UIC Law Review

Volume 11 | Issue 1 Article 3

Fall 1977

Illinois and the Right of Privacy: History and Current Status, 11 J. Marshall J. Prac. & Proc. 91 (1977)

Jay M. Hanson

ILLINOIS AND THE RIGHT OF PRIVACY: HISTORY AND CURRENT STATUS

by JAY M. HANSON*

> The bureaucracy of modern government is not only slow, lumbering, and oppressive; it is omnipresent. It touches everyone's life at numerous points. It pries more and more into private affairs, breaking down the barriers that individuals erect to give them some insulation from the intrigues and harrassments of modern life.[1]

Contrasted to the common law, a constitutionally protected right of privacy from government intrusion was unrecognized a century ago and barely gained judicial discussion by 1928.[2] Although not explicitly contained within the United States Constitution, this right of privacy obtained the recognition of the United States Supreme Court in 1965[3] and has subsequently blossomed into a fundamental right protected by the Bill of Rights.

As early as 1952 the Illinois courts recognized an individual right of privacy from invasions by other individuals. The Illinois Constitution, unlike the United States Constitution, specifically recognizes the right to be secure against governmental invasions of privacy. Article I, section 6 of the Illinois Constitution provides, "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means . . . ."[4]

"Privacy" by its very nature is a broad subject, and this article will not cover privacy in its entirety. The article is divided into three major parts. First, there is a brief discussion of the development of privacy as a concept under United States Supreme Court decisions in order to emphasize governmental intrusions into privacy, as opposed to non-governmental or individual or tortious invasions of privacy. Second, the article examines in more detail the development of the common law right of privacy as a concept of Illinois law. Third, the article analyzes

---

* Mr. Hanson is an Associate Judge for the Fourteenth Judicial Circuit, Rock Island, Illinois.

1. Wyman v. James, 400 U.S. 309 (1971) (Douglas, J., dissenting).
2. *See* Justice Brandeis' dissent in Olmstead v. United States, 277 U.S. 438 (1928), where he argued for the constitutional right "to be let alone." 277 U.S. at 478 (Brandeis, J., dissenting).
3. Griswold v. Connecticut, 381 U.S. 479 (1965).
4. ILL. CONST. art. I § 6 [Hereinafter cited in the text as Section 6].

the 1970 Illinois Constitutional Convention record[5] and subsequent supreme court decisions construing section 6 to define the current status of the constitutional right of privacy against governmental intrusions in Illinois.

The United States Constitution and Privacy

The United States Constitution contains no explicit provision for the right of privacy. However, the Court, in a series of decisions often credited to have begun in 1891,[6] has recognized the existence of a personal right of privacy, or "zone" of privacy, lying within the several constitutional guarantees of the Bill of Rights. The leading case recognizing a constitutional right of privacy is *Griswold v. Connecticut*.[7] Justice Douglas, writing for the majority, stated that the guarantees of the Bill of Rights have "penumbras, formed by emanations from those guarantees that help give them life and substance,"[8] and from which the right of privacy emanates.[9] He noted the ninth amendment guarantee that the enumeration of certain rights contained in the Constitution was not to be construed to deny "other" rights retained by the people;[10] he did not discuss the ninth amendment further.

Justice Goldberg, in a concurring opinion,[11] emphasized the historically silent ninth amendment in which he found the roots of privacy. The Goldberg opinion said that the history of the ninth amendment makes it clear that the framers did not intend that the first eight amendments should be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.[12] He argued that historically the ninth amendment was offered as part of the Bill of Rights precisely in order to quiet fears that specific enumeration of some rights would later be interpreted as a denial of other rights.[13] The landmark *Griswold* decision was followed by two significant cases in 1969 and 1971 involving the issue of governmental invasion of personal privacy, one of which began to limit the newly defined constitutional right.

Stanley v. Georgia,[14] a 1969 case, involved an appellant who

5. Sixth Illinois Constitutional Convention [hereinafter cited as the Constitutional Convention].
6. Union Pacific R. Co. v. Botsford, 141 U.S. 250 (1891) (recognizing a common law right "to be let alone," although no such specific constitutional right had been asserted).
7. 381 U.S. 479 (1965).
8. *Id.* at 484.
9. *Id.*
10. *Id.*
11. *Id.* at 486.
12. *Id.* at 488-89.
13. 381 U.S. at 488 (Goldberg, J., concurring).
14. 394 U.S. 557 (1969).

had been convicted of violating a Georgia statute which criminalized the possession of obscene materials, including, as in this case, private possession. Without using the *Griswold* method of establishing a clear constitutional right of privacy, the Court reached a strong affirmation of the right by relying on the concept of privacy as elicited from the first and fourteenth amendments. The Court held that the statute was unconstitutional as violative of a fundamental right stating that "also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[15]

The 1971 case of *Wyman v. James*[16] limited, to some extent, this concept of privacy. The state of New York required home visits by caseworkers as a condition to receiving Aid to Dependent Children benefits. The appellant refused entrance to caseworkers on the grounds that the visits were "searches." The action was not brought on a strict invasion of privacy theory. The Court held that the visitation was not an unreasonable search.[17] The majority mentioned, without further discussion, that the visits were "not an unwarranted invasion of personal privacy."[18]

Notwithstanding such cases, the United States Supreme Court decision in *Roe v. Wade*[19] solidified the legitimacy of the right of privacy. In *Roe*, a series of Texas statutes prohibited abortions at any stage of pregnancy except to save the life of the mother. The Court based its controversial abortion decision on its reaffirmation of the constitutional right of privacy—the strongest decision concerning privacy since *Griswold*. The majority opinion traced the origins of privacy, stating that the Court has recognized that:

> a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts the court or individual Justices have found at least the roots of the right in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, the Ninth Amendment or in the concept of liberty guaranteed by

15. *Id.* at 564.
16. 400 U.S. 309 (1971).
17. *Id.* at 322-23.
18. *Id.* at 326. *See also* California Bankers Association v. Schultz, 416 U.S. 21 (1974), in which the plaintiff challenged the Bank Secrecy Act of 1970, which required that federally insured banks maintain records of the identity of persons maintaining accounts and copies of financial instruments having a high degree of usefulness to governmental investigations. The majority held that the regulations did not infringe on any constitutional right. Justice Douglas dissented, stating that, "one's bank accounts are within the 'expectation of privacy' category. For they mirror not only one's finances but his interests, his debts, his way of life, his family, and his civic commitments." *Id.* at 89 (Douglas, J., dissenting).
19. 410 U.S. 113 (1973).

> the first section of the Fourteenth Amendment. These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy.[20]

In reaffirming the right of privacy the Court noted that it is not absolute in that it is subject to invasions for legitimate state interests.[21] This notion that the right is nonabsolute coincides with the common law concept of the right, particularly as recognized by Illinois in 1952. A major distinction between constitutional and common law invasions of privacy is that cases arising under the constitution require governmental invasion, while the common law only allows recovery in civil cases.

The Common Law Right of Privacy in Illinois

Recognition of the Right of Privacy

Recognition of the right of privacy as a legal concept of tort law found its inception in Illinois in the 1952 case of *Eick v. Perk Dog Food*.[22] In *Eick*, the plaintiff charged that the defendant used her photograph in an advertisement without her consent, causing loss of respect and admiration among her friends, and causing her to suffer humiliation and mental anguish. She did not base the action on a property or contractual right, nor were any physical injuries or special damages alleged.[23] Based on prior Illinois law, the trial court dismissed the suit for failure to state a cause of action, but the appellate court found that a right of privacy existed in Illinois.[24]

In its decision the court departed from Illinois precedent and found this tort existed even though it was based upon neither a property nor a contractual right and no physical injury or special damages were alleged. The court justified its allowance of recovery of damages by noting the numerous cases in which pecuniary interests or physical injury were slight, but substantial damages were awarded for harm to reputation or mental disturbance.[25] In recognizing a right of privacy, the court noted the great number of jurisdictions that earlier had either judicially or statutorily recognized this common law right.[26] The court reasoned that "with changing times rigidity can often mean in-

---

20. *Id.* at 152 (citations omitted).
21. *Id.* at 154.
22. 347 Ill. App. 293, 106 N.E.2d 742 (1952).
23. *Id.* at 294, 106 N.E.2d at 743.
24. *Id.* 106 N.E.2d at 743.
25. *Id.* at 300-01, 106 N.E.2d at 745-46.
26. The following states recognized the right "either in direct holdings or well considered dicta": Alabama, Alaska, Arizona, California, District of Columbia, Florida, Georgia, Indiana, Kansas, Kentucky, Mary-

justice."[27] The court further noted that the Illinois Constitution of 1870 contained a *civil* due process clause and guaranteed " 'life, liberty, and the pursuit of happiness' as 'inherent and inalienable rights.' "[28] Following the decision of *Pavesich v. New England Life Insurance Co.*,[29] the *Eick* court found that "the right to privacy was a natural right, constitutionally protected by the due process clause . . . ."[30] Although the *Eick* court allowed recovery for invasion of privacy, it noted that there were limitations on that right where there was either a legitimate public interest in the subject matter or where express or implied consent had been given.[31]

Limitations of the Right Defined

Limitations of the right of privacy were discussed in decisions subsequent to *Eick*.[32] In *Branson v. Fawcett Publications, Inc.*, the court recognized a right of privacy based on *Eick* but compared that right to the right against defamation.[33] In this sense, it was held that the right of privacy was a personal right and the alleged invasion must specifically identify the particular person claiming an invasion of that right.[34] The court continued to limit the right by stating: "The right to be let alone undoubtedly requires the use of the personality, name or likeness of the individual."[35] These limitations of the right have been followed in all subsequent decisions.[36]

---

land, Michigan, Missouri, Nevada, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina. New York, Utah and Virginia had enacted statutes. *Id.* at 295, 106 N.E.2d at 743. The court also cited pertinent law review articles, *e.g.*, Warren and Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890); Feinberg, *Recent Developments in the Law of Privacy*, 48 COLUM. L. REV. 713 (1948).

27. 347 Ill. App. at 300-01, 106 N.E.2d at 745-46.

28. *Id.* at 305, 106 N.E.2d at 748; ILL. CONST. art. II, § 1.

29. 122 Ga. 190, 50 S.E. 68 (1905).

30. 347 Ill. App. at 305, 106 N.E.2d at 748.

31. *Id.* at 299, 106 N.E.2d at 748.

32. Common law right of privacy decisions occurred not only in the Illinois courts but also in the federal courts.

33. 124 F. Supp. 429 (E.D. Ill. 1954).

34. *Id.* at 432. This concept of the right as personal has been adopted by nearly all courts recognizing the right. *See, e.g.*, 41 ILL. BAR. J. 120, 121 (1952).

35. 124 F. Supp. at 431-32. In this case, the plaintiff alleged that a photograph of his racing car in a collision was used to illustrate a fictional story in a magazine thereby creating an invasion of his privacy. The court found that since the plaintiff's name was not mentioned and he was not otherwise identified, he had not stated a cause of action.

36. *See, e.g.*, Maritote v. Desilu Prod., Inc., 345 F.2d 418 (7th Cir. 1965). In a suit by Al Capone's widow and son for invasion of privacy by the defendant's appropriation of the deceased's likeness for a film in which the plaintiffs were not portrayed, the court held that one could not speak of the privacy of a deceased person. "Under Illinois law, the right of privacy cannot be asserted by anyone other than the person

In the common law right of privacy cases there must be a sufficient identification of "the personality, name or likeness of the individual"[37] to maintain a cause of action. What constitutes a sufficient identification has been decided on an ad hoc basis; however, the tendency of the courts is to enforce this requirement strictly.[38]

Qualified Privilege: Newsworthy Events

The *Branson* court was not forced to answer the defendant's contention that the plaintiff was a public figure. The court did, however, imply that a difference existed between invasions of privacy for commercial appropriation and invasions of privacy for newsworthy events.[39] This distinction has become firmly entrenched in subsequent decisions of the Illinois courts. There exists no cause of action for an invasion of personal privacy when the invasion is deemed newsworthy or is a matter of legitimate public concern, because it involves a qualified privilege.[40] In *Carlson v. Dell Publishing Co.*, the children of a murdered woman brought an action for invasion of their privacy.[41] The court held that even though the article was dramatized, since it contained information of legitimate public interest, the literary style should not defeat the privilege.[42]

---

whose privacy was invaded. . . . Comment, fictionalization, and even distortion of a dead man's career do not invade the privacy of his offspring, relatives or friends, if they are not even mentioned therein." *Id.*

37. 124 F. Supp. at 431-32.

38. In Carlson v. Dell Publishing Co., 65 Ill. App. 2d 209, 213 N.E.2d 39 (1965) the defendant gave partial names of three children, quoted their words and described their thoughts in his publication, but the court held this to be insufficient identification of the plaintiffs.

39. 124 F. Supp. at 433.

40. *See* Rohzon v. Triangle Publications, Inc., 230 F.2d 359 (7th Cir. 1956), where the plaintiff's son's death was caused by narcotics, a picture of the son in a magazine in an unidentified room coupled with a picture of narcotics paraphernalia was held not to be an invasion of the plaintiff's right of privacy. "Nothing . . . ties the photograph of narcotics . . . with the plaintiff's home, save the page layout and juxtaposition of illustrations." *Id.* at 361. The court also found that the plaintiff had been catapulted into the area of legitimate public interest.

In Bradley v. Cowles Magazines, Inc., 26 Ill. App. 2d 331, 168 N.E.2d 64 (1960), the court held that the right of privacy could not be extended to provide damages for anguish of a mother caused by the publication concerning the murder of her son *where she, herself, was not substantially publicized.* The court cited with approval Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P.2d 491 (1939). "The court held that where one, unwillingly or not, becomes an actor in an occurrence of general public interest, it is not an invasion of his right of privacy to publish his photograph with an account of such occurrence." 26 Ill. App. 2d at 336, 168 N.E.2d at 66.

41. 65 Ill. App. 2d 209, 213 N.E.2d 39 (1965).

42. The court quoted Jenkins v. Dell Publishing Co., 251 F.2d 447 (3d Cir. 1958):

> [T]he interest of the public in the free dissemination of the truth and unimpeded access to news is so broad, so difficult to define and

Proper Exercise of the Privilege

Earlier, in *Annerino v. Dell Publishing Co.*,[43] the court distinguished between fictionalized, dramatized articles and newsworthy events.[44] The court noted that while *Eick* "limited application of the rule to the use of a photograph of a person, who was not the subject of newsworthy interest, the court . . . fully intended to protect inviolate the personality of the individual."[45] The court conceded that many invasions of privacy were not actionable where justified by *proper exercise* of freedom of the press. This proper exercise of freedom of the press means that an invasion of an individual's privacy will not be actionable when the subject matter is of legitimate public interest or is newsworthy, and the publication is a vehicle of information, "not an article without informational value."[46]

Limiting Factor: No Return to Anonymity

In 1970, the Illinois Supreme Court finally held that a common law right of privacy existed in Illinois.[47] In *Leopold v. Levin*, the court impliedly determined that once a party is a public figure whose many actions are newsworthy, that party always remains a public figure for those events, and he will not be allowed to return to the private sector.[48] The plaintiff was a public figure as a result of his own criminal conduct in 1924. He alleged that his right of privacy was violated by appropriation of his likeness for the commercial gain of defendants in their novel, play and movie of a crime highly similar to the one perpetrated by him.

The court referred to the *Eick* case,[49] reviewed several subsequent Illinois appellate court decisions,[50] and arrived at the conclusion that, while recognizing the right of privacy, the right had not been expanded in Illinois beyond the original pronounce-

---

so dangerous to circumscribe that courts have been reluctant to make such factually accurate public disclosures tortious, except where the lack of any meritorious public interest in the disclosure is very clear and its offensiveness to ordinary sensibilities is equally clear.

65 Ill. App. 2d at 215-16, 213 N.E.2d at 43.

43. 17 Ill. App. 2d 205, 149 N.E.2d 761 (1958).
44. *Id.* at 208-10, 149 N.E.2d at 762-63.
45. *Id.* at 208, 149 N.E.2d at 762.
46. *Id.* at 209, 149 N.E.2d at 763.
47. Leopold v. Levin, 45 Ill. 2d 434, 259 N.E.2d 250 (1970).
48. *Id.* at 434, 259 N.E.2d at 250.
49. *Id.* at 440, 259 N.E.2d at 254.
50. The court specifically noted Carlson v. Dell Publishing Co., 65 Ill. App. 2d 209, 213 N.E.2d 39 (1965); Buzinski v. Do All Co., 31 Ill. App. 2d 191, 175 N.E.2d 557 (1961); Bradley v. Cowles Magazines, Inc., 26 Ill. App. 2d 331, 168 N.E.2d 64 (1960); Annerino v. Dell Publishing Co., 17 Ill. App. 2d 205, 149 N.E.2d 761 (1958).

ment in *Eick*.[51] The court concluded that because the plaintiff was a public figure due to his prior criminal conduct, he remained a public figure thereafter and no right of privacy existed in matters associated with his participation in a highly publicized crime.[52] Although the right was not extended to plaintiff Leopold, a public figure, the right was clearly recognized with this limitation, for the people of Illinois.

It is clear that each case involving the public interest or newsworthiness is to be decided on its own merits. Where the public interest is involved and there is little or no fictionalization or dramatization, the courts have found and will probably continue to hold that there can be no recovery for invasion of priacy.[53] In certain of the cases involving newsworthy subject matter, it could be said that the courts have also considered the limitation of implied consent set forth in *Eick*.[54] The major question there would be whether, by becoming involved in the occurrence, the plaintiff consented to be publicized.

Limiting Factor: Express Consent

In the area of express consent the important question is to what extent the plaintiff did in fact waive the right of privacy by giving consent. This question arose in *Dabbs v. Robert S. Abbott Publishing Co.*[55] Holding that the plaintiff had waived the right to recover for invasion of privacy, the court found that where the plaintiff entered an agreement to keep the defendant supplied with recent photographs and be available for programs and publicity stunts, subsequent publication of a photograph supplied by the defendant in connection with a news item did not entitle her to recover for invasion of privacy.[56]

One year later,[57] the court held that although the plaintiff

---

51. 45 Ill. 2d at 440, 259 N.E.2d at 254. *See* text accompanying note 31 *supra*.

52. *Id.* at 442, 259 N.E.2d at 255. Courts applying Illinois law have generally held that public figures have waived their right of privacy. *See* Wagner v. Fawcett Publications, 307 F.2d 409, 410 (7th Cir. 1962); Rohzon v. Triangle Publications, Inc., 230 F.2d 359, 361 (7th Cir. 1956); Branson v. Fawcett Publications, Inc., 124 F. Supp. 429, 433 (E.D. Ill. 1954).

53. *See* Buzinski v. Do All Co., 31 Ill. App. 2d 331, 175 N.E.2d 577 (1960) (photograph of land-yacht in magazine was of legitimate public interest and incidental appearance of the plaintiff in the picture did not defeat that privilege); Wagner v. Fawcett Publications, Inc., 307 F.2d 409 (7th Cir. 1962) (publication of account telling of the murder of plaintiff's daughter and plaintiff's involvement in criminal proceedings was held not actionable as it was a newsworthy event and plaintiff's participation therein was a report of the news).

54. *See* text accompanying note 31 *supra*. *See also* Wagner v. Fawcett Publications, Inc., 307 F.2d 409 (7th Cir. 1962).

55. 44 Ill. App. 2d 438, 193 N.E.2d 876 (1963).

56. *Id.* at 440, 193 N.E.2d at 877.

57. Smith v. WGN, Inc., 47 Ill. App. 2d 183, 197 N.E.2d 482 (1964).

had consented to "pose for a man that takes a movie . . . ,"[58] the *scope* of his consent was a question of fact. The court cited *Pavesich v. New England Life Insurance Co.* with approval:[59]

> The right to privacy, however, like every other right that rests in the individual, may be waived by him . . . . This waiver may be either express or implied . . . . It may be waived for one purpose, and still asserted for another . . . it may be waived as to one individual, and retained as against all other persons.[60]

It appears from this holding that the courts will treat the problem of the scope of consent as a question of fact. Consequently, as in the cases of public interest or newsworthiness,[61] each case must be decided on its particular set of facts. This appears to be true of all of the claims of invasion of privacy which involve *limitations* of the right.[62]

Extending the Common Law Right?

In the 1975 decision of *Midwest Glass Co. v. Stanford Development Co.*,[63] the appellate court was asked to extend the right of privacy to public disclosure of private debts. Noting that the recognition of this extension was one of first impression in Illinois, the court referred to Prosser's analysis of the common law right in which he divided the right of privacy into four possible grounds for complaint:[64] unreasonable intrusion into the seclusion of another; appropriation of another's name or likeness; public disclosure of private facts; and publicity which unreasonably places another in false light before the public.[65] Finding that this complaint dealt with public disclosure of private facts, the court cited decisions in other states and held that the requirement for that tort included an intentional giving of unreasonable publicity to private debts without the debtor's consent if the publicity is given for the purpose of either coercing or harassing the debtor into payment of the debt or of exposing the debtor to public contempt or ridicule.[66] Because the notices of indebtedness were not distributed to the general public but only to people having an interest in Stanford's ability to pay its debts,[67] the court held that there was no invasion of plain-

58. *Id.* at 185, 197 N.E.2d at 484.
59. 122 Ga. 190, 50 S.E. 68 (1905).
60. 47 Ill. App. 2d at 185, 197 N.E.2d at 484.
61. *See* note 53 and accompanying text *supra.*
62. *See* notes 40-52 and accompanying text *supra.*
63. 34 Ill. App. 3d 130, 339 N.E.2d 274 (1975).
64. *Id.* at 133, 339 N.E.2d at 277.
65. W. PROSSER, LAW OF TORTS § 117 (4th ed. 1971).
66. 34 Ill. App. 3d at 133, 339 N.E.2d at 277.
67. *Id.* at 135, 339 N.E.2d at 278.

tiff's privacy.[68] It concluded that "*although an action for the invasion of privacy based on the public disclosure of private debts may be brought in Illinois* the allegations contained in the counterclaims do not substantiate such a tortious offense."[69]

One year later, the appellate court was asked to apply this extension in *Bureau of Credit Control v. Scott.*[70] The court refused to extend the right, holding that the plaintiff had a remedy for intentional infliction of mental distress.[71] Citing only *Eick* and *Annerino*, the court stated: "It *appears* that a cause of action for the invasion of privacy *may* be stated for unauthorized use of an individual's name or likeness for commercial purposes."[72] By using this language, the court impliedly limited actions for invasions of privacy only to commercial use of a plaintiff's name.

Thus, the willingness of the Illinois courts to extend the right of privacy is far from clear. Although recognition of that tort clearly has been established,[73] the courts have been strict in their application of the limitations initially set forth in *Eick* and have rarely extended the application of the right.[74] It is to be em-

---

68. The court distinguished this situation from those in which the creditor, attempting to force payment of the debt, published the debtor's name and amount due in a newspaper, posted a written notice of indebtedness in a show window, or made threatening phone calls to the debtor's relatives or employer concerning the indebtedness. *Id.* at 135, 339 N.E.2d at 278 (citations omitted). *See* Bloomfield v. Retail Credit Co., 14 Ill. App. 3d 158, 302 N.E.2d 88 (1973) where the court dismissed the cause of action for invasion of privacy because the plaintiff had impliedly consented to disclosure by supplying names of former employers and the defendant had a legitimate business interest in the credit report.

69. 34 Ill. App. 3d at 135, 339 N.E.2d at 278 (emphasis added).

70. 36 Ill. App. 3d 1006, 345 N.E.2d 37 (1976). In that case, a collection agency, attempting to force payment of an alleged debt made phone calls to the plaintiff's parents and repeatedly called the plaintiff at work though she demanded that they cease as the calls jeopardized her job. The plaintiff suffered headaches, loss of appetite, and loss of sleep due to the language used and threats made.

71. *Id.* at 1006, 345 N.E.2d at 37. Justice Craven disagreed that the plaintiff had stated no cause of action for invasion of privacy. In his dissent he relied primarily on the reasoning contained in *Midwest Glass v. Stanford Development Co.*, 34 Ill. App. 3d 130, 339 N.E.2d 274 (1975). He found that in the instant case the efforts at collection had become so unreasonable and outrageous that they transcended the plaintiff's implied consent. He cited the tentative draft of RESTATEMENT (SECOND) OF TORTS § 652(B) note 13, comment D (1967):

> Thus there is no liability for knocking at the plaintiff's door, or calling him to the telephone on one occasion, or even two or three, to demand payment of a debt. It is only when the telephone calls are repeated with such persistence and frequency as to amount to a course of [harassing] the plaintiff, which becomes a susbtantial burden to his existence, that his privacy is invaded.

36 Ill. App. 3d at 1010, 345 N.E.2d at 41.

72. *Id.* at 1009, 345 N.E.2d at 40 (emphasis added). The majority said they knew of no other cases in Illinois upholding the right of privacy but ignored the reasoning of *Midwest Glass* saying they saw no reason to create additional remedies.

73. *See* Eick v. Perk Dog Food, 347 Ill. App. 293, 106 N.E.2d 742 (1952); Leopold v. Levin, 45 Ill. 2d 434, 259 N.E.2d 250 (1970).

74. *See* Bureau of Credit Control v. Scott, 36 Ill. App. 3d 1006, 345

phasized that the common law right of privacy is only applicable in civil cases. Traditionally, for governmental invasions of the right, a citizen was forced to turn to the United States Constitution.[75] It was not until 1970 that Illinois explicitly recognized the right as applied against governmental invasions;[76] even then, complainants often ignored that constitutional recognition and relied on fourth amendment rights.[77]

Privacy and the Illinois Constitution of 1970

Article I, section 6 of the Illinois Constitution provides, "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, *invasions of privacy* or interceptions of communications by eavesdropping devices or other means."[78]

Article I, section 12 of the Illinois Constitution further provides that, "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, *privacy*, property or reputation. He shall obtain justice by law, freely, completely and promptly."[79]

Reading these sections either separately or together, one is impressed with what appears to be a right of privacy guaranteed to the people without limitation as to scope or type of privacy. Reading section 12, the "remedy" section, in conjunction with section 6, the "right" section, there appears to be a specific guarantee of a remedy for every unlawful invasion of privacy.[80] With the United States Supreme Court decisions of *Griwsold*,[81] *Katz*[82] and *Mapp*[83] and the Illinois decisions of *Eick*[84] and *Leopold*,[85] the delegates to the Sixth Constitutional Convention had a reasonable basis for the meaning of "privacy."[86] An early reader of the Illinois Constitution of 1970 might justifiably have felt

---

N.E.2d 37 (1976); Midwest Glass v. Stanford Development Co., 34 Ill. App. 3d 130, 339 N.E.2d 274 (1975); Carlson v. Dell Publishing Co., 65 Ill. App. 2d 209, 213 N.E.2d 39 (1965).

75. *See* text accompanying notes 1-21 *supra*.

76. Ill. Const. art. I, § 6 (1970).

77. People v. Brooks, 51 Ill. 2d 156, 281 N.E.2d 326 (1972); People v. Abrams, 48 Ill. 2d 446, 271 N.E.2d 37 (1971); People v. Heflin, 40 Ill. App. 3d 635, 351 N.E.2d 594 (1976); People v. Reddock, 13 Ill. App. 3d 296, 300 N.E.2d 31 (1973); People v. Harden, 6 Ill. App. 3d 172, 284 N.E.2d 716 (1972).

78. Ill. Const. art. I, § 6 (emphasis added).

79. Ill. Const. art. I, § 12 (emphasis added).

80. *See* Ill. Const. art. I, §§ 6, 12.

81. 381 U.S. 479 (1965).

82. 389 U.S. 347 (1967).

83. 367 U.S. 643 (1961).

84. 347 Ill. App. 293, 106 N.E.2d 742 (1952).

85. 45 Ill. 2d 434, 259 N.E.2d 250 (1970).

86. *See generally* 3 Record of Proceedings, Sixth Ill. Constitutional Convention, at 1523-42 (1969-70) [hereinafter cited as Proceedings]. Elmer Gertz was chairman of the Bill of Rights Committee which drafted

that a bold, clearly stated right of privacy with a concomitant judicial remedy had been guaranteed to the Illinois citizen.

On three occasions section 6, of the Illinois Constitution of 1970 has been examined by the Illinois Supreme Court.[87] All cases focused on the issue of a state required public disclosure of financial statements by persons enjoying a particular relationship with the State of Illinois. In each of these cases the plaintiffs challenged the required disclosure on the basis of the constitutional right of privacy as set forth in section 6.

In *Stein v. Howlett*,[88] the Illinois Supreme Court recognized an all-encompassing *right* of privacy against state government intrusion but held that the required disclosure fulfilled a compelling, overriding state interest. In *Illinois State Employees Association v. Walker*,[89] and later in *Buettell v. Walker*,[90] the court retreated from recognizing an actual all-encompassing right of privacy against state government intrusion. Instead, the court found a limited right of privacy only from "interceptions of communications by eavesdropping devices or other means."[91] The court thus has been inconsistent in its construction of section 6. The record of the intent of the drafters of section 6 at the Constitutional Convention adds to this dichotomy by lending some support to both interpretations rendered by the Illinois Supreme Court.

Judicial Interpretation of the Privacy Clause of the Illinois Constitution

Stein v. Howlett

The first interpretation of article I, section 6 came in the

---

section 6 of the constitution. Appointed to explain section 6, the right of privacy section, was committee member John E. Dvorak. Gertz and Dvorak utilized these cases to present to the convention the perimeters of this section.

87. *See* Stein v. Howlett, 52 Ill. 2d 570, 289 N.E.2d 409 (1972); Illinois State Employees Ass'n. v. Walker, 57 Ill. 2d 512, 315 N.E.2d 9 (1974); Buettell v. Walker, 59 Ill. 2d 146, 319 N.E.2d 502 (1974).

88. 52 Ill. 2d 570, 289 N.E.2d 409 (1972).

89. 57 Ill. 2d 512, 315 N.E.2d 9 (1974).

90. 59 Ill. 2d 146, 319 N.E.2d 502 (1974). In that case, the Illinois Supreme Court, following their decision in *Illinois State Employees Ass'n. v. Walker*, held that to require a corporation seeking to do business with the state to disclose political contributions did not infringe on first amendment freedoms or the right of privacy.

> Insofar as the attack upon Executive Order No. 5 is predicated upon a right of privacy under the Illinois Constitution of 1970 (see sections 6 and 12 of article I), and upon the violation of the equal protection clauses of the Federal and State constitutions, our decision in *Illinois State Employees Association v. Walker* is pertinent. In their attack upon the present executive order, the plaintiffs relied heavily upon the decision of the trial court in that case. That decision, however, was reversed by this court, and the arguments based upon the trial court's decision are not persuasive.

Id. at 153, 319 N.E.2d at 506.

91. *See* Ill. Const. art. I, § 6.

Illinois Supreme Court case of *Stein v. Howlett.*[92] The plaintiff challenged the constitutionality of the Illinois Governmental Ethics Act[93] alleging that the Act was an unconstitutional invasion of privacy under article I, section 6 of the Illinois Constitution.[94] Specifically, the plaintiff questioned the necessity of the Act requiring disclosure of business activities unrelated to any state activity, including professional services to any entity if fees exceeded $5,000; any asset, including real estate from which a capital gain of $5,000 or more was received; any gifts in excess of $500; any business in which he had an interest in excess of $5,000 or more or earned in excess of $1,200 in dividends; all of which were required even if he or the entities or persons with whom he was involved did no business with the State of Illinois.[95] Citing section 6, the Illinois Supreme Court expressly recognized the *right of privacy as a constitutional right.*[96] The court further noted that there existed no limiting definition of the type of privacy as stated in the constitution[97] thus recognizing the broad nature of the right. Referring specifically to the plaintiff's case, however, the court disposed of his objection to disclosure of activities unrelated to the state by, in essence, saying that citizens of Illinois may all in some way be engaged in business with the state.[98]

The plaintiff utilized a California case to challenge the Act. In *City Of Carmel-By-The-Sea v. Young,*[99] the city sought declar-

---

92. 52 Ill. 2d 570, 289 N.E.2d 409 (1972).

93. ILL. REV. STAT. ch. 127, §§ 601-101 to 608-101 (1975). The Illinois Governmental Ethics Act was an act sanctioned by the Illinois Constitution, art. II, § 2. Therein, the General Assembly was given the power to require candidates for and holders of offices in units of local government and school districts to file verified statements of their economic interests. This act was the counterpart of the constitutional requirement for verified statements of economic interests of candidates and holders of state offices and all members of a commission or board created by the constitution.

94. ILL. CONST. art. I, § 6.

95. *See* ILL. REV. STAT. ch. 127, § 4A-102 (1975).

96. 52 Ill. 2d at 574, 289 N.E.2d at 411 (emphasis added).

97. The court stated in 52 Ill. 2d at 574, 289 N.E.2d at 411:

> The confirmation of the right of privacy as a constitutional right is found in section 6 of article I of the 1970 constitution which expressly states, for the first time in our state charters, that the people have the right to be secure in their persons, houses, papers, and other possessions against . . . *invasions of privacy.* . . . (Italics ours). No limiting definition of the type of privacy is stated in the constitution.

98. 52 Ill. 2d at 577, 289 N.E.2d at 413, where the court stated:

> But who is to say whether or not there is a business connection or relation with the State? Who is to say that the business within the State which does not do business directly with the State, but which supplies another company which does, has no connection with the State? Who is to say that a capital gain from the sale of an asset to a stockholder of a company doing business with the State has no connection with the position of the public official?

99. 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970).

atory judgment to determine the constitutionality of certain California statutes requiring every public officer and candidate to file a statement describing the nature of his investments and those owned by his spouse and minor children.[100] The California Supreme Court, relying extensively on *Griswold* and tracing the history of the right of privacy in the United States Supreme Court, held that the statutes in question were constitutionally overbroad, and that "the right of privacy concerns one's feelings and one's own peace of mind."[101] The court further stated that "the invasion of privacy rights and the chilling or discouraging effect upon the seeking or holding of public office, great or small, or high or low, appears too clear for dispute."[102]

However, the Illinois Supreme Court upheld the Illinois Act. The court distinguished *Stein* from *City Of Carmel-By-The-Sea* pointing out article XIII, section 2 of the Illinois Constitution, which provides, "All candidates for or holders of state offices and all members of a Commission or Board created by this Constitution shall file a verified statement of their economic interests, as provided by law . . . ."[103] Thus, the court in *Stein v. Howlett* recognized an all-encompasing right of privacy under the constitution yet upheld the required disclosure law. It was held that a forced disclosure of economic interests did impinge upon a right of privacy, but the court upheld the Act because it felt that such a right of privacy was secondary to the compelling governmental interest of disclosure of economic interests by public officials as manifested in article XIII, section 2 of the Illinois Constitution.[104]

Illinois State Employees Association v. Walker

Two years after *Stein v. Howlett*, the Illinois Supreme Court decided the most definitive case to date concerning the Illinois constitutional right of privacy, *Illinois State Employees Association v. Walker*.[105] The Governor issued an executive order requiring certain financial disclosure statements to be filed with the Board of Ethics by various state employees.[106] Plaintiffs in

---

100. *Id.* at 262, 466 P.2d at 227, 85 Cal. Rptr. at 3.
101. 2 Cal. 3d at 268, 466 P.2d at 231, 85 Cal. Rptr. at 7.
102. *Id.* at 268, 466 P.2d at 231, 85 Cal. Rptr. at 7.
103. ILL. CONST. art. XIII, § 2.
104. 52 Ill. 2d at 578, 289 N.E.2d at 413. "We believe that the statute as cast reflects the compelling governmental interest which is paramount to the *rights of the individual*, and that the statute is not overbroad as an unconstitutional invasion of privacy." (emphasis added).
105. 57 Ill. 2d 512, 315 N.E.2d 9 (1974). This article will discuss solely the court's opinion concerning the purported Illinois right of privacy.
106. The order in pertinent part provided:
3. At the commencement of state service and thereafter between

three consolidated cases represented themselves as individuals and as various state associations of employees affected.[107] In arguing against the constitutionality of the executive order, the plaintiffs invoked section 6 stating that it created a right of privacy in them with respect to disclosure of their economic interests. The majority limited the constitutional privacy right as originally recognized by the court in *Stein*. The court referred to its observation in *Stein* that "no limiting definition of the type of privacy is stated in the constitution,"[108] but qualified that earlier observation in light of further consideration of the language and history of section 6.[109]

April 15 and April 30 of each succeeding year, each of the following persons in each agency subject to the jurisdiction of the Board shall file with the Board a sworn Statement of Economic Interest and a copy of his most recent federal and state income tax returns:
a. Each person appointed by the Governor;
b. Each person who receives $20,000 or more per year from the State; and
c. Each other person whose position is subject to undue influence (as determined from time to time by rule of the Board).

4. The Statement of Economic Interest shall contain:
a. A current net worth statement, disclosing all assets and liabilities of the person;
b. A statement of income (including capital gains) received by the person during the preceding calendar year, disclosing:
(1) each source of income,
(2) the total amount received from the source, and
(3) the nature of the income transactions involving the source.
To provide this information, pertinent portions of federal or state income tax returns shall be made part of the Statement of Economic Interest;
c. A statement of gifts received by the person during the preceding calendar year, disclosing all gifts from any source having business with or regulated by the agency of the person and all gifts of a value of $50 or more from sources other than members of the person's family:
d. A statement of close economic associations, indicating the person's position with each business or professional entity with which the person is associated as an officer, employee, director or partner or in which he has a substantial interest and identifying those entities which derive substantial income from the State or from professional engagements concerning the State.

5. The Statement of Economic Interest of each person other than one appointed from the public to serve on a Board or Commission shall be open to reasonable public inspection. The Board shall provide by rule for the time, place and manner of inspection.

6. Subject to rule of the Board, the Statement of Economic Interest shall disclose interests of the spouse and immediate family living with the person making the statement.

107. The plaintiffs included: Individual state employees and the Illinois State Employees Association; the individual highway engineers and the Illinois Association of Highway Engineers; and the individual members of the State Highway Police and Trooper Lodge No. 41, Fraternal Order of Police. The court politely dismissed any standing issue by stating that the individuals named as plaintiffs did have standing to maintain the action. Therefore, according to the court, any standing of the plaintiff associations to represent their individual members was unnecessary. 57 Ill. 2d at 515, 315 N.E.2d at 10-11.

108. *Id.* at 522, 315 N.E.2d at 14.

109. *Id.* at 522, 315 N.E.2d at 14.

In limiting the right of privacy, the court first noted two word changes between the Illinois Constitution of 1870 and the final draft of the Illinois Constitution of 1970 in the clause pertaining to unreasonable searches and seizures.[110] The final draft of section 6 substituted the word "possessions" for "effects" and added the phrase "invasions of privacy or interceptions of communications by eavesdropping devices or other means."[111] The court then noted the differences of the placement of the phrase "invasions of privacy or interceptions of communications by eavesdropping devices or other means" between the first and final drafts of section 6.[112] The court indicated that as the section was originally reported to the full Constitutional Convention it read, "The right of the people to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, interceptions of their communications by eavesdropping devices or other means, or invasions of privacy shall not be violated . . . ."[113] The court then compared the original draft with the final adopted version, which reads, "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means . . . ."[114]

The majority of the court placed great emphasis on the difference of the grammatical placement of the "invasions of privacy" phrase within the section. It succinctly stated in dicta of major importance, "Not all members of the court are con-

---

110. ILL. CONST. art. II, §6 (1870) provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized.

ILL. CONST. art. I, § 6 (1970) as originally drafted by the Bill of Rights Committee at the Sixth Constitutional Convention and as it finally appeared presents a thoughtful contrast.

> The *right of the* people (shall have the right) to be secure in their persons, houses, paper and other possessions against unreasonable searches, seizures, *interceptions of their communications, by eavesdropping devices or other means*; (invasions of privacy or interceptions of communications by eavesdropping devices or other means) shall not be violated. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

The italicized material indicates the wording of the original article I, section 6. *See* 6 PROCEEDINGS, *supra* note 86, at 29 and note 124 *infra*.

111. ILL. CONST. art. I, § 6 (1970). *See* 57 Ill. 2d at 522, 315 N.E.2d at 14-15.

112. 57 Ill. 2d at 522-23, 315 N.E.2d at 15. *See* note 110 *supra*.

113. 57 Ill. 2d at 522-23, 315 N.E.2d at 15. *See* 6 PROCEEDINGS, *supra* note 86, at 210 (emphasis added).

114. 57 Ill. 2d at 522-23, 315 N.E.2d at 15. *See also* ILL. CONST. art. I, § 6.

vinced that this provision should be interpreted as asserting anything beyond protection from invasions of privacy by eavesdropping devices or other means of interception."[115] In sharp contrast the court in *Stein* reduced the right of privacy from a full, all-encompassing right as recognized in *Griswold* or *Roe v. Wade* to a *right* relating *merely to invasions of privacy by eavesdropping devices.*

The court strengthened its position by indicating that the financial disclosure article of the Constitution, article XIII, section 2,[116] was passed by the Constitutional Convention despite the existence of the privacy provision in section 6. The court noted that a notion to delete article XIII, section 2 for the reason that it would authorize an invasion of the right of privacy was rejected by a two to one vote at the Constitutional Convention[117] even though the convention was aware of the *Carmel-By-The-Sea* decision.[118] The court in *Illinois State Employees Association v. Walker* felt this rejection of the motion to strike the section indicated a rejection of the whole concept of a broad privacy right, rather than simply an expression of the need for a separate, though conflicting disclosure section.[119] The court determined that the history of section 6, and the passage of article XIII, section 2 "require that we reject the notion that the Illinois Constitution of 1970 created a right of privacy which restricts action by . . . government with respect to disclosure of economic interests by State officers and employees."[120]

In view of the United States Supreme Court decisions and the Illinois Supreme Court's own decision in *Leopold v. Levin*, one questions why the Illinois Supreme Court narrowed its construction of the Illinois guarantee of "privacy," thus creating an inconsistency with *Stein*. One wonders if the placement of a mere comma after the word "privacy" in the final adopted version of section 6 would have changed the court's interpretation of that section.[121]

The Constitutional Convention

The concept of incorporating into a state constitution a broad bill of rights prohibiting certain state activities or granting the people certain affirmative rights is common in all state char-

115. 57 Ill. 2d at 523, 315 N.E.2d at 15.
116. *See* text accompanying note 103 *supra.*
117. 57 Ill. 2d at 523, 315 N.E.2d at 15.
118. *See* 3 PROCEEDINGS, *supra* note 86, at 1800-04 (Verbatim Transcripts).
119. 57 Ill. 2d at 523, 315 N.E.2d at 15.
120. *Id.* at 524, 315 N.E.2d at 15.
121. *See* 57 Ill. 2d at 531-41, 315 N.E.2d at 19-24 (J.J. Ryan and Goldenhersh dissenting).

ters.[122] The creation, in the Bill of Rights of a prohibition against unreasonable state intrusion into a zone of privacy of an individual was, however, a very progressive move by Illinois in 1970.[123] At the Constitutional Convention the delegates creating this right of privacy discussed four concepts: whether there was a general right of privacy in the individual; who was protected by section 6 and who was prohibited from such an invasion of privacy; what was the scope and nature of the right of privacy; and what were the limitations on this right. Neither the courts nor the convention ever discussed whether this right of privacy was a "fundamental interest" which could be abridged only by a "compelling state interest."

In its first draft, section 6 of the Bill of Rights clearly set forth a general all-encompassing right of privacy.[124] This was demonstrated not only by the grammatical sense of the section but also by the comments of the drafters of the provision. The committee on the Bill of Rights stated in its report on the proposed draft of section 6, "The new section supplements the existing language (of section 6 of the Bill of Rights of the 1870 Constitution) in two important aspects. It adds a right against 'interceptions of their communications by eavesdropping devices or other means' and it adds a right against 'invasions of their privacy.' "[125]

In its first presentation to the entire convention, Delegate John E. Dvorak, a member of the committee, and Delegate Elmer Gertz, Chairman of the Bill of Rights Committee, explained section 6 to the full convention. Delegate Dvorak felt section 6 could be divided into three concepts: searches and seizures; eavesdropping or wiretapping; and the concept of a right of privacy.[126] This illustrates that the drafters felt all three concepts served different purposes. Since this three tiered division by Delegate Dvorak was never challenged, we may as-

---

122. *See* Grad, *The State Bill of Rights*, in CON-CON: ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION (Ranney, ed. 1970).

123. Only two other states had constitutions which mentioned the word privacy in their Bill of Rights: Arizona and Washington. 6 PROCEEDINGS, *supra* note 86, at 29-30 (Committee Proposals).

124. The original draft of article I, section 6 stated:

> The right of the people to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, interceptions of their communications, by eavesdropping devices or other means, or invasions of their privacy shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized.

See 6 PROCEEDINGS, *supra* note 86, at 29 (Committee Proposals). Each of the proposed sections of the constitution was subjected to three readings wherein it could be amended or deleted.

125. 6 PROCEEDINGS, *supra* note 86, at 29 (Committee Proposals).

126. *See generally Verbatim Transcripts*, vol. III, 1523-25.

sume that the consensus of the convention was that the three different concepts served three different purposes.

Following the drafting of the constitution, the delegates sought to explain the new document to the people of Illinois.[127] In describing the Bill of Rights article generally, the delegates explained, "There are additional new protections. . . . Unreasonable invasions of privacy are prohibited; . . . ."[128] Later, in a detailed explanation of section 6, the delegates asserted, "This is an amended version of Article 11, section 6 of the 1870 Constitution expanded to include guarantees of freedom from unreasonable eavesdropping *and* invasions of privacy."[129]

The 1972 case of *Stein v. Howlett*[130] was the first judicial test of section 6.[131] The facts of *Stein* implicitly forced the court to determine that a general right of privacy existed for the affected parties. Only because the court found a general all-encompassing right of privacy against state government intrusion in section 6 did it need to label article XIII, section 2, a "compelling interest" that would override the right of privacy.[132] In this manner the *Stein* court implicitly recognized the broad right of privacy.[133]

The right of privacy extends to the "people," and is not limited solely to citizens.[134] However, this constitutionally protected right is limited to the people only "in their persons, houses, papers and other possessions."[135] The question of who was protected by section 6 was never discussed at the convention but is clear from a reading of the section.

Creating some difficulty and controversy at the convention, however, was the question of who was prohibited from violating this right of privacy. The committee proposal for section 6 clearly prohibited only invasions of privacy by government or public officials,[136] and this position was emphasized during the debates on section 6.[137] Later in the convention an effort was

127. The constitution, after being written by the Constitutional Convention, was subject to the general approval of the Illinois voters.
128. 7 PROCEEDINGS, *supra* note 86, at 2673 (1970) (*Official Text With Explanation*).
129. *Id.* at 2683.
130. 52 Ill. 2d at 570, 289 N.E.2d at 409.
131. *See* text accompanying notes 92-104 *supra*.
132. 52 Ill. 2d at 578, 289 N.E.2d at 413.
133. If the court in *Stein* had recognized the narrow construction of the right of privacy adopted by *Illinois State Employees Ass'n. v. Walker*, the court quite simply would have dismissed the Plaintiff's argument by stating that disclosure of financial interests is not eavesdropping.
134. ILL. CONST. art. I, § 6.
135. *Id.*
136. 6 PROCEEDINGS, *supra* note 86, at 32.
137. 3 PROCEEDINGS, *supra* note 86, at 1529.

made by a proposed amendment of section 6 to prohibit unreasonable invasions of privacy by *any* person, group, firm or corporation.[138] Delegate Gertz responded to this proposed amendment by informing the convention that he interpreted *Leopold v. Levin* as already recognizing a right of privacy like that embodied in the proposed amendment.[139] This proposed amendment failed.[140]

Delegate Dvorak explained to the convention delegates that section 6 could be divided into three concepts:[141] the Illinois constitutional right against an unreasonable search and seizure;[142] unreasonable interceptions of communications by eavesdropping;[143] and unreasonable invasions of privacy.[144] These concepts clearly do overlap. In this sense a violation of either the search and seizure rule or the eavesdropping provision can violate the right of privacy. Delegate Dvorak explained:

> The cases that . . . deal with eavesdropping have pretty much intruded into the area of privacy because now the area of privacy that once was thought to be a complete area in and of itself mostly is the reason given for why eavesdropping, wiretapping, and bugging activities are unconstitutional. But there is the area of privacy still existing in very particular instances. For instance, we have now the concept of a general information bank whereby the state government or the federal government can take certain pertinent information about each and every one of us based on, for instance our social security number—know our weight, height, family ages, various things about us—and this is not acceptable to—was not acceptable—or the theory of such a thing—was not acceptable to the majority of our committee in approving section 6.[145]

---

138. *Id.* at 1733.

139. *Id.* at 1735. Delegate Netsch, offered an alternative reason for including a right of privacy against individual and state as opposed to only state invasion. She recognized that the common law right of privacy was slow to develop and stated:

> I believe that . . . this amendment's primary purpose . . . is to provide a constitutional basis for the development of that concept of the right to privacy, to make it possible for the courts—who have been reluctant to reach into that area for fear that they were legislating—to feel free to develop it very slowly and cautiously as they have been in the past.

3 PROCEEDINGS, *supra* note 86, at 1738-39.

140. *Id.* at 1739.

141. *See* text accompanying note 126 *supra.*

142. ILL. CONST. art. I, § 6.

143. *Id.*

144. *Id.*

145. 3 PROCEEDINGS, *supra* note 86, at 1525. In addition, Delegate Dvorak later pointed out an instance of unreasonable invasion of privacy where the post office, suspecting an employee of theft of checks, installed peepholes in the women's washrooms. *Id.* at 1530. Chairman Gertz indicated that the right of privacy would not interfere with ordinary police surveillance of an individual. Only where the surveillance would be in the nature of harassment of the individual would a right of privacy be violated. 5 PROCEEDINGS, *supra* note 86, at 4277. Delegate Foster made a distinction between the visual surveillance by renting an apartment across

This clearly indicates that the original section 6, prior to amendment, contemplated a right of privacy which included prohibitions against unreasonable searches and seizures and wiretapping, and also extended to additional areas.[146]

The narrow construction of section 6 proposed by the court in *Illinois State Employees Association v. Walker* was based on the changed positions of phrases in section 6. This change occurred when section 6 was originally submitted to the Committee on Style, Drafting and Submission. This committee was not a substantive committee and therefore could not make substantive changes in proposals.[147] Following realignment of section 6 to its present form, the Style and Drafting Committee clearly stated in its report that the committee's amendment made no substantive change in the section.[148] Thus, the narrow construction of section 6 as in *Illinois State Employees Association v. Walk*er interpreted the defeat of this proposal as a rejection by section 6 and the intent of its drafters.

The majority in *Illinois State Employees Association v. Walker*, in its narrow construction of section 6, placed heavy emphasis on the debate of the original form of article XIII, section 2 prior to its amendment.[149] During debates on this section, Delegate Carey argued that the required public financial disclosure by certain individuals dealing with the state offended the

---

the street for the purpose of taking pictures and using field glasses, and following a man in a car at a distance of never more than twenty feet. 5 PROCEEDINGS, *supra* note 86, at 4277.

146. The Bill of Rights Committee Proposal stated, "[I]t was essential to the dignity and well-being of the individual that every person be guaranteed a zone of privacy in which his thoughts and highly personal behavior were not subject to disclosure or review." 6 PROCEEDINGS, *supra* note 86, at 32. Chairman Gertz emphasized this point further when he said:

> The individual ought not to be completely at the mercy of the state. In every area we're trying to have the individual have a certain amount of dignity and have a certain amount of freedom from governmental interference of any kind. And the purpose obviously of this provision (the right to privacy) is to cover those situations that aren't covered by the other parts of the proposed section 6. We—insofar as it is possible constitutionally to do so, we want to make certain that the individual is free from these various deprivations of his individual right and dignity.

3 PROCEEDINGS, *supra* note 86, at 1535.

147. *See* Gertz, *Hortatory Language in the Preamble and Bill of Rights of the 1970 Constitution*, 6 J. MAR. J. 218 (1973); Lousin, *Constitutional Intent: The Illinois Supreme Court's Use of the Record in Interpreting the 1970 Constitution*, 8 J. MAR. J. 192 (1974-75).

148. 6 PROCEEDINGS, *supra* note 86, at 217.

149. *See* Illinois State Employees Ass'n. v. Walker, 57 Ill. 2d at 523-24, 315 N.E.2d at 15. Article XIII, section 2 is the public disclosure of financial interests provision. *See* ILL. CONST. art. XIII, § 2. The originally proposed section 2 provided, "Each candidate for or holder of a state office created by this constitution shall declare his and his immediate family's income, the sources thereof, their assets and liabilities, and any significant noneconomic interest." 6 PROCEEDINGS, *supra* note 86, at 605.

fourth amendment to the United States Constitution.[150] The majority opinion in *Illinois State Employees Association v. Walker* interpreted the defeat of this proposal as a rejection by the convention of a broad right of privacy.[151] However, the majority failed to note that this proposal by Delegate Carey attacked what was a more vague and uncertain draft of article XIII, section 2. Thus, upon debate of section 2 in this case the delegates did not know the nature of any and all disclosures and could not intelligently follow Delegate Carey's proposal of leaving some disclosure laws to the legislature.[152] For this reason, Delegate Carey's remarks seem irrelevant to any restriction of the right of privacy and reliance on them does not appear to be well founded.

The right of privacy was created to give individuals a zone of privacy, but it is subjected to limitations. Only *unreasonable* invasions of privacy are prohibited.[153] What is unreasonable must be determined by the court as different situations arise.[154] The early intent of the drafters indicated that what was considered to be a reasonable "zone of privacy" was dependent upon the physical location of the individual. For example, the difference between the urban area with its congestion and the more sparsely populated rural area[155] could be determinative of the reasonableness of the expectation of privacy. In this sense the drafters were informing the people of the flexible perimeters of the protected zone.

Finally, in consideration of a constitutional right of privacy, an examination must be made as to when the state may abridge that right. Being specifically guaranteed a right of privacy in section 6 and a remedy against a wrongful invasion of privacy in article I, section 12, a person certainly could argue that a fundamental interest in a right of privacy in the individual has been created. In this case the state could abridge that interest only when the state had demonstrated a "compelling interest." The decision in *Stein* seems to support this view. In *Stein* the court was only willing to deny the plaintiff's use of the right of privacy as a defense against the required public disclosure of financial interests due to the "compelling governmental interest

150. 3 PROCEEDINGS, *supra* note 86, at 1800. Due to the vague nature of the originally proposed section 2, Delegate Carey sought to amend the section out of existence.

151. *See* Illinois State Employees Ass'n. v. Walker, 57 Ill. 2d at 523, 315 N.E.2d at 15.

152. *See* Illinois State Employees Ass'n. v. Walker, 57 Ill. 2d at 536, 315 N.E.2d at 21-22 (Ryan, J., dissenting).

153. 3 PROCEEDINGS, *supra* note 86, at 1535.

154. *Id.* at 1538.

155. 6 PROCEEDINGS, *supra* note 86, at 31-32; *Verbatim Transcripts*, vol. III, 1528.

which is paramount to the rights of the individual."[156] Whether this creates a stronger standard of "compelling interest" is left to further judicial interpretation.

CONCLUSION

In a discussion of the guarantee of privacy of the individual against intrusions by the government, the right of the individual to privacy must always be balanced against the needs of the government to maintain itself in an orderly manner with respect to collective compelling needs of society. The danger becomes one of the government determining by its own collection of regulations and laws that its needs are virtually autonomous and always of more importance than those of the individual. It is against this dangerous intrusion by government that case law has grown up recently in the area of privacy.

At the time of adoption of the Illinois Constitution of 1970 the United States Supreme Court and the Illinois courts had recognized a reasonably well-defined right of privacy, as had courts of most other jurisdictions in the United States.[157] It is difficult to imagine that the framers of the Illinois Constitution of 1970 did not intend to adopt the existing common law of the time when they adopted section 6 guaranteeing a "right to be secure . . . against unreasonable invasions of privacy."[158] It is submitted that the common law of Illinois did recognize a right of privacy, but that the Illinois Supreme Court has severely limited that right, at least as to governmental invasions, in its decisions in the *Illinois State Employees Association v. Walker* and *Buettell v. Walker* cases.

A logical extension of the subject of privacy causes one to be even more aware of the role of computer banks, government registration requirements, bureaucratic regulations carrying the force of the law, and family planning requirements. It is submitted that the Illinois courts should not allow the Illinois citizens to be backed into an unprotected corner by a narrow interpretation of what was intended originally as a broad right guaranteed to all citizens against invasions of their privacy.

156. Stein v. Howlett, 52 Ill. 2d at 578, 289 N.E.2d at 413.
157. For instance, in 1952, a great number of jurisdictions had recognized the right of privacy. *See* note 26 *supra*.
158. ILL. CONST. art. I, § 6.

The John Marshall Journal Of Practice and Procedure

Volume 11 | Fall, 1977 | Number 1

Member, National Conference Of Law Reviews