it deleted the 1776 reference to "pursuing . . . safety," and deleted the
right to "obtaining . . . happiness." PA. CONST. of 1776, ch. I (Decl. of
Rights), § 1.

50 See, e.g., PA. CONST. art. I, §§ 1, 25; PA. CONST. of 1874, art. I, §§ 1,
26; PA. CONST. of 1838, art. IX, §§ 1, 26.
Virginia. Each state apparently viewed the provisions as having legal rather than merely hortatory effect. In the 1780s, Massachusetts Chief Justice William Cushing construed the Massachusetts clause to abolish slavery. Virginia rejected a similar result a generation later, not because Virginia's "equally free and independent" provision was without legal effect, but because the effect was limited "to white persons and native American Indians" rather than African Americans.

In Pennsylvania, the judicial enforceability of the "equally free and independent" provisions was recognized with no less emphasis. In 1795, a Pennsylvania court declared an act of the Pennsylvania legislature to be an unconstitutional violation of the "inherent and unalienable right" of possessing property, relying on Section 1 of the Declaration of Rights of the first Pennsylvania Constitution. In 1802, the Supreme Court of Pennsylvania entertained an argument challenging a state statute as unconstitutional, both as a

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51 Williams, supra note 46, at 1199. John Adams stated that the Pennsylvania Declaration was "taken almost verbatim from that of Virginia." See J. PAUL SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY 178 (1936). Massachusetts' provision was adopted in 1780 and drew on the models of Virginia and Pennsylvania. See WILLI P. ADAMS, THE FIRST AMERICAN CONSTITUTIONS 175 (1980).

52 For a discussion of Massachusetts and Virginia courts that have invoked natural law as part of judicial review, see Suzanna Sherry, Natural Law in the States, 61 U. CIN. L. REV. 171 (1992) [hereinafter Sherry, Natural Law]; see also Suzanna Sherry, The Early Virginia Tradition of Extra-Textual Interpretation, 53 A.B.A. L. REV. 297 (1989).

53 See ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 47, 48 (1975) (reporting on Commonwealth v. Jennison) (no official report of the arguments to the court or the jury instructions survive); JOHN C. HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 29, 30 n.1 (1862); cf. Winchendon v. Hartfield, 4 Mass. 123, 127 (1808) (stating that slavery was "tolerated until the ratification of the present [Massachusetts] constitution").

54 Hudgins v. Wrights, 11 Va. (1 Hen. & M.) 134, 144 (1806); COVER, supra note 53, at 50-55; HURD, supra note 53, at 246 n.1. For a discussion of Virginia's natural rights jurisprudence, see Sherry, Natural Law, supra note 52. In Crenshaw v. Slate River Co., 27 Va. (6 Rand.) 245, 276 (1828) (Green, J., concurring), Justice Green relied on the inherent rights provision to invalidate a statute infringing on property rights.

55 VanHorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (1795).
violation of the "inherent right to property" and as a violation of the "equality of rights" guaranteed by Section 1 of the 1790 Declaration of Rights. Since that time, Pennsylvania courts have regularly viewed the "equally free and independent" provision as conferring judicially enforceable rights.

The task, thus, is not to defend the claim that courts can enforce "inherent and indefeasible" rights; it is rather to identify exactly what "inherent and indefeasible" rights Article I, Section 1 protects. The Supreme Court of Pennsylvania announced emphatically, but cryptically, over a decade ago that the "interest in avoiding disclosure of personal matters... finds explicit protection in... Art. I, § 1." What is explicit to some is

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56 Commonwealth v. Franklin, 4 U.S. (4 Dall.) 255 (1802). In Franklin, the defendants were indicted for violating a statute that made it a crime to "conspire" to assert title not granted by Pennsylvania to land in Northampton, Northumberland, or Luzerne counties. Id. at 255. The defendants, who asserted title under a Connecticut grant, challenged the statute as unconstitutional, both because it was an infringement of their "inherent and indefeasible" right to property and because, directed at only three counties, it denied equality. Id. at 258.

The seriatim opinions of the Supreme Court of Pennsylvania, rejecting the defendants' arguments, are not reported in any detail, but the extensively reported arguments of Commonwealth counsel do not question the power of the court to declare the statute unconstitutional for violating Section 1. Rather, the prevailing arguments were directed to the proposition that Connecticut did not have the power to generate a constitutionally protected property right within Pennsylvania in the first place, and that the conflict with Connecticut was a "local evil" that could be dealt with by special legislation. Id. at 260.

57 Although Justice Gibson's famous dissent in Eakins v. Raub, 12 Serg. & Rawle 330, 344 (1825), raised doubts about the propriety of judicial review of legislation under the state constitution, by 1845 even he took the position that the Pennsylvania Constitutional Convention of 1838 "by their silence sanctioned the pretensions of the courts to deal freely with acts of the legislature." Norris v. Clymer, 2 Pa. 277, 281 (1845).

"shadowy" to others, and I must confess that I have read Article I, Section 1 quite a few times in search of the "explicit" protection against the disclosure of private matters. The closest I have come to finding that protection is where the text places the right to acquire, possess, and protect "reputation" with similar rights to life, liberty, and property.60

Government disclosure of private and sensitive matters to the community at large can certainly taint the citizen's reputation. This cannot, however, be the whole answer. On one hand, there are government disclosures of information (like announcing the true ownership of a polluting dump or an abusive nursing home) that can devastate a citizen's reputation without raising substantial objections based on intrusion of privacy. On the other hand, it

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As originally drafted, Article I, Section 1 of the Pennsylvania Constitution gave no explicit recognition to a right to privacy as it relates to one's reputation. I have been unable to find legislative history concerning the insertion of "reputation" into Article I, Section 1 in 1790. Cf. THOMAS R. WHITE, COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA 114 n.2 (1907).

61 Cf. Stenger v. Lehigh Valley Hosp. Ctr., 609 A.2d 796, 800 (Pa. 1992) ("[T]he object of such a right is, in part, to protect an individual from revealing matters which could impugn his character and subject him to ridicule or persecution.").

seems we could object on privacy grounds to a demand that doctors report the sexual practices of their patients to government agents, even if the information remained a matter known only to those officials.63

The right to privacy is thus not equivalent to the right to protect reputation. Justice Musmanno seems to have captured an important additional element of the right to privacy when he relied on Article I, Section 1 to condemn official wiretapping because "[o]ne of the pursuits of happiness is privacy. . . . The greatest joy that can be experienced by mortal man is to feel himself master of his fate,—this in small as well as in big things."64

To be observed is, in some dimension, to be controlled and to be vulnerable. The status of "equally free and independent" citizens—as distinguished from citizens who are simply "created equal" in the contemporaneous Declaration of Independence65—was established at the outset in Pennsylvania's first constitution in 1776. Preserved intact for two centuries, the document constitutes a natural basis for limits on the ability of the government to impose vulnerability and dependence on its citizens.66 This concern draws further strength from tort cases

63 Cf. In re B., 394 A.2d 419 (Pa. 1978) (striking down a subpoena for a mother's psychiatric records to be used by a juvenile court psychologist in determining placement of her son). This perception has not always carried the day. It was in dissent that Justice Larsen acknowledged that "[i]t is knowledge of private and personal matters by another that is offensive—not that the knowledge may or may not continue on a course of travel to yet another eager ear." In re Pittsburgh Action Against Rape, 428 A.2d 126, 149 (Pa. 1981) (Larsen, J., dissenting) (quoting In re June 1979 Allegheny County Investigating Grand Jury, 415 A.2d 73, 79 (Pa. 1980) (Larsen, J., dissenting)); cf. Marks v. Bell Tel. Co., 331 A.2d 424 (Pa. 1975) (denying a tort recovery for an invasion of privacy where a wiretap recording was never heard by another human being).


65 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

66 Cf. Commonwealth v. Brachbill, 555 A.2d 82, 90 (Pa. 1989) ("We are fortunate that we are not a part of a totalitarian regime that insists upon ascertaining our innermost thoughts and aspirations. It is that freedom of individual privacy that is the hallmark of the society that we are fortunate to enjoy.").
that have recognized the invasion of privacy as an assault on the personality, and the explicit protection against searches of persons, houses, papers, and effects in Article I, Section 8.67

Relying on these commitments to privacy, Pennsylvania courts have, in the past decade and a half, firmly established hurdles of constitutional magnitude in the path of government actions that breach the citizen's "right to be let alone" by demanding the disclosure of personal information.68 The strength of those

67 Stenger v. Lehigh Valley Hosp. Ctr., 609 A.2d 796, 800 (Pa. 1992) (asserting without identifying its source, that "the right of privacy is a well-settled part of the jurisprudential tradition in this Commonwealth"); cf. id. at 802 (citing search and seizure cases and tort cases in support of the proposition that "[u]nder the Pennsylvania Constitution, the right to be let alone has also been recognized"). Justice Mandarino's opinion in In re B., 394 A.2d 419, 425 (Pa. 1978), relied in addition to the "individual's interest in preventing the disclosure of information revealed in the context of a psychotherapist-patient relationship" on the "penumbras" of Article I, Sections 3-4 (freedom of religion); Section 7 (freedom of press subject to limits for abuse); Sections 8-9 (self-incrimination); Section 20 (assembly); Section 23 (quartering of troops); Sections 25 (power in the people); Section 26 (no discrimination in political subdivisions); and Section 30 (injury to reputation).

Another potential source of privacy rights is the commitment to tolerance and freedom of conscience that dates to William Penn's original charter. Cf. Robert N.C. Nix, Jr., & Mary M. Schweitzer, Pennsylvania's Contribution to the Writing and Ratification of the Constitution, 72 PA. MAG. OF HIST. & BIOGRAPHIES, Jan. 1988, at 3, 6 (Pennsylvania's record of civil and religious liberty made it a leader in the early Republic). History, however, is a slippery tool. What was a great protection of liberty in 1776 may not seem so today. In 1682, Number 37 of the Laws Agreed Upon in England by Penn and the settlers provided that "swearing, cursing, lying, profane talking, drunkenness, drinking of healths, and obscene words" would be discouraged and severely punished, along with "prizes, stage plays, cards, dice, may games, masques, revels, [and] bull-baiting." See PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, at 30 (Harrisburg, Pa., John S. Wiestling 1825). Section 45 of the Frame of Government, adopted in 1776, likewise required that "laws for the encouragement of virtue and prevention of vice . . . be constantly kept in force." Id. at 64 (citing PA. CONST. of 1776, ch. II (Frame of Gov't), § 45).
barriers has varied in two ways depending on the nature of the demands.

In one dimension, the degree of judicial scrutiny has depended on the nature of the information at stake. The underlying right to be "equally free and independent" suggests that information is protected based on the degree of its threat to the citizen's sense of independence. The more personally vulnerable the disclosure of information renders the individual, the more pressing must be the state's justification for protecting it. To identify one's business affairs is inconvenient, uncomfortable, and in some circumstances harmful, but it does not, in itself, greatly decrease the sense of being an equal and independent member of society. By contrast, to be naked in public, with one's person involuntarily exposed to view, is the antithesis of independence; to have secrets that

"trespass upon the sacred precincts of private and domestic life," and was an "unwarranted invasion of her right of privacy" rooted in the common law. Id. at 39. In the dissent's view, there was no basis for requiring the teacher to "divulge to a group of school directors such a strictly personal matter as approaching motherhood." Id. The majority viewed the teacher's failure to inform the board as an obstinate refusal to abide by the school's regulations. Id. at 36.

69 See Livingwell (North), Inc. v. Pennsylvania Human Relations Comm'n, 606 A.2d 1287 (Pa. Commw. Ct. 1992). The Livingwell court found that "[p]rivacy interests are especially protected involving a person's 'body,' clothed or unclothed. . . . 'Having one's body inspected by members of the opposite sex may invade the individual's most fundamental privacy right . . . ." Id. at 1292 (quoting City of Philadelphia v. Pennsylvania Human Relations Comm'n, 300 A.2d 97, 103 (Pa. Commw. Ct. 1973)); cf. Commonwealth v. Martin, 626 A.2d 556, 560 (Pa. 1993) ([A]lthough privacy may relate both to property and to one's person, an invasion of one's person . . . in the usual case, [is a] more severe intrusion on one's privacy interest than an invasion of one's property.); Commonwealth v. Kohl, 615 A.2d 308, 312 (Pa. 1992) (quoting Schmerber v. California, 384 U.S. 757, 772 (1966)) (striking down an implied consent to a blood test under Article I, Section 8 on the basis that the "integrity of an individual's person is a cherished value of our society"); Commonwealth v. Kean, 556 A.2d 374, 380-82 (Pa. Super. Ct. 1989). Kean held that the intimacies of married life are entitled to the "highest degree of privacy" under Article I, Section 8. Id. at 380. "There is something deep in the roots of our civilization which leads us to associate nudity with privacy and to shield our bodies from the uninvited eye." Id. at 382.
were confided to a trusted professional broadcast to the public is to exploit that dependence, which renders a citizen less free.

Demands concerning financial affairs thus require that the state demonstrate that the "government interest is significant and there is no alternate reasonable method of lesser intrusiveness." Demands for intimately personal data, such as subpoenas for information revealed in the context of psychotherapy or medical

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70 Denoncourt v. Pennsylvania State Ethics Comm'n, 470 A.2d 945, 949 (Pa. 1983) (footnote omitted) (invalidating financial reporting requirements of families of public officials, because "it does not realistically hold out much hope for effectiveness"); cf. Lunderstadt v. Pennsylvania House of Representatives, 519 A.2d 408, 414-15 (Pa. 1986) (striking down legislative subpoena for personal financial records). Justice Flaherty balanced legislative interests with an "individual's interest in maintaining privacy," by requiring "probable cause that the particular records sought contain evidence of civil or criminal wrongdoing." Id. at 413, 415; see also id. at 415 (Hutchinson, J., concurring) (checking compliance with the law is beyond proper legislative purpose); id. at 416-17 (Zappala, J., concurring) (stating that subpoenaed information was "too sweeping in scope to be enforced" and not "reasonably relevant"); Snider v. Thornburgh, 436 A.2d 593, 599 (Pa. 1981) (upholding financial reporting requirements for public officials when "intrusion into appellants' private affairs . . . is not great; the Legislature's interest in securing public confidence in the government, at all levels, is not small"); Pennsylvania Bar Ass'n v. Pennsylvania Ins. Dep't, 607 A.2d 850 (Pa. Commw. Ct. 1992) (finding no adequate justification for injuring reputation by keeping list of attorneys whose clients are suspected of insurance fraud); Barasch v. Pennsylvania Pub. Utils. Comm'n, 576 A.2d 79, 89 (Pa. Commw. Ct. 1990), aff'd on other grounds, 605 A.2d 1198 (Pa. 1992) (striking down approval by Public Utility Commission of caller identification because "consumers of telephone service should not suffer an invasion, erosion or deprivation of their privacy rights to protect the unascertainable number of individuals or groups who receive nuisance, obscene or annoying telephone calls which can . . . [be] otherwise dealt with by existing services").

71 In re B., 394 A.2d 419 (Pa. 1978) (holding unconstitutional on privacy grounds a juvenile court subpoena of a mother's psychiatric records in an effort to determine placement for her son). As the court stated, "[t]he individual's right of privacy, however, must prevail" despite a legitimate interest in obtaining information for appropriate placement of children. Id. at 426; cf. O'Donnell v. United States, 891 F.2d 1079 (3d Cir. 1989) (finding an action for the failure to protect psychiatric confidentiality in light of the state constitutional commitment to privacy); Commonwealth ex rel. Platt v. Platt, 404 A.2d 410 (Pa. Super. Ct. 1979) (declining to allow a patient to prevent a treating
records,\textsuperscript{72} requirements of compulsory blood tests,\textsuperscript{73} or demands for details of the experiences of rape or incest victims,\textsuperscript{74} will not

psychiatrist from testifying in a commitment proceeding, on the theory that exclusion of the psychiatrist’s testimony would place the determination of “mental health” in the hands of lay witnesses). \textit{Compare In re Pittsburgh Action Against Rape, 428 A.2d 126, 130 (Pa. 1981) (declining to establish a constitutionally based privilege for rape crisis centers) with Commonwealth v. Wilson, 602 A.2d 1290, 1294 (Pa. 1992) (stating that the statutory privilege for rape crisis centers reflects the legislative belief that PAAR constituted “a grave injustice committed against those who, because of lesser economic means, were forced to seek counseling from a public center rather than a private therapist”); compare also Wilson, 602 A.2d at 1296 (rejecting the claim that a rape defendant’s right to compulsory process was violated by statutory privilege) with Commonwealth v. Lloyd, 567 A.2d 1357 (Pa. 1989) (holding that defendant’s compulsory process and confrontation rights mandated disclosure of psychiatric records, without mentioning constitutional privilege).}

\textsuperscript{72} Stenger v. Lehigh Valley Hosp. Ctr., 609 A.2d 796 (Pa. 1992) (holding that an intrusion into the medical privacy by the anonymous discovery of HIV test results of other recipients of allegedly tainted blood, or anonymous questionnaires sent to donor of allegedly tainted blood in an AIDS liability case, was justified by a "compelling state interest" and the disclosure of the identity of the AIDS infected donor was not); \textit{In re June 1979 Allegheny County Investigating Grand Jury, 415 A.2d 73 (Pa. 1980) (stating that the privacy interest of patients in avoiding disclosure of medical information to a grand jury was protected by the Pennsylvania Constitution, but that it was not infringed upon because of grand jury secrecy); see also id. at 79 (Larsen, J., dissenting) (stating that the court should have held that the right to privacy was infringed); \textit{cf. Commonwealth v. Moore, 584 A.2d 936 (Pa. 1991) (construing narrowly an exception to the confidentiality requirements of the Disease Prevention and Control Act and refusing to allow a subpoena by prosecution of a rape defendant’s medical records); Sanderson v. Bryan, 522 A.2d 1138, 1142 (Pa. Super. Ct. 1987) (holding that "by allowing [a medical malpractice] plaintiff access to the medical records of other patients," the constitutional right to privacy was violated).}

\textsuperscript{73} John M. v. Paula T., 571 A.2d 1380, 1385-86 (Pa. 1990) (denying efforts to compel a blood test to negate marital paternity). The \textit{John M.} court stated that "a legitimate expectation of privacy . . . cannot be violated without . . . a judicial determination that the government or other private party has compelling needs and interests which justify the invasion of privacy." \textit{Id.} at 1385.

\textsuperscript{74} Fischer v. Commonwealth, Dep’t of Pub. Welfare, 482 A.2d 1148 (Pa. Commw. Ct. 1984) (en banc). \textit{Fischer}, which involved a 72-hour reporting requirement for rape or incest as a condition to obtaining state funding for abortions, was, on the basis of the record established by the trial court, an easy
be upheld without a showing of strong necessity for the information.\textsuperscript{75}

In a second dimension, the state justifications required have depended on the safeguards surrounding the uses to which the information is put. Unlike the Federal Constitution, Article I, Section 1 of the Pennsylvania Constitution explicitly guards the citizenry's interest in reputation.\textsuperscript{76} Under this aspect of

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As a matter of full disclosure, the reader should be aware that I was one of plaintiffs' counsel in each of the \textit{Fischer} cases.

\textsuperscript{73} Stenger v. Lehigh Valley Hosp. Ctr., 609 A.2d 796, 800 (Pa. 1992) ("balancing weighty competing private and state interests"); \textit{John M.}, 571 A.2d at 1385-86 (requiring a "compelling" interest for a blood test); \textit{cf. Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia}, 812 F.2d 105, 110 (3d Cir. 1987) (viewing Pennsylvania constitutional analysis as a "flexible balancing" with progressively greater standards of justification depending on the intimate nature of the information); \textit{Stenger}, 609 A.2d at 801 (the United States Supreme Court applies "increasing levels of scrutiny corresponding to increasing levels of confidentiality intrusions"); \textit{id.} at 803 (upholding discovery because it was the "least intrusive method available . . . to protect the public interest").

\textsuperscript{76} This protection provides a solid basis for Justice Nix's proposal that the courts of Pennsylvania reject, as a matter of state constitutional construction, the conclusion of Paul v. Davis, 424 U.S. 693 (1976), that reputation was not a right protected by the Due Process Clause. \textit{See Nix: States Must Lead Privacy Battle, PENNSYLVANIA L.J., Sept. 28, 1987, at 5; cf. Pennsylvania Bar Ass'n v. Pennsylvania Ins. Dep't}, 607 A.2d 830 (Pa. Commw. Ct. 1992) (en banc) (holding a statute unconstitutional for infringing the right to reputation without
Pennsylvania's constitutional protection of privacy, the scrutiny of demands for information increases with the threatened degree of public exposure. An intrusion is viewed as less of an invasion of privacy where the government will guard the information as confidential than where it can lead to subsequent disclosure to the public at large. Indeed, Pennsylvania's constitutional protection of reputation places limits on the state's ability to disseminate even information it has come by in the normal course of business without direct invasion of private domains.

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78 In the midst of the McCarthy-era Red Scare, Pennsylvania courts were ambivalent in their protection of reputation despite the words of Article I, Section 1. Compare Matson v. Jackson, 83 A.2d 134, 137 (Pa. 1951) (enjoining hearing by Attorney General into "communistic leanings" of a local official. The
Our hypothetical ordinance stands at the most intrusive end of each spectrum. The information at issue is the product of an interaction in which the patient, by necessity, makes herself vulnerable by putting herself in the care of another in a fiduciary relationship; it concerns the most intimate bodily conditions or activities. In the second dimension, there are no safeguards against disclosure. Indeed public exposure is the goal of the statute. Mere government expostulation about public health or safety, therefore, will not justify the reporting requirement.79

Matson court stated that "[t]o permit the existence of the power which the Attorney General asserts would be to open the door to possible abuses . . . where the good name and reputation of the victim . . . could be subtly and maliciously attacked . . . without any right or possibility of legal redress.") with Matson v. Margiotti, 88 A.2d 892, 893 (Pa. 1952) (stating that the Attorney General was absolutely immune from a libel action arising out of his public accusations of "Communistic tendencies").

During the last decade and a half, there has been more protection from the dissemination of government data. See Wolfe v. Beal, 384 A.2d 1187, 1189 (Pa. 1978) (holding that there is a right to expunge a record of illegal commitment to a mental hospital based on the Article I, Section 1 protection of reputation); cf. McMullan v. Wohlgemuth, 308 A.2d 888, 897 (Pa. 1973) (interpreting statute to prevent the dissemination of the names of welfare recipients because the "Commonwealth’s interest in protecting the privacy of those it aids through public assistance is paramount and compelling"); Mon Valley Unemployed Comm. v. Department of Pub. Welfare, 618 A.2d 1227, 1229 (Pa. Commw. Ct. 1992) (interpreting statute to restrict the disclosure of compilation of welfare liens "in order to protect the privacy rights of individuals who receive welfare benefits" despite the public nature of the liens individually).

IV. PRIVACY AND AUTONOMY: THE TEXT POINTS BEYOND ITSELF

There may be a final constitutional fault in the city’s course of action. Pennsylvania courts have regularly stated that Pennsylvania’s right to privacy encompasses both freedom from disclosure of personal information and the freedom to make certain important and intimate decisions without government coercion. The very purpose of the municipal exercise in our hypothetical is to attempt to coerce residents because of their sexual activities.

It is not entirely clear where the "personal autonomy" branch of privacy finds its federal roots, and the courts of Pennsylvania have been no more explicit on this issue. Unlike the federal courts, however, Pennsylvania’s judiciary has a strong textual basis to support an implied right to privacy. The proposition that "[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights," is certainly broad enough to encompass the right to personal autonomy. The identification of life, liberty, property, reputation, and the pursuit of happiness as "among" those rights strongly suggests that other "inherent" rights are also protected. The very breadth of that provision, however, is

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\[81\] PA. CONST. art. I, § 1.

\[82\] Cf. Commonwealth v. Edmunds, 586 A.2d 887, 896 (Pa. 1991) ("[T]he Pennsylvania Constitution was . . . meant to reduce to writing a deep history of unwritten legal and moral codes which had guided the colonists from the beginning of William Penn’s charter in 1681."). The neighboring courts in New Jersey have, for a long time, read that state’s almost identically worded Article I, Paragraph 1 to embody a "right to privacy" as one of the "natural and inalienable" rights that the provision protects. McGovern v. Van Riper, 43 A.2d 514 (N.J. Ch. 1945), aff’d, 45 A.2d 842 (N.J. 1946). McGovern was quoted with approval in Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11, 17 (N.J. 1992), which recognized protection against random drug testing under Article I, Paragraph 1 of New Jersey’s Constitution. See also State v. Saunders, 381 A.2d 333 (N.J. 1977) (Schreiber, J., concurring) (recognizing the right to sexual autonomy under Article I, Paragraph 1); In re Quinlan, 355 A.2d 647 (N.J. 1976) (recognizing right to refuse medical treatment under Article I,
problematic, for it gives no indication which activities fall within the protected class; riding a motorcycle without a helmet is as much a pursuit of happiness as is engaging in unconventional sexual activities.\textsuperscript{33}

At this point, I really only have one solid observation on the subject. The Supreme Court of Pennsylvania has said that "the right to engage in extramarital sexual activities [falls] within the zone of privacy,"\textsuperscript{34} which can be regulated only on the basis of a "compelling state interest."\textsuperscript{35} Even here, however, to the best of my knowledge, Pennsylvania courts have yet to strike down a

\begin{footnotesize}
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  \item \textsuperscript{34} Stenger v. Lehigh Valley Hosp. Ctr., 609 A.2d 796, 802 (Pa. 1992).
  \item \textsuperscript{35} Id. (characterizing Fabio v. Civil Serv. Comm'n, 414 A.2d 82 (Pa. 1980)). Fabio upheld the discharge of a policeman for engaging in extramarital sex, although it was opaque as to exactly where the "privacy" right was based. Fabio, 414 A.2d at 90. Fabio, citing federal precedent, stated that "[i]n Pennsylvania, individuals have the right to engage in extramarital sexual activities free from governmental interference." Id. at 89. The court went on to comment that the "law is hazy as to the appropriate standard of judicial scrutiny . . . but even under the strictest standards, the appellant's privacy argument has no merit." Id. at 90.
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government imposition for want of such a compelling state interest. In the last decade and a half, Pennsylvania courts have upheld the discharge of policemen for extramarital sex, and the denial—under a statute dating to 1915—of worker's compensation benefits to surviving spouses living in "meretricious relationships." In addition, Pennsylvania courts have reversed the granting of unemployment compensation benefits to parochial

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86 Fabio, 414 A.2d 82 (Pa. 1980); Faust v. Police Civil Serv. Comm'n, 347 A.2d 765 (Pa. Comwmw. Ct. 1975); cf. Tonkiel v. Tredyffrin Township, 440 A.2d 690, 691 (Pa. Commw. Ct. 1982) (stating that although private conduct consisting of sexual relationships is not protected, the use of obscene language to a prospective father-in-law was a "familial dispute having no impact upon the public" and therefore, was not conduct unbecoming of an officer). Somewhat inconsistently, in In re Dallesandro, 397 A.2d 743 (Pa. 1979), the court declined to uphold a judicial disciplinary proceeding for extramarital sex, characterizing such efforts as entering "a most precarious area of inquiry for the state—the realm in which private moral beliefs are enforced and private notions of acceptable social conduct are treated as law." Id. at 757.

87 Nevis v. Workmen's Compensation Appeal Bd., 416 A.2d 1134, 1137 (Pa. Comwmw. Ct. 1980) (stating that no fundamental interest was involved and that the state is "properly concerned with fostering good morals by encouraging legally recognized and responsible family relationships and discouraging the formation of illicit relationships"). Some judges of the commonwealth court who have expressed discomfort about the outcome, apparently feel helplessly bound by precedent. See Bethenergy Mines, Inc. v. Workmen's Compensation Appeal Bd. (Sadvary), 543 A.2d 1268, 1269 (Pa. Comwmw. Ct. 1988) ("a legislative attempt to regulate morality from an anachronistic era which has repeatedly survived due process and equal protection attacks which sunk similar minded criminal statutes . . . years ago"), rev'd on other grounds, 570 A.2d 84 (Pa. 1990).

Meretricious relationships are those in which "two individuals are living together in a carnal way without benefit of marriage." Nevis, 416 A.2d at 1136. The Supreme Court of Pennsylvania has softened the regime by holding that the Board may continue benefits when economic circumstances indicate that the surviving spouse is still dependent on the benefits. Bethenergy Mines, 570 A.2d at 84. Review has recently been granted by the Supreme Court of Pennsylvania in McCusker v. Workmen's Compensation Appeal Bd. (Rushton Mining Co.), 603 A.2d 238 (Pa. Commw. Ct.) (relying on Nevis to dismiss a constitutional challenge to the exclusion), appeal granted, 613 A.2d 562 (Pa. 1992). Additionally, a petition for review is currently pending in Shultz v. Workmen's Compensation Appeal Bd. (Leroy Roofing Co.), 621 A.2d 1239, 1243 (Pa. Commw. Ct. 1993).
school teachers discharged because of "cohabitation outside of marriage," as well as discharges for marriages of which their employer disapproved. Moreover, in a case that Justice McDermott announced did "not concern the right to an abortion," the Supreme Court of Pennsylvania declined to provide a state constitutional entitlement to state Medicaid funding for medically necessary terminations of pregnancy.

The closest Pennsylvania courts have come to consummating the impulse toward judicial activism in defense of privacy-based rights of autonomy in the last fifteen years was the rather colorful case of Commonwealth v. Bonadio. Bonadio arose in Pittsburgh at the Penthouse Theater, where Mildred Kannitz, whom the court informs us was "known on the stage as 'Dawn Delight,'" was arrested by plainclothes police officers who observed her engaging "in sexual acts with members of the audience." Ms. Kannitz was charged with "voluntary deviate sexual intercourse" under a statute that prohibited "[s]exual intercourse per os or per anus between human beings who are not husband and wife." As Justices Roberts, Nix, and O'Brien observed in dissent, commercial sex in a public theater was hardly the most inviting circumstance in which to make an argument about the right to privacy.

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91 Id.
92 415 A.2d 47 (Pa. 1980). The Supreme Court of Pennsylvania will have another opportunity in McCusker.
93 Id. at 52 (Nix, J., dissenting).
94 Id.
95 Id.
96 Id. at 49 n.1.
97 Id. at 52 (Roberts, J., dissenting); id. at 52-53 (Nix, J., dissenting).
98 According to the briefs before the Supreme Court of Pennsylvania, Ms. Kannitiz's customers were arrested as well. Brief for Appellant at 4, Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980) (Nos. 105-108). Because
Nonetheless, Justice Flaherty, writing for himself and Justice Kauffman, went on at length to expound the proposition that because the statute "regulate[d] the private conduct of consenting adults," and the conduct did not harm others, it exceeded the legitimate scope of governmental regulation. According to Justice Flaherty, "[s]piritual leadership, not the government, has the responsibility for striving to improve the morality of individuals."

This libertarian proposition, however, commanded the support of only two justices. Chief Justice Eagen and Justice Larsen voted to join Justices Flaherty and Kauffman in invalidating the prohibition for a different reason. They reached beyond shadowy commitments to libertarian philosophy and relied upon a somewhat the case was resolved on a motion to quash, the details of the nature of Ms. Kannitz's acts do not appear in either the briefs or the court's opinion.

99 Bonadio, 415 A.2d at 50.

100 Id. Even though Justice Holmes’ stricture in Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), would hold that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," Justice Flaherty in Bonadio seemed to argue in so many words that the Pennsylvania Constitution enacts John Stuart Mill's On Liberty. Bonadio, 415 A.2d at 50. As a matter of original intent, the proposition that a constitution adopted in 1776 was designed to embody a philosophy published in 1859, attributes a remarkable foresight to the Framers of Pennsylvania's Constitution.

Nonetheless, an indirect protection of "self-regarding" actions from government intervention is implicit in the guarantee against searches and seizures. To the extent that an action affects only the actor, uncovering it and suppressing it will be more difficult if the government is barred from exploring the actor's life by intrusive means. Cf. Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down a prohibition of the use of birth control because it would require a search of the marital bedroom). By contrast, actions that affect others are subject to discovery and prosecution on the direct testimony of those others.

101 The holding of the Bonadio court was mischaracterized on this point in Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) (purporting to follow Bonadio). Wasson invalidated Kentucky's prohibition of deviate sexual intercourse with another person of the same sex. Bonadio was also misinterpreted in Missouri v. Walsh, 713 S.W.2d 508, 512 (Mo. 1986) (purporting to decline to follow Bonadio). The Walsh court upheld a Missouri statute prohibiting "deviate sexual intercourse with another person of the same sex." Id. at 509 (quoting Mo. REV. STAT. § 566.090 (1978)). Both of these cases read the reliance on Mill's premise as a majority holding.
better-established constitutional commitment to equality. The resulting majority opinion stated that the statutory exception allowing intercourse per os or per anus between married human beings caused the statute to violate equal protection.102

Jurisprudentially, this seems odd. A legislature trying to respect the marital right to privacy might rationally decide that enforcing a prohibition of particular combinations of body parts should be limited to activities outside the marital bedroom. As a matter of common sense, it is odder still, because if there is something wrong with prosecuting Ms. Kannitz, it hardly seems that the flaw rests in the fact that she could engage in exotic behavior on stage only if she were married to her partner.

As a matter of judicial statesmanship, however, the approach in Bonadio has some redeeming features. The classic challenge to judicial protection of implicit rights to autonomy has always been that it allows judges to paralyze democracy by imposing a series of miniature coups d'état.103 Judges, it is said, oust the decisions of democratically elected legislatures on the basis of nothing more than their personal readings of moral philosophy.104 Odd as the outcome in Bonadio seems, it avoids this criticism. Without entirely eliminating the legislature's power to regulate sexuality, the Bonadio court effectively protected not only those who act on stage, but those who seek personal fulfillment in private bedrooms as well. After Bonadio, the outcome in Bowers v. Hardwick105—a successful criminal prosecution of a gay man for sexual acts with a willing partner in his own apartment—is possible only in one circumstance. In order to achieve the Bowers result, the Pennsylvania legislature, under Bonadio, would have to

102 Bonadio, 415 A.2d at 52 (Eagen, C.J., concurring); id. (Larsen, J., concurring). Logically, this proposition seems to establish that regulation of any nonmarital sexual activities permitted to married persons violates the Equal Protection Clause.
103 See, e.g., Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 6 (1971).
104 Id.
105 478 U.S. 186 (1986). The Bowers Court held that an individual's decision to engage in homosexual activity was not protected under the United States Constitution. Id. at 191-92.
impose the same sexual constraints on married couples. By taking seriously the constitutional commitment to citizens born "equally free and independent," the Bonadio approach provides a conceptual anchor outside of the personal philosophy of judges. By linking the fate of sexual minorities to the interests

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107 This use of the "equally free and independent" clause to challenge infringements on fundamental liberty is hardly a modern innovation. James Madison argued against religious assessments on the basis of Virginia's cognate "equally free and independent" clause as follows:

[The bill violates that equality which ought to be the basis of every law . . . . If 'all men are by nature equally free and independent,' all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. . . . Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to
of traditional families, Bonadio forged a more powerful support than reliance on a particular philosophy of privacy could provide.

Conversely, by casting its holding in terms of equal protection, the court allowed the legislature to regulate sex in circumstances where public necessity is sufficient to persuade legislators that the regulation of all citizens is justified. The decision left room for the legislature to participate in the ongoing debate on the future of the "inherent and indefeasible rights" of the citizens in the Commonwealth.¹⁰⁸

V. STATUTORY CONSTRUCTION, COMMON LAW, AND THE SHADOWS OF THE CONSTITUTION

A. Statutory Construction

The dialogue with the legislature need not rely on the direct exercise of the power of judicial review. If the Pennsylvania Constitution contains recognition of an "inherent" right to privacy, courts can give life to that commitment by working with the legislature to construe existing statutes to protect individual privacy.¹⁰⁹


This proposition reaches beyond the basic canon of statutory construction that states that a statute should not be construed in a manner that violates the constitution.\(^\text{110}\) It encompasses the independent "gravitational" force of constitutional norms. A frame of government committed to the protection of individual privacy will exert influence on all of the legal decisions made within that framework. A court thus need not conclude that a particular legislative determination would violate the constitution to hold that statutory ambiguities should be resolved in favor of individual privacy. This allows the legislature to fine-tune the protections provided, subject to final constitutional review by the courts.\(^\text{111}\)

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\(^\text{110}\) See 1 Pa. Cons. Stat. Ann. \$ 1922(3) (Supp. 1993) (stating that there is a presumption that the legislature does not intend to violate the constitution).

\(^\text{111}\) Thus, in Commonwealth v. Tarbert, 535 A.2d 1035, 1044 (Pa. 1987), the Supreme Court of Pennsylvania held that a roadblock stop would not violate Article I, Section 8 of Pennsylvania’s Constitution so long as it was performed within appropriate systematic guidelines; the legislative authorization for vehicle stops upon "articulable and reasonable grounds" did render suspicionless roadblocks impermissible. A legislative amendment that set forth an authorization for systematic programs of checking vehicles "in response to the guidelines set forth in Tarbert" was held to appropriately authorize
Justice Linde suggested, in a recent article, that if state courts can resolve cases on the basis of common law or statutory construction, then they "need not and should not make this a constitutional case." The court should "leave lawmakers every opportunity to clarify, to amend, or to reject the court's understanding of the state's policy before freezing it into constitutional law." If Justice Linde means that courts should leave constitutional issues unaddressed when they are not clearly necessary to determine the case, his approach seems misdirected on two counts. First, it incorrectly treats the state constitution as an entity entirely divorced from the body of law produced by nonconstitutional means. Second, it inaccurately seems to view "constitutional law" as made exclusively by the courts.

On the first issue, particularly under a constitutional provision such as Pennsylvania's Article I, Section 1, which recognizes an extra-textual body of "inherent and indefeasible rights," the state's policy is not separate and apart from its constitution. Rather, the constitution is a part of a legal fabric that takes meaning from and sheds light upon nonconstitutional decisions. A legislator acting in good faith should consider the state's constitutional commitments when adopting legislation. A court fails its duty when it declines to account for similar concerns in construing that legislation. Indeed, because the legislature may seek to modify the judicial construction of a statute, the court deprives the legislature of crucial information if the court treats the issue as a wholly nonconstitutional one.


Id.
"freeze [the state's policy] into constitutional law." On the contrary, if we recognize that legislators, like judges, are under an obligation to "support, obey and defend the . . . Constitution of this Commonwealth," then legislative decisions on constitutional issues are a part of the way that the "constitutional law" of the Commonwealth is made. Statutory construction that invokes constitutional concerns allows the legislature to exercise its role in shaping constitutional law in a way that an unvarnished refusal to address the constitutional issue would make impossible. By addressing the constitutional concern, the court offers the legislature both a second round of discussion with the courts and the opportunity to directly address constitutional concerns.

This approach of construing statutes in light of the constitutional commitment to privacy has been adopted by the Pennsylvania courts in reading statutes governing the disclosure of the identities of recipients of welfare benefits, the Pennsylvania Wiretap Act, and the statutory protections

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114 Linde supra note 112, at 227.
115 PA. CONST. art. VI, § 3.
117 18 PA. CONS. STAT. ANN. §§ 5701-5726 (Supp. 1993); see Commonwealth v. Hashem, 584 A.2d 1378 (Pa. 1991). The Hashem court stated that where an act is in derogation of this Commonwealth's constitutionally protected right to privacy its provisions must be strictly applied. . . . If the surveillance . . . is to meet the test of reasonableness [under Article I, Section 8], it is essential that, at a minimum, all the requirements directed by the Legislature be met.
ld. at 1381-82. Failure to request advance authorization of disclosure led to the suppression of evidence. ld.; see also Commonwealth v. Brachbill, 555 A.2d 82, 90 (Pa. 1989) (construing the Pennsylvania Wiretap Act to give force to the constitutional commitment to "individual privacy that is the hallmark of the society that we are fortunate to enjoy"); Boettger v. Miklich, 599 A.2d 713,

The progenitor of this line of cases, Commonwealth v. Murray, 223 A.2d 102 (Pa. 1966) (plurality opinion), is particularly noteworthy. In Commonwealth v. Chaitt, 112 A.2d 379, 380 (Pa. 1955), the court had rejected Justice Musmanno’s dissenting claim that the "pursuit of happiness" protected by Article I, Section 1 and Article I, Section 8 protected a right to privacy that was infringed by official wiretapping. See id. at 385, 387. The Chaitt court seemed to read federal precedent as governing both state and federal constitutional protections. A decade later, in Murray, Justice Musmanno repeated his claims (in identical purple prose)—this time in a plurality opinion for the court, which construed the Pennsylvania Wiretap Act of 1957 as more protective than the federal wiretap act. Murray, 223 A.2d at 109-10 (plurality opinion). The Murray court read Pennsylvania’s Wiretap Act to prohibit the use of telephone extensions to intercept conversations in light of the "jealous regard for individual privacy [which] is a judicial tradition of distinguished origin, buttressed in many areas by the imperative mandate of constitutional guarantees." Id. at 112 (Roberts, J., concurring). The court reached this conclusion even though the actual interception was performed by private detectives. See id. at 109 (Musmanno, J., plurality opinion) (relying on Article I, Section 1 for privacy rights); Commonwealth v. McCoy, 275 A.2d 28, 31 (Pa. 1971) (approving Justice Roberts’ opinion in Murray).

In Barasch v. Bell Tel. Co., 605 A.2d 1198 (Pa. 1992), the court addressed the "Caller ID" technology that allows a recipient of a phone call to identify the number from which the call was being placed. Although the Pennsylvania Commonwealth Court in Barasch had held that approval of the technology by the Public Utilities Commission violated Pennsylvania’s constitutional right to privacy, Barasch v. Pennsylvania Pub. Utils. Comm’n, 576 A.2d 79 (Pa. Commw., Ct. 1990), the Pennsylvania Supreme Court held that because the use of the technology clearly violated the Pennsylvania Wiretap Act, it was "unnecessary . . . to reach the constitutional issues." Barasch, 605 A.2d at 1201. This statement is best read as a commentary on the clarity of the statutory issue, rather than an abandonment of the practice of construing the Act in light of Pennsylvania’s commitment to privacy.
accorded to the records of patients who consult health professionals. The Supreme Court of Pennsylvania will have an opportunity to address similar issues in a pending case that raises the question of what constitutes a "compelling need" for disclosure of HIV status under Pennsylvania's Confidentiality of HIV-Related Information Act.


In this context, the court's decision in Commonwealth v. Lloyd, 567 A.2d 1357 (Pa. 1989), holding that a defendant is entitled to discovery of the psychotherapeutic records of a six-year old girl he allegedly raped, is somewhat puzzling. In Wilson, the court distinguished Lloyd stating that it "did not involve a statutory privilege." Wilson, 602 A.2d at 1297. However, the Wilson court recognized that Kyle established an "absolute," "statutory privilege" for psychologist-patient communications. Id. at 1295. Justice Larsen's dissent in Lloyd explicitly invoked Kyle. Lloyd, 567 A.2d at 1365 (Larsen, J., dissenting).

119 35 Pa. Cons. Stat. Ann. §§ 7601-7612 (1993); see In re Milton S. Hershey Medical Ctr., 595 A.2d 1290 (Pa. Super. Ct. 1991), appeal granted, 611 A.2d 712 (Pa. 1992). In Hershey, the Superior Court of Pennsylvania approved the grant of an order for the dissemination of information to patients and health care workers concerning the HIV-positive status of an obstetric resident. Id. at 1293-94. The "compelling need" required by the statute was found first in the necessity of informing patients of "their potential exposure to HIV and to offer them treatment, testing and counseling," and second in the need "to protect the other health professionals from stigmatism and to alleviate any 'mass hysteria.'" Id. at 1293. Given the court's constitutional concern in Stenger v. Lehigh Valley Hosp. Ctr., 609 A.2d 796 (Pa. 1992) for minimizing
B. The Common Law

The development of the common law raises somewhat different concerns. Courts developing the common law initially act alone. Thus, reference to constitutional concerns in developing common law do not initially promote constitutional dialogue between the branches of government. Unlike the situation in the federal courts, no special authorization is necessary for state courts to develop common-law rules in the interest of public policy. Therefore, one might argue that explicitly adverting to the constitutional commitment to privacy adds nothing to the analysis of a case when courts have protected privacy at common law.120

Two aspects, however, make the constitutional commitment to privacy important to common-law development. First, where state statutes have immunized government or other parties from common-law obligations, a constitutionally based doctrine can allow courts to provide relief. Although sovereign immunity may shield a Pennsylvania governmental entity from a strictly common-law cause of action,121 a common-law doctrine that develops as part of a constitutional commitment to privacy would establish, at a minimum, that public policy does not shield the individual state official from claims for redress.122
Second, and more important, courts, like legislatures, have an obligation to support and defend the constitutional commitments of the Commonwealth. To ignore those commitments in the formulation of common law is to truncate the analysis of public policy.123

The effort to protect privacy may often conflict with precedent or standard doctrines elsewhere in the law. Although it is always open to a court to declare that the standard commitment is against public policy, courts must root that public policy decision in a source of law more weighty than their own inclinations in the case before them. The common law does not spring immediately from the beliefs of the judge deciding the case. A recognized constitutional value can provide the requisite grounding. The gravitational force of the constitutional commitment may thus alter the common-law doctrine in a way analogous to the resolution of a statutory case.

In the employment context, for example, the general principle that employees are terminable-at-will has been held to be limited by Pennsylvania’s constitutional commitment to the availability of jury trials124 and to freedom of speech in the political process.125 A similar result should flow from Pennsylvania’s

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constitutional commitment to privacy.

On a parallel issue, the Supreme Court of New Jersey in *Hennessey v. Coastal Eagle Point Oil Co.*, recently relied on the right to privacy under New Jersey’s analogous “natural and unalienable rights” clause. The court found that public policy considerations in New Jersey would permit a common-law cause of action for wrongful discharge in the case of random urine testing by an employer.

The pitfalls of a contrary approach that seeks to avoid constitutional discourse in common-law decisionmaking are illustrated by the Third Circuit’s decision in *Borse v. Piece Goods Shop, Inc.*, which sought to predict the course Pennsylvania’s law. In *Borse*, the court declined to ground a cause of action for wrongful discharge in the constitutional commitments to privacy rooted in Article I, Section 1 of the Pennsylvania Constitution.

Yet, *Borse* recognized a cause of action for discharges resulting from abusive drug testing rooted in the “policy” of common law privacy rights in Pennsylvania. In many ways, this approach mirrors the defects of Justice Linde’s analysis of statutory construction. The *Borse* decision failed to acknowledge that the law of Pennsylvania is not divided into sealed categories of constitutional law and common law, but rather is part of a single fabric. The artificiality of this bifurcation between constitutional policy and common-law policy was highlighted when the Third

1989), the court found that a claim for sexual harassment rooted in the policies of Pennsylvania’s Equal Rights Amendment, was barred by the exclusivity of the remedies under the Pennsylvania Human Relations Act. *Id.* at 921; see 43 PA. CONS. STAT. ANN. §§ 951-963 (1991 and Supp. 1993); see also PA. CONST. art. I, § 28 (for the text of Pennsylvania’s Equal Rights Amendment). Chief Justice Nix concurred, suggesting that no wrongful discharge cause of action was available. *Clay*, 559 A.2d at 922 (Nix, C.J., concurring).


127 N.J. CONST. art. I, para. 1.

128 *Hennessey*, 609 A.2d at 19.

129 963 F.2d 611 (3d Cir.), reh’g denied, 1992 U.S. App. LEXIS 15100 (3d Cir. 1992) (en banc). The *Borse* case antedated the *Hennessey* decision.

130 *Id.* at 620.

131 *Id.*

132 See supra notes 112-19 and accompanying text.
Circuit found itself drawn to rely on search and seizure precedents to establish that urine testing impinges on the "expectations of privacy that society has long recognized as reasonable." 133

VI. CONCLUSION

At the close of the seventeenth century, having framed a charter for a new colony, William Penn wrote: "[T]hey that must be enjoy'd by every Body, can never enjoy themselves as they should... It is the Advantage little Men have upon them; they can be private... [which is] the greatest Worldly Contents Men can enjoy." 134 It is only fitting, three centuries later, that the courts of Pennsylvania, in construing the inheritance of Penn’s charter, have undertaken to preserve that right to "be private." Pennsylvania’s courts should feel no compunction about diverging from the conclusions of their federal brethren in this endeavor, bound as they are by a distinctive tradition and a different constitutional text. As it gives life to that heritage, Pennsylvania’s emerging right to privacy will become an important fixture of the Commonwealth’s jurisprudence. As it binds together constitutional text, inherent and indefeasible rights, statutes, and common law,

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The approach suggested in the text was adopted by the court in Bonacci v. Save Our Unborn Lives, Inc., 2 Phila. County Rptr. 643, 11 D. & C.3d 259 (1979), in which the common pleas court found a cause of action against a spurious abortion clinic that disclosed to a young woman’s parents her desire to obtain an abortion. Reasoning that the woman had confided the information to the clinic on its representation that it was a medical provider, the court relied on Pennsylvania’s constitutional commitment to medical privacy in In re B., 394 A.2d 419 (Pa. 1978), to find that the spurious clinic owed a common-law duty of confidentiality. Cf. Dunkle v. Tindal, 582 A.2d 1342 (Pa. Super. Ct. 1990) (refusing to obligate a physician to notify persons who may be harmed by her patients because of the constitutionally recognized importance of medical confidentiality).

134 WILLIAM PENN, SOME FRUITS OF SOLITUDE 96-97 (8th ed. 1749).
the right to privacy will constitute a needed bulwark against the threats of the twenty-first century.