Approved 3-3-92
Date

MINUTES OF THE House COMMITTEE ON Computers, Communications&Technology

The meeting was called to order by George Dean
Chairperson

12:00 Noon on February 26, 1992 in room 529-S of the Cap

All members were present except: Representative Kline - Excused

Committee staff present:

Julian Efird - Research
Jim Wilson - Revisor
Donna Stadel - Committee Secretary

Conferees appearing before the committee:

Representative Jim Garner
Mike Reecht - AT&T
Rob Hodges - Kansas Telecommunications Association
Karen Matson - Kansas Corporation Commission

Others attending: See attached list.

Chairman Dean called the meeting to order at approximately 12:10 P.M., announcing H.B. 3089 Cable television and H.B. 2945 Pay-Per-Call Service, previously scheduled for February 27, would be heard on Monday, March 2, along with overview of the Lottery.

Jim Wilson, Revisor gave the committee an overview of H.B. 3028 Telephone Call Identification Service (attachment 1).

Representative Garner, appeared before the committee and gave testimony in support of this bill (attachment 2). He also included a copy of a UCLA law review article which discusses the advent of caller identification technology and the resulting issues of informational privacy, and requested this and amendments to be a part of legislative record concerning this bill. (attachment 3). Representative Garner recommended favorable passage of H.B. 3028.

Chairman Dean asked if California's Corporation Commission did their regulatory oversight. Rep. Garner said, yes they did, they had a public utilities board which oversees this function, making sure the companies are providing this service to subscribers of telephone services so they know it is available and without charge. He pointed out 911 was exempt from caller ID because of emergency situations.

Rep. Pauls asked for examples of customers who would not want their number displayed, other than obscene callers. Rep. Garner said there is a good segment of our population who are very concerned about who has access to personal information about them. This is why we have unlisted telephone numbers for people who opt to choose who they want to make their number available to. Also there is concern that some corporations are using this service to develop marketing lists.

Rep. Patrick asked why the telephone company shouldn't set up a one time charge/fee to help pay for the cost of service by customers wanting this, rather than all customers absorb the cost of servcie only a few will utilize. It was agreed, any cost for the blocking service should go to those taking advantage of the identification service.

Mike Reecht representing AT&T appeared before the committee opposing legislation in its' current form; however, with the proposed amendment language, he felt some of his concerns, possibly all of them were alleviated (attachment 4).

Rob Hodges, Kansas Telecommunication Association appeared before the committee outlining comments of his telephone company members after reviewing H.B. 3028, (attachment 5).

Rep. Pauls asked for clairification that they were not opposed to blocking on an individual call basis as opposed to line blocking. Mr. Hodges, answered that was correct. There was some discussion as to how that might work from a technical standpoint.

Eva Powers, representing MCI stated briefly she was there in support of what Mike Reecht, AT&T and Rob Hodges, KTA had already said.

Karen Matson, Kansas Corporation Commission, appeared before the committee stating she was not offering testimony either in support of, or in opposition to the bill. Their observations were only from a technical aspect (attachment 6) and may already be incorporated in the amendments which she indicated she had not yet seen.

Rep. McKechnie asked if the commission recommends "per line" or "per call" blocking. Ms. Matson commented, because caller identification being a service not yet contemplated by our commission, they really have not come to a position in that regard. Generally those who promote caller ID would prefer call blocking because a caller must consciously input those codes before they place a call to have the ID blocked, it generally means that caller ID is going to become more widely available and if you are marketing a service to somebody and want to promote that, you would want to have more caller ID available on a widespread basis. Discussion followed concerning what might be the best way to provide this service.

Committee minutes of February 5, were presented before the committee for review and approval. Motion was made by Representative Rock to approve the minutes. Seconded by Rep. Patrick. Motion carried. The meeting adjourned at 12:50 P.M. until Thursday, February 27, 1992

# GUEST LIST

COMMITTEE: House CCT Committee DATE: 2-26-92

| NAME (PLEASE PRINT) | ADDRESS | COMPANY/ORGANIZATION |
|---|---|---|
| Allan Haverkamp | Topeka | KBI |
| Doug Smith | Topeka | St. Independent Telephone Assoc |
| David Nichols | Topeka | SWBT |
| Ever Powers | Topeka | M.C.I. |
| Jeff Russell | Topeka | United Tele |
| J. Bowser | Junction City | United Tel. |
| Rob Hodges | Topeka | Ks Telecom Assn |
| Karen Matson | Topeka | Kansas Corp. Comm. |
| Denny Koch | " | SW Bell |
| Rachel Lipman | Topeka | KCC |
| Dana Bradburg | Topeka | KCC |

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

HOUSE EDT
Attachment 1
3-26-92

*Session of 1992*

# HOUSE BILL No. 3028

By Representative Garner

2-12

AN ACT concerning telephone call identification service; enforcement by the state corporation commission.

*Be it enacted by the Legislature of the State of Kansas:*

Section 1. (a) The state corporation commission, by rule and regulation, shall require that every telephone call identification service offered in this state by a telephone corporation, or by any other person or corporation that makes use of the facilities of a telephone corporation, shall allow a caller to withhold display of the caller's telephone number, on an individual basis, from the telephone instrument of the individual receiving the telephone call placed by the caller.

(b) There shall be no charge to the caller who requests that the caller's telephone number be withheld from the recipient of any call placed by the caller.

(c) The state corporation commission shall direct every telephone corporation to notify the corporation's subscribers that such subscribers' calls may be identified to a called party either:

(1) Thirty or more days before the telephone corporation commences to participate in the offering of a call identification service; or

(2) by September 1, 1992, if the telephone corporation is participating in a call identification service prior to July 1, 1992.

(d) This section does not apply to any of the following:

(1) An identification service which is used within the same limited system, including, but not limited to, a Centrex or private branch exchange system, as the recipient telephone;

(2) an identification service which is used on a public agency's emergency telephone line or on the line which receives the primary emergency telephone number;

(3) any identification service provided in connection with legally sanctioned call tracing or tapping procedures; or

(4) any identification service provided in connection within any "800" or "900" access code telephone service until the telephone corporation develops the technical capability to comply with subsection (a), as determined by the state corporation commission.

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HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
VICE CHAIR JUDICIARY
MEMBER AGRICULTURE
TRANSPORTATION
LEGISLATIVE, JUDICIAL & CONGRESSIONAL APPORTIONMENT
JOINT COMMITTEE ON
KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM (KPERS)
INVESTMENT PRACTICES

26 February 1992

TESTIMONY BEFORE THE
HOUSE COMMITTEE ON COMPUTERS, COMMUNICATION AND TECHNOLOGY
ON H.B. 3028

Mr. Chairman and members of committee:

Thank you for the opportunity to appear in support of H.B. 3028. H.B. 3028 is mirrored after the California statute dealing with "caller identification" services. The bill, like the California law, would simply require that any telecommunication company offering a caller identification service to allow callers, who so requests, to block disclosure of the display of their telephone number to any such caller identification devise. There would be no charge to callers requesting this service. The Kansas Corporation Commission would have regulatory oversight and enforcement powers in this area.

Since at least 1987, telephone companies have been starting to offer a new "caller identification" service. This service displays the telephone number of the calling party each time the phone rings. I have been informed by some in the industry that the technology is currently available in 22 states. It has not been offered to Kansas yet, but inevitably it will be here.

This new achievement in telecommunications has not been welcomed without controversy. Usually, citizens and public officials raise serious concerns over individual rights to "informational privacy," particularly a person's right to control who has access to his or her telephone number. I have presented Chairman Dean a copy of a UCLA law review article which discusses the advent of caller identification technology and the resulting issues of informational privacy. I wish to make this article a part of the legislative record concerning this bill.

Although caller identification services have not yet been made available in Kansas, we should prepare for its certain and eventual arrival. The State of Kansas should provide the moderate protection of informational privacy set out in H.B. 3028 to alleviate concerns of those Kansans who do not wish to have their phone numbers identified by such devises.

House CCT
Attachment 2
2-26-92

Undoubtedly, there are numerous benefits to caller identification services. However, like many technological advances, it is subject to misuse. When the service has been introduced in other states, there are concerns raised about caller privacy. The State of Kansas should have some protection in place before the technology is available in Kansas, so that the controversy can be avoided.

I have visited with some representatives of the industry. They have recommended a few amendments to the bill. I have reviewed the proposed changes and I have no objections to them. I have attached a balloon to this testimony detailing those suggested changes.

I urge the committee to recommend favorable passage of H.B. 3028.

Session of 1992

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2-12

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(3) any identification service provided in connection with legally sanctioned call tracing or tapping procedures; or

(4) any identification service provided in connection within any "800" or "900" access code telephone service until the telephone corporation develops the technical capability to comply with subsection (a), as determined by the state corporation commission.

CUT - House Attachment 3 2-26-92

telephone number from which the caller is placing the call, on an individual call basis, from the number display device associated with the telephone in-

(b) There shall be no charge to the caller who requests that the telephone number from which the caller is placing the call

be withheld from the recipient of any individual call

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

# UCLA LAW REVIEW



VOLUME 37 OCTOBER 1989 NUMBER 1







# UCLA LAW REVIEW



VOLUME 37 OCTOBER 1989 NUMBER 1

## CONTENTS

### ARTICLES



### COMMENT

declaratory judgment action does present a concrete case and should be adjudicated.

Dean Griswold's recollection of then-Professor Frankfurter's reservations about the potential case-or-controversy problems of declaratory judgments is especially important in light of Justice Frankfurter's authorship of the Court's opinion in *Skelly Oil*.[22] By the time *Skelly Oil* was written, Justice Frankfurter's views of the constitutional problems of declaratory judgments and the jurisdictional concerns that flowed from those problems apparently had changed from what they were when he taught Dean Griswold's Federal Jurisdiction class. We respectfully submit that Professor Frankfurter's understanding of jurisdictional concerns about the declaratory judgment device was more accurate and better supported by history than was Justice Frankfurter's.

22. 339 U.S. 667 (1950).

# WE'VE GOT YOUR NUMBER! (IS IT CONSTITUTIONAL TO GIVE IT OUT?): CALLER IDENTIFICATION TECHNOLOGY AND THE RIGHT TO INFORMATIONAL PRIVACY

Glenn Chatmas Smith*

## INTRODUCTION

The filing of a telephone company tariff with a state public utilities commission seems an unlikely source of a prolonged and highly-publicized dispute over individual rights. Yet, in July 1987, when the New Jersey Bell Telephone Company sought permission to offer a new "Caller Identification" service,[1] which displays the telephone number of the calling party each time the phone rings, the stage was set for an ongoing controversy, with constitutional overtones, over the parameters of the right to privacy. Since that time, the dispute over Caller Identification has continued unabated

* Associate Professor of Law, California Western School of Law. B.A. 1975, George Washington University; J.D. 1978, New York University School of Law; L.L.M. 1979, Georgetown University Law Center. The author thanks Michal Belknap, John Noyes, Laurence Benner, Marilyn Ireland and Diane Seaberg for their very helpful comments on earlier drafts.

1. Filing by N.J. Bell Tel. Co. of a Revision of Tariff B.P.U.-N.J. No. 2, Providing for the Introduction of CLASS Calling Service on a Limited Basis, Docket No. TT87070560 (N.J. Bd. of Pub. Utils. July 16, 1987).

Part of a package of CLASS ("Custom Local Area Switching Service") features soon to be offered by telephone companies in important markets across the United States, Caller Identification "displays the number of the caller on a display device which [telephone subscribers] will have to obtain separately." *In the Matter of Filing by N.J. Bell Tel. Co. for a Revision of Tariff B.P.U.-N.J. No. 2, Providing for the Introduction of CLASS℠ Calling Service on a Limited Basis, Hearing Before State of N.J. Bd. of Pub. Utils.* 11 (Sept. 14, 1987) [hereinafter *CLASS Hearings*] (testimony of Fred D'Alessio, New Jersey Bell Tel. Co.).

in New Jersey[2] and spread to other states, where proposed implementation of the new technology has generated substantial media attention[3] and numerous expressions of concern by public officials and private citizens.[4] In California, concerns about Caller Identification have reached the state legislature, which is likely to pass a law limiting the service.[5] Privacy-related concerns have prompted six days of administrative hearings on Pennsylvania Bell's Caller Identification proposal.[6]

The controversy over Caller Identification in New Jersey illustrates the centrality of privacy issues to the debate over the merits of Caller Identification.[7] Proponents of the new technology have emphasized the usefulness of the service in protecting individual privacy by permitting customers to screen incoming calls and prevent obscene or harassing calls.[8] Opponents have raised the specter of privacy invasion through disclosure of unpublished telephone numbers, identification of callers to "anonymous" hotlines, and negation of the telephone subscriber's basic ability to control the dissemination of his or her own number.[9] Significantly, Caller Identification's leading opponents have suggested that Caller Identification's implications for calling party privacy "rise to constitutional dimension."[10]

This Article provides the first detailed analysis of constitutionally based objections to Caller Identification. It does so in part to contribute to the ongoing debate in states where the service has been proposed or is under active consideration.

Beyond its significance as a timely issue facing regulators, telephone companies, and the public, the dispute over Caller Identification presents a novel and interesting case study in the application of two constitutional doctrines which generate more than their share of contemporary uncertainty. To invoke the Constitution as a binding source of law, opponents of Caller Identification must meet the threshold requirements of the "state action" doctrine. Yet, the relationship between regulator and regulated that produced Caller Identification in New Jersey (and is likely to be replicated in other states) does not fit comfortably under the state action model currently used by the Supreme Court and lower courts. And in weighing claims that disclosure of calling party telephone numbers violates privacy rights, the analyst is confronted with several new twists on an admittedly amorphous strand of substantive due process: the right to "informational privacy."[11] Application of both

2. One of the three members of the New Jersey Board of Public Utilities cited privacy concerns in dissenting from the Board's October 1988 order approving statewide implementation of Caller Identification. New Jersey Bd. of Pub. Utils., Filing by N.J. Bell Tel. Co. of a Revision of Tariff B.P.U.-N.J. No. 2, Providing for Approval of Provision of CLASS[SM] Calling Service on a Standard Tariff Basis and the Withdrawal of the Interim Limited CLASS[SM] Calling Service Tariff at 5, Docket No. TT88070825 (N.J. Bd. of Pub. Utils. Oct. 20, 1988) [hereinafter Statewide CLASS Order] (dissenting opinion of Christine Whitman, Board President). The dissenting commissioner then emphasized privacy concerns in an appearance on the *Today Show*. Further, the New Jersey Civil Liberties Union threatened a legal challenge to the new service. Concerns about the privacy rights of calling parties were central to the Union's legal deliberations. Telephone Interview with Edward Martone, Executive Director, New Jersey Civil Liberties Union (Feb. 24, 1989).

3. Recent proposals to provide Caller Identification service in such important markets as California, Pennsylvania, New York, and New England have been the subject of media attention--including a nationally-syndicated Andy Rooney column. *See, e.g.*, Rooney, *Some Things Made in U.S.A. Are OK*, San Diego Tribune, Mar. 18, 1989, at B3, col. 4 ("This is going to revolutionize the way we use the telephone . . . ."); *Bell Atlantic's "Caller I.D." Bid Sparks Criticism*, Wall St. J., Mar. 9, 1989, at B8, col. 1; *Who's Phoning? New System Will Tell You*, N.Y. Times, Mar. 1, 1989, at D1, col. 4.

4. *See, e.g.*, Wall St. J., *supra* note 3 ("Pennsylvania's Consumer Advocate, an agency connected to the state attorney general's office, filed a complaint against Bell Atlantic's Bell of Pennsylvania unit, asking state regulators to delay a vote on whether to permit the service"); N.Y. Times, *supra* note 3, at C12, col. 1 (reporting concerns expressed by a member of the New York State Public Service Commission, a telecommunications specialist with the Consumer Federation of America, a lawyer for the American Civil Liberties Union, and the director of a suicide hotline in New York).

5. Assembly Bill 1446, introduced on March 7, 1989, and approved by an overwhelming margin by the California Assembly on June 27, 1989, would require the California Public Utilities Commission to order telephone companies offering Caller Identification service in the state to take measures to protect the privacy of calling parties. *See infra* note 273 (summarizing bill's provisions). Senate passage is anticipated.

6. Telephone interview with Robert Fortescue, Product Manager, Central-Office Based Services, Bell Atlantic Corp. (Aug. 17, 1989) [hereinafter Fortescue Interview].

7. Privacy-related issues also figured prominently in Pacific Bell's deliberations over Caller Identification service. Pacific Bell's Intelligent Network Task Force Report cited privacy concerns as an "unresolved" and "major" issue. Pacific Bell Tel. Co., The Intelligent Network Task Force Report 13 (Oct. 1987). Pacific Bell considered several approaches for mitigating the privacy concerns of calling parties. Telephone interview with Ethan Thorman, Manager, CLASS Services, Pacific Bell Tel. Co. (Mar. 6, 1989) [hereinafter Thorman Interview].

8. *CLASS Hearings*, *supra* note 1, at 12–15 (D'Alessio testimony); *id.* at 28–33 (testimony of Colonel Clinton Pagano, Superintendent of New Jersey State Police) (Call Identification useful in combating "obscene calls, threatening calls, nuisance calls, harassing calls, of a million different varieties").

9. *See, e.g.*, Statewide CLASS Order, *supra* note 2, at 5.

10. *CLASS Hearings*, *supra* note 1, at 44 (Makul testimony).

11. The right, which derives from the Supreme Court's 1977 recognition of a due process-based "interest in avoiding disclosure of personal matters," *see infra* text accompanying note 123, has become known as the right to "informational privacy." *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1393 (2d ed. 1988); Note, *The Constitutional Right of Informational Privacy: Does It Protect Children Suffering From AIDS?*, 14 FORDHAM URB. L.J. 927 (1986) [hereinafter Fordham Note]; Note, *The Constitutional Right to Withhold Private Information*, 77 NW. U.L. REV. 536, 541 (1982) [hereinafter Northwestern Note].

the state action and informational privacy rights doctrines to Caller Identification technology points up—and permits final resolution of—doctrinal difficulties of relevance far beyond the immediate context of Caller Identification service.

Part I of this Article provides necessary background by tracing the development and deployment of "CLASS" (Custom Local Area Switching Service) technology and the adoption of Caller Identification in New Jersey.

The state action question is analyzed in Part II. After tracing recent developments in the state action doctrine, this Part explains how New Jersey Bell's decision to offer Caller Identification would not be regarded as state action under the paradigm now in general use. Part II argues, however, that a state action paradigm suggested by earlier Supreme Court cases should be used to decide state action controversies involving pervasively and continuously regulated entities such as public utilities. Under the alternative model, the New Jersey Bell decision would be subject to constitutional strictures.

Part III traces the modern legal evolution of privacy rights, including the evolution of the distinct constitutional right to informational privacy, which provides the most appropriate lens through which to view Caller Identification.

Privacy implications of Caller Identification, in terms of this emerging constitutional framework for the protection of informational privacy rights, are then analyzed in Part IV. First, the weightiness of the individual's privacy interest in preventing disclosure of calling party telephone numbers is assessed. Second, the public interests in disclosing these numbers are measured. Part IV then balances the public interests against the individual privacy interests, concluding that the balancing tilts just barely toward the calling party side of the scale. Finally, Part IV considers the possibility of employing a broader model of privacy rights in contexts such as Caller Identification.

The Article concludes by summarizing the lessons from this analysis for telephone companies considering implementation of Caller Identification and for analysts addressing other state action and informational privacy questions.

## I. CALLER IDENTIFICATION: ITS ORIGINS AND ATTRIBUTES IN GENERAL AND IN NEW JERSEY

### A. *An Introduction to CLASS Technology and Caller Identification*

CLASS, or "Custom Local Area Switching Service," employs an innovative telephone switching technology capable of accommodating the additional signals necessary for the "set of advanced call management features" marketed under the CLASS name.[12] CLASS is billed as a technology to "enhance customers' security, control and convenience."[13] Among the services available, "Call Block" allows customers to screen calls by preventing their phones from ringing in response to a predetermined list of numbers. "Priority Call" provides a distinctive ring for a small number of high priority calls.[14] "Call Trace" "allows the customer to trace a call [by] sending a printout of the called and calling numbers, [and] the date and the time of the call traced" to the local telephone company.[15]

Caller Identification implicates both security and control. If the New Jersey case study is any guide, telephone companies will emphasize, in their tariff filings, the new technology's security value, both in detecting and preventing obscene and harassing calls[16] and in facilitating response by emergency services (e.g., police, fire, and ambulance) to incomplete telephone requests.[17] The

12. *CLASS Hearings*, supra note 1, at 7 (D'Alessio Testimony). The technological innovations coincide with the goal of local telephone companies to enhance their revenue base from local telephone service in the aftermath of the AT&T breakup. That shift ended the prevalent practice of "overcharging on long-distance service . . . to keep the local rates that ordinary Americans paid artificially low." Burgess, *Remember Ma Bell? Emotions Are Mixed As Her Memory Fades*, Wash. Post Nat'l. Weekly Ed., Jan. 9, 1989, at 6, col. 3. Faced with paying "the full costs of the services they received[ ]," *id.*, consumers have exerted pressure on telephone companies and regulators to keep the costs of basic telephone service as low as possible. Marketing additional services on a pay-per-option basis is one way to accomplish this goal. For example, New Jersey Bell anticipated an increase of $850,000 in revenues in the ten counties served by the CLASS interim experiment during the first eighteen months. *See* Filing by N.J. Bell Tel. Co., of a Revision of Tariff B.P.U.-N.J. No.2, Providing for Approval of CLASS℠ Service on a Limited Basis, Docket TT8707560 (Nov. 2, 1987 - Apr. 30, 1988) (Six Month Report) vol. I, Tab 3, at 1 [hereinafter Six Month Report].

13. *CLASS Hearings*, *supra* note 1, at 7 (D'Alessio testimony).

14. *Id.* at 9.

15. *Id.* at 11 ("to be used only in threatening or seriously harassing situations," Call Trace information would be "available to the police for their use").

16. *Id.* at 12–13. Opponents and supporters of Caller Identification in New Jersey debated the relative merits of Call Trace and Caller Identification in preventing abusive phone calls. This issue is discussed *infra* at text accompanying notes 310–18.

17. *See infra* text accompanying notes 290–93.

individual telephone subscriber, however, is much more likely to be interested in claims that Caller Identification will allow him or her to screen calls by obtaining the telephone number of an incoming caller before deciding whether to answer.[18]

Telephone companies offering Caller Identification provide only the electrical signal that can identify the incoming number. Caller Identification subscribers must purchase a separate video display terminal, at a cost of between $60 and $80.[19]

### B. *Implementation of Caller Identification*

To date, three telephone companies offer CLASS services on a permanent basis. Of these, telephone companies in New Jersey and West Virginia have included a Caller Identification feature in their CLASS service offerings.[20]

Although its other proposed CLASS offerings generated no real controversy,[21] New Jersey Bell's Caller Identification proposal led to significant publicity in national and local media.[22] In large measure, the controversy was fueled by the active opposition of the Division of Rate Counsel of the New Jersey Public Advocate, which

18. *CLASS Hearings*, *supra* note 1, at 38–39 (Makul testimony) (discussing New Jersey Bell claims that Caller Identification, by "allow[ing] one to identify the caller even before the phone is answered," is analogous to allowing telephone customer to see "who is at the door before you open it"). The value of Caller Identification as a call screening device is debatable. *See infra* text accompanying notes 319–21. However, there appears to be significant public interest in the call screening role of Caller Identification. *See, e.g.*, Six Month Report, *supra* note 12, Vol. I, Tab 2, at 4–5 (summarizing studies of interest among New Jersey Bell customers and national telephone subscribers).

19. *Caller Identification: New Bell Service Would Display Incoming Phone Numbers*, The Star-Ledger, June 17, 1988, at 32, col. 2.

20. Fortescue Interview, *supra* note 6. Concerns about customer and public reaction to Caller Identification's privacy implications led Diamond State Tel. Co. to omit the new technology from the menu of CLASS services it now makes available in Delaware. Telephone interview with Gil Smith, Regulatory Affairs Officer, Diamond State Bell Tel. Co. (Mar. 13, 1989) [hereinafter Smith Interview].

21. *See, e.g.*, *CLASS Hearings*, *supra* note 1, at 34 (Makul testimony) ("six of these [CLASS] services are not objectionable in principle").

22. In addition to the discussion of New Jersey's Caller Identification experiment in two different discussions on the *Today Show*, the New Jersey controversy was covered by the Wall Street Journal, see *Phone Firm's Proposal for New Service Raises Civil Liberty and Privacy Issues*, Wall St. J., Sept. 15, 1987, at 38, col. 3, and the Philadelphia Inquirer, see *State Approves Phone Service That Would Reveal Callers' Numbers*, Philadelphia Inquirer, Sept. 18, 1987, at 3. A large number of local New Jersey publications also covered the controversy in news stories. *See, e.g.*, *Phone Tracer vs. Privacy*, The Record, Aug. 28, 1987, at A3; *Privacy May Suffer with New Telephone Service*, Vineland Times J., Aug. 14, 1987, at 1, and editorials, *Telephone Privacy*, The Courier-News, Aug. 18, 1987, at A9, col. 1.



is responsible for advocating on the public's behalf in state administrative proceedings,[23] and the New Jersey Civil Liberties Union, which raised a number of privacy-based objections and threatened litigation.[24]

In response to this controversy, the New Jersey Board of Public Utilities acceded to the request of the Division of Rate Counsel and held a public hearing devoted to the Caller Identification issue.[25] After hearing from nine witnesses during a one-day hearing, the Board approved the proposed service experiment and imposed study and reporting requirements on New Jersey Bell.[26] The telephone company commenced the experiment in November 1987. Eight months later, New Jersey Bell declared the experiment a success and requested permission to offer CLASS service statewide with full Caller Identification service.[27] This time, the Board denied

23. *See CLASS Hearings*, *supra* note 1, at 34–41 (Makul testimony). Division Director Makul argued that other CLASS services, such as Call Block and Call Trace, would be better means of combating harassing telephone calls; that an answering machine would be a better means of screening incoming telephone calls; and that use of Caller Identification as a call screening device could actually be counterproductive, because subscribers might not answer calls from family members or friends calling from unfamiliar telephone numbers (including hospital emergency rooms). As to privacy concerns, the Director's essential objection was that Caller Identification would "allow a called party to obtain the telephone number of a calling party without the calling party's knowledge." *Id.* at 41. The Director saw this "privacy violation," *id.* at 42, as one of potentially wide magnitude, leading to inappropriate acquisition of calling party numbers by "individuals who had histories of convictions for criminal use of the telephone, sex offenders, snoopy individuals and government agencies, overzealous salesmen, supposedly 'confidential' hotlines, and numbers featuring recorded messages." *Id.* at 41. The Director also expressed concern that "many social telephone services [such as public health hotlines, suicide hotlines, child abuse hotlines, and tax agencies] could be seriously impaired if a caller's expectation of privacy is eroded." *Id.* at 45–46. The privacy implications of Caller Identification are elaborated upon *infra* at text accompanying notes 191–99.

24. The CLU Director made a much-publicized statement about "starting a class action suit representing all of the customers in the represented areas who have unlisted numbers." *CLASS Hearings*, *supra* note 1, at 99. The Executive Director envisioned the class action as a device for nonpublished subscribers to receive "a refund on all the extra money they are paying to remain unlisted because, obviously, there is no point in remaining unlisted or unpublished in the phone system any longer." *Id.*

25. *See CLASS Hearings*, *supra* note 1, at 1–2.

26. *See* Filing by N.J. Bell Tel. Co. of a Revision of Tariff B.P.U.-N.J. No. 2, Providing for the Introduction of CLASS℠ Calling Service on a Limited Basis, Decision and Order (N.J. Bd. of Pub. Utils. Sept. 17, 1987) [hereinafter Interim CLASS Order]. The study and reporting requirements are discussed *infra* at text accompanying notes 69–70.

27. Filing by N.J. Bell Tel. Co. of a Revision of Tariff B.P.U.-N.J. No. 2, Providing for Approval of Provision of CLASS℠ Calling Service on a Standard Tariff Basis and the Withdrawal of the Interim Limited CLASS℠ Calling Service Tariff, Docket No. TT88070825 (N.J. Bd. of Pub. Utils. July 7, 1988).

the request of the Division of Rate Counsel for more extensive administrative hearings.[28] Without further hearings, a divided Board issued an October 20, 1988 order approving statewide implementation of Caller Identification technology over a four-year period.[29]

## II. The Threshold State Action Question: Does the Constitution Apply to Caller Identification?

Invocation of the United States Constitution as a basis for opposing Caller Identification obviously assumes that the Constitution's protections of the right to privacy are applicable in some way to the issue at hand. May opponents justly claim that the Constitution is binding as a matter of law,[30] or is the Constitution useful to opponents only as an important model of rights that ought to be followed by regulators and regulated alike because of its great moral force?

This Part analyzes these questions and concludes that the Constitution should be legally binding when public utility regulators become as involved in a decisionmaking process as they did in the New Jersey decision to adopt Caller Identification.

The main impetus for development and implementation of Caller Identification comes from private corporate entities, such as New Jersey Bell. Actions by private individuals or entities are not subject to constitutional restrictions, nor is government normally held liable for the actions of private parties, without the existence of "a sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself."[31] Determining when private actions should be treated as "state action" for purposes of federal constitutional analysis is, however, fraught with difficulties and uncertainties. One early commentator on the state action doctrine

28. Statewide CLASS Order, *supra* note 2, at 2. The Board stated:

> Division of Rate Counsel's filings both prior to the trial and presently, the public hearing held on September 14, 1987, and numerous written comments submitted by members of the public on this issue fully explored all positions regarding Caller ID. We are not persuaded that additional hearings will appreciably expand the current record as to justify the time and cost of granting Rate Counsel's request.

29. *Id.* at 3–4.

30. This would be a powerful claim given the obligation of state regulatory officials to support and defend the Constitution, U.S. Const. art. VI, cl. 3, and the presumed litigation sensitivity of public utility commissioners and utility companies.

31. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) (quoting Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176 (1972)).



called it a "conceptual disaster area."[32] Repeated Supreme Court attempts to articulate when private action should be treated as state conduct have only fueled the critical fires.[33] The Court itself has recognized that "[t]he true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met."[34]

State action cases use a bewildering array of terms to describe the necessary degree of "nexus" between government and a pervasively regulated party.[35] Although the cases leave unclear the question of how much activity by public utility regulators is necessary to convert the initiatives of regulated entities into "state action," court decisions suggest two possible paradigms. One model, which this Article refers to as "responsibility through encouragement," turns on whether governmental regulatory officials can be said to have encouraged (in the sense of causing) regulated parties to take a constitutionally suspect action. The second model, which this Article terms "imprimatur through involvement," finds state action whenever regulated entities are subjected to active and extensive regulatory supervision—regardless of whether the regulators caused the entity to take the actions.

### A. *State Action in the Regulated Industry Setting: Some Guiding Principles*

Several important Supreme Court state action cases involved attempts to apply constitutional standards to actions by private

32. Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection and California's Proposition 14*, 81 Harv. L. Rev. 69, 95 (1967).

33. For a survey and analysis of modern state action cases, see J. Nowak, R. Rotunda, & J. Young, Constitutional Law 497–525 (2d ed. 1983). For critical commentary, see, e.g., L. Tribe, American Constitutional Law, § 18-2 (2d ed. 1988) ("inevitable indeterminacy of contemporary state action 'doctrine' "); Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. Pa. L. Rev. 1289, 1290 (1982) (Professor Black's assessment is "even more apt today"); Schneider, *The 1982 State Action Trilogy: Doctrinal Contraction, Confusion, and a Proposal for Change*, 60 Notre Dame L. Rev. 1150 (1985).

34. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) (citing Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)).

35. For example, in three sentences explaining why a utility's policy of terminating electric service without a hearing was not state action, the court in Taylor v. Consolidated Edison Co., 552 F.2d 39, 45 (2d Cir.), *cert. denied*, 434 U.S. 845 (1977), spoke of: whether the state "has involved itself in the decision" to terminate without a hearing; whether the termination policy "is and always has been" the utility's; whether "the state would object" to a change in the utility's procedure; whether "the state has ever ordered" termination without hearing; and whether the state has given "any kind of incentive" to the utility to terminate without hearing.

companies which, like the New Jersey Bell Telephone Company, are subject to pervasive schemes of governmental regulation. In the early 1950s case of *Public Utilities Commission v. Pollak*,[36] the Supreme Court found "a sufficiently close relation" between the actions of the District of Columbia Public Utilities Commission and a private street railway company "to make it necessary" for the Court to consider constitutional objections to the company's practice of installing piped-in music systems on certain streetcars and buses.[37] By contrast, in cases decided in 1972 and 1974, the Court found that neither the refusal of a private club regulated by state liquor control authorities to serve the black guest of a club member[38] nor the peremptory termination of electric service by "a heavily regulated utility" constituted state action.[39] Two decisions in a trilogy of cases decided in 1982 declined to find state action in the personnel decisions of a largely state-funded private school for maladjusted youths[40] and the decisions of private nursing homes to discharge or transfer Medicaid patients without following certain procedures.[41]

These Supreme Court grapplings with state action have closed the door to several possible avenues for subjecting public utilities to the individual rights protections of the Constitution.[42] The most important limitation for present analytical purposes is the holding in *Jackson v. Metropolitan Edison Co.* that "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment."[43] This holding has been accepted by later Supreme Court and lower court decisions,[44] despite the brief suggestion in *Pollak* that the power of "regulatory supervision" held by a public services commission could constitute state action.[45] Later cases have validated a corollary principle announced in *Jackson*: That the mere approval by government regulators of general tariff provisions for

36. 343 U.S. 451 (1952).

37. *Id.* at 462–66. Challengers brought a first amendment-based claim that the radio playing interfered with freedom of conversation and a fifth amendment-based claim that the practice invaded the "constitutional rights of privacy of the passengers." *Id.* at 463.

38. Moose Lodge No. 107 v. Irvis, 407 U.S. 161, 171–79 (1972).

39. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349–59 (1974). Another state action case of the same time period, involving a licensed and heavily regulated "utility," is Columbia Broadcasting Sys. v. Democratic Nat'l. Comm., 412 U.S. 94 (1973). In rejecting the claim that refusal of broadcasters to accept editorial advertising violated the first amendment, three Justices concluded that "the policies complained of do not constitute governmental action." *Id.* at 121 (Burger, J., Part III, joined by Stewart and Rehnquist, JJ.). Further discussion of *Columbia Broadcasting* is inappropriate here, however, because a majority of the Court did not coalesce behind any view of the state action question, *see* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 33, at 515, and, more important, because the state action question turned on specialized statutory limitations on the power of the Federal Communications Commission to intervene in broadcaster decisions about program content, *see, e.g.*, 412 U.S. at 119–20.

40. Rendell-Baker v. Kohn, 457 U.S. 830, 837–43 (1982).

41. Blum v. Yaretsky, 457 U.S. 991, 1002–12 (1982).

42. The Court has refused to view the granting of monopoly or near monopoly status to a private company as sufficient to transform that entity into a state-like actor. Public Util. Comm'n v. Pollak, 343 U.S. 451, 462 (1952); *Jackson*, 419 U.S. at 351–52. *See also* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 107 S. Ct. 2971, 2985–87 (1987) (refusal to find state action in grant of exclusive right to control use of "Olympic").

Further, that public utilities provide "an essential public service" is insufficient to bring those parties into the "public function" strand of the state action doctrine. *Jackson*, 343 U.S. at 352–54.

43. 419 U.S. at 350 (citation omitted). The Court came to this conclusion notwithstanding the recognition that most regulation of public utilities is "extensive and detailed." *Id.*

44. *See, e.g.*, *San Francisco Arts & Athletics*, 107 S. Ct. at 2971; *Blum*, 457 U.S. at 1004; Anderson v. USAir, Inc., 818 F.2d 49 (D.C. Cir. 1987) (fifth amendment analysis); Cobb v. Georgia Power Co., 757 F.2d 1248, 1250–51 (11th Cir. 1985); Taylor v. Consolidated Edison Co., 552 F.2d 39, 44–45 (2d Cir.), *cert. denied*, 434 U.S. 845 (1977).

45. As discussed below, *infra* text accompanying notes 72–81, modern cases tend to cite *Pollak* as a decision relying on the active involvement and approval of public utilities commissioners to find that the utility practice in question constituted state action. However, the text of the brief state action discussion in *Pollak* suggests that the Court viewed the fact that the public utility was operated under a scheme of "regulatory supervision" as sufficient to create state action. The relevant passage reads:

> In finding [a sufficiently close nexus] we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby.

343 U.S. at 462 (footnote omitted). Although the *Pollak* Court "particularly" relied on the active regulatory posture taken by the District of Columbia Public Utilities Commission, the Court relied independently on its "recognition" that Congress provided for "regulatory supervision." *Id.* Indeed, it was to its recognition of the *power* of regulatory supervision—and not to its description of the power's *actual exercise*—that the *Pollak* Court attached this footnote: "[W]hen authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself." *Id.* at 462 n.8. This footnote placement adds to the impression that the *Pollak* majority equated the presence of a regulatory supervision power per se with state action.

public utility services does not subject specific practices outlined in the tariffs to constitutional scrutiny.[46]

Thus, it is well-settled that if opponents of New Jersey Bell's Caller Identification wish to invoke the state action doctrine, they must show "something more"[47] than that New Jersey Bell is a heavily regulated utility which operates under general tariffs approved by the state of New Jersey.

### B. *The Current State Action Model and Its Application to the New Jersey Case Study*

#### 1. The "Responsibility Through Encouragement" Model

The Supreme Court has recently viewed the state action requirement as "assur[ing] that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct."[48] For example, the majority in *Blum v. Yaretsky*[49] used a variety of phrasings to describe when a finding of government responsibility is appropriate. The majority opinion variously referred to government exercising "coercive power,"[50] issuing an "affirmative[ ] command[ ],"[51] "dictat[ing] the decision,"[52] and providing "such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[53] The theme of responsibility (or, it could be said, causation) which unites the

46. As the *Jackson* opinion noted:

> The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility . . . does not transmute a practice initiated by the utility and approved by the commission into "state action."

419 U.S. at 357. *Accord* Carlin Communications, Inc. v. Southern Bell Tel. & Tel. Co., 802 F.2d 1352, 1358, 1361 (11th Cir. 1986); Teleco, Inc. v. Southwestern Bell Tel. & Tel. Co., 511 F.2d 949 (10th Cir.), *cert. denied*, 423 U.S. 875 (1975).

47. *Cobb*, 757 F.2d at 1251.

48. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

49. 457 U.S. 991 (1982).

50. *Id.* at 1004.

51. *Id.* at 1005.

52. *Id.* at 1010.

53. *Id.* at 1004.



different shades of meaning in these phrases[54] echoes in several other recent cases.[55]

The Supreme Court has not indicated clearly whether the responsibility paradigm should apply in the context of public utility rate and service regulation.[56] Lower courts, however, have applied the model to state action questions involving public utilities.[57] Two such cases illustrate how the responsibility paradigm focuses on the impact, and not the extent, of government's regulatory activity.

In *Carlin Communications, Inc. v. Southern Bell Telephone & Telegraph Co.*,[58] part of the challenger's state action theory was that intervention by the public services commission caused the telephone company to restrict its "Dial It" access policy to the exclusion of the challenger's sexually-oriented messages. In support of this claim, the challengers pointed to significant involvement by Florida Public Services Commission members in the implementation of the telephone company's policy.[59]

54. The *Blum* opinion returned to the responsibility theme at other points. In rejecting an argument for state action based on Medicaid regulations, the Court explained that the regulations do not "demonstrate that the State is responsible for the decision to discharge or transfer particular patients." *Id.* at 1008 (decisions "ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State"). The Court also noted that "[t]he State is simply not responsible for [the decision to discharge or transfer patients], although it clearly responds to it" by reducing benefit levels accordingly. *Id.* at 1009 n.19 ("if a particular patient objects to his transfer to a different nursing facility, the 'fault' lies not with the State").

55. *See* San Francisco Arts & Athletics Inc. v. United States Olympic Comm., 107 S. Ct. at 2917, 2986 (1987) (citing *Blum* for proposition that coercive power or significant encouragement is required for state action); Rendell-Baker v. Kohn, 457 U.S. 839, 840 (1982) (quoting *Blum* language quoted in text); *id.* at 841 (personnel discharges in question "were not compelled or even influenced by any state regulation").

56. None of the recent Supreme Court state action cases involved government regulation of a pervasiveness comparable to the all-encompassing control over rates and service which utility regulators exert.

57. *See, e.g.*, Carlin Communications v. Southern Bell Tel. & Tel. Co., 802 F.2d 1352, 1357 (11th Cir. 1986) (challenger "has failed to point to anything in the record that would indicate the [regulatory body] was responsible for Southern Bell's decision"); Taylor v. Consolidated Edison Co., 552 F.2d 39, 45 (2d Cir.) (posing question in terms of state's "responsibility" for utility policy), *cert. denied*, 434 U.S. 845 (1977); Kops v. New York Tel. Co., 456 F. Supp. 1090, 1094 (S.D.N.Y. 1978) (no "allegation . . . that the state influenced or encouraged the telephone company"), *aff'd*, 603 F.2d 213 (2d Cir. 1979); Cochran v. Public Serv. Comm'n., 421 F. Supp. 17, 19 (N.D. Okla. 1976) (failure of commission to order challenged practice indicates no state action).

58. 802 F.2d 1352 (11th Cir. 1986). *Carlin* was an action under 42 U.S.C. § 1983 (1982). Because conduct that constitutes state action also meets the "under color of state law" requirement for § 1983 actions, the *Carlin* court applied the state action case law to the dispute before it. 802 F.2d at 1357 n.1.

59. The challengers introduced evidence that a commissioner expressed concerns about the possibility of "pornographic phone calls" at an initial agenda conference and

Despite the active regulatory involvement of state officials, the *Carlin* court was looking for something else. The court downplayed evidence of leading comments made by Commission members at the initial and prehearing levels because it did "not support an inference that the [public service commission] *required* Southern Bell to add a prohibition on message content."[60] The court also remained unimpressed by the nature of the comments made by Commission members at the public hearing because they did "not give rise to a reasonable inference that the [Commission] *coerced* Southern Bell into placing the proposed language in its tariff in the first place."[61]

Similarly, in *Taylor v. Consolidated Edison Co.*,[62] another lower court employed the responsibility model in determining that Consolidated Edison's decision to terminate a customer's electrical service without a hearing, because she allegedly had tampered with her electric meter and refused to pay an estimated bill, was not tantamount to state action. New York law required some procedural protections, short of the hearing Taylor desired, before service termination. As the court recognized, the relevant regulatory agency had "intervened extensively" in the general "area" of termination of utility services.[63]

Nevertheless, in deciding the state action question pending before it, the *Taylor* court focused on whether the state was responsible for the utility's practice. That theme is implicit in the court's comment that "there is no evidence that the state would object" to hearings before discontinuance.[64] The responsibility model is also reflected in the court's statement that the state had never "ordered Con Ed not to conduct pretermination hearings or given it any kind of incentive to deny such hearings."[65] Finally, the *Taylor* court, in rejecting an argument that the Commission staff's intervention on behalf of the customer justified a finding of state action, emphasized responsibility. As the court put it: "All that the Commission has done is to exercise its supervisory powers in appellant's favor, investigating the circumstances of the termination and requiring that appellant not be deprived of service pending judicial disposition of her claims."[66]

at a prehearing conference. The evidence also showed that two commissioners made comments at the public hearing on the Dial-It tariff which tied commission approval of the total service offering to the ability of the telephone company to screen out sexually-oriented messages. 802 F.2d at 1359–60.

60. *Id.* at 1359 (emphasis added).

61. *Id.* at 1360–61 (emphasis added).

62. 552 F.2d 39 (2d Cir.), *cert. denied*, 434 U.S. 845 (1977).

63. *Id.* at 45. The court compared the situation before it to the facts of *Jackson*, finding it "clear . . . that New York has intervened extensively in the termination area, as was not the case in *Jackson*." *Id.* The New York Public Utility Commission had intervened specifically in Taylor's case, invoking a procedure whereby Commission staff members informally investigate customer complaints and may (as occurred in *Taylor*) prohibit discontinuance of service pending further investigation. *Id.* at 44–45.

64. *Id.* at 45.

65. *Id.*

66. *Id.* at 46. This view that governmental involvement does not enhance a state action argument if the involvement is helpful to the challenger's position is logical if the proper question is whether the involvement caused the utility's actions; A appears less "responsible" for the injuries B inflicts upon C if A intervenes on C's behalf.

67. In its order authorizing the CLASS experiment, the Board stated that Caller Identification "could be a further tool" in serving "the needs of law enforcement and emergency service officials for timely information in emergency situations." Interim CLASS Order, *supra* note 26, at 3. The Board also echoed New Jersey Bell's position in stating that "Non-published Listing Service does not provide, and has never been intended to provide complete anonymity." *Id.* at 3. The legitimacy of the privacy expectation of subscribers with unpublished numbers is discussed *infra* at text accompanying notes 258–61. Further, in its order authorizing statewide implementation, the Board stated that "[a]cceptance of the CLASS offering will give full play to technology." Statewide CLASS Order, *supra* note 2, at 3.

## 2. Application of the Responsibility Model to New Jersey's Adoption of Caller Identification

If the proper paradigm for assessing state action in the public utility regulation context is responsibility through encouragement, the implementation of Caller Identification technology in New Jersey (as with the likely implementation pattern in other states) is destined to fall in the "no state action" domain. True, New Jersey Bell may have been somewhat "encouraged" by several positive statements the Board of Public Utilities made in its CLASS service orders.[67] However, as discussed above, the cases employing the responsibility model have not allowed plaintiffs to fashion state action claims from such isolated statements. Rather, the focus has been on whether coercion or significant encouragement made the regulatory body a virtual "partner" in the challenged decision. The record of actions taken by the Board of Public Utilities and its staff does not show that Bell was coerced to adopt Caller Identification as part of its CLASS menu of services. Nor was Bell in any meaningful sense encouraged, influenced, or given incentives to develop and implement its proposal.

Indeed, the Board can quite plausibly characterize some of its actions as "exercis[ing] its supervisory powers in [the subscribers'] favor," akin to the New York PUC in *Taylor*. In both of its orders, the Board continued to speak in tentative, experimental terms and

to suggest vaguely that it might reverse course on Caller Identification.[68] Further, the Board established an ongoing monitoring presence by requiring New Jersey Bell to file reports "detailing customer reaction to the experiment"[69] and directing its staff and Bell to work together on matters of CLASS implementation.[70] Finally, both CLASS orders hold out the continuing possibility of imposing two limitations on Caller Identification: "[G]iv[ing] calling parties notification on calls where caller identification is taking place" and imposing "use restrictions" on certain subscribers (such as businesses or anonymous hotlines).[71]

To the extent that these Board actions have any causative impact on New Jersey Bell, they are likely to influence the utility to be more, not less, protective, of subscriber privacy. These Board actions attenuate any claim that the Board is "responsible" for the alleged threats to privacy caused by Caller Identification.

### C. *A Better Paradigm for the Public Utility Regulation Context*

#### 1. The "Imprimatur Through Involvement" Model

A different state action model emerges from *Pollak* and *Jackson*, the two cases discussed above in which the Supreme Court reached contrary conclusions about subjecting public utility actions to constitutional standards.[72]

In reconciling its holding of no state action with *Pollak*, where state action was found, the *Jackson* Court drew a contrast between the degree of regulatory involvement in the two cases.[73] The *Jackson* Court noted that the regulatory body in *Pollak* "on its own motion, commenced an investigation of the effects of the piped music."[74] The Court also emphasized that the *Pollak* regulators conducted "a full hearing." In addition, the Court took note of the fact that the *Pollak* regulators did more than merely conclude that the regulated utility's activities were " 'not inconsistent with public convenience, comfort, and safety' "; rather, the regulators affirmatively stated "that the practice 'in fact, through the creation of better will among passengers, . . . tends to improve the conditions under which the public ride.' "[75] By contrast, the *Jackson* Court noted that Metropolitan Edison's challenged practice had "appeared in Metropolitan's previously filed tariffs for many years [yet had] never been the subject of a hearing or other scrutiny by the [public utilities commission]."[76] Given the lack of such specific scrutiny,[77] "the Commission's failure to overturn [the challenged] practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired."[78] In contrast to *Pollak*, the *Jackson* Court concluded, "there was no such imprimatur placed on the practice of Metropolitan about which petitioner complains."[79]

The suggestion in *Jackson* that state action may be found in active regulatory involvement, in the form of a full investigatory hearing and approving conclusions,[80] draws limited inferential support from Supreme Court decisions which employ the responsibility

68. Interim CLASS Order, *supra* note 26, at 4 (emphasizing status of two-county trial "as an experiment" and stating that final decision on statewide implementation had to await "the results of this experiment"). The Board declared that statewide CLASS implementation "will also provide a more in-depth survey of subscriber reaction and law enforcement effectiveness with respect to Caller ID." Statewide CLASS Order, *supra* note 2, at 3. The implication that the Board might alter its position based on the subsequent "in-depth survey" is strengthened by the indefiniteness in the Board's description of its statewide authorization order as "defin[ing] the scope of CLASS Calling Services in New Jersey *for at least the immediate future*." *Id.* (emphasis added).

69. Interim CLASS Order, *supra* note 26, at 4; *see* Statewide CLASS Order, *supra* note 2, at 4 (continuing reporting requirement through Nov. 1, 1990).

70. Statewide CLASS Order, *supra* note 2, at 3; *see* Interim CLASS Order, *supra* note 26, at 4 (modifications "may be appropriate").

71. Statewide CLASS Order, *supra* note 2, at 3; Interim CLASS Order, *supra* note 26, at 4; *see infra* text accompanying notes 274, 349–50.

72. *See supra* text accompanying notes 36 & 37 (*Pollak*), 39 & 43 (*Jackson*).

73. The *Jackson* Court also questioned the sturdiness of *Pollak* as precedent on state action, by stating that "[i]t is not entirely clear whether the Court alternatively held that Capital Transit's action was action of the 'State' for First Amendment purposes, or whether it merely assumed, *arguendo*, that it was and went on to resolve the First Amendment question adversely to the bus riders." 419 U.S. at 356. This perceived difficulty, not mentioned in the Court's discussion of *Pollak* two years earlier in *Moose Lodge*, *see infra* note 81, is at odds with the several sentences in the *Pollak* opinion which state, and appear to endorse as persuasive, the lower court's reasoning that there was a "sufficiently close relation." Public Utils. Comm'n v. Pollak, 343 U.S. 451, 462 (1952); *see supra* note 45.

74. 419 U.S. at 356 (citations omitted).

75. *Id.* at 356–57.

76. 419 U.S. at 354. The Court noted that, "[a]lthough the [public utilities commission] did hold hearings on portions of Metropolitan's general tariff relating to a general rate increase, it never even considered the reinsertion of this provision in the newly filed general tariff. The provision became effective 60 days after filing when not disapproved by the Commission." *Id.* at 354–55.

77. Indeed, the Court noted that "[a]s a threshold matter, it is less than clear under state law that Metropolitan was even required to file this provision as part of its tariff or that the Commission would have had the power to disapprove it." *Id.* at 355 (footnote omitted).

78. *Id.* at 357.

79. *Id.* at 356–57.

80. Subsequent courts have downplayed this seemingly clear suggestion from *Jackson*. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (citing *Jackson* as authority for proposition that state action requires government exercise of "coercive power" or

paradigm.[81] It is important to note, however, that the involvement model follows a fundamentally different approach. Indeed, a court looking at the *Pollak* facts through the responsibility lens would not see state action. After all, a public utilities commission, by commencing and dismissing an oversight hearing more than a year after implementation of a challenged tariff, cannot have coerced, required, or been "responsible" for the practice at issue in the tariff.

"such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State").

Interpretations of *Jackson* as employing the responsibility through encouragement model appear to be based on another sentence in the *Jackson* opinion which confuses what otherwise seems the clear import of the Court's efforts to distinguish *Pollak*. Two sentences after the language quoted above, the opinion states: "Approval by a state utility . . . where the commission has not put its own weight on the side of the proposed practice *by ordering it*, does not transmute a practice initiated by the utility and approved by the commission into 'state action.'" 419 U.S. at 357 (emphasis added).

The suggestion that approval is insufficient without the government "ordering" the utility practice is problematic. In *Pollak*, not even the active regulatory presence (investigation, hearing and approval) amounted to "ordering." The piped-in music experiment had been under way for more than a year before the commission intervened, Public Util. Comm'n v. Pollak, 343 U.S. 451, 455–56 (1952) (experiment began Mar. 1948; hearing began July 1949), and the commission merely entered an "order. . . dismissing its investigation" and commenting approvingly upon the utility practice, *id.* at 460. Had the *Jackson* Court intended to hold that no regulatory involvement short of "ordering" the challenged practice is sufficient to establish state action, its effort to harmonize *Pollak* with its own holding would have been irrelevant and ultimately unavailing, since the *Jackson* court would have had to overrule *Pollak*.

The more reasonable interpretation of the *Jackson* majority opinion is that "if the Commission approves the tariff without argument or a hearing, the State has not sufficiently demonstrated its approval and support for the company's practices." *Jackson*, 419 U.S. at 370 (Marshall, J., dissenting). *See id.* at 370–71 ("Apparently, authorization and approval would require the kind of hearing that was held in *Pollak*.").

81. The *Moose Lodge* Court indicated in a footnote that the involvement of state liquor regulators in the Lodge's discriminatory service practice was "unlike the situation in [*Pollak*], where the regulatory agency had affirmatively approved the practice of the regulated entity after full investigation." Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176 n.3 (1972); *accord* Levitch v. Columbia Broadcasting Sys., 495 F. Supp. 649, 658 (S.D.N.Y. 1980) (no state action because regulators had not "expressly approved" the television network's conduct).

Further, in both Rendell-Baker v. Kohn, 437 U.S. 839, 840 (1982) and *Blum*, the Court rested findings of no state action in part on the fact that state officials did not "review[ ]" the actions of regulated parties and "either approve[ ] or reject[ ] them on the merits" subsequently. *Blum*, 457 U.S. at 1010 (rejecting argument that federal law required state officials to review patient care assessments prepared by nursing homes and filed with state); *Rendell-Baker*, 437 U.S. at 839 n.6 (state committee on criminal justice "had the power only initially to review the qualifications of a counselor selected by the school" and "did not take . . . part in" challenged discharge of counselor). The support these cases provide for the involvement paradigm is limited, however. As discussed *supra* notes 48–55 and accompanying text, the cases employ primarily the very different responsibility paradigm.



### 2. The Superiority of the Involvement Model for Measuring State Action During Public Utility Rate and Service Regulation

Notwithstanding recent lower court rulings such as *Taylor* and *Carlin*,[82] it is the involvement, and not the responsibility, paradigm which should be employed to decide state action questions involving public utilities. Beyond the fact that the involvement model derives from Supreme Court cases specifically involving public utilities, the involvement model is also more likely to account for, in this specialized context, the "symbiotic relationships" and "partner[ships]" between government and private parties which the state action doctrine seeks to discern.[83]

As students of extensive rate and service regulation know, the model of government regulators "coercing" or "causing" an unwilling regulated party to adopt a particular practice is woefully simplistic. Regulated parties develop, over time, an intuitive sense of the predilections and policy concerns of regulators; indeed, many public utility companies develop sophisticated information networks (including informal contacts with key staff members and regulators) for gaining advance information about the likely reactions of their regulators.[84] Regulators, for their part, depend in substantial measure on regulated parties for information,[85] continued legislative support, and, ultimately, their mission.[86] In general,

82. *See supra* notes 57–66 and accompanying text.

83. Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 119 (1973).

84. Telephone interview with Suedeen Kelly, law professor and former commissioner of the New Mexico Pub. Utils. Comm'n. (Mar. 22, 1989). Professor Kelly gave examples from her tenure as PUC commissioner of significant efforts by public utilities to sound out commissioner and staff reaction in advance of initiating administrative proceedings. Professor Kelly also indicated that one regional utility company was so interested in anticipating likely regulator reaction that it funded a study which attempted to develop an econometric model for predicting the outcomes of PUC deliberations.

A study of the federal regulatory process confirms the phenomenon Professor Kelly observed at the state PUC level. *See* P. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES 13 (1981).

85. *See, e.g.*, B. MITNICK, THE POLITICAL ECONOMY OF REGULATION 209–11 (1980) (industry expertise "in the complex technology it employs" leads to "[i]ndustry control of information needed in regulation"); Gormley, Hoadley & Williams, *Potential Responsiveness in the Bureaucracy: Views of Public Utility Regulation*, 77 AM. POL. SCI. REV. 704, 705 (1983) ("[M]uch of the information that commissioners receive comes directly or indirectly from utility companies. Inevitably such information is laced with assumptions and implications, which commissioners are likely to absorb.").

86. *See* P. QUIRK, *supra* note 84, at 12 (regulators' "detailed involvement" in the management and promotion of regulated industries "brings significant responsibility for

regulators have an incentive to avoid publicly pronounced fights with the regulated industry.[87] Even if they do not become "captured" by the regulated industry, regulators inevitably develop a mindset closer to the views of regulated parties than to those of most other participants in the regulatory process.[88]

In this subtle and symbiotic regulatory relationship, state action is unlikely to be seen in formal regulatory orders or other governmental commands, and would thus go undetected under the responsibility model.[89] The involvement model, by contrast, is more likely to detect the less dramatic ways in which state regulators influence the behavior of heavily regulated industries. When a government regulator approves a regulated party's initiative—after conducting an investigation, holding public hearings or otherwise giving significant visibility to the issue—the attitudes of the regulator have likely had an impact on the regulated party, either because the latter has reflected the regulator's reactions or has anticipated them through low or high level staff contacts. Regulatory approval may also reflect the common mind-set of regulators and regulated with respect to issues of policy implementation. Under either possibility, a "sufficiently close nexus between the state and the challenged actions" of the public utility may be shown, and it is therefore fair to treat "the action of the [public utility] as that of the state itself."[90]

the financial success of the regulated industry, and therefore industry success will be one of the criteria on which agency performance is evaluated").

87. *See* B. MITNICK, *supra* note 85, at 43 ("Since ['open criticism' of regulators can] 'hurt the regulators as much as the utilities,' the utility and the regulators develop a shared objective of simply minimizing 'political repercussions' . . . ") (quoting C. WILCOX & W. SHEPHERD, PUBLIC POLICIES TOWARD BUSINESS (1975)); *cf.* Berry, *An Alternative Theory of Regulation: The Case of State Public Utility Commissioners*, 28 AM. J. POL. SCI. 524, 528 (1984) (regulator strategy of maintaining "sufficient political support to function effectively in the regulatory process" involves "avoiding court appeals by private groups").

88. A study of the issue and value priorities of public utility commissioners in twelve states found a significantly greater agreement between attitudes of commissioners and utility company executives than between commissioners and other private participants. *See* Gormley, Hoadley & Williams, *supra* note 85, at 715. A similar finding flows from a study of attitudes of state insurance commissioners and the insurance companies they regulate. *See* R. MILES & A. BHAMBRI, THE REGULATORY EXECUTIVES 105–108 (1983); *see also* P. QUIRK, *supra* note 84, at 211, 212 ("shared regulator-industry perceptions of industry problems and appropriate solutions").

89. *Cf.* Blum v. Yaretsky, 457 U.S. 991, 1012 (1982) (Brennan, J., dissenting) ("the true character of the State's involvement in, and coercive influence over, the activities of private parties, often through complex and opaque regulatory frameworks, may not always be apparent").

90. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) (quoting Moose Lodge No. 7 v. Irvis, 407 U.S. 163, 176 (1972)).



Employment of the involvement model, with its capacity to register more accurately the interaction between regulators and the regulated, need not conflict with the general judicial aversion to a broad state action doctrine.[91] Given the scope of governmental regulation of the national economy, a state action model which subjected corporate practices to the standards of the Constitution merely because the entity was subject to some kind of governmental regulation would risk a wholesale and inappropriate intrusion of federal judicial power into state and private domains.[92] Only a small fraction of business decisions, however, are undertaken by industries subject to extensive rate and service regulation *and* subject to detailed, active regulatory scrutiny. Thus, the state action model proposed here can be employed in the limited context of public utility rate and service regulation without undercutting the current concerns driving the state action doctrine.[93]

91. *See, e.g., Jackson*, 419 U.S. at 350 n.7 (noting that Pennsylvania law defined twenty-six "distinct types of enterprises" as public utilities and expressing concern that "[i]f the mere existence of [public utility regulation] made Metropolitan's action that of the State, then presumably the actions of a lone Philadelphia cab driver could also be fairly treated as those of the State of Pennsylvania"); *Moose Lodge No. 107*, 407 U.S. at 173 (concern that elastic state action criterion "would utterly emasculate the distinction between private as distinguished from state conduct").

92. As Professor Tribe points out:

> The state action requirement, it is generally thought, furthers two primary purposes. First, by exempting private action from the reach of the Constitution's prohibitions, it stops the Constitution short of preempting individual liberty. . . . [Second, by] limiting the scope of the rights which the Constitution guarantees, the state action requirement limits the range of wrongs which the federal judiciary may right in the absence of congressional action, and thus creates a zone of action which, in the absence of valid congressional legislation, is reserved to the states unencumbered by the constraints of federal supremacy.

L. TRIBE, *supra* note 11, at 1691 (footnote omitted).

93. Nor need use of the involvement model for state action questions involving public utilities lead to undesirable results from the standpoint of encouraging active regulatory oversight. It is true that, by making exposure to constitutional scrutiny one of the results of active regulatory involvement, the model would create a theoretical disincentive for pro-industry regulators to hold public hearings and otherwise oversee the actions of the regulated. However, as the New Jersey Caller Identification case study shows, whether public hearings are held or other active means of scrutiny are pursued is much more likely to be a function of administrative practice requirements or the initial response of public officials, the media, and the public rather than concerns about subsequent judicial scrutiny.

### 3. Application of the Preferable Model to the New Jersey Case Study

The events surrounding approval of New Jersey Bell's experiment in Caller Identification fit on the state action side of the imprimatur through involvement paradigm. First, in terms of whether the regulating entity conducted an "investigation," the New Jersey Board of Public Utilities acted in a manner quite similar to the Public Utilities Commission in *Pollak*.[94] The Board responded to complaints about CLASS service by scheduling a "full hearing" for appearances by members of the public. The hearing was not the kind of general hearing about a broad tariff found insufficient in *Jackson*,[95] but focused specifically on Caller Identification.[96]

94. It is important at this stage of the analysis to reject a distinction drawn by the *Carlin* court. In explaining why the *Carlin* plaintiffs' "reliance on *Pollak* is misplaced," the court stated:

> In *Pollak*, the practice at issue, radio programs aboard city buses, already had been implemented. The regulatory agency in that case affirmatively undertook to study the practice after customers had complained and thereby took the initiative in determining the suitability of the practice. In the present case, the [public service commission's] action in undertaking further study of the Dial-It proposal was merely a response to the filing of the proposed tariff as part of its standard procedures for tariff approval and not an independent initiative on its part.

Carlin Communication v. Southern Bell Tel. & Tel. Co., 802 F.2d 1352, 1358 (11th Cir. 1986) (citation omitted). The suggestion that the timing of regulatory intervention should determine whether it constitutes state action is questionable for two reasons.

First, nothing in the Supreme Court's treatment of *Pollak* suggests a distinction based on timing. The *Jackson* Court's efforts to distinguish situations in which a full hearing had been granted and approval expressed from those in which no "hearing or other scrutiny" has been afforded, *see supra* text accompanying notes 73–79, would have been completely unnecessary if *Pollak* were distinguishable on the basis that the regulators weighed in *after* the service was in operation. A simple reference to the chronological differences would have sufficed. *See also* Moose Lodge No. 7 v. Irvis, 407 U.S. 163 (1972) (distinguishing *Pollak* without mentioning the timing of regulatory intervention).

Second, the *Carlin* distinction produces paradoxical results in terms of the theories behind either of the state action models the courts apply in cases involving heavily regulated industries. To the extent that the imprimatur through involvement model associates regulatory *activity* with regulatory *approval*, it is more reasonable to infer approval from actions taken *contemporaneously* with a service's introduction than actions taken *subsequently*. When a public service commission is unwilling to upset the *existing* status quo, this is less an indication of affirmative approval than when the body gives an initial green light to a proposed *change* in the status quo, notwithstanding expressions of concern. To the extent that the state action test seeks to measure whether the governmental actions "encourage" or cause the private conduct, *see supra* text accompanying notes 48–66, regulatory approval at the inception of service introduction is more properly characterized as a "cause" than mere confirmation of the service after it has been in effect.

95. *See supra* note 76 and accompanying text.



On the question of approval, application of the *Pollak/Jackson* model is more complicated. The order ultimately issued by the Board does contain statements which, as in *Pollak*, went beyond merely stating that New Jersey Bell could implement CLASS service if it wanted to. As noted above,[97] the Board did make positive statements in its orders about the value of Caller Identification for law enforcement, and it endorsed the New Jersey Bell view about the privacy expectations of nonpublished subscribers. However, these pro-Bell comments are undercut somewhat by statements preserving the option to reverse course on Caller Identification, directing further study of ways in which privacy might be more fully protected, and establishing an ongoing monitoring system involving Board staff and the utility.[98]

Although these more hesitant Board comments depart from the *Pollak* model of full endorsement, they strengthen the state action claim by indicating an active, ongoing government role in reviewing private party conduct, and perhaps even participating with the private party in system implementation.[99] Indeed, this involvement goes well beyond the facts of *Pollak*. Thus, under the imprimatur through involvement model, implementation of Caller Identification service in New Jersey qualifies as state action and should be subjected as a legal matter to the guarantees of the Constitution.

## III. THE CONSTITUTIONAL BASIS FOR NONDISCLOSURE OF CALLING PARTY PHONE NUMBERS: AN OVERVIEW

The remainder of this Article assesses Caller Identification technology in terms of the emerging constitutional scheme for the protection of informational privacy rights.

96. The public inquiry focused on "[t]he area of most particular interest"—Caller Identification; at least in the Board's own eyes, the hearing allowed the Board to "consider[ ] Call[er] Identification very carefully." Interim CLASS Order, *supra* note 26, at 3.

97. *See supra* note 67.

98. *See supra* text accompanying notes 68–71.

99. The Board orders are unclear as to how much they directed the Board staff and New Jersey Bell to work together on the exploration of alternatives. *See* Interim CLASS Order, *supra* note 26, at 4 (directive to Board staff and New Jersey Bell to spend time between interim and final approval "explor[ing] fully" two potential service modifications); *id.* at 5 (requirement that Bell "confer with staff concerning any and all tariff amendments deemed necessary by staff to conform with this Order"); Statewide CLASS Order, *supra* note 2, at 4. If significant collaboration was intended, this would strengthen further the claim of imprimatur through involvement.

This analysis has immediate practical relevance to New Jersey Bell and to other telephone companies in varying stages of CLASS implementation. In the aftermath of the much-publicized New Jersey controversy over Caller Identification, it is particularly likely that proposals by other telephone companies to implement the service would, at a minimum, trigger public hearings and orders from public utilities commissions over the merits of the service.[100] As argued in Part II, such active regulation would make the Constitution a binding source of law under the involvement model. Even if the Constitution does not apply as a legal formality, assessing the constitutionality of Caller Identification is an important component of the debate over the technology.[101]

Measuring Caller Identification with a constitutional yardstick is also useful in a different sense. Because Caller Identification sits on a constitutional, and not just a technological, cutting edge, constitutional analysis of the technology highlights the strengths and weaknesses of the modern judicial approach to informational privacy. The Caller Identification case study illustrates that, although a substantial body of law has developed over the last decade, significant uncertainties remain regarding the nature and scope of the right to keep personal information private. The Caller Identification case study also provides a particularly good illustration of the difficulties involved in balancing individual privacy rights against governmental justifications for disclosure—a task current informational privacy law seeks to accomplish.

This Part provides an overview for further detailed constitutional analysis by first showing how a broad right to privacy, originally articulated in the late nineteenth century, later solidified into privacy-based approaches to fourth amendment and substantive due process jurisprudence. This Part then illustrates how, in the last dozen years, lower courts have capitalized on two Supreme Court rulings to develop a distinct constitutional "right to informational

100. *See supra* note 4.

101. Appeals to constitutional values would have political potency in the Caller Identification debate. Further, the constitutional standards for reviewing actions which implicate informational privacy closely resemble the factors which prudent decisionmakers should assess in weighing the pros and cons of the new technology. As indicated *infra* text accompanying notes 149–54, determining the legitimacy of governmental action which implicates informational privacy rights requires a court to: (1) identify and value the privacy interests in nondisclosure, (2) identify and value the governmental interests justifying disclosure, and (3) weigh each set of interests against the other. This balancing process mirrors the cost/benefit decisionmaking process which should precede any important governmental or corporate decision.



privacy." This Part completes the overview by noting three nonconstitutional sources of privacy protection which provide potentially useful analogues for constitutional analysis.

### A. *Emerging Recognition of the "Right to Be Let Alone"*

Although the United States Constitution embodies no explicit "right to privacy," the idea of an implicit privacy guarantee traces its earliest origins to the late nineteenth century, when Charles Warren and Louis Brandeis wrote a *Harvard Law Review* article urging broad legal recognition of privacy rights, defined in terms of the "right to be let alone."[102] The efforts by Warren and Brandeis were aimed most directly at creation of new tort theories to provide redress against privacy invasions, and the tort system responded avidly.[103] Yet, Brandeis carried his intellectual lobbying for an expanded privacy right into his later writings on constitutional issues as a Supreme Court Justice.

In the 1928 case of *Olmstead v. United States*,[104] Brandeis wrote a now famous dissent stating that the founders of the Constitution "conferred, as against the [g]overnment, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[105] Brandeis' view ultimately prevailed in the 1967 case of *Katz v. United States*.[106] The *Katz* Court reversed *Olmstead*'s holding that telephone wiretapping was not covered by the fourth amendment, stating broadly that the amendment "protects people, not places."[107] *Katz* also led to a significant shift in the judiciary's approach to the scope of the fourth amendment's search and seizure protections. Case law since *Katz* assesses whether a de-

102. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890). Another important development of that era was the Supreme Court's decision in Boyd v. United States, 116 U.S. 616 (1886). *Boyd* read the fourth and fifth amendments as protecting the citizen against more than just "the breaking of his doors, and the rummaging of his drawers"; the Court viewed the amendments as protecting a broader "indefeasible right of personal security, personal liberty and private property." *Id.* at 630. The Court has since backtracked from its holding that the fifth amendment is a repository of privacy rights. *See* Fisher v. United States, 425 U.S. 391, 401 (1976).

103. *See* Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 177. The development of privacy-based torts is summarized *infra* at text accompanying notes 157–59.

104. 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

105. *Olmstead*, 277 U.S. at 478–79 (Brandeis, J, dissenting).

106. 389 U.S. 347 (1967).

107. *Id.* at 351. The Court stopped short of endorsing "a general constitutional 'right to privacy,'" *id.* at 350, but reflected the Brandeis view in holding that "what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected," *id.* at 351–52.

fendant has a "reasonable expectation of privacy" in determining whether fourth amendment protections apply.[108]

These fourth amendment standards are not directly applicable to the kind of data disclosure involved in Caller Identification. According to the Supreme Court, the fourth amendment protects "the right of the individual to be free in his private affairs from governmental surveillance and intrusion";[109] it determines the legitimacy of *acquisition* of information through a "search or seizure." This is different from the "right of an individual not to have his private affairs made public by the government,"[110] a right against subsequent *disclosure* of acquired information.[111] Nevertheless, fourth amendment standards and reasoning have influenced the development of privacy rights on the "civil side" of the Constitution.[112]

Brandeis' "right to be let alone" formulation and his willingness to find broad privacy rights implicit in the Constitution are mirrored further in the substantive due process rights developed in the last two dozen years.[113] Beginning with *Griswold v. Connecticut*,[114] the Court has been willing to afford strong legal protection to a variety of activities grouped under the rubric of the "right to privacy."[115] Thus, the Court has found in the due process clause's substantive protection for "fundamental" rights a mandate for safeguarding such aspects of the right to privacy as the decision to have an abortion, to marry, and to live in an extended family arrangement.[116]

This strand of right to privacy/substantive due process case law is also not directly applicable to Caller Identification. As the Supreme Court made clear in *Paul v. Davis*,[117] a challenge to disclosure of information about an individual[118] is, in most cases, "far afield" and "very different" from the interests in right to privacy cases "relating to marriage, procreation, contraception, family relationships, and child rearing and education."[119] *Paul* foreclosed recourse to the substantive due process theory which protects such "fundamental" interests, unless information disclosure could be shown to jeopardize exercise of such interests.[120]

108. The "reasonable expectation of privacy" formulation for which *Katz* is often cited was stated by Justice Harlan in a concurring opinion. *See id.* at 361. Justice Harlan's concurrence also established that the inquiry into privacy expectations "normally embraces two discrete questions." Smith v. Maryland, 442 U.S. 735, 740 (1979). The *Smith* Court synthesized the two-fold inquiry in this manner:

> The first [question] is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy," 389 U.S. at 361 [Harlan, J., concurring]—whether, in the words of the *Katz* majority, the individual has shown that "he seeks to preserve [something] as private." *Id.* at 351. The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,'" *id.* at 361 [Harlan, J., concurring]—whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is "justifiable" under the circumstances. *Id.* at 353.

442 U.S. at 740.

109. Whalen v. Roe, 429 U.S. 589, 599 n.24 (1977) (quoting Kurland, *The Private I*, U. CHI. MAG. 7, 8 (Autumn 1976), and stating that this facet of privacy rights is "directly protected by the Fourth Amendment"). Fourth amendment cases assess the validity of legislative or governmental, narrowly focused intrusions into individual privacy during the course of criminal investigations." *Id.* at 604 n.32.

110. *Id.* at 599 n.24.

111. *See infra* note 248.

112. *See infra* note 233 and accompanying text.

113. Posner, *supra* note 103, at 181–83 (Brandeis' *Olmstead* passage "proved a harbinger" of contemporary decisions "declar[ing] a constitutional right of privacy" through substantive due process).

114. 381 U.S. 479 (1965).

115. Although agreeing that there was a "right to privacy," the *Griswold* Justices disagreed markedly about the constitutional basis for the right. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 33, at 737–38.

116. *See*, respectively, Roe v. Wade, 410 U.S. 113 (1973); Zablocki v. Redhail, 434 U.S. 374 (1978); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (strict scrutiny applied in equal protection challenge to zoning ordinance excluding extended family members from definition of acceptable households).

117. 424 U.S. 693 (1976).

118. The challenger in *Paul* objected to the circulation by several Kentucky police departments of a flyer addressed to local area merchants which included his name and photograph in a listing of persons alleged to be active shoplifters. The flyer included persons that had "been arrested during 1971 and 1972 or have been active in various criminal fields in high density shopping areas." *Id.* at 695. Challenger Paul had been arrested for shoplifting, and had pleaded not guilty. Shortly after circulation of the flyer, the charge against him was dismissed. Paul's employer expressed concern about the arrest after circulation of the flyer. Paul also claimed his designation as an active shoplifter harmed his reputation, retarded his future employment opportunities and impaired his ability to enter local business establishments.

119. *Id.* at 713. The bulk of the *Paul* opinion considered and rejected the challenger's claim that circulation of the flyer deprived him of procedural due process and provided a basis for an action under 42 U.S.C. § 1983. *Id.* at 699–713.

120. For example, the Court has closely scrutinized state requirements that doctors performing abortions disclose information about individual patients and procedures. *See, e.g.*, Thornburgh v. American College of Obstetricians, 106 S. Ct. 2169 (1986) (invalidating Pennsylvania statute requiring, *inter alia*, identification of physicians and facilities involved in second trimester abortions and disclosure of patient's residence, age, race, marital status and number of prior pregnancies); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 79–81 (1976) (upholding recordkeeping requirements of more limited scope and availability than those invalidated in *Thornburgh*). The Court justified strong scrutiny of such information disclosure schemes on the ground that "[a] woman and her physician will necessarily be more reluctant to choose an abortion if there exists the possibility that her decision and her identity will become known publicly." *Thornburgh*, 106 S. Ct. at 2182. Indeed, the *Thornburgh* majority linked its treatment of abortion information disclosure statutes to other non-due process cases in

### B. *The Right to Informational Privacy: Of Supreme Court Inches and Lower Court Miles*

Less than a year after *Paul*, the Supreme Court decided *Whalen v. Roe*,[121] and confronted a privacy-based challenge to a New York law requiring state officials to collect, and retain for five years, information about the use of certain prescription drugs considered most likely to be abused.[122] The *Whalen* challengers argued that the "mere existence in readily available form of the information about patients' use of [the] drugs creates a genuine concern that the information will become publicly known and that it will adversely affect their reputations."[123] Although the Court upheld the New York law, it broke new ground when it cited the Brandeis "right to be let alone" theory and described "the individual interest in avoiding disclosure of personal matters" as one of "at least two different kinds of interests" involved in "[t]he cases sometimes characterized as protecting 'privacy.' "[124]

The Court did not make clear the exact constitutional source for this new and different "interest in avoiding disclosure."[125]

which "the Court consistently has refused to allow government to chill the exercise of constitutional rights by requiring disclosure of protected, but sometimes unpopular, activities." *Id.* The non-due process cases are discussed *infra* text accompanying notes 172–75; *Thornburgh* is further discussed *infra* text accompanying notes 180–82.

121. 429 U.S. 589 (1977).

122. 429 U.S. at 593. The New York law required prescriptions for a category of drugs ("Schedule II" drugs) to identify the following: "the prescribing physician; the dispensing pharmacy; the drug and dosage; and the name, address, and age of the patient." The State intended computer processing of the 100,000 prescription forms received each month to identify cases of possible overdispensing, *id.*, and it gave Health Department investigators access to the data to investigate cases so identified. *Id.* at 595.

123. *Id.* at 600. Apparently reluctant after *Paul* to build a federal constitutional claim solely on the reputational injury resulting from disclosure, the challengers tried to benefit from the *Griswold/Roe* line of cases which protect the autonomy to make important decisions. The petitioners alleged that the rights of patients to "mak[e] . . . decisions about matters vital to the care of their health" had been impaired. *Id.* Specifically, the challengers argued that concerns about information disclosure would "make[ ] some patients reluctant to use, and some doctors reluctant to prescribe, such drugs even when their use is medically indicated." *Id.*

The *Whalen* Court rejected these arguments. The Court found that, in contrast to the restrictions on private decisionmaking involved in previous cases, the New York law did not prohibit access to medical care or even condition access to care on the consent of third parties. *Id.* at 603. The Court also downplayed evidence that some use of Schedule II drugs had been discouraged, pointing instead to the large number of prescriptions still filled as proof that "the statute did not deprive the public of access to the drugs." *Id.*

124. *Id.* at 599 (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting)).

125. The Court relegated to several footnotes its discussion of the basis for the interest in nondisclosure. The footnote immediately following the Court's identification of



However, the right appears to be based on the due process clause.[126] Thus, the *Whalen* Court provided a legal foothold for a distinct branch of the substantive due process right to privacy, which has the potential to protect substantial categories of personal information from inappropriate disclosure.[127] And, by approving the New York law only after pronouncing its drug abuse prevention purpose "vital"[128] and its several safeguards against unauthorized disclosure of prescription data adequate, the Court provided an incipient balancing of interests model for judicial scrutiny of claims under the new privacy right.[129]

the interest, *see id.* at 599 n.25, cites: the "right to be let alone" language from the Brandeis *Olmstead* dissent; a statement in *Griswold* that the first amendment has a "penumbra where privacy is protected from governmental intrusion," Griswold v. Connecticut, 381 U.S. 479, 483 (1965); Stanley v. Georgia, 394 U.S. 557 (1969), a privacy case later characterized by the Court in *Bowers v. Hardwick* as "firmly grounded in the First Amendment," 478 U.S. 186, 195 (1986); and concurring and dissenting opinions in California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974), a case in which the Court upheld record-keeping requirements in the Bank Secrecy Act of 1970 without reaching constitutional claims, but in which several Justices expressed concerns about more widely applicable government information-gathering and dissemination systems, see TRIBE, *supra* note 11, at 1393–94. However, other *Whalen* footnotes make it clear that the interest in nondisclosure identified by the Court is not a direct emanation of the fourth amendment or the first amendment. *See* 429 U.S. at 599 n.24, 604 n.32; *supra* text accompanying notes 110 & 111; *infra* note 245.

126. *See* 429 U.S. at 598 n.23 (quoting statements in *Roe* v. *Wade* and two *Griswold* opinions that right of privacy is founded on due process clause). In so doing, *Whalen* seemed to put the lie to any suggestion in the *Paul* opinion that due process analysis could not protect informational privacy rights implicated by governmental information disclosures. As Professor Tribe has pointed out, if the Court's denial that *Paul v. Davis* involved any substantively protected interest "had been truly authoritative," the *Whalen* Court's extensive discussion of the risks of public disclosure posed by New York's prescription information gathering would have been quite unnecessary. Tribe views *Paul* as "a case about federalism-based limits on the remedial powers of a federal court acting under § 1983 rather than as a repudiation of deep substantive principles under the fourteenth amendment." L. TRIBE, *supra* note 11, at 1398.

127. This is not to say that *Whalen* provided a particularly strong trumpeting of the right to informational privacy. Part of the opinion discounted the patients' interest in nondisclosure of their prescription information on the ground that such disclosure was not "meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care." 429 U.S. at 602. The Court's conclusion included the statement that vital governmental programs "require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed." *Id.* at 605. Further, the Court weakened the power of its explication of privacy rights by characterizing its opinion as "[r]ecognizing that in *some* circumstances [the duty to avoid unwarranted disclosures] *arguably* has its roots in the Constitution." *Id.* (emphasis added).

128. *Id.* at 598.

129. *See* Northwestern Note, *supra* note 11, at 547.

Four months later, the Court revisited the informational privacy right in *Nixon v. Administrator of General Services*.[130] In permitting government archivists to review and classify papers of former President Nixon under the Presidential Recordings and Materials Preservation Act,[131] the Court confronted, *inter alia*, Nixon's claim that the Act violated his "fundamental rights of . . . privacy."[132] The *Nixon* Court reaffirmed the legitimacy of *Whalen*.[133] The Court also transformed the balancing of interests test implicit in *Whalen* into an explicit element of privacy rights analysis. The *Nixon* Court stated that privacy claims "cannot be considered in the abstract"; rather, said the Court, "the claim must be considered in light of the specific provisions of the Act, and any intrusion must be weighed against the public interest in subjecting the Presidential materials of appellant's administration to archival screening."[134] The Court's ultimate judgment, after lengthy analysis,[135] that Nixon's privacy claim was "without merit," reflected the Court's conclusion that Nixon's claim to confidentiality was weak, the public's interest in disclosure was strong, and the Act's safeguards against abuse were extensive.[136]

The Supreme Court has not since discussed the scope of the constitutional right to informational privacy,[137] leaving elaboration

130. 433 U.S. 425 (1977).

131. Title I of the Act provided in pertinent part that the Administrator of General Services would take custody of the Nixon presidential papers and "provide for the orderly processing and screening by Executive Branch archivists of such materials for the purpose of returning to [Nixon] those that are personal and private in nature." *Id.* at 429.

132. *Id.* at 455.

133. *Whalen* was the precedential starting point of the *Nixon* Court's privacy discussion. The Court began its substantive discussion as follows: "One element of privacy has been characterized as 'the individual interest in avoiding disclosure of personal matters . . . .'" *Id.* at 457 (quoting *Whalen*, 429 U.S. at 599). The *Nixon* Court further legitimized *Whalen* by using it as the yardstick by which to measure the strength of the former president's privacy interest. 433 U.S. at 458–59.

134. *Id.* at 458.

135. The Court's discussion of the balanced elements ran some eight pages. *See id.* at 458–65.

136. *Id.* at 465.

137. The Court considered employee privacy rights under federal labor laws in the case of Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979). The Court overturned an NLRB finding that Edison committed an unfair labor practice when it refused to disclose the aptitude test scores of individual employees to a union without the consent of the individual employees. The Court accepted, for the sake of argument, that employee scores were of potential relevance to the union in processing a grievance. *Id.* at 317. However, the Court also took judicial notice of the "sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence." *Id.* at 318. In rejecting the conclusion that Edison had "violated the statutory obligation to bargain in good faith," *id.* at 320, the Court employed a *Whalen*-like balancing test, stating: "In light of the sensitive nature of testing information, the minimal burden . . . on the Union, and the total absence of evidence that the Company had fabricated concern for employee confidentiality only to frustrate the Union in the discharge of its responsibilities, we are unable to sustain the Board . . . ." *Id.* at 319–20.



of the work begun in *Whalen* and *Nixon* to the lower federal courts. These courts have decided dozens of claims in which the distinct right to informational privacy has been invoked to attack such diverse targets as financial disclosure laws for public officials,[138] police exhibition of photographs claimed to be "highly sensitive, personal, and private,"[139] and the examination of employee medical records by federal occupational safety officials.[140] Despite some initial reluctance to depart from the apparent red light of *Paul*,[141] what one court said in 1983 is even truer today: "[m]ost courts considering the question . . . appear to agree that privacy of personal matters is a protected interest."[142] A distinct constitutional right to informational privacy, based on *Whalen* and rooted in substantive due process, has been recognized explicitly in cases from the Second,[143] Third,[144] Fourth,[145] Fifth,[146] Seventh,[147] and Tenth[148] Circuits.

138. *See, e.g.*, Barry v. City of New York, 712 F.2d 1554 (2d Cir.), *cert. denied sub nom.*, Slevin v. City of New York, 464 U.S. 1017 (1983); Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979).

139. *See* Slayton v. Willingham, 726 F.2d 631 (10th Cir. 1984).

140. *See* United States v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980).

141. *See, e.g.*, J.P. v. DeSanti, 653 F.2d 1080, 1088–90 (6th Cir. 1981) (*Whalen* and *Nixon* did not mean to undercut *Paul*; "[i]nferring very broad 'constitutional' rights where the Constitution itself does not express them is an activity not appropriate for the judiciary"). For a detailed criticism of *DeSanti*, and a briefer discussion of two other early cases which failed to embrace the right to informational privacy, see Northwestern Note, *supra* note 11, at 547–57.

142. *Barry*, 712 F.2d at 1559.

143. *Id.*; Schachter v. Whalen, 581 F.2d 35, 37 (2d Cir. 1978).

144. Fraternal Order of Police v. City of Philadelphia, 812 F.2d 105, 109-10 (3d Cir. 1987), *vacated*, 359 F.2d 276 (3d Cir. 1988); Shoemaker v. Handel, 795 F.2d 1136, 1144 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986); Trade Management Waste Ass'n v. Hughey, 780 F.2d 221, 234 (3d Cir. 1985); *Westinghouse*, 638 F.2d at 577–78.

145. Taylor v. Best, 746 F.2d 220, 225 (4th Cir. 1984), *cert. denied*, 474 U.S. 982 (1985).

146. Fadjo v. Coon, 633 F.2d 1172, 1175 (5th Cir. 1981); Duplantier v. United States, 606 F.2d 654, 672 (5th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981); Plante v. Gonzalez, 575 F.2d 1119, 1133–34 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979). *Fadjo* and *Plante* are cases commencing in courts now within the Eleventh Circuit.

147. *Compare* Kimberlin v. United States Dep't of Justice, 788 F.2d 434, 438–39 (7th Cir.) (constitutionally recognized right to informational privacy based on "reasonable expectations"), *cert. denied*, 478 U.S. 1009 (1986) *with* McElrath v. Califano, 615 F.2d 434, 441 (7th Cir. 1980) (no right of privacy against disclosure of social security numbers in welfare processing because no fundamental right to welfare).

148. Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986); Denver Policemen's Protective Ass'n v. Lichtenstein, 660 F.2d 432, 435 (10th Cir. 1981).

These courts, in determining whether a governmental disclosure practice is justified, employ a form of "intermediate balancing" of the individual interest in privacy against the governmental interest in disclosure.[149] This balancing act first requires that the courts assess the weightiness of the privacy interests at stake. Courts have developed different approaches, used alternatively or in conjunction, to make this assessment.[150] An integral aspect of the balancing process—an aspect which seems to relate to the weightiness of privacy interests, although the courts do not always categorize it as such—is whether the government information scheme provides "adequate security precautions to prevent inadvertent disclosure."[151] Once the privacy interest is weighted properly, the courts then assess the government's offsetting interests in disclosure. The governmental interests need not be "compelling,"[152] nor must the government have adopted the approach which most protects privacy.[153] To pass informational privacy muster, however, disclosures by the government must serve important policies which "outweigh" the privacy interests affected.[154]

This emergent right to informational privacy provides the most appropriate basis for assessing the constitutionality of Caller Identification. Unlike the fourth amendment, the informational privacy right transcends barriers against initial *acquisition* of information to provide protection against its subsequent *disclosure*.[155] And public disclosure—of phone numbers and, ultimately, identities—is at the core of the debate over Caller Identification, not the fact that the telephone companies (here, the government surrogates) have knowledge of the telephone numbers in the first place.[156]

149. *See infra* text accompanying notes 283–89.

150. These approaches, the subject of Part IV(A), *infra* text accompanying notes 179–282, are (1) assessing the extent to which the information sought to be disclosed will lead to embarrassment or reputational injury, (2) examining whether disclosure will lead to harassment and intrusion, and (3) determining the reasonableness of the individual expectations of privacy.

151. Barry v. City of New York, 712 F.2d 1554, 1561 (2d Cir.), *cert. denied sub nom.*, Slevin v. City of New York, 464 U.S. 1017 (1983); *see, e.g.*, Fraternal Order of Police v. City of Philadelphia, 812 F.2d 105, 118 (3d Cir. 1987) (enjoining use of applicant questionnaire for Philadelphia Police Department's Special Investigations Unit until City "under[took] to promulgate confidentiality directives or regulations regarding the responses"); Shane v. Buck, 658 F. Supp. 908, 917 (D. Utah 1985) ("adequate safeguards exist to control the dissemination of the information contained on Form 1583"), *aff'd*, 817 F.2d 87 (10th Cir. 1987).

One's interest against unjustified disclosures lessens as safeguards are imposed to reduce the risk of such disclosures; the interest increases when safeguards are absent. *See* Taylor v. Best, 746 F.2d 220, 225 (4th Cir. 1984) (privacy interest in nondisclosure of family history "weakened by" promise of staff psychologist to keep information confidential). Thus, this Article treats the adequate safeguards question as a factor relating to the weightiness of privacy interests, and not as a separate aspect of the balancing test. *But cf.* United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980) (listing "the adequacy of safeguards to prevent unauthorized disclosure" as one of several factors distinct from "the potential for harm in any subsequent nonconsensual disclosure").

152. *See, e.g.*, Plante v. Gonzales, 575 F.2d 1119, 1134 (5th Cir. 1978), *cert. denied* 439 U.S. 1129 (1979). *But see Mangels*, 789 F.2d at 839 (citing *Denver Policemen's Protective Ass'n*, 660 F.2d at 435) (applying compelling state interest/least intrusive manner test to information disclosure).

153. *See infra* text accompanying notes 307 & 308.

154. Fadjo v. Coon, 633 F.2d 1172, 1175–76 (5th Cir. 1981); *see* Duplantier v. United States, 606 F.2d 654, 670 (5th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981). The weighing standard is implicit in other case formulations. *See, e.g.*, *Fraternal Order of Police*, 812 F.2d at 112 (quoting district court query whether privacy intrusion "justified" by state interest(s); *Plante*, 575 F.2d at 1136 ("Financial privacy is a matter of serious concern, deserving strong protection. The public interests supporting public disclosure for . . . elected officials are even stronger.").

155. This is primarily a result of lower court elaborations of the privacy right in cases in which plaintiffs objected as much, if not more, to public disclosure as they did to governmental data acquisition. *See, e.g.*, *Barry*, 712 F.2d at 1561 (objecting to public inspection of public employee financial disclosure reports); *Duplantier*, 606 F.2d at 660 (similar objection with respect to Ethics in Government Act disclosure forms filed by federal judges); *Denver Policemen's Protective Ass'n*, 660 F.2d at 434 (objection to disclosure of police investigatory report to defendant on trial for assaulting police officer).

The two Supreme Court informational privacy cases, by contrast, focused primarily or exclusively on the initial governmental acquisition of information. As a Fifth Circuit informational privacy court explained: "The [*Whalen*] Court did not discuss the standard to be applied to public disclosure, because it determined that the chance of such disclosure occurring was minimal. . . . The [*Nixon*] case involved not public disclosure but viewing and screening of public and private documents by archivists . . . ." *Plante*, 575 F.2d at 1133.

156. Participants in most information privacy disputes do not gain much power by invoking the other "facet" of the right to privacy, the "interest in independence of making certain kinds of important decisions," such as family planning and family living arrangements. *Plante*, 575 F.2d at 1128 (quoting Whalen v. Roe, 429 U.S. 589, 599–600 (1977)). The link between disclosure of information and a privacy-based interest in autonomy has proven difficult to make in past informational privacy cases. *See id.* at 1128–32 (rejecting arguments that the Florida financial disclosure law adversely affects state senators' "familial affairs"); *Duplantier*, 606 F.2d at 669–70 (rejecting similar arguments for federal judges). *But see* Yeager v. Hackensack Water Co., 615 F. Supp. 1087, 1092 (D.N.J. 1985) (strict scrutiny employed because requirement that water users disclose names of household members "[a]rguably . . . could provide details of familial relationships and other intimate living arrangements").

Caller Identification arguably implicates the "autonomy" of important individual decisions in a few instances. For example, Caller Identification could reveal the identity of a woman who called a family planning information hotline for anonymous information about how to respond to a pregnancy. It is much easier to argue that such disclosures are embarrassing than to argue that the risk of embarrassment will cause the

### C. *Other Relevant Recognitions of the Informational Privacy Right*

Concern about the privacy of personal information has also led to three legal developments which, although distinct in source and scope from the informational privacy case law, are relevant to a full understanding of the due process-based informational privacy right.

The first development is what Warren and Brandeis most immediately sought in writing their law review article: that the common law "recognize[ ] and uphold[ ] a principle applicable to cases of invasion of privacy."[157] In 1960, Prosser undertook to synthesize "something over three hundred cases in the books" recognizing a right to privacy actionable in tort.[158] Prosser's taxonomy divided privacy law into "four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common."[159]

For present purposes, the most interesting of the four is the right against the "[p]ublic disclosure of embarrassing private facts about the plaintiff."[160] Because this tort is based on mass publication of information—and not publication to an "individual, or even to a small group"[161]—it is an ineffective legal tool against many information disclosure abuses,[162] including those associated with Caller Identification. Still, two other facets of this tort are interesting because they reverberate in subsequent cases and discussions of the constitutional right to informational privacy. First, the tort distinguishes between "private facts" and those which are public because they are contained in public documents or have been left "open to public inspection" by the plaintiff's actions.[163] Second, the tort protects only disclosures which are embarrassing or "offensive and objectionable to a reasonable man of ordinary sensibilities."[164]

A more recent privacy-related phenomenon is exemption six of the federal Freedom of Information Act (FOIA).[165] The exemption tempers the FOIA's "general philosophy of full agency disclosure"[166] with the recognition that release of agency files containing personal information on individual citizens may create a "clearly unwarranted invasion of privacy."[167] The large body of federal cases elaborating statutory privacy rights under exemption six[168] has no formal impact on evolution of the constitutional right to informational privacy. However, the exemption six courts have faced issues and have engaged in decisional processes remarkably similar to those found in the informational privacy jurisprudence.

Exemption six disputes require the courts to define the nature of the privacy interest at stake, evaluate its significance, and balance it against the interests served by disclosure.[169] More significantly, a number of exemption six cases have discussed the privacy issues involved in public disclosure of personal data which, like the telephone numbers revealed by Caller Identification, are "objective" in

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woman not to get information *and* that this lack of information will cause her to alter her actions with respect to the pregnancy or rob her of her independence in the choice.

157. Warren & Brandeis, *supra* note 102, at 198.

158. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 388 (1960).

159. *Id.* at 389. Critics have questioned Prosser's overall assumptions and specific case treatments. *See, e.g.*, Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964). Professor Bloustein's overall concern is that

> under Dean Prosser's analysis, the much vaunted and discussed right to privacy is reduced to a mere shell of what it has pretended to be. Instead of a relatively new, basic and independent legal right protecting a unique, fundamental and relatively neglected interest, we find a mere application in novel circumstances of traditional legal rights designed to protect well-identified and established social values.

*Id.* at 965–66.

160. Prosser, *supra* note 158, at 389.

161. *Id.* at 393.

162. *See* A. MILLER, THE ASSAULT ON PRIVACY 202–05 (1971) (outlining "[d]eficiencies in the Common-Law Approach" for the purpose of "vindicating one's privacy"); Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 291–92 (1977).

163. Prosser, *supra* note 158, at 395–96.

164. *Id.* at 396.

165. 5 U.S.C. § 552(b)6 (1982). This provision exempts from the mandatory disclosure provisions of the FOIA "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.*

166. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975) (quoting S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965)).

167. 5 U.S.C. § 552(b)6 (1982). "The philosophy of [exemption six] asserts that government will inevitably acquire information about individuals which they consider personally sensitive. . . . The accommodation of these sensitivities and individual rights with the overall desire for open government poses the tension which permeates the case law of this exemption." 2 J. O'REILLY, FEDERAL INFORMATION DISCLOSURE 16-2 (1988).

168. *See* 2 J. O'REILLY, *supra* note 167, ch. 16.

169. For example, in Brown v. FBI, 658 F.2d 71 (2d Cir. 1981), a criminal defendant challenged the FBI's refusal under exemption six to release information pertaining to the chief prosecution witness in his kidnaping trial. In reviewing the FBI's decision to withhold the information, the court first determined whether the type of information sought fit within the category of information covered by the exemption, a question which turned on the information's "personal, intimate quality." *Id.* at 75. After recognizing the witness' privacy interest, the court then "weigh[ed] the public interest in disclosure against the privacy interest of the individual." *Id.* at 75–76. The court upheld the FBI's refusal to disclose.

themselves but may lead to embarrassment, harassment, or other injuries.[170] In contrast to the informational privacy cases, which rarely deal with "objective" data and situations akin to Caller Identification,[171] the exemption six cases provide a wealth of helpful analogies for assessment of the informational privacy rights at issue in the new technology.

The final privacy-related development of interest is the line of cases, most of which predate *Whalen* and *Nixon*, in which the Supreme Court has recognized an interest in anonymity in order to safeguard the exercise of other constitutionally protected rights and activities. Thus, in *NAACP v. Alabama*,[172] the Court rejected efforts by the state of Alabama to force the NAACP to disclose its membership lists. Recognizing "the vital relationship between freedom to associate and privacy in one's associations," the Court stated that "[i]nviolability of privacy in group associations may in many circumstances be indispensable to preservation of freedom of

170. The vast bulk of these cases involve the release of individual names or addresses kept by the federal government on mailing lists or for other purposes. *See, e.g.*, USDA v. FLRA, 836 F.2d 1139 (8th Cir. 1988) (request of union seeking to represent 903 employees of FHA Finance Office for names and home addresses of employees), *vacated on other grounds*, 109 S. Ct. 831 (1989); Marzen v. Department of Health and Human Servs., 825 F.2d 1148 (7th Cir. 1987) (request of organization representing rights of dependent and disabled children for names of public welfare officials involved in decision to withhold treatment for severely handicapped newborn). Exemption six cases have also dealt with the release of social security numbers, *see* Heights Community Congress v. Veterans Admin., 732 F.2d 526 (6th Cir.) (redaction of social security numbers of recipients of VA loans), *cert. denied*, 469 U.S. 1034 (1984), and other objective biographical data, *see, e.g.*, Simpson v. Vance, 648 F.2d 10 (D.C. Cir. 1980) (request of diplomatic historians for release of "Biographic Register," which compiles biographical information on "over 12,000 senior-level and mid-level [State] Department employees and employees of other federal agencies involved in this country's foreign policy").

171. Two informational privacy cases involved challenges to government collection of the names and addresses of private individuals. In Kuzma v. United States Postal Serv., 798 F.2d 29 (2d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987), and Shane v. Buck, 658 F. Supp. 908 (D. Utah 1985), *aff'd*, 817 F.2d 87 (10th Cir. 1987), courts considered and rejected privacy-based objections to a postal regulation. The regulation governed persons receiving mail through a commercial mail receiving agency, an entity which receives a customer's mail and, for a fee, forwards it to the customer. The postal regulation required that the name and address of the ultimate mail recipient be disclosed. Because "adequate safeguards exist to control the dissemination of [the name and address] information" to persons other than postal officials, 658 F. Supp. at 917, the *Kuzma* and *Shane* cases amount to challenges to the initial governmental collection—and not the public dissemination—of "objective" information about individuals.

Another case, Yeager v. Hackensack Water Co., 615 F. Supp. 1087 (D.N.J. 1985), involved collection of the names and social security numbers of each person living at a residence served by the water company. *Yeager* dealt with the legality of the initial information collection; there is no indication in the case that the information would have been used by any entity other than the company.

172. 357 U.S. 449 (1958).



association particularly where a group espouses dissident beliefs."[173] Similarly, the Court has rejected requirements that individuals identify themselves in circumstances in which the forced identification would inhibit the individuals' right to engage in[174] or receive[175] political speech.

This strand of constitutional law is not the central nor even a sufficient legal basis for assessing the constitutionality of Caller Identification.[176] However, as the discussion to follow indicates, the *NAACP* line of cases is relevant to the informational privacy balancing test in that it emphasizes judicial concern about information disclosures which lead to embarrassment, stigmatization and other tangible injuries,[177] and adds a decisive consideration to an otherwise offsetting balance of privacy rights and governmental interests.[178]

173. *Id.* at 462. *But see* Buckley v. Valeo, 424 U.S. 1, 71–72 (1976) (distinguishing *NAACP* in upholding required disclosure of names and addresses of contributors to campaign committees, despite arguments that disclosure would infringe first amendment rights of contributors to minor parties and independent candidates).

174. Talley v. California, 362 U.S. 60 (1960) (rejecting municipal ban on anonymous pamphlets).

175. Lamont v. Postmaster General, 381 U.S. 301 (1964) (invalidating requirement that addressees file specific requests before receiving foreign mailings labeled as "communist political propaganda" by postal authorities).

176. There are relevant distinctions between the Caller Identification case study and the disclosures disputed in *NAACP*, *Talley*, and *Lamont*.

Most important is that in none of the three previous cases did persons engaging in or receiving protected speech have any ability to preserve their anonymity through alternative means while still exercising their first amendment rights. There was no system of anonymous NAACP membership; both the pamphleteers in *Talley* and the postal patrons in *Lamont* were required by governmental practices to reveal their identities as the price of exercising first amendment freedom. By contrast, as discussed *infra* text accompanying notes 280–82, persons wishing to exercise their first amendment rights through anonymous phone calls in jurisdictions with Caller Identification (e.g., whistleblowers calling governmental hotlines or news reporters, or anonymous callers to hotlines dispensing vital social or health information) may be able to avoid identification by calling from a telephone other than their own. These callers could also block transmission of their telephone numbers through technology the telephone company could build into the system.

Further, the right to preserve anonymity was advanced in *NAACP* on behalf of members of an organization whose associational rights were threatened by disclosure. It is difficult to apply this model of association to whistleblowers or persons seeking information, who may make only a single call to an organization or individual, and whose call does not necessarily indicate support or affiliation.

Both distinctions attenuate the degree to which the holdings of *NAACP*, *Talley* and *Lamont* provide a determinative framework for evaluating Caller Identification's constitutionality.

177. *See infra* text accompanying notes 204–07.

178. *See infra* text accompanying notes 337–39.

## IV. Is Caller Identification Constitutional? Informational Privacy Rights Balancing on the Edge of Telecommunications Technology

Caller Identification presents a novel and difficult challenge for the intermediate balancing task which courts engage in to protect informational privacy rights. Unlike previous informational privacy cases, privacy interests are present on both the antidisclosure and prodisclosure sides of the scale. Thus, proponents of Caller Identification argue, in part, that the privacy interests of calling parties must bow to the privacy interests of called parties in detecting and avoiding unwanted telephone calls. This novelty raises the unprecedented question of how competing privacy rights should be valued under the informational privacy doctrine.

Other unusual features of the Caller Identification case study complicate the balancing process. As discussed in subpart A below, assessing the privacy interests of the calling party requires the assessor to come to grips with a number of differences between Caller Identification and previous informational privacy cases in terms of the context in which disclosure occurs. Further, assessing prodisclosure interests (the subject of subpart B) is a complicated process. In part the complications arise because, unlike previous informational privacy cases, each of the several interests served by implementation of Caller Identification can be accomplished through one or more alternatives less intrusive on calling party privacy.

This Article's detailed balancing of the interests for and against Caller Identification disclosure concludes (in subpart C) that calling party privacy interests outweigh the interests served by the new technology as New Jersey has deployed it. However, the tilt toward calling party interests is only a slight one caused by factors largely unrelated to the strength of the privacy interests themselves.

The relative weakness of calling party interests is surprising in light of the common sense initial reaction of lawyers and lay persons alike that Caller Identification is an "invasion of privacy." Provoked by this, a concluding subpart D explores a broader privacy conception developed in the legal scholarship on privacy which would substantially tip the balancing toward the calling party side.





### A. *Assessing Calling Party Privacy Interests: Caller Identification, New Questions, and Uncertain Standards*

#### 1. A Novel Threshold Question: Does "Personal" Mean Intrinsically Personal?

All the formulations with which the courts have described the scope of informational privacy presuppose the disclosure of "personal" information, in the sense that it applies to a "particular individual."[179] The mere numerical digits of a telephone number are, of course, "impersonal." In and of themselves, they do not reveal the identity of, or convey any personal information about, the calling party. They would lead to identification of the caller only to the extent that the called party has prior knowledge that the number belongs to a particular individual or has some other capability to convert telephone numbers into names (such as through a specialized "criss-cross" directory). Caller Identification disclosures would lead to harassing return contacts or to personal embarrassment (the attributes on which some courts have hinged informational privacy rights coverage) only to the extent that the caller could be identified *and* the circumstances of the call suggested a particular need, interest, or attribute of the caller.

Thus, a threshold question in determining the extent to which Caller Identification raises concerns embodied in the various privacy models is whether disclosure of telephone numbers should be treated as disclosure of personal information at all. The question is a novel one for which the informational privacy decisions do not provide an answer. Useful light is cast, however, both by a Supreme Court case scrutinizing disclosure requirements affecting abortion rights and by an FOIA exemption six opinion written by Justice Scalia, then a D.C. Circuit judge.

In invalidating the abortion reporting statute at issue in *Thornburgh v. American College of Obstetricians*,[180] the Supreme Court recognized that the statute did "not specifically require the reporting of the [abortion patient's] name."[181] However, the Court noted that "the amount of information about her and the circumstances under which she had an abortion are so detailed that identification

179. United States Dep't of State v. Washington Post Co., 456 U.S. 595, 600 (1982) (FOIA exemption six case).

180. 106 S. Ct. 2169 (1986) (invalidating Pennsylvania statute requiring, *inter alia*, identification of physicians and facilities involved in second-trimester abortions and disclosure of patient's residence, age, race, marital status, and number of prior pregnancies).

181. *Id.* at 2182.

is likely."[182] Thus, the Court indicated that when constitutional rights related to information disclosure are at stake, it is appropriate to look at the amount of disclosure required and the circumstances in which disclosure will occur—and not merely at whether the disclosure requirements mandate direct personal identification.

*Arieff v. United States Department of the Navy*[183] concerned a journalist's FOIA request for documents disclosing the names and amounts of prescription drugs supplied to the physician who, in turn, provides prescription services to current and former Members of Congress and Supreme Court Justices.[184] The requester indicated that "the Navy could delete all information that would identify the ultimate recipient of any of the drugs." The Navy argued, however, that given the existing knowledge of those who would have access to the information, disclosure of the drug inventory information would in effect reveal the medical condition of particular members of Congress.[185]

Like a telephone number, the inventory information sought in *Arieff* did not identify any particular person.[186] Yet, the opinion by then-Judge Scalia did not find that fact dispositive. Rather, Scalia went on to determine whether, given the circumstances, disclosure of the "impersonal" drug names and quantities could lead indirectly to identification of medical conditions of individual officials.[187] Although Scalia found claims of indirect individual identification

182. *Id.* The Court also stated that identification of individual abortion patients was "the obvious purpose" of the "extreme" reporting requirements.

183. 712 F.2d 1462 (D.C. Cir. 1983).

184. *Id.* at 1464.

185. *Id.* at 1465. In ruling that the information was exempt from disclosure, the district court found this Navy argument convincing.

186. *Id.* at 1466 ("The district court acknowledged that the records appellant seeks 'do not, on their face, contain personal details of any individual's medical condition.' ").

187. Scalia's assessment, based on affidavits and conflicting arguments, concluded that there was no danger that the prescription information would disclose individual medical conditions. Scalia found it unlikely that "each of the drugs listed was prescribable for only a single disease." *Id.* at 1466–67. Further, Scalia noted,

> [I]t is fanciful to assume that without more (for example, visible and distinctive manifestations of that disease in the patient) the knowledge that *someone* among 600 possible recipients was probably using the drug (only *probably* because it might, of course, have been ordered merely to replenish inventory) would lead to the conclusion that Beneficiary X has disease Y.

*Id.* at 1467 (emphasis in original). The basic problem with the Navy's argument, according to Scalia, was that it did not establish "more than a 'mere possibility' " of privacy invasions, *id.*, and therefore collided with the Supreme Court's statement in Department of the Air Force v. Rose, 425 U.S. 352, 380 n.19 (1976), that exemption six requires "threats to privacy interests more palpable than mere possibilities."



far-fetched in *Arieff*, his approach suggests that an important privacy interest could be claimed in another FOIA case if facially impersonal data could, under the circumstances, disclose personal information.[188]

The *Arieff* approach—which, as with the Supreme Court's approach in *Thornburgh*, elevates the substance of a privacy invasion over its form—seems at least as well suited to the informational privacy context.[189] It makes little difference whether the harms the informational privacy right seeks to avoid are caused by the information per se or by the information *in the context in which it is received*. The policies behind the right are threatened in either situation.

### 2. The Scope of Interests Protected by the Informational Privacy Right: Caller Identification's Implications Under Different Privacy Definitions

A second and essential step in assessing the strength of calling party interests is confronting and resolving the fact that "[t]he nature and extent of the interest recognized in *Whalen* and *Nixon* . . . are unclear,"[190] and remain so even after more than ten years of lower court opinions. This requires an evaluation of the degree to which Caller Identification impinges upon privacy rights under the various information privacy regimes reflected in the case law.

If the informational privacy right protects only against disclosures of information that are embarrassing, stigmatizing, or otherwise injurious to reputational interests, a relatively small number of Caller Identification applications would implicate privacy rights. Only those telephone calls made by persons who wish to remain anonymous to avoid embarrassment (for example, persons with medical, psychological, financial, or other lifestyle problems who wish to make anonymous calls to information sources, such as "hotlines," governmental agencies, or individual information providers)

188. *Cf.* Heights Community Congress v. Veterans Admin., 732 F.2d 526 (6th Cir.) (impersonal digits of social security numbers assumed to be exempt from FOIA disclosure), *cert. denied*, 469 U.S. 1034 (1984).

189. Unlike his approach in other parts of the *Arieff* opinion, see 712 F.2d at 1468, Judge Scalia made no attempt to rely on the language or legislative history of the FOIA in assuming that information not individually identifiable would raise privacy concerns in certain circumstances. This enhances the validity of applying the FOIA analogy to the informational privacy cases. Indeed, given FOIA's stronger prodisclosure policy, *see infra* text accompanying note 224, the informational privacy context is an even more appropriate domain for an expansive formulation.

190. Barry v. City of New York, 712 F.2d 1554, 1559 (2d Cir.), *cert. denied sub nom.*, Slevin v. City of New York, 464 U.S. 1017 (1983).

would be included in this category.[191] Moreover, whistleblowers could fear damage to their social or work relationships if their identities were disclosed to the parties against whom they complained.[192] Of course, disclosure of the calling party's telephone number could also indicate facts about the location of the caller that would be embarrassing; the interesting question is whether individuals are entitled to constitutional protection from this embarrassment.[193]

On the other hand, if the informational privacy right protects against all disclosures that could lead to harassing contacts, particularly those involving intrusion into the home, a significantly wider range of Caller Identification's applications would be implicated.[194]

191. *See CLASS Hearings*, *supra* note 1, at 98–99 (Martone testimony) (examples of "people who will call the health department and ask for information concerning safe sex techniques" or who "called the IRS for information about tax amnesty programs").

192. *See id.* at 77 (Louis testimony) ("people who may have reasonable cause to believe that a child is abused or neglected but may not for whatever purposes [wish] to identify themselves in making the report"); *cf. id.* at 98 (Martone testimony) (concern about "people who call tips to newspapers and news agencies").

193. It is possible to imagine examples in which the embarrassment would be akin to that found in the anonymous caller situation. For example, a member of a family might wish to make a call from the office of the family doctor, lawyer, or clergyman without revealing that fact through disclosure of a telephone number known to other family members. However, many instances of this form of embarrassment do not have the loftiest claim to protection. The person who calls from the corner bar or a motel room to tell his or her spouse that he or she is working late at the office and the teen-ager who phones her parents to say she is at her girlfriend's home but is really at her boyfriend's house may be embarrassed by the disclosure of telephone numbers which reveal that they are not where they say they are. However, it is unlikely that informational privacy law would accord much protection, if any, to the "right to lie" via withheld information. *Cf.* United States v. Bales, 813 F.2d 1289 (4th Cir. 1987) (no constitutional privacy concerns raised by conviction for false representation of social security number); Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986) ("Accurate information concerning . . . unlawful activity is not encompassed by any right to confidentiality").

194. Harassment and embarrassment can occur simultaneously. *See* United States v. Liebert, 519 F.2d 542, 549 (3d Cir.) (discovery of IRS list of tax nonfilers could lead to "intrusive communication by a stranger about a failure to file a tax return" that could "prove disturbing" because it would "reviv[e] dormant unpleasant memories"), *cert. denied*, 423 U.S. 985 (1975). Further, release of some embarrassing information could be harmful without leading to further contact from others. For example, individuals who learn about a public employee's financial data through the public inspection provisions of a financial disclosure law might draw an adverse and embarrassing inference about the employee's reputation, see, e.g., *Barry*, 712 F.2d at 1561, without ever contacting or confronting him or her.

Still, much personal information—even if it could lead to harassing mailings or other contacts—is not embarrassing and would lead to no reputational injury. For example, release of a mailing list which indicated that one sought to travel a scenic wilderness river, Minnis v. USDA, 737 F.2d 784 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985), would cause neither chagrin nor stigmatization, although it would reveal knowledge which others could use as a basis for a mailed solicitation. Overall, it seems likely that a significantly larger domain of information could lead to harassment without being "intimate" or embarrassing, compared to the other way around.



Under the New Jersey implementation scheme, inquiries to any commercial establishment by a potential customer would reveal the inquirer's telephone number and could be a source of telephone solicitations by that establishment or others with whom the information is shared.[195] Indeed, telephone numbers for potential solicitations could be acquired through chicanery, without callers knowing that the number they were calling was connected to some commercial venture. Further, the implications of Caller Identification under a harassment model become even more substantial in light of the prevalent practice of unpublished telephone numbers.[196] Subscribers who retain unpublished telephone numbers presumably do so because they wish a large degree of control over the dissemination of their numbers;[197] they want to avoid being called, both by persons they do not know and by many they do know. Yet, despite the apparent feasibility of preventing unpublished numbers from being transmitted to called parties,[198] New Jersey's version of Caller Identification would reveal such numbers to all persons or enterprises called by persons with unpublished numbers.[199]

195. *See CLASS Hearings*, *supra* note 1, at 41 (Makul testimony) (concern that Caller Identification would make telephone numbers available to "overzealous salesmen"); *id.* at 101 (Martone testimony) (Caller Identification "make[s] it easier for people who wish to pester people with sales calls").

196. Data from New Jersey indicate that about 40% of all telephone subscribers have unpublished numbers. Telephone interview with Raymond Makul, Director of the Division of Rate Counsel, State of New Jersey State Public Advocate (Late summer, 1988) [hereinafter Makul Interview]. Approximately 35% of Delaware subscribers have unpublished numbers. Smith Interview, *supra* note 20.

197. Strangely, this common sense point is not the view of unpublished number subscribers that emerges from several FOIA exemption six cases. *See, e.g.*, Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 137 n.15 (3d Cir. 1974) (linking individual's use of unlisted telephone number to goal of "keeping his address private"); HMG Marketing Assocs. v. Freeman, 523 F. Supp. 11, 15 (S.D.N.Y. 1980) (same).

198. New Jersey Bell justified its refusal to block transmission of unpublished numbers on the basis that blocking would reduce the ability of the system to achieve its goals. *See infra* text accompanying notes 348 & 349.

199. In certain cases, the possibility of subsequent harassment could be particularly significant. For example, the hearings on Caller Identification in New Jersey focused on the following example:

> Teachers often have to call parents at home in the evening, particularly parents of problem children. If the teacher calls [a Caller Identification] equipped home of a problem child, and that child answers, the problem child now has the teacher's phone number, and can subject the teacher to all kinds of telephone abuse.

Caller Identification could prevent the teacher—or any other professional who wished to call persons from home without revealing his or her telephone number—from using

Finally, Caller Identification raises a different set of questions if the informational privacy right applies only to personal information in circumstances creating a reasonable expectation of privacy. At the threshold, the reasonable expectation of privacy model requires an assessment of the relevance of recent fourth amendment cases which hold that calling parties do not have a reasonable expectation of privacy in the fact (as opposed to the content) of their telephone calls. This raises a more general question not clearly answered by the informational privacy cases: To what extent are fourth amendment privacy standards legitimate analogies in the assessment of informational privacy rights? An analysis of the reasonable expectation of privacy model also requires an analysis of those circumstantial factors which enhance privacy expectations (such as subscribers' use of unpublished numbers) and factors which diminish those expectations (such as the general public availability of published telephone numbers).

The Caller Identification case study, therefore, suggests the need to resolve these and other uncertainties in the informational privacy case law about the scope of the privacy right protected. This section examines those issues by first considering those models which evaluate privacy rights in terms of the impact of disclosure on the individual. It then reviews models which evaluate privacy rights in terms of the reasonableness of privacy expectations.

### a. Models Based on the Impact of Disclosure on the Individual

One definition of protected privacy interests includes information that is "intimate," the disclosure of which could lead to embarrassment, stigmatization, or other reputational injury.[200] *Whalen* employed this approach in noting the extent to which much of the information collected by government is "personal in character and

in unlisted number to protect against such harassment. *CLASS Hearings*, *supra* note 1, at 42–43 (Makul testimony) (paraphrasing "letter from a concerned teacher").

Indeed, there might be legitimate circumstances in which one would not want one's office number to be revealed to particular persons. For example, a United States Attorney located in San Diego expressed to the author her concern that with Caller Identification she would be unable to call witnesses to whom she did not want her office phone number revealed.

200. A more complete list of these "injuries that can result from the unwarranted collection and disclosure of personal information" would include psychological harm, impairment of individual dignity, detrimental effect on social and professional interactions, and possibly life-long stigmatization. *See* Comment, *Conceptualizing National Identification: Informational Privacy Rights Protected*, 19 J. MARSHALL L. REV. 1007, 1014–15 (1986).

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potentially embarrassing or harmful if disclosed."[201] Lower court informational privacy cases have followed the Supreme Court's lead.[202]

The interest in avoiding embarrassment, stigmatization, and the like, is also recognized in cases discussing privacy interests in other legal contexts. In its 1979 analysis of privacy rights in the labor law context, the Supreme Court was concerned that the "sensitive" nature of employee personnel files could lead to embarrassment or other injury if the files were disclosed to the employee's union.[203] Further, the Court's decisions striking down disclosure requirements because of their potential to chill the exercise of first amendment or fundamental due process rights were based on the tendency of the requirements to lead to "public exposure,"[204] and even to "loss of employment" or other manifestations of "public hostility."[205] Finally, the Supreme Court's concern in FOIA exemption six cases with the "injury and embarrassment" that can result from release of "intimate" information[206] is reflected in a number of lower court opinions.[207]

The informational privacy cases are on solid ground in assigning significant value to the interest in avoiding embarrassing or

201. Whalen v. Roe, 429 U.S. 589, 605 (1977).

202. Lower court cases have observed that medical information in employee personnel files may contain "intimate facts," United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980), and that public employee financial data may be "personally embarrassing" and "highly intrusive," Barry v. City of New York, 712 F.2d 1554, 1561 (2d Cir.), *cert. denied sub nom.*, Slevin v. City of New York, 464 U.S. 1017 (1983). Another informational privacy court wrote generically about information that is "'highly personal [and] sensitive'" and "would be offensive and objectionable to a reasonable person of ordinary sensibilities." Denver Policemen's Protective Ass'n. v. Lichtenstein, 660 F.2d 432, 435 (10th Cir. 1981).

203. Detroit Edison Co. v. NLRB, 440 U.S. 301, 317, 318 n.16 (1979) (majority opinion); *id.* at 327 (White, J., dissenting) (issue framed as whether release would cause "ridicule").

204. Thornburgh v. American College of Obstetricians, 106 S. Ct. 2169, 2182 (1986). The Court noted, but did not rely on, findings by the district court that public disclosure would heighten the fear and anxiety of abortion patients of facing "pressure from anti-abortion forces." *Id.* at 2128 n.17.

205. NAACP v. Alabama, 357 U.S. 449, 462 (1957); *see* Talley v. California, 362 U.S. 60, 65 (1960) (concern with "identification and fear of reprisal").

206. United States Dep't of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

207. For example, one often quoted opinion stated that the "personal" and "intimate" quality of information depends upon whether it could lead to "embarrassment, harassment, disgrace, loss of employment or friends." Brown v. FBI, 658 F.2d 71, 75 (2d Cir. 1981). *See also*, Local 3, IBEW v. NLRB, 845 F.2d 1177, 1180–81 (2d Cir. 1988) (quoting *Brown* formulation); Southern Utah Wilderness Alliance Inc. v. Hodel, 680 F. Supp. 37, 39 (D.D.C. 1988) (dispositive question whether information leads to "opprobrium").

stigmatizing disclosures of "intimate" information. This was the most direct focus of Warren and Brandeis' campaign for an informational privacy right.[208] Thus, the constitutional informational privacy doctrine, as a constitutional analogue to the tort of public disclosure of *embarrassing* private facts, reflects appropriately the influence of Warren and Brandeis; it brings government practice into line with the practices required of private citizens. Placing constitutional weight on disclosures of intimate information also aligns the law with common sense views about the kinds of information that are at the core of what average persons wish to keep "confidential."[209]

A second "impact" model focuses on the potential of some personal information releases to lead to harassment of individuals. The informational privacy cases have not tended to feature this approach in their definition of protected privacy rights.[210] However, cases construing informational privacy rights in analogous statutory contexts have developed in more detail the right to avoid disclosures which may lead to future harassment. Thus, in *United States v. Liebert*[211] the court held that a criminal defendant's discovery request for the names and addresses of persons listed by the Internal Revenue Service as nonfilers of tax returns should be denied because release of the list would lead to "offensive" contact by those preparing the defense. And, in a number of FOIA exemption six cases, courts have had to decide whether requests for mailing lists compiled by federal agencies should be honored. Many of these courts

208. *See supra* note 102.

209. Moreover, according substantial strength to the interest in preventing disclosure of intimate information recognizes the association between the "confidentiality" branch of substantive due process and the "autonomy" branch. As the latter branch has developed, most of the "kinds of important decisions" in which individuals have an interest in "independence" are "intimate" ones; they relate to marital or medical intimacies and family decisions. Having information about intimate decisions protected by the confidentiality branch advances the strong substantive due process policy of protecting intimate decisionmaking. *See supra* text accompanying notes 114–16. Given the general unwillingness of courts to conclude that disclosures should be protected through strict scrutiny because they affect the exercise of autonomy of important decisions, protecting this information through the informational privacy rights branch of substantive due process is not redundant.

210. *But see* Slevin v. City of New York, 551 F. Supp. 917 (S.D.N.Y. 1982) (disclosure of public employee financial information may lead to unwanted follow-up contact), *aff'd in part and rev'd in part sub nom.*, Barry v. City of New York, 712 F.2d 1554 (2d Cir.), *cert. denied*, 464 U.S. 1017 (1983). On appeal, the Second Circuit stated that "public disclosure of financial information may be personally embarrassing and highly intrusive." *Barry*, 712 F.2d at 1561. The extent to which the court relied on the *intrusiveness* of the information, independent of its embarrassing nature, is not clear.

211. 519 F.2d 542 (3d Cir.), *cert. denied*, 423 U.S. 985 (1975).



have held that disclosures of names and addresses linking an individual to a particular status or preference are unacceptable, because disclosure would subject these individuals to "an unwanted barrage of mailings and personal solicitations" and thereby raise substantial privacy concerns.[212] In certain circumstances the harm of harassment could rise far above mere annoyance or bother.[213]

Nevertheless, some FOIA courts have downplayed the significance of the interest in avoiding harassing contacts. Courts in three federal circuits have characterized the interest as "miniscule,"[214] "minimal,"[215] "not particularly compelling,"[216] and "not inconsequential" yet "not very substantial."[217] Courts have also downplayed the generic privacy interest in names and addresses by indicating that only in special circumstances does the interest rise to significance.[218]

212. Multnomah County Medical Soc'y v. Scott, 825 F.2d 1410, 1415–16 (9th Cir. 1987) (names and addresses of Medicare beneficiaries); *see* Heights Community Congress v. Veterans Admin., 732 F.2d 526, 530 (6th Cir.) (names and addresses of property purchasers under VA mortgage plan; concern that plaintiffs would seek to "interrogate" purchasers), *cert. denied*, 469 U.S. 1034 (1984); Minnis v. USDA, 737 F.2d 784, 787 (9th Cir. 1984) (names and addresses of applicants for rafting permits), *cert. denied*, 471 U.S. 1053 (1985); AFGE, Local 1923 v. United States Dep't of Health & Human Servs., 712 F.2d 931, 932 (4th Cir. 1983) ("strong privacy interest" in employee home addresses); HMG Mktg. Assocs. v. Freeman, 523 F. Supp. 11, 15 (S.D.N.Y. 1980) (names and address of persons purchasing historic silver dollars from United States government).

213. As the Seventh Circuit pointed out:

> We doubt that operatives of the CIA, or even agents of the FBI or guards of federal prisons, want to reveal their home addresses to those who may have scores to settle. A request for the home addresses of prison guards might create the risk of a 'clearly unwarranted' invasion of privacy. Felons might use the addresses to retaliate . . . .

Department of the Air Force v. FLRA, 838 F.2d 229, 232 (7th Cir.), *cert. dismissed*, 109 S. Ct. 632 (1988); *see also* Marzen v. Department of Health & Human Servs., 825 F.2d 1148, 1152–54 (7th Cir. 1987) (refusal to disclose names and addresses of doctors serving on medical committee to representatives of pro-life group objecting to committee's actions). The *Department of the Air Force* court characterized *Marzen* as a case of withholding to prevent "harassment" of the committee members. 838 F.2d at 232.

214. *Department of the Air Force*, 838 F.2d at 232–33 ("[b]oth the secrecy and the seclusion components of privacy therefore are minuscule [sic] here"; "slight" privacy interest and impairment).

215. Getman v. NLRB, 450 F.2d 670, 675 (D.C. Cir. 1971).

216. AFGE, Local 1760 v. FLRA, 786 F.2d 554, 556 (2d Cir. 1986).

217. Disabled Officer's Ass'n v. Rumsfeld, 428 F. Supp. 454, 458 (D.D.C. 1987).

218. *See, e.g.*, *Department of the Air Force*, 838 F.2d at 232 (significant weight afforded name and address release only when it creates "risk of unpleasant encounters or attention" beyond mere receipt of mail); *supra* note 207 (citing *Local 3, IBEW* and *Southern Utah*, FOIA name and address cases indicating release must be embarrassing or reveal "intimate" details).

To the extent that the FOIA exemption six cases rest on a view that unsolicited mailings are benign because "the addressee may send it to the circular file,"[219] the view is out of harmony with broadly worded Supreme Court worries about the "plethora" of "unsolicited and often unwanted mail into every home."[220] In upholding, against a first amendment-based challenge, federal legislation permitting individuals to have their names and addresses removed from certain mailing lists,[221] the Court declared that "[the] ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality."[222] Dismissing the antiharassment interest would also ignore the strong "interest in seclusion" which commentators have located in the broad right to privacy and its embodiment in "the right to be let alone."[223] Finally, devaluation of the antiharassment interest in some FOIA decisions may well be a function of the FOIA's strong prodisclosure bias, as reflected in the requirement that nondisclosure be based on a showing of a "*clearly* unwarranted invasion of privacy."[224] This makes such devaluation less appropriate in the constitutional informational privacy context, where the thumb is less strongly on the scale of disclosure.

In sum, the fact that information disclosure will likely lead to harassment or intrusion, particularly in the home, should trigger the informational privacy balancing process suggested by *Whalen* and *Nixon*. Courts should still be free to require that allegations about harassment (as well as other harms) rise above the level of "utterly unsubstantiated"[225] or speculative.[226] What informational

219. *Department of the Air Force*, 838 F.2d at 232.

220. Rowan v. United States Post Office Dep't, 397 U.S. 728, 736 (1969).

221. *Rowan* involved a challenge to a 1967 federal postal statute "under which a person may require that a mailer remove his name from its mailing lists and stop all future mailings to the householder," *id.* at 729, based on the person's belief " 'in his sole discretion [that the material is] erotically arousing or sexually provocative . . . .' " *Id.* at 730 (quoting 39 U.S.C. § 3008(a) (1980)).

222. 397 U.S. at 737.

223. *See, e.g.*, Posner, *supra* note 103, at 174–75. Posner defines the privacy-based interest in seclusion as an interest against "disruption of peace and quiet." He states that "in general the case for protecting privacy in the sense of seclusion, physical privacy, is stronger, or at least clearer" than the different interest in keeping matters secret.

224. 5 U.S.C. § 552(b)6 (1982) (emphasis added); *see also supra* text accompanying notes 165–67.

225. United States v. Bales, 813 F.2d 1289, 1297 (4th Cir. 1987) (court's characterization of argument that conviction for use of false social security number violated defendant's privacy rights).

226. *See* Arieff v. Department of the Navy, 712 F.2d 1462, 1468 (D.C. Cir. 1983) (citing Department of the Air Force v. Rose, 425 U.S. 352, 378–82 (1976)).



privacy courts should not do is ignore, across the board, the possibility of harassment inherent in disclosure of certain forms of information.

### b. The Expectation Model: When Is An Expectation of Nondisclosure Reasonable?

A number of informational privacy cases use a "reasonable expectation of privacy" formulation in describing when a planned disclosure is subject to constitutional protection. The expectation approach focuses on the actions of the specific parties to the dispute, and the degree to which their actions justify the privacy expectations of the individual seeking nondisclosure.

The informational privacy case law does not address how this expectation approach interacts with the impact approach described in the previous subsection.[227] The best approach is illustrated by this passage from a recent Tenth Circuit informational privacy case:

> Information is constitutionally protected when a legitimate expectation exists that it will remain confidential while in the state's possession. The legitimacy of an individual's expectations depends, at least in part, upon the intimate or otherwise personal nature of the material which the state possesses.[228]

It makes sense to include the "intimate" character of information in the determination of privacy expectations; "[t]he more intimate or personal the information, the more justified is the expectation that it

227. A few cases use both approaches without differentiating them. *See, e.g.*, Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986) (discussion of "confidentiality with respect to certain forms of personal information" linked with consideration of "[t]he legitimacy of individual expectations of confidentiality").

Other cases appear to rely principally on the expectation approach, but they proceed to define "reasonable expectation," in part, in terms of the impact of the information involved. *See infra* text accompanying notes 228 & 229.

At least one informational privacy case seems to focus exclusively on factors relating to the reasonableness of privacy expectations. The court in Trade Waste Management Ass'n v. Hughey, 780 F.2d 221, 233–34 (3d Cir. 1985), sustained provisions of a licensing scheme which required waste disposal contractors to reveal any criminal convictions and pending criminal charges and be fingerprinted. In concluding that this information is "in no way analogous" to the information in a personal medical history, the court noted that "[w]hile it may be that when conduct resulting in the convictions or charges was engaged in the person who engaged in it *expected* that such participation would remain secret, that *expectation* was never reinforced by the law." *Id.* at 234 (emphasis added).

228. *Mangels*, 789 F.2d at 839; *accord* Martinelli v. District Court, 199 Colo. 163, 174, 612 P.2d 1083, 1091 (1980) ("that the material or information . . . is 'highly personal and sensitive' " is an important aspect of showing that plaintiff "has 'an actual or subjective expectation that the information . . . not be disclosed' ") (quoting Byron, Harless, Schaffer, Reid and Assocs., Inc. v. State *ex rel.* Schellenberg, 360 So. 2d 83, 94–95 (Fla. Dist. Ct. App. 1978), *rev'd*, 379 So. 2d 623 (1980)).

will not be subject to public scrutiny."[229] In some circumstances, however, more than just the "intimate" content of the information disclosed and its impact on the individual should be assessed; expectations flowing from the relationships of the parties and other circumstances may make an important difference in determining the substantiality of privacy interests.[230] Thus, the Supreme Court majority opinion in *Whalen* discounted the interest in avoiding disclosure of intimate medical information to public health officials because such disclosure is not "meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care."[231] So, too, the *Nixon* Court stated that former President Nixon's "status as a public figure" reduced the strength of his privacy claim in "matters of personal life."[232]

The informational privacy cases have borrowed the reasonable expectation of privacy formulation from the fourth amendment case law regarding searches and seizures[233]—case law which includes recent decisions holding that citizens have no reasonable expectation

229. Fraternal Order of Police v. City of Philadelphia, 812 F.2d 105, 112–13 (3d Cir. 1987).

230. At other times, the impact of the information will be the sole determinant of whether privacy expectations are reasonable. For example, the court in Barry v. City of New York, 712 F.2d 1554, 1561–64 (2d Cir.), *cert. denied sub nom.*, Slevin v. City of New York, 464 U.S. 1017 (1983), did not discuss reasonable expectations in finding that public employees had a significant privacy interest against public dissemination of their financial secrets. Rather, the court relied only on the "adverse effect of public disclosure." *Id.* at 1561. This makes perfect sense. In the absence of any particular understandings between the city and its employees with respect to financial data, any indication that the information was otherwise available, or any other factors affecting the employees' expectations of privacy, the "personally embarrassing and highly intrusive" nature of public financial disclosures, *id.*, is the sole and sufficient source of the employees' nondisclosure expectation. The consequences of disclosure become a proxy for the reasonableness of employee privacy expectations.

231. Whalen v. Roe, 429 U.S. 589, 602 (1977).

232. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 465, 457 (1977).

233. The *Nixon* case initiated the transplantation of fourth amendment concepts into the civil informational privacy context. In assessing the extent of the former president's privacy interest, the Court borrowed from *Katz*, the fourth amendment case defining when a "legitimate expectation of privacy" arises, *id.* at 458 (citing Katz v. United States, 389 U.S. 347, 351–53 (1967)), and drew contrasts to a fourth amendment case invalidating sweeping, general searches under the authority of a warrant, *id.* at 461–62 (discussing and distinguishing Stanford v. Texas, 379 U.S. 476 (1965)). The *Nixon* Court also cited two fourth amendment search cases in explicating its balancing of interests test. *Id.* at 458 (citing Camara v. Municipal Court, 387 U.S. 523, 534–39 (1967) and Terry v. Ohio, 392 U.S. 1, 21 (1968)).

Subsequent informational privacy cases have followed the lead of *Nixon*, citing *Katz* when the reasonable expectation of privacy formulation is employed. *See, e.g.*, Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986); Kimberlin v. United States Dep't of Justice, 788 F.2d 434, 438 (7th Cir.), *cert. denied*, 478 U.S. 1009 (1986).



of privacy in the record of their outgoing calls. If the reasoning of these decisions is applicable to expectation analysis in the informational privacy domain, this could preclude coverage for Caller Identification. Subsection (1) argues that the fourth amendment precedents should not preclude a finding of reasonable privacy expectations for those living under a Caller Identification system. In so doing, the discussion makes some general observations about the extent to which fourth amendment decisions on the reasonable expectation of privacy should be imported into the informational privacy context.

Yet, if the recent fourth amendment precedents are not applicable to informational privacy cases, this leaves the question of how privacy expectations should be assessed in the informational privacy context. Subsection (2) examines calling party expectations in light of two factors used by the informational privacy and FOIA exemption six cases: The extent to which individuals have been permitted to exercise "de facto control" over information sought to be disclosed, and whether the information is otherwise available publicly.

### (1) A Fourth Amendment Rejection of Privacy for Telephone Numbers: Relevance for Informational Privacy Analysis

In *Smith v. Maryland*,[234] the Supreme Court followed the lead of several Ninth Circuit cases[235] in holding that fourth amendment protections do not apply to the installation of a pen register, a device which unobtrusively "records the numbers dialed on a telephone."[236] Essentially, the *Smith* Court determined that calling parties have no reasonable expectation of privacy in the disclosure of the telephone numbers they dial.[237] The Court based its reasoning on two attributes of pen registers which Caller Identification technology shares.[238]

234. 442 U.S. 735 (1979). In *Smith*, a defendant convicted of robbery appealed his conviction. Part of the evidence used to convict the defendant was obtained after police determined, through use of a pen register, that the defendant had made obscene and threatening calls to the robbery victim. Arguing that installation and use of a pen register without a court order constituted a "search" in violation of the fourth amendment, the defendant moved to suppress the evidence.

235. *See* United States v. Lustig, 555 F.2d 737, 747 n.10 (9th Cir. 1977) (citing earlier Ninth Circuit cases), *cert. denied*, 434 U.S. 1045 (1978).

236. *See* United States v. New York Tel. Co., 434 U.S. 159, 161 n.1 (1977).

237. 442 U.S. at 742.

238. Caller Identification is unlike the pen register in that Caller Identification displays *incoming* telephone numbers (i.e. numbers dialed into the subscriber's Caller Identification-equipped line), while pen registers disclose only *outgoing* calls (i.e. numbers

To begin with, the *Smith* Court noted that, unlike the electronic eavesdropping devices to which fourth amendment standards apply, pen registers only record dialed telephone numbers;[239] they do not record "the *contents* of communications."[240] The Court apparently concluded that privacy expectations "only extend[ ] to the content of telephone conversations, not to records that conversations took place."[241] If relevant to the informational privacy domain, this distinction casts doubt about whether constitutional protection can be invoked by calling parties faced with Caller Identification. The new service can only display telephone numbers; it does not indicate directly the likely content of the call.

Further, the *Smith* Court denigrated the expectation of privacy of telephone subscribers because they "realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed."[242] The Court noted that telephone customers should be aware that pen registers are used to aid in the identification of persons making obscene and harassing calls.[243] Under the Court's view, by "exposing" numbers to the telephone company, telephone users "assume[ ] the risk" that the company will reveal the numbers to authorities.[244] Following this logic, Caller Identification would not disturb reasonable calling party expectations. Calling parties must "convey" their telephone numbers through the act of dialing before their numbers can be revealed. And, to the extent that callers are made aware of the existence of Caller Identification by notice in the telephone book or through telephone company publicity, they would have at least as much awareness as the Court attributed to telephone subscribers in *Smith*.

the subscriber dials out). *See* Claerhout, *The Pen Register*, 20 DRAKE L. REV. 108, 110 (1970) (pen register usually does not "disclose calls being received from other telephones"). Although it could be argued that one has a greater personal interest in preventing the disclosure of one's own number than in protecting the telephone numbers of other people one dials, the *Smith* Court's denigration of the privacy interest against pen register disclosure was not based on this distinction. Rather, the *Smith* majority realized that the asserted privacy interest was based on disclosure of the telephone numbers of others *in that they provided information about the defendant*.

239. *Smith*, 442 U.S. at 741 (quoting *New York Tel. Co.*, 434 U.S. at 167). Indeed, as the Court noted, pen registers do not even indicate whether the call was actually completed. *Id.*

240. *Id.* at 741 (emphasis in original).

241. United States v. New York Tel. Co., 434 U.S. 159 (1978); United States v. Lustig, 555 F.2d 737, 747 n.10 (9th Cir.), *cert. denied*, 434 U.S. 926 (1977).

242. *Smith*, 442 U.S. at 742.

243. *Id.*

244. *Id.* at 744.



Notwithstanding *Smith*'s dim view of the privacy interest in telephone numbers, calling parties should be viewed as having constitutionally protectable privacy expectations for two basic reasons. First, given the basic differences between the nature and scope of fourth amendment and informational privacy rights,[245] fourth amendment applications of the reasonable expectation of privacy formulation have very limited power as analogies. The first inquiry in fourth amendment challenges such as *Smith* is whether acquisition of information by the government is a search or seizure.[246] Exclusionary rule limitations on the ability of government to engage in limited disclosure of seized information (*i.e.*, in court as evidence) are only an incidental prophylactic means of enforcing the limitations on acquisition.[247] Thus, cases such as *Smith* shed no light on the proper scope of the right to secrecy, *from the public*, of information in the hands of government (or, as here, a government surrogate). That one cannot reasonably expect to withhold from the government or its proxy information shared with others does not necessarily mean one cannot reasonably expect that it will be withheld from others who do not share the government's valid interest in acquiring the information.[248] More particularly, that one has

245. The *Whalen* Court, for instance, saw the challengers' claim "that a constitutional privacy right emanates from the Fourth Amendment" as an additional claim separate and apart from the due process right to informational privacy the Court had recognized and discussed earlier in its opinion. Whalen v. Roe, 429 U.S. 589, 604 n.32 (1976). The Court succinctly denied the validity of this separate claim: "We have never carried the Fourth Amendment's interest in privacy as far as the Roe appellees would have us. We decline to do so now." *Id.*

Lower informational privacy courts have recognized and built upon the *Whalen* distinction between fourth amendment and informational privacy rights. *See, e.g.*, Barry v. City of New York, 712 F.2d 1554, 1564 (2d Cir.) (citing *Whalen* in holding that informational privacy strand of substantive due process clause, but not fourth amendment, applies to privacy interest in nondisclosure of financial information), *cert. denied sub nom.*, Slevin v. City of New York, 464 U.S. 1017 (1983); Shane v. Buck, 658 F. Supp. 908, 917 (D. Utah 1985) ("The propriety of government collection of data has been considered in terms of the fourth and fifth amendment, but none of the protections provided by those amendments is at issue here." (citation omitted)), *aff'd*, 817 F.2d 87 (10th Cir. 1987); *cf.* Fraternal Order of Police v. City of Philadelphia, 812 F.2d 105, 117 (3d Cir. 1987) (informational privacy case rejecting fourth amendment principle that disclosure to "party who has a particular need for it [strips] the information of its protection against disclosure" to others).

246. The *Smith* Court recognized that it was deciding whether recordation of dialed telephone numbers in a criminal investigatory context is a "search." 442 U.S. at 736.

247. *See* Gerety, *supra* note 162, at 286.

248. *See, e.g.*, J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 33, at 761 & n.25 (describing *Smith* as case in which "the Court has failed to acknowledge the possibility of *other* 'privacy' limitations on governmental data collection practices" (emphasis added)); Note, *The Interest in Limiting the Disclosure of Personal Information: A Constitutional Analysis*, 36 VAND. L. REV. 139, 159 (1983) (fourth amendment "extends to the

voluntarily" released information to the government does not imply "a blanket right to disseminate that information" to anyone.[249]

Given the limited analogolistic power of fourth amendment precedents, a second important reason why the informational privacy courts should not follow the reasoning of the *Smith* majority is that it is dubious in major respects. For one thing, the majority's assumption that pen registers were not capable of recording " 'the purport of any communication between the caller and the recipient of the call [or] their identities' "[250] is both inaccurate and irrelevant to analysis of fourth amendment privacy rights. The characterization ignores the fact that identification of persons is the obvious result (and the basic goal) of deploying the device. In *Smith*, the police used the pen register records to obtain a warrant to search the defendant's residence. The search revealed other evidence that the defendant had placed calls to the robbery victim, and led to a lineup at which the victim identified the defendant.[251] Further, the majority's characterization ignores a reality that critics of Caller Identification have noted: In certain circumstances, disclosure of the fact that calling party X telephoned party or entity Y may say much about the particular "purport" of the call and, in a broad way, the subjects discussed.[252] Moreover, the content versus fact-of-call distinction makes no difference to the relevant question at issue: the reasonableness of privacy expectations.[253]

Nor are the *Smith* majority's views about assumption of risk logical or appropriate from the standpoint of protecting privacy rights. As Justice Marshall pointed out in dissent in *Smith*, "[i]mplicit in the concept of assumption of risk is some notion of

limited interest of the individual in keeping information out of the government's possession in the first instance, but provides no restraints on what the government does with the information after its collection").

249. Comment, *supra* note 200, at 1022.

250. 442 U.S. at 741 (quoting United States v. New York Tel. Co., 434 U.S. 159, 167 (1977)).

251. *See id.* at 737.

252. *See supra* text accompanying notes 191–93.

253. *See* 442 U.S. at 746 (Stewart, J., dissenting) ("What the telephone company does or might do with those numbers is no more relevant to [the reasonable expectation] inquiry than it would be in a case involving the conversation itself.") Indeed, the majority seems to have erred in taking the content versus fact-of-call distinction out of context. *New York Tel. Co.* held that recordations which did not involve telephone call content were not "interceptions" under Title III of the wiretapping provisions of the Omnibus Crime Control Act. That Congress arguably intended the content versus fact-of-call distinction to govern interpretation of the Act is irrelevant to the task of interpreting the intent of the fourth amendment's framers. *See id.* at 749 n.1 (Marshall, J., dissenting).



choice."[254] Yet, as Marshall continued, "unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance."[255] Such unrealistic conceptions about the freedom of choice individuals have with respect to their telephones should not be used by informational privacy courts.

Nor, finally, should informational privacy law be saddled with the ultimate implications of the assumption of risk theory: that the government can make unprecedented inroads into the existing privacy rights of individuals as long as it tells those individuals about the invasions. The *Smith* majority recognized this difficulty and offered an assurance that courts could use a "normative inquiry" to protect privacy values against unjustified intrusion.[256] However, the majority's assurance is insufficient, either because it is limited to extreme instances of wholesale rights violations or because its intended broader reach remains vague.[257]

254. *Id.* at 749–50 (Marshall, J., dissenting).

255. *Id.* Of course, in *Smith* and in the Caller Identification situation, the calling party has some choice of which telephone line to use to make a call. The reasonableness of expecting calling parties to use pay phones and other means of avoiding disclosure of their telephone numbers is discussed *infra* at text accompanying notes 280 & 351.

256. 442 U.S. at 740 n.5.

257. The majority explained the basis for a normative inquiry as follows:

> Situations can be imagined, of course, in which *Katz*' two-pronged inquiry would provide an inadequate index of Fourth Amendment protection. For example, if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects. Similarly, if a refugee from a totalitarian country, unaware of this Nation's traditions, erroneously assumed that police were continuously monitoring his telephone conversations, a subjective expectation of privacy regarding the contents of his calls might be lacking as well. In such circumstances . . . those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was. In determining whether a "legitimate expectation of privacy" existed in such cases, a normative inquiry would be proper.

*Id.* In general, commentators remain unimpressed that the *Smith* majority allowed room for appropriate protective measures. *See, e.g.*, 1 J. CHOPER, Y. KAMISAR & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS (1979) 143–44 (statement of Professor Kamisar that the *Smith* assumption of risk theory requires individual desiring privacy to "engag[e] in drastic discipline, the kind of discipline characteristic of life under totalitarian regimes"); L. TRIBE, *supra* note 11, at 1391 (*Smith* "generates a terribly crabbed sense of the contemporary possibilities for privacy").

### (2) Caller Identification and Reasonable Factors Governing Reasonable Expectations

Although the *Smith* conception of privacy expectations is inappropriate, the reasonable expectation analysis of several informational privacy and FOIA cases is germane to an assessment of calling party privacy expectations.

The widespread practice of permitting subscribers to have an unpublished telephone number arguably enhances the privacy expectations of the substantial percentage of subscribers who acquire nonpublished status.[258] As the *Nixon* Court recognized, a would-be information discloser's "acquiescence" in a "pattern of *de facto* . . . control" over the information by the disclosee "gives rise to [a] legitimate expectation of privacy in such materials."[259] By analogy, telephone companies which make unpublished number status available to subscribers have acquiesced in a de facto control pattern. That telephone subscribers go to the effort (and, usually, the additional expense) to have an unpublished number also illustrates what one informational privacy court found to be "[t]he essence of private information"[260]—the "individual[ ] treatment of [information] as confidential." Thus, expectational analysis suggests that holders of unpublished numbers do have an enhanced privacy expectation.[261]

258. *See supra* text accompanying note 196.

259. Nixon v. Administrator of General Servs., 433 U.S. at 458; *see also* Southern Utah Wilderness Alliance v. Hodel, 680 F. Supp. 37, 39 (D.D.C. 1988) (FOIA exemption six case) (privacy claim diminished because Department of Interior "has not taken any precaution to assure privacy at the time the information was obtained").

260. Fraternal Order of Police v. City of Philadelphia, 812 F.2d 105, 116 (3d Cir. 1987).

261. New Jersey Bell took the position, endorsed by the New Jersey Board of Public Utilities in the interim CLASS service order, that subscribers with unpublished numbers should have expectations only that the company would not list their numbers in the telephone directory or give them out to users of directory assistance. *See CLASS Hearings*, *supra* note 1, at 16 (D'Alessio statement). Yet, this overly literal reading of the "contract" between an unpublished subscriber and the telephone company ignores the likelihood that persons expecting (and paying for) such broad nondisclosure from their telephone companies would almost certainly expect those companies to avoid *selective* disclosure, a practice totally at odds with their blanket nondisclosure expectation.

Another way to conceive of telephone company actions is that they constitute a pledge of confidentiality—backed by contractual trappings—which enhance the individual interest in confidentiality. FOIA courts have found assurances of confidentiality relevant in weighing the individual interest in nondisclosure. *See, e.g.*, Marzen v. United States Dep't of Health & Human Servs., 825 F.2d 1148, 1154 (7th Cir. 1987) (that names and addresses made available to agency "on the condition of confidentiality" provided additional reason to keep them confidential). *But see* Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986) (informational privacy case) (limited assurances of confidentiality offered by Denver Fire Department officials not relevant to determination of whether firefighters had reasonable expectation in nondisclosure of adverse personnel investigation).



The converse question is whether subscribers who *fail* to take advantage of unpublished number service have significantly diminished their expectation of privacy. The question ties into the theory that the "general unavailability"[262] of information is a prerequisite to having a reasonable expectation of privacy in it. On the assumption that "[i]nformation readily disclosed or available carries no protection,"[263] courts have devalued privacy expectations when the information "is a matter of public record."[264] Of special interest are several FOIA exemption six cases devaluing the privacy interest in one's name and address because they are available from telephone directories and city directories.[265] These cases suggest, at first glance, that a telephone customer who does not take advantage of unpublished number status, thus leaving his or her phone number and name in the public domain, has similarly diminished his or her privacy expectation.

The public availability of listed telephone numbers would undercut the privacy interest of the persons holding those numbers *if* the interest were merely in disclosure of the numerical digits themselves or in the mere linking of their names and telephone numbers.[266] However, most of the disclosures about which opponents of Caller Identification can legitimately complain under the right to informational privacy are not already available publicly from telephone directories. Would-be phone solicitors may find that telephone numbers and general demographic data in the telephone directory are of some limited use in "cold calling," but the solicitors

262. *Fraternal Order of Police*, 812 F.2d at 116.

263. *Id.*

264. AFGE, Local 1923 v. United States Dep't of Health & Human Servs., 712 F.2d 931, 934 (4th Cir. 1983) (Winters, J., dissenting) (FOIA exemption six case), *vacated*, 109 S. Ct. 831 (1989); *see* United States v. Liebert, 519 F.2d 542, 548 (3d Cir.) (criminal discovery case; fact of nonfiling of taxes not confidential because "public information"), *cert. denied*, 423 U.S. 985 (1975).

265. Department of the Air Force v. FLRA, 838 F.2d 229, 232 (7th Cir.) ("home addresses are in the telephone book, freely available to anyone interested"), *cert. dismissed*, 109 S. Ct. 632 (1988); AFGE, Local 1760 v FLRA, 786 F.2d 554, 556 (2d Cir. 1986). *But see* USDA v. FLRA, 836 F.2d 1139, 1143 (8th Cir. 1988) ("We cannot agree that even such a modest interest should receive little solicitude solely because the information at stake may be available from other sources"), *vacated*, 109 S. Ct. 831 (1989).

266. For example, if this were the extent of the interest, a teacher would have no reasonable expectation that Caller Identification withhold his or her telephone number from a "problem student" if he or she took no steps to keep the number unpublished. *See supra* note 199.

certainly would not get the targeted indicators of consumer interest they could obtain through Caller Identification (by writing down the telephone numbers of consumers who make inquiries). And, obviously, the information that a person called an AIDS hotline is nowhere found in the telephone directory. That most people's telephone numbers are in public directories should not significantly diminish the privacy expectations of calling parties who do not have unpublished numbers. Those parties reasonably expect that their telephone number will not identify them and link them with a particular telephone call.

### 3. The Presence of "Adequate Safeguards" Against Inappropriate Disclosures

A third step in assessing the weight of calling party nondisclosure interests is to determine whether there are "adequate safeguards" against unwanted disclosure.[267] Several informational privacy cases suggest that even when the government contemplates wide potential dissemination, such disclosure is less objectionable when the government nevertheless preserves an individual's ability to prevent particularly troublesome disclosures. For example, in upholding the public inspection portion of New York City's public employee financial disclosure law, the Second Circuit assuaged concerns over the "exponentially greater" privacy risks which public inspection created.[268] The court noted the following safeguards: That employees may oppose an inspection request by filing a written "claim of privacy with respect to any item of information sought by the City"; that employees may specify information which should not be released to "particular persons or groups"; and that the governmental agency which administers the disclosure law may deny an inspection request if it believes the requester is pursuing an " 'inappropriate or improper purpose.' "[269] The Second Circuit

267. *See supra* note 151 and accompanying text (citing informational privacy cases using "adequate safeguards" criterion and arguing it relates to assessment of privacy interest significance).

268. Barry v. City of New York, 712 F.2d 1554, 1561 (2d Cir.) (quoting Slevin v. City of New York, 551 F. Supp. 917, 934 (S.D.N.Y. 1982)), *cert. denied sub nom.*, Slevin v. City of New York, 464 U.S. 1017 (1983).

269. *Id.* at 1561 & 1562 (quoting uncited representations by New York City); *see also Nixon*, 433 U.S. at 433–36 (describing procedure for archival screening of presidential documents and opportunity for Nixon to claim privacy interests with respect to them before broad public disclosure); United States v. Westinghouse Elec. Corp., 638 F.2d 570, 581 (3d Cir. 1980) (requiring "NIOSH to give prior notice to the employees whose medical records it seeks to examine and to permit the employees to raise a personal claim of privacy, if they desire").



cautioned, however, that privacy rights may loom larger with respect to "a system that [does] not contain comparable security provisions."[270]

In implementing Caller Identification, New Jersey Bell and state regulators declined to adopt any options for mitigating calling party privacy concerns.[271] Bell declined to adopt a system feature advocated by Caller Identification opponents,[272] and considered by at least one large telephone company,[273] which prevents calls from unpublished telephone numbers from flashing on Caller Identification display screens. Bell also declined the suggestion that it prevent certain entities whose activities raise particular privacy concerns (*e.g.*, anonymous information hotlines, businesses using telephone solicitation, and the like) from obtaining Caller Identification service.[274] These safeguards put privacy-conscious subscribers to financial expense[275] and significant inconvenience.[276]

270. *Whalen*, 429 U.S. at 606.

271. The Board's CLASS orders did leave open the possibility of ordering one or more safeguards in the future. *See supra* text accompanying note 71.

272. *See CLASS Hearings*, supra note 1, at 57–63 (discussion between Board members and New Jersey Bell officials on feasibility of blocking transmission of certain telephone numbers through Caller Identification); *id.* at 50 (Makul testimony) (suggesting blocking for nonpublished numbers).

273. Pacific Bell Telephone Co. has been considering this as one of several options for assuaging privacy concerns when it implements Caller Identification service. *See* Thorman Interview, *supra* note 7. Although Pacific Bell has envisioned this option for customers with unpublished number status, the technological capability apparently exists to permit any subscriber, whether published or unpublished, to avoid disclosure of his or her phone number. *See CLASS Hearings*, *supra* note 1, at 59, 62 (D'Alessio testimony).

Pacific Bell has also been considering a narrower alternative to protect subscribers with unpublished numbers; an option which allows subscribers to block disclosure on a per-call basis is under study. Thorman Interview, *supra* note 7. Adoption of A.B. 1446, *see supra* note 5, would extend per-call blocking capability to all subscribers, whether or not their number is unpublished. The bill would require the California Public Utilities Commission to "provide by rule or order that a call identification service offered in this state . . . shall allow a caller to withhold display of the caller's telephone number, on an individual basis, from the telephone instrument of the individual receiving the telephone call made by the caller." A.B. 1446, 1989-90 Reg. Sess. § 2 (1989) (as amended).

274. *See CLASS Hearings*, *supra* note 1, at 49–50 (Makul testimony) ("I don't see any reason why [New Jersey Bell] should be giving this to real estate agents, used car dealers, ad agencies and other agencies that the public may make contact [with] in the course of everyday life").

275. At a minimum, privacy-conscious subscribers would have to pay the cost of becoming unpublished subscribers, if telephone companies continue their present inclination to link the ability to block Caller Identification with unpublished subscriber status. Moreover, telephone companies are giving some consideration to charging a fee for per-call number blocking or per line number blocking. Thorman Interview, *supra* note 7. The California legislation, *see supra* note 273, makes no provision for a blocking charge.

However, they provide an avenue for the preservation of individual control which is consistent with the information privacy cases discussed above.

There is a second dimension in which the adequate safeguard criterion is relevant to Caller Identification. Read broadly, the informational privacy cases stand for the proposition that individual privacy concerns are less weighty if individuals can avoid particularly worrisome disclosures—even if the act of doing so is not a conscious feature of the government information scheme. This proposition appears explicitly in *Fraternal Order of Police Lodges v. City of Philadelphia*.[277] While correctly rejecting the City's claim that applicants to the Special Investigation Unit waived their privacy concerns by choosing to apply,[278] the Third Circuit held that "the nature of the employment, and perforce the officers' free choice to join the unit, are elements to be considered in the balancing appropriate to the alleged privacy violation."[279] Arguably, the ability of calling parties to "freely choose" either (1) to make particularly sensitive calls from pay phones or from other phones not likely to breach their anonymity,[280] rather than from their home or office telephone, or (2) to forego particularly sensitive calls altogether should reduce, although not negate,[281] the weightiness of the protected calling party privacy interests.

Informational privacy case law provides little basis for judging the significance of these imperfect forms of protection against unwanted disclosure. Except for *Fraternal Order of Police*, the informational privacy cases do not discount privacy concerns on the basis of individual "free choices," beyond those formally offered by the government information disclosure scheme. More important, no informational privacy case involves the individual capability to avoid privacy problems *selectively* without foregoing all benefits of participation in the activity which raised privacy concerns in the first place.[282] Still, it is a logical general proposition that privacy concerns should be discounted to the extent that individuals have *reasonable* choices available to them for avoiding particularly troublesome scenarios.

The question is whether total forbearance from calling or resort to telephones other than the caller's own is a "reasonable" safeguard. For most calling situations in which the concern is to avoid harassing return contacts; using a pay phone or alternative telephone would be a minor inconvenience. However, persons seeking to communicate information about embarrassing medical, social, legal or other problems are unlikely to want to discuss their problems on a pay phone within earshot of others.

Overall, although New Jersey's Caller Identification system does not provide any formal safeguards for reducing the threat to calling party privacy, the availability of self-implementing safeguards, such as using another telephone or foregoing a particularly sensitive call, reduces the magnitude of a calling party's privacy right to be protected against calls which risk harassment. The safeguard is less reasonable with respect to those few calls which risk embarrassment or reputational injury.

276. Under the Pacific Bell contingency plans, for example, a telephone customer who wishes to avoid disclosure of her telephone numbers to others who have Caller Identification capability, yet still wants friends and others to have access to her phone number through directories and directory assistance, would be unable to do so.

277. 812 F.2d 105 (3d Cir. 1987).

278. *Id.* at 112.

279. *Id.*

280. Several participants in the New Jersey hearings on CLASS service discussed the possibility that calling parties could make sensitive telephone calls from pay phones. *See CLASS Hearings*, *supra* note 1, at 46 (Makul testimony); *id.* at 84–85 (Louis testimony); *id.* at 107 (Finn testimony). Although one witness stated that New Jersey Bell took the position that privacy-conscious calling parties could call from pay phones, *id.* at 46 (Makul testimony), such a suggestion is not in the hearing record or other Bell filings with the Commission.

Given the fiscal ramifications, New Jersey Bell is unlikely to endorse having its customers fail to make telephone calls as a solution to privacy concerns. Indeed, Bell officials criticized Public Advocate Makul for suggesting this alternative in media interviews. Makul Interview, *supra* note 196.

281. As indicated in the previous discussion on the limitations of Smith v. Maryland, *see supra* text accompanying notes 254–55, unrealistic assumptions that individuals, in general, have the free choice not to use the telephone should not be the basis for removing calling data from all constitutional protection.

282. For example, the court in Slevin v. City of New York, 551 F. Supp. 917 (S.D.N.Y. 1982), *aff'd in part and rev'd in part sub nom.*, Barry v. City of New York, 712 F.2d 1554 (2d Cir.), *cert. denied*, 464 U.S. 1017 (1983), did not discount the interests of city employees in financial privacy because of their "free choice" to avoid accepting jobs paying over $30,000, and thus avoid the public employee financial disclosure laws. *Id.* at 934–37. In part this is because the choice between employment and full constitutional protection is not truly "voluntary" and courts decline to permit government to "condition [employment] on the applicants' waiver of their constitutional rights." *Fraternal Order of Police*, 812 F.2d at 111–12. More important, as the *Slevin* court viewed the facts, the employees had no effective means by which they could avoid privacy concerns *selectively* while maintaining their employment. 551 F. Supp. at 936–37 (statutory mechanism for permitting individual employees to apply for protection of private information inadequate). *But see Barry*, 712 F.2d at 1561–63 (reversing *Slevin* on adequacy of statutory mechanism).

### B. *Weighting The Interests Favoring Disclosure: How Important Are They, and How Necessary is Caller Identification to Achieve Them?*

The second basic step in the informational privacy balancing test is to assess the magnitude of the interests favoring disclosure. As befits "intermediate scrutiny," informational privacy courts have examined prodisclosure interests largely on the basis of two criteria. First, they have identified the proffered justifications for disclosure, putting a qualitative valuation on the "importance"[283] or "substantial[ity]"[284] of the goals served by disclosure. Second, the courts have examined the extent to which disclosure "significantly promotes" the interests claimed.[285] The second inquiry assesses not only whether there is a substantial link between means and ends, but also whether disclosure is unnecessary because other alternatives could achieve the ends sought.

A pertinent example of this assessment is the challenge to municipal public employee financial disclosure laws in *Barry v. City of New York*.[286] After determining that the public employee's privacy interests were significant, the court examined the purposes of the disclosure law—to deter corruption, eliminate conflicts of interest, and enhance public confidence in the integrity of government—and found the purposes to be "substantial, possibly even . . . compelling."[287] The court then assessed and found wanting the challenger's claims that the new law was unnecessary because existing departmental mechanisms for promoting honesty and integrity were adequate, and there was no history of corruption among lower-level employees covered by the law.[288] The court particularly rejected, as a less effective deterrent, an alternative procedure in which employee information would be disclosed only to the city, and not to the public and the media.[289] This subpart follows the model of *Barry* and other informational privacy cases by examining and addressing the three interests claimed by Caller Identification proponents to justify disclosure of calling party telephone numbers. The discussion then examines the link between New Jersey's chosen

283. Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979).

284. United States v. Westinghouse Elec. Corp., 638 F.2d 570, 579 (3d Cir. 1980).

285. *Plante*, 575 F.2d at 1134.

286. 712 F.2d 1554 (2d Cir.), *cert. denied sub nom.*, Slevin v. City of New York, 464 U.S. 1017 (1983).

287. *Id.* at 1560.

288. *Id.* at 1560–61.

289. *Id.* at 1563.



means for implementing Caller Identification and the ends it is designed to serve.

#### 1. The Weightiness of Disclosure Interests

The most important of all interests served by Caller Identification is the technology's potential to assist law enforcement and other public officials in preventing damage to lives and property. The New Jersey CLASS Hearings indicate that Caller Identification could help police, fire departments, suicide crisis centers, and similar emergency response entities assist callers who fail to provide their telephone numbers or other means of identification when calling for assistance.[290] State police officials also pointed out that public facilities subject to bomb threats could use Caller Identification to determine the seriousness and source of the threat.[291] This interest in preventing loss of life and property is clearly a "substantial," and seemingly compelling one.[292] In particular, the informational privacy cases have accepted the importance of safeguarding life and health.[293]

Another strong interest is the detection and deterrence of "obscene calls, threatening calls . . . harassing calls, of a million . . . different varieties."[294] Data from New Jersey show that the problem of abusive calls is quantitatively as well as qualitatively significant.[295] Both New Jersey Bell and law enforcement officials emphasize that subscribers with Caller Identification would be able to report immediately to police such calls and the numbers from

290. *See CLASS Hearings*, *supra* note 1, at 87–91.

291. *Id.* at 30–31 (Pagano testimony).

292. *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 650 (1981) ("interest in protecting the 'safety and convenience' of persons using a public forum" is significant governmental interest); Craig v. Boren, 429 U.S. 190, 199–200 (1976) ("protection of public health and safety" is "an important function of state and local governments").

293. *See, e.g.*, Whalen v. Roe, 429 U.S. 589, 598–99 (1976) (disclosures "designed to minimize the misuse of dangerous drugs" considered problem "of vital local concern"); United States v. Westinghouse Elec. Corp., 638 F.2d 570, 572 (3d Cir. 1980) (employee health data needed by governmental agency "to improve occupational safety and health").

294. *CLASS Hearings*, *supra* note 1, at 28 (Pagano testimony).

295. New Jersey Bell received 36,000 complaints in 1987 about "annoyance calls." Six Month Report, *supra* note 12, tab 2, at 2. This statistic apparently includes mildly annoying calls (such as mischief calls from children inquiring whether one's refrigeration appliance is functioning) along with life threatening and grossly obscene calls. One-third of these 36,000 calls were serious enough to motivate the telephone company to implement procedures for detecting and stopping the calls. *See CLASS Hearings*, *supra* note 1, at 119 (testimony of Leigh Buggeln, counsel for New Jersey Bell Tel. Co.).



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which they came.[296] A prominent claim on behalf of Caller Identification is that it provides a system-wide deterrent against abusive callers, because they "never know if th[eir] number is being displayed."[297]

Although the informational privacy courts have not assessed such interests, the interest in protecting the public against abusive telephone calls does seem as substantial as was the protection of the integrity of city government in *Barry*. In both cases, the planned disclosures enable citizens to detect and deter activities already made illegal by the criminal law. And, in both cases, the illegal conduct has broader social implications.

The final interest served by Caller Identification is less dramatic, yet potentially broadly applicable. This is the interest in using the technology to screen calls that, while not rising to the level of obscene, threatening, or seriously harassing, are annoying.[298] As noted earlier in the discussion on the privacy interests of calling parties, the interest in being free of harassment—particularly in the home—is not de minimis.[299] The weight attributed to harassment prevention varies depending upon the subjective annoyance value attributable to the call; the freedom to screen an isolated unwanted commercial solicitation call may be worth less, depending upon individual preferences, than the ability to avoid a series of hectoring calls from a former lover.

In sum, two asserted interests in the disclosures inherent in Caller Identification are clearly substantial. The weight accorded to the third interest varies depending upon the context, but could rise to the substantial.

### 2. Does Caller Identification Substantially Further the Interests in Disclosure?

Providing Caller Identification technology to public institutions involved in public protection and safety would "substantially promote" the goal of enhancing their emergency response capabilities. Present alternatives for attempting to trace telephone numbers

296. *See CLASS Hearings*, *supra* note 1, at 14 (D'Alessio testimony); *id.* at 30 (Pagano testimony).

297. Six Month Report, *supra* note 12, tab 5, at 6. Thus, New Jersey Bell claims benefits both to Caller Identification service subscribers and to nonsubscribers. *Id.*

298. *See supra* note 18 (statements touting Caller Identification's value as a call screening device).

299. *See supra* text accompanying notes 219–24.



through the telephone company have significant limitations.[300] The instantaneous ability of emergency officials to read the telephone numbers of incoming calls could make the life-saving difference in dramatic cases.[301]

Yet, this interest does not necessarily justify New Jersey's Caller Identification scheme. First, "enhanced 911" technology, which displays instantaneously both the name and geographic location of parties calling 911 emergency service, is becoming available.[302] Further, even if Caller Identification is the preferred alternative for providing telephone numbers to officials handling emergency crises, this does not justify pervasive availability of Caller Identification to any subscriber who desires it.[303] At most the public safety protection rationale would justify availability of Caller Identification to (1) public institutions generally responsible for emergencies, and (2) public or private entities that can demonstrate a particularized threat of injury to property or person.

This discussion of public safety goals and alternative mechanisms raises the question of how "substantial" the link between means and ends must be to pass informational privacy scrutiny. The appropriate balancing test is an "intermediate" one,[304] eschewing both the " 'strict' in theory and fatal in fact" rigor of "strict scrutiny"[305] and the low degree of privacy protection that would be afforded if nothing "more than mere rationality" had to be demonstrated.[306] The informational privacy cases have rejected the idea that the government's disclosure scheme must be the best one possible.[307] That an information scheme "sweeps too broadly" is not a

300. *See CLASS Hearings*, *supra* note 1, at 89–90 (Testimony of Captain Wilde, Cranford Police Dep't).

301. *See supra* text accompanying notes 290–91.

302. Makul Interview, *supra* note 196.

303. The only safety-related justification for broad availability would be to deal with situations in which a private citizen with Caller Identification capability receives a misdialed emergency call intended for emergency services and the caller hangs up without the call recipient being able to tell the caller the call is misdialed; the private citizen could then dutifully relay the plea for help and the number to police. *See CLASS Hearings*, *supra* note 1, at 91 (Wilde testimony). Although not impossible, this scenario is unlikely to comprise a major source of emergency-related usages of Caller Identification.

304. Barry v. City of New York, 712 F.2d 1554, 1559 (2d Cir.), *cert. denied sub nom.*, Slevin v. City of New York, 464 U.S. 1017 (1983).

305. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

306. Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979).

307. *Barry*, 712 F.2d at 1563.

asis for invalidation, if the sweep is kept within bounds and is necsary for the integrity of the basic governmental scheme.[308] On the ther hand, a wide disparity between the scope of needed disclosure nd the scope of the actual disclosure would not be the kind of "dict and substantial relationship" implied by intermediate scruiny.[309] The most reasonable assessment of Caller Identification is hat it permits disclosures far in excess of those required to achieve he interest in protecting public health and safety.

Whether Caller Identification substantially furthers the second nterest—empowering telephone customers to take action to detect nd prevent obscene, threatening, or seriously harassing phone alls—is also debatable. New Jersey Bell's preliminary reports on he initial limited trials of Caller Identification service presents anecdotal evidence of Caller Identification subscribers using the technology to stop abusive calls.[310] The reports also indicate a forty-nine percent reduction in abusive call complaints[311] and a thirty percent reduction in problems prompting the telephone company to take remedial action.[312]

308. Fraternal Order of Police v. City of Philadelphia, 812 F.2d 105, 113 (3d Cir. 1987). Yet, the court did not give carte blanche to the governmental authorities in question. Although the court recognized "that some information disclosed in response to the questionnaire may have no pertinence to selection of an honest and efficient police officer," it found the basic scope of required disclosure justified on the following basis:

> It is not evident, however, that the City could draw the line more precisely even were it required to. No matter where the line is drawn, some information of marginal or little relevance will necessarily be elicited. Requiring a narrower line drawing might foreclose acquisition of highly relevant information.

*Id.*

309. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723–26 (1982) (intermediate scrutiny of gender-based classification subject to equal protection attack); *see also* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 33, at 592–93.

310. *See, e.g.*, Six Month Report, *supra* note 12, tab 2, at 2. Prior to Caller Identification, New Jersey Bell's typical way of responding to annoyance calls was to use "call trap capability." Under this system, the recipient of an annoying call notified the telephone company, which installed equipment capable of keeping a computer-accessible record of "each and every phone call that [the customer] receive[d]." The customer kept a log of all calls received and the timing of the calls. Comparison of the customer log with the "call trap" data facilitated identification of the source of the annoyance call. *See CLASS Hearings*, *supra* note 1, at 110 (D'Alessio testimony).

311. *See* N.Y. Times, Aug. 5, 1981, at A1, col. 5 (summarizing New Jersey Bell data comparing complaint levels in Apr. 1989 with level two years earlier).

312. *See* Six Month Report, *supra* note 12, tab 2, at 3.



However, that New Jersey Bell offers its Call Trace CLASS feature[313] detracts from the "necessity" of Caller Identification for obscene and abusive call prevention.[314] Call Trace may be a superior abusive call response device, both from a technological and a privacy rights standpoint.[315] Caller Identification would require customers to note calmly and accurately the seven digit incoming telephone number at the time they may be threatened or shocked by phone calls. Call Trace, by contrast, notes the number of abusive callers electronically and automatically and stores a permanent record to assist in prosecution of the caller.[316] And, because Call Trace makes the telephone numbers of abusive callers available to the authorities without ever revealing calling party numbers to the called party,[317] it does not fight abusive calls at the expense of the privacy interests of calling parties who do not make such calls.[318]

The usefulness of Caller Identification for the third interest, preventing unwanted calls, is also disputable. As opponents of Caller Identification note, it is an inexact means of call screening because, before a call is answered, the called party only knows the

313. This is the CLASS feature that "allows customers to trace a call, sending a printout of the called and calling numbers, the date and the time of the call traced." *Class Hearings*, *supra* note 1, at 11.

314. As a preliminary matter, New Jersey's simultaneous implementation of Call Trace and Caller Identification makes it difficult to interpret the data showing a decrease in the magnitude of the abusive call problem in areas served by CLASS. It is impossible to know how much of the decrease is attributable to the existence of Caller Identification, as opposed to the availability of Call Trace. Due to both the pitched controversy surrounding Caller Identification and the public sale of Caller Identification video display equipment in all Sears stores, Caller Identification is probably more widely publicized. On the other hand, if the data from the trial CLASS offering are indicative, abusive callers will be more likely to encounter subscribers with Call Trace than with Caller Identification. *See* Six Month Report, *supra* note 12, tab 3, Appendix A.

315. Caller Identification is marginally more likely to be used as a response to the initial instance(s) of such abusive calls. Although there are no data on the question, it seems logical that customers without a history of abusive calls may be less likely to have Call Trace on hand when their first abusive call comes in than they are to have existing Caller Identification service (for call screening purposes).

316. *See CLASS Hearings*, *supra* note 1, at 36 (Makul testimony).

317. *Id.*

318. *Cf.* Heights Community Congress v. United States Veterans Admin., 732 F.2d 526 (6th Cir.), *cert. denied*, 469 U.S. 1034 (1984). In balancing the privacy interests of individual VA mortgage holders against the public's interest in disclosure of VA loan data, the court considered, as a factor which enhances privacy interests, the fact "that release of the requested information would subject a veteran, *who is himself not suspected of any wrongdoing*" to potential harassment. *Id.* at 530 (emphasis added). Calling parties who do not make obscene or harassing calls are similarly "not suspected of any wrongdoing," yet must endure information disclosure so that other wrongdoers may be identified.

number of the caller and not necessarily his or her identification or message. The technology would be of some usefulness to callers who wish to avoid answering calls from specific numbers, although callers bent on getting through could resort to the artifice of calling from pay phones or unfamiliar numbers. Caller Identification would assist call screening by subscribers who adopted a policy of answering only calls from particular numbers. However, these subscribers would run the risk that "calls from friends and family members originating from pay phones or unfamiliar numbers will not be recognized"—no matter how important the call.[319]

These limitations are not the only factors discounting the extent to which Caller Identification "substantially" serves the harassment-prevention interest. Alternative call screening capabilities undercut the case for Caller Identification. For certain call screening functions, other CLASS features would be better than Caller Identification.[320] A telephone answering machine would also provide a similar call screening capability—except that the called party would not be insulated totally from exposure to the message content of callers, a disadvantage with annoyance calls.[321]

In sum, for each of the interests served by disclosure of calling party telephone numbers through Caller Identification, there is a substantial question about the necessity of broad deployment of the new technology; there are also one or more superior alternatives for achieving the new technology's goals.

319. *CLASS Hearings*, *supra* note 1, at 39 (Makul testimony).

320. Subscribers who wish to screen out calls from six or fewer telephone numbers would be wiser to use the Call Block CLASS feature. *See supra* text accompanying note 14. With Call Block, incoming calls from undesired callers would not disturb the subscriber (and, perhaps, the subscriber's sleep) through a ringing telephone. (Caller Identification, by contrast, flashes the incoming telephone number only after the phone has begun to ring. *See CLASS Hearings*, *supra* note 1, at 37 (Makul testimony)).

Subscribers who wish to screen calls by answering calls from only a small list of telephone numbers would be better off with Priority Call, the service that provides a distinctive ringing for certain incoming numbers. *See supra* text accompanying note 14. A Priority Call user would know immediately and aurally whether an incoming call was from a desired telephone number. The subscriber would not have to interrupt other activities and go to the Caller Identification display screen to make this determination.

321. Given this drawback, an answering machine would not be a satisfactory alternative in the context of obscene, threatening, or seriously harassing calls. On the other hand, an answering machine would allow the called party to recognize and answer "important emergency calls originating from unfamiliar numbers [that would] not be recognized if [Caller Identification] is used to selectively screen numbers." *CLASS Hearings*, *supra* note 1, at 39 (Makul testimony).



### C. *Balancing the Interests For and Against Disclosure: Slight Tilt Toward Calling Party Privacy Interests*

The informational privacy balancing act is particularly difficult in the Caller Identification context because privacy interests are present on both the antidisclosure and prodisclosure sides of the scale. For example, to honor the interests against telephone harassment of called parties, calling parties must live with an enhanced risk of harassment in return—or vice versa. That privacy rights are on both sides of the scale also complicates significantly the task of assessing the implications of alternative protective measures and other factors enhancing or detracting from the significance of privacy concerns.[322]

The Caller Identification case study is also novel and difficult in that it provides for an unprecedented competition between privacy interests and interests favoring disclosure. Some informational privacy cases involved disputes in which privacy interests were substantial, but disclosure interests were even more so.[323] In other cases, privacy interests and disclosure interests were both substantial, but the availability of adequate safeguards against unauthorized disclosures allowed the court to downplay the privacy interests and uphold the disclosure scheme.[324] In still other decisions, privacy interests were insubstantial, and were easily outweighed by substantial government interests.[325]

By contrast, the Caller Identification case study presents a scenario in which, once all the caveats and alternatives are considered, relatively unsubstantial privacy interests must be weighed against

322. For example, the availability of telephone answering machines as a call screening alternative undercuts the argument for Caller Identification as a means of preventing the harassment of called parties; yet, *calling* parties could also fend off harassing solicitation calls through answering machines. Another example is the ability of calling parties to make sensitive calls from other than their personal telephones. Although this capability decreases the significance of calling party privacy interests, it may also undercut the efficacy of Caller Identification, in that abusive callers could also call from pay phones, thus avoiding detection.

323. *See, e.g.*, Plante v. Gonzalez, 575 F.2d 1119, 1136 (5th Cir. 1978) (financial privacy "a matter of serious concern"; prodisclosure interests "even stronger"), *cert. denied*, 439 U.S. 1129 (1979).

324. *See, e.g.*, Barry v. City of New York, 712 F.2d 1554, 1561 (2d Cir.) ("public disclosure of financial information may be personally embarrassing and highly intrusive," but "the statute's privacy mechanism adequately protects plaintiffs' constitutional privacy interests"), *cert. denied sub nom.*, Slevin v. City of New York, 464 U.S. 1017 (1983).

325. *See, e.g.*, Shane v. Buck, 658 F. Supp. 908, 917 (D. Utah 1985) ("the government's legitimate interests here outweigh any *minimal* intrusion upon plaintiff's privacy") (emphasis added), *aff'd*, 817 F.2d 87 (10th Cir. 1987).

atively unsubstantial interests favoring disclosure. Particularly ause New Jersey's scheme for implementing Caller Identification es not itself provide any capability for callers with enhanced pri- y expectations to block disclosure on a selective or blanket basis, ller Identification does implicate the weighty privacy interest in venting disclosure of embarrassing private facts. However, the erall magnitude of this privacy concern is reduced somewhat by ) the relatively small percentage of total calling situations in ich embarrassment or reputational injury is likely, and (2) the ailability of admittedly imperfect means external to CLASS tech- logy for preserving anonymity (*e.g.*, by calling from numbers her than one's personal telephone).

The more broadly applicable privacy concern against harass- ent will not, in many cases, rise to the significance of the interest ainst disclosure of intimate facts, but is entitled to consideration netheless. The importance of this interest is diminished, how- er, by the fact that, in many calling situations, it is reasonable to pect calling parties to make these calls from telephones other than eir own.[326] Further, as noted above in the discussion on the inter- t against harassment raised on behalf of *called* parties, use of an- vering machines can reduce the annoyance inherent in exposure to nwanted telephone calls.

In sum, once they are appropriately discounted, the privacy terests against disclosure are relatively modest; so, however, are e interests favoring disclosure. Two of the interests favoring dis- losure, protecting public health and safety and foiling abusive tele- hone calls, are very weighty in the abstract. However, their agnitude is substantially diminished when the question asked is hether widespread implementation of Caller Identification is "sub- tantially related" to the interests. Blanket availability of Caller dentification to anyone willing to pay the monthly fee goes dramat- ally beyond the coverage necessary to ensure that entities with a ublic health and safety mandate may adequately perform their vork. Moreover, the availability of Call Trace, a more viable and

326. Even when the calling party is concerned that his or her number not fall into he hands of someone who might engage in serious harassment or retaliation, the calling arty may still be more willing to make the call from a telephone number other than his r her own than would a person making a call involving embarrassing private facts. The teacher wishing to call the home of a "problem student" might not be embarrassed o make that call from another telephone because the content of the call does not reflect dversely on the teacher. On the other hand, a whistleblower fearing harassment would e no more—and perhaps less—interested in using a generally accessible location to nake a confidential call than a caller to an anonymous hotline.



less intrusive means of deterring or ferreting out abusive calls, undercuts the justification for using Caller Identification for that important purpose.

This means that the justification for disclosure of calling party telephone numbers through Caller Identification rests mainly on the relatively less substantial interest in enabling called parties to avoid the intrusion of unwanted calls. The strength of this justification is devalued by both the awkwardness of call screening by telephone number alone and the availability of alternatives (including other CLASS features and answering machines) to mitigate the effects of intrusion.

Ultimately, then, the always "flexible" informational privacy balancing test[327] is particularly indeterminate in the Caller Identification context. A court's final weighing of interests for and against disclosure depends upon how the judge answers two questions: "Whose privacy right is it anyway?"[328] and how important is it to preserve "broad latitude in experimenting with possible solutions to problems of vital local concern"?[329]

A court inclined to view privacy concerns in a quantitative light would be more likely to find that called party privacy interests predominate. From the standpoint of sheer numbers, called parties face significantly more *harassing* calls than calling parties: every unwanted call made to a called party is (at least mildly) a harassing call. By contrast, only a portion of the calls made by calling parties would be from their own telephones in situations in which an unwanted *return* call is likely. The number of embarrassing calls—the major concern of calling parties—would be low, given the alternative of using another telephone. Thus, significantly more numerous privacy risks are found on the called party side of the scales, rather than on the calling party side.

By contrast, a court inclined to use a more qualitative balancing test would weigh the calling party interests more heavily. The interest in avoiding embarrassment or reputational injury—which appears legitimately only on the calling party side of the scale—is more weighty. As discussed above,[330] this interest is a more central

327. Fraternal Order of Police v. City of Philadelphia, 812 F.2d 105, 110 (3d Cir. 1987).

328. *See CLASS Hearings*, *supra* note 1, at 29 (Pagano testimony) ("It comes down in my mind as a balance of rights and the privacy of really, whom.").

329. Barry v. City of New York, 712 F.2d 1554, 1563 (2d Cir.) (quoting Whalen v. Roe, 429 U.S. 589, 597 (1977)), *cert. denied sub nom.*, Slevin v. City of New York, 464 U.S. 1017 (1983).

330. *See supra* text accompanying notes 200–01.

ment of the privacy right articulated in the informational privacy e law. Further, any reputational injuries inflicted through Caller ntification may well be long-lasting and irreversible.

The balancing of the interests implicated by Caller Identifica- would also be affected by judicial attitudes about the appropri- degree of deference to prodisclosure justifications under the ermediate scrutiny standard. An informational privacy court ncerned about preserving "broad latitude" would be more likely focus on whether the rationale for disclosure was in some sense nreasonable."[331] Such a court might give more credence to the ssibility that unconditional Caller Identification deployment uld enhance, however marginally, the clearly "vital local con- rn[s]" of promoting public safety and fighting abusive telephone lls. By contrast, a court viewing intermediate scrutiny as afford- "very little deference" to the interests at odds with individual hts[332] would more likely find "an unduly tenuous 'fit' "[333] be- een ends and means.

The admittedly uncertain balancing of interests required by the ller Identification case study tilts against the disclosure mandated the New Jersey plan, although this is more a function of factors related to the strength of the privacy interests. To begin with, ere is much appeal in the conclusion that "something more than ere rationality must be demonstrated" if the Supreme Court's in- nt to protect informational privacy as a separate, second branch of bstantive due process is to be honored.[334] Concern with preserv- g the "broad latitude" of government to attack local concerns is ppropriate under the deferential rational basis standard, but is not ppropriate for resolving informational privacy disputes where eightened scrutiny is required.[335] It may be rational (but barely

331. *Barry*, 712 F.2d at 1563.

332. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 33, at 593.

333. Craig v. Boren, 429 U.S. 190, 202 (1976).

334. Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978) (noting the Supreme ourt's "clear[ ] recogn[ition] that the privacy of one's personal affairs is [to be] pro- cted by the Constitution"), *cert. denied*, 439 U.S. 1129 (1979).

335. The *Barry* opinion took the "broad latitude" language from a portion of the *Whalen* opinion not involving informational privacy rights analysis. The *Whalen* ourt, in reversing the district court's ruling that New York's patient information dis- losure law was " 'unreasonable, unnecessary and arbitrary' " referred to the need to ford broad latitude for responses to local problems. Whalen v. Roe, 429 U.S. 589, 596 1977) (quoting Lochner v. New York, 198 U.S. 45, 56 (1905)). The district court's ling was made under a different strand of substantive due process, requiring only that legislation have a rational relationship to a legitimate end." J. NOWAK, R. ROTUNDA J. YOUNG, *supra* note 33, at 443. That the Supreme Court emphasized the need for eference under a due process theory characterized by "almost total abandonment of any real scrutiny," *id.* at 449, is of no bearing on the informational privacy context, in which intermediate scrutiny is requisite.

336. *See supra* text accompanying notes 172–75.

337. *See supra* note 176.

338. These critics' concerns about the impact of Caller Identification on information hotlines and other social services, see *supra* notes 23 & 192, reflects an assumption that would-be callers would choose not to risk possible disclosure of their identities.

339. Courts called upon to choose between free speech values and privacy have as a general rule come down on the side of speech. *Cf.* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 541 (1980) ("the ability of government 'to shut off dis- course solely to protect others from hearing it [is] dependent upon a showing that sub- stantial privacy interests are being invaded in an essentially intolerable manner' " (quoting Cohen v. California, 403 U.S. 15, 21 (1971))); Martin v. City of Struthers, 319 U.S. 141 (1943) (invasion of privacy insufficient justification for banning door-to-door solicitors).



so) to argue that Caller Identification in the hands of private citizens would occasionally assist law enforcement in promoting health and safety—or that Caller Identification could be a marginally preferable call screening device in some situations but not others—but this does not provide the substantial link between ends and means required under the heightened scrutiny standard.

Calling party interests are further strengthened by values extrapolated from the first amendment context. As noted earlier, several Supreme Court decisions rejected forced disclosure of individual identities when such disclosure would compromise the freedoms to associate, speak and receive constitutionally protected information.[336] Although these decisions are not an independent basis for assessing the constitutionality of Caller Identification,[337] the cases do provide a source of principled considerations for breaking the seeming tie between the antidisclosure and prodisclosure interests implicated by Caller Identification. If Caller Identification critics are correct, consigning calling parties to use of pay phones or other less convenient calling options may lead instead to their foregoing some calls altogether.[338] This result would be at variance with the broad policy (if not the holdings) of *NAACP*, *Talley* and *Lamont*: claims to anonymity gain legal stature when they further the rights of individuals to communicate and receive (and the rights of organizations to communicate) information and viewpoints about matters of important public concern. Arguably, then, first amendment values tilt the balance toward the privacy interests of calling as opposed to called parties—particularly because the main alternative for protecting the privacy interests of called parties against harassment (an answering machine) does not prevent a message from being communicated or received by the calling party.[339]

*Toward A Broader Right to Reveal Information Selectively*

The result of the balancing test just performed is provocative. ller Identification's adversaries instinctively argue that forced closure of telephone numbers, which may lead to ancillary revelions about an individual, raises significant privacy issues. This tinctive fear of potential privacy invasions has a common sense nsibility to it. Yet, as indicated above, the informational privacy lancing test suggests that the privacy rights of calling parties are latively unsubstantial. Caller Identification emerges as mildly nstitutionally suspect mainly because of factors unrelated to the ivacy interests. What this suggests is that there is a gap between e conception of privacy interests embodied in the informational rivacy and FOIA exemption six cases and the conception implicly used by Caller Identification's skeptics.

Most of the circumstances in which telephone numbers would e disclosed under Caller Identification implicate neither the embarassment nor the harassment concerns recognized in the informional privacy and FOIA exemption six cases. Rather, many otential disclosures under Caller Identification seem objectionable ecause they displace a broader conception of privacy rights. This conception, identified by privacy scholars, is found in Professor Fried's definition of privacy as the generic right to "control . . . knowledge about oneself,"[340] as well as in Professor Huff's definition of privacy as the right to keep matters confidential to avoid being "treated as the potential objects of others' gratuitous evaluations."[341] Indeed, as Professor Tribe has asked, "what could be more commonplace than the idea that it is up to the *individual* to *measure out information* about herself *selectively*—to whomever she chooses?"[342]

340. Fried, *Privacy*, 77 YALE L.J. 475, 483 (1968).

341. Huff, *Thinking Clearly About Privacy*, 55 WASH. L. REV. 777, 782 (1980). As Huff has put it, "Our privacy is invaded by disclosures of information when the sort of information which could make us subject to evaluation is transmitted to persons who lack the authority to evaluate us." *Id.* at 782. Significantly, Professor Huff locates the harm to privacy in the fact of evaluation itself, and not in the emotional or other consequences such evaluation might trigger.

342. L. TRIBE, *supra* note 11, at 1391 (emphasis in original). Indeed, such a broad right may be implicit in Warren & Brandeis' expansive call for the common law "to protect all persons, whatsoever [ ] their position or station, from having matters which *they* may properly prefer to keep private, made public against their will." Warren & Brandeis, *supra* note 102, at 214–15 (emphasis added). The breadth of the personal right to act on privacy preferences depends upon how broad a range of preferences for [illegible] regarded as "proper"—a question the authors did not address.



Many, if not most, of Caller Identification applications affect the right to control release of information about one's status, preferences, and activities selectively, even if there is no risk of embarrassment or harassment. For example, Caller Identification could reveal that A is calling B from the house of a mutual friend. It might not embarrass A for B to know this, but it is still information which A might choose not to reveal.[343] Similarly, Caller Identification could reveal information about individual tastes and preferences that an individual might chose to keep confidential to avoid "gratuitous evaluations," even if the information is neither embarrassing nor likely to trigger harassing return calls. Thus, the real affront in this new technology may be to the individual's expectation that he or she has the right to retain control over information release in a world in which privacy continues to shrink.

Because this expectation goes largely unrecognized in the current informational privacy and FOIA exemption six cases[344]—and

343. As Professor Fried has noted, an individual's interest in controlling both the quantity and quality of information released might legitimately depend upon the identity of the recipient and the degree of intimacy of the relationship between recipient and communicant:

> We may not mind that a person knows a general fact about us, and yet feel our privacy invaded if he knows the details. For instance, a casual acquaintance may comfortably know that I am sick, but it would violate my privacy if he knew the nature of the illness. Or a good friend may know what particular illness I am suffering from, but it would violate my privacy if he were actually to witness my suffering from some symptom which he must know is associated with the disease.

Fried, *supra* note 340, at 483 (footnote omitted).

344. The *Whalen* opinion does use some broad phrases in characterizing the information protected by the newly announced informational privacy right. *See* Whalen v. Roe, 429 U.S. 589, 599, 600, 605 (1977) ("personal matters"; "private information"; and information "which is personal in character"). However, the Court did not intend to create a broad right to control all individually identifiable information. The Court's statement that the Constitution establishes a right to informational privacy in "some circumstances," see *supra* note 127, implies that "not all 'personal information' merits constitutional protection," Fordham Note, *supra* note 11, at 943. Further, the Court's final statement about the informational privacy right ties it to "intimate" information, which the court defines as "potentially embarrassing or harmful if disclosed." 429 U.S. at 605; *see supra* text accompanying note 127.

Similarly, isolated statements in a few informational privacy cases express solicitude for privacy interests broader than the interests against embarrassment or harm through "intimate" information. *See, e.g.*, Fadjo v. Coon, 633 F.2d 1172, 1175 (5th Cir. 1981) (tracing informational privacy right to broader concern with "individual autonomy and identity"); United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 n.5 (3d Cir. 1980) (quoting Fried's definition of privacy as "control over information about oneself"); *see also* Martinelli v. District Court, 199 Colo. 163, 173–74, 612 P.2d 1083, 1091 (1980) ("While its contours are not yet fully defined, [the] right to confidentiality encompasses the 'power to control what we shall reveal about our intimate selves, to whom, and for what purpose.' ") (citing Bryon, Harless, Schaffer, Reid and Assocs. v.

nlikely to be so in the future[345]—enhanced protection of the ider right would have to come from statutes, administrative reg-ions, or other pro-privacy governmental policies. Given the rel-ely marginal advantages of Caller Identification technology—the possibility of a significant reduction in privacy concerns ough technological fixes such as nonpublished number blocking, notice that Caller Identification is in use—state public utility mission orders or state legislation regarding CLASS features ld not be a bad place to start.

## CONCLUSION

Analysis of the New Jersey Caller Identification case study ler the informational privacy balancing test indicates that the vacy interests against disclosure of calling party telephone num-s only slightly outweigh the privacy and other interests justifying closure. This conclusion suggests an important lesson for tele-ne companies and regulatory officials faced with decisions about to implement the service in the future.[346] The relative equiva-

e *ex. rel.* Schellenberg, 360 So. 2d 83, 92 (Fla. Dist. Ct. App. 1978), *rev'd*, 379 So. 2d (Fla. 1980)). Still, the main preoccupation with these and the other informational acy cases is the more restrictive domain of "highly personal" and "intimate" infor-ion. *See supra* text accompanying notes 200–07.

The FOIA does afford theoretical protection to any "personal" information, in the e of information "which applies to a particular individual." United States Dep't of e v. Washington Post Co., 456 U.S. 595, 602 (1982) (rejecting argument that only "a row class of files" or "a discrete kind of personal information" qualifies for FOIA tection). However, although the individual's interest against disclosure of *any* per-al information must be considered in the FOIA balancing process, the FOIA courts erally have not accorded nondisclosure interests much strength if they have not ed concerns about embarrassment, reputational injury, or, at a minimum, harass-nt. *See supra* text accompanying notes 212–18. *But see* Wine Hobby USA, Inc. v. S, 502 F.2d 133, 137 (3d Cir. 1974) (release of names and addresses of persons regis-ed as home wine brewers objectionable in part because disclosure would "reveal[ ] rmation concerning the family status of the registrant" as well as "information con-ning personal activities within the home").

345. It is unlikely that lower courts will broaden significantly and generically the ception of rights protected by the constitutional right to informational privacy. The preme Court's initial articulation of the informational privacy right was amorphous, l lower courts may properly fear to push the articulation too far. Both courts and mmentators have expressed concern that overexpansion of informational privacy hts would mean that the judiciary would "be able to give all privacy interests only sory protection." J.P. v. DeSanti, F.2d 1080, 1090 (6th Cir. 1981). *See also*, L. BE, *supra* note 11, at 1304.

346. The New Jersey Board of Public Utilities falls within the described class, given Board's statements in its CLASS orders that its approval is provisional and that it ll continue to consider the value of further system modifications. *See supra* text ac-mpanying notes 68–71.



lence of antidisclosure and prodisclosure interests suggests that one or more deviations from the New Jersey model of unrestricted Caller Identification service would tip the balance in the other direction—perhaps dramatically.

Preventing unpublished telephone numbers from flashing on Caller Identification screens would eliminate altogether the privacy concerns of that portion of the telephone subscriber population with the greatest expectation of privacy. This would substantially reduce the aggregate weightiness of calling party privacy interests and fundamentally alter the constitutional status of the new technology. Providing a per-call blocking capability, as California is poised to do,[347] would obviate or reduce another major part of the calling party privacy problem. It would reduce the privacy concerns of all calling parties by allowing them to block transmission of their telephone numbers, and thus protect their identities, in the relatively few situations in which calls might lead to embarrassment or reputational injury.

New Jersey Bell has opposed blocking options consistently, on the ground that they would reduce the coverage of the system and therefore limit its usefulness.[348] It is true that empowering callers to block transmission of their telephone numbers reduces the value (already highly disputable) of Caller Identification as a call screening device. However, because the blocking alternatives would not be effective against Call Trace (which is, in any event, the better technology for responding to abusive and obscene calls), blocking would not undercut the overall ability of CLASS features to detect and deter such calls.[349]

Short of implementing blocking options, telephone companies and regulators could turn to two other privacy-enhancing measures which would tip the informational privacy scales, although less dramatically. First, appropriate restrictions on the ability of institutions or individuals to obtain Caller Identification service would mitigate concerns that calls to anonymous hotlines or commercial establishments will lead to embarrassment or harassment. Second, regulators might require that a distinctive tone or recording be employed to inform callers that Caller Identification capability was in operation. This might create some disadvantages,[350] but it would

347. *See supra* note 5 and accompanying text.

348. *See supra* note 271 and accompanying text.

349. *See CLASS Hearings*, *supra* note 1, at 73 (Moore testimony).

350. As the technology existed in 1988, providing notice that Caller Identification is in operation could require "the expenditure of significant time and money." Six Month

duce calling party privacy concerns by making resort to telehones other than the caller's own, or forbearing from calling altoether, a more targeted, "adequate" safeguard.[351]

Beyond indicating how Caller Identification could be implemented in such a way as to pass constitutional muster, analysis of ie New Jersey Caller Identification case study suggests a number f broadly applicable lessons for two constitutional doctrines that ave undergone significant creation and recreation in the last dozen ears.

New Jersey's regulatory involvement with Caller Identification oints out the extent to which the current state action doctrine, hen applied in the context of rate- and service-regulated indusries, fails to make the important distinction between "mere regulaory approval" (which should continue to be an insufficient basis for finding of state action) and active regulatory review and oversight which should make out a case for state action). Mindful of the upreme Court's concern that more segments of the private econmy not be "publicized" and the Court's general paradigmatic emhasis on responsibility, lower courts which have considered state ction questions in the public utility context have evolved an approach that fails to register adequately the realities of public utilities egulation. Given the subtle and symbiotic relationship between egulator and regulated, the correct approach is to assume that active regulatory involvement, followed by approval, is a sufficient ign that government has put its "imprimatur" on the actions of egulated parties such that the Constitution may be invoked as a binding source of law.

The Caller Identification case study delineates several important issues regarding the nature and scope of the relatively new informational privacy doctrine which has, over the last decade, emerged from the amorphous language of two Supreme Court cases. Caller Identification is a particularly apt vehicle for identify-

Report, *supra* note 12, tab 5, at 2. In addition, installation of a notice feature "eliminates the benefits to non-subscribers because it encourages those who would misuse the phone to keep looking for another target." *Id.* at tab 5, at 6.

351. *See CLASS Hearings*, *supra* note 1, at 50 (Makul testimony). This feature would give calling parties "the option to abort the call before the call is completed and the caller's number [is] displayed," yet permit sensitive calls to be made from home to numbers not Caller Identification-equipped. *Id.* Without such a notice feature, callers would have to err on the side of caution and assume that any sensitive telephone call may be to an individual or entity equipped with Caller Identification. Because only a fraction of called parties would have the service, a large percentage of delayed or forgone calls would be done so unnecessarily.



ing and answering affirmatively the novel question whether facially "impersonal" information is protected constitutionally if it will lead indirectly to individually identifiable disclosures.

The case study also permits elaboration and harmonization of two different approaches to defining the scope of informational privacy protection—the first focusing upon the impact of disclosure on the individual, the second on reasonable expectations of privacy—which have been used, but not fully distinguished or explained, by various informational privacy courts. In analyzing the approach which defines privacy protection in terms of the impact of disclosure on the individual, this Article has argued that the emphasis which informational privacy courts have put on avoidance of embarrassment or reputational injury should not obscure the constitutional importance of protecting against those disclosures which lead to harassment. With respect to individual expectations of privacy, reasonable expectations that information will remain private should have independent relevance in assessing the scope of the constitutional right to privacy. Appropriate factors are the expectations created by de facto control patterns and the public availability of information through other avenues. This Article has argued, however, that informational privacy courts must reject unduly restrictive and inappropriate fourth amendment formulations of what constitutes a reasonable expectation of privacy.

The Caller Identification case study also highlights difficulties in the "intermediate balancing" model which informational privacy cases have employed. By showing the difficulty of weighing relatively marginal privacy interests against relatively marginal disclosure interests, the new technology brings home a broader point about the extent to which the flexible intermediate balancing approach entails subjective tradeoffs and difficult decisions about the proper role of judicial review. That the informational privacy standards provide a relatively low valuation of calling party privacy interests also points out the extent to which current law falls short of a general "right to control information about oneself."

Just how and when these lessons for state action and informational privacy analysis will again be called into service is difficult to predict. However, Caller Identification is the opening chapter of a larger story of rapidly changing telecommunications technology which brings with it unique privacy dilemmas. As the telephone becomes even more of an "intelligent network" at the center of the "information age," new challenges for privacy and the law are certain to arise.

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# TESTIMONY OF MIKE REECHT ON BEHALF OF AT&T WITH REGARD TO HOUSE BILL 3028

Mr. Chairman and Members of the Committee:

My name is Mike Reecht and I appear before you today representing AT&T regarding House Bill 3028. AT&T opposes this legislation in its current form.

House Bill 3028 represents legislation on a relatively recent service brought about by technological advancement in telecommunication switches and end user products. Telephone call identification service provides several benefits to our customers. It reduces harassing calls to all customers. It serves as an answering machine. It allows call screening for the called party. It enhances emergency response services such as 911, false fire alarms, poison control centers, and suicide prevention center. It enhances law enforcement in situations involving telephones. And in the interactive computer world it enhances data base security.

House Bill 3028 as drafted provides for the capability of the calling customer to restrict their number from appearing at the called telephone. Although there may exist legitimate reasons for a calling party not to be identified by the called party before answering, I think such application should be limited.

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It is AT&T's position that called parties have a right to know who is calling before they answer. Call identification service eliminates the current imbalance that exists for the called customer. If any blocking is required, it should be limited to the least restrictive. for example, it might require the calling customer to satisfy certain criteria before per call blocking is made available at his telephone.

Call identification service has significant business application in the sales and services areas. It would allow the sales clerk to have your records available as your call is answered. Hypothetically, a call to place an order from J.C. Penney's 800 number can be routed to the nearest location insuring a speedy and more cost effective delivery of your products.

It is important to let advanced technology in telecommunications be utilized. House Bill 3028 would limit application of this technology and that does not seem to be in the consumers' best interest.

# Legislative Testimony

Kansas Telecommunications Association, 700 S.W. Jackson St., Suite 704, Topeka, KS 66603-3731

**Testimony before the**
**House Committee on the Computers,**
**Communications & Technology**

HB 3028

February 26, 1992

Mr. Chairman, members of the committee, I am Rob Hodges, President of the Kansas Telecommunications Association. KTA membership is made up of telephone companies, long distance companies, and firms and individuals that provide service to and support for the telecommunications industry in Kansas.

Having read HB 3028, KTA members asked that I bring you two comments regarding the provisions of the proposal:

1. The proposal would impose on the Kansas Corporation Commission (KCC) a requirement that rules and regulations be promulgated for a service that, to the best of our knowledge, is not available in Kansas at this time. It may be that such service will be available in the state in the future, but it seems prudent that the KCC be given the benefits of following a normal rules and regs process to determine the needs for and the corresponding requirements of any rules governing telephone call identification. Perhaps the issue of "caller ID" would be more appropriately addressed with a resolution recommending a policy to the KCC and asking for the issue to be given a full review.

2. The proposal appears to agree with the current telecommunications industry position on the issue of "caller ID." That position calls for per-call blocking at no charge to the telephone customer. We would suggest that, on line 17 of the bill, the language regarding "...on an individual basis..." be clarified to state that caller ID may be blocked "...on an individual, *per-call* basis...".

Thank you Mr. Chairman, members of the committee, for your attention. We appreciate the opportunity to be heard on this proposal.

House CCT
Attachment 5
2-26-92

**H.B. 3028**
Bill Summary

* This bill address Caller Identification Services, commonly known as Caller Id service.

* The bill is somewhat unclear in whether it intends for "per call" blocking or "per line" blocking. Generally telephone companies promoting Caller Id serivces prefer "per call" blocking. The major difference between "per call" and "per line" blocking is that "per call" blocking is activated by the caller each time he or she wishes to block a specific call. "Per line" blocking is implemented one-time-only and from that point on, all caller identification of calls placed from that number will be blocked.

* Caller Id services have been controversial in several states where potential violation of privacy law issues have been raised.

* Would recommend substituting "Telecommunications Public Utility" in place of "Telephone Corporation."

House CCT
Attachment 6
2-26-92