IN THE SUPREME COURT OF INDIA

CIVIL WRIT JURISDICTION

WRIT PETITION (C) NO.494 of 2012

Justice (Retd) KS Puttaswamy and Another ...Petitioners

Versus

Union of India and others ...Respondents

NOTE ON BEHALF OF THE UNION OF INDIA

ADVOCATE ON BEHALF OF RESPONDENTS: ZOHEB HOSSAIN

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1. The present reference made to the 9 Judge Bench is to decide whether there is a fundamental right to privacy in the Constitution and to decide whether the correctness of the decision by *MP Sharma v Satish Chandra, District Magistrate, Delhi, AIR 1954 SC 300* ("*MP Sharma*") (8 judges) and *Kharak Singh v State of Uttar Pradesh, AIR 1963 SC 1295* ("*Kharak Singh*") (6 judges) which hold that there is no fundamental right is the correct reading of the Constitutional provisions.

A. MP Sharma and Kharak Singh hold that there is no fundamental right to privacy in the Constitution

2. In *MP Sharma*, the central issue relevant for the purposes of this note, before an 8-judge bench of this Hon'ble Court was whether search warrants and seizure of documents on such searches under Sections 94 and 96 of the Code of Criminal Procedure, 1898 for searching premises of certain companies alleged to have been part of commission of criminal offences ought be quashed on the ground that such searches (and documents seized consequent thereto) violate the fundamental right against self-incrimination in Article 20(3) of the Constitution. Article 20(3) reads,

"No person accused of any offence shall be compelled to be a witness against himself."

3. It was held that a search warrant is under a communication from a Magistrate to a police officer under law (in this case the Code of Criminal Procedure) and, consequently, there is no testimonial act of the accused involved in this process. Similarly, a seizure consequent to such search warrant is also not a testimonial act. *Per* Jagannadhadas, J.:

*"**17.** ....It is, therefore, clear that there is no basis in the Indian law for the assumption that a search or seizure of a thing or document is in itself to be treated as compelled production of the same. Indeed a little consideration will show that the two are essentially different matters for the purpose relevant to the present discussion. A notice to produce is addressed to the party concerned and his production in compliance therewith constitutes a*

testimonial act by him within the meaning of Article 20(3) as above explained. But a search warrant is addressed to an officer of the Government, generally a police officer. Neither the search nor the seizure are acts of the occupier of the searched premises. They are acts of another to which he is obliged to submit and are, therefore, not his testimonial acts in any sense. Even in the American decisions there is a strong current of judicial opinion in support of this distinction." (emphasis supplied)

4. In the context of the right to privacy, it was held (*per* Jagannadhadas, J.):

   *"**17.** ...A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under Article 20(3) would be defeated by the statutory provisions for searches."* (emphasis supplied)

5. As a result of this analysis, the Court held:

   *"**18.** We are, therefore, clearly of the opinion that the searches with which we are concerned in the present cases cannot be challenged as illegal on the ground of violation of any fundamental rights and that these applications are liable to be dismissed."*

6. It is thus clear that *MP Sharma* holds (in para 17 extracted above) that since the Constitution makers have not thought it fit to subject searches and seizures to any fundamental right to privacy in Article 21 (like in the 4th Amendment to the Constitution of the United States of America), there is no question of incorporating such a right into Article 20(3). Thus it is testament for the following propositions:

   a. Searches authorised by law do not violate Article 20(3);

b. No fundamental right to privacy exists in Article 21 and consequently no such right can be brought into Article 20(3) by a strained construction.

7. In *Kharak Singh*, the central issue relevant for the purposes of this note, before a 6-judge bench of this Hon'ble Court was whether Chapter XX of the Uttar Pradesh Police Regulations violated the fundamental rights guaranteed under Article 21 of the Constitution. The relevant regulations (which were admitted by the UP Government as being non-statutory in nature) permitted the police to engage in secret picketing, domiciliary visits, periodical enquiries, reporting of movements and collection of records of "history sheeters," i.e., persons who are, or are likely to become habitual criminals and therefore require surveillance. Regulation 236, which according to the Court *"for all practical purposes, defines 'surveillance'"* provided,

*"**236.** Without prejudice to the right of Superintendents of Police to put into practice any legal measures, such as shadowing in cities, by which they find they can keep in touch with suspects in particular localities or special circumstances, surveillance may for most practical purposes be defined as consisting of one or more of the following measures :*

(a) Secret picketing of the house or approaches to the house of suspects;

(b) domiciliary visits at night;

(c) through periodical inquiries by officers not below the rank of Sub-Inspector into repute, habits, associations, income, expenses and occupation;

(d) the reporting by constables and chaukidars of movements and absence from home;

(e) the verification of movements and absences by means of inquiry slips;

(f) the collection and record on a history-sheet of all information bearing on conduct."

8. It was held by the majority that the regulation which deals with secret picketing [clause (a) of Regulation 236] does not violate personal liberty. The majority of the Court said (*per* Ayyangar, J.):

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*"**10.** We shall now consider each of these clauses of Regulation 236 in relation to the "freedoms" which it is said they violate:*

(a) Secret picketing of the houses of suspects.—

It is obvious that the secrecy here referred to is secrecy from the suspect; in other words its purpose is to ascertain the identity of the person or persons who visit the house of the suspect, so that the police might have a record of the nature of the activities in which the suspect is engaged. This, of course, cannot in any material or palpable form affect either the right on the part of the suspect to "move freely" nor can it be held to deprive him of his "personal liberty" within Article 21. It was submitted that if the suspect does come to know that his house is being subjected to picketing, that might affect his inclination to move about or that in any event it would prejudice his "personal liberty". We consider that there is no substance in this argument. In dealing with a fundamental right such as the right to free movement or personal liberty, that only can constitute an infringement which is both direct as well as tangible and it could not be that under these freedoms the Constitution-makers intended to protect or protected mere personal sensitiveness." (emphasis supplied)

9. This clearly envisages that intimacy in a household or exercise of personal autonomy within a household free from surveillance was not considered by the Court to be protected by Article 21. It is instructive to note that such right to conceal information about oneself, particularly intimate information inside one's own household, is seen as a component of the right to privacy, as widely accepted by scholars. Illustratively, Judge Richard Posner writes in this regard:

"[T]he word 'privacy' seems to embrace at least two distinct interests. One is the interest in being left alone-the interest that is invaded by the unwanted telephone solicitation, the noisy sound truck, the music in elevators, being jostled in the street, or even an obscene theater billboard or shouted obscenity...The other privacy interest, concealment of information, is invaded whenever private information is obtained against the wishes of the person to whom the information pertains. ... [W]hen

people today decry lack of privacy, what they want, I think, is mainly something quite different from seclusion; they want more power to conceal information about themselves that others might use to their disadvantage."

[Richard A. Posner, *The Economics of Justice* (Cambridge MA: Harvard University Press, 1981) 272-3]

10. By not protecting the right of individuals to live in their homes without surveillance, the Supreme Court did not fully uphold "the individual interest in avoiding disclosure of personal matters" a component of the right to privacy. However, with regard to the regulation pertaining to domiciliary visits at night [regulation 236(b)], the Court held (*per* Ayyangar, J.):

*"**10.** ...The question that has next to be considered is whether the intrusion into the residence of a citizen and the knocking at his door with the disturbance to his sleep and ordinary comfort which such action must necessarily involve, constitute a violation of the freedom guaranteed by Article 19(1)(d) or "a deprivation" of the "personal liberty" guaranteed by Article 21.*

***13.** ...Frankfurter, J. observed in Wolf v. Colorado [338 US 25] .*

"The security of one's privacy against arbitrary intrusion by the police ... is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples ... We have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guarantee of the Fourteenth Amendment."

***14.** Murphy, J. considered that such invasion was against "the very essence of a scheme of ordered liberty.*

15. *It is true that in the decision of the U.S. Supreme Court from which we have made these extracts, the Court had to consider also the impact of a violation of the Fourth Amendment which reads:*

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

and that our Constitution does not in terms confer any like constitutional guarantee. Nevertheless, these extracts would show that an unauthorised intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man an ultimate essential of ordered liberty, if not of the very concept of civilisation. An English Common Law maxim asserts that "every man's house is his castle" and in Semayne case [5 Coke 91 : 1 Sm LC (13th Edn) 104 at p. 105] where this was applied, it was stated that "the house of everyone is to him as his castle and fortress as well as for his defence against injury and violence as for his repose". We are not unmindful of the fact that Semayne case [5 Coke 91 : 1 Sm LC (13th Edn) 104 at p. 105] was concerned with the law relating to executions in England, but the passage extracted has a validity quite apart from the context of the particular decision. It embodies an abiding principle which transcends mere protection of property rights and expounds a concept of "personal liberty" which does not rest on any element of feudalism or on any theory of freedom which has ceased to be of value.

16. In our view clause (b) of Regulation 236 is plainly violative of Article 21 and as there is no "Law" on which the same could be justified it must be struck down as unconstitutional." (emphasis supplied)

11. It is clear that the impugned regulation which allowed an unauthorised intrusion into a person's home was found unconstitutional since it was antithetical to "ordered liberty, if not of the very concept of civilisation." This was seen as a common law right which was enshrined in Article 21. It is instructive to note however that such a right was not seen as a facet of a

right to privacy but a standalone protection that flowed directly from the Court's conception of "ordered liberty".

12. With regard to the regulations pertaining to shadowing of history sheeters for the purpose of recording their movements and activities and obtaining of information relating to persons with whom they associate, [regulations 236(c), (d) and (e)] the majority of the Court held (*per* Ayyangar, J.):

"***17.*** *...Having given the matter our best consideration we are clearly of the opinion that the freedom guaranteed by Article 19(1)(d) is not infringed by a watch being kept over the movements of the suspect. Nor do we consider that Article 21 has any relevance in the context as was sought to be suggested by learned Counsel for the petitioner. As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.*" (emphasis supplied)

13. Thus it is clear that the Court provided limited protection to unauthorised intrusions into a person's home as contrary to ordered liberty under Article 21. It is critical to note that such right was viewed by the Court in contradistinction to the right of privacy particularly regarding movements of an individual or his need for intimacy and safeguards against surveillance, which, according to the Court, were not guaranteed.

14. The concurring judgement held not only the regulation pertaining to domiciliary visits, but also the other impugned regulations pertaining to secret picketing, periodical enquiries, reporting of movements and collection of records of history sheeters unconstitutional since they impeded free movement protected by Article 19(1)(d) and personal liberty protected by Article 21. It held (*per* Subba Rao, J. concurring):

"***27.*** *...In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does amount to a reasonable restriction within the meaning of Article 19(2) of the Constitution. But in this case no such defence is available, as admittedly*

there is no such law. So the petitioner can legitimately plead that his fundamental rights both under Article 19(1)(d) and Article 21 are infringed by the State."

15. On a combined reading of the two judgments it is clear that they hold that there is no fundamental right to privacy in the Constitution. It is only unauthorised intrusions (without law) into one's home that is protected as a component of ordered liberty. However there continues to be a common law right to privacy which exists.

. . .

16. It appears to be the stand of the petitioners that the subsequent decisions by smaller benches of this Hon'ble Court decide contentions not raised or decided in *MP Sharma* and *Kharak Singh*, and should, therefore, notwithstanding their inconsistency with *MP Sharma* and *Kharak Singh*, be treated as having correctly read the fundamental right of privacy into Article 21. This, it is submitted, is wholly untenable, in the light of the decision of this Hon'ble Court in ***T. Govindaraja Mudaliar vs. State of Tamil Nadu***, (1973) 1 SCC 336, wherein it was held:

> "The binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided."

17. Further, in ***Kharak Singh*** – the majority unequivocally held that "*the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.*" (@P. 351)

18. It was on this basis that the challenge to the Regulation 236 (a) (c) (d) & (e) (@P. 340) pertaining to verification of movements and absences of individual, failed and the Court said that the general right to privacy is not a fundamental right under Part III of the Constitution.

B. The ratio of the judgment in *Kharak Singh* has not been overruled expressly, impliedly or otherwise by subsequent judgments

19. It is humbly submitted that the ratio of the judgment of this Hon'ble Court in ***Kharak Singh*** to the effect that there is no fundamental right to privacy in Part III of the Constitution, has not been overruled, impliedly or otherwise, by the judgments in ***Rustom Cavasjee Cooper (Bank Nationalisation) v. Union of India (1970) 1 SCC 248*** & ***Maneka Gandhi.v. Union of India, (1978) 1 SCC 248.***

20. In order to substantiate the above, it is pertinent to examine the ratio in ***A.K. Gopalan v. State of Madras AIR 1950 SC 27*** on interpretation of fundamental rights and their interplay, which was subsequently overruled. The said ratio can be best captured in the following excerpts:

KANIA J.:

> **25.** A detailed discussion of the true limits of Article 21 will not be necessary if Article 22 is considered a code to the extent there are provisions therein for preventive detention. *In this connection it may be noticed that the articles in Part III deal with different and separate rights. Under the caption "Right to Freedom" Articles 19-22 are grouped but each with a separate marginal note. It is obvious that Article 22(1) and (2) prescribe limitations on the right given by Article 21. If the procedure mentioned in those articles is followed the arrest and detention contemplated by Article 22(1) and (2), although they infringe the personal liberty of the individual, will be legal, because that becomes the established legal procedure in respect of arrest and detention.* [Emphasis supplied]

MUKHERJEA J.:

> **226....** My conclusion, therefore, is that in Article 21 the word "law" has been used in the sense of State-made law and not as an equivalent of law in the abstract or general sense embodying the principles of natural justice. *The article presupposes that the law is a valid and binding law under the provisions of the Constitution having regard to the competency of the legislature and the subject it relates to and does not*

infringe any of the fundamental rights which the Constitution provides for." [Emphasis supplied]

21. The proposition of law expounded in *Gopalan* with respect to the interplay of Art. 21 with the other fundamental rights was expressly overruled in ***RC Cooper,*** which can be seen from the following *dicta* of J. C. SHAH J. at page 290 of the SCC report, speaking for the majority:

> ***"55.*** *We have found it necessary to examine the rationale of the two lines of authority and determine whether there is anything in the Constitution which justifies this apparently inconsistent development of the law. In our judgment, the assumption in A.K. Gopalan case that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct. We hold that the validity of "law" which authorises deprivation of property and "a law" which authorises compulsory acquisition of property for a public purpose must be adjudged by the application of the same tests. A citizen may claim in an appropriate case that the law authorising compulsory acquisition of property imposes fetters upon his right to hold property which are not reasonable restrictions in the interests of the general public. It is immaterial that the scope for such challenge may be attenuated because of the nature of the law of acquisition which providing as it does for expropriation of property of the individual for public purpose may be presumed to impose reasonable restrictions in the interests of the general public."* [Emphasis supplied]

22. Consequently, in ***Maneka Gandhi*** at page 278 it was held that the observations of the majority in *Kharak Singh (supra)* discussing *Gopalan (supra)* stood overruled by implication after the judgment in *R C Cooper (supra).* It was held as follows:

> ***5.*** *It is obvious that Article 21, though couched in negative language, confers the fundamental right to life and personal liberty. So far as the right to personal liberty is concerned, it is ensured by providing that no one shall be deprived of personal liberty except according to procedure prescribed by law. The first question that arises for consideration on the language of Article 21 is : what is the meaning*

and content of the words "personal liberty" as used in this article? This question incidentally came up for discussion in some of the judgments in A.K. Gopalan v.State of Madras [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] and the observations made by Patanjali Sastri, J., Mukherjea, J., and S.R. Das, J., seemed to place a narrow interpretation on the words "personal liberty" so as to confine the protection of Article 21 to freedom of the person against unlawful detention. But there was no definite pronouncement made on this point since the question before the Court was not so much the interpretation of the words "personal liberty" as the inter-relation between Articles 19 and 21. It was in Kharak Singh v. State of U.P.[AIR 1963 SC 1295 : (1964) 1 SCR 332 : (1963) 2 Cri LJ 329] that the question as to the proper scope and meaning of the expression "personal liberty" came up pointedly for consideration for the first time before this Court. The majority of the Judges took the view "that "personal liberty" is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the "personal liberties" of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue. The minority Judges, however, disagreed with this view taken by the majority and explained their position in the following words: "No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned." There can be no doubt that in view of the decision of this Court in R.C. Cooper v. Union of India [(1970) 2 SCC 298 : (1971) 1 SCR 512] the minority view must be regarded as correct and the majority view must be held to have been overruled. We shall have occasion to analyse and discuss the decision in R.C. Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] a little later when we deal with the arguments based on infraction of Articles 19(1)(a) and 19(1)(g), but it is sufficient to state for the present that according to this decision, which was a decision given by the Full

Court, the fundamental rights conferred by Part III are not distinct and mutually exclusive rights. Each freedom has different dimensions and merely because the limits of interference with one freedom are satisfied, the law is not freed from the necessity to meet the challenge of another guaranteed freedom. .....

23. Chandrachud J also part of the majority in ***Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 at page 323,** observed as follows:

> ". . . Secondly, even the fullest compliance with the requirements of Article 21 is not the journey's end because, a law which prescribes fair and reasonable procedure for curtailing or taking away the personal liberty guaranteed by Article 21 has still to meet a possible challenge under other provisions of the Constitution like, for example, Articles 14 and 19. ***If the holding in A.K. Gopalan v. State of Madras [1950 SCR 88 : AIR 1950 SC 27 : 51 Cri LJ 1383] that the freedoms guaranteed by the Constitution are mutually exclusive were still good law, the right to travel abroad which is part of the right of personal liberty under Article 21 could only be found and located in that article and in no other. But in the Bank Nationalisation case (R.C. Cooper v. Union of India [(1971) 1 SCR 512 : (1970) 2 SCC 298]) the majority held that the assumption in A.K. Gopalan that certain articles of the Constitution exclusively deal with specific matters cannot be accepted as correct. Though the Bank Nationalisation case was concerned with the inter-relationship of Articles 31 and 19 and not of Articles 21 and 19, the basic approach adopted therein as regards the construction of fundamental rights guaranteed in the different provisions of the Constitution categorically discarded the major premise of the majority judgment in A.K. Gopalan as incorrect.*** That is how a seven-Judge Bench in *Shambhu Nath Sarkar* v. *State of West Bengal* [(1973) 1 SCC 856 : 1973 SCC (Cri) 618] assessed the true impact of the ratio of the *Bank Nationalisation case* on the decision in *A.K. Gopalan*. In *Shambhu Nath Sarkar* it was accordingly held that a law of preventive detention has to meet the challenge not only of Articles 21 and 22 but also of Article 19(1)(*d*). Later, a five-Judge Bench in *Haradhan Saha* v. *State of West Bengal* [(1975) 1 SCR 778 : (1975) 3 SCC 198 : 1974 SCC (Cri) 816] adopted the same approach and considered the question whether the Maintenance of Internal Security Act, 1971 violated the right guaranteed by Article

19(1)(*d*). Thus, the inquiry whether the right to travel abroad forms a part of any of the freedoms mentioned in Article 19(1) is not to be shut out at the threshold merely because that right is a part of the guarantee of personal liberty under Article 21. I am in entire agreement with brother Bhagwati when he says:
"The law must, therefore, now be taken to be well-settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by Article 21, such law, insofar as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that article."

24. That, in light of the above, it will be clear that the ratio of the majority in ***Kharak Singh*** that the "right to privacy is not a guaranteed right under our Constitution" is still good law and the said conclusion is independent of the ***Gopalan*** reasoning, which in the view of both the majority and the minority was not in question in the present case.

a. The majority in Kharak Singh **@ Page 345** explicitly held:

"In view of the very limited nature of the question before us it is unnecessary to pause to consider either the precise relationship between the "liberties" in Articles 19(1)(a) & (d) on the one hand and that in Article 21 on the other, or the content and significance of the words "procedure established by law" in the latter article, both of which were the subject of elaborate consideration by this Court in A.K. Gopalan v. State of Madras."

b. Even Subba Rao J. in partly concurring partly dissenting opinion agrees with the majority on this aspect and holds as under: **(@ P. 352:**

"Let us at the outset clear the ground. We are not concerned here with a law imposing restrictions on a bad character, for admittedly there is no such law. Therefore, the petititioner's fundamental right, if any has to be judged on the basis that there is no such law. To state it differently, what fundamental right of the petitioner has been infringed by the acts of the

police? If he has any fundamental right which has been infringed by such acts, he would be entitled to a relief straightaway, for the State could not justify it on the basis of any law made by the appropriate legislature or the rules made thereunder."

P. 356 & 357):

At this stage it will be convenient to ascertain the scope of the said two provisions and their relation *inter se* in the context of the question raised. Both of them are distinct fundamental rights. No doubt the expression "personal liberty" is a comprehensive one and the right to move freely is an attribute of personal liberty. *It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression "personal liberty" in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty have many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does amount to a reasonable restriction within the meaning of Article 19(2) of the Constitution.* ***But in this case no such defence is available, as admittedly there is no such law.*** *So the petitioner can legitimately plead that his fundamental rights both under Article 19(1)(d) and Article 21 are infringed by the State.*

25. That the above submission is further countenanced by the discussion in the majority opinion @ P 338-339 itself which makes it abundantly clear that the *Gopalan reasoning* would have come into play only if there was a "valid

law", but in its absence, the challenge was made under both Articles 19 & 21.

> "Before entering on the details of these regulations it is necessary to point out that the defence of the State in support of their validity is two-fold: (*1*) that the impugned regulations do not constitute an infringement of any of the freedoms guaranteed by Part III of the Constitution which are invoked by the petitioner, and (*2*) that even if they were, they have been framed "in the interests of the general public and public order" and to enable the police to discharge its duties in a more efficient manner and were therefore "reasonable restrictions" on that freedom. *Pausing here it is necessary to point out that the second point urged is without any legal basis for if the petitioner were able to establish that the impugned regulations constitute an infringement of any of the freedoms guaranteed to him by the Constitution then the only manner in which this violation of the fundamental right could be defended would be by justifying the impugned action by reference to a valid law i.e. be it a statute, a statutory rule or a statutory regulation. Though learned Counsel for the respondent started by attempting such a justification by invoking Section 12 of the Indian Police Act he gave this up and conceded that the regulations contained in Chapter 22 had no such statutory basis but were merely executive or departmental instructions framed for the guidance of the police officers. They would not therefore be "a law" which the State is entitled to make under the relevant clauses 2 to 6 of Article 19 in order to regulate or curtail fundamental rights guaranteed by the several sub-clauses of Article 19(1), nor would the same be "a procedure established by law" within Article 21. The position therefore is that if the action of the police which is the arm of the executive of the State is found to infringe any of the freedoms guaranteed to the petitioner would be entitled to the relief of mandamus which he seeks, to restrain the State from taking action under the regulations.*

> There is one other matter which requires to be clarified even at this stage. A considerable part of the argument addressed to us on behalf of the respondent was directed to showing that the regulations were reasonable and were directed only against those who were on proper grounds suspected to be of proved anti-social habits and tendencies and on whom it was necessary to impose some restraints for the protection of society. *We entirely agree that if the regulations had any statutory basis and were a "law" within Article 13(3), the consideration mentioned might have an overwhelming and even decisive weight in establishing that the classification was rational and that the restrictions were reasonable and designed to preserve public order by suitable preventive action. But not being any such "law", these considerations are out of place* and their constitutional validity has to be judged on the same basis as if they were applied against every one including respectable and law-abiding citizens not being or even suspected of being, potential dangers to public order."

26. That this is further evident and buttressed by the fact that both the majority and the minority proceeded to test the impugned Regulations against both Articles 19 and 21, which would have been impermissible under the *Gopalan test*.

27. That therefore, it would not be incorrect to state that the Supreme Court in Para 5 of *Maneka Gandhi* in fact overrules the *obiter dicta* of the majority in Kharak Singh pertaining to the *Gopalan* test and confirms the obiter of the minority in Kharak Singh as evident from the excerpt from *Maneka Gandhi* quoted above, without affecting the ratio of the majority as to the non-existence of fundamental right to privacy under our Constitution.

28. Hence, it is submitted that the ratio of Kharak Singh that privacy is not a fundamental right, has not been overruled in *Maneka Gandhi.*

29. The above submission is supported by **Para 5 of Maneka Gandhi** that what was overruled was the majority's understanding of Gopalan, which in our view was obiter in Kharak Singh and not whether there is a fundamental right to privacy, which is still good law. This will be evident from a reading of Cooper's understanding of Gopalan which is at **Page 284 Para 45 (1970) 1 SCC 248** and its overruling @ Para 55. In Kharak Singh both the majority and minority while discussing Gopalan state that the interplay of fundamental right is irrelevant for the present case. Therefore, the discussion in Kharak Singh relating to the interplay of rights had no bearing on the ratio of the majority that there is no fundamental right to privacy in Part III.

30. On this basis the Union of India humbly submits that *Kharak Singh* is good law and there is no general fundamental right to privacy in the Constitution. This is particularly so, since privacy in its jurisprudential conception is a value underlying several rights and interests as delineated below.

C. There is no general right to privacy, but it finds enunciation as an underlying value for other rights which may be constitutional or otherwise

31. It is submitted that there is no general fundamental right to privacy. Instead, privacy has been considered as an underlying principle for several constitutional concepts. In other instances, privacy has been contextualised in various forms to ensure confidentiality of information, protecting reproductive integrity and other non-constitutional interests. In what is considered to be a seminal work on the right to privacy, Warren and Brandeis said:

"The general object in view is to protect the privacy of private life, and to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is likely to be withdrawn. Since, then, the propriety of publishing the very same facts may depend wholly upon the person concerning whom they are published, no fixed formula can be used to prohibit obnoxious publications. Any rule of liability adopted must have in it an elasticity which shall take account of the varying circumstances of each case, a necessity which unfortunately renders such a doctrine not only more difficult of application, but also to a certain extent uncertain in its operation and easily rendered abortive. Besides, it is only the more flagrant breaches of decency and propriety that could in practice be reached, and it is not perhaps desirable even to attempt to repress everything which the nicest taste and keenest sense of the respect due to private life would condemn."

[Warren and Brandeis, "Right to Privacy" IV(5) *Harvard Law Review* (1890)]

32. In his understanding of privacy in common law, noted academic William Prosser considers privacy to be a conglomerate of four torts:

"What has emerged from the decisions is no simple matter. It is not one tort, but a complex of four. The law of privacy comprises 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 except that each represents an interference with the right of the plaintiff, in the phrase coined byJudge Cooley, "to be let alone." Without any attempt to exact definition, these four torts may be described as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness."

[William L. Prosser, "Privacy," 48 (3) *California Law Review* 383, 389(1960)]

33. Similarly, in various jurisdictions, privacy as a value is protected in the form of a statutory right that does not rise to the constitutional level. This may be seen, for example in Australia's protections provided under its Privacy Act, 1988:

"There is no general right to privacy in Australia. The Privacy Act 1988 (Cth) provides some protection in relation to the collection, storage, use and disclosure of personal information by Commonwealth agencies and some private sector bodies. However, the protections contained in the Privacy Act are by no means equivalent to the right to privacy in the ICCPR."

[Fiona David & Jake Blight, "Understanding Australia's Human Rights Obligations in Relation to Transsexuals: Privacy and Marriage in the Australian Context", 9 (2) *Deakin Law Review* 310, 318]

34. As evident from the above, privacy cannot be treated as a separate and independent Fundamental right. Thus, no blanket right to privacy in general should be read in to Part III. To the extent constituent facets of such rights are already covered by the provisions of Part III, such facets will be protected any way. It is, therefore, respectfully submitted that the Court may remain cautious of reading the right to privacy generally into Part III of the Constitution, or into any specific article.

D. Reading in a compendious fundamental right to privacy is not appropriate

35. In order to answer the question as to whether a fundamental right to privacy ought to be determinatively read into Article 21 of the Constitution, it will be instructive to look at the development of the common law in this regard. In the common law, despite being called upon several times to read in a right to privacy, courts have refused to read in such a general right. Particular protections however are available for breach of confidence, intentional infliction of harm, trespass etc. This position has been authoritatively laid down in *Wainwright v. Home Office* [2004] 2 A.C. 406 (per Lord Hoffman):

"15. My Lords, let us first consider the proposed tort of invasion of privacy. Since the famous article by Warren and Brandeis ("The Right to Privacy" (1890) 4 Harvard LR 193) the question of whether such a tort exists, or should exist, has been much debated in common law jurisdictions. Warren and Brandeis suggested that one could generalise certain cases on defamation, breach of copyright in unpublished letters, trade secrets and breach of confidence as all based upon the protection of a common value ****419*** *which they called privacy or, following Judge Cooley (Cooley on Torts, 2nd ed (1888), p 29) "the right to be let alone". They said that identifying this common element should enable the courts to declare the existence of a general principle which protected a person's appearance, sayings, acts and personal relations from being exposed in public.*

16 Courts in the United States were receptive to this proposal and a jurisprudence of privacy began to develop. It became apparent, however, that the developments could not be contained within a single principle; not, at any rate, one with greater explanatory power than the proposition that it was based upon the protection of a value which could be described as privacy. Dean Prosser, in his work on The Law of Torts, 4th ed (1971), p 804, said that:

"What has emerged is no very simple matter ... it is not one tort, but a complex of four. To date the law of privacy comprises 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 except that each represents an interference with the right of the plaintiff 'to be let alone'."

17. Dean Prosser's taxonomy divided the subject into (1) intrusion upon the plaintiff's physical solitude or seclusion (including unlawful searches, telephone tapping, long-distance photography and telephone harassment) (2) public disclosure of private facts and (3) publicity putting the plaintiff in a false light and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. These, he said, at p 814, had different elements and were subject to different defences.

18 The need in the United States to break down the concept of "invasion of privacy" into a number of loosely-linked torts must cast doubt upon the value of any high-level generalisation which can perform a useful function in enabling one to deduce the rule to be applied in a concrete case. English law has so far been unwilling, perhaps unable, to formulate any such high-level principle. There are a number of common law and statutory remedies of which it may be said that one at least of the underlying values they protect is a right of privacy. Sir Brian Neill's well known article "Privacy: a challenge for the next century" in Protecting Privacy (ed B Markesinis, 1999) contains a survey. Common law torts include trespass, nuisance, defamation and

malicious falsehood; there is the equitable action for breach of confidence and statutory remedies under the Protection from Harassment Act 1997 and the Data Protection Act 1998. There are also extra-legal remedies under Codes of Practice applicable to broadcasters and newspapers. But there are gaps; cases in which the courts have considered that an invasion of privacy deserves a remedy which the existing law does not offer. Sometimes the perceived gap can be filled by judicious development of an existing principle. The law of breach of confidence has in recent years undergone such a process: see in particular the judgment of Lord Phillips of Worth Matravers MR in Campbell v MGN Ltd [2003] QB 633 . On the other hand, an attempt to create a tort of telephone harassment by a radical change in the basis of the action for private nuisance in Khorasandjian v Bush [1993] QB 727 was held by the House of Lords inHunter v Canary Wharf Ltd [1997] AC 655 to be a step too far. The gap was filled by the 1997 Act.

19. What the courts have so far refused to do is to formulate a general principle of "invasion of privacy" (I use the quotation marks to signify doubt about what in such a context the expression would mean) from which the conditions of liability in the particular case can be deduced. The reasons were discussed by Sir Robert Megarry V-C in Malone v Metropolitan Police Comr [1979] Ch 344 , 372-381. I shall be sparing in citation but the whole of Sir Robert's treatment of the subject deserves careful reading. The question was whether the plaintiff had a cause of action for having his telephone tapped by the police without any trespass upon his land. This was (as the European Court of Justice subsequently held in Malone v United Kingdom (1984) 7 EHRR 14) an infringement by a public authority of his right to privacy under article 8 of the Convention, but because there had been no trespass, it gave rise to no identifiable cause of action in English law. Sir Robert was invited to declare that invasion of privacy, at any rate in respect of telephone conversations, was in itself a cause of action. He said, at p 372:

"I am not unduly troubled by the absence of English authority: there has to be a first time for everything, and if the principles of English law, and not least analogies from the existing rules, together with the requirements of justice and common sense, pointed firmly to such a right existing, then I think the court should not be deterred from recognising the right. On the other hand, it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another....

23. The absence of any general cause of action for invasion of privacy was again acknowledged by the Court of Appeal in Kaye v Robertson [1991] FSR 62 , in which a newspaper reporter and photographer invaded the plaintiff's hospital bedroom, purported to interview him and took photographs. The law of trespass provided no remedy because the plaintiff was not owner or

occupier of the room and his body had not been touched. Publication of the interview was restrained by interlocutory injunction on the ground that it was arguably a malicious falsehood to represent that the plaintiff had consented to it. But no other remedy was available. At the time of the judgment (16 March 1990) a Committee under the chairmanship of Sir David Calcutt QC was considering whether individual privacy required statutory protection against intrusion by the press. Glidewell LJ said, at p 66: "The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals."

24. Bingham LJ likewise said, at p 70: "The problems of defining and limiting a tort of privacy are formidable but the present case strengthens my hope that the review now in progress may prove fruitful."

25. Leggatt LJ, at p 71, referred to Dean Prosser's analysis of the development of the law of privacy in the United States and said that similar rights could be created in England only by statute: "it is to be hoped that the making good of this signal shortcoming in our law will not be long delayed."

26. All three judgments are flat against a judicial power to declare the existence of a high-level right to privacy and I do not think that they suggest that the courts should do so. The members of the Court of Appeal certainly thought that it would be desirable if there was legislation to confer a right to protect the privacy of a person in the position of Mr Kaye against the kind of intrusion which he suffered, but they did not advocate any wider principle. And when the Calcutt Committee reported in June 1990, they did indeed recommend that "entering private property, without the consent of the lawful occupant, with intent to obtain personal information with a view to its publication" should be made a criminal offence: see the Report of the Committee on Privacy and Related Matters (1990) (Cm 1102), para 6.33. The Committee also recommended that certain other forms of intrusion, like the use of surveillance devices on private property and long-distance photography and sound recording, should be made offences.

27. But the Calcutt Committee did not recommend, even within their terms of reference (which were confined to press intrusion) the creation of a generalised tort of infringement of privacy: paragraph 12.5. This was not because they thought that the definitional problems were insuperable. They said that if one confined the tort to "publication of personal information to the world at large" (paragraph 12.12) it should be possible to produce an adequate definition and they made some suggestions about how such a statutory tort might be defined and what the defences should be. But they

considered that the problem could be tackled more effectively by a combination of the more sharply-focused remedies which they recommended: paragraph 12.32. As for a "general wrong of infringement of privacy", they accepted, at paragraph 12.12, that it would, even in statutory form, give rise to "an unacceptable degree of uncertainty". There is nothing in the opinions of the judges in Kaye v Robertson [1991] FSR 62 which suggests that the members of the court would have held any view, one way or the other, about a general tort of privacy." (emphasis supplied)

36. The Court of Appeal judgment in this case may also be noted. In this case, the Court of Appeal held (per Mummery LJ) [2002] QB 1334:

"57. This claim fails, as there is no tort of invasion of privacy. Instead there are torts protecting a person's interests in the privacy of his body, his home and his personal property. There is also available the equitable doctrine of breach of confidence for the protection of personal information, private communications and correspondence.

58. The common law position remains as stated in the Justice Report on Privacy and the Law (1970), paragraph 30: "it is generally recognised that at the present time there is no existing common law remedy for invasion of privacy as such."

59. According to a more recent statement of the legal position in Clayton & Tomlinson, The Law of Human Rights (2000) , para 12.06 : "It is well established that English law does not recognise a right to privacy as such."

60. As to the future I foresee serious definitional difficulties and conceptual problems in the judicial development of a "blockbuster" tort vaguely embracing such a potentially wide range of situations. I am not even sure that anybody—the public, Parliament, the press—really wants the creation of a new tort, which could give rise to as many problems as it is sought to solve. A more promising and well trod path is that of incremental evolution, both at common law and by statute (e g section 3 of the Protection from Harassment Act 1997), of traditional nominate torts pragmatically crafted as to conditions of liability, specific defences and appropriate remedies, and tailored to suit significantly different privacy interests and infringement situations." (emphasis supplied)

37. It was also held in the same case by Buxton LJ:

"108. "Privacy" covers a very wide range of cases, which are affected by a very wide range of policy considerations. What occurred in our case is perhaps one of the simpler examples. The right not to have another stare at one's naked body, save by consent or in clearly defined situations of necessity, would be unambiguously regarded as a matter of privacy. But what of the obtaining of information that (on the assumptions made to justify the extension of the law of tort into new situations of privacy) is not covered by the law of confidence? What of the making of true statements about others, hitherto rigorously excluded from the law of defamation? What of the whistle-blower? And, indeed, what of a preference to have photographs of your wedding in one publication rather than another?

109. As is well accepted, in none of these cases can a right to privacy be absolute. But that is only the start. What needs to be worked out is the delicate balance, particularly in the area of the publication of information, between the interests on the one hand of the subject and on the other of someone entering his private space, or of the publisher and the latter's audience. It also has to be borne in mind that what is necessarily proposed is a general tort, available not only to private citizens who simply want to get on with their own lives, like the Wainwrights, but also to corporate bodies that want to keep their affairs private. That plainly adds a further dimension of considerable difficulty to attempts to formulate the proper ambit and balance of the tort.

*110. That even without those complications, and while remaining within the ambit of private individuals, differing views can be held on the issue of protection of privacy, and that such views can change over time, can perhaps be illustrated from the classic article that first investigated a right to privacy, and which is still viewed as a significant intellectual source of *1365 the proposed tort: see the judgment in Douglas'scase [2001] QB 967, 999-1000, para 120. The article is by Samuel D Warren and Louis D Brandeis, "The Right to Privacy" (1890) 4 Harv L Rev 193. Its point of departure is believed to have been the behaviour of the press in Boston on the occasion of the wedding of Mr Warren's sister. The authors commented, at p 196:*

"Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle ... When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance."

It may be doubted whether a judge in 2001 would feel able to advance quite that justification for awarding damages for breach of privacy.

111. All these considerations indicate that not only is the problem a difficult one, but also that on grounds not merely of rationality but also of democracy the difficult social balance that the tort involves should be struck by Parliament and not by the judges: as Sir Robert Megarry V-C urged in Malone'scase [1979] Ch 344, 379 , in the passage quoted in paragraph 92 above, and Leggatt LJ urged in Kaye v Robertson[1991] FSR 62 . And that is rendered the more, not the less, the case by reason of the fact that Parliament, and those who advise it, have themselves found the problem of the limits of a tort of invasion of privacy to be one of profound difficulty. The Law Commission has had the issue of a tort of invasion of privacy on its agenda since the 1960s. No proposals have emerged. The Younger Committee on Privacy (1972) (Cmnd 5012) considered in detail whether there should be "a general right of privacy" protected by law, and rejected that proposal, on grounds, amongst others, of uncertainty: see in particular the discussion at paragraphs 660-666 of the report. Subsequent initiatives, summarised by Brooke LJ in Douglas'scase [2001] QB 967, 993, paras 89-90 , have borne no further fruit.

*112. Whatever sympathy may be felt for the particular position of the Wainwrights, we have to remember that laws are not made for particular cases but for men in general: R (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening) [2002] 1 AC 800, 823, para 29, Lord Bingham of Cornhill . And I have no doubt that in being invited to recognise the existence of a tort of breach of privacy we are indeed being invited to make the law, and not merely to apply it. Diffidence in the face of such an invitation is not, in my view, an abdication of our responsibility, but rather a recognition that, in areas involving extremely contested and strongly conflicting social interests, the judges are extremely ill-equipped to undertake the detailed investigations necessary before the proper shape of the law can be decided. It is only by inquiry outside the narrow boundaries of a particular case that the proper ambit of such a tort can be determined. The interests of democracy demand that such inquiry should be conducted in order to inform, and the appropriate conclusions should be drawn from the inquiry by, Parliament and not the courts. It is ***1366** thus for Parliament to remove, if it thinks fit, the barrier to the recognition of a tort of breach of privacy that is at present erected by Kaye v Robertson[1991] FSR 62 and Khorasandjian v Bush[1993] QB 727 ."*
(emphasis supplied)

38. Courts in the United Kingdom have thus not undermined the value of privacy by not reading in such a general tort. They have, quite to the contrary, been prepared to let other torts develop on a case-by-case basis to cover privacy questions. This has been recognised by the House of Lords in *Campbell v. MGN* [2004] 2 A.C. 457:

> *"43.In order to set both the concession and the residual claim in their context and to identify the point of law at issue, I must say something about the cause of action on which Ms Campbell relies. This House decided in Wainwright v Home Office [2004] 2 AC 406 that there is no general tort of invasion of privacy. But the right to privacy is in a general sense one of the values, and sometimes the most important value, which underlies a number of more specific causes of action, both at common law and under various statutes. One of these is the equitable action for breach of confidence, which has long been recognised as capable of being used to protect privacy. Thus in the seminal case of Prince Albert v Strange (1849) 2 De G & Sm 652; 1 Mac & G 25the defendant was a publisher who had obtained copies of private etchings made by the Prince Consort of members of the royal family at home. The publisher had got them from an employee of a printer to whom the Prince had entrusted the plates. Knight Bruce V-C, in granting an injunction restraining the publication of a catalogue containing descriptions of etchings, said, 2 De G & Sm 652 , 698, that it was:*
>
> *"an intrusion—an unbecoming and unseemly intrusion ... offensive to that inbred sense of propriety natural to every man—if intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life—into the home (a word hitherto sacred among us) ..."*

39. It emerges from the common law that courts in England have refused to read in a general tort of invasion of privacy for three distinct reasons:

- *First*, privacy is a value that underlies several causes of action such as breach of confidence, trespass etc. If a particular cause of action leads to such breaches, privacy will necessarily be protected as a consequence.
- *Second*, creating a general right to privacy will lead to several definitional issues. Such a right must not only be seen in easy cases (such as Wainwright, where any person would have a reasonable

expectation of privacy while visiting prison to not be strip-searched) but in harder cases such as whether there is a right to watch child pornography in the privacy of one's home, whether there is a privacy right to refuse to be part of the census on the ground of a conscientous objection, whether there is a privacy right to be able to sell one's organs or to not have one's emails being read, even for law enforcement purposes. Creating a general right, courts in England have recognised, might cause greater problems than solve them.

- *Third*, creating a general right is not the prerogative of the courts, but of Parliament. It will be necessary to note that today in the United Kingdom, there is a right to privacy not in tort but because of Article 8 of the European Convention of Human Rights, brought in to the UK by Parliament.

40. The English experience is thus instructive against reading in a compendious right to privacy, instead of allowing such interests to be protected on a case-by-case basis in other existing rights and bringing the need for such a law to the notice of Parliament.

41. Reference, in this regard, may also be made to the Article titled *'What to we mean by "Right to Privacy"'*, by Frederick Davis, published in the South Dakota Law Review [4 SDL Rev 1 1959], which expresses the view that privacy is a sociological notion, not a jural concept, and that "as a tool available to courts in their every day task of deciding, in particular cases, which interests must be protected and to what extent, "right to privacy" has little more utility than "pursuit of happiness." "

42. It is humbly submitted that the accepted principle of jurisprudence remains that the creation of new rights is not a judicial but a legislative function. This is particularly true in the United States of America where the reading in of the right to privacy as a constitutional rights has been severely criticised. Scholarly literature in the USA has observed this in several places. For instance, Judge Robert H. Bork notes in an article written in the Indiana Law Journal:

"It follows that the choice of "fundamental values" by the Court cannot be justified. Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights. ... The Court's Griswold opinion, by Justice Douglas, and the array of concurring opinions, by Justices Goldberg, White and Harlan, all failed to justify the derivation of any principle used to strike down the Connecticut anti-contraceptive statute or to define the scope of the principle. Justice Douglas, to whose opinion I must confine myself, began by pointing out that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Nothing is exceptional there. In the case Justice Douglas cited, NAACP v. Alabama," the State was held unable to force disclosure of membership lists because of the chilling effect upon the rights of assembly and political action of the NAACP's members. The penumbra was created solely to preserve a value central to the first amendment, applied in this case through the fourteenth amendment. It had no life of its own as a right independent of the value specified by the first amendment. But Justice Douglas then performed a miracle of transubstantiation. He called the first amendment's penumbra a protection of "privacy" and then asserted that other amendments create "zones of privacy."" He had no better reason to use the word "privacy" than that the individual is free within these zones, free to act in public as well as in private. None of these penumbral zones-from the first, third, fourth or fifth amendments, all of which he cited, along with the ninth-covered the case before him. One more leap was required. Justice Douglas asserted that these various "zones of privacy" created an independent right of privacy, a right not lying within the penumbra of any specific amendment. He did not disclose, however, how a series of specified rights combined to create a new and unspecified right." (emphasis supplied)

[Robert H. Bork, "Neutral Principles and some First Amendment Problems", 47(1) *Indiana Law Journal* (Fall 1971) pp. 8, 9]

43. Bork's observations indicate a general criticism of creation of new rights by judges. This sentiment has been witnessed fairly widely in academic literature as well. Ira C. Lupu wrote in an article in the Michigan Law Review:

"Justice Douglas's famous "penumbras" and "emanations" opinion drew upon the incorporation legacy, rather than a doctrine of "naked" substantive due process, and tortured the Bill of Rights into yielding a protected zone of privacy that would not tolerate a law banning contraceptive use by married couples. Justice Goldberg's reliance upon the ninth amendment in his concurring opinion was equally disingenuous in its attempt to avoid the jaws of substantive due process. Only Justices White and Harlan were willing to grapple directly with the fearful creature, and concluded that a law invading marital choice about contraception violated the due process clause itself, independent of links with the Bill of Rights. Shocking though that analysis may have been at the time, subsequent developments seem to have confirmed the White-Harlan view, and not the magical mystery tour of the zones of privacy, as the prevailing doctrine of Griswold." (Citations removed)

[Ira C. Lupu, "Untangling the Strands of the Fourteenth Amendment" 77(4) *Michigan Law Review* (April 1979) 982, 994]

44. The expansion of the meaning of contours of privacy by judicial decision has also been taken note of in another scholarly article, by Robert G. Dixon Jr. in 1976:

"What the invocation of "privacy" does in these freedom of action cases is simply to italicize the word "personal" in the phrase "personal freedom" because all freedoms are personal-some are just more personal than others. But because "privacy" has no single, generally accepted meaning, the mold remains pure Lochner-a judicial probe for the fundamentality of fundamental values not immediately apparent in the Constitution."

[Robert G. Dixon Jr., "The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon" 1976 Brigham Young University Law Review (1976) 48]

This should provide some guidance on the aspect that it is unadvisable for the Court to create a new general right to privacy by means of interpretation. The creation of such right under the Constitution or under a statute should happen by means of legislative exercise.

45. It is thus humbly submitted that the correct interpretive approach to adopt in respect of compendious rights such as privacy is as follows:

a. No general right *de hors* content or context ought to be laid down.

b. Specific aspects of privacy that may protect liberty, equality or other rights textually protected in Part III of the Constitution shall be entitled to such protection.

c. Any such protections may be trammelled by reasonable restrictions, in public interest, as has been held in several judgments of this Hon'ble Court.

E. The Framers of the Constitution also did not think it fit to incorporate a right to privacy in Part III of the Constitution

Discussion on Privacy in Constituent Assembly Debates

46. Draft report of the Fundamental Rights Sub-Committee (3rd April 1947): The Committee borrowed heavily from the Fourth Amendment in the US Constitution and also from the Weimar Constitution and provided for:

> *"9 (d). The right to the secrecy of his correspondence"*
>
> *10. "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath of affirmation, and*

particularly describing the place to be searched, and the persons or things seized."[1]

47. In the Notes to the Draft Report of the Fundamental Rights, the following notes of dissent were made:

Alladi Krishnaswami Aiyyar:

In Relation to Clause 9(d):

"In regard to secrecy of correspondence, I raised a point during the discussions that it need not find a place in a chapter on fundamental rights and that it had better be left to the protection afforded by the ordinary law of the land contained in the various enactments. There is no such right in the American Constitution. Such a provision only finds its place in the post First World War Constitutions. The effect of the clauses upon provisions of the Indian Evidence Act bearing upon privilege will have to be considered. The Indian Evidence Act hedges in the privilege with a number of restrictions vid. *Chapter 9 — Sections 120–127. The result of this clause will be that every private correspondence will assume the rank of a State paper or, in the language of Sections 123 and 124, a record relating to the affairs of the State.*

A clause like this may checkmate the prosecution in establishing any case of conspiracy or abetment in a criminal case and might defeat every action for civil conspiracy, the plaintiff being helpless to prove the same by placing before the court the correspondence that passed between the parties, which in all these cases would furnish the most material evidence. The opening words of the clause "public order and morality" would not be of any avail in such cases. On a very careful consideration of the whole subject, I feel that inclusion of such a clause in the chapter on fundamental rights will lead to endless complications and difficulties in the administration of justice. It will be for the committee to consider whether a reconsideration of the clause is called for in the above circumstances.

In relation to Clause 10:

In regard to this subject I pointed out the difference between the conditions obtaining in America at the time when the American Constitution was drafted and the conditions in India obtaining at present after the provisions of the Criminal Procedure Code in this behalf have been in force for nearly a century. The effect of the clause as it is, will be to abrogate some of the provisions of the Criminal Procedure Code and to leave it to the Supreme Court in particular cases to decide

[1] B. Shiva, The Framing of Indian Constitution, Vol.II @ Pg. 139

> *whether the search is reasonable or unreasonable. While I am averse to reagitating the matter I think it may not be too late for the committee to consider this particular clause.*[2]
>
> BN Rau:
>
> *If this means that there is to be no search without a court's warrant, it may seriously affect the powers of investigation of the police. Under the existing law, e.g. Criminal Procedure Code, Section 165 (relevant extracts given below), the police have certain important powers. Often, in the course of investigation, a police officer gets information that stolen property has been secreted in a certain place. If he searches it at once, as he can at present, there is a chance of his recovering it; but if he has to apply for a court's warrant, giving full details, the delay involved, under Indian conditions of distance and lack of transport in the interior, may be fatal.*[3]

48. Advisory Committee dropped both draft articles (Apr. 1947): After several rounds of debates, both Clause 9(d) and 10 were removed from the Chapter dealing with Fundamental rights[4].

49. During the Constituent Assembly debates, on 30.04.1947, Mr. Somanth Lahiri, while debating on Clause 8, dealing with 'Rights of Freedoms', introduced certain amendments to the same, which included: "*The privacy of correspondence shall be inviolable and may be infringed only in the cases provided by law*".[5] However, a motion was passed to discuss the new proposal brought in by Somnath Lahiri later, at the end of the discussion. However, this issue was never taken up by the House and the said proposal was dropped[6].

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[2] B.Shiva, The Framing of Indian Constitution, Vol.II @ Pgs. 158-159
[3] B. Shiva Rao, The Framing of Indian Constitution, Vol.II @ Pg. 152
[4] B. Shiva Rao, The Framing of Indian Constitution, Vol.II @ Pg. 300
[5] Interim Report on Fundamental Rights, Constituent Assembly Debate, Pg. 459, Vol. III
[6] PAPER-THIN SAFEGUARDS AND MASS SURVEILLANCE IN INDIA, Chinmayi, 26 NLSI Rev. (2014) 105

50. Further on 03.12.1948, Kazi Syed Karimuddin introduced an amendment to Article 14 to include safeguards against arbitrary search and seizure[7]. The relevant potions from the Constituent Assembly debates read as under:

> *"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."*
>
> *This is a very important amendment. You will be pleased to find that this finds place as article 4 in the American Constitution and in the Irish Constitution there are clauses(2) and (5) which are similar and in the German Constitution there are articles 114 and 115 on the same lines. In the book of Dr. Ambedkar--Minorities and States--on page 11,item No. 10, a similar provision has been made. Thus, this is an amendment, the correctness of which cannot be challenged. What is the situation in India today? In India, in practically every province, there are Goonda Act and Public Safety Act which do not provide for any appeals or representations, and which give no opportunity to the persons concerned to defend themselves. Arrests are made without warrant and searches without justification. We are being governed by lawless laws and there is no remedy for the redress of grievances on account of unauthorized arrests and searches.*
>
> *We have seen in 1947, and in the beginning of 1948, that hundreds of thousands of people were arrested and houses were searched merely on suspicion. The result is that the morale of the members of the Muslim minority community was undermined and they were treated just like criminals in the country. I will give the house one very important instance. Whenever we went to an aerodrome to go to Delhi, our belongings were searched without any reason, without any cause and without any warning. I will now give another instance. When there was police action in Hyderabad, every Muslim worth the name was arrested without any justification in the adjoining provinces. If those Muslims were really traitors they ought to have been prosecuted, punished and hanged. But people who had nothing whatever to do with Hyderabad were arrested under the pretence that they were taken only under protective custody. Well, if they were taken only under protective custody, why were their women and children who were outside not taken under this protective custody?*
>
> *Therefore my submission is that unless this fundamental right that I have asked for in this amendment is guaranteed, there will be no end to these arrests without warrants and to these searches without justifications. I have moved this amendment in the earnest hope that it would be accepted."*

[7] Constituent Assembly Debates, Vol. VII, Page 794/ 840-842

51. However, a vote on this amendment was postponed. On 06.12.1948, a re-count of the votes took place, wherein the amendment was defeated. [8]

F. Alternatively, even if this Court finds a right to privacy in Article 21, (a) it is not absolute and (b) it would be subservient to other rights and interests as held by this Hon'ble Court in several decisions.

52. In **Gobind v. State of M.P., (1975) 2 SCC 148. (3 Judges)** this Court cautioned that – *"Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest."*

53. In **Malak Singh v. State of P&H, (1981) 1 SCC 420,(2 judges)** this Court was of the view that *"surveillance may be intrusive and it may so seriously encroach on the privacy of a citizen as to infringe his fundamental right to personal liberty guaranteed by Article 21 of the Constitution and the freedom of movement guaranteed by Article 19(1)(d). That cannot be permitted. This is recognised by the Punjab Police Rules themselves. Rule 23.7, which prescribes the mode of surveillance, permits the close watch over the movements of the person under surveillance but without any illegal interference. Permissible surveillance is only to the extent of a close watch over the movements of the person under surveillance and no more. **So long as surveillance is for the purpose of preventing crime and is confined to the limits prescribed by Rule 23.7 we do not think a person whose name is***

[8] Constituent Assembly Debates, Vol. VII, Page 840-842

. . .

included in the surveillance register can have a genuine cause for complaint. We may notice here that interference in accordance with law and for the prevention of disorder and crime is an exception recognised even by European Convention of Human Rights to the right to respect for a person's private and family life. Article 8 of the Convention reads as follows:

> "(1) Everyone's right to respect for his private and family life, his home and his correspondence shall be recognised.
>
> (2) There shall be no interference by a public authority with the exercise of this right, except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder and crime or for the protection of health or morals.""

54. This Hon'ble Court in ***Mr 'X' v. Hospital 'Z'*, (1998) 8 SCC 296 at page 307**, subjected the fundamental right to privacy to a right to health. The Court held, "*The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.*"

55. This Court in ***Sharda vs Dharmpal, (2003) 4 SCC 493*** has also held that ". . . *when there is no right to privacy specifically conferred by Article 21 of the Constitution of India and with the extensive interpretation of the phrase "personal liberty" this right has been read into Article 21, it cannot be treated as an absolute right. What is emphasized is that some limitations on*

this right have to be imposed and particularly where two competing interests clash. In matters of the aforesaid nature where the legislature has conferred a right upon his spouse to seek divorce on such grounds, it would be the right of that spouse which comes in conflict with the so-called right to privacy of the respondent. Thus the court has to reconcile these competing interests by balancing the interests involved... So viewed, the implicit power of a court to direct medical examination of a party to a matrimonial litigation in a case of this nature cannot be held to be violative of one's right of privacy."

56. In **People's Union for Civil Liberties and Anr. V. Union of India (UOI); [(2004) 9 SCC 580],** The Prevention of Terrorist Act (POTA) was challenged. In this case right to privacy was alleged to be violated by the search and seizure procedure prescribed in the act. This Hon'ble Court held that "it is the duty of everybody to assist the State in detection of the crime and bringing criminal to justice. Withholding such information cannot be traced to right to privacy, which itself is not an absolute right Right to privacy is subservient to that of security of State."

57. Following are cases decided by this Hon'ble Court where despite finding a right of privacy, relief was denied to the petitioner due to overiding corresponding rights or interests therein:

SNO	PARTICULARS	RELIEF DENIED
1.	**R.M. Malkani vs. State of Maharasthra, (1973) 1 SCC 471 (2 judges):**	"31. Telephonic conversation of an innocent citizen will be protected by Courts against wrongful or highhanded interference by

	Phone Tapping case	tapping the conversation, but is not available for guilty citizen against the efforts of police to vindicate the law and prevent corruption of public servants." **Held:** Telephonic conversation was admitted as evidence.
2.	**Gobind vs. State of M.P (1975) 2 SCC 148 (3Judges):** *Against MP Police Regulation*	31. "**Assuming that** the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right..." ..."**Even if** we hold that Article 19 (1)(d) guaranteed to a citizen a right to a privacy in his movement as an emanation from that Article and is itself a fundamental right, the question will arise whether Regulation 856 is a law imposing reasonable restriction in public interest on the freedom of movement falling within Article 19 (5),..., a law imposing reasonable restriction upon it for compelling interest of State must be upheld as valid." **Held:** Upheld the Regulations providing for surveillance.
3.	**Malak Singh vs. State of P& H, (1981) 1 SCC 420 (2 Judges):** *Removal of names from surveillance register.*	6. So long as surveillance is for the purpose of preventing crime and is confined to the limits prescribed by Rule 23.7 we do not think a person whose name is included in the surveillance register can have a genuine cause for complaint. Interference in accordance with law and for the prevention of disorder and crime is an exception recognized even by ECHR to the right to respect for a person's private and family life. **Held:** Sufficient reasons found to keep names

		on register.
4.	**Rupinder Singh Sodhi vs. Union of India, (1983) 1 SCC 140 (2 Judges):** Remove obstructions on highways to prevent akali Sikhs from entering Delhi.	2...all such restraints on personal liberty have to be commensurate with the object which furnishes their justification. They must be minimal and cannot exceed the Constraints of the particular situation, either in nature or in duration. Above all they cannot be used as engines of oppression, persecution, harassment or the like. **Held:** Police is entitled to impose reasonable restraints.
5.	**PUCL vs. Union of India (1997) 1 SCC 301 (2 Judges):** *Constitutionality of Sec. 5 (2) of Indian Telegraph Act- telephone tapping*	18. The right to privacy-by itself- has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. **Held:** Telephone tapping infracts Article 21 unless it is permitted under the procedure established by law.
6.	**Mr. X. vs. Hospital Z, (1998) 8 SCC 296 (2 Judges):** Clash of Right to privacy and Right to health	26. As one of the basic Human Rights, the right of privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of Crime or disorder or protection of health or morals or protection of rights and freedoms of others. **Held**: Open for the hospital to disclose HIV status to balance the right to health, morality and protection of right of others.
7.	**PUCL & Anr. vs. Union of India , (2003) 4 SCC 399** Validity of provisions of	When there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right as it

	Representation of People Act' 2002 for disclosures made by electoral candidates	serves larger public interest. More important, it is to be noted that the Parliament itself accepted in principle that not only the assets of the elected candidates but also his or her spouse and dependent children should be disclosed to the constitutional authority and the right of privacy should not come in the way of such disclosure.
8.	**Sharda vs. Dharampal, (2003) 4 SCC 493** *Whether a party to divorce can be compelled to medical examination to prove their sanity*	71. However, like any other privilege the psychotherapist-patient privilege is not absolute and may only be recognized if the benefit to society outweigh the costs of keeping the information private. 76. If respondent avoids such medical examination on the ground that it violates his/her right to privacy or for a matter right to personal liberty as enshrined under Article 21 of the Constitution of India, then it may in most of such cases become impossible to arrive at a conclusion. It may render the very grounds on which divorce is permissible nugatory. Therefore, when there is no right to privacy specifically conferred by Article 21 of the Constitution of India and with the extensive interpretation of the phrase "personal liberty" this right has been read into Article 21, it cannot be treated as absolute right. 80. So viewed, the implicit power of a court to direct medical examination of a party to a matrimonial litigation in a case of this nature cannot be held to be violative of one's right of privacy.
9.	**PUCL vs. UOI (2004) 9 SC**	37. Section 14 confers power to the

	580 *POTA was challenged for procedure of search and seizure*	investigating officer to ask for furnishing information that will be useful for or relevant to the purpose of Act. ...Such power is quiet necessary in the detection of terrorist activities or terrorist.
10.	**Distt. Registrar and Collector, Hyderabad and Anr. vs. Canara Bank (2005) 1 SCC 496** Section 73 of the Stamp Act was challenged being against the arbitrary interference with person's privacy, home and family.	34. Intrusion into privacy may be by - (1) legislative provisions, (2) administrative/executive orders and (3) judicial orders. The legislative intrusions must be tested on the touchstone of reasonableness as guaranteed by the Constitution and for that purpose the Court can go into the proportionality of the intrusion vis- `-vis the purpose sought to be achieved. (2) So far as administrative or executive action is concerned, it has again to be reasonable having regard to the facts and circumstances of the case. (3) As to Judicial warrants, the Court must have sufficient reason to believe that the search or seizure is warranted and it must keep in mind the extent of search or seizure necessary for the protection of the particular state interest. In addition, as stated earlier, common law recognized rare exceptions such as where warrantless searches could be conducted but these must be in good faith, intended to preserve evidence or intended to prevent sudden danger to person or property. The American Courts trace the 'right to privacy' to the English common law which treated it as a right associated with 'right to property'. It was declared in Entick v. Carrington (1765) that the right of privacy protected trespass against

		property.
11.	**Narayan Dutt Tiwari vs. Rohit Shekhar and Anr., (2012) 12 SCC 554 (2 Judges Bench)** *DNA Testing for establishing Paternity*	31. The learned Single Judge has in paras 74, 78, 79 and 80 of the impugned judgment also held that the right of privacy is subject to such action as may be lawfully taken for protection of rights of others; that the level of privacy protection depends on the context; that Human Rights law justifies carrying out of compulsory and mandatory medical examination which may be bodily invasive and that the right to privacy is not an absolute right and can be reasonably curtailed. **Held**: SC had dismissed the SLP against the Order of the HC and upheld DNA Testing.

G. **Reading an unqualified or broad right to privacy in the Constitution may impact various routine governmental functions or state interests which are governed by various statutes illustrated hereinafter.**

58.VARIOUS LAWS REQUIRING PERSONAL INFORMATION

1. The Census Act, 1948

   a. Section 8: The law makes it obligatory on the part of every citizen to answer the census questions truthfully.

b. Section 9 :Every person is mandated to allow a census officer into their home to give him/her personal information about themselves

c. Section 11: The Act provides penalties for giving false answer or not giving answers at all to the census questionnaire.

d. Rule 5 of Census Rules, 1990 :Census Commissioner shall determine the questionnaire and publish the census statistics

2. Representation of People Act,1950

a. Section 62 of the Act requires a person to be entered into an electoral roll so as to vote

b. The Registration Of Electors Rules, 1960 : Rule 8 & Rule 28 r/w Form IV & Form VI shall call for various information such as full name , father/mother husband's name, age, residence, place of birth

c. The Registration of Electors Rules, 1960, Rule 9: Registration officer may access copies of the Register of Births and Deaths and admission register of an educational institute in any area.

d. Complete electoral rolls containing various details is published and kept at the office of the Registration Officer under Rule 22 of the Registration of Electors Rules

e. The electoral roll is available for inspection to any person under Rule 33 of the said Rules.

3. The Citizenship Act, 1955

a. Section 14A: The Central Government may compulsory register every citizen of India and issue a national identity card to him. The National Registration Authority shall maintain a register for the same.

b. Forms attached to the Citizenship Rules, 2009 : Requires the full name of the individual including his fathers, mothers etc, sex, date of birth, place of birth, address, marital status, occupation, identification mark, details of criminal proceedings.

4. **Income Tax Act, 1961**

a. Section 139A: All details of an individual's bank account, any income or expenditure is shared to make a PAN card.

5. **The Passports Act, 1967**

a. Section 5 r/w Section 24 : Passport Rules, 1980 : Rule 5 r/w Forms to be filled require for proof of date of birth and for identification the following information(among other things):

b. Full name , family details, address , school information etc

c. Personal identification mark.

6. **The Registration of Births and Deaths Act, 1969**

a. Section 8, Section 16, Section 21: A register is maintained of births and deaths with various personal information.

b. Section 17: Any person can search for any entry of any person in the register.

7. **Registration Act, 1908** – Section 32A requires the compulsory affixing of photographs and fingerprints of each buyer and seller for transfer of immovable property.

H. **The petitioners cannot claim any right to privacy against Aadhaar since Aadhaar is an enabler of the right to life of millions of people of this**

country who continue to live below poverty line and/or marginalised conditions.

59. Aadhaar provides a lifelong identifier to a resident, by way of a unique 12 digit number, which is held in a highly secure database. This pioneering initiative in practice is yielding rich dividends in the form of effective service delivery to marginalized groups, ensuring complete transparency, reducing fraud and corruption as well as providing savings on account of weeding out of ineligible beneficiaries.

60. With implementation of Aadhaar based delivery of food grains to the residents, residents have been empowered to receive their entitlement of full portion of food grains with an assurance that their food grains cannot be diverted by middle men through impersonation. The implementation has enabled portability for the residents wherein resident can take their entitled food grain from any of Fair Price Shop in the state. Apart from this crores of fake / duplicate LPG connections were weeded out which has resulted into huge financial savings.

61. ***Targeted Delivery of Food Grains under PDS***: - With implementation of Aadhaar based delivery of food grains to the residents, residents have been empowered to receive their entitlement of full portion of food grains with an assurance that their food grains cannot be diverted by middle men through impersonation.

62. The implementation has enabled portability for the residents wherein resident can take their entitled food grain from any of Fair Price Shop in the state.

63. In the process of seeding Aadhaar for de-duplications and other DBT processes **2.33 crore fake ration cards have been deleted amounting to saving of Rs. 14,000 crore upto December 2016.**

64. The implementation of Aadhaar based DBT in the PAHAL scheme has empowered residents to receive the subsidy amount directly into their Aadhaar linked bank account. The Aadhaar based DBT has stopped diversion of subsidized LPG which has resulted into increase in sale of commercial LPG cylinders as black marketing of subsidized cylinder has been contained. All of the above has resulted in crores of savings in public money. **In this process more than 3 crore fake / duplicate LPG connections were weeded out which has resulted into huge financial saving of over Rs 26,000 crore upto December 2016.**

65. *Jeevan Pramaan*: Jeevan Pramaan facility has empowered the senior citizen pensioners to submit Jeevan Pramaan certificate from anywhere in the country and now they are not required to personally visit the pension disbursement agency Which used to be an onerous affair and required senior citizens to travel to the particular branches where their pension accounts existed. So far more than **71.17 lakh pensioners have used Jeevan Pramaan during the previous year.**

66. ***Ease of Opening of Bank Account***: India traditionally has been underbanked country as a large part of the population were not having any identity proof for opening a bank account. Aadhaar has enabled this by becoming the single document which acts as Proof of Identity for opening a bank account. To achieve this UIDAI has also enabled e-KYC. Over **7.35**

Crore bank account have been opened using e-KYC service Total Bank Accounts seeded with Aadhaar (as on 31st May 2017): **47.25 Cr.**

67. ***Aadhaar seeding in MGNREGS***: Aadhaar number have been linked to over **8.80 crore active NREGA workers** of the existing database of 10.38 crore active workers. All of them are receiving their daily wages directly in their bank accounts. Aadhaar seeding ensures that there are no duplicate or fake workers in the system.

68. In fact Aadhaar is an enabler of various facets of the right to life which includes the right to food, right to livelihood, and the right to receive the various benefits and subsidies intended for the genuine beneficiaries.

69. Therefore, with such overwhelming public interest and the right to life, right to food and livelihood of millions of people involved in one hand, the Petitioners cannot claim any broad privacy right which would otherwise have deleterious effects on millions of people of this country.

ANNEXURE-R-1

47

VARIOUS POSSIBLE FACETS OF PRIVACY

1. Intrusion upon a person's seclusion or solitude, or into his/her private affairs
2. Public disclosure of embarrassing facts
3. Publicity which places a person in a false light in the public eye
4. Appropriation of a person's name of likeness
5. Unauthorized recording, photography and filming
6. Electronic surveillance, interception of correspondence, telephone tapping
7. Disclosure of information given to public authorities or professional advisers
8. Entry and search of premises and property
9. Search of a person
10. Compulsory medical examinations or tests
11. Pursuit by the press or mass media

FACETS ENUMERATED BY THE PETITIONERS

1. Bodily integrity
2. Personal autonomy
3. Right to be let alone
4. Informational self-determination
5. Protection from state surveillance
6. Dignity
7. Confidentiality
8. Compelled speech
9. Freedom to dissent
10. Freedom of movement
11. Freedom to think

ANNEXURE-R-2 48

Form Number

Census of India 2011

Start Here

Location Particulars: State/UT | District | Tahsil/Taluk/P.S./Dev. Block/Circle/Mandal | Town/Village | Ward Code No. (only for Town) | Enumeration Block Number & Sub-Block No.

ENGLISH

Serial number	Q.1 Name of the person start with head of household	Q.2 Relationship to head write the relationship in full.	Q.3 Sex Male ...1 Female 2 In case the respondent wishes to return other than code 1 or 2 then give code '3' Other...3	Q.4 Date of birth and Age 4(a) Date of birth as per English calendar (as declared or estimated) Day - Month - Year 4(b) Age Also write age on last birthday in completed years, in box against 4(b)	Q.5 Current marital status give code from list below	Q.6 Age at marriage In completed years (not applicable for Never married)	Q.7 Religion (Write name of the religion in full) Also give code in box if foun in the list below For other religions, write nar of the religion in full but do not give any code number

Page totals: (To be filled after Revisional Round)

Population M	Population F	Population O	0-6 years population M	0-6 years population F	0-6 years population O
(Total of 1's)	(Total of 2's)	(Total of 3's)	For age less than 7 years or date of birth after 28th February, 2004		

Q.5 Current marital status
Never married 1
Currently married . 2
Widowed 3
Separated 4
Divorced 5

Q.7 Religion
Hindu 1
Muslim 2
Christian 3
Sikh 4
Buddhist 5
Jain 6

Form Number

49

Household Schedule

Confidential when filled

Use only arabic numbers as indicated here 0 1 2 3 4 5 6 7 8 9

SIDE-A

To be copied from Abridged Houselist

Houselist Block Number (Column 2 of section 2)

Household Number (Column 6 of section 2)

Serial Number of Household (Column 8 of section 2 or 3 of column 6 of section 4)

Type of Household: Normal.....1, Institutional .2, Houseless ...3

If institutional household, give details

Q.8 * Scheduled Caste (SC)/ Scheduled Tribe (ST)	Q.9 Disability	Q.10 Mother tongue	Q.11 Other languages known	Q.12 Literacy status	Q.13 Status of attendance	Q.14 Highest educational level attained
8(a) If this person SC/ST? If 'YES' give code in box SC .....1 ST .....2 If 'NO' put '3' in box 8(b) If SC or ST write name of the SC or ST from the list supplied. 8(a) 8(b)	9(a) Is this person mentally / physically disabled? Yes-1/No-2 9(b) If 'Yes' in 9(a), give code in the box against 9(b) from the list below 9(c) If 'multiple disability' (Code '8') in 9(b), give maximum three codes in boxes against 9(c) from the list below	write name of the mother tongue in full.	write upto two languages in order of proficiency excluding mother tongue	Literate ...1 Illiterate ..2 M F O	in educational institution give code from list below	Write the full description. For diploma or degree holder, also write the subject of specialisation.

Q.8 * NOTE

SC can be only among the Hindus, Sikhs and Buddhists. ST can be from any religion

Q.9 Disability

In Seeing	1	Mental Retardation	5
In Hearing	2	Mental Illness	6
In Speech	3	Any Other	7
In Movement	4	Multiple Disability	8

	M	F	O
Literates (Total of 1's) ->			
Illiterates (Total of 2's) ->			

Q.13 Status of attendance

Attending School	1	Literacy centre	5
College	2	Other institution	6
Vocational	3	Not Attending	
Special Institution for disabled	4	Attended before	7
		Never attended	8

Census of India 2011 Household Schedule

Confidential when filled

Q. 11 | Q. 15 | Q. 16 | Q. 17 | Q. 18 | Q. 19 | Q. 20 | Q. 21

Characteristics of workers and non-workers

Serial number	Name of the person	Worked any time during last year include part time help, unpaid work on farm, family enterprise or in any other economic activity	Category of economic activity Fill for main or marginal worker (If code '1' or '2' or '3' in Q.15)	Fill for worker in household industry or other worker (If code '3' or '4' in Q.16)			Fill for marginal worker or non worker (If code '2' or '3' or '4' in Q.15)	
				Occupation Describe the actual work	Nature of industry, trade or service where the person works/ worked or self employed. Write the full description.	Class of worker	Non-economic activity	Seeking or available for work
Copy from side A in same order		give code from list below	give code from list below			give code from list below	give code from list below	Yes ..1 No ...2

Q.15 Workers and non-workers

Yes
- Main worker ..... 1 (If worked for 6 months or more)

Or
- Marginal worker
  - If worked for 3 months or more but less than 6 months ..2
  - Or
  - Less than 3 months 3

No
- Non-worker ..... 4 (If not worked at all)

Q.16 Category of economic activity

- Cultivator 1
- Agricultural Labourer..2
- Worker in household industry 3
- Other worker 4

Q.19 Class of worker

- Employer.... 1
- Employee... 2
- Single worker.... 3
- Family worker.... 4

Q.20 Non-Economic activity

- Student 1
- Household duties ...2
- Dependent 3
- Pensioner .4
- Rentier 5
- Beggar 6
- Other 7

Use only arabic numbers as indicated here: C 1 2 3 4 5 6 7 8 9 SIDE-B

Q. 22	Q. 23	Q. 24		Q. 25	Q. 26	Q. 27	Q. 28	Q. 29
		Migration characteristics				Fertility particulars		
Fill for other worker (If code '4' in Q.16) Travel to place of work 22(a) One-way distance from residence to place of work in kilometres 22(b)* Mode of travel to place of work give code from list below	Fill for person born outside this village/town Birth place If within India, write the present name of the village/town, district and state. Also write '1' for village or '2' for town in the box. If outside India, write the present name of the country and put '-' against village/town and district.	Fill for person who has come to this village/town from elsewhere Place of last residence 24(a) If within India, write the present name of the village/town, district and state. Also write '1' for village or '2' for town in the box. If outside India, write the present name of the country and put '-' against village/town and district.	24(b) at the time of migration Rural...1 Urban...2	Reason for migration Work/Employment 1 Business .....2 Education .....3 Marriage .....4 Moved after birth 5 Moved with household .....6 Any other 7	Duration of stay in this village/ town since migration (in completed years (write '00' if less than a year)	Children surviving No. of children surviving at present (also include daughters and sons presently not staying)	Children ever born Total no. of children ever born alive (include both living and dead daughters and sons)	Fill for c married woman Numb of Child born al during l one yea (1st Marc 2010 to 2 February

22(b) Mode of travel

On foot	1
Bicycle	2
Moped/Scooter/Motor cycle	3
Car/Jeep/Van	4
Auto/Autorickshaw/Taxi	5
Bus	6
Train	7
Water transport	8
By other	9
No Travel	0

Name of the Respondent

Signature/Thumb impression of Respondent with Date

Serial Number

Signature of the Enumerator with Date

Signature of the Supervisor with Date

Sex of Enumerator: Male / Female (Put ✓ at appropriate box)

Continued to another sheet: Write 'C' if continued to another sheet

Write last three digits of the form number of the continued sheet

ANNEXURE-3 52

FORM 4

[See Rule 1

FORM OF APPLICATION FOR LICENCE TO DRIVE A MOTOR VEHICLE

To,
THE LICENSING AUTHORITY,

.....

I apply for a licence to enable me to enable me to drive vehicles Of the following description:-

(a) Motor Cycle without gear.
(b) Motor Cycle with gear.
(c) Invalid Carriage .
(d) Light Motor Vehicle
(e) Medium Goods Vehicle
(f) Medium Passenger Motor Vehicle
(g) Heavy Goods Vehicle
(h) Heavy Passenger Motor Vehicle
(i) Road Roller
Q) Motor Vehicle of the following description

Passport Size photograph Of the applicant

Particulars to be furnished by the applicant

1. Full name .....
2. Son/ wife/ daughter of .....
3. Permanent address (Proof to be enclosed) .....
4. Temporary address/ Official address (if any) .....
5. Date of birth (Proof to be enclosed) .....
6. Educational qualification .....
7. Identification mark (1).....
   (2).....
8. Blood Group with Rh factor (optional) .....
9. Have you previously held driving licence? if so, give details. .....
10. Particulars and date of every conviction which has been ordered to be endorsed on any licence held by the applicant. .....
11. Have you been disqualified for obtaining a licence to drive? If so, for what reason? .....
12. Have you been subjected to a driving test as to your fitness or ability to drive a vehicle in respect of which a licence to drive is applied for? If so, give the following details :-

	Date of test	Testing Authority	Result of test
(1)			
(2)			
(3)			
(4)			

13. I enclose three copies of my recent passport size photographs (where Laminated card is used, no photographs are required).
14. I enclose learner's licence number _____date _____ issued by licesing Authority_____
15. I enclose the driving certificate number _____ dated _____ issued by _____
16. I have submitted along with my application for learner's licence the written consent of parent / gaurdian.
17. I have submitted along with my application for learner's licence. I enclose the medical fitness certificate.
18. I am exempted from the medical test under rule 6 of the Central Motor Vehicle Rules , 1989.

19. I am exempted from preliminary test under rule 11 (2) of the central motor vehicle rules 1989.
20. I have paid the fee of Rs. _____

I hereby declare that to the best of my knowledge and belief the particulars given above are true.

*Strike out whichever is inapplicable.

Date : *Signature / Thumb impression of applicant.*

Certificate of test of competence to drive

The applicant has passed the test prescribed under rule 15 of the Central Motor vehicle Rules, 1989. The test was conducted on (here enter the registration mark and description of the vehicle)_____
On (date)_____

*The applicant has failed in the test.(The details of deficiency to be listed out.)

Date_____ *Signature of Testing Authority*

Full name and desingnation_____

Two specimen signatures of applicant:

(1) (2)

_____

strike out whichever is inapplicable

ANNEXURE-R-4 54

SOCIAL SECURITY ADMINISTRATION
Application for a Social Security Card

Applying for a Social Security Card is free!

USE THIS APPLICATION TO:

- Apply for an original Social Security card
- Apply for a replacement Social Security card
- Change or correct information on your Social Security number record

IMPORTANT: You MUST provide a properly completed application and the required evidence before we can process your application. We can only accept original documents or documents certified by the custodian of the original record. Notarized copies or photocopies which have not been certified by the custodian of the record are not acceptable. We will return any documents submitted with your application. For assistance call us at 1-800-772-1213 or visit our website at www.socialsecurity.gov.

Original Social Security Card

To apply for an original card, you must provide at least two documents to prove age, identity, and U.S. citizenship or current lawful, work-authorized immigration status. If you are not a U.S. citizen and do not have DHS work authorization, you must prove that you have a valid non-work reason for requesting a card. See page 2 for an explanation of acceptable documents.

NOTE: If you are age 12 or older and have never received a Social Security number, you must apply in person.

Replacement Social Security Card

To apply for a replacement card, you must provide one document to prove your identity. If you were born outside the U.S., you must also provide documents to prove your U.S. citizenship or current, lawful, work-authorized status. See page 2 for an explanation of acceptable documents.

Changing Information on Your Social Security Record

To change the information on your Social Security number record (i.e., a name or citizenship change, or corrected date of birth) you must provide documents to prove your identity, support the requested change, and establish the reason for the change. For example, you may provide a birth certificate to show your correct date of birth. A document supporting a name change must be recent and identify you by both your old and new names. If the name change event occurred over two years ago or if the name change document does not have enough information to prove your identity, you must also provide documents to prove your identity in your prior name and/or in some cases your new legal name. If you were born outside the U.S. you must provide a document to prove your U.S. citizenship or current lawful, work-authorized status. See page 2 for an explanation of acceptable documents.

LIMITS ON REPLACEMENT SOCIAL SECURITY CARDS

Public Law 108-458 limits the number of replacement Social Security cards you may receive to 3 per calendar year and 10 in a lifetime. Cards issued to reflect changes to your legal name or changes to a work authorization legend do not count toward these limits. We may also grant exceptions to these limits if you provide evidence from an official source to establish that a Social Security card is required.

IF YOU HAVE ANY QUESTIONS

If you have any questions about this form or about the evidence documents you must provide, please visit our website at www.socialsecurity.gov for additional information as well as locations of our offices and Social Security Card Centers. You may also call Social Security at 1-800-772-1213. You can also find your nearest office or Card Center in your local phone book.

EVIDENCE DOCUMENTS

The following lists are examples of the types of documents you must provide with your application and are not all inclusive. Call us at 1-800-772-1213 if you cannot provide these documents.

IMPORTANT : If you are completing this application on behalf of someone else, you must provide evidence that shows your authority to sign the application as well as documents to prove your identity and the identity of the person for whom you are filing the application. We can only accept original documents or documents certified by the custodian of the original record. Notarized copies or photocopies which have not been certified by the custodian of the record are not acceptable.

Evidence of Age

In general, you must provide your birth certificate. In some situations, we may accept another document that shows your age. Some of the other documents we may accept are:

- U.S. hospital record of your birth (created at the time of birth)
- Religious record established before age five showing your age or date of birth
- Passport
- Final Adoption Decree (the adoption decree must show that the birth information was taken from the original birth certificate)

Evidence of Identity

You must provide current, unexpired evidence of identity in your legal name. Your legal name will be shown on the Social Security card. Generally, we prefer to see documents issued in the U.S. Documents you submit to establish identity must show your legal name AND provide biographical information (your date of birth, age, or parents' names) and/or physical information (photograph, or physical description - height, eye and hair color, etc.). If you send a photo identity document but do not appear in person, the document must show your biographical information (e.g., your date of birth, age, or parents' names). Generally, documents without an expiration date should have been issued within the past two years for adults and within the past four years for children.

As proof of your identity, you must provide a:

- U.S. driver's license; or
- U.S. State-issued non-driver identity card; or
- U.S. passport

If you do not have one of the documents above or cannot get a replacement within 10 work days, we may accept other documents that show your legal name and biographical information, such as a U.S. military identity card, Certificate of Naturalization, employee identity card, certified copy of medical record (clinic, doctor or hospital), health insurance card, Medicaid card, or school identity card/record. For young children, we may accept medical records (clinic, doctor, or hospital) maintained by the medical provider. We may also accept a final adoption decree, or a school identity card, or other school record maintained by the school.

If you are not a U.S. citizen, we must see your current U.S. immigration document(s) and your foreign passport with biographical information or photograph.

WE CANNOT ACCEPT A BIRTH CERTIFICATE, HOSPITAL SOUVENIR BIRTH CERTIFICATE, SOCIAL SECURITY CARD STUB OR A SOCIAL SECURITY RECORD as evidence of identity.

Evidence of U.S. Citizenship

In general, you must provide your U.S. birth certificate or U.S. Passport. Other documents you may provide are a Consular Report of Birth, Certificate of Citizenship, or Certificate of Naturalization.

Evidence of Immigration Status

You must provide a current unexpired document issued to you by the Department of Homeland Security (DHS) showing your immigration status, such as Form I-551, I-94, or I-766. If you are an international student or exchange visitor, you may need to provide additional documents, such as Form I-20, DS-2019, or a letter authorizing employment from your school and employer (F-1) or sponsor (J-1). We CANNOT accept a receipt showing you applied for the document. If you are not authorized to work in the U.S., we can issue you a Social Security card only if you need the number for a valid non-work reason. Your card will be marked to show you cannot work and if you do work, we will notify DHS. See page 3, item 5 for more information.

HOW TO COMPLETE THIS APPLICATION

Complete and sign this application LEGIBLY using ONLY black or blue ink on the attached or downloaded form using only 8 ½" x 11" (or A4 8.25" x 11.7") paper.

GENERAL: Items on the form are self-explanatory or are discussed below. The numbers match the numbered items on the form. If you are completing this form for someone else, please complete the items as they apply to that person.

4. Show the month, day, and full (4 digit) year of birth; for example, "1998" for year of birth.

5. If you check "Legal Alien Not Allowed to Work" or "Other," you must provide a document from a U.S. Federal, State, or local government agency that explains why you need a Social Security number and that you meet all the requirements for the government benefit. NOTE: Most agencies do not require that you have a Social Security number. Contact us to see if your reason qualifies for a Social Security number.

6., 7. Providing race and ethnicity information is voluntary and is requested for informational and statistical purposes only. Your choice whether to answer or not does not affect decisions we make on your application. If you do provide this information, we will treat it very carefully.

9.B., 10.B. If you are applying for an original Social Security card for a child under age 18, you MUST show the parents' Social Security numbers unless the parent was never assigned a Social Security number. If the number is not known and you cannot obtain it, check the "unknown" box.

13. If the date of birth you show in item 4 is different from the date of birth currently shown on your Social Security record, show the date of birth currently shown on your record in item 13 and provide evidence to support the date of birth shown in item 4.

16. Show an address where you can receive your card 7 to 14 days from now.

17. WHO CAN SIGN THE APPLICATION? If you are age 18 or older and are physically and mentally capable of reading and completing the application, you must sign in item 17. If you are under age 18, you may either sign yourself, or a parent or legal guardian may sign for you. If you are over age 18 and cannot sign on your own behalf, a legal guardian, parent, or close relative may generally sign for you. If you cannot sign your name, you should sign with an "X" mark and have two people sign as witnesses in the space beside the mark. Please do not alter your signature by including additional information on the signature line as this may invalidate your application. Call us if you have questions about who may sign your application.

HOW TO SUBMIT THIS APPLICATION

In most cases, you can take or mail this signed application with your documents to any Social Security office. Any documents you mail to us will be returned to you. Go to https://secure.ssa.gov/apps6z/FOLO/fo001.jsp to find the Social Security office or Social Security Card Center that serves your area.

PROTECT YOUR SOCIAL SECURITY NUMBER AND CARD

Protect your SSN card and number from loss and identity theft. DO NOT carry your SSN card with you. Keep it in a secure location and only take it with you when you must show the card; e.g., to obtain a new job, open a new bank account, or to obtain benefits from certain U.S. agencies. Use caution in giving out your Social Security number to others, particularly during phone, mail, email and Internet requests you did not initiate.

PRIVACY ACT STATEMENT
Collection and Use of Personal Information

Sections 205(c) and 702 of the Social Security Act, as amended, authorize us to collect this information. The information you provide will be used to assign you a Social Security number and issue a Social Security card.

The information you furnish on this form is voluntary. However, failure to provide the requested information may prevent us from issuing you a Social Security number and card.

We rarely use the information you supply for any purpose other than for issuing a Social Security number and card. However, we may use it for the administration and integrity of Social Security programs. We may also disclose information to another person or to another agency in accordance with approved routine uses, which include but are not limited to the following:

1. To enable a third party or an agency to assist Social Security in establishing rights to Social Security benefits and/or coverage;

2. To comply with Federal laws requiring the release of information from Social Security records (e.g., to the Government Accountability Office and Department of Veterans' Affairs);

3. To make determinations for eligibility in similar health and income maintenance programs at the Federal, State, and local level; and

4. To facilitate statistical research, audit or investigative activities necessary to assure the integrity of Social Security programs.

We may also use the information you provide in computer matching programs. Matching programs compare our records with records kept by other Federal, State, or local government agencies. Information from these matching programs can be used to establish or verify a person's eligibility for Federally-funded or administered benefit programs and for repayment of payments or delinquent debts under these programs.

Complete lists of routine uses for this information are available in System of Records Notice 60-0058 (Master Files of Social Security Number (SSN) Holders and SSN Applications). The Notice, additional information regarding this form, and information regarding our systems and programs, are available on-line at www.socialsecurity.gov or at any local Social Security office.

This information collection meets the requirements of 44 U.S.C. §3507, as amended by Section 2 of the Paperwork Reduction Act of 1995. You do not need to answer these questions unless we display a valid Office of Management and Budget control number. We estimate that it will take about 8.5 to 9.5 minutes to read the instructions, gather the facts, and answer the questions. You may send comments on our time estimate to: SSA, 6401 Security Blvd., Baltimore, MD 21235-6401. **Send only comments relating to our time estimate to this address, not the completed form.**

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SOCIAL SECURITY ADMINISTRATION
Application for a Social Security Card

Form Approved
OMB No. 0960-0066

1	NAME TO BE SHOWN ON CARD	First	Full Middle Name	Last
	FULL NAME AT BIRTH IF OTHER THAN ABOVE	First	Full Middle Name	Last
	OTHER NAMES USED			
2	Social Security number previously assigned to the person listed in item 1	___ - ___ - ____		
3	PLACE OF BIRTH (Do Not Abbreviate) City / State or Foreign Country / FCI	Office Use Only	4 DATE OF BIRTH	MM/DD/YYYY
5	CITIZENSHIP (Check One)	☐ U.S. Citizen ☐ Legal Alien Allowed To Work ☐ Legal Alien Not Allowed To Work (See Instructions On Page 3) ☐ Other (See Instructions On Page 3)		
6	ETHNICITY Are You Hispanic or Latino? (Your Response is Voluntary) ☐ Yes ☐ No	7 RACE Select One or More (Your Response is Voluntary) ☐ Native Hawaiian ☐ American Indian ☐ Other Pacific Islander ☐ Alaska Native ☐ Black/African American ☐ White ☐ Asian		
8	SEX	☐ Male ☐ Female		
9	A. PARENT/ MOTHER'S NAME AT HER BIRTH	First	Full Middle Name	Last
	B. PARENT/ MOTHER'S SOCIAL SECURITY NUMBER (See Instructions for 9 B on Page 3)	___ - ___ - ____ ☐ Unknown		
10	A. PARENT/ FATHER'S NAME	First	Full Middle Name	Last
	B. PARENT/ FATHER'S SOCIAL SECURITY NUMBER (See Instructions for 10B on Page 3)	___ - ___ - ____ ☐ Unknown		
11	Has the person listed in item 1 or anyone acting on his/her behalf ever filed for or received a Social Security number card before? ☐ Yes (If "yes" answer questions 12-13) ☐ No ☐ Don't Know (If "don't know," skip to question 14.)			
12	Name shown on the most recent Social Security card issued for the person listed in item 1	First	Full Middle Name	Last
13	Enter any different date of birth if used on an earlier application for a card	MM/DD/YYYY		
14	TODAY'S DATE MM/DD/YYYY	15 DAYTIME PHONE NUMBER	Area Code Number	
16	MAILING ADDRESS (Do Not Abbreviate)	Street Address, Apt. No., PO Box, Rural Route No.	City / State/Foreign Country / ZIP Code	
17	I declare under penalty of perjury that I have examined all the information on this form, and on any accompanying statements or forms, and it is true and correct to the best to my knowledge. YOUR SIGNATURE	18 YOUR RELATIONSHIP TO THE PERSON IN ITEM 1 IS: ☐ Self ☐ Natural Or Adoptive Parent ☐ Legal Guardian ☐ Other Specify		

DO NOT WRITE BELOW THIS LINE (FOR SSA USE ONLY)

NPN			DOC	NTI	CAN			ITV
PBC	EVI	EVA	EVC	PRA	NWR	DNR	UNIT	
EVIDENCE SUBMITTED					SIGNATURE AND TITLE OF EMPLOYEE(S) REVIEWING EVIDENCE AND/OR CONDUCTING INTERVIEW / DATE			
					DCL / DATE			

ANNEXURE-R-5 59

भारतीय विशिष्ट पहचान प्राधिकरण
भारत सरकार

Under Section 3 of THE AADHAAR (TARGETED DELIVERY OF FINANCIAL AND OTHER SUBSIDIES, BENEFITS AND SERVICES) ACT, 2016 (Aadhaar Act)

AADHAAR ENROLMENT / CORRECTION FORM

Aadhaar Enrolment is free and voluntary. Correction within 96 hours of enrolment is also free. No charges are applicable for Form and Aadhaar Enrolment. In case of Correction provide your EID, Name and only that field which needs Correction.

In case of Correction provide your EID No here: | | | | | | | | | | | | | | | | dd |mm| yyyy|hh: mm: ss|

Please follow the instructions overleaf while filling up the form. Use capital letters only.

1	Pre-Enrolment ID :	2	NPR Receipt/TIN Number :
3	Full Name:		
4	Gender: Male ( ) Female ( ) Transgender ( )	5	Age: Yrs OR Date of Birth: DD | MM | YYYY Declared ☐ Verified ☐
6	Address: C/o ( ) D/o ( ) S/o ( ) W/o ( ) H/o ( ) NAME		
	House No/ Bldg./Apt.		Street/Road/Lane
	Landmark		Area/locality/sector
	Village/Town/City		Post Office
	District	Sub-District	State
	E Mail	Mobile No | | | | | | | | | |	PIN CODE | | | | | |
7	Details of : Father ( ) Mother ( ) Guardian ( ) Husband ( ) Wife ( ) *For children below 5 years Father/Mother/Guardian's details are mandatory. Adults can opt to not specify this information, if they cannot/do not want to disclose.*		
	Name		
	EID/ Aadhaar No.: | | | | | | | | | | | | | | dd |mm| yyyy|hh: mm: ss|		

Verification Type : Document Based ( ) Introducer Based ( ) Head of Family ( )
Select only one of the above. Select Introducer or Head of Family only if you do not possess any documentary proof of identity and/or address. Introducer and Head of Family details are not required in case of Document based Verification.

8	For Document Based (Write Names of the documents produced. Refer overleaf of this form for list of valid documents)	
a. POI		b. POA
c. DOB (Mandatory in case of Verified Date of Birth)		d. POR
9	For Introducer Based – Introducer's Aadhaar No. | | | | | | | | | | | |	For HoF Based - Details of : Father ( ) Mother ( ) Guardian ( ) Husband ( ) Wife ( ) HoF's Eid/Aadhaar No.: | | | | | | | | | | | | | dd |mm| yyyy|hh: mm: ss

I hereby confirm the identity and address of _____ as being true, correct and accurate.

Introducer/HoF's Name: **Signature of Introducer/HOF**

Disclosure under section 3(2) of THE AADHAAR (TARGETED DELIVERY OF FINANCIAL AND OTHER SUBSIDIES, BENEFITS AND SERVICES) ACT, 2016

I confirm that I have been residing in India for at least 182 days in the preceding 12 months & information (including biometrics) provided by me to the UIDAI is my own and is true, correct and accurate. I am aware that my information including biometrics will be used for generation of Aadhaar and authentication. I understand that my identity information (except core biometric) may be provided to an agency only with my consent during authentication or as per the provisions of the Aadhaar Act. I have a right to access my identity information (except core biometrics) following the procedure laid down by UIDAI.

Verifier's Stamp and Signature:
(Verifier must put his/her Name, if stamp is not available)

Applicant's signature/Thumbprint

To be filled by the Enrolment Agency only :

Date & time of Enrolment: ----------

THE FRAMING OF INDIA'S CONSTITUTION

SELECT DOCUMENTS

THE PROJECT COMMITTEE

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B. SHIVA RAO

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ANNEXURE

FUNDAMENTAL RIGHTS

Chapter I

Justiciable Rights

Definitions

1. In this and the next chapter, unless the context otherwise requires :—

(i) "The State" includes the legislatures and the governments of the Union and the units and all local or other authorities within the territories of the Union.

(ii) "The Union" means the Union of India.

(iii) "The law of the Union" includes any law made by the Union Legislature and any existing Indian law as in force within the Union or any part thereof.

Application of laws

2. Any law or usage in force within the territories of the Union immediately before the commencement of this Constitution and any law which may hereafter be made by the State inconsistent with the provisions of this Chapter / Constitution shall be void to the extent of such inconsistency.

Citizenship

3. Every person born or naturalized in the Union and subject to the jurisdiction thereof shall be a citizen of the Union. Further provisions governing the accrual, acquisition and termination of Union citizenship may be made by the law of the Union.

4. All citizens whether within the territories of the Union or outside are entitled to the protection of the Union.

Right to equality

5. (1) All persons within the Union shall be equal before the law. No person shall be denied the equal protection of the laws within the territories of the Union. There shall be no discrimination against any person on grounds of religion, race, caste, language or sex.

In particular—

(a) There shall be no discrimination against any person on any of the grounds aforesaid in regard to the use of wells, tanks, roads, schools and places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

(b) There shall be equality of opportunity for all citizens—

(i) in matters of public employment;

(ii) in the exercise or carrying on of any occupation, trade, business or profession;

and no citizen shall on any of the grounds aforesaid be ineligible for public office or be prohibited from acquiring, holding or disposing of property or exercising or carrying on any occupation, trade, business or profession within the Union.

(2) Any enactment, regulation, judgment, order, custom or interpretation of law, in force immediately before the commencement of this Constitution, by which any penalty, disadvantage or disability is imposed upon or any discrimination is made against any citizen on any of the grounds aforesaid shall cease to have effect.

6. "Untouchability" is abolished and the practice thereof shall be an offence.

7. No titles except those denoting an office or a profession shall be conferred by the Union.

No citizen of the Union and no person holding any office of profit or trust under the State shall, without the consent of the Union, accept any present, emolument, office or title of any kind from any foreign State.

National language

8. Hindustani, written either in the *Devanagari* or the Persian script at the option of the citizen, shall, as the national language, be the first official language of the Union. English shall be the second official language for such period as the Union may by law determine. All official records of the Union shall be kept in Hindustani in both the scripts and also in English until the Union by law otherwise provides.

Rights to freedom

9. There shall be liberty for the exercise of the following rights subject to public order and morality :

(a) The right of every citizen to freedom of speech and expression.
The publication or utterance of seditious, obscene, slanderous, libellous or defamatory matter shall be actionable or punishable in accordance with law.

(b) The right of the citizens to assemble peaceably and without arms.
Provision may be made by law to prevent or control meetings which are likely to cause a breach of the peace or are a danger or nuisance to the general public or to prevent or control meetings in the vicinity of any chamber of a Legislature.

(c) The right of the citizens to form associations or unions.
Provision may be made by law to regulate and control in the public interest the exercise of the foregoing right provided that no such provision shall contain any political, religious or class discrimination.

(d) The right of every citizen to the secrecy of his correspondence.
Provision may be made by law to regulate the interception or detention of articles and messages in course of transmission by post, telegraph or otherwise on the occurrence of any public emergency or in the interests of public safety or tranquillity.

10. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

11. No person shall be deprived of his life, liberty or property without due process of law.

12. (1) Every citizen not below 21 years of age shall have the right to vote at any election to the Legislature of the Union and of any unit thereof, or, where the Legislature is bicameral, to the lower chamber of the Legislature, subject to such disqualifications on the ground of mental incapacity, corrupt practice or crime as may be imposed, and subject to such qualifications relating to residence within the appropriate constituency, as may be required by or under the law.

(2) The law shall provide for free and secret voting and for periodical elections to the Legislature.

(3) The superintendence, direction and control of all elections to the Legislature whether of the Union or of a unit, including the appointment of Election Tribunals shall be vested in an Election Commission for the Union or the unit, as the case may be, appointed, in all cases, in accordance with the law of the Union.

NOTE BY THE CONSTITUTIONAL ADVISER (B. N. RAU) ON THE EFFECT OF SOME OF THE PROPOSED CLAUSES

In sending the above "Notes on Clauses", I feel bound to draw attention to the possible effect of certain provisions of the draft.

Clauses 2, 11 and 27. Forty per cent. of the litigation in the Supreme Court of the U.S.A. during the last half century has centred round the "due process" clause, of which it has been said that, in the last analysis, it means just what the courts say it means. No other definition is possible. Our draft not only borrows this clause (see clause 11) but also gives it retrospective effect (see clause 2, which makes it applicable even to pre-constitution laws). The result is likely to be a vast flood of litigation immediately following upon the new Constitution. Tenancy laws, laws to regulate money-lending, laws to relieve debt, laws to prescribe minimum wages, laws to prescribe maximum hours of work, etc., will all be liable to be challenged; and not only those which may be enacted in future but also those which have already been enacted.

A good illustration of what may happen is furnished by the U.S.A. case *Louisville Joint Stock Land Bank* v. *Radford* (1935). In this case, the Frazier-Lemke Act passed by the Congress was held by the Supreme Court to be unconstitutional. The Act had been passed at a time of severe agricultural depression in order to give relief to farmers by scaling down their mortgage-debts and helping them to retain their farms. Declaring the law to be invalid, the court observed: "The Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation". It may be mentioned that in defence of the Act the mortgager sought to establish (1) that the welfare of the Nation demands that its farms be owned by those who work them, (2) that to permit widespread foreclosure of farm mortgages would result in transferring ownership to great corporations and in transforming farm owners into farm labourers, (3) that there was great danger at the time of the passing of the Act owing to the severe depression in agricultural prices that the foreclosure of the farms would become widespread. The court did not dispute any of these propositions but held in effect that they were irrelevant, the only question being whether or not the impugned Act had taken from the bank, without just compensation, property rights of substantial value. This question being answered in the affirmative, the Act was held to be void. It should be noted that the Fifth Amendment of the U.S.A. Constitution contains the "due process" clause and also another clause which provides that private property shall not be taken for public use without just compensation. Our draft contains both these clauses (see clauses 11 and 27). It must be admitted that the clauses are a safeguard against predatory legislation; but they may also stand in the way of beneficent social legislation. The Irish Constitution has sought to steer a middle course by inserting under

its guarantees of private property two qualifications :

> 43(2)1°. The State recognizes, however, that the exercise of the rights mentioned in the foregoing provisions of this article ought, in civil society, to be regulated by the principles of social justice.
>
> 2°. The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

If some such qualification is considered desirable in the Indian Constitution also, we may insert a provision on the following lines between clauses 27 and 28 of the draft, numbering it as 27A for the present :

> 27A. The State may limit by law the rights guaranteed by sections 11, 16 and 27 whenever the exigencies of the common good so require.

The reason for the inclusion of a reference to section 16 in the above clause will be apparent from the note under clause 16.

Clauses 7 and 8. I am not sure whether clauses 7 and 8 are enforceable by legal action in any one of the ways specified in clause 32.

Clause 10. If this means that there is to be no search without a court's warrant, it may seriously affect the powers of investigation of the police. Under the existing law, *e.g.*, Criminal Procedure Code, section 165 (relevant extracts given below), the police have certain important powers. Often, in the course of investigation, a police officer gets information that stolen property has been secreted in a certain place. If he searches it at once, as he can at present, there is a chance of his recovering it ; but if he has to apply for a court's warrant, giving full details, the delay involved, under Indian conditions of distance and lack of transport in the interior, may be fatal.

> [Search by police-officer.
>
> 165. (1) Whenever an officer in charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorized to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search or cause search to be made, for such thing in any place within the limits of such station.
>
> (2) A police officer proceeding under sub-section (1) shall, if practicable, conduct the search in person.]

Clause 11. See notes on clause 2 above.

Clause 12. Under the existing law, the remedy for any electoral irregularity is by election petition and the finding of the election tribunal is final. Under the clause as now drafted the case can be taken to the Supreme Court. I am not sure whether this is intended.

provided for the utmost utilization of such sources of new wealth by collective effort and for the common benefit. If private individual proprietors have to be expropriated for this purpose, I would not object to reasonable compensation being given to them ; though even here it must be pointed out that at least in the case of developed land or exploited mines, the individual proprietor must have in many cases benefited himself several times the value of his property ; and this should be taken into account before any policy of expropriation with compensation is adopted and given effect to.

18. Article 9, dealing with several of the primary freedoms or civil liberties, makes them subject to "public order and morality". The last named is a very vague term. Its connotation changes substantially from time to time. There have been many instances, in this as well as in other countries, wherein, in the name of public morality, essential freedoms of thought or expression have been denied to citizens. The example of the bar placed by the Lord Chamberlain in England against the staging of some of Bernard Shaw's plays need hardly be cited to lend point to my objection. In a land of many religions, with differing conceptions of morality, different customs, usages and ideals, it would be extremely difficult to get unanimity on what constitutes morality. Champions of the established order would find much in the new thought at any time, which might be considered by them as open to objection on grounds of public morality. If this is not to degenerate into a tyranny of the majority, it is necessary either to define more clearly what is meant by the term "morality", or to drop this exception altogether.

These remarks are offered in response to your invitation in para 4 of your letter under reply. I hope they will be considered by the sub-committee before the report is finalised. As for the notes I had reserved my right to append, I am enclosing a copy of the note on the right to work, which may please be treated separately.

I hope you will receive this in time.

(g) *Alladi Krishnaswami Ayyar's comments on the Draft Report*
April 10, 14 and 15, 1947

Note dated April 10, 1947

There is one other point to which I should like to draw the attention of the committee. From the draft, which is a result of the deliberations, some of the rights guaranteed are subject to public order and morality. Other rights are not even subject to that qualification. During the time of war or a similar emergency, it may be difficult to bring these cases under public order or morality. Besides, public order or morality in our final draft covers only particular rights. A perusal of the Defence of India Act and the rules thereunder will illustrate the need for the security of the State also being added as a further qualification to the fundamental rights. Mr. Munshi suggested a general clause giving a suspending power to the Provincial or

the Union Government, but that was voted against by the committee on the ground that the fundamental right itself would be rendered illusory. Would it not therefore be better to add some such expression as "security and defence of the State or national security" to the words "public order".

Note dated April 14, 1947

Clause 5. On further consideration I feel that unless the latter part beginning with "There shall be no discrimination etc., etc.," is connected with the former part by a conjunctive it might be open to the construction that no sort of discrimination between even a citizen and a non-citizen can exist in regard to such matters as the exercise of a trade, calling or profession which is what is not intended. For example, a South African resident in this country or a foreign company even might claim equal rights with an Indian citizen. In this connection it is well to remember that the scheme of the chapter relating to discrimination in the Government of India Act is however confined to non-discrimination between British citizens and Indian nationals. All that was intended by the majority of the committee was that in such matters as trial before courts of law and the exercise of normal rights as human beings there should not be any distinction between man and man, the feeling being that in India it should take a broader view than is taken in the recent European constitutions which confine all the fundamental rights to citizens. I would therefore suggest to the committee the retention of 'and' or make the provision clearer in some other way.

Clause 9(a). I have the following note to submit in regard to the liberty secured under cl. 9. Its effect on s. 153-A of the Indian Penal Code will have to be carefully considered, though the attention of the committee was not drawn specifically to that section. Under the clause as it stands unless the class hatred is of the kind likely to affect public order and morality it will not be covered by the section. If the opening words alone were there, it might possibly cover cases under 153-A when the speech or the writing is of a virulent character. But the specific reference to "obscene, slanderous and libellous utterances" in cl. 9(a) might give rise to an argument that preaching class hatred might not come under that clause. The committee might therefore consider the inclusion in the clause of words to the following effect :— "or calculated to promote class hatred".

Clause (d). In regard to secrecy of correspondence I raised a point during the discussions that it need not find a place in a chapter on fundamental rights and that it had better be left to the protection afforded by the ordinary law of the land contained in the various enactments. There is no such right in the American Constitution. Such a provision finds a place only in the post-First World War constitutions. The effect of the clauses upon the sections of the Indian Evidence Act bearing upon privilege will have to be considered. The Indian Evidence Act hedges in the privilege with a number of

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restrictions—*vide* chapter 9, s. 120-127. The result of this clause will be that every private correspondence will assume the rank of a State paper, or, in the language of s. 123 and 124, a record relating to the affairs of State.

A clause like this might checkmate the prosecution in establishing any case of conspiracy or abetment in a criminal case and might defeat every action for civil conspiracy, the plaintiff being helpless to prove the same by placing before the court the correspondence that passed between the parties, which in all these cases would furnish the most material evidence. The opening words of the clause "public order and morality" would not be of any avail in such cases. On a very careful consideration of the whole subject I feel that inclusion of such a clause in the chapter on fundamental rights will lead to endless complications and difficulties in the administration of justice. It will be for the committee to consider whether a reconsideration of the clause is called for in the above circumstances.

Clause 10. Unreasonable searches. In regard to this subject I pointed out the difference between the conditions obtaining in America at the time when the American Constitution was drafted and the conditions in India obtaining at present after the provisions of the Criminal Procedure Code in this behalf have been in force for nearly a century. The effect of the clause, as it is, will be to abrogate some of the provisions of the Criminal Procedure Code and to leave it to the Supreme Court in particular cases to decide whether the search is reasonable or unreasonable. While I am averse to re-agitating the matter I think it may not be too late for the committee to consider this particular clause.

Clause 13. Though I have been in some measure responsible for the inclusion of this clause I feel it must be made clear that: (1) goods from other parts of India than in the units concerned coming into the units cannot escape duties and taxes to which the goods produced in the units themselves are subject.

(2) It must also be open to the unit in an emergency to place restrictions on the rights declared by the clause.

(3) It was not intended to extend this right to non-citizens carrying on trade. Elsewhere in the chapter a distinction has been drawn between citizens and non-citizens.

There is also a further point to be considered on the terms of the clause as it stands. If for any reason 'coastal trade' is ultimately left to the provincial jurisdiction, the units will not in any way be hampered by the right to the freedom of trade as put in the clause. To meet this point I would suggest that the clause might be recast either by the addition of 'coastal trade' or by the omission of the words "whether by means of internal carriage or by ocean navigation".

To meet the other points the following amendments will have to be made to the clause :

(1) After the proviso add : "or such restrictions as the unit may impose on an emergency declared as such".

(2) Add another proviso to the effect: "provided that nothing in this clause shall prevent any unit from imposing on goods from other units the same duties and taxes to which goods produced in the unit are subject."

Clause 16. On further consideration and with due regard to the innumerable acts from the beginning of Anglo-Indian history bearing upon social rights and obligations which are inter-mixed with Hindu religion and the danger of such legislation being upset in the peculiar conditions of this country by force of this clause I am for some clause being inserted on the lines suggested by the lady members of the committee.

To meet the point an explanation or proviso to the following effect may be added: "The right to profess and practise religion shall not preclude the legislature from enacting laws for the social betterment of the people".

Clause 21. On further consideration the clause as drafted seems to me to require some slight modification. The intention as the committee might remember was not to rule out the cypres application of the funds of religious bodies or institutions but merely to prevent the State from expropriating property devoted to religious uses excepting for necessary works of public utility and on payment of compensation. The clauses as drafted may even prevent a court from directing a cypres application or the legislature of any unit from passing legislation authorizing cypres application. I would therefore suggest the inclusion of the words "or taken by the States" after the word "diverted".

Clause 32. While I do not want to re-agitate before the committee the point I raised with regard to writs, the draft as it stands might require slight modification. "Without prejudice to the powers that may be vested in this behalf in other courts" might be added at the beginning of sub-clause (2).

Note dated April 15, 1947

Clause 5. On a further consideration of the first part of this clause and the possible utilization of the clause as it stands by non-citizens for purposes for which it is not intended I am for the deletion of that part altogether. Sufficient protection is afforded to non-citizens within the Union by clause (ii). Omitting the first part the clause may read as follows: There shall be no discrimination against any person on grounds of religion, race, caste, or sex in regard to the use of ..... general public. Omit the word "language". The omission of the word "language" is rendered all the more necessary because the grounds referred to are not to disqualify a citizen from holding a public appointment. Clause (b) may be retained as it is.

* * *

The freedom of trade guaranteed to the citizens under this clause shall not in any way interfere with such Indian States as may become members of

(III) CLAUSES ON FUNDAMENTAL RIGHTS AS ADOPTED BY THE CONSTITUENT ASSEMBLY
April-May, 1947

JUSTICIABLE FUNDAMENTAL RIGHTS

Definitions

1. Unless the context otherwise requires—
   (i) "The State" in this Part includes the legislatures and the governments of the Union and the units and all local or other authorities within the territories of the Union.
   (ii) "The Union" means the Union of India.
   (iii) "The law of the Union" includes any law made by the Union legislature and any existing Indian law in force within the Union or any part thereof.

Application of Laws

2. All existing laws, notifications, regulations, customs or usages in force within the territories of the Union inconsistent with the rights guaranteed under this Part of the Constitution shall stand abrogated to the extent of such inconsistency, nor shall any such right be taken away or abridged except by an amendment of the Constitution.

Citizenship

*[3. Every person born in the Union and subject to its jurisdiction; every person either of whose parents was, at the time of such person's birth, a citizen of the Union; and every person naturalized in the Union shall be a citizen of the Union.

Further provision regarding the acquisition and termination of Union citizenship may be made by the law of the Union.]

Rights of Equality

4. (1) The State shall not discriminate against any citizen on grounds of religion, race, caste or sex.

(2) There shall be no discrimination against any citizen on any ground of religion, race, caste or sex in regard to—
   (a) access to trading establishments including public restaurants, hotels and places of public entertainment,
   (b) the use of wells, tanks, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public :

Provided that nothing contained in this clause shall prevent separate provision being made for women and children.

*Further consideration held over. (This clause is as redrafted by the *ad hoc* committee.)

5. (a) There shall be equality of opportunity for all citizens in matters of public employment.

(b) No citizen shall on grounds only of religion, race, caste, sex, descent, place of birth or any of them be ineligible for public office.

Nothing herein contained shall prevent the State from making provision for reservations in favour of classes who in the opinion of the State, are not adequately represented in the public services.

Nothing herein contained shall prevent a law being made prescribing that the incumbent of an office to manage, administer or superintend the affairs of a religious or denominational institution or the member of the governing body thereof shall be a member of that particular religion or denomination.

6. "Untouchability" in any form is abolished and the imposition of any disability on that account shall be an offence.

7. No title shall be conferred by the Union.

No citizen of the Union shall accept any title from any foreign State.

No person holding any office of profit or trust under the State shall without the consent of the Union Government, accept any present, emoluments, office or title of any kind from any foreign State.

Rights of Freedom

8. There shall be liberty for the exercise of the following rights subject to public order and morality and except in a grave emergency declared to be such by the Government of the Union or the unit concerned whereby the security of the Union or the unit, as the case may be, is threatened :

(a) The right of every citizen to freedom of speech and expression.

(b) The right of the citizens to assemble peaceably and without arms.

(c) The right of citizens to form associations or unions.

(d) The right of every citizen to move freely throughout the Union.

(e) The right of every citizen to reside and settle in any part of the Union, to acquire, hold, and dispose of property and to exercise or carry on any occupation, trade, business or profession :

Provision may be made by law to impose such restrictions as may be necessary in the public interest including the protection of minority, groups and tribes.

9. No person shall be deprived of his life or liberty without due process of law, nor shall any person be denied equality before the law within the territories of the Union.

10. Subject to regulation by the law of the Union, trade, commerce, and intercourse among the units by and between the citizens shall be free :

Provided that nothing in this section shall prevent any unit from imposing on goods imported from other units the same duties and taxes to which the goods produced in the unit are subject and under regulations and conditions which are non-discriminatory :

Provided that no preference shall be given by any regulation of commerce or revenue to one unit over another:

ANNEXURE-R-7

(71)

28-4-1947
to
2-5-1947

Volume III

CONSTITUENT ASSEMBLY DEBATES

OFFICIAL REPORT

Mr. President: I will read the amendment first:

"No title shall be conferred by the Union.

No citizen of the Union shall accept any title from any foreign State.

No person holding any office of profit or trust under the State shall, without the consent of the Union Government, accept any present, emoluments, office or title of any kind from any foreign State."

I now put the amendment to vote.

The amendment was adopted.

Mr. President: This becomes now the amended clause. I put the amended clause to vote.

The clause, as amended, was adopted.

Clause 8—Rights of Freedom.

Mr. President: Then we go on to Clause 8*.

The Hon'ble Sardar Vallabhbhai Patel: I move clause 8 which reads thus :

*8. There shall be liberty for the exercise of the following rights subject to public order and morality or to the existence of grave emergency declared to be such by the Government of the Union or the Unit concerned whereby the security of the Union or the Unit, as the case may be, is threatened:—

(a) the right of every citizen to freedom of speech and expression :"

I do not move the proviso to be found in the Report:

"(b) The right of the citizens to assemble peaceably and without arms:"

Here again I do not propose to move the proviso:

"(c) The right of citizens to form associations or unions:"

The proviso to this sub-clause also I am not moving:

"(d) The right of every citizen to move freely throughout the Union:"

(e) The right of every citizen to reside and settle in any part of the Union, to acquire property and to follow any occupation, trade, business or profession";

Rights of freedom

*8. There shall be liberty for the exercise of the following rights subject to public order and morality or to the existence of grave emergency declared to be such by the Government of the Union or the Unit concerned whereby the security of the Union or the Unit, as the case may be, is threatened:—

(a) the right of every citizen to freedom of speech and expression:

Provision may be made by law to make the publication or utterance of seditious, obscene, blasphemous, slanderous, libellous or defamatory matter actionable or punishable.

(b) The right of the citizens to assemble peaceably and without arms:

Provision may be made by law to prevent or control meetings which are likely to cause a breach of the peace or are a danger or nuisance to the general public or to prevent or control meetings in the vicinity of any chamber of a Legislature.

(c) The right of citizens to form associations or unions:

Provision may be made by law to regulate and control in the public interest the exercise of the foregoing right provided that no such provision shall contain any political, religious or class discrimination.

(d) The right of every citizen to move freely throughout the Union:

(e) The right of every citizen to reside and settle in any part of the Union, to acquire property and to follow any occupation, trade, business or profession:

Provision may be made by law to impose such reasonable restrictions as may be necessary in the public interest including the protection of minority groups and tribes.

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To the proviso to this sub-clause, there is a small formal amendment to be made which I will move presently. It will be moved later. This proviso is on the lines of clause 5. It reads :

"Provision may be made by law to impose such reasonable restrictions as may be necessary in the public interest including the protection of minority groups and tribes."

The word 'reasonable' may have to be omitted after discussion on an amendment that is expected to be moved.

I see that there are some amendments to this motion. When they are moved I shall give my reply.

Mr. President: I now call upon Shri Ajit Prasad Jain to move his amendment.

Shri Ajit Prasad Jain (U.P. : General) : Sir, I have given notice of an amendment to this clause, but I do not propose to move it. I would, however, request the Hon'ble Mover to make it clear that the declaration of an emergency should be done under authority derived from law. It is not now clear as to who will be the authority that is empowered to declare an emergency. I wish that the Legislature should have the right to declare an emergency and no other body. If the power to declare an emergency is placed in the hands of the executive, it may on occasion, work harshly. It is with this object that I sent up this amendment.

Mr. President: Do you or do you not move the amendment ?

Shri Ajit Prasad Jain: I do not move the amendment, Sir.

Rai Bahadur Syamanandan Sahaya (Bihar: General): Sir, before we proceed with the amendments I should like to make a submission. Actually we are considering the Report at present and the proposition moved was that the Report be taken into consideration. The Hon'ble Mover, in moving Clause 8, suggested dropping all the three provisos and, in fact, did not move their adoption at all. The proper thing to do, it seems to me, is to move for their omission by way of an amendment and not simply to say that they are not being moved. This forms part of our proceedings. If we simply omit the provisos in the manner suggested by the Hon'ble Mover, one may not know how and why they were omitted. I simply want to draw the attention of the Mover to this position.

The Hon'ble Sardar Vallabhbhai Patel: I have no objection to the course suggested. It may be taken that I have formally moved for the omission of the provisos to (a), (b) and (c).

Mr. Somnath Lahiri: Sir, as I have amendments to all the sub-clauses of clause 8, I request you to allow me to move all of them together. Some of them have become redundant now in view of the fact that the Hon'ble Mover has dropped the first three provisos.

Sir, my amendment to the proviso 8 (a) to delete the word 'seditious' has become unnecessary, because the whole proviso is to be deleted.

My next amendment is to substitute for the whole of clause 8(b), the sentence "The right of the citizen to assemble". Here also, except two or three words, the rest have already been proposed to be deleted.

My last amendment runs thus :

"After clause 8 the following new clauses be added and existing clause 9 be renumbered as clause 14, and consequential changes be made in the subsequent clauses:—

9. No person shall be detained in custody without trial.

10. (a) Liberty of the press shall be guaranteed subject to such restrictions as may be imposed by law in the interests of public order or morality.

(b) The Press shall not be subject to censorship and shall not be subsidised. No security shall be demanded for the keeping of a Press or the publication of any book or other printed matter.

11. The privacy of correspondence shall be inviolable and may be infringed only in cases provided by law.....

Mr. Dhirendra Nath Datta (Bengal: General): The Hon'ble Member is suggesting new clauses. We are now dealing with clause 8. He may at best move his amendments to clause 8 and not move new clauses.

Mr. Somnath Lahiri: All these clauses have reference to the subjects' right to freedom and so on. I can move them now or later on. Both mean the same thing.

Mr. R. K. Sidhwa: I rise to a point of order. If Mr. Lahiri is allowed now to move all his amendments, similar opportunities may have to be given to other members also. I submit that the consideration of all these new clauses may be held over till we finish the main business. It will otherwise be doing an injustice to us.

Mr. Somnath Lahiri: Even if you ask me, Sir, not to move this amendment now, as soon as this is over you will have to ask me to move it. So it comes to the same thing.

Mr. K. M. Munshi: May I rise to a point of order ? Clause 8 has been moved: The House is considering a number of amendments to clause No. 8. Now, Mr. Lahiri wants to suggest certain additions. Really speaking, they are independent matters, and as such they require independent consideration. They have nothing to do with clause No. 8, and as such, they should be treated as independent motions. The House is now considering the Report and after the Report is finished, if there are any additional matters, they may be considered by the House. In the Report itself, it has been mentioned that several fundamental rights have not been brought before the House and that the Advisory Committee is considering them. The appropriate procedure would be for all these new matters to be sent to the Advisory Committee for its consideration. This is what clause 20 of the May 16 Statement contemplates.

Mr. Somnath Lahiri: I have already said that, since I have put up these amendments, I have to be called after clause 8 has been finished. The clauses that I have moved also refer to the same subject "Rights of Freedom". Therefore I am quite in order in asking to be allowed to speak now.

Sri K. Santhanam: Many of us have got similar clauses to be added. For the convenience of the House, I propose that all the new clauses be taken up later on after the Report has been considered.

Mr. Somnath Lahiri: If you give a ruling like that, Sir, I have no objection.

Mr. President: There are two view points placed before the House. Mr. Lahiri has a number of fresh proposals which are not exactly amendments, but which are new proposals which he wants to be added to the fundamental rights. There are other members who have got similar proposals to be brought into the fundamental rights. The question is whether they should be taken as independent resolutions at this stage or later on.

Mr. K. M. Munshi: Later on, Sir.

Mr. President: Those who would like these new clauses to be taken up at the end of the discussion with regard to fundamental rights will please say 'Aye'—those against will say 'No'.

The motion was adopted.

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Shri Balkrishna Sharma (United Provinces: General): I submit this is a matter for your ruling, Sir, not a matter for voting, Sir.

Mr. Somnath Lahiri: I do not take part in the voting as a protest, Sir, because I think this is not a votable matter.

Mr. President: Your amendments now.

Mr. Somnath Lahiri: My amendments are Nos. 48, 49 and 52 of Supplementary List I.

No. 48—"That in clause 8 for the words 'security of the Union' the words 'defence of the Union' be substituted."

No. 49—"That in clause 8 (a) the word 'seditious' be deleted."

No. 52—"That for the whole of clause 8(b) the following be substituted:—'The right of the citizens to assemble'."

I am glad that the Mover of the Resolution has agreed to the deletion of some of the provisos of this clause. I am especially glad because the Congress Party members did not take the advice of Professor Ranga who thought that democracy and liberty are harmful to India, because democracy and liberty are supposed by him to have helped Nazis to power in Germany. Anybody who knows a little bit of history knows that Nazism was not the result of having too much of democracy. Nazism came into power in Germany because the rights and liberties that were given under the Weimar Constitution were challenged by force by the capitalist classes in Germany with the help of Hitler's Nazi gangsters, and the Social Democratic Party failed to rally the working classes of Germany to challenge that force with force. That was the main reason why Nazism came into power there; not because there was an extra amount of freedom.

I am very glad, Sir, that these provisos against which I fought—may be, very bitterly for which I express my regrets also—have been done away with. That is very good. That means that my amendment No. 49 will not be necessary and No. 52 also will not be necessary. Only 48 will be necessary. The clause reads:

"There shall be liberty for the exercise of the following rights subject to public order and morality or to the existence of grave emergency declared to be such by the Government of the Union or the Unit concerned whereby the security of the Union or the Unit....."

I want it to read, "defence of the Union" instead of "security of the Union". The word 'security' is a very vague term and may mean anything. In the past we have seen the Government taking advantage of the vagueness of this term. Defence of the Union is certainly a thing which should be guarded and for this special power may be needed. It is an important amendment. I have got nothing more to say.

Mr. R. K. Sidhwa: My amendment which is in relation to clause (c) on the agenda reads thus. Sub-clause (c) says:

"The right of citizens to form associations or unions;"

My amendment is to the following effect: Add at the end of the sub-clause the words:

"for the purpose of safeguarding and ameliorating economic condition and the status of workers and employees shall be guaranteed."

As this is considered a new clause, I reserve my right to move it at the appropriate time.

With regard to provisions to (a), (b) and (c) as the motion for deletion of the same stands in my name, with your permission, I would move that these provisos be deleted. My point is that when we are giving

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DRAFT CONSTITUTION—*contd.*

Article 14—contd.

Mr. Vice-President: We shall now resume discussion of article 14. Amendment 510 was moved. 509 will be put to vote. So we next come to 512.

Kazi Syed Karimuddin (C.P. & Berar: Muslim): Mr. Vice-President, Sir, I beg to move:—

That in article 14, the following be added as clause (4):—

> "(4) The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

This is a very important amendment. You will be pleased to find that this finds place as article 4 in the American Constitution and in the Irish Constitution there are clauses (2) and (5) which are similar and in the German Constitution there are articles 114 and 115 on the same lines. In the book of Dr. Ambedkar—Minorities and States—on page 11, item No. 10, a similar provision has been made. Thus, this is an amendment, the correctness of which cannot be challenged. What is the situation in India today? In India, in practically every province, there are Goonda Act and Public Safety Act which do not provide for any appeals or representations, and which give no opportunity to the persons concerned to defend themselves. Arrests are made without warrant and searches without justification. We are being governed by lawless laws and there is no remedy for the redress of grievances on account of unauthorised arrests and searches.

We have seen in 1947, and in the beginning of 1948, that hundreds of thousands of people were arrested and houses were searched merely on suspicion. The result is that the morale of the members of the Muslim minority community was undermined and they were treated just like criminals in the country. I will give the house one very important instance. Whenever we went to an aerodrome to go to Delhi, our belongings were searched without any reason, without any cause and without any warning. I will now give another instance. When there was police action in Hyderabad, every Muslim worth the name was arrested without any justification in the adjoining provinces. If those Muslims were really traitors they ought to have been prosecuted, punished and hanged. But people who had nothing whatever to do with Hyderabad were arrested under the pretence that they were taken only under protective custody. Well, if they were taken under protective custody, why were their women and children who were outside not taken under this protective custody?

Therefore my submission is that unless this fundamental right that I have asked for in this amendment is guaranteed, there will be no end to these arrests without warrants and to these searches without justifications. I have moved this amendment in the earnest hope that it would be accepted.

Mr. Vice-President: The next amendment in the List is the one standing in the name of Mr. Kakkan.

Shri P. Kakkan (Madras: General): Sir, I do not want to move it. But, with your permission I wish to speak on it.

Mr. Vice-President: That I cannot permit. I can give the honourable Member an opportunity to speak in the course of the general discussion on

article 14. I think, as there are no other amendments to this article, the House can now take up the general discussion of this article. Mr. Kakkan may now make the speech he wanted to.

Shri P. Kakkan: Mr. Vice-President, I had given notice of an amendment to this article only with a view to speak on it.

Sir, what I have got to say concerns the jail administration. In the jails they make a distinction between prisoners and prisoners in allotting duties in the jails. If a prisoner belongs to the Harijan community he is compelled to do scavenging work, no matter what his class or rank or education is. Prisoners belonging to other communities are not similarly forced to do scavenging work. On this occasion I desire to express my opinion and my feeling that this distinction in the matter of the allotment of work to prisoners inside the jails should be removed forthwith. Sir, I know from experience that the members of the Harijan community are treated in jails very cruelly, as if they are God's creatures and that He created them for doing scavenging work. I earnestly hope that this distinction will be removed hereafter and that Harijans will get impartial treatment everywhere. It is with this object that I have stated in my amendment that no person convicted for any offence shall be compelled to work in jail (*castewar*) in respect of religion, caste, race or class. I thank you, Sir, for giving me this opportunity to speak.

Shri T. T. Krishnamachari (Madras: General): Mr. Vice-President, Sir, the point I have to place before the House happens to be a comparatively narrow one. In this article 14, clause (2) reads thus: 'No person shall be punished for the same offence more than once'. It has been pointed out to me by more Members of this House that this might probably affect cases where, as in the case of an official of Government who has been dealt with departmentally and punishment has been inflicted, he cannot again be prosecuted and punished if he had committed a criminal offence; or, *per contra,* if a Government official had been prosecuted and sentenced to imprisonment or fine by a court, it might preclude the Government from taking disciplinary action against him. Though the point is a narrow one and one which is capable of interpretation whether this provision in this particular clause in the Fundamental Rights will affect the discretion of Government acting under the rules of conduct and discipline in regard to its own officers, I think, when we are putting a ban on a particular type of action, it is better to make the point more clear.

I recognise that I am rather late now to move an amendment. What I would like to do is to word the clause thus: 'No person shall be prosecuted and punished for the same offence more than once.' If my Honourable Friend Dr. Ambedkar will accept the addition of the words 'prosecuted and' before the word 'punished' and if you, Sir, and the House will give him permission to do so, it will not merely be a wise thing to do but it will save a lot of trouble for the Governments of the future. That is the suggestion I venture to place before the House. It is for the House to deal with it in whatever manner it deems fit.

Mr. Vice-President: Does the House give the permission asked for by Shri T. T. Krishnamachari?

Honourable Members: Yes.

Mr. Vice-President: Now I will call upon Dr. Ambedkar to move the amendment suggested by Shri T. T. Krishnamachari.

The Honourable Dr. B. R. Ambedkar: Mr. Vice-President, Sir, with regard to the amendments that have been moved to this article, I can say

[The Honourable Dr. B. R. Ambedkar]

that I am prepared to accept the amendment moved by Mr. T. T. Krishnamachari. Really speaking, the amendment is not necessary but as certain doubts have been expressed that the word 'punished' may be interpreted in a variety of ways, I think it may be desirable to add the words "prosecuted and punished".

With regard to amendments Nos. 506 and 509 moved by my friend, Mr. Naziruddin Ahmad.....,

Mr. Naziruddin Ahmad: It is No. 510.

The Honourable Dr. B. R. Ambedkar: Anyhow, I have examined the position the whole day yesterday and I am satisfied that no good will be served by accepting these amendments. I am however prepared to accept amendment No. 512 moved by Mr. Karimuddin. I think it is a useful provision and may find a place in our Constitution. There is nothing novel in it because the whole of the clause as suggested by him is to be found in the Criminal Procedure Code so that it might be said in a sense that this is already the law of the land. It is perfectly possible that the legislatures of the future may abrogate the provisions specified in his amendment but they are so important so far as personal liberty is concerned that it is very desirable to place these provisions beyond the reach of the legislature and I am therefore, prepared to accept his amendment.

With regard to amendment No. 513 moved by my friend, Mr. Kakkan.....

An Honourable Member: It was not moved.

Mr. Vice-President: What about amendments Nos. 505 and 506?

The Honourable Dr. B. R. Ambedkar: I have already said that I am not prepared to accept amendment Nos. 506 and 510.

Mr. Vice-President: Have you anything to say about amendment No. 505, the second part of it as modified by amendment No. 92 in List V? Perhaps you have overlooked it. It is in the name of Pandit Thakur Dass Bhargava.

The Honourable Dr. B. R. Ambedkar: I accept the amendment moved by him.

Mr. Vice-President: I am putting the amendments one by one to the vote.

Amendment No. 505 as modified by amendment No. 92 of List V. I understand that Dr. Ambedkar accepts it. The question is:

"That in clause (1) of article 14, for the words 'under the law at the time of the commission' the words 'under the law in force at the time of the commission' be substituted."

The amendment was adopted.

Mr. Vice-President: Amendment No. 506. The question is:

"That in clause (1) of article 14, after the words 'greater than' the words 'or of a kind other than' be inserted."

The amendment was negatived.

Mr. Vice-President: Amendment No. 510. The question is:

"That at the end of clause (2) of article 14, the words 'otherwise than as permitted by the Code of Criminal Procedure, 1898' be added."

The amendment was negatived.

Mr. Vice-President: Amendment No. 512 moved by Kazi Syed Karimuddin and accepted by Dr. Ambedkar. The question is:

That in article 14, the following be added as clause (4):—

"(4) The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

I think the 'Ayes' have it.

Shri T. T. Krishnamachari: The Noes have it.

Mr. Vice-President: I will again put it to the vote.

I think the 'Ayes' have it.

Shri T. T. Krishnamachari: No, Sir, the Noes have it.

Mr. Vice-President: I shall first of all call for a show of hands.

(The Division Bell was rung.)

Shri Mahavir Tyagi (United Provinces: General): May I proposed that this question might be postponed for the time being and a chance be given for the Members to confer between themselves and arrive at a decision. Even the British House of Commons, sometimes converts itself into a committee to give various parties a chance to confer and arrive at an agreed solution.

Mr. Vice-President: I am prepared to postpone the voting on this amendment provided the House gives me the requisite permission. I would request the House to be calm. This is not the way to come to decisions which must be reached through co-operative effort and through goodwill. Does the House give me the necessary power to postpone voting on this?

The Honourable Pandit Jawaharlal Nehru: Mr. Vice-President, Sir, as apparently a slight confusion has arisen in many members' minds on this point, I think, Sir, that the suggestion made is eminently desirable, that we might take up this matter a little later, and we may proceed with other things. It will be the wish of the House that will prevail of course. I would suggest to you, Sir, and to the House that your suggestion be accepted.

Dr. B. V. Keskar (United Provinces: General): Can it be done after the division bell has rung?

Mr. Vice-President: I never go by technicalities. I shall continue to use common-sense as long as I am here. I have little knowledge of technicalities, but I have some knowledge of human nature. I know that in the long run it is good sense, it is common-sense, it is goodwill which alone will carry weight. I ask the permission of the House to postpone the voting.

Honourable Members: Yes.

Article 15

Mr. Vice-President: Then we shall pass on to the next article. The next amendment is No. 514 but as Mr. Lari is absent, I shall pass on to the next article.

Shri T. T. Krishnamachari: May I suggest that discussion of this article be postponed, as it is being examined and the Members of the House would like to take some more time for the consideration of this particular article?

Mr. Vice-President: I shall now put article 19, as amended by amendments numbers 596 and 609 to vote. The question is :

"That article 19, as amended, form part of the Constitution."

The motion was adopted.

Article 19, as amended, was added to the Constitution.

Article 14--(*Contd.*)

Mr. Vice-President: We shall go back to Article 14. So far as I remember —I am sorry I have mislaid my notes—in article 14 there were a number of amendments which were put to the vote one after the other, and that only two amendments were being considered, when, for reasons already known to the House, we postponed their consideration. One was amendment No. 512 moved by Kazi Syed Karimuddin, and the other was a suggestion—am I right in saying that it was a suggestion made by Mr. T. T. Krishnamachari? Mr. T. T. Krishnamachari, will you please enlighten me? Was it a suggestion or was it a short notice amendment?

Shri T. T. Krishnamachari: It was a short notice amendment.

Mr. Vice-President: It was a short notice amendment admitted by me. These two only remained to be put to the vote.

Mr. Naziruddin Ahmad: With regard to amendment No. 512 I have a point of order, Mr. Vice-President.

You will be pleased to remember, Sir, that amendment No. 512 was moved in the House. It was accepted by Dr. Ambedkar and then it was put to the vote. The shouts according to your estimate were in favour of its acceptance. Then some trouble arose and then shouts were again called. The shouts according to your estimate were again in favour of the amendment. What is very important in this connection, Sir, is that you declared the amendment to be carried.

Mr. Vice-President: Did I declare the amendment to be carried?

Mr. Naziruddin Ahmad: Yes, Sir. I remember.

Mr. Vice-President: Do the records show that?

Mr. Naziruddin Ahmad: The shorthand notes may be referred to. My recollection is it was declared carried (*Interruption*).

Mr. Vice-President: Kindly, in order to preserve the dignity of the House, do not interrupt Mr. Naziruddin Ahmad only because he is putting forward a point of view which may not be agreeable to a certain section of the House.

(To Mr. Naziruddin Ahmed) Kindly confine your remarks to the business on hand.

Mr. Naziruddin Ahmad: Sir, I do not wish to obstruct the majority in dealing with this amendment in any way they please. I simply suggest that if it is carried, it cannot be put again. It is against the Rules. But I have a way out, which I shall suggest and which will be constitutional. There is a rule, in our Rules, that with the consent of twenty five per cent of the Members of the House, any resolution that has been carried may be re-opened. I suggest, Sir, that if I am right that it was declared to be carried, then, it should be re-opened in the regular constitutional manner.

Mr. Vice-President: The official records of the deliberations read this way :

"Just before the voting was called, however, Shri Mahavir Tyagi made a suggestion, which was later supported by the Prime Minister, that the voting on this particular amendment be postponed as there appeared to be some confusion as to the full implications of this provision. The House agreed to the suggestion and voting on this amendment and on the article as a whole was accordingly postponed."

That shows that your whole objection falls to the ground.

(Mr. Naziruddin Ahmad rose to speak.)

Please do not argue.

I want to make certain other things clear to the House. I want to make clear the point of view from which I regard this. As I have said already, the House is the ultimate authority in this as in all matters. The House has laid down certain Rules for the conduct of the business. These Rules have been laid down mainly because the aim of the House is that the work should proceed smoothly. The smooth working of the House I regard as the really essential thing, and much more important than sticking to the Rules which the House has made and which the House can un-make at any time. When there was this confusion, to use the language of Mr. Naziruddin Ahmad, I made a reference to the House and the House agreed that the matter should be re-considered. The House is fully competent to do so and if the House is still of that view, then the matter will be considered here and now.

Maulana Hasrat Mohani: (United Provinces: Muslim): May I know, Sir, whether the House has reconsidered or whether it is a mandate from the Congress Party who has issued a whip that it should be opposed? Do you decide to allow the House to reconsider or is it only a mandate from the Congress Party? I have got a copy of that whip in my hand, that this must be opposed.

Shri Mahavir Tyagi: (United Provinces: General): Sir, I protest against the language used and the honourable Member's referring to the whip of the Congress Party.

Mr. Vice-President: You have done your duty as a Congress man; now I shall do my duty as the presiding officer here.

Maulana Hasrat Mohani: Sir, I stick to what I have said.

Mr. Vice-President: I am sorry.....

Shri Mahavir Tyagi: Will you please ask him to give back the whip, which the honourable Member has no right to handle?

Mr. Vice-President: You are always the stormy petrel. While I am trying to bring peace and good humour you are interfering. I will not allow you to do so again.

As I was saying, I am very sorry that an old and experienced public man like Maulana Hasrat Mohani should have permitted himself to make references to things which are no concern of this House. As I have said more than once, though I belong to a particular political party, so long as I am in the Chair, I recognise no party at all. It is in that spirit that proceedings of this House are being conducted. I regret very much that anything should have been said challenging the way in which the proceedings have been conducted or are going to be conducted.

I ask the permission of the House once again as to whether I can re-open the matter.

Honourable Members: Yes.

Mr. Vice-President: Thank you. I am going to put amendment No. 512 to the vote.

The Honourable Shri Ghanshyam Singh Gupta: Sir, there is no question of re-opening. You had not finally said that the amendment was carried or was not carried. I want to impress upon the House that the Chair had not declared that it was either carried or it was not carried and therefore there is no question of re-opening at all. The matter is absolutely in the discretion of the Chair now. The Rules are quite clear. A vote is taken. Once it is challenged, the division bell rings. After the division bell

(82)

[The Honourable Shri Ghansham Singh Gupta]

rings, the Chair again puts it to the vote and then sends Ayes and Noes to the lobbies. The Teller counts the votes and after that, it is declared that a certain motion is lost or is carried. This was not done at all. In fact, it was in the process of declaration by the Chair that the motion is or is not carried that the Chair was pleased to say that this thing stands over. Anybody who says that the Chair finally declared that that motion was carried or lost is wrong.

Mr. Vice-President: It merely shows the depth of my ignorance. I used the word which should not have been used. I used the word 'reopen'. I am glad that the matter has been set right. I only wish that I had sufficient—what shall I say—ability to act in the way in which the Honourable Mr. Gupta has done. I now put amendment No. 512 to vote.

The question is :

"That in article 14, the following be added as clause (4) :—

"(4) The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probables cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

The amendment was negatived.

Mr. Vice-President: We come to Mr. Krishnamachari's amendment which was accepted by Dr. Ambedkar.

Shri H. V. Kamath: Is it necessary to say that Dr. Ambedkar has accepted or rejected everytime ?

Mr. Vice-President: Sometimes it is necessary. Not always. I now put the amendment to vote.

The question is :

"That in clause 2 of article 14 after the word 'shall be' the words 'prosecuted and' be inserted."

The amendment was adopted.

Mr. Vice-President: Now the question is :

"That article 14, as amended, stand part of the Constitution."

The motion was adopted.

Article 14, as amended was added to the Constitution.

Article 15

Mr. Vice-President: Now the motion before the House is : that article 15 form part of the Constitution.

We shall go over the amendments one after another. 515 is ruled out of order. Nos. 516, 517, 518 and 532 are similar and of these I can allow 516 to be moved as also 517 both standing in the name of Shri Brajeshwar Prasad.

Shri Brajeshwar Prasad: (Bihar : General) : Sir, I am not moving 516 and 517.

(Amendments Nos. 518, 532, 519 and 520 were not moved.)

Mr. Vice-President: No. 521 is blocked. Then 522, 523, 524, 525, 528 and 530 are similar. I can allow 523 to be moved.

Kazi Syed Karimuddin (C.P. & Berar : Muslim) : Mr. Vice-President, Sir, if the proposed amendment by the Drafting Committee is accepted and the article is allowed to stand as it is :—

"No person shall be deprived of his life or personal liberty except according to procedure established by law.....".

then in my opinion, it will open a sad chapter in the history of constitutional law. Sir, the Advisory Committee on Fundamental Rights appointed by the Constituent Assembly had suggested that no person shall be deprived of his life or liberty without due process of law; and I really do not understand how the

ANNEXURE-R-8 (83)

II. Relevance of Constituent Assembly Debates – *Constituent Assembly Debates as an aid to the interpretation of the Constitution*

a). *T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481*, at page 604: (11 Judges)

> ***205.*** *In Kesavananda Bharati v. State of Kerala, it was held that the Constituent Assembly Debates although not conclusive, yet the intention of framers of the Constitution in enacting provisions of the Constitution can throw light in ascertaining the intention behind such provision.* ***(13 judges)***
>
> ***207.*** *Thus, the accepted view appears to be that the report of the Constituent Assembly Debates can legitimately be taken into consideration for construction of the provisions of the Act or the Constitution. In that view of the matter, it is necessary to look into the Constituent Assembly Debates which led to enacting Articles 29 and 30 of the Constitution.*

b). *Special Reference No. 1 of 2002, In re (Gujarat Assembly Election matter), (2002) 8 SCC 237*, at page 265 (5 Judges)

> ***16.*** *In Kesavananda Bharati v. State of Kerala it was held that Constituent Assembly Debates although not conclusive, yet show the intention of the framers of the Constitution in enacting provisions of the Constitution and the Constituent Assembly Debates can throw light in ascertaining the intention behind such provisions.*
>
> ***18.*** *Since it is permissible to look into the pre-existing law, historical legislative developments, and Constituent Assembly Debates, we will look into them for interpreting the provisions of the Constitution.*

c). *S.R. Chaudhuri v. State of Punjab, (2001) 7 SCC 126*, at page 142 (3 Judges)

> ***33.*** *Constitutional provisions are required to be understood and interpreted with an object-oriented approach. A Constitution must not be construed in a narrow and pedantic sense. The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve. Debates in the Constituent Assembly referred to in an earlier part of this judgment clearly indicate that a non-member's inclusion in the Cabinet was considered to be a "privilege" that extends only for six months, during which period the member must get elected, otherwise he would cease to be a Minister. It is a settled position that debates in the Constituent Assembly may be relied upon as an aid to interpret a constitutional provision because sit is the function of the court to find out the intention of the framers of the Constitution. We must remember that a Constitution is not just a document in solemn form, but a living framework for the Government of the people exhibiting a sufficient degree of cohesion and its successful working depends upon the democratic spirit underlying it being respected in letter and in spirit. The debates clearly indicate the "privilege" to extend "only" for six months.*

d). *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 at page 710 (9 Judges)

> ***772.*** *We may now turn to Constituent Assembly debates with a view to ascertain the original intent underlying the use of words "backward class of citizens". At the outset we must clarify that we are not taking these debates or even the speeches of Dr Ambedkar as conclusive on the meaning of the expression "backward classes". We are referring to these debates as furnishing the context in which and the objective to achieve which this phrase was put in clause (4). We are aware that what is said during these debates is not*

conclusive or binding upon the Court because several members may have expressed several views, all of which may not be reflected in the provision finally enacted. The speech of Dr Ambedkar on this aspect, however, stands on a different footing. He was not only the Chairman of the Drafting Committee which inserted the expression "backward" in draft Article 10(3) [it was not there in the original draft Article 10(3)], he was virtually piloting the draft Article. In his speech, he explains the reason behind draft clause (3) as also the reason for which the Drafting Committee added the expression "backward" in the clause. In this situation, we fail to understand how can anyone ignore his speech while trying to ascertain the meaning of the said expression. That the debates in Constituent Assembly can be relied upon as an aid to interpretation of a constitutional provision is borne out by a series of decisions of this Court. [See Madhu Limaye, in re [AIR 1969 SC 1014, 1018 : (1969) 3 SCR 154] ; Golaknath v.State of Punjab [Golak Nath v. State of Punjab, AIR 1967 SC 1643 : (1967) 2 SCR 762] (Subba Rao, CJ); opinion of Sikri, CJ, in Union of India v. H.S. Dhillon [(1971) 2 SCC 779 : (1972) 2 SCR 33] and the several opinions in Kesavananda Bharati[(1973) 4 SCC 225: 1973 Supp 1 SCR 1] where the relevance of these debates is pointed out, emphasing at the same time, the extent to which and the purpose for which they can be referred to.] Since the expression "backward" or "backward class of citizens" is not defined in the Constitution, reference to such debates is permissible to ascertain, at any rate, the context, background and objective behind them. Particularly, where the Court wants to ascertain the 'original intent' such reference may be unavoidable."

e). ***A.K. Roy vs Union of India (1982) 1 SCC 271 at page 288*** **(9 Judges)**

"9. Our Constituent Assembly was composed of famous men who had avariegated experience of life. They were not elected by the people to frame the Constitution but that was their strength, not their weakness. They were neither bound by a popular mandate nor bridled by a party whip. They brought to bear on their task their vast experience of life — in fields social, economic and political. Their deliberations, which run into twelve volumes, are a testimony to the time and attention which they gave with care and concern to evolving a generally acceptable instrument for the regulation of the fundamental affairs of the country and the life and liberty of its people."

g). ***Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 :***

J. SIKRI

"186. It seems to me that when a Ruler or Rajpramukh or the people of the State accepted the Constitution of India in its final form, he did not accept it subject to the speeches made during the Constituent Assembly debates. The speeches can, in my view, be relied on only in order to see if the course of the progress of a particular provision or provisions throws any light on the historical background or shows that a common understanding or agreement was arrived at between certain sections of the people."

The rule that the constituent assamble debates were not important or very relevant as in (1952) 3 SCR 1112 State of Travancore- Cochin & Others vs the Bombay Co. ltd. was based on English law. The same case has changed in England in Pepper vs Hart [1993] 1 All ER 42.

J. REDDY

1088. Before I refer to the proceedings of the Constituent Assembly, I must first consider the question whether the Constituent Assembly Debates can be looked into by the Court for construing these provisions. The Advocate-General of Maharashtra says until the decision of this Court In H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur v. Union of India13 — commonly known as Privy Purses case — debates and

proceedings were held not to be admissible. Nonetheless counsel on either side made copious reference to them. In dealing with the interpretation of ordinary legislation, the widely held view is that while it is not permissible to refer to the debates as an aid to construction, the various stages through which the draft passed, the amendments proposed to it either to add or delete any part of it, the purpose for which the attempt was made and the reason for its rejection may throw light on the intention of the framers or draftsmen. The speeches in the legislatures are said to afford no guide because members who speak in favour or against a particular provision or amendment only indicate their understanding of the provision which would not be admissible as an aid for construing the provision. The members speak and express views which differ from one another, and there is no way of ascertaining what views are held by those who do not speak. It is, therefore, difficult to get a resultant of the views in a debate except for the ultimate result that a particular provision or its amendment has been adopted or rejected, and in any case none of these can be looked into as an aid to construction except that the legislative history of the provision can be referred to for finding out the mischief sought to be remedied or the purpose for which it is enacted, if they are relevant. But in Travancore Cochin v. Bombay Company Ltd.,d14 the Golaknath case, the Privy Purses case, and Union of India v. H.S. Dhillon,d15 there are dicta against referring to the speeches in the Constituent Assembly and in the last mentioned case they were referred to as supporting the conclusion already arrived at. In Golaknath case, as well as Privy Purses case, the speeches were referred to though it was said not for interpreting a provision but for either examining the transcendental character of fundamental rights or for the circumstances which necessitated the giving of guarantees to the rulers. For whatever purpose speeches in the Constituent Assembly were looked at though it was always claimed that these are not admissible except when the meaning was ambiguous or where the meaning was clear for further support of the conclusion arrived at. In either case they were looked into Speaking for myself, why should we not look into them boldly for ascertaining what was the intention of our framers and how they translated that intention? What is the rationale for treating them as forbidden or forbidding material. The Court in a constitutional matter, where the intent of the framers of the Constitution as embodied in the written document is to be ascertained, should look into the proceedings, the relevant data including any speech which may throw light on ascertaining it. It can reject them as unhelpful, if they throw no light or throw only dim light in which nothing can be discerned. Unlike a statute, a Constitution is a working instrument of Government, it is drafted by people who wanted it to be a national instrument to subserve successive generations. The Assembly constituted Committees of able men of high calibre, learning and wide experience, and it had an able adviser, Shri B.N. Rau to assist it. A memorandum was prepared by Shri B.N. Rau which was circulated to the public of every shade of opinion, to professional bodies, to legislators, to public bodies and a host of others and was given the widest publicity. When criticism, comments and suggestions were received, a draft was prepared in the light of these which was submitted to the Constituent Assembly, and introduced with a speech by the sponsor Dr Ambedkar. The assembly thereupon constituted three Committees: (1) Union Powers Committee; (2) Provincial Powers; Committee; and (3) Committee on the fundamental rights and Minorities Committee. The deliberations and the recommendations of these Committees, the proceedings of the Drafting Committee, and the speech of Dr Ambedkar introducing the draft so prepared along with the report of these Committees are all valuable material. The objectives of the Assembly, the manner in which they met any criticism, the resultant decisions taken thereupon, amendments proposed, speeches in favour or against them and their ultimate adoption or rejection will be helpful in the owing light on the particular matter in issue. In proceedings of a legislature on an ordinary draft bill, as I said earlier, there may be a partisan and heated debate, which often times may not throw any light on the issues which come before the Court but the proceedings in a Constituent Assembly have no such partisan nuances and their only concern is to give the national a working instrument with its basic structure and human values sufficiently balanced and stable enough to allow an interplay of forces which will subserve the needs of future generations. The highest Court created under it and charged with the duty of understanding and expounding it, should not, if it has to

catch the objectives of the frames, deny itself the benefit of the guidance derivable from the records of the proceedings and the deliberations of the Assembly. Be that as it may, all I intend to do for the present is to examine the stages through which the draft passed and whether and what attempts were made to introduce words or expressions or delete any that were already there and for what purpose. If these proceedings are examined from this point of view, do they throw any light on or support the view taken by me?

J. KHANNA

1367. So far as the question is concerned as to whether the speeches made in the Constituent Assembly can be taken into consideration, this court has in three cases, namely, I.C. Golak Nath v. State of Punjab, H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur v. Union of Indiae38 and Union of India v. H.S. Dhillone39 taken the view that such speeches can be taken into account. In Golak Nath caseSubba Rao, C.J., who spoke for the majority referred to the speeches of Pt. Jawaharlal Nehru and Dr Ambedkar on p. 791. Reference was also made to the speech of Dr Ambedkar by Bachawat, J. in that case on p. 924. In the case of Madhav Rao, Shah, J. who gave the leading majority judgment relied upon the speech of Sardar Patel, who was Minister for Home Affairs, in the Constituent Assembly (see P. 83). Reference was also made to the speeches in the Constituent Assembly by Mitter, J. on pages 121 and 122. More recently in H.S. Dhilon case relating to the validity of amendment in Wealth Tax Act, both the majority judgment as well as the minority judgment referred to the speeches made in the Constitutent Assembly in support of the conclusion arrived at. It can, therefore, be said that this Court has now accepted the view in its decisions since Golak Nath case that speeches made in the Constituent Assembly can be referred to while dealing with the provision of the Constitution.

1368. The speeches in the Constitutent Assembly, in my opinion, can be referred to for finding the history of the Constitutional provision and the background against which the said provision was drafted. The speeches can also shed light to show as to what was the mischief which was sought to be remedied and what was the object which was sought to be attained in drafting the provision. The speeches cannot, however, form the basis for construing the provisions of the Constitution. The task of interpreting the provision of the Constitution has to be done independently and the reference to the speeches made in the Constitutent Assembly does not absolve thecourt from performing that task. The draftsmen are supposed to have expressed their intentions in the words used by them in the provisions. Those words are final repositories of the intention and it would be ultimately from the words of the provision that the intention of the draftsmen would have to be gathered.

ANNEXURE-R-9 87

Aadhaar Empowering Residents, Enabling Good Governance, Transparency and Accountability in the Government

1. ***Targeted Delivery of Food Grains under PDS***:
    - Over 18.05 crore Ration card holders receive ration post Aadhaar authentication. They are sure that nobody else can claim their rations, reducing pilferage and theft in the process.
    - Aadhaar seeding for de-duplications and other DBT processes has removed over 2.33 crore fake ration cards saving over Rs. 14,000 crore upto March 2017.
2. ***PAHAL and Ujjwala Scheme***:
    - Over 15.12 crore LLPG beneficiaries received LPG subsidy in their bank accounts under the PAHAL scheme. Over 2.5 crore connections issued to BPL women under Ujjwala Scheme.
    - Aadhaar Seeding and DBT process removed more than 3 crore fake / duplicate LPG connections which has resulted into huge financial saving of over Rs 29,769 crore upto March 2017.
3. ***Jeevan Pramaan***:
    - Jeevan Pramaan facility has empowered the senior citizen pensioners to submit Jeevan Pramaan certificate from anywhere in the country and now they are not required to personally visit the pension disbursement agency.
    - So far more than 65 lakh pensioners have used Jeevan Pramaan during the previous year of the over 81 lakh registered users.
4. ***Ease of Opening of Bank Account using e-KYC***:
    - Aadhaar has enabled this by becoming the single document which acts as KYC docuent for opening a bank account. So far over 10.32 crore Aadhaar holders have used this facility to open their bank accounts instantly.
5. ***Digi-locker***:
    - Residents have been empowered to open to a digital locker using their Aadhaar and upload their documents like driving license, certificates issued by educational institutes/boards etc.
    - So far, over 75 lakh individuals have availed this facility and uploaded over 90 lakh documents.
6. ***Door step Banking***:
    - Aadhaar enabled payment system (AePS) has enabled banks to provide basic banking services such as cash deposit, cash withdrawal, etc at the doorstep in

the remote and rural areas where bank branches or ATMs do not exist, using microATM devices.

- So far, about 50 crore people are enabled to use this service. The system currently processes over 7 crore transactions every month. So far, over 69 crore AePS transactions have been done across over 3.04 lakh microATMs offered by 128 banks.

7. ***E-verification of Income Tax return***:
   - Aadhaar has enabled Income Tax payer to e-verify their income tax return using Aadhaar OTP authentication, obviating the need for sending the ITR-5 in a physical form to Income Tax Authorities.
   - So far, over 3 crore residents have already linked their Aadhaar with PAN Card and over 41 lakh have e-verified their income tax returns this year.
8. ***Aadhaar for getting Mobile SIM***:
   - Aadhaar has enabled telecom operators to issue mobile SIM without the need of physical application form, proof of address and identity documents. Using e-KYC empowers an Aadhaar holder to get an instantly activated SIM card.
   - So far, of the about 128 crore mobile connections, over 33.8 crore people have linked their mobile with Aadhaar.
9. ***AadhaarPay for making payment digitally to merchants***:
   - The large chunk of population who are not using any digital payment platform such as cards, internet/mobile banking, wallets, etc. are now enabled to make digital payment using their Aadhaar number and fingerprints.
   - Launched on 14th April 2017, so far, over 55 banks have enabled AadhaarPay in their systems thus enabling about 50 crore people use their bank accounts to pay digitally to merchants.
10. ***Pay to Aadhaar using BHIM/UPI***:
    - Users of BHIM/UPI application are now enabled to send / transfer money to Aadhaar holders by using only the Aadhaar number of the recipient.
    - Launched early this year, it has been deployed by over 38 banks and enables over 50 crore Aadhaar linked bank a/c's to start receiving money using Aadhaar as financial Address.
11. ***Ease of getting Passport***:
    - Aadhaar has enabled residents to get their passport made easily and in less time. The Ministry of External Affairs (MEA) has started giving the passport within a week's time for applicants who are submitting Aadhaar along with

PAN and EPIC (Voter ID) card. So far, over 1.36 crore residents have obtained passport using their Aadhaar in a convenient manner.

ANNEXURE R-10 (90)

Year	87 Purposes for which SSN is used in USA (as of 2005) (count shown in BLUE numbers) Description of the use of SSN authorized
1935	required the issuance of an account number to each employee covered by the **Social Security program(1).**
1943	• All Federal components to use the SSN "**exclusively**" whenever the component found it advisable to set up **a new identification system for individuals(2).** • The Social Security Board to cooperate with Federal uses of the number by **issuing and verifying numbers for other Federal agencies**
1961	The Civil Service Commission adopted the SSN as an **official Federal employee identifier (3).**
1962	The Internal Revenue Service adopted the SSN as its **official taxpayer identification number (4).**
1964	Treasury Department, via internal policy, required **buyers of Series H savings bonds (5)** to provide their SSNs.
1965	**Medicare: It became necessary** for most individuals age 65 and older to have an SSN **(6).**
1966	The Veterans Administration began to use the SSN as the **hospital admissions number (7)** and for patient record keeping.
1969	The Department of Defense adopted the SSN in lieu of the **military service number** for identifying Armed Forces personnel.
1970	Bank Records and Foreign Transactions Act (P.L. 91-508) required all **banks, savings and loan associations, credit unions and brokers/dealers in securities** to obtain the **SSNs of all of their customers (8).** Also, financial institutions were required to file a report with the IRS, including the SSN of the customer, **for any transaction involving more than $10,000.**
1976	To allow **use by the States of the SSN** in the **administration of any tax (9), general public assistance (10), driver's license (11) or motor vehicle registration law (12)** within their jurisdiction and to authorize the States to require individuals affected by such laws to furnish their SSNs to the States;
1976	amended **section 6109 of the Internal Revenue Code to provide that the SSN be used as the tax identification number (TIN) for all tax purposes.**
1977	Food Stamp Act of 1977 (P.L. 96-58) required disclosure of SSNs of all household members as a condition of eligibility for participation in the **food stamp program (13).**
1981	Omnibus Budget Reconciliation Act of 1981 (P.L. 97-35) required the disclosure of the SSNs of all adult members in the household of children applying to the **school lunch program (14).**
1981	Section 6 required any Federal, State or local government agency to furnish the name and SSN of prisoners convicted of a felony to the Secretary of HHS, to enforce **suspension of disability benefits to certain imprisoned felons (15).**
1982	Debt Collection Act (P.L. 97-365) required that all **applicants for loans under any Federal loan program (16)** furnish their SSNs to the agency supplying the loan.
1983	The Interest and Dividend Tax Compliance Act (P.L. 98-67) requires SSNs for all **interest-bearing accounts (17)** and provides a penalty of $50 for all individuals who fail to furnish a correct TIN (usually the SSN).
1984	Amended the Social Security Act to establish an **income and eligibility verification system involving State agencies (18)** administering the AFDC, Medicaid, unemployment compensation, the food stamp programs, and State programs under a plan approved under title I, X, XIV, or XVI of the Act. States were permitted to require the SSN as a condition of eligibility for benefits under any of these programs.
1984	Amended Section 6050I of the IRC to require that **persons engaged in a trade or business (19)** file a report (including SSNs) with the IRS for cash transactions over $10,000.
1986	(P.L. 99-514) required individuals filing a tax return due after December 31, 1987, to include the taxpayer identification number--usually the **SSN--of each dependent age 5 or older (20).**

1986	Commercial Motor Vehicle Safety Act of 1986 (P.L. 99-750) authorized the Secretary of Transportation to require the use of the SSN on commercial motor vehicle operators' licenses (21).
1986	Higher Education Amendments of 1986 (P.L. 99-498) required that student loan applicants submit their SSN as a condition of eligibility (22).
1988	Housing and Community Development Act of 1987 (P.L. 100-242) authorized the Secretary of HUD to require disclosure of a person's SSN as a condition of eligibility for any HUD program (23).
1988	beginning November 1, 1990, a State to obtain the SSNs of the parents when issuing a birth certificate (24).
1988	Authorized a State and/or any blood donation facility to use SSNs to identify blood donors (25)
1990	required an SSN for eligibility for benefits from the Department of Veterans Affairs (DVA) (26).
1994	authorized the use of the SSN for jury selection (27).
1994	authorized cross-matching of SSNs and Employer Identification Numbers maintained by the Department of Agriculture with other Federal agencies for the purpose of investigating both food stamp fraud and violations of other Federal laws (28).
1994	authorized the use of the SSN by the Department of Labor in administration of Federal workers' compensation laws (29)
1996	Section 317 provided that State child support enforcement procedures require the SSN of any applicant for a professional license (30), commercial driver's license (31), occupational license (32), or marriage license (33) be recorded on the application.
1996	The SSN of any person subject to a divorce decree, (34) support order, (35)or paternity determination or acknowledgement (36) would have to be placed in the pertinent records.
1996	SSNs are required on death certificates. (37)
1998	Identity Theft and Assumption Deterrence Act of 1998 (P.L. 105-318) defines "means of identification" to include name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, and employer or taxpayer identification number; and
2005	Prohibits Federal, State, and local governments from displaying SSNs, or any derivative thereof, on drivers' licenses, motor vehicle registrations, or other identification documents issued by State departments of motor vehicles.

ANNEXURE-R-11

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DIGITAL DIVIDENDS

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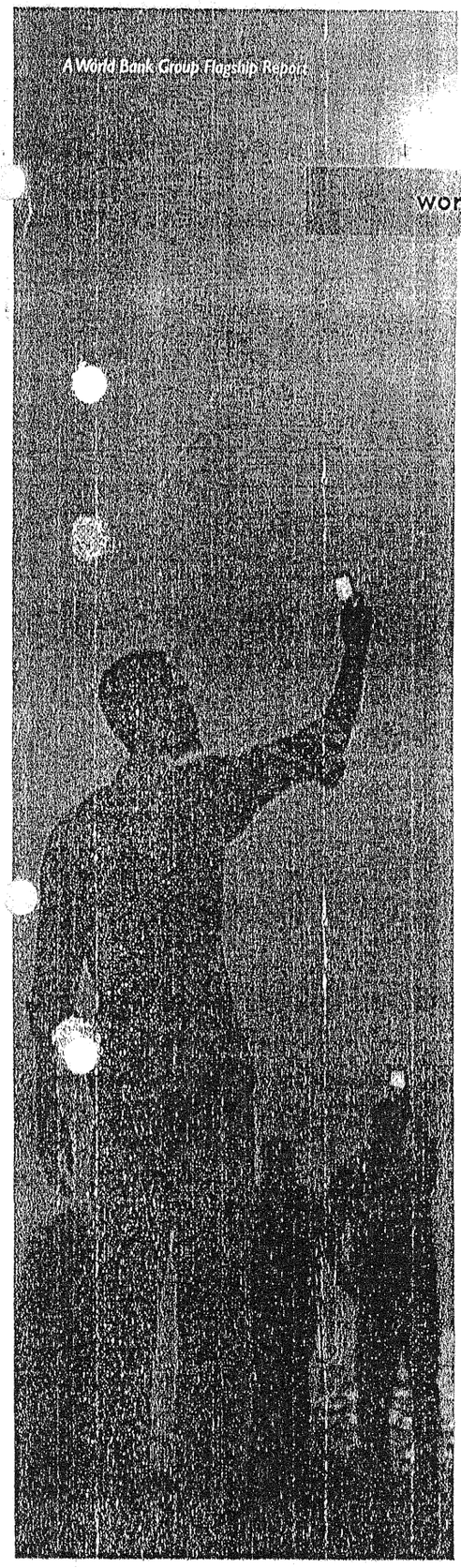

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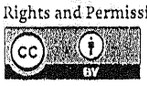

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Cover photo: This 2013 World Press Photo of the Year shows migrants crowding the night shore of Djibouti City in an attempt to capture inexpensive cellphone signals from neighboring Somalia. © John Stanmeyer/National Geographic Creative. Used with the permission of John Stanmeyer/National Geographic Creative. Further permission required for reuse.

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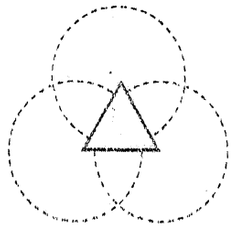


OVERVIEW

Strengthening the analog foundation of the digital revolution

Digital technologies have spread rapidly in much of the world. Digital dividends—the broader development benefits from using these technologies—have lagged behind. In many instances digital technologies have boosted growth, expanded opportunities, and improved service delivery. Yet their aggregate impact has fallen short and is unevenly distributed. For digital technologies to benefit everyone everywhere requires closing the remaining digital divide, especially in internet access. But greater digital adoption will not be enough. To get the most out of the digital revolution, countries also need to work on the "analog complements"—by strengthening regulations that ensure competition among businesses, by adapting workers' skills to the demands of the new economy, and by ensuring that institutions are accountable.

Digital technologies—the internet, mobile phones, and all the other tools to collect, store, analyze, and share information digitally—have spread quickly. More households in developing countries own a mobile phone than have access to electricity or clean water, and nearly 70 percent of the bottom fifth of the population in developing countries own a mobile phone. The number of internet users has more than tripled in a decade—from 1 billion in 2005 to an estimated 3.2 billion at the end of 2015.[1] This means that businesses, people, and governments are more connected than ever before (figure O.1). The digital revolution has brought immediate private benefits—easier communication and information, greater convenience, free digital products, and new forms of leisure. It has also created a profound sense of social connectedness and global community. But have massive investments in information and communication technologies (ICTs) generated faster growth, more jobs, and better services? Indeed, are countries reaping sizable digital dividends?

Technology can be transformational. A digital identification system such as India's Aadhaar, by overcoming complex information problems, helps willing governments to promote the inclusion of disadvantaged groups. Alibaba's business-to-business e-commerce site, by significantly reducing coordination costs, boosts *efficiency* in China's economy and arguably the world's. The M-Pesa digital payment platform, by exploiting scale economies from automation, generates significant financial sector *innovation*, with great benefits to Kenyans and others. Inclusion, efficiency, innovation—these are the main mechanisms for digital technologies to promote development.

Although there are many individual success stories, the effect of technology on global productivity, expansion of opportunity for the poor and the middle class, and the spread of accountable governance has so far been less than expected (figure O.2).[2] Firms are more connected than ever before, but global productivity growth has slowed. Digital technologies are changing the world of work, but labor markets have become more polarized and inequality is rising—particularly in the wealthier countries, but increasingly in developing countries. And while the number of democracies is growing, the share of free and fair elections is falling. These trends persist, not because of digital technologies, but in spite of them.

So, while digital technologies have been spreading, digital dividends have not. Why? For two reasons. First, nearly 60 percent of the world's people are still offline

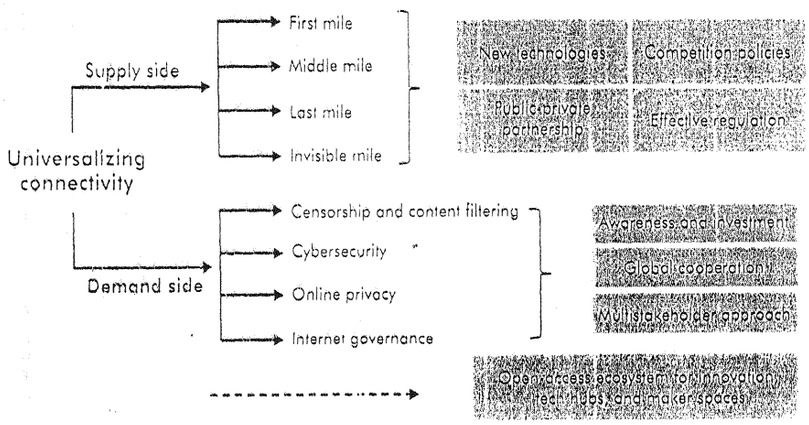
Box O.8 The four digital enablers *(continued)*

behavior in ways that are consistent with development, providing a platform for information and dissemination during natural disasters and emergencies, and encouraging political mobilization and social change. Some analysts think that social media played a critical role in recent events such as the Arab Spring and Occupy Wall Street, and thereby were instrumental in spreading democratic ideas, although many remain skeptical of their actual impact. There is still much to learn about the role social media can play in development. While a source for innovative ideas, social media also remain conduits for gossip, slander, misinformation, harassment, bullying, and crime. One important lesson is that the impact of social media on development seems to be highly specific to context. Variation in access to technology, education, and broader sociopolitical context matters. For instance, there is evidence that people in more autocratic countries are less likely to forward information (for example, by re-tweeting it).

Digital identity. Being able to prove who you are may seem trivial, but it can be transformational for those excluded from jobs and services. Simple electronic identification systems, often using biometric characteristics, have become an effective platform for secure bank transactions, voting, accessing social services, paying utility bills, and much more. Many countries, from Moldova to Nigeria and Oman, have introduced digital IDs. India is on track to register its entire population using its Aadhaar digital ID. In Estonia and other countries, thousands of different types of public and private transactions are verified within a unique electronic ID system, including legally binding contracts and voting in national elections.

Data revolution. In harnessing data for development, attention focuses on two overlapping innovations: "big data" and open data. Big data are voluminous or fast, and they come from myriad sources—from satellites to sensors and from clouds to crowds. Big data analytics is being deployed to improve traffic planning, estimate macro aggregates (also referred to as "nowcasting"), track the spread of epidemics, and improve credit scoring and job matching. Open data are those that are freely and easily accessible, machine-readable, and explicitly unrestricted in use. Governments are, or could be, the most important source of open data. Exuberant estimates of the current and potential economic value of big data and open data range from hundreds of billions to trillions of dollars per year. Yet sustained, impactful, scaled-up examples of big data and open data in developing countries are still relatively rare. Most big data are in private hands—large telecom and internet companies—which are reluctant to share it for fear of jeopardizing customer privacy or corporate competitiveness. Public agencies, too, are reluctant to share data, even when they have large public benefits. For example, of countries surveyed by the Open Data Barometer, one-third of the high-income countries and 85 percent of developing countries had made little or no progress in opening map data. Reasons include lack of technical skills, inadequate resources, and unwillingness to expose data to scrutiny.

Figure O.20 A policy framework for improving connectivity



Source: WDR 2016 team.

SPOTLIGHT 4

ENABLING DIGITAL DEVELOPMENT

Digital identity

Individuals need mechanisms to identify one another and to identify themselves to their communities and governments. While this point may be obvious, it is profoundly important for people's welfare. Simple mechanisms—familiarity, appearance, perhaps vouching by an elder—are sufficient in small, intimate communities. Wider societies and economies require more formal systems—traditionally physical tokens, such as a paper-based identification (ID) card that includes the signatures or representations of their holders, and is verified against documents stored in a central registry. But these formal systems are failing in the developing world. Nearly 2.4 billion people are not registered. They are usually the poorest and most marginalized members of society; about one-quarter are children.[1] They are excluded from a range of rights and services, such as health care, enrollment in school, social welfare, and financial services.

Identity should be a public good. Its importance is now recognized in the post-2015 development agenda, specifically as a Sustainable Development Goal (SDG) target to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable, and inclusive institutions at all levels."[2] One of the indicators is to "provide legal identity for all, including birth registration, by 2030." The best way to achieve this goal is through digital identity (digital ID) systems, central registries storing personal data in digital form and credentials that rely on digital, rather than physical, mechanisms to authenticate the identity of their holder. India's massive Aadhaar program, which has enrolled over 950 million people, has dispensed with the physical ID card altogether. Estonia has created an electronic legal representation of an individual. Through the use of personal identification numbers (PINs) to authenticate the holder against a digital card credential, people can access public services remotely and even sign legal documents and contracts with the same legal validity as if they were signed in person.

Contributed by Joseph Atick, Mariana Dahan, Alan Gelb, and Mia Harbitz.

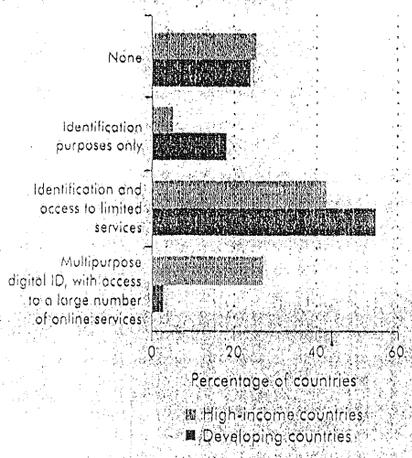
Country-specific use of digital identity

Most developing countries have some form of digital ID scheme tied to specific functions and serving a subset of the population, but only a few have a multipurpose scheme that covers the entire population. Eighteen percent of developing countries have a scheme that is used for identification purposes only; 55 percent have digital IDs that are used for specific functions and services like voting, cash transfers, or health; and only 3 percent have foundational ID schemes that can be used to access an array of online and offline services (figure S4.1). Twenty-four percent of developing countries have no digital ID system.

Although the concept of digital ID is universal, it plays somewhat different roles depending on the country context. In high-income countries, digital ID represents an upgrade from well-established, robust legacy physical ID systems that have worked reasonably well in the past. Belgium, Estonia, Finland, France, the Republic of Korea, and Singapore are some of the countries leveraging existing physical identity infrastructure to create digital ID ecosystems, enabling them to deliver public services more efficiently.

Low-income countries, by contrast, often lack robust civil registration systems and physical IDs and are building their ID systems on a digital basis, leapfrogging the more traditional physically based

Figure S4.1 Different types of digital ID schemes across countries



Source: World Bank ID4D database (various years). Data at http://bit.do/WDR2016-FigS4_1.

system. Identification, rather than e-services, is the main immediate goal. Such systems are being developed in Bangladesh, Guinea, and Kenya. One potential risk associated with leapfrogging to civil identification systems without a solid civil registration system is that in many cases the 0–18 population is excluded, and continues to be unregistered.

In middle-income countries, digital ID is strengthening and progressively replacing physical identity services while supporting the emergence of some e-services. Successful examples are found in Albania, India, Moldova, and Pakistan.

Evidence of impact

Evidence of the impact of digital ID is still largely anecdotal, but there is a growing body of research in at least three key areas—efficient management of social welfare programs, removing ghost workers from the government payroll, and improving the sanctity of elections.

Efficient management of social programs and welfare distribution

Digital IDs enable targeted cash transfers to bank accounts linked to a unique identifier. This ensures that those who are entitled to receive subsidies or benefits are actually getting them. For example, in India's fuel subsidy program, implementing cash transfers to Aadhaar-linked bank accounts to buy liquefied petroleum gas cylinders saved about US$1 billion per year when applied throughout the country.[3] This is just one of many subsidy programs in India that are being converted to direct transfers using digital ID, potentially saving over US$11 billion per year in government expenditures through reduced leakage and efficiency gains.[4] Other examples of the benefits of digital ID in reducing leakages for social protection or security programs, health insurance, and pension schemes due to duplicates, "ghost" beneficiaries, and corruption are occurring in Chile, the Arab Republic of Egypt, Ghana, Indonesia, Pakistan, South Africa, and Turkey.

Removing ghost employees from the government payroll

The budgets of many developing countries suffer from bloated civil service wages that leave little room for capital investments. For example, the public payroll occupies the bulk of the national budgets of Ghana, Uganda, and Zimbabwe, but weak systems imply that many individuals paid from the payroll do not actually work for the government, and may not even be alive.[5] Nigeria recently implemented a digital ID system for civil servants that enabled it to remove about 62,000 such ghost workers, saving US$1 billion annually, and providing a return on investment of nearly 20,000 percent in one year.[6] The impact of ghost workers is even worse in many other countries, ranging from 10 percent to as high as an estimated 40 percent in Zimbabwe, pointing to the substantial fiscal savings and efficiency gains from digital ID.[7]

Improving electoral integrity

Nigeria used digital IDs to prevent vote rigging in its 2015 elections.[8] The system enrolled about 68 million voters using biometrics (issuing voter cards that encoded the fingerprints of the rightful holder on a chip) and used card readers to authenticate voters, thus preventing 4 million duplicate votes. Although there were some operational challenges at the polls, the election was conducted successfully; all votes were cast, and it was difficult to rig or contest the results in the face of the transparency brought about by digital identity. However, other countries, such as Kenya and Somalia, have not reaped the same benefits from the biometric voter IDs.[9] Therefore, this remains an area of further research.

Developing effective digital ID schemes

Digital ID schemes rely on a backbone of connected systems, databases, and civil or population registries. These in turn have been established through a thorough enrollment process of the targeted population.

SPOTLIGHT 4

SPOTLIGHT 4

Many programs now include the use of both biometric data and traditional biographical data, as well as programs to eliminate duplicate enrollments to help ensure that each individual has only one registered identity and one unique identifying number.

The digital record is the basis for issuance of credentials, which may be cards equipped with bar codes or more advanced chip-based smart cards; they can also be single-function (and provide evidence only of identity) or multifunctional, with the card able to act as a bank card, driving license, and so on. India's Aadhaar program dispenses with the card altogether, providing remote authentication based on the holder's fingerprints or iris scan.[10] Online and mobile environments require enhanced authentication features—such as electronic trust services, which include e-signatures, e-seals, and time stamps—to add confidence in electronic transactions.

Mobile devices offer a compelling proposition for governments seeking to provide identity credentials and widespread access to digital services. In Sub-Saharan Africa, for example, more than half of the population in some countries is without official ID, but more than two-thirds of the residents in the region have a mobile phone subscription. The developing world is home to more than 6 billion of the world's 7 billion mobile subscriptions, making this a technology with considerable potential for registration, storage, and management of digital identity.

For a digital ID system to be effective, it must be rooted in an upgraded legal framework that considers the accessibility and protective measures of the system; clear definitions for the interconnectivity and interoperability with other (administrative or functional) registries; and coordinated investments throughout the country in information and communication technology (ICT) to develop a reliable and secure platform.

Digital identification systems may be developed in response to a specific application (elections, tax, social protection or security, pensions, health insurance, and the like), referred to as *functional schemes*.[11] Or they may be developed as universal multipurpose systems capable of supporting the entire range of needs for legal identity across all applications, known as *foundational identity schemes*. This distinction between functional and foundational systems is not immutable over time; often functional ones evolve to become foundational (in Bangladesh, Haiti, and Mexico, voter ID has become de facto national ID). No matter what the country context is, the priority should be to confer identity for all, either through a universal foundational scheme or through harmonization of the multitude of existing functional systems, so that in their totality they achieve full coverage.

Risks and mitigation

Digital ID schemes tend to be complex, are often politicized, and are subject to failure to deliver on high expectations. Risks associated with unsuccessful implementation can be mitigated by adopting guidelines that have emerged from the collective experience of digital ID schemes' rollouts around the world.[12] In this respect, several areas of focus emerge as critical:

- *Legal and regulatory concerns* about how to best determine the types, extent, and use of information collected under digital ID schemes; how to safeguard the privacy of personal data; and how to craft new primary legislation or rules to avoid unintended consequences such as inadvertent exclusions, onerous mandates that could deter individuals from accessing services, or increased rent-seeking involving registration or certificates.
- *Institutional and administrative concerns* about the institutional location of the civil and identification registries, and their interaction with functional registries or line ministries that need to verify or authenticate identities of beneficiaries or clients. The legal or foundational registries are traditionally located in the ministry of interior, justice, or home affairs, and more recently in special-purpose agencies independent of any line ministry (or loosely affiliated with one), and reporting to the center of government. Without effective coordination, there is a risk of a patchwork of competing schemes that would lack interoperability and consistency. The risk of exclusion would also be higher, as participation in functional IDs is a matter of program eligibility and not a birthright, as in foundational schemes.[13]
- *Technological concerns* about working with the private sector to develop a sustainable digital infrastructure that can reach remote areas and prevent exclusion; ensure interoperability and trusted authentication protocols for data exchange among different services and solution providers; and ensure data security, particularly in the use of biometrics, as well as the long-term accessibility and security of identity records.
- *Business models and procurement concerns* engendered by technology solutions that are tied to specific vendors; lack of open architecture anchored on modularity and open standards; lack of costing guidance

identify ghost workers, as in Nigeria, where a digital identification scheme for civil servants removed about 60,000 fictitious workers from the government payroll, saving US$1 billion annually.[68]

Establish population registers

Digital population registers can establish citizen identity and be leveraged later for a variety of applications through appropriate credential verification (see spotlight 4). The focus should be on developing the identity database and on the systems to ensure completeness and high quality. Only after the country has developed harmonized identity registers can it legitimately begin to tie e-services and issue the right credentials to support them. In many cases, countries, under vendor pressure, have prematurely procured costly smart cards, which then remained unused as the identity registers had not been developed first. India focused on enrollment and unique identity and launched the program without any smart cards or credentials, just an Aadhaar number communicated to individuals. Now, more than five years later, different programs are issuing application-specific credentials linked to the Aadhaar framework and database.

Scale up nonstate provision of services

Citizens in many low-income countries send their children to nonstate schools (for-profit or not-for-profit) and seek care from private health providers. Nonstate provision raises questions of equity and quality. These risks can be mitigated through regulations, disclosures, and public-private partnerships, such as voucher programs and contracting out. These programs, if implemented well, can be highly effective. In an educational scheme for marginal communities in rural Pakistan, the government paid the private provider a per-child subsidy, increasing primary school enrollments and boosting test scores by 30 percentage points.[69] These programs can also be compatible with the interests of even clientelist politicians, as they are likely to be supported by important stakeholders like the business community and private service providers.

Nonstate provision theoretically relies on the power of the market to solve accountability failures in ways that public provision cannot. But in practice, parents may lack the choice of alternative providers or the information on provider quality to "vote with their feet" and hold nonstate providers accountable. The impact of low-cost private schools on student learning is generally positive, but in some cases they can be even worse than their public counterparts.[70] Performance agreements between governments and nonstate providers require some contracting and monitoring capacity in government, and the collection and verification of data to hold nonstate providers accountable.

Digital technologies can improve the impact of these schemes through better data collection, monitoring, and dissemination of information on provider quality. Parents can make more informed decisions, fixing the market failures in private provision. Nondigital school report cards in Pakistan's rural Punjab for example, improved parental information, lowered private school prices, and boosted school quality.[71] Digital technologies can make these choices easier through simpler versions of the school and health care provider rating systems that are now commonplace in the high-income countries. And governments, in the absence of parental choice, can better hold the private providers to account.

Improve electoral accountability

Digital technologies are improving both the sanctity of elections and providing citizens with meaningful and actionable information on government performance. Although the number of electoral democracies in poor countries has increased over the past two decades, the integrity of elections in these new democracies is low. Over half of the elections over the past decade had irregularities either in the run-up to the election or on election day.[72] Elections are well-suited for digitally enabled monitoring. As high-profile events that attract significant international attention and scrutiny, improving electoral integrity may be possible even in politically difficult emerging country contexts.

Digital technologies can reduce election violence, as in Kenya and Mozambique, and uncover fraud in vote-counting, as in Afghanistan. Digital identification is being increasingly used to register voters. In Pakistan for example, ahead of the 2013 parliamentary elections, the digital identity database was used to clean the electoral rolls, leading to the removal of 37 million voters with either no, invalid, or duplicate identities, and the addition of 36 million new voters, mostly young and poor, who had valid identification.[73] Similarly, in the 2015 presidential election in Nigeria, biometric identification was used for the first time to enroll 68 million voters and to eliminate 4 million duplicate identities (see spotlight 4). Despite these successes though, biometric identification is not without its risks in emerging countries. Simpler, lower-cost monitoring technologies like cellphones that require fewer institutional complements may be preferable.[74]

Digital technologies can also improve electoral accountability by exposing corruption and abuse of office, thereby better enabling voters to sanction

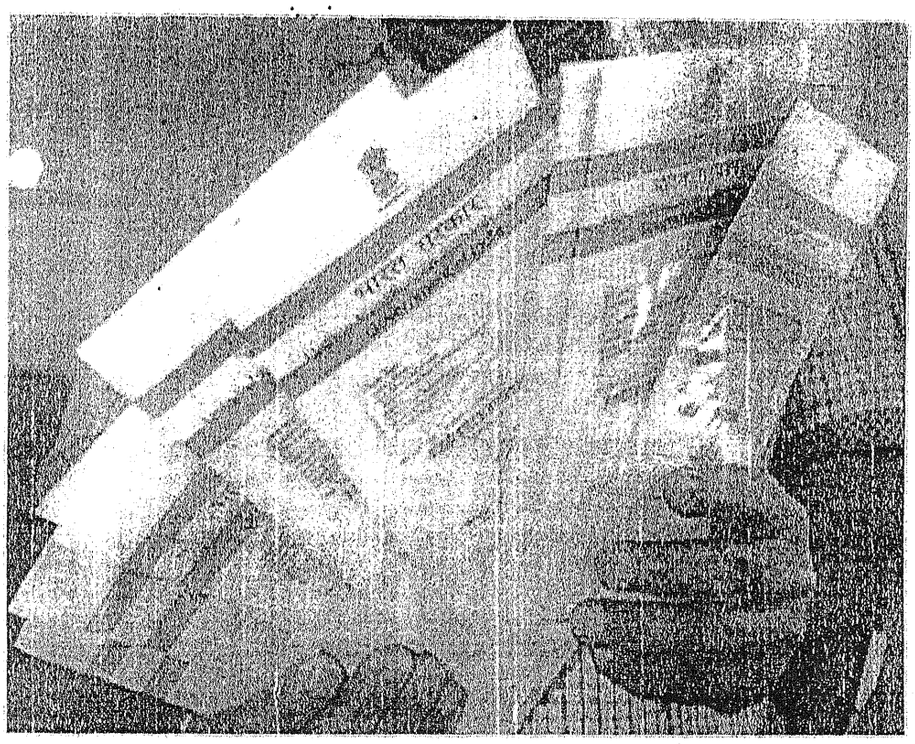
ANNEXURE-R-12 103

Business Standard

World Bank gives Aadhaar thumbs up; wants other nations to adopt it too

The Aadhaar system is the most sophisticated identification programme in the world, said Romer

BS Web Team | New Delhi March 17, 2017 Last Updated at 11:43 IST



Aadhaar

As the government is in the process of linking Aadhaar cards with an array of schemes and programmes amid criticism, the system has been lauded by World Bank chief economist Paul Romer. He feels that other nations should also adopt this system.

"The Aadhaar system is the most sophisticated identification programme in the world," said Romer in an interview with Bloomberg.

He further asserted that it is best to develop one standardised system so people can carry their IDs wherever they go in the world.

"It's the basis for all kinds of connections that involve things like financial transactions. It could be good for the world if this became widely adopted," Romer said.

Interestingly, countries like Tanzania, Afghanistan and Bangladesh have shown interest in the Aadhaar system and visited India, Nandan Nilekani, former chairman of the Unique Identification Authority of India (UIDAI), who created Aadhaar said.

In 2016, RS Sharma, chairman of Telecom Regulatory Authority of India (Trai) told Mint that Russia, Morocco, Algeria and Tunisia have also shown interest in Aadhaar.

However, many critics suggest that Aadhaar could put privacy at stake. In 2013, a group of petitioners, including a retired judge of the Karnataka High Court, approached the Supreme Court saying that the Aadhaar scheme is an "infringement" on the right of privacy of citizens.

In countries like UK, France and USA similar plans are widely debated. In 2010, UK announced that it was scrapping a plan for a national identity register after objections that it infringed on civil liberties, but it continues to issue biometric residence permits for foreigners. In France a mega database for biometric details of citizens is under the scanner. In US, identity theft complaints were the second-most reported in 2015, Federal Trade Commission said.

Romer rubbished such concerns saying, "It should be part of the policy of the government to give individuals some control over the data that the private firms collect and some control over how that data is used."

UIDAI says no reason to worry

The UIDAI has biometric and demographic details of 1,110 million residents.

"There has been no breach to UIDAI database of Aadhaar in any manner whatsoever and personal data of individuals held by UIDAI is fully safe and secure," the UIDAI, which was sent up in 2009 with an aim to provide a 12-digit unique identification number to all the residents after capturing their biometrics details, said in a statement.

The agency claimed that it has decided to encrypt data at the point of capture to strengthen the security features of Aadhaar eco-system. It noted that it has helped 44.7 million people to open bank accounts through Aadhaar e-KYC and enabled the government to directly transfer benefits into the accounts of beneficiaries of various schemes, including domestic cooking gas subsidy, scholarships, the Mahatma Gandhi National Rural Employment Guarantee Scheme and pension disbursal. ALSO READ: No data breach, Aadhaar transfer saved Rs 50,000 cr: UIDAI

.ne important schemes where Aadhaar is linked

- All disabled people receiving cash benefits such as transport cost, boarding and lodging cost, conveyance cost, cost for post placement support under the Central Sector Scheme for Implementation of Persons with Disability Act, 1995 are required to furnish Aadhaar as a form of identity or enrol for it on or before May 30 2017.
- All cash benefits under the Central Sector Sponsorship Scheme for Disabled People will be received by people who provide Aadhaar or get enrolled for it on or before May 30 2017.
- All women belonging to below poverty line families getting a new liquefied petroleum gas connection are required to provide Aadhaar in order to recover the expenditure and get subsidies under the Pradhan Mantri Ujjwala Yojana scheme . The last date for Aadhaar enrolment in case of this scheme is March 31 2017.
- Compensation received by the victims of the Bhopal gas tragedy will also require Aadhaar. For this scheme, the last date of enrolment for Aadhaar is May 30 2017.
- Under the Integrated Child Development Scheme (ICDS), the schools and Anganwadis have been asked to collect the Aadhaar number of the children beneficiaries of mid-day meal scheme and in case a child does not have Aadhaar, the school or ICDS functionary will be required to provide enrolment facilities to a child and till Aadhaar number is assigned, the benefits will continue, the government said in a statement. The last date for enrolling for Aadhaar is June 30 2017 for it.

ALSO READ: Not just mid-day meals: Aadhaar made mandatory for 11 more schemes

Government faces flak

Recently, the government faced a lot of flak for making Aadhaar mandatory for availing benefits for socially evant schemes like mid-day meal scheme and Integrated Child Development Scheme (ICDS) as critics were skeptical that the step is meant to curtail the benefits. The circular was also said to be in violation of Supreme Court guidelines.

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BRIEF NOTE ON AADHAAR

1. A few facts with regard to the Aadhaar Act, which is under challenge in these cases, are also noteworthy. Around 115 Crore residents of India are now enrolled with Aadhaar with an adult coverage of over 99%. The uniqueness of Aadhaar helps in elimination of duplicates and fakes from any beneficiary database, ensuring that the teeming millions of poor people of this country are now receiving the subsidies and benefits directly into their bank accounts, which they were hitherto deprived of. This has also led to immense savings through reduction of leakages and wastages and therefore, it sub-serves vital public interest, which ought not to be interfered with on account of the apprehensions raised in these petitions. There is also tremendous convenience to the old, infirm and the weaker sections of people who receive benefits like pensions etc at their door-step on account of Aadhaar based E-KYC.

2. It is also pertinent to note that it is incorrectly claimed by the petitioners that as per the Notifications under Section 7 of the Aadhaar Act 2016, people will be denied benefits if they do not enroll for Aadhaar by 30th June 2017 (now extended to 30th September 2017) and therefore people will suffer hardships. It may be noted that while the notifications require people to enroll for Aadhaar by 30th June, 2017(now extended to 30th September 2017), it is provided in the notifications themselves that if people are not able to enroll for Aadhaar before the time prescribed due to lack of enrolment facilities in the nearby areas, then they can register their request for Aadhaar enrolment before the appropriate authorities giving their contact details , so that as and when enrolment facilities are set up in the area, such persons can be enrolled for Aadhaar and for such people, benefits will continue to be given even if they have not enrolled for Aadhaar before 30th September, 2017. Moreover, there is also no question of any exclusion of any genuine beneficiaries, since Section 7 of the Aadhaar Act itself requires either Aadhaar authentication or furnishing proof of possession of Aadhaar number on the basis of which subsidies, benefits etc can be availed by the beneficiaries concerned. Therefore, the averment of the Petitioner that there is large scale exclusion on account of authentication failure etc is misplaced and untenable in law.

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WHAT DO WE MEAN BY "RIGHT TO PRIVACY"?

By FREDERICK DAVIS*

After tracing the evolution of the right to privacy in American and English law, Professor Davis contrasts it to related rights and suggests that however useful in the sociological sense, as a jural concept it conceals more than it explains. He goes on to point out that the main difficulty arises from the essentially derivative nature of the interest in privacy which makes the right to privacy itself a mere distillate of other more meaningful and explicit causes of action.

Without authorization a newspaper identifies and publishes photographs of a newly born two-headed baby, thereby adding to the emotional distress and mental suffering of the parents. An advertising agency uses a photograph of a school teacher, without her consent, to promote the sale of cough-drops, thereby subjecting her to bothersome questions, comments, and jokes, both in the classroom and the community. A famous politician discovers that a periodical, in an attempt to stimulate sales, is distributing free copies of his portrait. A newspaper columnist taps the telephone of a businessman and records his conversations. A student signs his professor's name to a letter to the editor and the letter is published. A retired prize-fighter finds that films of his early efforts in the ring, and which he can hardly remember having been filmed, are now, because of television, being shown to an audience of millions. A beer company uses a photograph of a famous baseball player on calendars promoting its beer. A garage mechanic and his family are subjected to incessant and aggravating telephone calls from a collection agency which has been assigned a legal debt owed by the mechanic. Do the victims of such events have any legal rights?

Although many judges and writers say that facts such as those imagined constitute an invasion of privacy, neither the South Dakota Code[1] nor the South Dakota Constitution[2] grants specific relief for

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1. The general provision of the South Dakota Code, dealing with rights and obligations of persons, guarantees protection against "personal insult" independent from defamation and injury to personal relations. SDC 47.0301 (1939). Whether this guar-

such wrongs and to date the South Dakota courts have not been obliged to decide whether remedies exist.[3] Nevertheless, extension of communications media and advertising techniques into new areas has increased the likelihood that such questions may arise.[4]

Nor are the illustrations entirely hypothetical. A number of cases have been decided dealing with similar or identical facts. Unfortunately, the decisions have not been uniform, even when cases involving almost indistinguishable facts have arisen twice in the same jurisdiction.[5] Both courts and legislatures have been troubled about

antee would be broad enough to cover the bundle of interests supposedly embraced by the right to privacy is difficult to say. No cases bearing directly on this point have been decided, but other cases indicate that the provision would be broadly construed in such an instance. See Smith v. Weber, 70 S.D. 233, 16 N.W.2d 537 (1944) (semble). The almost identical provision of the California Civil Code, CAL. CIV. CODE § 43 (Deering 1949), similarly lacks judicial construction, although it has been construed to warrant recoveries for the intentional infliction of mental suffering, Boulden v. Thompson, 21 Cal. App. 279, 131 Pac. 765 (1913). In one of the most famous cases granting compensation for mental suffering, however, the California Supreme Court ignored the relevant provision of the code, State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952), noted, 1 KAN. L. REV. 83 (1953).

2. The Bill of Rights of the South Dakota Constitution asserts the general right of every individual to protect property and pursue happiness. S.D. CONST., art. VI, § 1. Conceivably this provision is broad enough to enfold those interests commonly thought to make up the right to privacy, but no attempt has ever been made to push it that far. In California, however, an almost identical provision of the California Constitution, CAL. CONST., art. I, § 1, has been the exclusive basis upon which California courts recognize a right to privacy. Melvin v. Reid, 112 Cal. App. 525, 297 Pac. 91 (1931).

3. In a number of cases the South Dakota Supreme Court has indicated that it is not reluctant to grant relief just because the injuries suffered are not classifiable under orthodox theories of recovery, Swanson v. Ball, 67 S.D. 161, 290 N.W. 482 (1940) (loss of consortium resulting from defendant's serving booze to plaintiff's husband); Racich v. Mastrovich, 65 S.D. 321, 273 N.W. 660 (1937) (spite fence); and Simmons Hardware v. Waibel, 1 S.D. 495, 47 N.W. 816 (1891) (threatened interference with common law property right in an uncopyrighted pricing system and catalogue). In a proper case, therefore, it is not unlikely that the Court would protect interests commonly classified under the label of a right to privacy.

4. Among the states whose jurisprudences recently have been examined to determine whether a right to privacy exists, are Arizona, Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954); Reed v. Real Detective Publishing Company, 63 Ariz. 294, 162 P.2d 133 (1945); Illinois, Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 742 (1952); Iowa, Bremer v. Journal Tribune Publishing Co., 247 Iowa 817, 76 N.W.2d 762 (1956); Minnesota, Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957 (4th Div. Minn. 1948); Montana, Welsh v. Pritchard, 125 Mont. 517, 241 P.2d 816 (1952); Nebraska, Brunson v. Ranks Army Store, 161 Neb. 519, 73 N.W.2d 803 (1955); Pennsylvania, Hull v. Curtis Publishing Co., 182 Pa. Super. 86, 125 A.2d 644 (1956); West Virginia, Roach v. Harper, 105 S.E.2d 564 (W. Va. 1959); Wisconsin, Yoeckel v. Samonig, 272 Wis. 430, 75 N.W.2d 925 (1956); and Wyoming, Note, 11 WYO. L.J. 184 (1957). The Wyoming note-writer suggests that the provisions of the Wyoming Constitution which require both truth and good intentions as defenses to an action for civil libel, in effect sanction a right to privacy. The same argument could be made in South Dakota because of the similar wording of the South Dakota Constitution:

> ". . . the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." S.D. CONST., art. VI, § 5.

Even if valid, however, this argument holds true only for a small part of the area ordinarily claimed for the right to privacy; namely, the right to be free from disparaging publicity.

5. In Binns v. Vitagraph Co. of America, 210 N.Y. 51, 103 N.E. 1108 (1913), plaintiff, who had been the principal hero in a widely publicized ocean rescue operation, recovered for an unauthorized dramatization of his part in the event. In Molony v.

whether relief should be given in such circumstances, and, if so, on what grounds. Much of their difficulty stems from the question whether such persons have suffered from an invasion of "privacy" or whether more recognizable interests have been abused.

I.

Background and Credentials of the Right to Privacy

In the common-law world, at least, Samuel D. Warren and Louis D. Brandeis are the acknowledged promoters of the right to privacy. Although the late Judge Cooley had proposed a "right to be let alone",[6] it remained for Warren and Brandeis to give this proposal specific expression. They did this in a famous article entitled "The Right to Privacy" which the Harvard Law Review published in 1890.[7] It is doubtful if any other law review article, before or since, has achieved greater fame or recognition. Prior to publication no English or American court had ever recognized such a right. Since publication, a number of jurisdictions have granted relief on the basis of this right and, more often than not, have used the Warren-Brandeis article in support of the results reached.[8]

By masterful reasoning Warren and Brandeis contended that a number of cases which had afforded relief on the basis of an invasion of some property right, for a breach of trust, defamation, etc., were in fact based upon a more important principle, namely, the inviolability of an individual's privacy. None of the cases analyzed by these authors had afforded relief on the specific ground of a right to privacy, and the only American case remotely touching upon the concept, *De May v. Roberts*,[9] was not mentioned. The authors' arguments were so convincing, however, that they won immediate and enthusiastic support from various quarters.[10]

The early experience of the right to privacy was, however, a dis-

Boy Comics Publishers, 277 App. Div. 166, 98 N.Y.S.2d 119 (1st Dep't 1950), plaintiff, who had been a hero under similar circumstances (the crash of a four-engined bombing plane into New York's Empire State Building) was denied recovery for an unauthorized and augmented account of his activities at the time of the disaster. See Note, 37 Cornell L.Q. 283, 285 (1952).

6. Cooley, Torts 29 (1880).

7. Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

8. In the first case accepting the right to privacy as a theory of recovery, the court acknowledged its indebtedness to the Warren-Brandeis article, Pavesich v. New England Life Insurance Co., 122 Ga. 190, 50 S.E. 68 (1904). Similar homage is paid by the important recent cases. See, for example, Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 742 (1952).

9. 46 Mich. 160, 9 N.W. 146 (1881).

10. On August 23, 1902, the New York Times published an editorial lauding the concept of a right to privacy, a copy of which appears in O'Brien, *The Right of Privacy*, 2 Col. L. Rev. 437 (1902). For a compendium of articles adopting the reasoning advanced by Warren and Brandeis see Prosser, Torts 636 (2d ed. 1955).

appointment to its promoters. Its first real test came in the now famous case of *Roberson v. Rochester Folding Box Company*[11] in which the defendant had admittedly used lithographs of plaintiff's portrait to advertise its flour. The New York Court of Appeals, in a four-to-three decision, rejected the right to privacy, while indicating that a suit based upon some other theory (e.g. expropriation of some property right) might have succeeded.[12] This last point, although frequently overlooked by critics of the *Roberson* case, moved the editors of Lawyers Reports Annotated to comment as follows:

> "This is a case of extraordinary interest and importance. But it is greatly to be regretted that its determination has been made to depend almost entirely on the question of a right of privacy. It would have been far more satisfactory if the case had been so presented and decided as to give full consideration to the question of the right of a person to be protected against the essentially defamatory use of his or her portrait in such manner as to cause disgrace or discredit, and the question of the property right of a person in the use of his or her own portrait, which will be protected against the unauthorized use of it by other persons for advertising purposes."[13]

Despite early setbacks the right to privacy appears today to be accepted by a majority of American jurisdictions.[14] It has never been recognized in England, Australia, New Zealand, Canada, or other jurisdictions sharing the heritage of the common law.[15]

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11. 171 N.Y. 538, 64 N.E. 442 (1902).

12. Judge Parker delivered the opinion of the court in the Roberson case. His unwillingness to consider other bases for relief probably stemmed from an extremely narrow view of equity jurisdiction and an insistence that the case be decided on the tender academic thread whether the plaintiff's allegations spelled out a cause of action traditionally encompassed by equity. Roberson v. Rochester Folding Box Company, 171 N.Y. 538, 64 N.E. 442 (1902) (passim).

13. 59 L.R.A. 478-479 (1903).

14. Definitely recognizing the right to privacy are Alabama, Alaska, Arizona, California, the District of Columbia, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nevada, New Jersey, North Carolina, Oregon, and South Carolina. PROSSER, TORTS 636 (2d ed. 1955), and cases cited. Ohio, Pennsylvania, Tennessee, and West Virginia seem ready to be added to Dean Prosser's list. Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956); Langford v. Vanderbilt University, 199 Tenn. 389, 287 S.W.2d 32 (1956) (dicta); Hull v. Curtis Publishing Co., 182 Pa. Super. 86, 125 A.2d 644 (1956) (dicta); Roach v. Harper, 105 S.E.2d 564 (W. Va. 1959). Probably recognizing the right are Colorado, Maryland, Minnesota, and Mississippi, PROSSER, *op. cit.* 637, *supra*, and cases cited.

15. In England, breach of a confidential relationship or some sort of copyright infringement are the best bases upon which to win protection for interests similar to those claimed for the right to privacy, see Stephenson, Jordan and Harrison v. Macdonald and Evans, (1952) 69 R.P.C. 10 (C.A.) and Nichrotherm Electrical Co. Ltd. v. Percy, (1957) R.P.S. 207 (C.A.). Another way in which English courts grant relief is by hallucinating a libel, Tolley v. Fry, (1931) A.C. 33 (An unauthorizel advertisement pictured plaintiff relishing defendant's chocolates. It was held that plaintiff's

Numerous means have been employed to give effect to the right to privacy. Approximately thirty states have it by virtue of judicial decision.[16] In four states a limited right to privacy has been enacted by the respective state legislatures.[17] The right still appears to be rejected in Massachusetts,[17a] Nebraska,[17b] Wisconsin,[18] Rhode Island,[19] and Texas,[20] while in the remaining jurisdictions there is no real evidence either way. Even where adopted by judicial decision, however, there is inconsistency. Some courts have based recognition on fundamental principles of common law,[21] others on constitutional mandate,[22] and still a third group, on something called "natural law".[23]

It is not only the credentials of the right to privacy which cause disagreement, however. There is conspicuous lack of concord about the scope of interests supposedly embraced by the right. Warren and Brandeis wanted the scope wide, and included within it the rights of performers and artists to have their creations protected.[24] Few courts have gone this far, but considerable dispute still rages over the substantive limitations of the right, even in those jurisdictions which nominally have accepted it.

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standing as an amateur golfer had been libeled by implying that he had received money for the ad. Apparently a non-athlete, or a professional golfer, would have been without remedy.). In McCulloch v. May (1947) 2 All E.R. 855, Uncle Mac, a radio announcer popular with children, unsuccessfully challenged the appropriation of his title by a breakfast food company. The court held that the expropriation of the name did not come within the technical definition of libel, which was the only theory on which he would be permitted to recover. The only known references to the right to privacy in English legal literature is the famous article by Winfield, Privacy, (1931) 47 L.Q.R. 23, and the comparative law treatments by Gutteridge and Walton, The Comparative Law of the Right to Privacy, (1931) 47 L.Q.R. 203, 219.

16. See note 14 *supra*.

17. New York: N.Y. CIVIL RIGHTS LAW §§ 50, 51; Oklahoma: OKLA. STAT. ANN. tit. 21, §§ 839, 840 (West 1958); Utah: UTAH CODE ANN. §§ 76-4-8, 76-4-9 (1953); and Virginia: VA. CODE ANN. § 8-650 (1950).

17a. Marek v. Zanol Products, 298 Mass. 1, 9 N.E.2d 393 (1937) (semble).

17b. Brunson v. Ranks Army Store, 161 Neb. 519, 73 N.W.2d 803 (1955).

18. Yoeckel v. Samonig, 272 Wis. 430, 75 N.W.2d 925 (1956).

19. Henry v. Cherry and Webb, 30 R.I. 13, 73 Atl. 97 (1909).

20. Milner v. Red River Valley Pub. Co., 249 S.W.2d 227 (Tex. 1952).

21. Typical of the reasoning of courts recognizing a common law right of privacy is that of the Oregon Supreme Court:

"The common law's capacity to discover and apply remedies for acknowledged wrongs without waiting on legislation is one of its cardinal virtues."

Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P.2d 438, 447 (1941).

22. Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931). See note 2 *supra*.

23. In Pavesich v. New England Mutual Life Co., 122 Ga. 190, 50 S.E. 68, 69-70 (1905) it was held:

"The right of privacy has its foundation in the instincts of nature. . . . A right of privacy in matters purely private is therefore derived from natural law."

In McGovern v. Van Riper, 137 N.J. EQ. 24, 43 A.2d 514, 519 (1945), it was asserted:

"It is now well settled that the right of privacy having its origins in natural law, is immutable and absolute and transcends the power of any authority to change or abolish it." (sic)

24. Warren and Brandeis, *op. cit. supra* note 7, at 213.

II.

DIFFICULTIES PRESENTED BY THE ABSTRACT NATURE OF THE CONCEPT OF "PRIVACY"

Individual interests and desires are, almost by definition, subjective. Some interests and desires are so universally shared by members of society, however, that their protection, whether by law or custom, is accepted as a matter of course. When protected by law these interests become rights. Other interests are not so universally shared, while still others may be peculiar only to one individual or group.

The interest in being free from physical attack, injury, and physical pain inflicted by another human being is almost universal. In all common law jurisdictions it is protected by law. Although the intensity of the pain suffered by the individual victims of physical attacks varies from case to case, the physical manifestations of the event are almost always there to see. The lump on the head, the broken leg, the severed ear, etc., are objective facts susceptible to some sort of measurement and apprehension.

Injury resulting from an invasion of privacy, on the other hand, is not nearly so susceptible to objective evaluation. Privacy is defined as a

> "State of being apart from the company or observation of others; seclusion; as, unwilling to disturb his *privacy*."[25]

Obviously, this interest is not one which everyone wishes protected at all times and to the same degree. Although everybody desires some sort of seclusion, and nearly everyone desires that certain aspects of his personal affairs be immune from public scrutiny, the *degree* of such seclusion, or the *extent* to which secrecy is desired varies from individual to individual. While the extrovert is pleased and flattered by publicity, the recluse may be made physically and mentally ill. Injury resulting from an invasion of privacy is, therefore, far more subjective than that resulting from physical attack. It is also singularly difficult to measure. Although difficulty in measuring damages is a poor excuse for denying recovery,[26] it can certainly be said that one of the main reasons why the right to privacy has been refused unreserved acknowledgment is the traditional reluctance of courts to grant recoveries based upon findings as to a "state of mind". This is particularly true where there is no parallel or connected physical injury from which the state of mind can be inferred.

25. WEBSTER'S NEW INTERNATIONAL DICTIONARY, (2d ed. 1958).

26. For a criticism of the judicial reluctance to compensate mental suffering on grounds that it is impossible to measure damages and that such recoveries would open "floodgates", see PROSSER, TORTS, 38-39 (2d ed. 1955).

Militating against this traditional position of the courts, however, is the immediate and compelling social attractiveness of the concept of a "right to privacy". Especially in this day and age, the right to privacy has a slogan-like appeal similar to that of "pursuit of happiness", "natural justice", "due process of law", "freedom from fear", and other such ideals. The trouble with most of these ideals is that however understandable they seem in the abstract, they are difficult to define in application. Recently, in *Bell v. Birmingham Broadcasting Corporation*,[27] the Alabama courts discovered this truth. After three appeals and a retrial,[28] the Alabama Supreme Court finally convinced the Jefferson County Circuit Court that the only cause of action accruing to a radio sports announcer, whose name and portrait had been utilized by the defendant in the promotion of defendant's services, was an action for invasion of privacy. Yet it was admitted that plaintiff was a well known figure in the State of Alabama; that publicity did not disturb him; that his income depended upon his being in the public eye; and that for him, at least, seclusion spelled professional disaster.

The *Bell* case, like some others before it, came to grips with the question whether invasion of privacy consists of mental suffering stemming from unwarranted publicity, or whether the wrong consists of an unwarranted exploitation, for purposes peculiar to the defendant, of plaintiff's personality. The Alabama Supreme Court said that either or both types of behavior can give rise to an invasion of privacy, but this view is not universally shared.

In order to understand what is really meant by the right to privacy, and, perhaps, to explain the conflicting decisions as to its scope, it is helpful to consider the right in relationship to traditional tort causes of action of a similar nature and which arise out of comparable circumstances.

III.

Relationship to a Cause of Action Based Upon Defamation

It has been said that an action for invasion of privacy is closely allied to an action for defamation.[29] Although a technical distinction has been made that an action for defamation must be grounded upon

27. 266 Ala. 266, 96 So. 2d 263 (1957).

28. Reversed and remanded on ground that invasion of privacy is the only cause of action for the unwarranted use of one's name, Birmingham Broadcasting Co. v. Bell, 259 Ala. 656, 68 So. 2d 314 (1953); reversed and remanded for failure to admit evidence as to custom of trade, Bell v. Birmingham Broadcasting Co., 263 Ala. 355, 82 So. 2d 345 (1955); reversed and remanded for failure to deny defendant's demurrer based on alleged waiver of right to privacy, Bell v. Birmingham Broadcasting Co., 266 Ala. 266, 96 So. 2d 263 (1957).

29. 41 Am. Jur. *Privacy* §§ 1, 2 (1942).

real injury to reputation, while an action for invasion of privacy does not require that plaintiff must have suffered ridicule or contempt, certainly both actions attempt to compensate the plaintiff for injuries to his feelings. However much we try to disguise the truth by saying that the action for defamation is not concerned with mental suffering or injured feelings, common experience tells us this is not true. We all know that individual pride is the prime motivator of such suits.

While truth is ordinarily a good defense to an action for defamation,[30] it is not a defense to an action for an invasion of privacy.[31] Is this distinction important? Superficially, yes, but it must be remembered that truth was never a complete defense to criminal libel, and that many writers have criticized the rule that truth is an absolute defense to civil actions for defamation.[32] The critics of this rule reason that it is unjust to provide assassins of reputations with such an effective legal defense, a defense which almost pre-empts the court from an examination of defendant's motive in publishing the defamatory material. Beyond that, reason the critics, John Citizen can be just as much hurt by the unwarranted publication of true statements as by false. The last argument admits what legal pundits have ignored for centuries, namely, that the real interest protected by the action for defamation is, in most cases, the mental feelings of the victim. In this respect, therefore, the action for defamation is not only akin, but identical to the action for invasion of privacy.

Because both causes of action protect the peace of mind of the individual, it takes little further analysis to see that both torts share an artificial rationale bearing no relation to actual conditions. Both were contrived to provide damages for mental suffering during eras when courts were unwilling to accept such a straight-forward basis for recovery.[33] In the classic action for defamation the tort-feasor is supposed to have caused damage to some intangible yet independent

30. PROSSER, TORTS, 630 (2d ed. 1955). In South Dakota the defendant would seem to be required to show good motives and proper purpose as well as truth in a defense to libel. S.D. CONST., art. VI, § 5. See note 4 *supra*.

31. Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931).

32. For a compilation of the arguments and authorities militating against the rule that truth is an absolute defense to a civil action for defamation, see Harnett and Thornton, *The Truth Hurts: A Critique of a Defense to Defamation*, 35 VA. L. REV. 425 (1949).

33. The unwillingness of courts to compensate a person for his mental suffering compelled them to make the "damage" and not the "insult" the cause of action for defamation. One eminent writer says that this caused the law to go wrong from the beginning. POLLOCK, LAW OF TORTS, 249 (13th ed. 1929). Another famous author stated:

"That our law of defamation is full of anomalies is now well recognized, and we need waste no words in showing it is so."

1 STREET, FOUNDATIONS OF LEGAL LIABILITY 273 (1906). Strangely enough, once defamation is established, proof of mental suffering is freely admitted as evidence of damage. See Bedtkey v. Bedtkey, 15 S.D. 310, 89 N.W. 479 (1902).

entity called "reputation".[34] When the right to privacy is invaded, the damage is supposedly to a similarly metaphysical and similarly independent thing called "privacy". Although it can be argued that reputation is a "fact" which seriously affects the economic potential of the individual, it cannot be said that every action for defamation is brought to recover for damage to this potential. In some cases the concerned interest may be entirely economic, as where plaintiff is falsely reported to be suffering financial difficulties.[35] In other cases the interest may be in peace of mind or freedom from mental anguish, as where plaintiff is reported to be a bastard.[36] In particular cases, drawing the line may be difficult, but this difficulty only illustrates shortcomings inherent in the concept of defamation itself. The wounding of pride remains the gravamen of the tort.

Like "defamation", therefore, the concept of "privacy" seems to obscure the true nature of the interest invaded. Perhaps an even closer relationship between the two concepts arises out of the fact that causes of action based upon them result in damages for injuries which are peculiarly subjective and which are frequently unaccompanied by parallel physical injury. The histories of both causes of action suggest that some confusion would be avoided if mental suffering were recognized as an independent tort.[37] In many actions for invasion of privacy and defamation, mental suffering is the principal injury sustained by plaintiff.

IV.

Relationship to a Cause of Action Based Upon Interference With an Interest in Property

In their broad claim for the right to privacy, Warren and Brandeis referred to interests which are today better protected either by a more realistic conception of "property", or by judicial recognition that twentieth century social changes have expanded the spectrum of protectible interests.[38] Many of the early cases on the basis of which

34. Waite v. Stockgrowers' Credit Corporation, 63 N.D. 763, 249 N.W. 910 (1933).

35. Herrick v. Lapham, 10 Johns 281 (N.Y. 1813).

36. Barth v. Hanna, 158 Ill. App. 20 (1911).

37. Wade, *Tort Liability for Abusive and Insulting Language*, 4 Vand. L. Rev. 63 (1951), Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874 (1939), and Note, *Mental Disturbance in the Law of Torts—A Problem of Legal Lag*, 6 West. Res. L. Rev. 384 (1955).

38. "The principle which protects personal writings and any other production of the intellect or of the emotions, is the right to privacy. . . ."
Warren and Brandeis, *op. cit. supra* note 7, at 213. The above assertion has not been accepted.
"We think a distinction should be made. . . . Where a professional performer is involved, there seems to be a recognition of a kind of property right in the performer to the product of his services."
Judge Biggs in Ettore v. Philco Television Broadcasting Corporation, 229 F.2d 481, 487 (3d Cir. 1956).

Warren and Brandeis urged recognition of a right to privacy were, in fact, cases giving relief for injury to some interest in property.[39] In 1890, however, the common understanding of the word "property" was quite narrow. For this reason one can understand their apprehension that the concept was too narrowly orthodox to permit relief in a large number of instances where relief was required. Their eloquent plea to protect performances and intellectual productions on the basis of "privacy" rather than "property" was, with regard to the age for which they wrote, justified. In the light of today's law, however, the plea would not appear so reasonable.

So wide has the concept of property expanded and so developed are causes of action based upon unfair competition and unjust enrichment, that today recoveries grounded upon such theories are liberally granted. Thus, property rights have been recognized in the timely reporting and collection of news items,[40] in athletic spectacles,[41] in musical performances,[42] in real estate directories,[43] in collections of names having unique qualities,[44] in ideas,[45] and in sports performances.[46] The old law of unfair competition which required plaintiff to show some "palming off" or actual competition[47] has undergone substantial change.[48] Today, in many courts, plaintiff need only show access and deliberate expropriation of something having demonstrable utility and which was under the exclusive possession and control of the plaintiff. Two recent cases have made explicit the distinction between the property interest in intellectual or artistic creations, and

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39. Chief among the cases relied upon by Warren and Brandeis were Gee v. Pritchard, 36 Eng. Rep. 670 (1818) and A-G *ex rel.* Prince Albert v. Strange, 41 Eng. Rep. 1171, 64 Eng. Rep. 293 (1849).

40. International News Ser. v. Associated Press, 248 U.S. 215 (1918).

41. National Exhibition Co. v. Fass, 143 N.Y.S.2d 767 (Sup. Ct. N.Y. County 1955), Pittsburgh Athletic Co. v. KQV, 24 F. Supp. 490 (W.D. Pa. 1938).

42. Metropolitan Opera Ass'n v. Wagner Nichols Recorder Corp., 279 App. Div. 632, 107 N.Y.S.2d 795 (1st Dep't 1951).

43. Real Estate Register v. Baird, 97 N.Y.S.2d 868 (Sup. Ct. Kings County 1950).

44. *Id.*

45. Trenton Industries v. A. E. Peterson, 165 F. Supp. 523 (S.D. Cal. 1958).

46. Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir. 1956).

47. For a discussion of the historic rule, now fairly well repudiated, which required "palming off" as an element of unfair competition, see Soft-Lite Lens Co. v. Ritholz, 301 Ill. App. 100, 21 N.E.2d 835, 838 (1939):

> "The 'palming off' doctrine has been accepted by the courts in England and America . . . as the rule of law itself, and not as a descriptive term or classification of the most typical cases illustrative of the rule."

48. "Unfair competition is a form of unlawful business injury. Originally, it consisted in palming off, or in attempting to pass off, the goods, products or business of another as and for one's own. . . . In the modern acceptation of that term it includes not only any misrepresentation as to one's goods, products or business, but also any misappropriation of the trade name, trade mark, reputation, or good will of another."

Harvey Machine Co. v. Harvey Aluminum Corp., 9 Misc. 2d 1078, 175 N.Y.S.2d 288, 291 (Sup. Ct. N.Y. County 1957).

interests in the physical media used to project and circulate the creations.[49]

Beyond intellectual and artistic creations, it can be argued that the potential utility of the individual's personality itself ought to be protected against unwarranted interference and exploitation. The more logical way to extend such protection here, also, is to recognize it as property. If the defendant has taken the name, photograph, or personal details of plaintiff's life, and has used any of such matters to promote some scheme of his own, plaintiff should recover, irrespective of any mental suffering which plaintiff may or may not have endured. Whether the expression "property" is used, or whether we leave the interest unlabelled, it is an interest worthy not only of protection, but of straightforward recognition.[50]

It should be noted that the property interest may not be the only interest injured. If plaintiff has also suffered compensable emotional distress, he probably ought to recover on an additional count. But here the tort cause of action is based upon defendant's infliction of mental suffering. Although both causes of action (i.e. unlawful expropriation of personality as well as infliction of mental suffering) can arise out of one single act, the interests damaged are demonstrably different. One is the individual's interest in exploiting, or not exploiting, in his own way and in his own time, his own personality, circumstances, or creations. The other interest is one in peace of mind, freedom from distress, freedom from embarrassment, or, in short, Cooley's "right to be let alone."

Despite classical theories to the contrary, many of the circumstances which are said to give rise to invasion of privacy do no such thing. This is especially true where a public figure such as a movie star has had his name associated with commercial enterprise.[51] Such a situation, although persistently referred to by some as invasion of privacy, better exemplifies expropriation of property rights in personality. Failure to distinguish between mental suffering and exploitation

49. Richards v. C.B.S., 161 F. Supp. 516, 518 (D.C. 1958), Pickford Corp. v. De-Luxe Labs., 161 F. Supp. 367 (S.D. Cal. 1958). In the latter case plaintiff's cause of action was held barred by the statute of limitations, thus preventing a judicial consideration of the very controversial question whether there can be a "conversion" of incorporeal and intangible property—herein of sights and sounds emanating from film.

50. "Whether it (the interest) be labelled a 'property' right is immaterial; for . . . the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth."
Judge Frank in Haelen Labs. v. Topps Chewing Gum, 202 F.2d 866 (2d Cir. 1953).

51. For a sympathetic case in which plaintiff movie-star was denied relief despite an outrageous expropriation of the economic utility of his personality, see Chaplin v. N.B.C., 15 F.R.D. 134 (S.D.N.Y. 1953). A case involving both expropriation of personality and infliction of mental suffering is Kerby v. Hal Roach Studios, 53 Cal. App. 2d 267, 127 P.2d 577 (1942).

of name frequently makes it impossible to tell whether an alleged invasion of privacy is an interference with seclusion or unlawful appropriation of personality.

V.

Relationship to Causes of Action Based Upon Physical Intrusion

Included among acts said to constitute an invasion of privacy are types of conduct which would traditionally warrant the issuance of an injunction, or, perhaps, an action based upon trespass. The earliest American case on the subject, *De May v. Roberts*,[52] involved an outsider's intrusion upon plaintiff's childbirth. Plaintiff sued and recovered from both the intruder and the doctor who permitted the intrusion. Although the Michigan Supreme Court mentioned that ". . . plaintiff had a legal right to . . . privacy . . ."[53] the theories of recovery were the doctor's deceit in procuring the intruder's admission to the premises, and the intruder's trespass.[54]

Disturbing plaintiff's physical solitude by invading her stateroom, which probably involved a trespass, also has been held to be an invasion of privacy.[55] So, similarly, have been the unpermitted taking of a blood test[56] and the tapping of telephone lines[57]—acts which are also classifiable as trespasses of one sort or another. Further, it has been suggested that shadowing the plaintiff,[58] looking into his windows,[59] or investigating his bank account,[60] all of which have been held actionable on other grouds, might, in addition, constitute invasions of privacy. Even more recent candidates for the right to privacy label

52. 46 Mich. 160, 9 N.W. 146 (1881).
53. De May v. Roberts, 46 Mich. 160, 9 N.W. 146, 149 (1881).
54. *Id.*
55. Byfield v. Candler, 33 Ga. App. 275, 125 S.E. 905 (1924).
56. Bednarik v. Bednarik, 18 N.J. Misc. 633, 16 A.2d 80 (1940). In this case it was held that the court could not order a defendant to submit to a paternity blood test, even though such procedure was authorized by statute, because the right to privacy transcended the legislative enactment. The case, commonly cited for a proposition with regard to which it is dicta at most, was later overruled. Anthony v. Anthony, 9 N.J. Super. 411, 74 A.2d 919 (1950); Cortese v. Cortese, 10 N.J. Super. 152, 76 A.2d 717 (1950).
57. Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46 (1931). But in Chaplin v. N.B.C., 15 F.R.D. 134 (S.D.N.Y. 1953), it was held no invasion of privacy for a party to a telephone conversation (as opposed to an outsider) to record it, and in Schmukkler v. Ohio-Bell Tel. Co., 116 N.E.2d 819 (Ohio C.P. 1953) it was held no invasion of plaintiff's privacy for the telephone company to monitor plaintiff's calls in order to determine whether he was using the telephone for business purposes.
58. Schultz v. Frankfort Marine Acc. and Plage G. Ins. Co., 151 Wis. 537, 139 N.W. 386 (1913).
59. Moore v. New York Elev. R.R. Co., 130 N.Y. 523, 29 N.E. 997 (1892) (semble); *contra,* Cohen v. Perrino, 355 Pa. 455, 50 A.2d 348 (1947).
60. Brex v. Smith, 104 N.J. Eq. 386, 146 Atl. 34 (1929); United States v. First Nat'l Bank of Mobile, 67 F. Supp. 616 (S.D. Ala. 1946) (semble). See 5 Zollman, Banks and Banking 379-380 (Perm. ed. 1936).

are causes of action based upon a creditor's attempt to secure assistance from the debtor's employer to compel debtor to pay,[61] and dunning techniques outrageous to ordinary sensibilities.[62]

In this relationship, again, invasion of privacy seems to be a compound of other wrongs. In some instances, as where there is a direct interference with person or property, the wrong would be one traditionally encompassed by trespass. In other instances, such as the use of dunning techniques causing acute emotional distress, the wrong would be covered by the action grounded upon the infliction of mental suffering. In many cases both wrongs are probably involved. In such instances both wrongs should be recognized and it should be admitted that two causes of action exist, not because the law must be enslaved to forms of action, but because two distinct interests have been injured. The trouble with the assertion that persons suffering from certain trespasses and physical interferences really suffer from invasion of "privacy" is that it assumes what is demonstrably untrue, namely, that the interest involved is invariable and unchanging. As we have seen, the interest may actually vary from that of being free from physical injury to the interest in peace of mind.

Where events giving rise to actions based upon trespass to person or land are also claimed to constitute an invasion of privacy, the right to privacy frequently serves as a disguise for a cause of action based upon the infliction of mental suffering or emotional distress. It is difficult to see, therefore, what profit is gained by employing the indirect label. The relationship is too remote.

VI.

Legislative Recognition of the Right to Privacy: The Unhappy Experience of New York

In 1902, the New York Court of Appeals decided that a young lady whose photograph had been used to promote the sale of flour had no cause of action for invasion of privacy.[63] Public disapproval was articulate and widespread.[64] That the unfortunate holding was largely a result of her attorneys' failure to plead and stress alternative theories of recovery was overlooked. Instead, the highly questionable assumption was made that there was a "gap" in the law which only legislation could fill. Accordingly, in 1909, the New York legislature

61. Gouldman-Taber Pontiac, Inc. v. Zerbst, 96 Ga. 48, 99 S.E.2d 475 (1957).
62. Housh v. Peth, 99 Ohio App. 485, 135 N.E.2d 440 (1955).
63. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).
64. The New York Times published a bitter editorial denouncing the decision in the Roberson case. See note 10 *supra*. The editorial was so critical that one of the Judges responsible for the decision defied convention by writing an article defending the decision, O'Brien, *The Right of Privacy*, 2 Col. L. Rev. 438 (1902).

adopted a right to privacy statute.[65] This statute has become a prototype for similar statutes adopted in other jurisdictions.[66]

Of the States recognizing a right to privacy by way of legislation, New York has had the longest and most varied experience. It has not been an altogether happy experience, however, and for this reason should be carefully studied by other states inclined to solve the privacy problem with legislation.

The main shortcoming of the New York statute is that it does not establish, really, what it purports to establish. Although labelled "right of privacy"[67] the legislation does not make intrusion into the plaintiff's private affairs the gravamen of the wrong, nor is the interruption of his seclusion prohibited.[68] No mention is made of such things. Instead, the words of the statute make commercial exploitation the material element or sine qua non of the wrong without any reference to mental suffering, emotional disturbance or other consequences normally associated with an invasion of privacy. As a result, the New York courts have been troubled by conflict between that concept of privacy commonly entertained by reasonable people, and that sort of "privacy" described by the New York legislature. The latter, by its terms, is strictly limited to freedom from unauthorized commercial exploitation. Because of the strictness of their statute, New York courts have been compelled to deny recovery to plaintiffs with sympathetic cases, but who were nevertheless unable to bring themselves within the ambit of the statutory test requiring some "advertising" use or "purpose" of trade. In one early case a woman was denied recovery even though her portrait had been published without her consent in a weekly periodical.[69] The court held that this did not constitute a use for advertising purposes or purposes of trade.[70]

In the very controversial case of *Sidis v. F–R Publishing Corpo-*

65. N.Y. Civil Rights Law §§ 50, 51.

66. Oklahoma, Utah, and Virginia. See note 17 *supra*.

67. N.Y. Civil Rights Law § 50: "Right of Privacy—A person, firm, or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

§ 51: "Action for injunction and for damages—Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. . . ."

68. *Id.*

69. Colyer v. Richard K. Fox Pub. Co., 162 App. Div. 297, 146 N.Y. Supp. 999 (2d Dep't 1914).

70. ". . . (T)his statute has not been so far extended as to prohibit . . . a publication . . . in a magazine, of the portrait of an individual." *Id.* at 1001.

ration,[71] the plaintiff, a dedicated recluse, seemed to come within the precise class of persons Warren and Brandeis were so anxious to protect—yet he was denied recovery. In 1910 Sidis had been a nationally famous child prodigy. In 1911 he delivered distinguished lectures on the fourth dimension. At the age of 16, and with the accompaniment of considerable fanfare, he was graduated with honors from Harvard College. His subsequent breakdown and withdrawal from the world were not common knowledge until 1937. At that time an article appeared in the *New Yorker* magazine which described in detail the events of the intervening years. Sidis was particularly embittered and irritated because for twenty-seven years his main concern—indeed, his seeming obsession—was to insulate himself from exactly this sort of thing. The appearance of the article prompted him to sue. In an excellent opinion, Judge Clark of the Second Circuit Court of Appeals held that there was a legitimate public interest in the present circumstances of a person who had once, whether wittingly or unwittingly, commanded such widespread attention and who had shown such great promise.[72] Such an overriding public interest, reasoned Judge Clark, precluded recovery for invasion of privacy in a jurisdiction which had recognized the right by judicial decision. But, said Judge Clark, in New York the plaintiff would be denied recovery in any case because of the restrictive wording of the New York statute. Supervening public interest or not, publication of information in a magazine article, no matter how outrageous an intrusion into the private affairs of the individual, is not a use "for advertising purposes or for the purposes of trade," and hence not within the technical ban of the New York "right of privacy" law.[73]

Thus, where recognition of the right to privacy has been attempted by statute, something far short of full recognition has been accomplished. The statutes, despite their benign labels, do not protect the sensibility or peace of mind of the individual. The most they can be said to do is to protect the latent economic utility of his personality, and, as has been suggested at an earlier point, this interest is probably just as well protected by tort causes of action based upon expanded and more realistic concepts of property—in this instance, a property interest in one's name and personality.[74]

71. 113 F.2d 806 (2d Cir. 1940), *cert. den.* 311 U.S. 711 (1940).

72. ". . . (H)is subsequent history, containing as it did the answer to the question of whether or not he had fulfilled his early promise, was still a matter of public concern."
Sidis v. F-R Pub. Corp., 113 F.2d 806, 809 (2d Cir. 1940).

73. *Id.* at 810.

74. "A performer has a property right in his performance that it shall not be used for a purpose not intended, and particularly in a manner which does not fairly represent his service."
Gieseking v. Urania Records, 155 N.Y.S.2d 171, 172 (Sup. Ct. N.Y. County 1956).

> "Plaintiff, a professional entertainer, gave his show before a vast audience in an athletic stadium. His grievance here is not the invasion of his "privacy"—privacy is the one thing he did not want, or need, in his occupation. . . . [T]he intent of the "Privacy" statutes was to forbid and punish the exploitation, for gain, of a man's individual personality, *that is, invasions of his right to be let alone.*"[78] (Italics supplied.)

In other words, Judge Desmond could not give the statute a literal interpretation so clearly contrary to common understanding of privacy, and so clearly out of step with what the legislators are presumed to have intended. Yet the ambiguity of the statute remains. It prohibits commercial use on grounds of a person's "right to be let alone"—an obvious non-sequitur since these interests are demonstrably different.

To sum up, the label of the statute connotes a right to be let alone; to be free from distasteful publicity. The words of the statute, however, prohibit only commercial exploitation. Therefore, by definition, victims unable to show commercial motive are denied recovery from their tormentors. Public performers, on the other hand, are also cut off by judicial interpretations of the statute which make it applicable only to those not in the public eye. In the final result the statutes protect only a very small class of persons: a class much smaller than Warren and Brandeis originally described.

VII.

Relationship to the "Right to Publicity"

Following the decision in the *Gautier* case it was generally agreed that the scope of the New York "right of privacy" statute was much narrower than had hitherto been thought. In a later case baseball players sued defendant for using their photographs without their respective consents in order to promote sales of chewing gum.[79] Judge Frank of the United States Court of Appeals for the Second Circuit, in order to get around the *Gautier* case, coined the phrase "right to publicity". Judge Frank sought higher ground than the New York statute for a cause of action. He found it in the now somewhat famous concept of a "right to publicity", which, according to Judge Frank, inheres to every performer who through hard work, energy and talent, has won a commercially exploitable share of public recognition and acknowledgment.[80]

Despite the fanfare, however, the "right to publicity", as Judge

78. *Id.* at 489.
79. Haelen Labs. v. Topps Chewing Gum, 202 F.2d 866 (2d Cir. 1953).
80. *Id.* at 868.

Frank called it, is nothing more than a recognition that the utility inherent in the personality of every individual is worthy of protection. Moreover, it is difficult to see how the horizons of our jurisprudence are very much enlarged by the introduction of a new slogan. To make protection of the utility of personality contingent upon the acceptance of the conceptualism of a "right to publicity" is as awkward as to wed it to a "right to privacy". Perhaps some courts, ordinarily unwilling to protect an individual's property interest in his name and personality, might be persuaded to extend protection if the interest is disguised under the label of a "right to publicity" or a "right to privacy". It is submitted, however, that whatever gains are accomplished by such subterfuges are more than offset by confusion resulting from the obvious abuse of the legal concepts involved. The fact remains that peace of mind and freedom from mental aggravation are not the same as the potential utility of personality and circumstances, and that the right to privacy, if it is to be used at all, ought only to protect the former interests. Compensating for restrictive interpretations of the right to privacy by coining phrases such as the "right to publicity" only serves to obscure the basic issue: namely, whether mental suffering resulting from unpermitted publicity, and unauthorized exploitation of name and personality constitute distinct, separate, and recognizable tort causes of action.

VIII.

Privacy As a Derivative Interest

The usefulness of the "right to privacy" as a jural concept can be more easily calculated if "privacy" is recognized as a condition or state achieved when other more elementary interests are safeguarded. Thus, if it is agreed that a person should not be subjected to acts causing mental suffering or emotional distress, and if it is agreed that the inherent utility of personality and circumstances ought to be above piracy or unwarranted expropriation, there arises no need to protect "privacy". In other words, "privacy" is an interest or condition which derives from and is automatically secured by the protection of more cognizable rights.

If one takes time to think about the matter it will immediately appear that "right to privacy" is not the only derivative interest imaginable. Most sociological and ideological goals derive from the protection of more fundamental rights. Thus, "pursuit of happiness" and "freedom from fear" are preserved as inevitable consequences of the protection of other interests. A plaintiff who seeks to recover from an assailant on the basis of the assailant's abridgement of plaintiff's

"freedom from fear" is well advised to amend his complaint, even in a Clark court, to set forth a cause of action for assault and battery. Similarly, one illegally arrested or unlawfully confined is better off if he alleges a false arrest or a false imprisonment than if he alleges an unwarranted interference with his "pursuit of happiness". Yet victims of mental suffering, emotional distress, and personality expropriation are all urged to ignore the true bases of their respective miseries and to sue, instead, for invasions of their "privacy".

The point of the analogies is that the "right to privacy" is a sociological notion and not a jural concept at all. As a tool available to courts in their every day task of deciding, in particular cases, which interests must be protected and to what extent, "right to privacy" has little more utility than "pursuit of happiness".

The logical error in subsuming such diverse interests under a "right to privacy" label is illustrated by the problem presented in a number of cases dealing with a substantially similar fact pattern. Thus, a two-headed or otherwise deformed baby is born to parents not in the public eye.[81] Catering to morbid curiosity in this sort of thing, a newspaper publishes and unduly publicizes, without the consent of the parents, photographs of the unfortunate offspring. The parents sue, and, following the logic of Warren and Brandeis, ground their cause of action on an invasion of privacy. What the parents really resent is the added aggravation and emotional distress which resulted when their own private misfortune was made public. The lawyers, nevertheless, have more confidence in the "privacy" label than in possible causes of action relative to the true interests involved. At the trial, and on appeal, however, the defendant will urge excellent defenses. He will point out that the only person whose privacy was invaded was the child. If the child were born dead, he will argue that it never existed long enough to be wronged and, in any case, had no standing to sue. If it lived, but died shortly after birth, he will insist that the cause of action is one which does not survive.[82] Even if the child lived, he will go on, upon what basis can damages be measured and how can a suit by and for the benefit of the parents be justified when it is still the child who was exposed?

81. Douglas v. Stokes, 149 Ky. 506, 149 S.W. 849 (1912); Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930).

82. Part of the folklore of the right to privacy is the rubric that the cause of action does not survive the individual and cannot exist after death, Abernathy v. Thornton, 263 Ala. 473, 83 So. 2d 235 (1956); Schumann v. Loew's Incorporated, 135 N.Y.S.2d 361 (Sup. Ct. N.Y. County 1954); *In re* Hart's Estate, 83 N.Y.S.2d 635 (Surr. Ct. N.Y. County 1948); *contra*, Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133 (1945). The Utah statute expressly creates a right to privacy in the dead. See note 17 *supra*. But the statute has been strictly construed in the only case in which advantage of this provision was sought, Donahue v. Warner Bros. Pictures, 2 Utah 2d 256, 272 P.2d 177 (1954).

Good replies to these defenses are not unknown, but the whole problem so easily could be got over if courts would recognize that the infliction of mental suffering can be the basis of a tort cause of action, and if lawyers would only plead causes of action based upon the true interests invaded.

In one leading case, *Bazemore v. Savannah Hospital*,[83] the court permitted the parents of a dead and deformed child to recover damages caused by unwarranted publicity. The cause of action, as usual in such cases, was based on an invasion of privacy to which the logical defense was pleaded: namely, that the cause of action, if any, did not survive the death of the child. The court disposed of the defense by saying that the parents had stated a good cause of action and had shown damage. But Hill, J., dissenting, pointed out that if invasion of privacy were the basis for the suit, it was not in the parents but in the child.[84] Hill's dissent has been followed.[85] The popularity of the "privacy" theory of recovery would indicate that courts have expressly disavowed the more logical approach, yet, in the instant case there is not the slightest indication that plaintiffs would have failed in their action had they based it upon mental suffering in the first instance.

Other areas of interest, protection of which results in the safeguarding of privacy have been referred to earlier.[86] The most important, probably, is the property interest which each individual has in the potential or immediate utility of his personality. If truly fundamental interests are accorded the protection they deserve, no need to champion a right to privacy arises. Invasion of privacy is, in reality, a complex of more fundamental wrongs. Similarly, the individual's interest in privacy itself, however real, is derivative and a state better vouchsafed by protecting more immediate rights.

IX.

Needed and Traditional Limitations on Actions for Invasion of Privacy Are Equally Applicable to Its Component Torts

Part of the folklore traditionally connected with the right to privacy consists of a consideration of the limitations on the right.

83. 171 Ga. 257, 155 S.E. 194 (1930).

84. "The child, if living, would have a right to sue and recover for a violation of the right of privacy, but the cause of action would not be in the parents." Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194, 197 (1930).

85. Bremer v. Journal Tribune Publishing Co., 247 Iowa 817, 76 N.W.2d 762 (1956); Abernathy v. Thornton, 263 Ala. 473, 83 So. 2d 235 (1956); Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P.2d 491 (1939).

86. See note 74 *supra*.

Having been so frequently described and analyzed in other writings,[87] however, a summary of the classic points should be sufficient for present purposes.

Probably the most important limitation is the supervening public interest in news and information. Obviously, one who has been involved in a newsworthy event, whether intentionally or fortuitously, cannot be heard to complain about his ensuing exposure to publicity. It is frequently difficult to decide, however, whether exposure to the public eye of personal circumstances is for the purpose of informing the public or whether it is for the commercial purpose of amusing the public. The "miscellany" column of *Time* magazine exemplifies the problem. The items reported are "news" in one sense, and, indeed, the actual names of the parties involved are usually set forth. Yet, is it *Time's* purpose to inform, or to amuse? If to amuse, does *Time's* status as a "news" magazine privilege its use of names?

The conflict between public interest in information on the one hand, and private interest in freedom from mental aggravation and commercial exploitation, on the other hand, must necessarily be solved on a case to case basis. American courts, for policy reasons and because of the protection afforded freedom of the press by our Constitution, have given and will no doubt continue to give the press considerable latitude in this regard.[88]

The question arises, however, whether the classic limitation on the right to privacy is dissolved if we pierce the "privacy" veil and base the cause of action on mental suffering. The answer is, of course not. It need only be said that the individual's interest in freedom from aggravating publicity or expropriation of personality must occasionally yield to an overriding and legitimate public interest in news and information. When so cast, the problem appears no different from that presented when necessity, whether public or private, requires the commission of a trespass or some other tort.[89] Moreover, the word "privilege" would not seem at all inappropriate to describe the situation where mental suffering or commercial expropriation fol-

87. For the clearest and most concise summary of the classic limitations on the right to privacy and references to other writings on the subject, see PROSSER, TORTS 641 *et seq.* (2d ed. 1955).

88. ". . . [I]t must not be forgotten that the right of privacy infringes upon freedom of speech and press and clasbes with the interest of the public in the free dissemination of news and information, and that these paramount public interests must be considered when placing the necessary limitations upon the right of privacy."

Hull v. Curtis Publishing Co., 182 Pa. Super. 86, 125 A.2d 644, 651 (1956).

89. The classic case on trespass privileged by necessity still appears to be Ploof v. Putnam, 81 Vt. 471, 71 Atl. 188 (1908). Where for the benefit of third parties or the public at large, the same privilege seems to exist, Northern Assur. Co. v. New York Cent. R.R. Co., 271 Mich. 569, 260 N.W. 763 (1935).

lows or ensues directly from the publication or publicizing of matters or circumstances in which the public has a legitimate interest.

Similarly, if the victim has consented to the use, or has been guilty of behavior justifying the assertion of an estoppel, the classic and orthodox rules defining the conditions for such defenses ought to apply, regardless of the label affixed to the cause of action.[90]

Among the more salutary results which would attend a realistic classification of the interests transgressed by an "invasion of privacy" would be the removal of the necessity for making a number of legalistic distinctions referred to as "limitations" on the right to privacy. For example, it has been held that the right to privacy does not extend to one's dog,[91] one's car,[92] or one's business name.[93] Similarly, it has been held that the cause of action does not survive the death of the one exposed, and that relatives of the illegally publicized person have no grounds for relief.[94] If we find that the real injury consists of mental anguish or expropriation of property, rather than "invasion of privacy", the need for such distinctions disappears. If defendant is chargeable with knowledge that unwarranted publicity and ridicule of plaintiff's dog will cause plaintiff acute mental anguish, the defendant would have to respond in damages in accordance with time-tested principles of the law of torts, and without the necessity of making metaphysical explanations of how the dog's cause of action came to inure to the benefit of the master. The same is true of the anguished parents of the deformed, dead, and over-publicized child. The mental anguish is suffered by the parents, not by the child, and if the publicity is unprivileged, and the consequences appear to be the foreseeable and proximate result of defendant's acts, then defendant should be held liable. Legalistic arguments about whether the cause of action survives in such cases are as ignorant as they are tasteless.

X.

Some Suggestions

It is submitted that there is hardly a case involving an action for the invasion of privacy in which recovery could not have been sought and granted on one or both of two other theories: (1) infliction

90. O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941), compare Tolley v. Fry (1931) A.C. 333. See Annot., 14 A.L.R.2d 750, 762 (1950); 168 A.L.R. 446, 454 (1947).

91. Lawrence v. Ylla, 184 Misc. 807, 55 N.Y.S.2d 343 (Sup. Ct. N.Y. County 1945).

92. Branson v. Fawcett Publications, 124 F. Supp. 429 (E.D. Ill. 1954).

93. Shubert v. Columbia Pictures Corp., 189 Misc. 734, 72 N.Y.S.2d 851 (Sup. Ct. N.Y. County 1947), *aff'd without opinion*, 274 App. Div. 571, 80 N.Y.S.2d 724 (1st Dep't 1948).

94. Abernathy v. Thornton, 263 Ala. 473, 83 So. 2d 235 (1956); Bremmer v. Journal-Tribune Publishing Co., 247 Iowa 817, 76 N.W.2d 762 (1956).

of mental suffering; and (2) expropriation of personality or some property interest therein. Included within the bounds of these two causes of action would be those decisions affording relief on the basis of such theories as breach of confidential relationship and physical intrusion. A recovery supported on the theory of a breach of a confidential relationship is only a special instance of an unlawful expropriation of personality and bears the same relationship to this major tort as the crime of embezzlement bears to larceny.[95]

It is further submitted that as tort causes of action based upon infliction of mental suffering become more acceptable, and as our concept of property grows to the point where it is broad enough to protect the performer's interest in his performance in the same way that we protect the cabinet maker's interest in his cabinets, there will be an ever diminishing need to invoke the right to privacy as a means to compensate individuals victimized by such circumstances as were hypothesized at the outset of this discussion.

Indeed, one can logically argue that the concept of a right to privacy was never required in the first place, and that its whole history is an illustration of how well-meaning but impatient academicians can upset the normal development of the law by pushing it too hard. In this regard the State of New York provides a pathetic example. One of the most progressive jurisdictions in recognizing property rights in such intangibles as performances and personality,[96] New York still operates under a truncated right to privacy statute which excludes almost as many deserving plaintiffs as it covers.[97] It is not unfair to say that the enactment of this supposedly "remedial" legislation might

95. Embezzlement is common law larceny extended by statute to the situation where the stolen property comes into the possession of the wrongdoer without a trespass because the property was legally in the custody of the wrongdoer in the first instance, Moody v. People, 65 Colo. 339, 176 Pac. 476 (1918). Similarly, those cases permitting recovery for the expropriation of or misuse of letters, ideas, personalities, portraits, and pictures where the subject matter has come into the hands of the wrongdoer because of a confidential relationship, are only special instances of the stealing of valuable, if intangible, things. However, by making the breach of confidence the wrong, instead of the unlawful use of the plaintiff's property, the early English cases committed blunders to which the English courts continue blind homage. The progress of the nonsense can be observed by comparing the following cases: Yovatt v. Winyard (1820) 1 J.&W. 394; Abernathy v. Hutchinson, (1825) 3 L.J. Ch. 209; A-G *ex rel.* Prince Albert v. Strange, (1849) 41 Eng. Rep. 1171, 64 Eng. Rep. 293; Pollard v. Photographic Co., (1888) 40 Ch. D. 345; Stephenson, Jordan and Harrison v. Macdonald and Evans, (1952) 69 R.P.C. 10 (C.A.).

96. Metropolitan Opera Ass'n v. Wagner Nichols Recorder Corp., 279 App. Div. 632, 107 N.Y.S.2d 795 (1st Dep't 1951); Gieseking v. Urania Records, 155 N.Y.S.2d 171 (Sup. Ct. N.Y. County 1956), see note 74 *supra*.

97. For examples of deserving plaintiffs who were denied recoveries under the New York statute see Chaplin v. N.B.C., 15 F.R.D. 134 (S.D.N.Y. 1953) (telephone conversation secretly recorded and later broadcast over a nationwide radio hook-up); and Molony v. Boy Comics, 277 App. Div. 166, 98 N.Y.S.2d 119 (1st Dep't 1950) (embellishment, pictorial representation and publication of plaintiff's role in an event of some years past, held not a use for "advertising purposes" or "purposes of trade").

not have been necessary had more orthodox theories of recovery been urged in the *Roberson*[98] case.

It would be fanciful to urge that the right to privacy be totally excised from the law and forever disregarded even if this were desirable, which it probably is not. In the first place it has become too firmly entrenched, both in our decisions and in our literature. In the second place, it serves as a valuable concept in the fashioning of criminal legislation, criminal procedures, and rules of evidence which accord to the individual and his affairs the punctilious respect they deserve. Finally, however unsatisfactory in describing the true detail of the interests involved, the expression itself evokes support and defense for conditions of daily living which today are in sore need of buttressing. To paraphrase the late Justice Cardozo, ". . . the assaults upon the citadel of privacy are proceeding apace these years."[99]

Greater clarification in the law can be achieved, nevertheless, if the fundamental basis for recovery were made explicit in each case. If it is mental suffering or emotional distress, let us say so. If it is the expropriation of one's personality, or the property interest therein, let us admit that circumstances can support a recovery here as well. In the sociological sense, either or both bases for recovery can be described as an invasion of privacy, and it would be entirely proper for a court so to state. In the same way, and by analogy, a court would be justified in describing a false imprisonment as unlawful curtailment of one's constitutional right to the pursuit of happiness. But to gather together a number of diverse and explicit tort causes of action under general social concepts without further articulation is to undermine the administration of justice by blurring the lines between deserving and undeserving cases. Such a process also obscures inquiry into the nature of the interests to be balanced.

All this should be carefully considered before an invasion of privacy is recognized, without further analysis, as a separate and distinct tort cause of action.

98. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). See text discussion corresponding to note 63 *supra*.

99. The assault upon the citadel of privity is proceeding in these days apace. Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441, 445 (1931).

ANNEXURE R-15

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House of Lords

Wainwright *v* Home Office

[2003] UKHL 53

2003 July 1, 2, 3; Oct 16

Lord Bingham of Cornhill, Lord Hoffmann, Lord Hope of Craighead, Lord Hutton and Lord Scott of Foscote

Tort — Cause of action — Intentional infliction of harm — Visitors to prison strip-searched for drugs — Distress and humiliation inflicted — Whether infringement of right to respect for private life — Whether cause of action

The claimants, a mother and son, were strip-searched for drugs on a prison visit in 1997. The search was not conducted according to rule 86 of the Prison Rules 1964, and the claimants were humiliated and distressed. No drugs were found. The second claimant, aged 21, who was mentally impaired and suffered from cerebral palsy, developed post-traumatic stress syndrome. They claimed damages for trespass, and the second claimant claimed, in addition, damages for battery. The judge held that trespass to the person, consisting of wilfully causing a person to do something to himself which infringed his right to privacy, had been committed against both claimants, and, further, that trespass to the person, consisting of wilfully causing a person to do something calculated to cause harm to him, namely infringing his legal right to personal safety, had been committed against the second claimant, as had battery. He awarded basic and aggravated damages of £2,600 to the first claimant and £4,500 to the second claimant. The Court of Appeal allowed the Home Office's appeal against the finding of trespass, dismissed the first claimant's claim and reduced the award of damages to the second claimant.

On appeal by the claimants—

Held, dismissing the appeals, (1) that there was no common law tort of invasion of privacy; that the creation of such a tort required a detailed approach which could be achieved only by legislation rather than the broad brush of common law principle; that adoption of a right to privacy as a principle of law in itself was not necessary to comply with article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; and that any gaps in existing remedies for breaches of article 8 by public authorities had been filled by sections 6 and 7 of the Human Rights Act 1998 (post, paras 1, 30–35, 52–56, 64).

Dicta of Sir Robert Megarry V-C in *Malone v Metropolitan Police Comr* [1979] Ch 344, 372–381 applied.

Douglas v Hello! Ltd [2001] QB 967, CA considered.

(2) That in so far as there might be a tort of intention to cause harm under which damages for distress which did not amount to recognised psychiatric injury might be recoverable the necessary intention was not established on the facts of the case (post, paras 1, 45, 47, 54–56, 64).

Janvier v Sweeney [1919] 2 KB 316, CA considered.

Wilkinson v Downton [1897] 2 QB 57 distinguished.

Decision of Court of Appeal [2001] EWCA Civ 2081; [2002] QB 1334; [2002] 3 WLR 405; [2003] 3 All ER 943 affirmed.

The following cases are referred to in the opinion of Lord Hoffmann:

Campbell v MGN Ltd [2002] EWCA Civ 1373; [2003] QB 633; [2003] 2 WLR 80; [2003] 1 All ER 224, CA

Collins v Wilcock [1984] 1 WLR 1172; [1984] 3 All ER 374, DC

Derbyshire County Council v Times Newspapers Ltd [1993] AC 534; [1993] 2 WLR 449; [1993] 1 All ER 1011, HL(E)

A *Douglas v Hello! Ltd* [2001] QB 967; [2001] 2 WLR 992; [2001] 2 All ER 289, CA
Dulieu v White & Sons [1901] 2 KB 669, DC
Hicks v Chief Constable of South Yorkshire Police [1992] 2 All ER 65, HL(E)
Hunter v Canary Wharf Ltd [1997] AC 655; [1997] 2 WLR 684; [1997] 2 All ER 426, HL(E)
Iwanczuk v Poland (Application No 25196/94) (unreported) 15 November 2001, ECHR
B *Janvier v Sweeney* [1919] 2 KB 316, CA
Kaye v Robertson [1991] FSR 62, CA
Khan v United Kingdom (2000) 31 EHRR 1016
Khorasandjian v Bush [1993] QB 727; [1993] 3 WLR 476; [1993] 3 All ER 669, CA
Letang v Cooper [1965] 1 QB 232; [1964] 3 WLR 573; [1964] 2 All ER 929, CA
Lorsé v The Netherlands (Application No 52750/99) (unreported) 4 February 2003, ECHR
C *Malone v Metropolitan Police Comr* [1979] Ch 344; [1979] 2 WLR 700; [1979] 2 All ER 620
Malone v United Kingdom (1984) 7 EHRR 14
Peck v United Kingdom (2003) 36 EHRR 719
R v Khan (Sultan) [1997] AC 558; [1996] 3 WLR 162; [1996] 3 All ER 289, HL(E)
Spencer (Earl) v United Kingdom (1998) 25 EHRR CD 105
Valasinas v Lithuania Reports of Judgments and Decisions 2001—VIII, p 385
Victorian Railways Comrs v Coultas (1888) 13 App Cas 222, PC
D *Wilkinson v Downton* [1897] 2 QB 57
Wilson v Pringle [1987] QB 237; [1986] 3 WLR 1; [1986] 2 All ER 440, CA
Wong v Parkside Health NHS Trust [2001] EWCA Civ 1721; [2003] 3 All ER 932, CA

The following additional cases were cited in argument:

Alcorn v Anbro Engineering Inc (1970) 468 P 2d 216
E *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109; [1988] 3 WLR 776; [1988] 3 All ER 545, HL(E)
Australian Broadcasting Corpn v Lenah Game Meats Pty [2001] HCA 63; 208 CLR 199
Barnett v Collection Service Co (1932) 242 NW 25
Burnett v George [1992] 1 FLR 525, CA
Cox Broadcasting Corpn v Cohn (1975) 420 US 469
F *Freeman v Home Office (No 2)* [1984] QB 524; [1984] 2 WLR 802; [1984] 1 All ER 1036, CA
Grosse v Purvis [2003] QDC 151
Hatton v United Kingdom (2001) 34 EHRR 1
Henderson v Chief Constable of Fife Police 1988 SLT 361
K D (A Minor) (Ward: Termination of Access), In re [1988] AC 806; [1988] 2 WLR 398; [1988] 1 All ER 577, HL(E)
G *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29; [2002] 2 AC 122; [2001] 2 WLR 1789; [2001] 3 All ER 193, HL(E)
Laskey, Jaggard and Brown v United Kingdom (1997) 24 EHRR 39
Lindley v Rutter [1981] QB 128; [1980] 3 WLR 660, DC
McFeeley v United Kingdom (1980) 3 EHRR 161
McLeod v United Kingdom (1998) 27 EHRR 493
Motherwell v Motherwell (1976) 73 DLR (3d) 62
H *R v Attorney General for England and Wales* [2003] UKPC 22, PC
R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 696; [1991] 2 WLR 588; [1991] 1 All ER 720, HL(E)
RWDSU v Dolphin Delivery Ltd [1986] 2 SCR 573
Rantzen v Mirror Group Newspapers (1986) Ltd [1994] QB 670; [1993] 3 WLR 953; [1993] 4 All ER 975, CA

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Reynolds v Times Newspapers Ltd [2001] 2 AC 127; [1999] 3 WLR 1010; [1999] 4 All ER 609, HL(E)
Tucker v News Media Ownership Ltd [1986] 2 NZLR 716
W (A Minor) (Wardship: Restrictions on Publication), In re [1992] 1 WLR 100; [1992] 1 All ER 794, CA
Williams v Home Office (No 2) [1981] 1 All ER 1211

APPEAL from the Court of Appeal

This was an appeal, by permission of the Court of Appeal, by the claimants, Mary Jane Wainwright and her son Alan Joseph Wainwright, a patient suing by his litigation friend, Mary Jane Wainwright, against a decision of the Court of Appeal (Lord Woolf CJ, Mummery and Buxton LJJ) dated 20 December 2001 by which it allowed the appeal of the defendant, the Home Office, against a decision of Judge McGonigal sitting at Leeds County Court on 23 April 2001 to award damages for trespass to the person in respect of each claimant.

The facts are stated in the opinion of Lord Hoffmann.

David Wilby QC, Iain Christie and *Ashley Serr* for the claimants. Although the conduct complained of occurred before the Human Rights Act 1998 came into force the United Kingdom was still obliged to provide an effective remedy to those whose rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms were infringed in order to comply with its obligations under article 13. Whereas the Court of Appeal was bound by the decision in *Kaye v Robertson* [1991] FSR 62 and earlier authority indicating that no tort of invasion of privacy exists in English law, the House is not so bound. It is clear that in *Kaye v Robertson* the Court of Appeal regretted that it had to decide as it did and that in *Douglas v Hello! Ltd* [2001] QB 967, the Court of Appeal thought that the common law had evolved since the decision in *Kaye v Robertson* [1991] FSR 62. This is a clear and meritorious case in which the House should find a remedy for an invasion of privacy prior to the coming into force of the Human Rights Act 1998.

An oft-cited stumbling block to a tort of invasion of privacy is the inability to provide a suitable definition. This has not been a problem encountered in other jurisdictions where the courts have devised, or are devising, a workable law of protection of privacy. In the United States the development of the law has been extensive since the publication of an article called "The Right to Privacy" by Warren and Brandeis (1890) 4 Harvard LR 193. The history of the development of the tort of invasion of privacy is traced in *Prosser and Keaton on The Law of Torts*, 5th ed (1988), pp 850 et seq. Prosser defined the tort as not one tort but four: (i) intrusion upon a plaintiff's seclusion or solitude or his private affairs; (ii) public disclosure of embarrassing private facts about the plaintiff; (iii) publicity which places the plaintiff in a false light in the public eye; (iv) appropriation for the defendant's advantage of the plaintiff's name or likeness. Clearly (i) is relevant to the instant case. That classification has been accepted by the United States Supreme Court: see *Cox Broadcasting Corpn v Cohn* (1975) 420 US 469. Following on the writings of Warren and Brandeis and Prosser, New Zealand developed a tort of privacy: see *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716. For the Australian approach: see *Australian Broadcasting Corpn v Lenah Game Meats Pty* (2001) 208 CLR 199. For the Canadian approach: see *Linden, Canadian Tort Law*, 6th ed

(1997), para 56; *Motherwell v Motherwell* (1976) 76 DLR (3d) 62. For the German approach: see *Markesinis, A Comparative Introduction to the German Law of Torts*, 3rd ed (1994), pp 63–66.

Those in the United Kingdom who have considered the situation have had little difficulty in establishing an appropriate definition and identifying appropriate defences: see, for example, Report of the Committee on Privacy and Related Matters (1990) (Cm 1102), paras 12.17, 12.19, 38; Review of Press Self-Regulation (1993) (Cm 2315), paras 7.33–7.42. The most obvious and inclusive definition is that provided by article 8 of the Convention itself.

The issue of privacy was most recently considered by the House of Lords in *R v Khan (Sultan)* [1997] AC 558. In this pre 1998 Act case the House was prepared if necessary to find a tort of invasion of privacy in English law on the basis of the necessity of compliance with the Convention both in respect of the provisions of article 8 and the requirement that there should be an effective remedy under article 13: see p 571. In contrast to *R v Khan* the instant case is an appropriate occasion on which to decide that a right to privacy exists. In *Douglas v Hello! Ltd* [2001] QB 967, paras 125–126 Sedley LJ clearly believed that English law had now developed to recognise a right of privacy. Further Lord Irvine of Lairg LC in the Parliamentary debate preceding the passage of the Human Rights Act 1998 acknowledged that the courts were on the verge of developing a law of privacy and that it was preferable for the court to do so: see Hansard (HL Debates), 24 November 1997, cols 784–785.

In an intentional tort the concepts of remoteness and foreseeability which relate respectively to the law of contract and the tort of negligence are not of assistance. Nor should the ambit of damages to be awarded be limited to personal injury including psychiatric illness as in the tort of negligence but should also include compensation for distress and humiliation of sufficient gravity to properly justify compensation. That follows the approach of the European Court of Human Rights and the American courts.

Should the House not be willing to create a general remedy for invasion of privacy the tort of intentionally causing harm in *Wilkinson v Downton* [1897] 2 QB 57 can be extended to establish a limited law of privacy sufficient to protect the autonomy of an individual's body in the circumstances of the instant case. The extent of the ambit of the tort has been approved and extended over the years: see *Janvier v Sweeney* [1919] 2 KB 316, *Burnett v George* [1992] 1 FLR 525; *Khorasandjian v Bush* [1993] QB 727. There can be no logical distinction between circumstances in which as in *Wilkinson v Downton* [1897] 2 QB 57 and *Janvier v Sweeney* [1919] 2 KB 316 a practical joke is played which causes anguish and a situation where a person in appropriate circumstances instructs another to do something which has the same effect. A statement or conduct causing distress and humiliation to the victim is within the tort. It does not matter if the words or actions of the tortfeasor or the consequences of them cause the distress or humiliation. In the instant case the instruction to strip in circumstances where the victims were clearly humiliated, upset and anguished is within the tort.

The ambit of the damage for which compensation is to be given should be dictated by the nature of the tort, an intentional tort, not by restrictive mechanisms used in the tort of negligence. Thus the ambit of the damages should extend beyond personal injury/psychiatric illness, to circumstances of distress and humiliation. In the case of an intentional tort there is no justification for restricting the ambit of the tort to psychiatric injury as

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erroneously decided by the Court of Appeal in *Wong v Parkside Health NHS Trust* [2003] 3 All ER 932. That is wholly inconsistent with the proper evolution of the tort as identified by Lord Hoffmann in *Hunter v Canary Wharf Ltd* [1997] AC 655, 707. That approach to the principles in the tort in *Wilkinson v Downton* [1897] 2 QB 57 is consistent with decisions in other jurisdictions: see *Tucker v News Media Ownership Ltd* [1996] 2 NZLR 716; *Barnett v Collection Service Co* (1932) 242 NW 25; *American Law Institute, Restatement of the Law, Torts*, 2d (1965), para 46.

The European Court of Human Rights and the Commission have long held that English law does not in certain circumstances provide an appropriate remedy in respect of article 8 and an invasion of privacy: see *Earl Spencer v United Kingdom* (1998) 25 EHRR CD 105; *Peck v United Kingdom* (2003) 36 EHRR 719. In *Peck* the court found that the failure by the United Kingdom to provide a remedy for an invasion of privacy in 1995/1996 amounted to a breach of articles 8 and 13. That decision is decisive to the instant appeal.

In addition the conduct complained of amounts to a violation of article 3. *McFeeley v United Kingdom* (1980) 3 EHRR 161 can be distinguished and has in any event been superseded by two more recent cases, *Valasinas v Lithuania* Reports of Judgments and Decisions 2001-VIII, p 385 and *Iwanczuk v Poland* (Application No 25196/94) (unreported) 15 November 2001. The latter case in particular has many similarities to the facts here. The claimants are entitled to even greater protection than the prisoners in *Valasinas* and *Iwanczuk* because of their status as innocent members of the public.

It is accepted that recognition of a common law remedy for invasion of privacy would be equally applicable against private individuals as against public authorities. There is no reason, as a matter of principle or practice, why this should not be so. Such a horizontal approach to protection of privacy has support from other jurisdictions: see *RWDSU v Dolphin Delivery Ltd* [1986] 2 SCR 573. In the context of the instant appeal the clear recognition by the Convention of a fundamental right to privacy and the subsequent right afforded against public bodies who contravene an individual's Convention rights under the 1998 Act should provide a sound basis for the development of a co-extensive right at common law against individuals or private bodies who are also guilty of invasion of privacy.

[Submissions were made on the facts. Reference was made to *Laskey, Jaggard and Brown v United Kingdom* (1997) 24 EHRR 39.]

Christie following. Whether a narrow or more general right to privacy is recognised, there must be an actionable right, derived from the United Kingdom's obligations under the Convention, to allow the claimants to recover damages for the wrong committed to them in the instant case. Prior to the Human Rights Act 1998 the courts were free to develop the common law in conformity with Convention jurisprudence. There has been an increasing influence by the Convention in the interpretation of the common law in a range of circumstances since the 1970s: see, for example, *Malone v Metropolitan Police Comr* [1979] Ch 344; *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109; *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534; *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670; *R v Khan* [1997] AC 558; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127. A useful summary of the law on

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A the status of the Convention in England and Wales prior to the Human Rights Act 1998 is contained in *Hunt, Using Human Rights Law in English Courts*, (1997), pp 146–151, 185–204. The leading House of Lords authority on the status of the Convention in English law prior to the 1998 Act, *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696, concerned the relevance of the Convention to interpreting legislation and not the development of the common law. As *Hunt* explains,
B at pp 196 et seq, that created an anomaly whereby the Convention had less impact on statutory construction than it did on the common law. The true position prior to the Human Rights Act 1998 was that the courts were not only permitted to but were required to interpret the common law in conformity with the Convention in at least two situations: where the domestic law was not firmly settled or where the court was required to
C balance competing public interests. Both conditions are met in respect of the law of privacy prior to the 1998 Act. Consequently, immediately prior to the coming into force of the 1998 Act the law should be read in conformity with the Convention. Of the cases which can be regarded as one of the authorities against such a proposition *Malone v Metropolitan Police Comr* [1979] Ch 344 is one of the earliest cases on this issue and one of the few cases in which the relevant Convention article was article 8. In due course the European
D Court agreed with Sir Robert Megarry V-C that the lack of legislation regulating interception of communication violated article 8: see *Malone v United Kingdom* (1984) 7 EHRR 14. It is inconceivable that a court in the late 1990s faced with such a clear breach of the Convention as arose in *Malone* would have left the victim with no remedy but to bring an application to Strasbourg. Sir Robert Megarry V-C's reservation at
E declaring the interference in *Malone* contrary to English law was because various institutions or offices would have to be created to oversee the system of surveillance which could only be done by statute: see [1979] Ch 344, 380. No such restrictions apply in this case; the necessary safeguards exist, they were just not complied with by the authorities.

As a general principle it may be right that international treaties cannot confer rights in English law but the Convention is in a class of its own. The
F reason for its pre-eminent influence on English law is a combination of the right of individual petition and the binding nature of the judgments of the European Court. It was largely those factors which ostensibly led Parliament to enact the 1998 Act i e to avoid the necessity for a victim of a violation of a Convention right to be put to the unnecessary time and expense of issuing proceedings in Strasbourg. But the 1998 Act was also enacted in recognition of the fact that, absent express Parliamentary
G approval, the courts were already in the process of incorporating the Convention into English law and had already done so to a large extent. The Act represented Parliament's approval of that process and an attempt to exercise some legislative control over it.

No case where the limits of the common law protection of privacy have been tested has been taken to the higher courts since *Kaye v Robertson* [1991] FSR 62. It is now clear, in the light of *Peck v United Kingdom* (2003)
H 36 EHRR 41, that the failure of the United Kingdom to provide a remedy for an invasion of privacy in the late 1990s amounted to a breach of articles 8 and 13. The breach of Article 8 in the instant case relates not just to the invasion of the claimants' privacy occasioned by the strip-searches but also by the interference which those strip-searches constituted with their right to

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visit a family member in prison, a right which is also protected by article 8. Neither interference was carried out in accordance with the law, nor were they necessary or proportionate in the circumstances. The respondents' reasons for ordering the searches were not relevant or sufficient. This, together with the alleged breach of article 3, should not be overlooked when considering the need to provide the claimants with a remedy.

Ian Burnett QC, Robin Tam and *Anna Kotzeva* for the Home Office. The claimants' approach is misconceived. It amounts to incorporation of the Convention by the back door which is impermissible: see, for example, *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696, which lays down a general principle about the relationship between domestic and public international law which is not confined to the interpretation of statutes. The claimants' heavy reliance on the Convention exposes the underlying reality, that the common law does not recognise the cause of action for which they contend. In respect of events post-dating incorporation Parliament has provided a cause of action via section 7 of the Human Rights Act 1998. Prior to incorporation a court could not have adopted the approach suggested by the claimants. Indeed if their current approach to the Convention is correct the 1998 Act becomes an irrelevance and their arguments would have been sound since at least 1966 when direct access to the European Court of Human Rights was permitted.

In addition, the remedy would be available against anyone not just public authorities. The House is being asked to give direct and horizontal effect to the Convention in respect of a cause of action which arose before its incorporation via the 1998 Act. Horizontal effect is controversial in the context of the 1998 Act. It is revolutionary in the context of the common law: see Wade "Horizons of Horizontality" (2000) 116 LQR 217; Buxton "The Human Rights Act and Private Law" (2000) 116 LQR 48; Lester and Pannick "The Impact of the Human Rights Act on Private Law: The Knight's Move" (2000) 116 LQR 380; Hunt "The 'Horizontal Effect' of the Human Rights Act" [1998] PL 423.

It is accepted as unexceptional that before the 1998 Act the development of the common law might be influenced by the Convention and that post-incorporation the Convention can be and is being used to develop the common law in actions between individuals. But the courts have not used the Convention to create new causes of action. In any event, there would be little purpose in a judge at first instance seeking to decide whether there exists a new cause of action in tort protecting privacy since, in relation to events post-dating incorporation, an action for breach of confidence will probably provide the necessary protection. The point is a fortiori in circumstances where the essence of the complaint is that a public authority is in breach of article 8. A similar reservation was expressed by the house in *Hunter v Canary Wharf Ltd* [1997] AC 655 about the utility of exploring the uncertain boundaries of the common law in connection with harassment and the attempt by the Court of Appeal in *Khorasandjian v Bush* [1993] QB 727 to harness the law of nuisance to provide protection. The House declined to develop the common law given that the Protection from Harassment Act 1997 had created a statutory remedy.

English law has not recognised an omnibus tort of privacy. The instant case is not an appropriate case in which to consider whether, and if so, to what extent a general tort of privacy exists. Privacy is not a unitary concept.

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A The use of that single word encompasses a broad range of concepts which contain very different features: see the classification into four distinct torts in *Prosser, The Law of Torts,* 4th ed (1971), p 804. The instant case is concerned only with an aspect of the first category and not at all with the others. Most of the debate about privacy starting with Warren and Brandeis "The Right to Privacy" (1890) 4 Harvard LR 193 and including the Report of the Committee on Privacy and Related Matters (1990) (Cm 1102) and the B Review of Press Self-Regulation (1993) (Cm 2315) has concerned media intrusion which largely lies in the field of the second category. Where appropriate the interests protected by the different parts of the Prosser classification are protected by torts well established in the English common law. Further Parliament has stepped in from time to time to protect interests within the various categories: see, for example, the Data Protection Act C 1998 and the Protection from Harassment Act 1997.

The claimants' argument does not distinguish between the different types of interest encompassed within the concept of privacy. There would be serious definitional difficulties and conceptual problems with recognising one omnibus tort of privacy which would vaguely embrace a potentially wide range of situations. The steps towards embedding a common law of privacy in New Zealand have been concerned with the unauthorised publication of D private facts: see, for example, *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716. Further, there are major difficulties in attempting to fashion a tort of privacy which relates to or impinges on the second Prosser category. The press and other media have real and important interests in relation to the second category, including the interests protected by article 10 of the Convention and section 12 of the 1998 Act, yet they are not represented before the House in the instant case and nor do the parties have any locus to E speak on their behalf. The House is being asked to attempt to define such a tort and to strike a balance between the competing interests involved after having, in effect, heard only from one side. In a field in which enormous difficulties have been demonstrated to exist, even when all interested parties have been afforded input into the debate, the House should decline to intervene. The debate needed to ensure that such a law is appropriately F fashioned, assuming it is needed, is one which is more appropriately undertaken through the democratic legislative process. The dangers of law-making through litigation were identified by Sir Robert Megarry V-C in *Malone v Metropolitan Police Comr* [1979] Ch 344, 372–373. It is those reasons, rather than an inability or incapacity of the House to define the law, which suggest that the instant case is not an appropriate forum for the definition of an omnibus tort affecting areas of privacy as a whole.

G The historical context of the decision of Wright J in *Wilkinson v Downton* [1897] 2 QB 57 is important. In 1897 the law of negligence was not full developed and there were particular obstacles to the recovery of damages for illness caused by shock. Wright J referred to the decision of the Privy Council in *Victorian Railways Comrs v Coultas* (1888) 13 App Cas 222 which held such damage to be too remote in negligence. In *Dulieu v White & Sons* H [1901] 2 KB 669 the very narrow approach of the Privy Council was not adopted. The courts have continued to delineate the proper bounds for the recovery of damages in negligence for psychiatric illness in the absence of physical injury ever since. But in 1897 negligence would not have availed the plaintiff. Similarly trespass was of no help as there was no direct harm. Hence Wright J devised the tort in *Wilkinson v Downton* [1897] 2 QB 57.

The Court of Appeal in *Janvier v Sweeney* [1919] 2 KB 316 approved *Wilkinson v Downton* [1897] 2 QB 57 without detailed consideration of the ingredients of the tort and the language of the headnote in *Janvier v Sweeney* [1919] 2 KB 316 was taken up in *Khorasandjian v Bush* [1993] QB 727.

The analysis of the ingredients of the tort in *Wilkinson v Downton* [1897] 2 QB 57 found in the judgments of Lord Woolf CJ and Buxton LJ below [2003] QB 1334, and Hale LJ in *Wong v Parkside Health NHS Trust* [2003] 3 All ER 932 is correct and should be upheld. The different approaches to the nature of any recklessness element in the tort are immaterial to the instant case. Thus they were all agreed that "calculated to cause physical harm" in the *Wilkinson* tort is to be understood as intending the claimant to suffer physical or psychiatric injury or being reckless as to whether such harm is suffered. The claimants fail to bring themselves within the tort for the reasons given by the Court of Appeal.

The courts of New Zealand have applied the rule in *Wilkinson v Downton* [1897] 2 QB 57 within the conventional bounds identified by the Court of Appeal in the instant case and in *Wong v Parkside Health NHS Trust* [2003] 3 All ER 932. The extensions of the rule contended for by the claimants have not been recognised: see *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716.

There is a significant difference between the general approach in the United States and other common law jurisdictions in that American law is prepared, subject to various control mechanisms, to compensate for mental injury that does not cause physical or psychiatric injury. Even in the United States the law does not recognise liability merely for intentionally or recklessly causing mental distress. the conduct must be outrageous and the emotional distress severe: see *Alcorn v Anbro Engineering Inc* (1970) 468 P 2d 216.

The line drawn between physical/psychiatric injury on the one hand and mental distress, anger and upset on the other in the common law world is sensible and principled. It recognises that where mental distress is an incident of physical/psychiatric harm it falls to be compensated. So too where it is incidental to the nature of the wrong, for example, nuisance. But where it stands on its own it is not sufficient to sound in damages, save in those few instances where damage is not an ingredient of the tort, such as assault. Parliament has recently legislated to allow for recovery of damages for distress in a number of respects: see the Protection from Harassment Act 1997; the Data Protection Act 1998; the Human Rights Act 1998. There is now no obvious gap in the law. There is no clear justification for introducing into a narrow area of law such as *Wilkinson v Downton* [1897] 2 QB 57 cases a special rule creating a hybrid form of injury, namely severe emotional distress.

[Submissions were made on the facts and whether, in the circumstances, there had been any breaches of articles 8 and 3. Reference was made to *Williams v Home Office (No 2)* [1981] 1 All ER 1211; *Lindley v Rutter* [1981] QB 128; *Henderson v Chief Constable of Fife Police* 1988 SLT 361; *In re K D (A Minor) (Ward: Termination of Access)* [1988] AC 806; *In re W (A Minor) (Wardship: Restrictions on Publication)* [1992] 1 WLR 100; *R v Attorney General for England and Wales* [2003] UKPC 22; *McLeod v United Kingdom* (1998) 27 EHRR 493.]

Valasinas v Lithuania Reports of Judgments and Decisions 2001-VIII, p 385 and *Iwanczuk v Poland* (Application No 25196/94) (unreported)

15 November 2001 can be distinguished on the facts. The conduct complained of here was not of the same degree.

Wilby QC in reply and *Wilby* QC, *Christie* and *Serr* in written reply. The issue of strip-searching engages both articles 3 and 8 and conditions attached to a family visit to a prisoner engage the right to respect for family life under article 8: see *Lorsé v The Netherlands* (Application No 52750/99) (unreported) 4 February 2003. The most important distinction between *Valasinas v Lithuania* Reports of Judgments and Decisions 2001-VIII, p 385 and *Iwanczuk v Poland* (Application No 25196/94) (unreported) 15 November 2001 and this case is that this case involved strip-searching persons who were members of the public and who were visiting a prison voluntarily. That entitles the claimants to a less onerous regime of searching than would be appropriate for prisoners. Rule 86 of the Prison Rules 1964 does not satisfy the requirements of article 8(2). [Submissions were made as to the absence of coherent consideration by the Prison Governor.]

There is nothing in the speeches in *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696 to suggest that the House was intending to cast any doubt on the correctness of the approach in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 to interpreting and developing the common law in accordance with the Convention. In respect of the provision of a remedy for private individuals see Hunt "The 'Horizontal Effect' of the Human Rights Act" [1998] PL 423. The courts in numerous subsequent cases, such as *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 and *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670 did not consider that *Ex p Brind* [1991] 1 AC 696 prevented them from developing the common law consistently with the Convention.

This is not a case like *Hunter v Canary Wharf Ltd* [1997] AC 655 where Parliament has created a statutory tort under the Protection from Harassment Act 1977 making the development of the common law unnecessary. Parliament has not extended the tort in *Wilkinson v Downton* [1897] 2 QB 57 or established a cause of action for invasion of privacy such as would give a right to relief for persons in a similar position to the claimants. On the contrary, Parliament has repeatedly set its face against legislating in this area. Although the Human Rights Act 1998 would now give a remedy for breach of a Convention right by a public authority, the instant case is an opportunity for the House to take a more principled approach to the issues which it raises. English law contains a myriad of overlapping common law and statutory causes of action and criminal offences. There is nothing novel about the same facts giving rise to two or more claims in the civil law or to civil and criminal liability simultaneously. Parliament cannot be taken to have intended to exclude the existence of a common law remedy because it has provided for an additional right to relief by statute.

Although extension of common law protection of privacy might affect the interests of others who are not parties to the litigation the Human Rights Act 1998 itself requires that competing interests, for example of the press under article 10, be balanced against the claimants' right to privacy. In that way the interests of those who are not represented in the instant proceedings would be protected. See also Lester "English Judges as Law Makers" [1993] PL 269, 289–290 on the limits of judicial creativity in developing the common law.

[Reference was made to *Hatton v United Kingdom* (2001) 34 EHRR 1; *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122; *Grosse v Purvis* [2003] QDC 151. Submissions were made on the facts, including consent in the context of the principles identified in *Freeman v Home Office (No 2)* [1984] QB 524.]

Their Lordships took time for consideration.

16 October. LORD BINGHAM OF CORNHILL

1 My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend, Lord Hoffmann. I agree with it, and for the reasons which he gives I would dismiss this appeal.

LORD HOFFMANN

2 My Lords, on 15 August 1996 Patrick O'Neill was taken into custody on a charge of murder and held at Armley Prison, Leeds. The prison authorities suspected that while awaiting trial he was dealing in drugs. They did not know how he obtained his supplies but people who visit prisoners are a common source of drugs and other contraband. So the governor gave instructions that anyone who wanted an open visit with Patrick O'Neill had first to allow himself (or herself) to be strip searched. Rule 86(1) of the Prison Rules 1964 (SI 1964/388) (consolidated 1998) confers a power in general terms to search any person entering a prison.

3 Strip searching is controversial because having to take off your clothes in front of a couple of prison officers is not to everyone's taste. Leeds Prison has internal rules designed to reduce the embarrassment as far as possible. They are modelled on the code of practice issued to the police. The search must take place in a completely private room in the presence of two officers of the same sex as the visitor. The visitor is required to expose first the upper half of his body and then the lower but not to stand completely naked. His body (apart from hair, ears and mouth) is not to be touched. Before the search begins, the visitor is asked to sign a consent form which outlines the procedure to be followed.

4 On 2 January 1997 Patrick O'Neill's mother Mrs Wainwright, together with her son Alan (Patrick's half-brother) went to visit him. A prison officer told them that they would have to be strip-searched. They reluctantly agreed and prison officers took them to separate rooms where they were asked to undress. They did as they were asked but both found the experience upsetting. Some time afterwards (it is unclear when) they went to a solicitor who had them examined by a psychiatrist. He concluded that Alan (who had physical and learning difficulties) had been so severely affected by his experience as to suffer post-traumatic stress disorder. Mrs Wainwright had suffered emotional distress but no recognised psychiatric illness.

5 Mrs Wainwright and Alan commenced an action against the Home Office on 23 December 1999, just before the expiry of the limitation period. By the time the case came to trial in April 2001, none of the prison officers could remember searching the Wainwrights. They, on the other hand, gave evidence, which the judge accepted, that the search had not been conducted in accordance with the rules. Both had been asked to uncover all or virtually all of their bodies at the same time, both were not given the consent form until after the search had been completed, the room used to search Mrs Wainwright was not private because it had an uncurtained window

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A from which someone across the street could have seen her and one prison officer had touched Alan's penis to lift his foreskin.

6 Judge McGonigal, who heard the action in the Leeds County Court, said that the searches could not be justified as a proper use of the statutory power conferred by rule 86(1). He gave two reasons. The first was that the strip searching of the Wainwrights was an invasion of their privacy which exceeded what was necessary and proportionate to deal with the drug
B smuggling problem. Although the prison officers honestly believed that they had a right under the rules to search the Wainwrights, they should not have done so because it would have been sufficient to search Patrick O'Neill after they left. The second reason was that the prison authorities had not adhered to their own rules. The Court of Appeal agreed with the second reason but not the first. Lord Woolf CJ, who has considerable experience of the
C administration of prisons, said that a search of Patrick O'Neill would have been inadequate. It followed that "on the findings of the judge, searching, if it had been properly conducted, was perfectly appropriate": [2002] QB 1334, 1351, para 54. On the other hand, Lord Woolf CJ agreed that if there were clearly laid down restrictions on how the search was to be conducted, conduct which did not observe those restrictions could not (if otherwise actionable) be justified.

D 7 The conclusion of both the judge and the Court of Appeal was therefore that the searches were not protected by statutory authority. But that is not enough to give the Wainwrights a claim to compensation. The acts of the prison officers needed statutory authority only if they would otherwise have been wrongful, that is to say, tortious or in breach of a statutory duty. People do all kinds of things without statutory authority. So
E the question is whether the searches themselves or the manner in which they were conducted gave the Wainwrights a cause of action.

8 The judge found two causes of action, both of which he derived from the action for trespass. As Diplock LJ pointed out in *Letang v Cooper* [1965] 1 QB 232, 243, trespass is strictly speaking not a cause of action but a form of action. It was the form anciently used for a variety of different kinds of claim which had as their common element the fact that the damage was
F caused directly rather than indirectly; if the damage was indirect, the appropriate form of action was the action on the case. After the abolition of the forms of action trespass is no more than a convenient label for certain causes of action which derive historically from the old action for trespass vi et armis. One group of such causes of action is trespass to the person, which includes the torts of assault, battery and false imprisonment, each with its own conditions of liability.

G 9 Battery involves a touching of the person with what is sometimes called hostile intent (as opposed to a friendly pat on the back) but which Robert Goff LJ in *Collins v Wilcock* [1984] 1 WLR 1172, 1177 redefined as meaning any intentional physical contact which was not "generally acceptable in the ordinary conduct of daily life": see also *Wilson v Pringle* [1987] QB 237. Counsel for the Home Office conceded that touching Alan's
H penis was not acceptable and was therefore a battery.

10 That, however, was the only physical contact which had occurred. The judge nevertheless held that requiring the Wainwrights to take off their clothes was also a form of trespass to the person. He arrived at this conclusion by the use of two strands of reasoning. First, he said that a line of authority starting with *Wilkinson v Downton* [1897] 2 QB 57, which I shall

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have to examine later in some detail, had extended the conduct which could constitute trespass to the utterance of words which were "calculated" to cause physical (including psychiatric) harm. There was in his view little distinction between words which directly caused such harm and words which induced someone to act in a way which caused himself harm, like taking his own clothes off. So inducing Alan to take off his clothes and thereby suffer post-traumatic stress disorder was actionable.

11 The judge recognised, however, that in the cases upon which he relied the claimant had suffered a recognised psychiatric injury. Mrs Wainwright had not. It seemed to him illogical to deny her a remedy for distress because her constitution was sufficiently robust to protect her from psychiatric injury. So the second strand of his reasoning was that the law of tort should give a remedy for any kind of distress caused by an infringement of the right of privacy protected by article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. At the time of the incident the Human Rights Act 1998 had not yet come into force but the judge considered that he was justified in adapting the common law to the Convention by analogy with the principle by which, even before the 1998 Act, the courts interpreted statutes so as to conform, if possible, to the Convention.

12 The judge therefore found in favour of both Wainwrights. He awarded Mrs Wainwright damages of £2,600, divided into £1,600 "basic" and £1,000 aggravated damages, and Alan £4,500, divided into £3,500 basic and £1,000 aggravated. The award to Alan did not distinguish between the damages for the battery and the injury caused by having to strip.

13 The Court of Appeal did not agree with the judge's extensions of the notion of trespass to the person and did not consider that (apart from the battery, which was unchallenged) the prison officers had committed any other wrongful act. So they set aside the judgments in favour of the Wainwrights with the exception of the damages for battery, to which they attributed £3,750 of the £4,500 awarded by the judge.

14 The Wainwrights appeal to your Lordships' House. Their counsel (Mr Wilby and Mr Christie) put the case in two ways. The first was that, in order to enable the United Kingdom to conform to its international obligations under the Convention, the House should declare that there is (and in theory always has been) a tort of invasion of privacy under which the searches of both Wainwrights were actionable and damages for emotional distress recoverable. This does not give retrospective effect to the Human Rights Act 1998. It accepts that the Convention, at the relevant time, operated only at the level of international law. Indeed, the argument (if valid) would have been equally valid at any time since the United Kingdom acceded to the Convention. Alternatively, counsel proposed that if a general tort of invasion of privacy seemed too bold an undertaking, the House could comply with the Convention in respect of this particular invasion by an extension of the principle in *Wilkinson v Downton* [1897] 2 QB 57.

15 My Lords, let us first consider the proposed tort of invasion of privacy. Since the famous article by Warren and Brandeis ("The Right to Privacy" (1890) 4 Harvard LR 193) the question of whether such a tort exists, or should exist, has been much debated in common law jurisdictions. Warren and Brandeis suggested that one could generalise certain cases on defamation, breach of copyright in unpublished letters, trade secrets and breach of confidence as all based upon the protection of a common value

which they called privacy or, following Judge Cooley (*Cooley on Torts*, 2nd ed (1888), p 29) "the right to be let alone". They said that identifying this common element should enable the courts to declare the existence of a general principle which protected a person's appearance, sayings, acts and personal relations from being exposed in public.

16 Courts in the United States were receptive to this proposal and a jurisprudence of privacy began to develop. It became apparent, however, that the developments could not be contained within a single principle; not, at any rate, one with greater explanatory power than the proposition that it was based upon the protection of a value which could be described as privacy. Dean Prosser, in his work on *The Law of Torts*, 4th ed (1971), p 804, said that:

> "What has emerged is no very simple matter . . . it is not one tort, but a complex of four. To date the law of privacy comprises 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 except that each represents an interference with the right of the plaintiff 'to be let alone'."

17 Dean Prosser's taxonomy divided the subject into (1) intrusion upon the plaintiff's physical solitude or seclusion (including unlawful searches, telephone tapping, long-distance photography and telephone harassment) (2) public disclosure of private facts and (3) publicity putting the plaintiff in a false light and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. These, he said, at p 814, had different elements and were subject to different defences.

18 The need in the United States to break down the concept of "invasion of privacy" into a number of loosely-linked torts must cast doubt upon the value of any high-level generalisation which can perform a useful function in enabling one to deduce the rule to be applied in a concrete case. English law has so far been unwilling, perhaps unable, to formulate any such high-level principle. There are a number of common law and statutory remedies of which it may be said that one at least of the underlying values they protect is a right of privacy. Sir Brian Neill's well known article "Privacy: a challenge for the next century" in *Protecting Privacy* (ed B Markesinis, 1999) contains a survey. Common law torts include trespass, nuisance, defamation and malicious falsehood; there is the equitable action for breach of confidence and statutory remedies under the Protection from Harassment Act 1997 and the Data Protection Act 1998. There are also extra-legal remedies under Codes of Practice applicable to broadcasters and newspapers. But there are gaps; cases in which the courts have considered that an invasion of privacy deserves a remedy which the existing law does not offer. Sometimes the perceived gap can be filled by judicious development of an existing principle. The law of breach of confidence has in recent years undergone such a process: see in particular the judgment of Lord Phillips of Worth Matravers MR in *Campbell v MGN Ltd* [2003] QB 633. On the other hand, an attempt to create a tort of telephone harassment by a radical change in the basis of the action for private nuisance in *Khorasandjian v Bush* [1993] QB 727 was held by the House of Lords in *Hunter v Canary Wharf Ltd* [1997] AC 655 to be a step too far. The gap was filled by the 1997 Act.

19 What the courts have so far refused to do is to formulate a general principle of "invasion of privacy" (I use the quotation marks to signify doubt

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about what in such a context the expression would mean) from which the conditions of liability in the particular case can be deduced. The reasons were discussed by Sir Robert Megarry V-C in *Malone v Metropolitan Police Comr* [1979] Ch 344, 372–381. I shall be sparing in citation but the whole of Sir Robert's treatment of the subject deserves careful reading. The question was whether the plaintiff had a cause of action for having his telephone tapped by the police without any trespass upon his land. This was (as the European Court of Justice subsequently held in *Malone v United Kingdom* (1984) 7 EHRR 14) an infringement by a public authority of his right to privacy under article 8 of the Convention, but because there had been no trespass, it gave rise to no identifiable cause of action in English law. Sir Robert was invited to declare that invasion of privacy, at any rate in respect of telephone conversations, was in itself a cause of action. He said, at p 372:

> "I am not unduly troubled by the absence of English authority: there has to be a first time for everything, and if the principles of English law, and not least analogies from the existing rules, together with the requirements of justice and common sense, pointed firmly to such a right existing, then I think the court should not be deterred from recognising the right. On the other hand, it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another."

20 As for the analogy of construing statutes in accordance with the Convention, which appealed to the judge in the present case, Sir Robert Megarry V-C said, at p 379:

> "I readily accept that if the question before me were one of construing a statute enacted with the purpose of giving effect to obligations imposed by the Convention, the court would readily seek to construe the legislation in a way that would effectuate the Convention rather than frustrate it. However, no relevant legislation of that sort is in existence. It seems to me that where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will carry out the Crown's treaty obligations, or to discover for the first time that such rules have always existed."

21 Sir Robert Megarry V-C pointed out, at p 380, that the problem about telephone tapping was not in formulating the generalisation that the state should not ordinarily listen to one's telephone calls but in specifying the circumstances under which it should be allowed to do so. This required detailed rules and not broad common law principles:

> "Give full rein to the Convention, and it is clear that when the object of the surveillance is the detection of crime, the question is not whether there ought to be a general prohibition of all surveillance, but in what circumstances, and subject to what conditions and restrictions, it ought to be permitted. It is those circumstances, conditions and restrictions which are at the centre of this case; and yet it is they which are the least suitable for determination by judicial decision."

22 Once again, Parliament provided a remedy, subject to a detailed code of exceptions, in the Interception of Communications Act 1985. A similar

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problem arose in *R v Khan (Sultan)* [1997] AC 558, in which the defendant in criminal proceedings complained that the police had invaded his privacy by using a listening device fixed to the outside of a house. There was some discussion of whether the law should recognise a right to privacy which had been prima facie infringed, but no concluded view was expressed because all their Lordships thought that any such right must be subject to exceptions, particularly in connection with the detection of crime, and that the accused's privacy had been sufficiently taken into account by the judge when he exercised his discretion under section 78 of the Police and Criminal Evidence Act 1984 to admit the evidence obtained by the device at the criminal trial. The European Court of Human Rights subsequently held (*Khan v United Kingdom* (2000) 31 EHRR 1016) that the invasion of privacy could not be justified under article 8 because, in the absence of any statutory regulation, the actions of the police had not been "in accordance with law". By that time, however, Parliament had intervened in the Police Act 1997 to put the use of surveillance devices on a statutory basis.

23 The absence of any general cause of action for invasion of privacy was again acknowledged by the Court of Appeal in *Kaye v Robertson* [1991] FSR 62, in which a newspaper reporter and photographer invaded the plaintiff's hospital bedroom, purported to interview him and took photographs. The law of trespass provided no remedy because the plaintiff was not owner or occupier of the room and his body had not been touched. Publication of the interview was restrained by interlocutory injunction on the ground that it was arguably a malicious falsehood to represent that the plaintiff had consented to it. But no other remedy was available. At the time of the judgment (16 March 1990) a Committee under the chairmanship of Sir David Calcutt QC was considering whether individual privacy required statutory protection against intrusion by the press. Glidewell LJ said, at p 66: "The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals."

24 Bingham LJ likewise said, at p 70: "The problems of defining and limiting a tort of privacy are formidable but the present case strengthens my hope that the review now in progress may prove fruitful."

25 Leggatt LJ, at p 71, referred to Dean Prosser's analysis of the development of the law of privacy in the United States and said that similar rights could be created in England only by statute: "it is to be hoped that the making good of this signal shortcoming in our law will not be long delayed."

26 All three judgments are flat against a judicial power to declare the existence of a high-level right to privacy and I do not think that they suggest that the courts should do so. The members of the Court of Appeal certainly thought that it would be desirable if there was legislation to confer a right to protect the privacy of a person in the position of Mr Kaye against the kind of intrusion which he suffered, but they did not advocate any wider principle. And when the Calcutt Committee reported in June 1990, they did indeed recommend that "entering private property, without the consent of the lawful occupant, with intent to obtain personal information with a view to its publication" should be made a criminal offence: see the Report of the Committee on Privacy and Related Matters (1990) (Cm 1102), para 6.33. The Committee also recommended that certain other forms of intrusion, like the use of surveillance devices on private property and long-distance photography and sound recording, should be made offences.

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27 But the Calcutt Committee did not recommend, even within their terms of reference (which were confined to press intrusion) the creation of a generalised tort of infringement of privacy: paragraph 12.5. This was not because they thought that the definitional problems were insuperable. They said that if one confined the tort to "publication of personal information to the world at large" (paragraph 12.12) it should be possible to produce an adequate definition and they made some suggestions about how such a statutory tort might be defined and what the defences should be. But they considered that the problem could be tackled more effectively by a combination of the more sharply-focused remedies which they recommended: paragraph 12.32. As for a "general wrong of infringement of privacy", they accepted, at paragraph 12.12, that it would, even in statutory form, give rise to "an unacceptable degree of uncertainty". There is nothing in the opinions of the judges in *Kaye v Robertson* [1991] FSR 62 which suggests that the members of the court would have held any view, one way or the other, about a general tort of privacy.

28 The claimants placed particular reliance upon the judgment of Sedley LJ in *Douglas v Hello! Ltd* [2001] QB 967. Sedley LJ drew attention to the way in which the development of the law of confidence had attenuated the need for a relationship of confidence between the recipient of the confidential information and the person from whom it was obtained—a development which enabled the UK Government to persuade the European Human Rights Commission in *Earl Spencer v United Kingdom* (1998) 25 EHRR CD 105 that English law of confidence provided an adequate remedy to restrain the publication of private information about the applicants' marriage and medical condition and photographs taken with a telephoto lens. These developments showed that the basic value protected by the law in such cases was privacy. Sedley LJ said, at p 1001, para 126:

> "What a concept of privacy does, however, is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy."

29 I read these remarks as suggesting that, in relation to the publication of personal information obtained by intrusion, the common law of breach of confidence has reached the point at which a confidential relationship has become unnecessary. As the underlying value protected is privacy, the action might as well be renamed invasion of privacy. "To say this" said Sedley LJ, at p 1001, para 125, "is in my belief to say little, save by way of a label, that our courts have not said already over the years."

30 I do not understand Sedley LJ to have been advocating the creation of a high-level principle of invasion of privacy. His observations are in my opinion no more (although certainly no less) than a plea for the extension and possibly renaming of the old action for breach of confidence. As Buxton LJ pointed out in this case in the Court of Appeal [2002] QB 1334, 1361–1362, paras 96–99, such an extension would go further than any English court has yet gone and would be contrary to some cases (such as *Kaye v Robertson* [1991] FSR 62) in which it positively declined to do so.

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A The question must wait for another day. But Sedley LJ's dictum does not support a principle of privacy so abstract as to include the circumstances of the present case.

31 There seems to me a great difference between identifying privacy as a value which underlies the existence of a rule of law (and may point the direction in which the law should develop) and privacy as a principle of law in itself. The English common law is familiar with the notion of underlying B values—principles only in the broadest sense—which direct its development. A famous example is *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, in which freedom of speech was the underlying value which supported the decision to lay down the specific rule that a local authority could not sue for libel. But no one has suggested that freedom of speech is in itself a legal principle which is capable of sufficient definition to enable one C to deduce specific rules to be applied in concrete cases. That is not the way the common law works.

32 Nor is there anything in the jurisprudence of the European Court of Human Rights which suggests that the adoption of some high level principle of privacy is necessary to comply with article 8 of the Convention. The European Court is concerned only with whether English law provides an adequate remedy in a specific case in which it considers that there has been D an invasion of privacy contrary to article 8(1) and not justifiable under article 8(2). So in *Earl Spencer v United Kingdom* 25 EHRR CD 105 it was satisfied that the action for breach of confidence provided an adequate remedy for the Spencers' complaint and looked no further into the rest of the armoury of remedies available to the victims of other invasions of privacy. Likewise, in *Peck v United Kingdom* (2003) 36 EHRR 719 the court E expressed some impatience, at paragraph 103, at being given a tour d'horizon of the remedies provided and to be provided by English law to deal with every imaginable kind of invasion of privacy. It was concerned with whether Mr Peck (who had been filmed in embarrassing circumstances by a CCTV camera) had an adequate remedy when the film was widely published by the media. It came to the conclusion that he did not.

F 33 Counsel for the Wainwrights relied upon *Peck's* case as demonstrating the need for a general tort of invasion of privacy. But in my opinion it shows no more than the need, in English law, for a system of control of the use of film from CCTV cameras which shows greater sensitivity to the feelings of people who happen to have been caught by the lens. For the reasons so cogently explained by Sir Robert Megarry V-C in *Malone v Metropolitan Police Comr* [1979] Ch 344, this is an area which G requires a detailed approach which can be achieved only by legislation rather than the broad brush of common law principle.

34 Furthermore, the coming into force of the Human Rights Act 1998 weakens the argument for saying that a general tort of invasion of privacy is needed to fill gaps in the existing remedies. Sections 6 and 7 of the Act are in themselves substantial gap fillers; if it is indeed the case that a person's rights under article 8 have been infringed by a public authority, he will have a H statutory remedy. The creation of a general tort will, as Buxton LJ pointed out in the Court of Appeal [2002] QB 1334, 1360, para 92, pre-empt the controversial question of the extent, if any, to which the Convention requires the state to provide remedies for invasions of privacy by persons who are not public authorities.

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35 For these reasons I would reject the invitation to declare that since at the latest 1950 there has been a previously unknown tort of invasion of privacy.

36 I turn next to the alternative argument based upon *Wilkinson v Downton* [1897] 2 QB 57. This is a case which has been far more often discussed than applied. Thomas Wilkinson, landlord of the Albion public house in Limehouse, went by train to the races at Harlow, leaving his wife Lavinia behind the bar. Downton was a customer who decided to play what he would no doubt have described as a practical joke on Mrs Wilkinson. He went into the Albion and told her that her husband had decided to return in a horse-drawn vehicle which had been involved in an accident in which he had been seriously injured. The story was completely false and Mr Wilkinson returned safely by train later that evening. But the effect on Mrs Wilkinson was dramatic. Her hair turned white and she became so ill that for some time her life was thought in danger. The jury awarded her £100 for nervous shock and the question for the judge on further consideration was whether she had a cause of action.

37 The difficulty in the judge's way was the decision of the Privy Council in *Victorian Railway Comrs v Coultas* (1888) 13 App Cas 222, in which it had been said that nervous shock was too remote a consequence of a negligent act (in that case, putting the plaintiff in imminent fear of being run down by a train) to be a recoverable head of damages. Wright J distinguished the case on the ground that Downton was not merely negligent but had intended to cause injury. Quite what the judge meant by this is not altogether clear; Downton obviously did not intend to cause any kind of injury but merely to give Mrs Wilkinson a fright. The judge said, however, at p 59, that as what he said could not fail to produce grave effects "upon any but an exceptionally indifferent person", an intention to cause such effects should be "imputed" to him.

38 The outcome of the case was approved and the reasoning commented upon by the Court of Appeal in *Janvier v Sweeney* [1919] 2 KB 316. During the First World War Mlle Janvier lived as a paid companion in a house in Mayfair and corresponded with her German lover who was interned as an enemy alien on the Isle of Man. Sweeney was a private detective who wanted secretly to obtain some of her employer's documents and sent his assistant to induce her to co-operate by pretending to be from Scotland Yard and saying that the authorities wanted her because she was corresponding with a German spy. Mlle Janvier suffered severe nervous shock from which she took a long time to recover. The jury awarded her £250.

39 By this time, no one was troubled by *Victorian Railway Comrs v Coultas* 13 App Cas 222. In *Dulieu v White & Sons* [1901] 2 KB 669 the Divisional Court had declined to follow it; Phillimore J said, at p 683, that in principle "terror wrongfully induced and inducing physical mischief gives a cause of action". So on that basis Mlle Janvier was entitled to succeed whether the detectives intended to cause her injury or were merely negligent as to the consequences of their threats. Duke LJ observed, at p 326, that the case was stronger than *Wilkinson v Downton* [1897] 2 QB 57 because Downton had intended merely to play a practical joke and not to commit a wrongful act. The detectives, on the other hand, intended to blackmail the plaintiff to attain an unlawful object.

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A 40 By the time of *Janvier v Sweeney* [1919] 2 KB 316, therefore, the law was able comfortably to accommodate the facts of *Wilkinson v Downton* [1897] 2 QB 57 in the law of nervous shock caused by negligence. It was unnecessary to fashion a tort of intention or to discuss what the requisite intention, actual or imputed, should be. Indeed, the remark of Duke LJ to which I have referred suggests that he did not take seriously the idea that Downton had in any sense intended to cause injury.

B 41 Commentators and counsel have nevertheless been unwilling to allow *Wilkinson v Downton* to disappear beneath the surface of the law of negligence. Although, in cases of actual psychiatric injury, there is no point in arguing about whether the injury was in some sense intentional if negligence will do just as well, it has been suggested (as the claimants submit in this case) that damages for distress falling short of psychiatric injury can C be recovered if there was an intention to cause it. This submission was squarely put to the Court of Appeal in *Wong v Parkside Health NHS Trust* [2003] 3 All ER 932 and rejected. Hale LJ said that before the passing of the Protection from Harassment Act 1997 there was no tort of intentional harassment which gave a remedy for anything less than physical or psychiatric injury. That leaves *Wilkinson v Downton* with no leading role in the modern law.

D 42 In *Khorasandjian v Bush* [1993] QB 727, the Court of Appeal, faced with the absence of a tort of causing distress by harassment, tried to press into service the action for private nuisance. In *Hunter v Canary Wharf Ltd* [1997] AC 655, as I have already mentioned, the House of Lords regarded this as illegitimate and, in view of the passing of the 1997 Act, unnecessary. I did however observe, at p 707:

E > "The law of harassment has now been put on a statutory basis . . . and it is unnecessary to consider how the common law might have developed. But as at present advised, I see no reason why a tort of intention should be subject to the rule which excludes compensation for mere distress, inconvenience or discomfort in actions based on negligence . . . The policy considerations are quite different."

F 43 Mr Wilby said that the Court of Appeal in *Wong's* case should have adopted this remark and awarded Ms Wong damages for distress caused by intentional harassment before the 1997 Act came into force. Likewise, the prison officers in this case did acts calculated to cause distress to the Wainwrights and therefore should be liable on the basis of imputed intention as in *Wilkinson v Downton* [1897] 2 QB 57.

44 I do not resile from the proposition that the policy considerations G which limit the heads of recoverable damage in negligence do not apply equally to torts of intention. If someone actually intends to cause harm by a wrongful act and does so, there is ordinarily no reason why he should not have to pay compensation. But I think that if you adopt such a principle, you have to be very careful about what you mean by intend. In *Wilkinson v Downton* Wright J wanted to water down the concept of intention as much as possible. He clearly thought, as the Court of Appeal did afterwards in H *Janvier v Sweeney* [1919] 2 KB 316, that the plaintiff should succeed whether the conduct of the defendant was intentional or negligent. But the *Victorian Railway Comrs* case 13 App Cas 222 prevented him from saying so. So he devised a concept of imputed intention which sailed as close to negligence as he felt he could go.

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45 If, on the other hand, one is going to draw a principled distinction which justifies abandoning the rule that damages for mere distress are not recoverable, imputed intention will not do. The defendant must actually have acted in a way which he knew to be unjustifiable and either intended to cause harm or at least acted without caring whether he caused harm or not. Lord Woolf CJ, as I read his judgment [2002] QB 1334, 1350, paras 50–51, might have been inclined to accept such a principle. But the facts did not support a claim on this basis. The judge made no finding that the prison officers intended to cause distress or realised that they were acting without justification in asking the Wainwrights to strip. He said, at paragraph 83, that they had acted in good faith and, at paragraph 121, that: "The deviations from the procedure laid down for strip-searches were, in my judgment, not intended to increase the humiliation necessarily involved but merely sloppiness."

46 Even on the basis of a genuine intention to cause distress, I would wish, as in *Hunter's* case [1997] AC 655, to reserve my opinion on whether compensation should be recoverable. In institutions and workplaces all over the country, people constantly do and say things with the intention of causing distress and humiliation to others. This shows lack of consideration and appalling manners but I am not sure that the right way to deal with it is always by litigation. The Protection from Harassment Act 1997 defines harassment in section 1(1) as a "course of conduct" amounting to harassment and provides by section 7(3) that a course of conduct must involve conduct on at least two occasions. If these requirements are satisfied, the claimant may pursue a civil remedy for damages for anxiety: section 3(2). The requirement of a course of conduct shows that Parliament was conscious that it might not be in the public interest to allow the law to be set in motion for one boorish incident. It may be that any development of the common law should show similar caution.

47 In my opinion, therefore, the claimants can build nothing on *Wilkinson v Downton* [1897] 2 QB 57. It does not provide a remedy for distress which does not amount to recognised psychiatric injury and so far as there may be a tort of intention under which such damage is recoverable, the necessary intention was not established. I am also in complete agreement with Buxton LJ [2002] QB 1334, 1355–1356, paras 67–72, that *Wilkinson v Downton* has nothing to do with trespass to the person.

48 Counsel for the Wainwrights submit that unless the law is extended to create a tort which covers the facts of the present case, it is inevitable that the European Court of Human Rights will find that the United Kingdom was in breach of its Convention obligation to provide a remedy for infringements of Convention rights. In addition to a breach of article 8, they say that the prison officers infringed their Convention right under article 3 not to be subjected to degrading treatment.

49 I have no doubt that there was no infringement of article 3. The conduct of the searches came nowhere near the degree of humiliation which has been held by the European Court of Human Rights to be degrading treatment in the cases on prison searches to which we were referred: see *Valasinas v Lithuania* Reports of Judgments and Decisions 2001—VIII, p 385 (applicant made to strip naked and have his sexual organs touched in front of a woman); *Iwanczuk v Poland* (Application No 25196/94) (unreported) 15 November 2001 (applicant ordered to strip naked and subjected to humiliating abuse by guards when he tried to exercise his right

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to vote in facilities provided in prison); *Lorsé v The Netherlands* (Application No 52750/99) (unreported) 4 February 2003 (applicant strip-searched weekly over six years in high security wing without sufficient security justification).

50 In the present case, the judge found that the prison officers acted in good faith and that there had been no more than "sloppiness" in the failures to comply with the rules. The prison officers did not wish to humiliate the claimants; the evidence of Mrs Wainwright was that they carried out the search in a matter-of-fact way and were speaking to each other about unrelated matters. The Wainwrights were upset about having to be searched but made no complaint about the manner of the search; Mrs Wainwright did not ask for the blind to be drawn over the window or to be allowed to take off her clothes in any particular order and both of them afterwards signed the consent form without reading it but also without protest. The only inexplicable act was the search of Alan's penis, which the prison officers were unable to explain because they could not remember having done it. But this has been fully compensated.

51 Article 8 is more difficult. Buxton LJ thought [2002] QB 1334, 1352, para 62, that the Wainwrights would have had a strong case for relief under section 7 if the 1998 Act had been in force. Speaking for myself, I am not so sure. Although article 8 guarantees a right of privacy, I do not think that it treats that right as having been invaded and requiring a remedy in damages, irrespective of whether the defendant acted intentionally, negligently or accidentally. It is one thing to wander carelessly into the wrong hotel bedroom and another to hide in the wardrobe to take photographs. Article 8 may justify a monetary remedy for an intentional invasion of privacy by a public authority, even if no damage is suffered other than distress for which damages are not ordinarily recoverable. It does not follow that a merely negligent act should, contrary to general principle, give rise to a claim for damages for distress because it affects privacy rather than some other interest like bodily safety: compare *Hicks v Chief Constable of South Yorkshire Police* [1992] 2 All ER 65.

52 Be that as it may, a finding that there was a breach of article 8 will only demonstrate that there was a gap in the English remedies for invasion of privacy which has since been filled by sections 6 and 7 of the 1998 Act. It does not require that the courts should provide an alternative remedy which distorts the principles of the common law.

53 I would therefore dismiss the appeal.

LORD HOPE OF CRAIGHEAD

54 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann. I agree with it, and for the reasons which he gives I too would dismiss this appeal.

LORD HUTTON

55 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann. I agree with it, and for the reasons which he gives I too would dismiss this appeal.

LORD SCOTT OF FOSCOTE

56 My Lords, I have had the advantage of reading in advance the opinion of my noble and learned friend, Lord Hoffmann, and am in full

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agreement with his analysis and exposition of the principles of law applicable to this case. A

57 The essence of the complaint of each claimant is that he or she was subjected to conduct by the prison officers at Armley Prison, Leeds, that was calculated to, and did, cause humiliation and distress. The main issue is whether this conduct was tortious. In the case of each the strip search was carried out in a manner that, in a number of respects, was in breach of the procedures prescribed for strip searches by the internal rules of Armley Prison. And whether or not it was the intention of the prison officers to humiliate and cause distress to Mrs Wainwright and to Alan, it must, in my opinion, be accepted that the manner in which the strip searches were carried out was calculated (in an objective sense) to produce and did in fact, in relation to each of them, produce that result. I need not rehearse the relevant core facts. They are set out in paragraph 5 of Lord Hoffmann's opinion. B C

58 But there is an important difference between the case of Alan Wainwright and that of Mrs Wainwright. In the course of, and as part of, the strip-search of Alan, one of the prison officers poked a finger into Alan's armpits, handled his penis and pulled back his foreskin. It is conceded by the defendant that this touching of Alan constituted battery. The commission of the battery, being part of the conduct of the strip search, was inextricably associated with the overall humiliation and distress caused to Alan by the strip-search. No justification for the handling of Alan's penis in the way described, or indeed for any of the touching of him, was offered by the prison officers. They said they had no recollection of the strip-searching of Alan but that they would, when carrying out a strip-search, have followed the prescribed procedure and avoided any touching of the person being searched. But the trial judge accepted Alan's evidence to the contrary of what they had done to him. Counsel for the defendant, the Secretary of State, did not suggest that there could ever be circumstances in which a strip search with a view to discovering the presence of drugs on the person being searched would require the foreskin of the penis to be pulled back, or indeed the penis to be touched at all. For my part I am unable to understand how in any circumstances the pulling back of the foreskin could be a necessary part of a search for drugs. D E F

59 The pulling back of Alan Wainwright's foreskin by the prison officers constituted as gross an indignity as can be imagined. It undeniably warranted an award of aggravated damages. The judge awarded Alan £3,500 ordinary damages and £1,000 aggravated damages. He did so on the footing that even without the touching, i e without the battery, the conduct of the strip search would have been tortious. The Court of Appeal disagreed with that conclusion. They held that if there had been no touching the prison officers' conduct would not have been tortious and they, therefore, reduced Alan's damages by £750. G

60 My Lords, I am doubtful whether this reduction was justified. I agree with the Court of Appeal, and with your Lordships, that if there had been no touching, as there was not in Mrs Wainwright's case, no tort would have been committed. The unjustified infliction of humiliation and distress does not, without more, suffice at common law to constitute a tort. But the touching of Alan, in his armpits and on his penis, and the humiliation and distress thereby caused to him, cannot in my opinion be separated out from the strip-search as a whole and the humiliation and distress caused by the H

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strip-search as a whole. The touching was an integral part of the strip search, neither minor nor incidental. Accordingly, I would have been receptive to an argument that, whatever view be taken about the existence at common law of a tort based on the infliction of humiliation and distress, the judge's award to Alan of £4,500 should have been left untouched.

61 Moreover, the award to Alan of £1,000 aggravated damages was, in my opinion, distinctly on the low side. It was the same amount as that awarded to Mrs Wainwright who did not suffer the humiliation of having her sexual parts handled. And the absence of any possible justification for the handling of Alan's penis allows the inference to be drawn that it was a form of bullying, done with the intention to humiliate. However, no argument on these lines was addressed to your Lordships. The claimants have not sought to distinguish their respective cases. They have concentrated on the issue of principle.

62 The important issue of principle is not, in my opinion, whether English common law recognises a tort of invasion of privacy. As Lord Hoffmann has demonstrated, whatever remedies may have been developed for misuse of confidential information, for certain types of trespass, for certain types of nuisance and for various other situations in which claimants may find themselves aggrieved by an invasion of what they conceive to be their privacy, the common law has not developed an overall remedy for the invasion of privacy. The issue of importance in the present case is whether the infliction of humiliation and distress by conduct calculated to humiliate and cause distress, is without more, tortious at common law. I am in full agreement with the reasons that have been given by Lord Hoffmann for concluding that it is not. Nor, in my opinion, should it be. Some institutions, schools, university colleges, regiments and the like (often bad ones) have initiation ceremonies and rites which newcomers are expected to undergo. Ritual humiliation is often a part of this. The authorities in charge of these institutions usually object to these practices and seek to put an end to any excesses. But why, absent any of the traditional nominate torts such as assault, battery, negligent causing of harm etc, should the law of tort intrude? If a shop assistant or a bouncer or barman at a club is publicly offensive to a customer, the customer may well be humiliated and distressed. But that is no sufficient reason why the law of tort should be fashioned and developed with a view to providing compensation in money to the victim.

63 Whether today, the Human Rights Act 1998 having come into effect, conduct similar to that inflicted on Mrs Wainwright and Alan Wainwright, but without any element of battery and without crossing the line into the territory of misfeasance in public office, should be categorised as tortious must be left to be decided when such a case arises. It is not necessary to decide now whether such conduct would constitute a breach of article 8 or of article 3 of the Convention.

64 I, too, would dismiss these appeals.

Appeal dismissed.
No order as to costs.

Solicitors: Restons, York, Treasury Solicitor.

BLS

ANNEXURE R-16

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ICLR

*1334 Wainwright v Home Office

Court of Appeal

20 December 2001

[2001] EWCA Civ 2081

[2002] Q.B. 1334

Lord Woolf CJ , Mummery and Buxton Ljj

2001 Nov 20, 21; Dec 20

Tort—Cause of action—Intentional infliction of harm—Visitors to prison strip—searched for drugs—Distress and humiliation inflicted but no bodily harm caused—Whether infringement of right to respect for private life—Whether cause of action

Statute—Retroactive effect—Conduct occurring before statute in force—Whether statutory provision on which claim founded having retrospective effect— Human Rights Act 1998 (c 42), s. 3(1)

The claimants, a mother and son, were strip-searched for drugs on a prison visit in 1997. The search was not conducted according to rule 86 of the Prison Rules 1964 , and the claimants were humiliated and distressed. No drugs were found. The second claimant, aged 21, who was mentally impaired and suffered from cerebral palsy, developed post-traumatic stress syndrome. They claimed damages for trespass, and the second claimant claimed, in addition, damages for battery. The judge held that trespass to the person, consisting of wilfully causing a person to do something to himself which infringed his right to privacy, had been committed against both claimants, and, further, that trespass to the person, consisting of wilfully causing a person to do something calculated to cause harm to him, namely infringing his legal right to personal safety, had been committed against the second claimant. He awarded basic and aggravated damages of £2,600 to the first claimant and £4,500 to the second claimant.

On appeal by the Home Office against the finding of trespass—

Held:

(1) that there was no common law tort of invasion of privacy; that the Human Rights Act 1998 could not change the substantive law by introducing a retrospective right to privacy; and that, since the conduct complained of occurred before the 1998 Act came into force, section 3(1) did not apply retrospectively to it (post, paras 40, 57, 61, 63, 89, 102, 114, 124).

Douglas v Hello! Ltd[2001] QB 967, CA , R v Lambert[2002] 2 AC 545, HL(E) and *R v Kansal (No 2)[2002] 2 AC 69, HL(E) considered* .

(2) Allowing the appeal, that there was a tort of intentional infliction of harm but it was not conventional trespass, although it was more akin to trespass than negligence; that the tort required an intention to cause harm which was then in fact caused or recklessness as to whether it would be caused; that emotional distress by itself was insufficient to found the tort unless bodily harm or recognised psychiatric illness resulted from it; that, although on the judge's findings the claimants had suffered the necessary damage, since there was no finding that the prison officers had intended to cause harm or were reckless as to whether they caused harm, the claimants had failed to establish the necessary basis for their claim; and that, accordingly, the first claimant's claim would be dismissed and the second claimant's damages reduced to £3,750 for battery (post, paras 47-51, 55-56, 63, 66, 70, 72, 78-81, 84-85, 124-125).

*1335

Wilkinson v Downton[1897] 2 QB 57 , Janvier v Sweeney[1919] 2 KB 316, CA and *Khorasandjian v Bush[1993] QB 727, CA considered* .

Per Buxton LJ. If the events in question had occurred after 2 October 2000 they would have grounded a right to relief for the claimants under section 7(1)(a) of the 1998 Act by reason of the prison authorities' breach of article 8 of the Convention (post, para 93).

The following cases are referred to in the judgments:

**1336*

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA

Burnett v George [1992] 1 FLR 525, CA

Burris v Azadani [1995] 1 WLR 1372; [1995] 4 All ER 802, CA

Director of Public Prosecutions v K (A Minor) [1990] 1 WLR 1067, DC

Douglas v Hello! Ltd [2001] QB 967; [2001] 2 WLR 992; [2001] 2 All ER 289, CA

Hellewell v Chief Constable of Derbyshire [1995] 1 WLR 804; [1995] 4 All ER 473

Hunter v Canary Wharf Ltd [1997] AC 655; [1997] 2 WLR 684; [1997] 2 All ER 426, HL(E)

Janvier v Sweeney [1919] 2 KB 316, CA

Kaye v Robertson [1991] FSR 62, CA

Khorasandjian v Bush [1993] QB 727; [1993] 3 WLR 476; [1993] 3 All ER 669, CA

Letang v Cooper [1965] 1 QB 232; [1964] 3 WLR 573; [1964] 2 All ER 929, CA

Malone v Metropolitan Police Comr [1979] Ch 344; [1979] 2 WLR 700; [1979] 2 All ER 620

Pearce v Governing Body of Mayfield Secondary School [2001] EWCA Civ 1347; [2002] ICR 198, CA

Peters v Prince of Wales Theatre (Birmingham) Ltd [1943] KB 73; [1942] 2 All ER 533, CA

Platform Home Loans Ltd v Oyston Shipways Ltd [2000] 2 AC 190; [1999] 2 WLR 518; [1999] 1 All ER 833, HL(E)

Pye (J A) (Oxford) Ltd v Graham [2001] EWCA Civ 117; [2001] Ch 804; [2001] 2 WLR 1293, CA

R v Benjafield [2001] 3 WLR 75; [2001] 2 All ER 609, CA

R v Kansal (No 2) [2001] UKHL 62; [2002] 2 AC 69; [2001] 3 WLR 1562; [2002] 1 All ER 257, HL(E)

R v Lambert [2001] UKHL 37; [2002] 2 AC 545; [2001] 3 WLR 206; [2001] 3 All ER 577, HL(E)

R v Martin (1881) 8 QBD 54

R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 696; [1991] 2 WLR 588; [1991] 1 All ER 720, HL(E)

R (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening) [2001] UKHL 61; [2002] 1 AC 800; [2001] 3 WLR 1598; [2002] 1 All ER 1, HL(E)

Rayner (J H) (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418; [1989] 3 WLR 969; [1989] 3 All ER 523, HL(E)

Spencer (Earl) v United Kingdom (1998) 25 EHRR CD 105

Victorian Railways Comrs v Coultas (1888) 13 App Cas 222, PC

Warner v Riddiford (1858) 4 CBNS 180

Wilkinson v Downton [1897] 2 QB 57

Wilson v First County Trust Ltd (No 2) [2001] EWCA Civ 633; [2002] QB 74; [2001] 3 WLR 42; [2001] 3 All ER 229, CA

Wilson v Pringle [1987] QB 237; [1986] 3 WLR 1; [1986] 2 All ER 440, CA

Wong v Parkside Health NHS Trust [2001] EWCA Civ 1721; The Times, 7 December 2001, CA ***1336***

The following additional cases were cited in argument:

Laskey, Jaggard and Brown v United Kingdom (1997) 24 EHRR 39

Latter v Braddell (1881) 44 LT 369, CA

R v Deputy Governor of Parkhurst Prison, Ex p Hague [1992] 1 AC 58; [1991] 3 WLR 340; [1991] 3 All ER 733, HL(E)

R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326; [1999] 3 WLR 972; [1999] 4 All ER 801, HL(E)

R (Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532; [2001] 2 WLR 1622; [2001] 3 All ER 433, HL(E)

R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840, CA

The following cases, although not cited, were referred to in the skeleton arguments:

Murray v Ministry of Defence [1988] 1 WLR 692; [1998] 2 All ER 521, HL(NI)

Valasinas v Lithuania(Application No 44558/98) (unreported)24 July 2001, ECHR

Westminster Property Management Ltd, In re The Times, 19 January 2000

APPEAL from Judge McGonigal sitting at Leeds County Court

By particulars of claim dated 14 March 2000 the claimants, Mary Jane Wainwright and her son Alan Joseph Wainwright, a patient suing by his litigation friend Mary Jane Wainwright, sought damages against the defendant, the Home Office, including aggravated and exemplary damages, for trespass to the person, breach of their human rights under the Convention for the Protection of Human Rights and Fundamental Freedoms as scheduled to the Human Rights Act 1998, personal injury, injury to feelings, loss and damage in respect of strip-searches carried out by prison officers at Armley prison, Leeds on 2 January 1997 when the claimants were visiting the first claimant's son at the prison. The second claimant, who was born in 1975, suffered from cerebral palsy and severe arrested social and intellectual development. On 23 August 2001 the judge awarded damages for trespass to the person in respect of each claimant, and for battery to the second claimant. The judge found that the tort of trespass to the person, consisting of wilfully causing a person to do something to himself which infringed his right to privacy, had been committed against both claimants, and a further tort of trespass to the person, consisting of wilfully causing a person to do something calculated to cause harm to him, namely infringing his legal right to personal safety, had been committed against the second claimant. The basic award to the first claimant was £1,600 with £1,000 aggravated damages, and to the second claimant a basic award of £3,500 with aggravated damages of £1,000, with agreed sums by way of interest.

By an appellant's notice the defendant appealed against the decision of the judge on the findings of trespass only, on the grounds, inter alia, that (1) the judge erred in holding that there existed a tort of wilfully causing a person to do something calculated to cause harm to him, namely infringing his legal right to personal safety, notwithstanding that such a tort was not recognised by English law; (2) the judge erred in holding that that tort had been committed against the second claimant (subject to questions of consent and legal justification); (3) the judge erred in holding that there existed a tort of trespass to the person consisting of wilfully causing a person to do something to himself which infringed his right of privacy, notwithstanding **1337* that such a tort was not recognised by English law and that there was no authority for it, in particular the judge erred in purporting to apply the technique of legislative interpretation enunciated in *R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 696* to the modification of the common law when that technique applied only to the interpretation of legislation in limited circumstances, and in failing adequately or properly to define the scope of any such tort; (4) the judge erred in holding that that tort had been committed against the claimants (subject to questions of consent and legal justification) since any conduct of the officers was outside the scope of any such tort; (5) the officers had a lawful power to search the claimants and the judge erred in holding otherwise, in that rule 86(1) of the Prison Rules 1964 (SI 1964/388) should not have been construed as if section 3 of the Human Rights Act 1998 was in force at the time of the search, since it took place before the Act came into force and neither section 3 nor the 1998 Act in general was retrospective save where it expressly so provided, the judge should have held that the decision to search and the carrying out of the search were proportionate and lawful, and that the search of each claimant was lawfully justified by the power in rule 86(1); (6) the judge erred in holding that the consent given by each claimant was not a real consent; (7) the judge erred in holding that the defendant had represented to the claimants that the officers had a legal right to search them; (8) alternatively, any representation made to the claimants that the officers had a lawful power to search them if they chose to proceed with the proposed visit was true; and (9) alternatively, even if any representation made to the claimants was not true, that did not vitiate or nullify the consent which the claimants had given to being searched.

By a respondent's notice filed on 28 June 2001 the claimants requested the court to uphold the judge's order for the additional reasons, inter alia, that (1) the judge was statutorily bound to give effect to the parties' Convention rights, in particular the claimants' rights under article 8 of the

Convention , which might extend to providing common law duties on all parties which were coextensive with the new statutory requirements on public bodies under the 1998 Act: (2) the judge correctly stated that where A wilfully caused B to do something which was calculated to cause harm to B, namely infringing B's legal right to personal safety, and did in fact cause physical harm to B, that constituted a valid cause of action unless it could be justified, and rightfully held that the second claimant was the victim of that tortious act: the judge should have held that the first claimant was also a victim of that type of tortious act: (3) the judge ought to have held that both claimants suffered a violation of their privacy which constituted an actionable tort for which damages for personal injury and/or damages purely for distress and humiliation were recoverable: (4) the judge ought to have held that rule 86(1) of the Prison Rules 1964 as interpreted in accordance with article 8 of the Convention did not provide lawful justification to strip-search the claimants: and (5) in the alternative, rule 86(1) was entirely incompatible with the claimants' Convention rights and could not in any event provide lawful justification to perform the searches.

The facts are stated in the judgment of Lord Woolf CJ.

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Robin Tam for the Home Office. The claimants had no right, as such, to enter the prison but if they were to do so, they could be searched: see rule 86 of the Prison Rules 1964 and section 47 of the Prison Act 1952 . Since there is no action for damages for unlawful administrative action it is not sufficient for the claimants to show that the search was not permitted by rule 86. To succeed in a claim for damages the claimants have to show that a tort has been committed against them. Against any such tort, it is open to the defendant to raise the general defences of lawful justification and consent. [Reference was made to *R v Deputy Governor of Parkhurst Prison, Ex p Hague[1992] 1 AC 58* .]

It s implicit in the claimants' factual cases that none of the traditionally recognised torts of trespass to the person have been committed. Trespass to the person comprises a collection of related torts, each distinct from the other, each with its own requirements. It is not a unitary tort, readily amenable to being stretched and extended into new situations: see Clerk & Lindsell on Torts, 18th ed (2000) , para 13-05 . Wilfully causing a person to do something calculated to cause harm to him, namely, infringing his legal right to personal safety, and wilfully causing a person to do something to himself which infringes his right of privacy are not torts known to English law. [Reference was made to *Laskey, Jaggard and Brown v United Kingdom(1997) 24 EHRR 39* .]

The judge's alterations to the character of the tort of trespass to the person amounts to a radical and unjustifiable extension of the tort first identified in *Wilkinson v Downton[1897] 2 QB 57* , which involved (a) intentional direct action against the victim: (b) an element of malice or hostility: and (c) damage which was intended by, and flowed directly from, the intentional direct action. In contrast, in the torts identified by the judge, the core action "against" the victim does not have the same intentional and direct character. Although there is action by the perpetrator in the sense that he deliberately persuades the victim to do something, the action which forms the basis of the tort is not that of the perpetrator but of the victim who has been persuaded to act against himself. There would be no tort if the victim refused to act. Similarly, the "damage" does not flow directly from the action of the perpetrator but is self-inflicted in the sense that it is brought about by the victim himself. In the second of the torts identified by the judge there is no element of intention in respect of the "damage" (namely, the infringement of the right to privacy), and the tort could be committed if the infringement was merely an unintended incident of the victim's own act. The judge wrongly imported the concept of inducement into trespass to the person from the torts of deceit and misrepresentation and of intimidation. There is neither authority nor justification for such an importation. The scope of a recognised tort should not be widened by disregarding or modifying its requirements: see *Hunter v Canary Wharf Ltd[1997] AC 655, 691-692, 698, 707, 725* , which overruled part of *Khorasandjian v Bush[1993] QB 727* . [Reference was also made to *Janvier v Sweeney[1919] 2 KB 316* ; *Burnett v George[1992] 1 FLR 525* and *Burris v Azadani[1995] 1 WLR 1372* .]

The torts identified by the judge are not complete unless the perpetrator persuades the victim to do something to himself and the victim does it. But any such act by the victim would be voluntary and the defence of consent should be made out. A tort should not be held to have been committed by *1339 the very circumstances which would normally simultaneously establish a general defence.

There is no general right to privacy: see *Kaye v Robertson[1991] FSR 62* . The judge erred in treating *Douglas v Hello! Ltd[2001] QB 967* as authority for the proposition that a tort of privacy has now been

developed.

The torts identified by the judge would have a wide and dramatic impact on ordinary life, particularly if the defences available were of uncertain ambit, and they would lead to undesirable consequences and undesirable new litigation. Civil liability is not an appropriate method of regulating relationships between people in such situations, bearing in mind the voluntary act of the person bringing any legal action.

The Prison Rules 1964 should not have been construed by applying section 3 of the Human Rights Act 1998 . The 1998 Act is not retrospective, save in so far as the Act itself provides in section 22(4) : see *R v Lambert[2002] 2 AC 545* . The fact that the first instance decision was made after the Act came into force does not mean that the Act can have retrospective effect if the conduct complained of took place before it came into force. [Reference was made to *R (Mahmoood) v Secretary of State for the Home Department[2001] 1 WLR 840* and *R v Director of Public Prosecutions, Ex p Kebilene[2000] 2 AC 326* .]

In any event, nothing in the 1998 Act compels the court to find the existence of these two torts. If there is any interference with article 8(1) rights, that interference is justified under article 8(2) by the legitimate aim of stopping the flow of drugs into prison. The prison was entitled to set a policy as to how to deal with such a pressing problem. The reaction of the prison to the situation, in so far as it might affect any person's rights under article 8, fell within the discretionary area of judgment identified in *R v Director of Public Prosecutions, Ex p Kebilene[2000] 2 AC 326, 380-381* . [Reference was also made to *R (Mahmoood) v Secretary of State for the Home Department[2001] 1 WLR 840* and *R (Daly) v Secretary of State for the Home Department[2001] 2 AC 532* .] Each individual search was a proportionate response to the problem faced by the prison.

Any departure from the procedure laid down was not such as to remove the claimants' consent to the searches. Neither innocent misrepresentation nor the voluntary making of an unwelcome choice suffices to nullify the consent given. [Reference was made to *Latter v Braddell(1881) 44 LT 369* .]

There was no evidence that the search was calculated to cause the second claimant harm, and no evidence of malice or intention to do so.

David Wilby QC and *Ashley Serr* for the claimants. The strip searches undertaken by the prison officers did not comply with rules 39 and 86(1) of the Prison Rules 1964 . They were not undertaken in a manner promulgated by the authorities at the prison. Therefore the prison officers' actions cannot be justified by their sub-statutory power. Further, there was no consent to the searches because such consent as was given was predicated on the searches being conducted in accordance with proper practice. Therefore, if a cause of action other than battery can be shown to exist, liability can be established. Two causes of action in tort are possible. First, an extension of the principle in *Wilkinson v Downton[1897] 2 QB 57* , so that a person who does something calculated to cause harm to another is liable whether the harm is physical injury or other harm, which need not be as serious as **1340* psychiatric ill health but should include distress of the nature suffered by the first claimant: see also *Janvier v Sweeney[1919] 2 KB 316* ; *Burnett v George[1992] 1 FLR 525* ; and *Khorasandjian v Bush[1993] QB 727* . Where a person intentionally or recklessly causes fright or horror and harm results, that can be regarded as intended or likely, as distinguished from merely foreseeable as in the tort of negligence: see Mullany & Handford, Tort Liability for Psychiatric Damage (1993) , chapter 14 . A proper analysis of the evolution of the tort in the light of *Wong v Parkside Health NHS Trust* The Times, 7 December 2001 is that there must be the intentional infliction of harm, or conduct which is so proximate to the resulting infliction of harm that an intention can be imputed. [Reference was also made to *Victorian Railways Comrs v Coultas(1888) 13 App Cas 222* .]

Second, it should be recognised that a tort is committed where one person wilfully causes another person to do something to himself which infringes his right to privacy. In *Douglas v Hello! Ltd[2001] QB 967, 1001-1002 Sedley LJ* stated, obiter, that the law would recognise and, where appropriate, protect a right to privacy both under the common law and as a result of article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Keene LJ stated, at p 1012, that it was unlikely that *Kaye v Robertson[1991] FSR 62* would now be followed. The claimants were entitled to the protection of the privacy of their bodies and the deliberate and tortious acts of the prison officers invaded or adversely affected that privacy and should be actionable. The judge was correct to extend the principle in *R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 696* that domestic legislation should be construed in conformity with the Convention to a common law situation. The 1998 Act should be used to qualify the interpretation of rule 86 of the Prison Rules 1964

so that it accords with article 8 : see section 3(1) ; *J A Pye (Oxford) Ltd v Graham[2001] Ch 804* ; *Wilson v First County Trust Ltd (No 2)[2002] QB 74* ; and *R v Lambert[2002] 2 AC 545* . *R v Lambert* and *R v Kansal (No 2)[2002] 2 AC 69* do not preclude such retrospective effect where the events took place before the 1998 Act came into force but the civil trial at first instance took place after the Act came into force. A court as a public authority is required by section 6(1) to act in a way which is compatible with Convention rights and by section 3(1) to give effect to privacy and subordinate legislation in a way compatible with such rights. Rule 86, when construed so that it accords with article 8 of the Convention, does not provide lawful justification for the searches that took place. The infringement of the right to privacy was not proportionate to the legitimate aim pursued. [Reference was also made to *Pearce v Governing Body of Mayfield Secondary School[2002] ICR 198* .]

Tam replied.

Cur. adv. vult.

20 December. The following judgments were handed down. LORD WOOLF CJ

1 This appeal relates to a judgment of Judge McGonigal, given at the Leeds County Court on 23 April 2001. The claimants were a mother, Mrs Mary Wainwright, and her son, Alan Wainwright. The judge awarded ***1341** basic and aggravated damages which were, in total, for the mother the sum of £2,600 and for the son the sum of £4,500. The damages were compensation for the manner in which they were strip-searched by prison officers when they went to Armley prison, Leeds in order to visit another son (Patrick O'Neill) of Mrs Wainwright.

2 The case raises difficult issues of law and the judge gave leave to appeal. The most important of those issues are identified by Mr Tam for the defendant, the Home Office, as being whether a person is liable in tort if he: (i) wilfully causes a person to do something calculated to cause harm to him, namely to infringe his legal right to personal safety; (ii) wilfully causes a person to do something to himself which infringes his right of privacy?

3 Additional issues were: (i) if such conduct was tortious, whether, on the facts of this case (a) it was negatived by consent or (b) protected by statutory authority; (ii) whether the complainants were entitled to rely on section 3 of the Human Rights Act 1998 notwithstanding that the conduct complained of occurred on 2 January 1997, before the 1998 Act came into force.

4 Judge McGonigal gave a detailed and clear judgment as to both his findings of fact and the legal principles which he applied in this difficult case. It is therefore possible to rely on the judgment in order to explain the factual background and the issues.

Factual background

5 At the time of the visit Alan Wainwright was 21 years of age. He suffers from cerebral palsy with a degree of mental impairment. He therefore sues as a patient by Mrs Wainwright, his litigation friend.

6 On 2 January 1997 Mrs Wainwright and Alan arrived at the prison at about 6 p m. They went through normal security checks and then waited with the other visitors prior to seeing Patrick. They were then approached by a number of prison officers and asked to accompany them. They then proceeded to the north gatehouse of the prison. On the way there, they were told they were to be strip-searched because they were suspected of bringing drugs into the prison and if they refused they might be denied a visit to Patrick. At the gatehouse they were taken up to the first floor, where they were separated.

Mrs Wainwright was strip-searched by two female prison officers in one room while Alan was searched by two male prison officers in another room. They were then allowed to visit Patrick.

8 Before a strip-search takes place, the person who is to be strip-searched is required to sign a consent form. There is no dispute that both claimants signed the form, which is known as F2141. There was a dispute as to *when* they signed the form. The form reads:

> "Notice for the information of visitors or other persons entering an establishment
>
> "Strip-search

" *Please read carefully*

"The governor has directed that, for the reasons explained to you, you should be strip-searched. The police have been informed but cannot come to deal with the matter. The search will therefore be carried out by **1342* prison staff. The procedure for the search is explained overleaf. Please sign below if the search is taking place with your consent. I have read this notice (or it has been read to me) and I understand it. I agree to be strip-searched by prison staff."

9 The prison officers who gave evidence said that the forms would have been signed prior to the search being undertaken in accordance with proper practice. Mrs Wainwright and Alan both said that they were asked to sign the forms after the search had been substantially completed. The judge preferred their evidence on this issue. He regarded Mrs Wainwright "as an honest witness who was doing her best to tell the truth as she remembered it". He felt the circumstances surrounding Alan's search supported his story.

10 The search was conducted at a time when it was dark outside and Mrs Wainwright believed that she could be seen by those who were in a single storey flat-roofed administration block which was on the opposite side of the road or from that road. There were roller blinds on the windows of the room that she was in but the judge accepted her evidence that the blinds were not pulled down. Mrs Wainwright does not allege that she was touched by either of the female officers who searched her, but says that she felt threatened and that she was upset and worried. Alan said (and this the judge accepted) that during his search he was naked, that a finger was poked into his armpits and that one prison officer went all round his body, lifted up his penis and pulled back the foreskin. The judge also found that Mrs Wainwright was correct in saying that there was a point when she was naked apart from knickers around her ankles and a vest held above her breasts. The judge also accepted that the officers had *not* known of Alan's learning difficulties before they had completed the strip-search of him: see paragraph 56 of his judgment. Mrs Wainwright describes how she was crying during the search and there is no doubt that she and Alan were very upset by what happened.

11 The judge also made the following relevant findings of fact. (i) There was a pressing problem involving the prevalence of illicit drugs within the prison; (ii) visitors in general were a major source of such drugs and that all visitors were suspected of bringing in drugs until it was proved otherwise because all sorts of unlikely visitors had been known to bring in drugs; (iii) there were reasonable grounds for believing that Mrs Wainwright's son, Patrick, had been obtaining illicit drugs; (iv) the claimants each consented to being strip-searched before they were searched although in each case they signed the consent forms after the search was complete or substantially complete; (v) the search of each of the complainants was not conducted in as seemly a manner as was consistent with discovering anything concealed; (vi) the officers honestly believed that they had a legal right to strip-search the claimants; (vii) Mrs Wainwright understood and was intended to understand that the officers had a legal right to strip-search the claimants; (viii) notwithstanding that each claimant consented to the strip-search, such consent was not a real consent because they were expressly told that if they did not consent the defendant would deny the claimants the proposed visit; (ix) further, such consent was not a real consent because it was represented to them that the officers had a legal right to strip-search them, which was untrue, although honestly believed; (x) any search under a power given by rule 86 of the Prison Rules 1964 was lawful only if it was conducted in as **1343* seemly a manner as was consistent with discovering anything concealed; (xi) the strip-search of the claimants was not a proportionate response to the objective of preventing that person from obtaining drugs from visitors and was therefore not permitted by that rule; (xii) the prison officers had no right to conduct a search.

12 The judge on these findings came to the conclusion that a tort of trespass to the person, consisting of wilfully causing a person to do something to himself which infringes his right to privacy, had been committed against both claimants. In addition he concluded that the tort of trespass to the person, consisting of wilfully causing a person to do something calculated to cause harm to him, namely infringing his legal right to personal safety, had been committed against the second claimant.

13 There is no dispute now that the Home Office is liable to Alan for the physical handling which took place and that this amounted to battery. Nothing was found during the course of the searches.

14 As to injuries, the findings of the judge are not so clear. It appears that he accepted in the case of

Mrs Wainwright there was exacerbation of existing depression and unpleasant memories of the incident. In the case of Alan, it appears that the judge found that he was suffering from post-traumatic stress disorder.

15 Both claimants sought exemplary and aggravated damages. The judge did not consider that it was an appropriate case for exemplary damages. He considered that it was an appropriate case in which to award aggravated damages. As aggravated damages, he awarded each claimant £1,000.

The statutory authority to conduct searches

16 The Prison Rules 1964 (consolidated 1998) are made pursuant to section 47 of the Prison Act 1952 . The parties accept that these rules (as consolidated) applied to the search. The rule which is directly applicable is rule 86(1) . This rule provides: "Any person or vehicle entering or leaving a prison may be stopped, examined and searched."

17 The very general terms of rule 86 have to be contrasted with the terms of rule 39(1) , which applies to prisoners. This states:

> "(1) Every prisoner shall be searched when taken into custody by an officer, on his reception into a prison and subsequently as the governor thinks necessary or as the Secretary of State may direct.
>
> "(2) A prisoner shall be searched in as seemly a manner as is consistent with discovering anything concealed.
>
> "(3) No person shall be stripped and searched in sight of another prisoner, or in the sight or presence of an officer not of the same sex."

18 Leeds prison has its own strategy and procedure relating to searches. Part of the strategy applies to visitors to prisons. The following statements are important. Section 1.2.1:

> "Searches will be conducted in as seemly and sensitive manner as is consistent with [discovering] anything concealed. No person will be strip-searched in the sight of anyone not directly involved in the search. A person who refuses to be searched will be denied access to the prison or detained in accordance with section 1.2.7."

Section 1.2.5: **1344*

> "Strip-searching of visitors is not permitted except in the circumstances specified in section 1.2.7 and then only if police attendance is not possible. In cases where strip-searches of visitors are necessary it is preferable that this is done by the police."

Section 1.2.6:

> "A visitor who refuses to co-operate with the search procedures will be advised that the failure to comply will result in exclusion from the prison."

Section 1.2.7:

> "If the duty governor sanctions a strip-search, the visitor should be taken to a room which is completely private and informed of the general nature of the suspected article."

19 After the conclusion of the oral argument our attention was drawn to two recent decisions. At our invitation the parties submitted further written submissions on those decisions.

The Human Rights Act issue

20 It is convenient to take this issue first. It relates to the judge's finding that the Home Office was

under a liability to Mrs Wainwright based on the infringement of her right to privacy, notwithstanding that she suffered no physical injury, but only distress and humiliation. The existence of such a right at common law has never been clearly established but the judge found that she was entitled to the protection of such a right, basing his conclusion in part on the judgment of Sedley LJ in *Douglas v Hello! Ltd[2001] QB 967* that such a right could exist at common law and in part on the Human Rights Act 1998. However, as the judge recognised, in that case the acts complained of occurred after the Human Rights Act 1998 had come into force on 2 October 2000 (Sedley LJ in his most instructive judgment was dealing with the question "Is there today a right of privacy in English law?" (p 997, para 109), while here the matters of complaint occurred prior to that date.

21 On this appeal Mr Wilby relies on the Human Rights Act 1998 for a different purpose, namely to qualify the interpretation of prison rule 86 so that it accords with article 8.

22 There has been considerable uncertainty as to whether the Human Rights Act 1998 can apply retrospectively in situations where the conduct complained of occurred before the Act came into force. The position was considered by the House of Lords in *R v Lambert[2002] 2 AC 545* . After the hearing of this appeal the decision was given by the House of Lords in *R v Kansal (No 2)[2002] 2 AC 69* . In *Kansal's* case the actual decision in *R v Lambert* was subject to considerable criticism but because *R v Lambert* had only been recently decided and the decision only concerned a transitional situation *R v Lambert* was not overruled.

23 Mr Wilby, on behalf of the claimants, concedes that *R v Lambert* made clear that convictions by courts before the Act had come into force cannot be impugned after the Act came into force on the grounds that the court acted in a way which would be incompatible with Convention rights. He therefore accepts, for example, that the Court of Appeal could not on an ***1345** appeal coming before it after 2 October 2000 differ from a decision of the Employment Appeal Tribunal prior to the Act coming into force as to the construction of the Sex Discrimination Act 1975 , if the construction of the Employment Appeal Tribunal would have been regarded as correct before the Human Rights Act 1998 came into force. *Pearce v Governing Body of Mayfield Secondary School[2002] ICR 198* was cited in support of this concession.

24 However, Mr Wilby argues that this does not apply to section 3 of the 1998 Act . Section 3 provides:

> "(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> "(2) This section—(a) applies to primary legislation and subordinate legislation whenever enacted ..."

25 It is not necessary to refer to section 3(2) as Mr Wilby does not rely on section 3(2) to support his contention. He accepts the only relevance of that subsection is to make it clear that once section 3 is in force it applies to legislation prior to the Act coming into force.

26 Mr Wilby says, looking at the language of section 3(1) , it is clear from its unqualified wording that once the Act was in force the judge and this court are obliged to comply with section 3(1). Mr Wilby stresses that there has been no case in which there is a judgment which is inconsistent with his submissions that once the Act is in force a court is required to give effect to section 3(1) even though matters complained of (as here) took place before the Act came into force. He submits to do so does not involve giving retrospective effect to section 3 as long as the court, as here, is trying the case after the Act is in force.

27 *R v Lambert[2002] 2 AC 545* and *R v Kansal (No 2)[2002] 2 AC 69* do not directly decide this point. They did not concern section 3. In those cases, unlike the position here, the decision under appeal was given before the Act came into force. In addition there was no appeal by a public authority as there is here by the Home Office. However the decision in both cases is consistent with the general presumption that legislation should not be treated as changing the substantive law in relation to events taking place prior to legislation coming into force. But the whole purpose of this part of the claimants' argument is to rely on section 3 to assist in establishing a liability on the Home Office for causing humiliation and distress where without section 3 it would not exist. This is therefore an attempt by Mr Wilby to rely on section 3 to achieve an interpretation of rule 86 which is then to be applied retrospectively to a situation when the Act was not in force.

28 Of course, legislation can expressly provide that it is to apply retrospectively and if it does so the legislation is retrospective in accordance with the terms of the legislation. This is the position with regard to section 22(4) of the Human Rights Act 1998 . Section 22(4) provides:

> "Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section."

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29 Section 22(4) has no application to section 3. However, this does not mean that section 22(4) is not relevant. On the contrary, it is highly significant since it demonstrates that when Parliament wanted the Act to operate retrospectively it said so.

30 The speeches in *R v Lambert[2002] 2 AC 545* as to the general approach to the Human Rights Act 1998 commence with that of Lord Slynn of Hadley, at p 561, para 6:

> "It is clear that the 1998 Act must be given its full import and that long or well entrenched ideas may have to be put aside, sacred cows culled. Since, however, the Act did not come into force (apart from limited provisions) until the Secretary of State had appointed a day or days for the Act or parts of it to come into force, and since there is a presumption against retrospectivity in legislation, it is not to be assumed a priori that Convention rights, however commendable, are to be enforceable in national courts in respect of past events. The question is whether the Act has provided for rights to be enforceable in respect of such past events or more precisely whether a court reviewing the legality of a direction to a jury at a criminal trial given before the Act came into force, which was in accordance with the law at the time, has to be judged by the standards of the Convention."

31 Lord Slynn was concerned to look at the reality of the situation, as I would suggest we must do here, in order to see whether we are being asked to apply the Act retrospectively. Lord Slynn's approach is indicated in this passage from his speech, at p 562, para 12:

> "Moreover, even if there is a basis for the contention that the appellant's argument based on sections 7 and 22 do not involve retrospectivity, it seems to me that the obvious effect of section 6 as interpreted by the appellant is to impose on the House the current duty of quashing retrospectively a conviction which was good as the law stood at the time."

32 The speech of Lord Hope of Craighead is also relevant. Lord Hope said, at p 595, para 115: "there is nothing in the 1998 Act to indicate that [section 3(1)] is to be applied retrospectively to acts of courts or tribunals which took place before the coming into force of section 3(1)."

33 Furthermore Lord Hope cited what Sir Andrew Morritt V-C had said in *Wilson v First County Trust Ltd (No 2)[2002] QB 74, 88-89, para 20* and then went on to say:

> "I agree with the Vice-Chancellor that the answer to this argument is to be found in section 22(4) . Parliament made its choice as to the extent to which the 1998 Act should have effect retrospectively. It did so by express enactment, and in my opinion no other reading of section 22(4) than that which I have indicated is possible."

34 What had been said by Sir Andrew Morritt V-C is:

> "The effect of section 22(4) is not in doubt. It provides (by the second limb of the section) that, in general, section 7(1) does not apply to an act taking place before 2 October 2000. So, for example, a person who claims that a public authority has acted in a way which is incompatible **1347* with a Convention right (contrary to section 6(1) of

> the Act) cannot bring proceedings against the authority under the Act (pursuant to section 7(1)(a)) if the unlawful act took place before 2 October 2000." .

35 Lord Clyde also dealt with the issue but his approach is neutral so far as the present issue is concerned. He said *[2002] 2 AC 545, 604, para 142* : "In my view section 3 only became obligatory on courts on 2 October 2000. The rule of construction which it expresses applies to all legislation whenever enacted."

36 However later Lord Clyde indicated his general approach when he adds, at p 605, para 143:

> "In general Acts of Parliament should not be read as operating so as to affect things done prior to their coming into effect. I see no reason why that principle should not apply to the 1998 Act. If a departure from the usual course was intended I would expect that to have been clearly stated."

37 In *R v Kansal (No 2)[2002] 2 AC 69 Lord Hope* again referred expressly to section 3 after referring to my judgment in *R v Benjafield[2001] 3 WLR 75, 92* . He stated, at p 112, para 84: "In my opinion however the usual presumption that statutes are not intended to be retrospective in effect applies to section 3(1) ."

38 And at the end of that paragraph he added: "So I would not extend retrospectivity to section 3(1), in the absence of an express provision to that effect."

39 In their additional written submissions, counsel on behalf of Mrs Wainwright and Alan submit *R v Lambert[2002] 2 AC 545* should be given a very narrow application and confined to its facts. However, the major part of the criticism of the decision in *R v Lambert* relates to the artificial distinction which was drawn between proceedings involving the trial and the appeal. This distinction has no relevance to the present appeal. The point is also made that not to apply the Human Rights Act 1998 to what happened to the claimants will only result in their having to take proceedings in the European Court so as to obtain an effective remedy. This contention would have more force if the claimants were not seeking to rely on the Convention to change English substantive law. Where this is what is in issue it is by no means clear that the European Court of Human Rights will provide a remedy when our courts do not do so.

40 I would reject Mr Wilby's argument that the Human Rights Act 1998 can affect the outcome of this appeal. It certainly cannot be relied on to change substantive law by introducing a retrospective right to privacy which did not exist at common law. The European Convention on Human Rights, contrary to the conclusion of the judge, is only relevant here as background against which the appeal is to be decided. This undermines one of the foundations for the judge's conclusions that the claimants were entitled to succeed on an extended form of trespass designed to protect the privacy of the individual

Wilkinson v Downton

41 The other prop on which the judge relied to find that there was an extended tort of trespass containing the ingredients to which I have referred **1348* is the judgment of Wright J in *Wilkinson v Downton[1897] 2 QB 57* . The facts of *Wilkinson v Downton* are different from those here. The case involved a practical joke by the defendant. He falsely represented to the claimant, a married woman, that her husband had met with a serious accident in which his legs had been broken. The defendant made the statement with intent that it should be believed to be true. The plaintiff believed it to be true and in consequence suffered a violent nervous shock which rendered her ill. Why reliance is placed on this decision by the claimants is because at the time of the decision *Victorian Railway Comrs v Coultas(1888) 13 App Cas 222* , as was acknowledged, would have made it difficult, if not impossible, to recover damages for "illness which was the effect of shock caused by fright". Such injury was regarded as being too remote in an action for negligence.

42 Wright J decided for the claimant and in doing so set out "the real ground" of action as being that "a person who makes a false statement intended to be acted on must make good the damage naturally resulting from it being acted on": *[1897] 2 QB 57, 58* . Of this he said, at pp 58-59:

> "The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal

> safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant."

43 And later Wright J added, at p 59:

> "It remains to consider whether the assumptions involved in the proposition are made out. One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs. The other question is whether the effect was, to use the ordinary phrase, too remote to be in law regarded as a consequence for which the defendant is answerable."

44 To understand the approach of Wright J it is important to note the emphasis which Wright J placed on the act being "wilfully done". For this to be the position, the act has to be either one which is done with the intention of causing harm or done in circumstances where it was so likely that the harm would be incurred that an intention to produce harm has to be imputed. Certainly nothing less than recklessness would do.

45 Until the very recent decision of this court in *Wong v Parkside Health NHS Trust[2001] EWCA Civ 1721* , *Wilkinson v Downton[1897] 2 QB 57* had not been considered extensively. Wright J's judgment was approved in **1349 Janvier v Sweeney[1919] 2 KB 316* . In *Janvier's* case there was an actual intention to terrify the plaintiff for the purpose of obtaining an unlawful object in which both the defendants were jointly concerned. *Wilkinson v Downton* was more recently relied on in this court in *Burnett v George[1992] 1 FLR 525* . However, that was a case involving the jurisdiction to grant an injunction and is not of any real assistance in determining the ambit or the validity of the principle enunciated by Wright J.

46 Our attention was drawn by Mr Wilby to Mullany & Handford, Tort Liability for Psychiatric Damage (1993). In chapter 14 of that book *Wilkinson v Downton[1897] 2 QB 57* is considered in some detail. It points out that *Wilkinson v Downton* has been followed in a number of Commonwealth jurisdictions and in the United States. In that jurisdiction the approach is confined by the need for the conduct to be "extreme and outrageous conduct": see p 299. The editors consider that the argument for the *Wilkinson v Downton* action, being distinct from the tort of negligence, is that cases based on this principle do involve the intentional or reckless causing of shock "in that the defendant intends to cause, or is reckless as to, the immediate consequences—fright or horror—and that the physical harm which results can be regarded as intended or likely, rather than as merely foreseeable": see p 290.

47 In *Wong'scase [2001] EWCA Civ 1721* the judgment of the court was given by Hale LJ. She considered the "tort" created by *Wilkinson v Downton* . She did not doubt that there was a tort commonly labelled "intentional infliction of harm". She rejected the suggestion that the tort would be committed if there was deliberate conduct which "foreseeably [led] to alarm or distress falling short of the recognised psychiatric illness which is now considered the equivalent of physical harm, provided that such harm is actually suffered": para 11. She added, at para.12:

> "For the tort to be committed, as with any other action on the case, there has to be actual damage. The damage is physical harm or recognised psychiatric illness. The defendant must have intended to violate the claimant's interest in his freedom from such harm. The conduct complained of has to be such that that degree of harm is sufficiently likely to result that the defendant cannot be heard to say that he did not 'mean' it to do so. He is taken to have meant it to do so by the combination of the likelihood of such

harm being suffered as a result of his behaviour and his deliberately engaging in that behaviour."

48 I happily adopt this definition of the "tort" though I am not sure I would regard it as an action on the case but this is only of historic interest. I accept that an actual recognised psychiatric illness or bodily injury is required in order for damages to be recovered.

49 The limiting factor to the "tort" is the intention to cause harm which harm is in fact then caused or recklessness as to whether that harm would be caused. While the tort is not conventional trespass it is closer to trespass than negligence. I personally have no difficulty with the statement in Salmond & Heuston on Torts, 21st ed (1996) , p 215 that "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is liable for such emotional distress, provided that bodily harm results from it". This passage accepts that emotional distress by itself does not suffice. It requires bodily harm to have resulted. It ***1350** presumably is intended to recognise that emotional distress although severe may not be classifiable by psychiatrists as a psychiatric illness. It therefore requires, in lay terms, that the severe emotional distress has caused bodily harm. It also requires that this is what the defendant intended to be the consequence or was reckless as to whether this would be the consequence.

50 Both as a matter of principle and authority I regard it appropriate that there should be a right to compensation in these circumstances. We are here concerned with an intentional tort and intended harm. In such a situation, unlike negligence, problems as to foreseeability do not arise. If the conduct is actionable then compensation should be payable for the intended harm. For this general approach there is general support in Winfield & Jolowicz on Tort, 15th ed (1998) , pp 86-87 .

51 In this jurisdiction I consider that *Wilkinson v Downton[1897] 2 QB 57* should be so limited. This provides the proper justification for distinguishing the cause of action from negligence. On that basis I would not seek to doubt the correctness of the decision in *Wilkinson v Downton* . However, so understood *Wilkinson v Downton* cannot be relied upon by the claimants in the present case. The judge made no finding that the prison officers were intending to cause or were reckless as to whether they caused harm. Furthermore the findings which he did make were inconsistent with such a conclusion. Had the facts been otherwise and harm had been intended or if there had been recklessness then I would have upheld the decision of the judge. I would have concluded that on the judge's findings the complainants had suffered the necessary damage.

Justification

52 Mr Tam, on behalf of the Home Office, argued that, because of the width of rule 86, in any event what the prison officers did was justified. Mr Tam argued that, because of the language of rule 86 , the Home Office was not bound by either what appears on the consent form or what is stated in the policy strategy document which applies specifically to Armley prison. This cannot be the position. If there are clearly laid down restrictions on how a particular activity is to be conducted, then the conduct of the prison officers cannot be excused merely because those restrictions may not have been observed. The conduct may not be actionable but as we will see the rule cannot justify their conduct if it were otherwise actionable. I would therefore reject this part of the argument on behalf of the Home Office if it had been necessary to do so.

Consent

53 Mr Tam also argued the judge was wrong to conclude there had been no real consent here. Again I disagree but do so on the grounds that the consent which was given was given on the basis that the search would be conducted in accordance with proper practice. It was not and so the consent does not provide the Home Office with a defence.

Proportionality

54 As the Human Rights Act 1998 was not in force, the judge should not have become involved in issues as to proportionality. However, as he expressed the view that to conduct the search in the

circumstances which *1351 were then existent at the prison was disproportionate, I should make it clear that we would not agree with that view. Each case, of course, depends on its facts but, when one has the sort of problem with which the Prison Service is faced in relation to drugs, clearly it is not sufficient to search the prisoner. There are numerous ways in which drugs can be smuggled into the prison and the most vigorous regime of searching *prisoners* will not in itself suffice. On the findings of the judge, searching, if it had been properly conducted, was perfectly appropriate. The visitor who is treated in accordance with the instructions laid down was reasonably given the choice of having a visit and submitting to being searched or not being searched.

55 It follows that the appeal has to be allowed except for the finding of battery, which was not subject to appeal. This has the effect that Mrs Wainwright's claim is dismissed and Alan's claim for damages has to be reduced. Unfortunately the parties were unable to agree what should be the proper measure of damages. We are not in a position to do more than give the most limited consideration to this subject and, without the figure which we have determined being regarded as any precedent for other cases, I would reduce the damages that Alan receives to £3,750 including £1,000 aggravated damages.

MUMMERY LJ

56 I agree that this appeal should be allowed for the reasons given by Lord Woolf CJ and Buxton LJ. I shall confine my brief additional comments to the issue of invasion of privacy at common law and in equity and to the applicability of section 3(1) of the Human Rights Act 1998 .

(1) Invasion of privacy at common law and in equity

57 This claim fails, as there is no tort of invasion of privacy. Instead there are torts protecting a person's interests in the privacy of his body, his home and his personal property. There is also available the equitable doctrine of breach of confidence for the protection of personal information, private communications and correspondence.

58 The common law position remains as stated in the Justice Report on Privacy and the Law (1970), paragraph 30: "it is generally recognised that at the present time there is no existing common law remedy for invasion of privacy as such."

59 According to a more recent statement of the legal position in Clayton & Tomlinson, The Law of Human Rights (2000) , para 12.06 : "It is well established that English law does not recognise a right to privacy as such."

60 As to the future I foresee serious definitional difficulties and conceptual problems in the judicial development of a "blockbuster" tort vaguely embracing such a potentially wide range of situations. I am not even sure that anybody—the public, Parliament, the press—really wants the creation of a new tort, which could give rise to as many problems as it is sought to solve. A more promising and well trod path is that of incremental evolution, both at common law and by statute (e g section 3 of the Protection from Harassment Act 1997), of traditional nominate torts pragmatically crafted as to conditions of liability, specific defences and appropriate remedies, and tailored to suit significantly different privacy interests and infringement situations. *1352 *(2) Section 3(1) of the Human Rights Act 1998*

61 With the benefit of the recent decisions of the House of Lords (*R v Lambert[2002] 2 AC 545* and *R v Kansal (No 2)[2002] 2 AC 69*) and of this court (*Wilson v First County Trust Ltd (No 2)[2002] QB 74* and *Pearce v Governing Body of Mayfield Secondary School[2002] ICR 198*), I am now convinced that I was wrong in the remarks made by me obiter in *J A Pye (Oxford) Ltd v Graham[2001] Ch 804, 823, para 48* on the applicability of the principle of interpretation in section 3(1) to causes of action arising before the section came into effect. Section 3(1) does not apply retrospectively to the cause of action in this case, which arose in 1997. It cannot therefore assist on the construction of rule 86 of the Prison Rules 1964 .

BUXTON LJ

Introduction

62 I gratefully adopt the account set out by Lord Woolf CJ of the facts of this worrying and difficult

case. If the deplorable treatment meted out to Mrs Wainwright and her son had occurred not in January 1997 but in August 1997, after the coming into effect of the Protection from Harassment Act 1997, they would have had a strong case, subject to as yet unresolved difficulties about the definition of "course of conduct", for relief under section 3 thereof. If the events had occurred in October 2000, they would equally have had a strong case for relief under section 7 of the Human Rights Act 1998 , by reason of a public authority's lack of regard for article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms as scheduled to the Human Rights Act 1998. Whether, in either case, that would have led to recovery in respect of the damage claimed is another matter, to which I will in due course have to return. But the issue in this case is whether, before those two alterations in the law, English law provided any private law relief at all in respect of conduct of the type with which we are concerned.

63 I have reached the clear conclusion that the judge, in a difficult and unusual case, was in error in finding that the conduct complained of fell within a tort recognised by English law, subject only to the potential defences of consent and justification. It will first be necessary to examine in some detail the basis on which the judge felt able to proceed, and then set out what in my judgment is the true state of the law, and how that law should be applied to the facts of the present case.

An analysis of the judge's reasoning

64 In the hope of better explaining some parts of this judgment that follows, I feel constrained to set out the relevant parts of the judge's reasoning verbatim. The judge found that Alan Wainwright had been stripped naked and Mrs Wainwright virtually so, dealt with the additional allegation of battery in relation to Alan Wainwright, and then continued:

> "70. It is clear that the original tort of trespass to the person, namely battery, has been extended in a number of ways beyond its original scope of protecting the interest of the victim in freedom from bodily harm. In the form of trespass to the person known as assault the interest of the **1353* victim which is protected is the victim's interest in freedom from a particular form of anxiety, namely the apprehension of bodily harm. The form of trespass to the person involved in false imprisonment protects the interest in freedom from confinement or freedom of movement. The tort of trespass to the person protects, therefore, a wider range of interests than protection from bodily harm.
>
> "71. Another element in the law of torts generally and trespass to the person in particular is the conduct of the defendant. Again the original tort focused on some physical act of the defendant, namely touching the plaintiff or doing something which causes the plaintiff to apprehend physical contact. In *Wilkinson v Downton[1897] 2 QB 57* and the subsequent Court of Appeal decision in *Janvier v Sweeney[1919] 2 KB 316* the courts extended the types of conduct which could constitute the tort of trespass to the person to include words intentionally uttered which caused physical harm. In *Burnett v George[1992] 1 FLR 525* the principle derived from these two cases, namely that there is a good cause of action if A wilfully does something calculated to cause harm to B, namely infringing B's right to personal safety, and does in fact cause physical harm to B, was extended to a case of harassment. The conduct involved in trespass to the person includes conduct which involves no bodily contact with the victim but nevertheless has an effect on the victim by infringing some interest of the victim which the law protects.
>
> "72. In this case the essence of the complaint is that the prison officers caused Mrs Wainwright and her son to take their clothes off and thereby suffer distress and humiliation in the case of both claimants and damage to health in the case of Alan Wainwright. The law of torts already recognises causes of action where the defendant induces the claimant to act to the claimant's detriment. Misrepresentation is one example and intimidation another. It does not, therefore, seem to me to be a significant extension of the principle in *Wilkinson v Downton* to hold that if A wilfully causes B to do something which is calculated to cause harm to B, namely infringe B's legal right to personal safety, and does in fact cause physical harm to B, that constitutes a valid cause of action unless it can be justified in some way. I would hold, therefore, that if the prison officers caused Alan Wainwright to take his clothes off and that was calculated to cause a physical harm, namely illness, to Alan Wainwright there is a valid cause of

action in trespass to the person unless their conduct can be justified.

"74. [2]

The same principle would apply to Mrs Wainwright but in her case the strip-search did not cause any physical illness. This raises the question whether this particular form of trespass to the person should be limited to protecting the victim's right to personal safety or whether it should be extended to other rights, including in particular the right of privacy. In the case of assault the law of trespass protects the victim's interest in being protected from mental distress caused by the apprehension of physical harm. Other forms of trespass to the person protect a victim's interest in freedom of movement or even freedom from harm caused by verbal practical jokes in bad taste. It seems difficult to justify a situation in which the same act (inducing someone to take their clothes off) gives the victim a cause of action if the victim succumbs to **1354* some form of illness but denies a remedy to a more robust victim who merely suffers distress and humiliation.

> "75. In *Douglas v Hello! Ltd[2001] QB 967* , the Court of Appeal discharged an injunction granted against 'Hello!' magazine from publishing unauthorised photographs of a wedding. Another magazine had the exclusive rights to photograph the wedding. Sedley LJ said that a point had been reached where it could be said with confidence that the law recognised and would appropriately protect a right of personal privacy for two reasons. The first reason was that there was a powerfully arguable case that the bride and groom had a right of privacy which English law would recognise and, where appropriate, protect. The second reason was that the Human Rights Act 1998 required courts to give appropriate effect to the right of respect for private and family life set out in article 8 of the Convention . Keene LJ said that it seemed unlikely that *Kaye v Robertson[1991] FSR 62* , which held that that there was no actionable right of privacy in English law, would be decided the same way on that aspect today. These dicta show how the attitude of the courts to invasions of someone's privacy have developed in recent years. There seems to me to be no valid objection to extending the tort of trespass to the person to protect an interest in privacy."
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> "77 ... [Counsel for the claimants] pointed out that in *R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 693* the House of Lords had held in 1991 that any provision in domestic legislation which was capable of a meaning which either conformed to or conflicted with the Convention would be construed in conformity with the Convention on the basis that Parliament was to be presumed to have intended to legislate in accordance with the Convention. On analogous reasoning it appears to me that it was right to apply and, so far as appropriate, extend the common law so that it is also in conformity with the Convention even before the passing of the 1998 Act. Sections 2 and 3 of that Act strengthen the force of that reasoning.
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> "78. I conclude therefore that the tort of trespass of the person extends to situations where A causes B to do something to himself which infringes B's right of privacy. The defendant is liable to Mrs Wainwright and Alan Wainwright unless the defendant can set up a valid defence. The two defences put forward are those of consent and legal justification."

65 This reasoning contains the following elements. (i) The tort of trespass to the person extends to interests other than protection from bodily harm. (ii) One example of such extension is to "words intentionally uttered which caused physical harm", as in *Wilkinson v Downton[1897] 2 QB 57* (paragraph 71). (iii) However, "physical harm" in that formulation means illness, which was proved in the case of Alan Wainwright but not in the case of Mrs Wainwright. Alan Wainwright could therefore recover under this head of tort, but Mrs Wainwright could not (para 72). (iv) English law however recognises a tort of breach of privacy, independent of any change introduced by the Human Rights Act 1998, and therefore applicable to events occurring in January 1997. That tort, described as an aspect of trespass to the person, had been committed in relation to Mrs Wainwright, and also, in addition to the *Wilkinson v Downton* tort, in relation to Alan Wainwright (paragraph 78). **1355 The inappropriateness of trespass*

66 Whatever torts the Wainwrights may be able to complain of, none of them are, or are properly derivatives of, the tort of trespass to the person, and only confusion was caused by the attempt to

force what occurred in this case into that straitjacket. That objection is not merely an obsolete recourse to the forms of action, nor a reflection of a mediaeval distinction between trespass and case. As I shall demonstrate, it reflects fundamental principles by which modern English law, rightly or wrongly, limits the ambit of tortious liability.

67 Leaving aside false imprisonment, which is sometimes, though not very happily, categorised as a trespass to the person, trespass in this sense consists of battery and of assault. Battery is physical interference with the person of the plaintiff. That will normally consist of direct touching of the person, but has also been extended to acts directly likely to cause such interference, such as hitting the plaintiff's horse, causing him to fall off; and more controversially, in the criminal understanding of battery, to the creating of a dangerous situation from which physical interference naturally results, such as putting sulphuric acid into a hot air dryer that when used by others blew out and caused them injury (*Director of Public Prosecutions v K (A Minor)[1990] 1 WLR 1067*); or locking the doors of a theatre and then causing a panic, with injury occurring to persons in the resulting crush (*R v Martin(1881) 8 QBD 54*). The unifying factor in all these cases is an invasion of the physical person of the plaintiff.

68 An assault has long been defined as an overt action, by word or by deed, indicating an immediate intention to commit a battery and with the capacity to carry the threat into action: see Clerk & Lindsell on Torts, 18th ed (2000) , para 13-13 ; or, as it is sometimes expressed, to put the plaintiff in fear of an immediate assault. This tort is therefore parasitic upon, and protects the interests protected by, battery.

69 The importance that the law attaches to protecting citizens from direct physical interference with their persons is demonstrated by two particular features of the tort of battery, both of which sharply distinguish it from the tort of negligence. The first, expounded in further detail in the judgment of this court in *Wilson v Pringle[1987] QB 237* , is that any intended "hostile" touching founds an action for battery, even if there is no intention thereby to cause injury or actual physical harm. The second is that battery is actionable per se. That in turn implies two things: first, damages are recoverable for the act of interference itself, even if it causes no injury and no loss; but, secondly, if damage is caused by a trespass it is recoverable simply on the basis of causation, and does not additionally require foreseeability to be established.

70 These rules show the basis of the tort of trespass, in the protection from interference with the person of the plaintiff by direct contact with him. Once the defendant causes such contact, without justification, he is not only liable for damages even if no quantifiable loss results, but also liable for any loss that is in fact caused by the interference. These rules are strikingly different from those obtaining in negligence. Liability in negligence is limited to the type of damage that the defendant should have foreseen as liable to result from his acts: authority is hardly needed for that proposition, but I would venture to refer to the recent exposition by Lord Hobhouse of ***1356*** Woodborough, speaking with the agreement of a majority of the House, in *Platform Home Loans Ltd v Oyston Shipways Ltd[2000] 2 AC 190, 209a* .

71 There are therefore powerful reasons why a claimant will be well advised to seek to categorise his claim as sounding in trespass. Once he has passed through that door, he not only is able to recover for unforeseeable damage, but also is relieved of the issues of duty of care and of fairness, justice and reasonableness that are applied to limit recovery in negligence. And on the other side of the coin there are strong policy reasons why the tort of trespass to the person should be limited to its proper sphere. It was these considerations that Lord Denning MR had in mind when he said in *Letang v Cooper[1965] 1 QB 232, 239e* that an unintentional but negligent battery must be pleaded in negligence and not in trespass.

72 But our case goes further than that. It is not a case of direct interference, battery, at all, but of causing the claimants to do something to themselves that led to humiliation and illness. Nor was the case argued to be a case of trespass, nor was it seen as such by the judge. Rather it was presented as an extension of the tort of trespass into the areas covered by *Wilkinson v Downton[1897] 2 QB 57* and privacy. Such an extension of trespass is unsupported by authority, entirely unprincipled, and if adopted would severely undermine the policy reasons for limiting the ambit of trespass that are referred to above.

73 It does not, however, follow from that that the appeal must necessarily succeed. It is possible to read the judgment as a decision that the Home Office is liable on the basis of separate and independent torts, outside the law of trespass, of " *Wilkinson v Downton* " in the case of Alan

Wainwright, and of breach of privacy in respect of both of the Wainwrights. If, as the judge thought, the requirements of those torts were in fact fulfilled, I would not permit the argument to fail just because of the inappropriate pleading in terms of trespass. I therefore turn to those torts.

Wilkinson v Downton

74 In *Wilkinson v Downton[1897] 2 QB 57, 58-59 Wright J* said:

> "The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant ... One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind."

75 The greatest respect is always paid to anything that fell from Wright J: see for instance Goddard LJ in *Peters v Prince of Wales Theatre (Birmingham) Ltd[1943] KB 73, 77* . However, one cannot escape from the observation that *Wilkinson v Downton[1897] 2 QB 57* has puzzled generations of tort lawyers. No little part of the difficulty has sprung from a tendency to quote Wright J's reference to acts "calculated to cause physical **1357* harm" divorced from the rest of his formulation of the cause of action: as indeed the judge did in our case, in paragraph 72 of his judgment. That is particularly unfortunate, because the word "calculated" is ambiguous between acts subjectively intended to cause harm and acts objectively very likely to cause harm. And Wright J's extension of "physical harm" into infringement of the "legal right to personal safety" carries difficulties of its own, since it again is ambiguous between the actuality of physical harm and a threat of such harm.

76 Wright J provided further explanation by his later reference, in a passage much less often quoted, to an "act ... so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant". That, however, raises further difficulties, since although using the concept of intention it stops short of requiring actual intention, and rather speaks of "imputed" intention, in terms that would nowadays be analysed as referring to gross (objective) negligence.

77 This court took up the matter in *Janvier v Sweeney[1919] 2 KB 316* . Much of the judgments is addressed to the question in issue in that case of whether it was possible to recover at all for "nervous shock". That had been doubted in the Privy Council case of *Victorian Railways Comrs v Coultas13 App Cas 222* , but the Court of Appeal recognised that if they were to accept that argument they would have to differ from *Wilkinson v Downton* , which they declined to do. The judgments are, however, less clear as to the acts and intentions leading to the nervous shock that are sufficient to found the tort. While not differing from, indeed adopting, the formulation of Wright J, both Bankes and Duke LJJ laid stress on the fact that the plaintiff in *Janvier v Sweeney* had put the plaintiff in a state of terror, Duke LJ saying in terms that the defendant had intended to produce that condition.

78 The editor of the Law Reports report of *Janvier v Sweeney[1919] 2 KB 316* synthesised the effect of the judgments thus: "False words and threats calculated to cause, uttered with the knowledge that they are likely to cause, and actually causing physical injury to the person to whom they are uttered are actionable." This statement is important, because in *Khorasandjian v Bush[1993] QB 727, 735g* the majority in this court accepted it as a correct expression of the doctrine of *Wilkinson v Downton* and *Janvier v Sweeney* ; and would have granted quia timet relief against such words that could be expected, if continued, to result in a recognisable psychiatric illness: which is how the majority, at p 736c, considered that "nervous shock" should now be understood. These observations were obiter, in view of the majority's placing of liability on the basis of private nuisance; but they were fully considered and, because of their obiter nature, have, as Mr Wilby urged upon us, escaped the condemnation by the House of Lords in *Hunter v Canary Wharf Ltd[1997] AC 655* of the nuisance aspects of *Khorasandjian's* case.

79 I respectfully consider that the headnote in *Janvier v Sweeney* , adopted in *Khorasandjian's* case, comes as close as it is possible to do to a general statement of the rule in *Wilkinson v Downton* . If

that is not correct, then the rule must be limited to the statement in the latter part of Wright J's observations cited in paragraph 74 above, that the defendant's act was so clearly likely to produce a result of the kind that occurred that an intention to produce it should be imputed to him: that is to say, objective recklessness. I do *1358 not find helpful in this connection the only other Court of Appeal case shown to us, *Burnett v George[1992] 1 FLR 525* , since there the court simply read the "calculated" formula of *Wilkinson v Downton* into the form of an injunction, without further investigating the implications of that language.

80 It follows that I cannot agree with the formulation adopted in Salmond & Heuston on the Law of Torts, 21st ed , p 215 from the American Law Institute, Restatement of the Law, Torts, 2d (1965), section 46 that "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is liable for such emotional distress, provided that bodily harm results from it". No doubt the outrageous nature of the defendant's conduct was not far from the minds of the judges in *Wilkinson v Downton* and, in particular, *Janvier v Sweeney* . However, moral condemnation is not enough. What is required by the formulation in *Khorasandjian v Bush* is knowledge that the words are likely to cause, that is to say subjective recklessness as to the causation of, physical injury in the sense of recognisable psychiatric illness. Intention or recklessness merely as to severe emotional distress, from which bodily harm happens in fact to result, is not enough.

81 It also follows that, with equal respect, I am unable to adopt as a complete statement of the law the observation in Clerk & Lindsell on Torts , para 13-17 that: "It would appear that any act deliberately designed to 'infringe [the] legal right to personal safety', albeit falling outside the torts of assault and battery, will now readily be classified as tortious." The authority cited for this proposition is *Burris v Azadani[1995] 1 WLR 1372* . Since that case largely relied on that part of *Khorasandjian v Bush* that was disapproved in the *Canary Wharfcase [1997] AC 655* and in any event was an injunction case in which this court was of the view that conduct could be enjoined even if it was not in itself tortious, its authority in the present context must be open to question. And, while it is correct that Clerk & Lindsell's formulation does quote the ipsissima verba of Wright J, it leaves unresolved the uncertainties as to the ambit of the "right to personal safety" to which I have ventured to draw attention in paragraphs 75-76 above.

82 After the close of argument in the present appeal, and after the substance of the foregoing paragraphs of this judgment had been drafted, there came to our attention the judgment of this court in *Wong v Parkside Health NHS Trust[2001] EWCA Civ 1721* , in which another division of this court was, like ourselves, called upon to consider the correct ambit of *Wilkinson v Downton* .

83 This court said in *Wong's* case, at para 12:

> "The damage is physical harm or recognised psychiatric illness. The defendant must have intended to violate the claimant's interest in his freedom from such harm. The conduct complained of has to be such that that degree of harm is sufficiently likely to result that the defendant cannot be heard to say that he did not 'mean' it to do so. He is taken to have meant it to do so by the combination of the likelihood of such harm being suffered as the result of his behaviour and his deliberately engaging in that behaviour."

and then referred in support of that formulation to the observations of Dillon LJ in *Khorasandjian v Bush[1993] QB 727, 735g* . The court accordingly saw as equivalent in their effect the two formulations between *1359 which a distinction was drawn in the first two sentences of paragraph 79 above.

84 The decision in *Wong's* case, to the extent to which it differs from the analysis earlier in this judgment, binds us as an earlier decision of this court. However, in the present case it does not matter which of these various detailed formulations is adopted, because it is plain that the claimants can bring themselves within none of them. Because the case proceeded on the basis of the formulaic expression of "calculated to cause physical harm", without further examination of what that meant, the judge was not asked to make, and did not make, any finding as to actual intention to cause, or imputed intention to cause; or recklessness, either objective or subjective, as to; physical injury, recognisable psychiatric illness, or even severe emotional distress. Mr Wilby gallantly sought to argue that some such findings could be extracted from the last two sentences of paragraph 72 of the judgment, but with respect to him all that the judge did there was to recite in abstract terms what he considered the law to be, rather than analyse the facts of the case in the light of that law.

85 A claim based on *Wilkinson v Downton* must therefore fail. I should however perhaps make it clear that, although the claim fails because of the absence of findings necessary to support it, I do not regard that as a merely technical or formalistic objection. Had the judge been asked to make any of the findings referred to in paragraph 84 above it seems to me that he would have found it difficult or impossible to do so, however much the prison officers ought to have realised, and perhaps did realise, that what they asked the Wainwrights to do would and did cause them offence and distress.

86 It is therefore necessary to turn to the alternative basis on which the judge decided the case in favour of Alan Wainwright, and the only basis on which, because the search did not cause her physical illness, he decided the case in favour of Mrs Wainwright: the tort of invasion of privacy.

Privacy: introduction

87 The present case is important, not only because it appears to be the first case in which recovery has been achieved simply for a breach of the right to privacy; but also because, as Brooke LJ pointed out in the important case of *Douglas v Hello! Ltd[2001] QB 967, 988, para 71* , previous investigations of this area have all been in cases where, in one way or another, confidence can be said to have been broken. That was of course the case in *Douglas's* case itself. The difficulty arises, as Brooke LJ foresaw, in a case where privacy alone is in issue; and that is this case, since, whatever else the Wainwrights may be able to complain of, they cannot and do not say that any right of *confidence* has been infringed.

88 It will therefore be necessary to examine whether there was in 1997 a tort of breach of privacy, and if so what was its ambit. That will require attention both to authority and, since this is an area in which it has been suggested that the judges should take the initiative in extending the law, also to some issues of policy. First, however, it is necessary to dispose of a series of issues that relate to the Convention.

Privacy: the Convention

89 First, since the events complained of took place in 1997, the tort of privacy that is relied on, if it exists, must have an existence independent of the **1360* Human Rights Act 1998. I respectfully agree with what is said by Lord Woolf CJ in paragraphs 39 and 40 of his judgment: "the claimants [are] seeking to rely on the Convention to change English substantive law ... [the 1998 Act] certainly cannot be relied on to change substantive law by introducing a retrospective right to privacy which did not exist at common law."

90 Second, that implies that the tort must indeed be a tort, that is, sounding in damages in private law, and available against any kind of defendant, however much in the present case the complaint is about the conduct of a public authority in the performance of its public functions.

91 Third, however, is the judge's reasoning in paragraph 77 of his judgment that, by analogy with the approach to legislative construction that was adopted in *R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 696* , the common law should be read as being "in conformity with the Convention" even before the passing of the Human Rights Act 1998. While courts before the Human Rights Act 1998 were alert to the importance of the United Kingdom's treaty obligations, there was never any suggestion of an approach as broad as that of the judge, and positive authority against it, specifically in the context of privacy, in the judgment of Sir Robert Megarry V-C in *Malone v Metropolitan Police Comr[1979] Ch. 344* . And that is quite apart from the more general principle, enunciated for instance by Lord Templeman, speaking for a majority of the House, in *J H Rayner (Mincing Lane) Ltd v Department of Trade[1990] 2 AC 418, 476-477* , that international treaties, such as was the status of the Convention in England before 2 October 2000, cannot confer rights enforceable in English courts. Indeed, if the judge were right, it would be difficult to understand why Parliament thought it necessary to pass the Human Rights Act 1998 at all.

92 And further, quite apart from that fundamental difficulty, the judge's approach does not face up to the fact that the Convention by its terms creates obligations only against the state, and not against other private individuals. That point was plainly in the mind of Sir Robert Megarry V-C in *Malone'scase [1979] Ch 344, 379* :

> "It seems to me that where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will carry out the Crown's treaty obligations, or to discover for the first time that such rules have always existed."

Some have argued that, with the advent of the Human Rights Act 1998, it is possible to use the recognition of the courts as "public authorities" by section 6(3)(a) thereof to create private law rights broadly in the same verbal terms as the wording of the articles of the Convention. There are many difficulties about that contention: I readily adopt the observation of Sedley LJ in *Douglas'scase [2001] QB 967, 1001, para 128* that this also is not the place, at least without much fuller argument, in which to resolve such a large question. But the present importance of that issue is that it is seen to be the terms of the Human Rights Act 1998, and not, as the judge thought, the direct application of the terms of the Convention, that render it even arguable that the Convention creates new torts in English private law.

93 Fourth, it may be convenient to say that, if the events in question had occurred after 2 October 2000, they would in my view have grounded a right **1361* to relief for the Wainwrights under section 7(1)(a) of the 1998 Act , by reason of the prison authorities' breach of article 8 of the Convention. That does not, however, engage a private law right in tort, such as the Wainwrights must establish in relation to events occurring before 2 October 2000, because section 7(1)(a) makes the defendants liable on the basis of, and only on the basis of, their status as public authorities. I would consider that the right to privacy in article 8(1) had been infringed, and that that breach could not be offset under article 8(2) . That would not be because, as the judge seems to have thought, at paragraphs 107-108 of his judgment, that something like a "blanket" policy of searching visitors to suspected drug dealers was not justified: in the context of the threat of drug abuse in prisons that policy was well within the reasonable, and if it is relevant the proportionate, actions of the prison authorities. Rather, the failure was in the manner in which this particular search was conducted, a matter to which I return when considering the defence of consent.

94 It does not, however, follow from that that the Wainwrights could recover in respect of the injuries on which their present claim is based, as opposed to recovering some amount, perhaps not dissimilar to the aggravated damages awarded in this case, to mark the unlawful invasion of their privacy. That is because it is wholly unclear what are the rules of remoteness attaching to a claim under section 7; whether breaches of the Convention by public authorities are actionable per se; and, if they are, what heads of damage and amounts of damages are recoverable. I mention these matters because they are difficulties that equally attach to the private law tort of breach of privacy that is asserted in this case.

95 I have ventured to address these matters in some detail because, when considering the implications for private law torts of a case such as *Douglas's* case that was decided after 2 October 2000, it is necessary to be clear as to what springs from the effect of the Human Rights Act 1998, and what from the application of the common law as it stood before that date. To the latter question I now turn.

Privacy: authority

96 Mr Wilby relied very heavily upon an observation of Sedley LJ in *Douglas'scase [2001] QB 967, 1001, para 126* . That observation was obiter, since the court was satisfied that recovery was available in respect of breach of *confidence* , in which circumstances it is unnecessary to go on to the wider category of acts argued to ground liability for breach of privacy. Nevertheless, the passage indubitably demands the closest attention. Sedley LJ said:

> "What a concept of privacy does, however, is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy."

It will be noted that this formulation of the basis of recovery is distinctly different from that adopted by

the judge, and discussed in paragraphs 91 to 92 above. Sedley LJ saw the tort as one existing in English private law, **1362* independently of the Convention. True it is that, at p 998, para 111, he referred to the 1998 Act as "arguably [giving] the final impetus to the recognition of a right of privacy in English law"; which may of course raise some questions about the status of the tort in 1997. But in truth the process is seen as one of judicial development of the common law, with the Convention serving as, at most, a catalyst for that development.

97 This is at first sight an attractive prospect and, if I may very respectfully say so, it could not have been put more attractively than it was by Sedley LJ in *Douglas's* case. However, authority in this court precludes our taking that course; and in addition there are serious difficulties of principle in the way of the judges creating a tort in the terms now suggested.

98 With one exception, all of the previous cases that are seen as providing the germ of a tort of breach of privacy were decided on the basis of breach of confidence. That is clear from the exposition by Brooke LJ in *Douglas'scase [2001] QB 967, pp 985-988, paras 64-71* , as indeed from the exposition of Sedley LJ, at pp 998-1000, paras 116-122. And that is true even of the well known observation of Laws J in *Hellewell v Chief Constable of Derbyshire[1995] 1 WLR 804, 807* , which was strongly relied on by Sedley LJ in *Douglas's* case:

> "If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his *subsequent disclosure of the photograph* would ... as surely amount to *a breach of confidence* as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it." (Emphasis supplied.)

99 These cases therefore do nothing to assist the crucial move now urged, that the courts in giving relief should step outside the limits imposed by a requirement of a relationship of confidence, artificial or otherwise. This court was called on to consider making that move in *Kaye v Robertson[1991] FSR 62* . It declined to do so.

100 The conduct of the defendants in that case, in breaking into the plaintiff's hospital ward, taking a photograph of him in a distressed state, and then seeking to publish it in their newspaper, was, in the words of Bingham LJ, at p 70, a monstrous invasion of his privacy. Glidewell LJ said however that there was no right of action in English law for breach of a person's privacy, and both Bingham and Leggatt LJJ expressed, in extremely strong terms, their profound regret that English law provided no remedy on that basis. In *Douglas'scase [2001] QB 967, 998, para 113, Sedley LJ* argued that *Kaye's* case did not in fact decide that point, since the court "adopted—for it plainly shared—counsel's assumption that there was [no tort of breach of privacy]". However, first, if a court not only adopts but says that it actively shares a concession or assumption by counsel, that assumption then becomes part of its reasoning, whatever may have been the origin of the point. And, second, even if, on a very narrow view of ratio, it is possible to say that the court's observations about privacy were obiter, the language of Bingham and Leggatt LJJ shows, in what Brooke LJ characterised in *Douglas's* case, at p 984, para 61, as uncompromising terms, that they had directed their minds to the possibility of relief for breach of privacy, and had rejected that possibility. Even if, which I doubt, it is in technical terms open to us to do so, it would be a very strong thing indeed for a subsequent division of this court to say that they were wrong.

**1363*

101 *Kaye'scase [1991] FSR 62* was consistent with the only other clear authority in this field, the judgment of Sir Robert Megarry V-C in *Malone'scase [1979] Ch 344* . The issue that *Kaye's* case addressed was reverted to again in *Khorasandjian v Bush[1993] QB 727* . Counsel argued in that case that the defendant's behaviour was an actionable interference with privacy. That, if correct, would have provided the court with a ready-made basis for achieving the result that they plainly, and rightly, sought, of protecting the plaintiff from the unwanted attentions of the defendant, without becoming entangled either in the obscurities of *Wilkinson v Downton[1897] 2 QB 57* or in an unprincipled extension of the law of private nuisance. However, Dillon and Rose LJJ did not even mention this potential right of action. The assumption that that was because they thought the claim was without foundation in law is given force when one turns to the judgment of Peter Gibson J. He said, at p 744:

> "[Counsel] submitted that the plaintiff has a right of privacy with which the defendant

> was unreasonably interfering. But that argument is not open to him in the light of the decision of this court in *Kaye v Robertson[1991] FSR 62* , confirming that English law has recognised no such right."

102 In my respectful view, the combination of the judgments in *Khorasandjian v Bush* comes very close indeed to establishing as a matter of ratio that there is no English law tort of breach of privacy. Certainly, they are a formidable barrier to this court now declaring that such a tort had in some way come into existence by 1997.

103 That view is reinforced by a number of further considerations.

104 First, one of the situations that was, rightly, thought to be most in need of protection on the ground of privacy was the causing of distress by harassment, besetting and intrusive telephoning, often in a sexual context: the very conduct that engaged the concern of this court in *Khorasandjian v Bush* . After an exhaustive analysis of the authorities before 1997 this court concluded in *Wong v Parkside Health NHS Trust[2001]·EWCA Civ 1721* at [30] that before the passing of section 3 of the Protection from Harassment Act 1997 there had been no tort of harassment in English law. Two comments follow. First, nowhere in any of the cases reviewed in *Wong's* case was it suggested that the matter might be regulated on the basis of a tort of invasion of privacy, which, if it had existed, would have been an obvious solution to the problems of harassment. Second, if the tort of invasion of privacy now contended for had always been in existence the statutory tort of harassment, introduced in 1997, would appear to be substantially redundant: granted in particular that by section 7(2) of the 1997 Act "harassment" includes the causing of distress, the very circumstance that most attracts demands for the protection of privacy.

105 Second, in his judgment in *Douglas'scase [2001] QB 967, 1001, para 124 Sedley LJ* drew attention to the ruling of the European Commission on Human Rights in *Earl Spencer v United Kingdom(1998) 25 EHRR CD 105* , commented that that ruling had been the considered view of a body of distinguished jurists, and said that it would not be a happy thing if the national courts were to go back without cogent reason on the United Kingdom's successful exegesis of its own law. I respectfully agree. But the law expounded by the United Kingdom and accepted by the Commission **1364* was indeed that there is no law of privacy, as such, in England and Wales, citing *Kaye v Robertson[1991] FSR 62* . That submission cannot of course affect us if it was wrong; but at the lowest it represents a respectable strand of construction of the current state of English law.

106 Third, and further in that respect, I have not been able to find any commentator who thought, at least before the coming into effect of the Human Rights Act 1998, that there was a tort of invasion of privacy in English law, as opposed to thinking that there should be such a tort. Paragraph 1-34 of *Clerk & Lindsell* , the leading authority, says of the law in 2001, and thus a fortiori of the law before 1998: "Privacy remains an interest unprotected by the English law of torts. However gross the invasion of the claimant's privacy, that violation of privacy is not itself a tort." That English law provides no direct action for invasion of privacy is also the view of the learned editor of Winfield & Jolowicz on Tort, 15th ed , pp 464-465 ; and of Sir Brian Neill in his essay "Privacy: A Challenge for the Next Century" in the important collection *Protecting Privacy* (edited by Basil S Markesinis, 1999), p 17.

107 I am therefore plainly of the opinion that it is not open to us to grant relief to the claimants on the basis of an invasion of their privacy. Since, however, the protection of privacy has been seen by some as none the less a proper field for the exercise of judicial activism, I venture to go further and draw attention to some difficulties that stand in our way.

Privacy: policy

108 "Privacy" covers a very wide range of cases, which are affected by a very wide range of policy considerations. What occurred in our case is perhaps one of the simpler examples. The right not to have another stare at one's naked body, save by consent or in clearly defined situations of necessity, would be unambiguously regarded as a matter of privacy. But what of the obtaining of information that (on the assumptions made to justify the extension of the law of tort into new situations of privacy) is not covered by the law of confidence? What of the making of true statements about others, hitherto rigorously excluded from the law of defamation? What of the whistle-blower? And, indeed, what of a preference to have photographs of your wedding in one publication rather than another?

109 As is well accepted, in none of these cases can a right to privacy be absolute. But that is only the start. What needs to be worked out is the delicate balance, particularly in the area of the publication of information, between the interests on the one hand of the subject and on the other of someone entering his private space, or of the publisher and the latter's audience. It also has to be borne in mind that what is necessarily proposed is a general tort, available not only to private citizens who simply want to get on with their own lives, like the Wainwrights, but also to corporate bodies that want to keep their affairs private. That plainly adds a further dimension of considerable difficulty to attempts to formulate the proper ambit and balance of the tort.

110 That even without those complications, and while remaining within the ambit of private individuals, differing views can be held on the issue of protection of privacy, and that such views can change over time, can perhaps be illustrated from the classic article that first investigated a right to privacy, and which is still viewed as a significant intellectual source of **1365* the proposed tort: see the judgment in *Douglas'scase [2001] QB 967, 999-1000, para 120* . The article is by Samuel D Warren and Louis D Brandeis, "The Right to Privacy" (1890) 4 Harv L Rev 193. Its point of departure is believed to have been the behaviour of the press in Boston on the occasion of the wedding of Mr Warren's sister. The authors commented, at p 196:

> "Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle ... When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance."

It may be doubted whether a judge in 2001 would feel able to advance quite that justification for awarding damages for breach of privacy.

111 All these considerations indicate that not only is the problem a difficult one, but also that on grounds not merely of rationality but also of democracy the difficult social balance that the tort involves should be struck by Parliament and not by the judges: as Sir Robert Megarry V-C urged in *Malone'scase [1979] Ch 344, 379* , in the passage quoted in paragraph 92 above, and Leggatt LJ urged in *Kaye v Robertson[1991] FSR 62* . And that is rendered the more, not the less, the case by reason of the fact that Parliament, and those who advise it, have themselves found the problem of the limits of a tort of invasion of privacy to be one of profound difficulty. The Law Commission has had the issue of a tort of invasion of privacy on its agenda since the 1960s. No proposals have emerged. The Younger Committee on Privacy (1972) (Cmnd 5012) considered in detail whether there should be "a general right of privacy" protected by law, and rejected that proposal, on grounds, amongst others, of uncertainty: see in particular the discussion at paragraphs 660-666 of the report. Subsequent initiatives, summarised by Brooke LJ in *Douglas'scase [2001] QB 967, 993, paras 89-90* , have borne no further fruit.

112 Whatever sympathy may be felt for the particular position of the Wainwrights, we have to remember that laws are not made for particular cases but for men in general: *R (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening) [2002] 1 AC 800, 823, para 29, Lord Bingham of Cornhill* . And I have no doubt that in being invited to recognise the existence of a tort of breach of privacy we are indeed being invited to make the law, and not merely to apply it. Diffidence in the face of such an invitation is not, in my view, an abdication of our responsibility, but rather a recognition that, in areas involving extremely contested and strongly conflicting social interests, the judges are extremely ill-equipped to undertake the detailed investigations necessary before the proper shape of the law can be decided. It is only by inquiry outside the narrow boundaries of a particular case that the proper ambit of such a tort can be determined. The interests of democracy demand that such inquiry should be conducted in order to inform, and the appropriate conclusions should be drawn from the inquiry by, Parliament and not the courts. It is **1366* thus for Parliament to remove, if it thinks fit, the barrier to the recognition of a tort of breach of privacy that is at present erected by *Kaye v Robertson[1991] FSR 62* and *Khorasandjian v Bush[1993] QB 727* .

Privacy: remoteness of damage

113 Mr Wilby said confidently that, once a tort of breach of privacy was established, all damage caused by that breach was recoverable simply on the basis of causation. There may have been some echo in that formulation of the original claim in trespass: see paragraph 70 above. However, the claim, and in particular the claim on the basis of the facts of the present case, illustrates a further uncertainty about a tort of breach of privacy. It is entirely unclear why the illness that in the event overtook Alan Wainwright should be recoverable just because it followed upon a breach of privacy, a tort whose values do not include prevention of physical injury. And even more difficult questions can easily be hypothesised: for instance, if non-confidential and true, but private, information is published about someone, with the result that he loses his job, or his marriage.

Privacy: conclusions

114 Even, therefore, if the Wainwrights could bring themselves under the protection of a tort of invasion of privacy, I would find it difficult to see how they could recover for the special damage claimed in this case. But in the event that issue does not arise, since it is still the law of England that there is no tort of invasion of privacy.

115 That suffices to reverse the finding of the judge and to allow the appeal. However, in deference to the arguments that we received, and also to the importance of the issue, I do go on and consider the two defences upon which the Home Office sought to rely, on the assumption that otherwise it would have been liable. Those defences are consent and justification. I do not consider that either of them could be made out in this case.

Consent

116 The judge held, at paragraph 82 of his judgment, that the Wainwrights "consented to the strip-search" because they were told that, if they did not, they could not visit Mr O'Neill; but because the consent was obtained by a show of authority it was not real consent in law.

117 The question of the distinction between consent and submission, and of the concepts of "social" or "forced" consent, is a subject of considerable difficulty in relation to crimes involving offences against the person, and for the same reasons difficult also in the law of tort. Some account of the subject in the former context is given in the Law Commission Consultation Paper on Consent and Offences against the Person (1993) Law Com No 134, paras 24.1 to 31.1. It may be mentioned in passing that the authority relied on by the judge, the judgment of Willes J in *Warner v Riddiford(1858) 4 CBNS 180, 206* , is not a case on consent. These issues do not however arise in the present case, because the Home Office's argument, and the judge's acceptance of it, was mistaken on the facts.

118 What the Wainwrights, and all other visitors to Armley gaol, were asked to consent to was not "a strip-search" in general terms, with the result, as the Home Office appeared to argue, that they had forfeited their right to **1367* complain about anything that was done as part of an activity that could be so described. Rather, the search that was proposed and for which consent was sought was that described in the prison's procedure document, and set out on the back of the consent form. The relevant procedures have already been set out by Lord Woolf CJ, but it will be convenient to repeat the prison's own public statement of the limits of the search in Procedures for a Strip-search: Staff and Visitors:

> "1. Two officers will be present. No person of the opposite sex will be present. 2. You will not be required to be fully undressed at any stage. 3. You will be asked to remove clothes from one half of your body, and pass them to an officer so that they may be examined. Your body will then be examined briefly so that the officers can see if anything is concealed. The clothes will then be returned to you without delay and you will be given time to put them on. 4. The procedure will then be repeated for the other half of your body. 5. The soles of your feet will be checked. 6. When your upper body is undressed, you may be required to hold your arms up. 7. When your lower body is undressed, you may be required to position yourself in such a way as to enable staff to observe whether anything is hidden in the genital and anal areas. Your body will not be touched during the process. 8. If you have long hair, it may be necessary for an officer to search it. It may also be necessary for an officer to check your ears, and mouth. You will not be touched otherwise."

119 Since Alan Wainwright was required wholly to undress, and Mrs Wainwright effectively so, items 2 and 3 of these rules were flagrantly departed from. So effectively was item 1 in the case of Mrs Wainwright, to the extent that she may have been visible from outside the office. If the Wainwrights had been shown the consent forms before the procedure and had them explained to them, then it would have been impossible thereafter to contend that they had consented to what in the event occurred. I reject as entirely unreal Mr Tam's contention that they could none the less have caused the search to be interrupted; and in any event the point does not arise on the facts, because the Wainwrights had not been told what the rules of the search were. The Home Office cannot be in a better position because it did not follow its own procedure that required it to present the forms before the search began. I would therefore hold that no consent was given to what actually occurred; so the defence would fail on that ground alone.

Justification

120 This defence was based on a comparison between rule 86(1) of the Prison Rules 1964 , which says, but says no more than, that "Any person or vehicle entering or leaving a prison may be stopped, examined and searched" and rule 39(2) , relating to searches of prisoners, which provides that "a prisoner shall be searched in as seemly a manner as is consistent with discovering anything concealed". Expressio unius, said the Home Office, exclusio alterius. The search of a visitor does not have to be seemly.

121 I regret that this point was ever taken. A rule as broad as rule 86 , giving power over persons who have committed no crime, and who attend as part of the accepted social policy that prisoners' families are entitled to contact with them, cannot have been intended by Parliament, and cannot be justified, in terms that give largely unlimited powers to the prison **1368* authorities. And, as Mr Wilby acutely pointed out, the prison authorities themselves did not think that to be the case, as evidenced by their own rule book, already quoted, and by their internal strategy document that is set out by Lord Woolf CJ at paragraph 18 of his judgment. This is not a question of limitation on *Wednesbury* grounds (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223*), as the Home Office submitted and the judge accepted; rather, it is a question, to be determined by the court, of what the legislation is to be taken as authorising. In company with the rule book, I hold that it did not authorise the search that in fact took place.

122 The judge did not take that view. Rather, the case became involved before him in a long inquiry into whether the form of the search could be justified in terms of article 8(2) of the Convention . The basis for this inquiry was the contention that rule 86, even in its application before 2 October 2000, had by reason of section 3(1) of the 1998 Act to be read by a court after that date in terms that if possible complied with the Convention. I respectfully agree with what Lord Woolf CJ says on that subject in paragraph 29ff of his judgment. I would also venture to add that in my view any liberty for this court to hold that section 3(1) of 1998 Act has retrospective force has been put to rest by the decision in *Pearce v Mayfield School[2002] ICR 198* , as expressed in the judgment of Judge LJ at p 222, para 79. Nothing in *R v Kansal (No 2)[2002] 2 AC 69* undermines the binding authority for this court of *Pearce v Mayfield* .

123 None of this, however, affects the result of this appeal. A defence of justification would fail for the reason set out in paragraph 121 above, and not because of any implication of the Convention.

Disposal of the appeal

124 I would allow the appeal, because the claimants cannot make out any claim in either trespass, *Wilkinson v Downton[1897] 2 QB 57* or breach of privacy. If a prima facie claim had been made out, it would not have been defeated by a defence either of consent or of justification.

125 I respectfully agree with Lord Woolf CJ as to the disposal of the further outstanding matter of the measure of damages to be awarded to Alan Wainwright in relation to the separate battery committed upon him.

Appeal allowed. First claimant's claim dismissed; second claimant's claim reduced to £3,750. Home Office to have costs against first claimant, not to be enforced without permission of court. Permission to appeal granted.

Representation

Solicitors: Treasury Solicitor ; David A Reston, York .

S L D

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1. Human Rights Act 1998, s. 3: see post, para 24. S 7(1): 'A person who claims that a public authority has acted ... in a way which is [incompatible with a Convention right] may-(a) bring proceedings against the authority ... if he is ... a victim of the unlawful act." Sch 1, Pt I, art 8: "(1) Everyone has the right to respect for his private ... life ..."

2. Reporter's note. There was no paragraph 73 in Judge McGonigal's judgment.

ANNEXURE R-17

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pense, it is appropriate to construe—very generously, and very liberally—defendants' papers in support of Rule 4(m) dismissal as motions to extend the time to file responsive pleadings in the alternative to dismissal. Defendants' failure to file a responsive pleading while litigating the Rule 4(m) issue presented here is sufficient to establish excusable neglect justifying an extension of time to file pursuant to Rule 6(b). *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 392, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) ("[I]t is clear that 'excusable neglect' under Rule 6(b) is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant") (footnotes omitted; Black's Law Dictionary 508 (5th ed. 1979) ("excusable neglect" is "a failure to take the proper steps at the proper time, not in consequence of the party's own carelessness, inattention, or willful disregard of the process of the court").

II.

The occasional tendency of lawyers to fight all possible battles rather than to solve core problems is well illustrated by the fictional estate case *Jarndyce and Jarndyce*, a "scarecrow of a suit . . . so complicated, that no man alive knows what it means [and] no two . . . lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises." Charles Dickens, Bleak House 3 (Chapman & Hall 1907) (1853). After years of litigation, and upon final resolution of the case, the parties in *Jarndyce* found that "the whole estate [had] been absorbed in costs." *Id.* at 695. In order to avoid cases like *Jarndyce* that "drag [their] dreary length before the Court, perennially hopeless," the very first Federal Rule of Civil Procedure explicitly directs litigation to move promptly and economically. *Id.* at 4. Courts and parties must take that admonishment to heart.

For the foregoing reasons, plaintiff must be given a brief extension of time in which to serve process, and it is appropriate also to extend defendants' time to file a responsive pleading.

An appropriate Order has already issued.

WEST KEY NUMBER SYSTEM

UNITED STATES of America,

v.

Edward Joseph. MATISH, III, Defendant.

Criminal No. 4:16cr16

United States District Court,
E.D. Virginia,
Newport News Division.

Signed June 21, 2016

Filed June 23, 2016

Background: Defendant was charged with possessing child pornography. Defendant moved to suppress identifying information obtained through network investigative technique (NIT) that government used to investigate persons who accessed child pornography website.

Holdings: The District Court, Henry Coke Morgan, Jr., Senior District Judge, held that:

(1) source code for NIT was not material to preparing defense, and thus did not have to be disclosed;

(2) law enforcement privilege applied to full NIT source code;

(3) government's need to protect NIT source code outweighed defendant's need for it;

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(4) magistrate judge possessed substantial basis for determining that probable cause existed to support issuance of search warrant;

(5) defendant did not make substantial showing to justify *Franks* hearing;

(6) warrant did not violate Fourth Amendment's particularity requirement;

(7) defendant did not possess any objectively reasonable expectation of privacy in his computer's internet protocol (IP) address; and

(8) deployment of NIT to capture identifying information found on defendant's computer did not represent "search."

Ordered accordingly.

1. Criminal Law ⇐627.5(1)

In order for the defendant to show materiality under the rule for discovery in criminal cases, there must be some indication that the pretrial disclosure of the disputed evidence would enable the defendant significantly to alter the quantum of proof in his favor; hence, evidence is material as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal. Fed. R. Crim. P. 16.

2. Privileged Communications and Confidentiality ⇐358

The party asserting the law enforcement privilege bears the burden of showing that the privilege applies.

3. Privileged Communications and Confidentiality ⇐358

In order to illustrate that the law enforcement privilege applies, the party must show that the documents contain information that the law enforcement privilege is intended to protect, which includes information pertaining to law enforcement techniques and procedures, information that would undermine the confidentiality of sources, information that would endanger witness and law enforcement personnel or the privacy of individuals involved in an investigation, and information that would otherwise interfere with an investigation.

4. Privileged Communications and Confidentiality ⇐358

If the party asserting the law enforcement privilege successfully shows that the privilege applies, the district court then must balance the public interest in nondisclosure against the need of a particular litigant for access to the privileged information, as the privilege is qualified, not absolute.

5. Privileged Communications and Confidentiality ⇐358

When evaluating claims of privilege in the criminal context, a court should remain cognizant of the fact that while the public's interest in effective law enforcement supports the creation of the privilege, it does not extinguish a criminal defendant's strong interest in effective cross-examination of adverse witnesses; thus, in criminal cases, a district court should balance the government's need to keep certain information private with the defendant's need for the information.

6. Criminal Law ⇐627.6(3)

Defendant did not demonstrate that computer program's source code for network investigative technique (NIT) that government used to investigate persons who accessed child pornography website would play important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal in defendant's trial on charge of possessing child pornography, and thus code was not discoverable; among other things, defendant's experts could have applied NIT to his computer to determine if it affected security but did not, and they did not produce any eviden-

tial basis supporting interruption in chain of custody. 18 U.S.C.A. § 2252A(b)(1); Fed. R. Crim. P. 16(a)(1)(E)(i).

7. **Privileged Communications and Confidentiality** ⇐358

Law enforcement privilege applied to full network investigative technique (NIT) source code that government used to investigate persons who accessed child pornography website, excluding NIT instructions and corresponding data stream, and thus code was not discoverable by defendant who had been charged with possessing child pornography, since source code included information pertaining to law enforcement techniques, procedures, and information that could endanger public if released. 18 U.S.C.A. § 2252A(b)(1); Fed. R. Crim. P. 16(a)(1)(E)(i).

8. **Constitutional Law** ⇐2101
Privileged Communications and Confidentiality ⇐358
Searches and Seizures ⇐26

Government's need to protect network investigative technique (NIT) source code that government used to investigate persons who accessed child pornography website outweighed defendant's need for it in his trial on charge of possessing child pornography, and thus law enforcement privilege applied to preclude discovery of code; protecting citizens outweighed defendant's First Amendment's right of freedom of speech and implied right of privacy under Fourth Amendment, defendant received NIT instructions and two-way data stream, and images recovered from defendant's computer did not serve as basis for any charge filed. U.S. Const. Amends. 1, 4, 6, 14; 18 U.S.C.A. § 2252A(b)(1).

9. **Constitutional Law** ⇐4594(1)
Criminal Law ⇐662.4
Privileged Communications and Confidentiality ⇐358

After finding that the law enforcement privilege applies to information material to the defense, a court must balance the government's right to keep the information private with the defendant's right to inspect the information; this particular issue concerns the public interest in nondisclosure and defendant's rights to put on a defense and to confront witnesses against him under the Sixth and Fourteenth Amendments. U.S. Const. Amends. 6, 14; Fed. R. Crim. P. 16(a)(1)(E).

10. **Searches and Seizures** ⇐113.1, 117

A magistrate considering whether probable cause supports the issuance of a search warrant simply must make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. U.S. Const. Amend. 4.

11. **Searches and Seizures** ⇐113.1

In order for a magistrate to conclude that probable cause exists, a warrant application's supporting affidavit must be more than conclusory and bare bones; indeed, the affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause. U.S. Const. Amend. 4.

12. **Searches and Seizures** ⇐200

A court reviewing whether a magistrate correctly determined that probable cause exists for a search warrant should afford the magistrate's determination of probable cause great deference; therefore, the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed, and the reviewing court should resist the temptation to invalidate warrants by interpreting affidavits in a hypertechnical, rather than a common-sense, manner. U.S. Const. Amend. 4.

13. Obscenity ⇐282(2)
Telecommunications ⇐1466

Magistrate judge possessed substantial basis for determining that probable cause existed to support issuance of search warrant for government to use network investigative technique (NIT) computer program to investigate persons who accessed anonymous child pornography website on hidden network; affidavit described website as focused on anonymity and that people who accessed it had to take numerous affirmative steps to find it, website had name and logo suggestive of child pornography, and it described website's repeated warnings and focus on anonymity as consistent with child pornography and its dedication to child pornography. U.S. Const. Amend. 4; 18 U.S.C.A. § 2252A(b)(1).

14. Searches and Seizures ⇐199

Because affidavits supporting search warrants are presumed valid, in order to mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine; therefore, there must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. U.S. Const. Amend. 4.

15. Searches and Seizures ⇐112

A defendant can challenge a search warrant affidavit on the ground that the affiant intentionally or recklessly included false statements or on the ground that the affiant omitted material facts with the intent to make, or in reckless disregard of whether the omission made, the affidavit misleading, but it is insufficient for the defendant to allege mere negligence on the part of the affiant. U.S. Const. Amend. 4.

16. Searches and Seizures ⇐199

To make the necessary substantial preliminary showing, the defendant seeking a *Franks* hearing should furnish to the court affidavits or sworn or otherwise reliable statements or satisfactorily explain their absence; a defendant can make a substantial preliminary showing that a false statement was included in the affidavit with reckless disregard for its truth by showing that an officer acted with a high degree of awareness of a statement's probable falsity, that is, when viewing all the evidence the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported. U.S. Const. Amend. 4.

17. Searches and Seizures ⇐112

In order to be material, the falsity or the omission in a search warrant affidavit must do more than potentially affect the probable cause determination: it must be necessary to the finding of probable cause. U.S. Const. Amend. 4.

18. Searches and Seizures ⇐112

To determine whether the inaccuracies in a search warrant affidavit were necessary to find probable cause, a district court must excise the offending inaccuracies and insert the facts recklessly omitted, and then determine whether the "corrected" warrant affidavit would establish probable cause; to make this determination, courts apply a commonsense, totality-of-the-circumstances analysis. U.S. Const. Amend. 4.

19. Obscenity ⇐290
Telecommunications ⇐1479

Defendant did not make substantial showing to justify *Franks* hearing to challenge affidavit in support of warrant to search child pornography website using electronic network investigative technique (NIT); although logo on website changed few hours before seeking warrant and investigating officer learned of change, he did not inform officer seeking warrant of change, officer seeking warrant did not

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have to examine website one more time on day he sought warrant's authorization, as he had recently examined website and confirmed that nothing had changed, and logo change was not material to probable cause determination. U.S. Const. Amend. 4; 18 U.S.C.A. § 2252A(b)(1).

20. Searches and Seizures ⇐124

The Fourth Amendment's requirement of particularity applies to the warrant, as opposed to the application or the supporting affidavit submitted by the applicant. U.S. Const. Amend. 4.

21. Searches and Seizures ⇐124

By requiring warrants to state the scope of the proposed search with particularity, the Fourth Amendment ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit; additionally, the Fourth Amendment requires that a warrant be no broader than the probable cause on which it is based. U.S. Const. Amend. 4.

22. Obscenity ⇐286(4)
Telecommunications ⇐1470

Warrant to search child pornography website using electronic network investigative technique (NIT) to identify activating computers of users or administrators that logged into it did not violate Fourth Amendment's particularity requirement; although government could have and did narrow its search, there existed fair probability that anyone accessing website possessed intent to view and trade child pornography and warrant explicitly outlined place to be searched and it also detailed seven items to be seized. U.S. Const. Amend. 4; 18 U.S.C.A. § 2252A(b)(1).

23. Searches and Seizures ⇐122

Anticipatory warrants are based upon an affidavit showing probable cause that at some future time, but not presently, certain evidence of a crime will be located at a specified place; generally, these warrants subject their execution to some condition precedent other than the mere passage of time, which is a so-called "triggering condition." U.S. Const. Amend. 4.

24. Searches and Seizures ⇐122

The Fourth Amendment does not require that the triggering condition for an anticipatory search warrant be set forth in the warrant itself. U.S. Const. Amend. 4.

25. Obscenity ⇐285(3)
Telecommunications ⇐1465

Logging into child pornography website that anticipatory warrant application identified by its uniform resource locator (URL) represented relevant triggering event to search child pornography website using electronic network investigative technique (NIT) to identify activating computers of users or administrators that logged into it, rather than logging into website through home page exactly as it was described in application. U.S. Const. Amend. 4; 18 U.S.C.A. § 2252A(b)(1).

26. Criminal Law ⇐392.41

A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed and thus cannot vicariously assert the third party's Fourth Amendment rights. U.S. Const. Amend. 4.

27. Searches and Seizures ⇐164

Defendant possessed standing to challenge warrant to search child pornography website using electronic network investigative technique (NIT) to identify activating computers of users or administrators that logged into it, where government deployed NIT onto defendant's own computer and defendant challenged warrant that purportedly authorized government to search

that computer. U.S. Const. Amend. 4; 18 U.S.C.A. § 2252A(b)(1).

28. Obscenity ⇐281
Telecommunications ⇐1463

United States Magistrate Judge had authority to issue warrant to search child pornography website using electronic network investigative technique (NIT) to identify activating computers of users or administrators that logged into it; users came into Virginia in electronic manner when they entered website, and NIT resembled tracking device because it enabled government to determine website users' locations. U.S. Const. Amend. 4; 28 U.S.C.A. §§ 636, 2252A(b)(1); Fed. R. Crim. P. 41(b)(4).

29. Searches and Seizures ⇐26

To establish a violation of one's rights under the Fourth Amendment, a defendant must first prove that he had a legitimate expectation of privacy in the place searched or the item seized; in order to so prove, the defendant must show that his subjective expectation of privacy is one that society is prepared to accept as objectively reasonable. U.S. Const. Amend. 4.

30. Searches and Seizures ⇐26

Like information revealed to a third party, what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. U.S. Const. Amend. 4.

31. Obscenity ⇐274(2)
Searches and Seizures ⇐26
Telecommunications ⇐1439

Defendant did not possess any objectively reasonable expectation of privacy in his computer's internet protocol (IP) address, and thus government's acquisition of IP address using electronic network investigative technique (NIT) to identify activating computers of users or administrators that logged into child pornography website did not represent prohibited Fourth Amendment search; although defendant used anonymous network, users had to disclose information, including their IP addresses, to unknown individuals, and users were warned that network had vulnerabilities and that they might not remain anonymous. U.S. Const. Amend. 4; 18 U.S.C.A. § 2252A(b)(1).

32. Searches and Seizures ⇐26
Telecommunications ⇐1439

Generally, one has no reasonable expectation of privacy in an internet protocol (IP) address when using the internet; this lack of a reasonable expectation of privacy stems from the fact that Internet users should know that this information is provided to and used by Internet service providers for the specific purpose of directing the routing of information. U.S. Const. Amend. 4.

33. Searches and Seizures ⇐26
Telecommunications ⇐1439

Internet user who in attempt to mask his or her internet protocol (IP) address employs publicly accessible "onion router" or "Tor" network that was created by the U.S. Naval Research Laboratory in attempt to protect government communications lacks reasonable expectation of privacy in his or her IP address; users had to disclose information, including their IP addresses, to unknown individuals, and users were warned that network had vulnerabilities and that they might not remain anonymous. U.S. Const. Amend. 4.

34. Searches and Seizures ⇐26

The appropriate Fourth Amendment inquiry is whether the individual had a reasonable expectation of privacy in the area searched, not merely in the items found. U.S. Const. Amend. 4.

35. Searches and Seizures ⇐21, 26
Telecommunications ⇐1439

Deployment of network investigative technique (NIT) to capture identifying in-

formation found on defendant's computer did not represent "search" under Fourth Amendment, and thus warrant was not needed; NIT did not gather contents of computer, defendant lacked any expectation of privacy in his internet protocol (IP) address, which was main piece of information gathered, NIT was not deployed until after child pornography actually had been accessed, and defendant had diminished expectation of privacy due to virtual certainty that computers accessing internet eventually would be hacked. U.S. Const. Amend. 4; 18 U.S.C.A. § 2252A(b)(1).

See publication Words and Phrases for other judicial constructions and definitions.

36. Telecommunications ⇐1439

Federal Bureau of Investigation (FBI) agents who exploit a vulnerability in an online network do not violate the Fourth Amendment. U.S. Const. Amend. 4.

37. Criminal Law ⇐392.16(1)

Suppressing information identifying activating computers of users or administrators that logged into child pornography website that had been obtained through use of electronic network investigative technique (NIT) was not warranted, even if there was nonconstitutional violation of rule governing authority of magistrate judges to issue search warrants, since warrant was not needed to deploy NIT, so defendant could not show prejudice, and magistrate judge was not misled in any way as to locations of activating computers. U.S. Const. Amend. 4; 18 U.S.C.A. § 2252A(b)(1); Fed. R. Crim. P. 41(b).

38. Criminal Law ⇐392.12

Without a constitutional violation, suppression is warranted by the violation of a rule only when the defendant is prejudiced by the violation or when there is evidence of intentional and deliberate disregard of a provision in the rule. U.S. Const. Amend. 4.

39. Criminal Law ⇐392.38(12)

Good faith exception to exclusionary rule applied to search of child pornography website using electronic network investigative technique (NIT) to identify activating computers of users or administrators that logged into it; magistrate judge concluded that there existed probable cause to issue NIT warrant, officers did not intentionally or recklessly mislead magistrate judge, application detailed ample probable cause to support issuance of warrant and affidavit adequately described items to be seized and places to be searched, and officers did not show any improper conduct or misjudgment in relying upon warrant. U.S. Const. Amend. 4; 18 U.S.C.A. § 2252A(b)(1).

40. Criminal Law ⇐392.4(1)

Generally, if a search violates the Fourth Amendment, the fruits thereof are inadmissible under the exclusionary rule, a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect; however, because exclusion is so drastic a remedy, it represents a "last resort." U.S. Const. Amend. 4.

41. Criminal Law ⇐392.38(7)

Under the good faith exception to the exclusionary rule, a court need not exclude evidence obtained pursuant to a later-invalidated search warrant if law enforcement's reliance on the warrant was objectively reasonable. U.S. Const. Amend. 4.

Kaitlin C. Gratton, Eric M. Hurt, United States Attorney's Office, 721 Lakefront Commons, Suite 300, Newport News, VA, for United States.

Andrew W. Grindrod, Richard J. Colgan, Office of the Federal Public Defender,

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150 Boush Street, Suite 403, Norfolk, VA, for Andrew W. Grindrod.

OPINION AND ORDER

HENRY COKE MORGAN, JR., SENIOR UNITED STATES DISTRICT JUDGE

This matter is before the Court on Defendant Edward Matish, III's ("Defendant" or "Matish") First Motion to Suppress ("First Motion"), Doc. 18, Third Motion to Suppress ("Third Motion"), Doc. 34, and Motion to Compel Discovery, Doc. 37. The Court recently rescheduled the trial in this case from June 14, 2016 to October 25, 2016.

The Court issued an Opinion and Order denying Defendant's First and Third Motions to Suppress on June 1, 2016, and the Court *sua sponte* filed this Opinion and Order under seal. Doc. 75. Subsequent to an inquiry by the Court on June 14, 2016, defense counsel asked the Court to continue to keep the Opinion and Order, Doc. 75, under seal. However, the Government now has filed a Motion to Unseal the original Opinion and Order. Doc. 89. The Government notes that the trial date has been rescheduled and that Defendant's declarant, Dr. Soghoian, has published information regarding this case and named Defendant on the Internet. See id. Defendant does not oppose the Government's Motion. Doc. 87. Accordingly, the Court will make public its June 1, 2016 Opinion and Order, which it hereby modifies and restates.

On February 8, 2016, Defendant was named in a four (4) count criminal indictment charging him with access with intent to view child pornography, in violation of 18 U.S.C. §§ 2252A(a)(5) and (b)(2). Doc. 1. The Government filed an eight (8) count superseding indictment on April 6, 2016, charging Defendant with access with intent to view child pornography, in violation of 18 U.S.C. §§ 2252A(a)(5) and (b)(2) (Counts One through Four), and receipt of child pornography, in violation of 18 U.S.C. §§ 2252A(a)(2) and (b)(1) (Counts Five through Eight). Doc. 26. Defendant filed his First Motion on March 17, 2016, Doc. 18, and he adopted it after the Government filed the superseding indictment on April 8, 2016, Doc. 30. Defendant filed his Third Motion on May 2, 2016. Doc. 34. Defendant filed the Motion to Compel Discovery on May 6, 2016. Doc. 37.

In the Motions to Suppress, Defendant seeks to suppress "all evidence seized from Mr. Matish's home computer by the FBI on or about February 27, 2015 through the use of a network investigative technique, as well as all fruits of that search." Doc. 18 at 1; Doc. 34 at 1. Defendant challenges the warrant authorizing the search on the grounds that it lacked probable cause, that the FBI included false information and omitted material information in the supporting affidavit intentionally or recklessly, that the warrant lacked specificity, and that the warrant's triggering event never occurred. See Doc. 18; Doc. 33. Defendant also argues that the warrant was void *ab initio*, making the warrantless search unconstitutional. Doc. 34 at 1. Finally, Defendant "alleges a prejudicial and deliberate violation of Rule 41." Id.

In the Motion to Compel Discovery, Defendant asks the Court to compel the Government to provide him with the network investigative technique's full source or programming code. Doc. 37 at 1. The defense argues that the full code is relevant not only to Defendant's defense at trial but also to his First and Third Motions to Suppress. Id. at 1-2.

Other courts across the country have considered various challenges to the particular warrant used in this case. See United States v. Werdene, No. 2:15-cr-00434, ECF No. 33 (E.D. Pa. May 18, 2016); United States v. Levin, No. 15-10271, 186 F.Supp.3d 26, 2016 WL 2596010 (D.Mass.

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May 5, 2016); United States v. Arterbury, No. 15-cr-182, ECF No. 47 (N.D. Okla. Apr. 25, 2016) (adopting the report and recommendation of a magistrate judge, ECF No. 42); United States v. Epich, No. 15-cr-163, 2016 WL 953269 (E.D.Wis. Mar. 14, 2016); United States v. Stamper, No. 1:15-cr-109, ECF No. 48 (S.D. Ohio Feb. 19, 2016); United States v. Michaud, No. 3:15-cr-05351, 2016 WL 337263 (W.D.Wash. Jan. 28, 2016). The Western District of Washington also has considered a similar discovery motion requesting the full source code. See Michaud, No. 3:15-cr-05351, ECF No. 205 (W.D. Wash. May 18, 2016).

The Court held hearings to address these Motions on May 19, 2016, May 26, 2016, and June 14, 2016. The Court **FINDS**, for the reasons stated herein, that probable cause supported the warrant's issuance, that the warrant was sufficiently specific, that the triggering event occurred, that Defendant is not entitled to a Franks hearing, and that the magistrate judge did not exceed her jurisdiction or authority in issuing the warrant. Furthermore, the Court **FINDS** suppression unwarranted because the Government did not need a warrant in this case. Thus, any potential defects in the issuance of the warrant or in the warrant itself could not result in constitutional violations, and even if there were a defect in the warrant or in its issuance, the good faith exception to suppression would apply. Therefore, the Court **DENIES** Defendant's First and Third Motions to Suppress.

The Court additionally **FINDS** that Defendant is not entitled to the full source code at this stage of the proceeding. Thus, the Court **DENIES** Defendant's Motion to Compel Discovery, Doc. 37. The Government raised a timeliness issue concerning this Motion in its response; however, the Court **GRANTED** Defendant's request to file the Motion late at the hearing on May 26, 2016. Additionally, Defendant submitted a Consent Motion for Leave to File an Expert Declaration Relevant to the Motion to Compel Discovery, Doc. 83, which the Court **GRANTS**.

I. FACTUAL BACKGROUND

The prosecution of Mr. Matish stems from the Government's investigation of Playpen, a website that contained child pornography. At the hearing on May 19, 2016, the Court heard testimony from FBI Special Agent ("SA") Daniel Alfin and SA Douglas Macfarlane. The Court also admitted several Defense Exhibits. See Def. Exs. 1A, 1B, 2, 3, 4, 5, 6. Doc. 58. The Court admitted Ex. 5 under seal. Id. Additionally, the Court received a brief of amicus curiae from the Electronic Frontier Foundation. See Doc. 42. These sources, in addition to the parties' briefs, informed the Court's understanding of the relevant facts, which are recounted below.

i. The Tor Network

Playpen operated on "the onion router" or "Tor" network. The U.S. Naval Research Laboratory created the Tor network in an attempt to protect government communications. The public now can access the Tor network. Many people and organizations use the Tor network for legal and legitimate purposes; however, the Tor network also is replete with illegal activities, particularly the online sexual exploitation of children.

A person can download the Tor browser from the Tor website. See Tor Project: Anonymity Online, https://www.torproject.org (last visited May 23, 2016). SA Alfin testified that the Tor network possesses two primary purposes: (1) it allows users to access the Internet in an anonymous fashion and (2) it allows some websites—hidden services—to operate only within the Tor network. Although a website's operator usually can identify visitors to his or

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her site through the visitors' Internet Protocol ("IP") addresses, Tor attempts to keep a user's IP address hidden. Additionally, people who log into a hidden service cannot identify or locate the website itself. Furthermore, all communications on hidden services are encrypted. Thus, the Tor network attempts to provide anonymity protections both to operators of a hidden service and to visitors of a hidden service. There are index websites of Tor hidden services that users can search, although these indexes behave differently than a typical search engine like Google. According to SA Alfin, more than 1,000 servers all over the world exist in the Tor network. Because Tor attempts to keep users' IP addresses hidden, the Government cannot rely on traditional identification techniques to identify website visitors who utilize the Tor network.

ii. Playpen

Both parties agree that Playpen contained child pornography. While SA Alfin described Playpen as being entirely dedicated to child pornography, Doc. 59 at 51-52, the Government conceded in its briefs that some of Playpen's sections and forums did not consist entirely of child pornography. See Doc. 24 at 11 (noting that the "vast majority" of Playpen's sections, forums, and sub-forums were "categorized repositories for sexually explicit images of children, subdivided by gender and the age of the victims"). The Government characterizes Playpen as a hidden service, but Defendant disputes that Playpen always resembled a hidden service, claiming that "due to an error in Playpen's connections with the Tor network, it could be found and viewed on both the Tor network and the regular Internet for at least part of the time that it was operating." Doc. 18 at 5.

The Government notes that the "scale of child sexual exploitation on the site was massive: more than 150,000 total members created and viewed tens of thousands of postings related to child pornography." Doc. 24 at 4. Additionally, "[i]mages and videos shared through the site were highly categorized according to victim age and gender, as well as the type of sexual activity. The site included forums for discussion of all things related to child sexual exploitation, including tips for grooming victims and avoiding detection." Id. at 4. The victims displayed on Playpen were both foreign and domestic, and some represent children known to the Government. Upon registering for an account with Playpen, potential users were warned not to enter a real email address or post identifying information in their profiles.

In December 2014, a foreign law enforcement agency discovered Playpen and alerted the FBI. After locating Playpen's operator, the FBI executed a search of his home in Florida on February 19, 2015, seizing control of Playpen. The FBI did not immediately shut Playpen down; instead, it assumed control of Playpen, continuing to operate it from a government facility in the Eastern District of Virginia from February 20, 2015 through March 4, 2015. As of February 20, 2015, Playpen had 158,094 members from all over the world, 9,333 message threads, and 95,148 posted messages. Doc. 18 at 6; Doc. 24 at 9. Defendant argues a substantial increase in the usage of Playpen occurred after the Government took it over. While the Government concedes that there was some increase, it disputes the unsupported figures in Defendant's briefs.

iii. The NIT Warrant and the Supporting Affidavit

On February 20, 2015, an experienced and neutral federal magistrate judge authorized the FBI to deploy a network investigative technique ("NIT") on Playpen's server to obtain identifying information from activating computers, which the warrant defines as computers "of any user or

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administrator who logs into [Playpen] by entering a username and password." Def. Ex. 1A. It is undisputed that the FBI could not identify the locations of any of the activating computers prior to deploying the NIT. The NIT is a set of computer code that in this case instructed an activating computer to send certain information to the FBI. This information included:

1. the activating computer's IP address, and the date and time that the NIT determines what that IP address is;
2. a unique identifier generated by the NIT (e.g., a series of numbers, letters, and/or special characters) to distinguish data from that of other activating computers, that will be sent with and collected by the NIT;
3. the type of operating system running on the computer, including type (e.g., Windows), version (e.g., Windows 7), and architecture (e.g., x 86);
4. information about whether the NIT has already been delivered to the activating computer;
5. the activating computer's Host Name;
6. the activating computer's active operating system username; and
7. the activating computer's media access control ("MAC") address.

Def. Ex. 1A. In order to determine a target's location, the FBI only needed to identify the first piece of information described above. SA Macfarlane acted as the affiant, and he signed the warrant application. SA Macfarlane has nineteen (19) years of federal law enforcement experience.

The NIT Warrant application described Playpen's home page logo as depicting "two images [of] partially clothed prepubescent females with their legs spread apart, along with the text underneath stating, 'No cross-board reposts, .7z preferred, encrypt filenames, include preview, Peace out.' " Def. Ex. 1B ¶ 12. This description was inaccurate at the time the magistrate judge signed the warrant, although SA Macfarlane did not know of the inaccuracies at the time he sought the magistrate's authorization. A very short time before the FBI assumed control of Playpen, the logo changed from depicting two partially clothed prepubescent females with their legs spread apart to displaying a single image of a female. SA Alfin described this image as "a single prepubescent female wearing fishnet stockings and posed in a sexually suggestive manner." Doc. 59 at 33. The text underneath the logo remained unchanged. SA Alfin participated in the search of Playpen's operator's home in Florida, and he testified that during the search he saw the website displayed on the operator's computer. However, though SA Alfin admits to viewing the new logo, he testified that "it went unobserved by me because it was an insignificant change to the Web site." Doc. 59 at 10.

Even though the warrant authorized the FBI to deploy the NIT as soon as a user logged into Playpen, SA Alfin testified that the Government did not deploy the NIT against Mr. Matish in this particular case until after someone with the username of "Broden" logged into Playpen, arrived at the index site, went to the bestiality section—which advertised prepubescent children engaged in sexual activities with animals—and clicked on the post titled "Girl 11YO, with dog." In other words, the agents took the extra precaution of not deploying the NIT until the user first logged into Playpen and second entered into a section of Playpen which actually displayed child pornography. At this point, testified SA Alfin, the user apparently downloaded child pornography as well as the NIT to his computer. Thus, the FBI deployed the NIT in a much narrower fashion than what the warrant authorized.

After determining a user's IP address via the NIT, the FBI can send a subpoena

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to an Internet Service Provider ("ISP"), which will be able to identify the computers that possessed that IP address on a particular date and time. Based on this information, a different experienced and neutral magistrate judge authorized a residential search warrant for Mr. Matish's home, which the FBI executed on July 29, 2015. Pursuant to this second warrant, the FBI seized several computers, hard drives, cell phones, tablets, and video game systems.

iv. Discovery Disputes

Defendant first requested discovery pertaining to the NIT code in March 2016. Initially, the Government declined to disclose any part of the NIT code. Therefore, on May 6, 2016, Defendant submitted the Motion to Compel Discovery. Doc. 37. The Government responded in opposition on May 17, 2016. Doc. 56. Defendant replied on May 23, 2016. Doc. 60. On May 25, 2016, the Government requested permission to file a surreply, Doc. 62, which the Court orally granted at a hearing on May 26, 2016. The Government filed the surreply on June 1, 2016. Doc. 74. On June 10, 2016, Defendant submitted a Consent Motion for Leave to File an Expert Declaration Relevant to this Motion. Doc. 83. After Defendant submitted the Motion to Compel Discovery, Doc. 37, after the Government responded, Doc. 56, and after Defendant replied, Doc. 60, the Government made the NIT instructions, as well as the information obtained via the NIT's execution, available for review. See Doc. 74 at 9. Additionally, on June 14, 2016, the Government made available to the defense the two-way network data stream, which details the information sent to and from Defendant's computer and the FBI. Defendant asserted at a hearing on May 26, 2016 that the NIT instructions do not represent the entire NIT source code, and he now asks for the remaining pieces of the code.

The Court held a hearing to address this matter on June 14, 2016. At the hearing, the Court heard testimony from SA Alfin. The defense did not offer any additional testimony or evidence at the hearing, instead relying upon the declarations filed with its pleadings. With his briefing, Defendant submitted three declarations from Mr. Vlad Tsyrklevich, a computer security engineer, see Doc. 78, Dr. Matthew Miller, an Assistant Professor of Computer Science and Information Technology, see Doc. 60, Ex. C, and Dr. Christopher Soghoian, a "researcher focused on privacy, computer security and government surveillance," Doc. 83.

II. Defendant Is Not Entitled to Discovery of the Full NIT Source Code

A. Legal Standards

i. Disclosure

Under Federal Rule of Criminal Procedure 16(a)(1)(E), "[u]pon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies of portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its casein-chief at trial; or (iii) the item was obtained from or belongs to the defendant." Fed. R. Crim. P. 16(a)(1)(E). This rule differs from that announced in Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), "which rests upon due process considerations[ ] and provides the minimum amount of pretrial discovery granted in criminal cases." E.g., United States v. Caro, 597 F.3d 608, 620 (4th Cir.2010) (citing United States v. Baker, 453 F.3d 419, 424 (7th Cir.2006) ("Rule 16 ... is broader than Brady."); United States v.

Conder, 423 F.2d 904, 911 (6th Cir.1970) ("We are ... of the view that the disclosure required by Rule 16 is much broader than that required by the due process standards of Brady.")).

[1] In United States v. Armstrong, the Supreme Court of the United States clarified that, "in the context of Rule 16 'the defendant's defense' means the defendant's response to the Government's case in chief." 517 U.S. 456, 462, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). Thus, in order for "the defendant to show materiality under this rule, there must be some indication that the pretrial disclosure of the disputed evidence would [ ] enable[ ] the defendant significantly to alter the quantum of proof in his favor." Caro, 597 F.3d at 621 (quoting United States v. Ross, 511 F.2d 757, 763 (5th Cir.1975)) (internal quotations omitted). Hence, "evidence is material as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." Caro, 597 F.3d at 621 (quoting United States v. Lloyd, 992 F.2d 348, 351 (D.C.Cir.1993)) (internal quotations omitted).

ii. Law Enforcement Privilege

[2–4] The Fourth Circuit has not directly addressed the law enforcement privilege. However, other circuits have considered how district courts should evaluate a party's assertion of the law enforcement privilege. Courts agree that the party asserting the law enforcement privilege bears the burden of showing that the privilege applies. See, e.g., In re The City of New York, 607 F.3d 923, 944 (2d Cir. 2010) (citing In re Sealed Case, 856 F.2d 268, 271–72 (D.C.Cir.1988)). In order to illustrate that the privilege applies, the party "must show that the documents contain information that the law enforcement privilege is intended to protect," which "includes information pertaining to law enforcement techniques and procedures, information that would undermine the confidentiality of sources, information that would endanger witness and law enforcement personnel [or] the privacy of individuals involved in an investigation, and information that would otherwise ... interfere[ ] with an investigation." In re The City of New York, 607 F.3d at 944 (quoting In re Department of Investigation of City of New York, 856 F.2d 481, 484 (2d Cir.1988)) (internal quotations omitted). If "the party asserting the privilege successfully shows that the privilege applies, the district court then must balance the public interest in nondisclosure against 'the need of a particular litigant for access to the privileged information,'" as the privilege is qualified, not absolute. In re The City of New York, 607 F.3d at 948 (quoting In re Sealed Case, 856 F.2d at 272).

[5] When evaluating claims of privilege in the criminal context, courts should remain cognizant of the fact that "[w]hile the public's interest in effective law enforcement ... support[s] the creation of the privilege, [it does] not extinguish a criminal defendant's strong interest in effective cross-examination of adverse witnesses." United States v. Green, 670 F.2d 1148, 1155 (D.C.Cir.1981); see also United States v. Van Horn, 789 F.2d 1492, 1507 (11th Cir.1986) (comparing the qualified law enforcement privilege to the informant's privilege and recognizing that the "privilege must give way, however, where the informant's identity or knowledge is 'relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause.'" (quoting Roviaro v. United States, 353 U.S. 53, 60–61, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957))). Thus, in criminal cases, district courts should balance the Government's need to keep certain in-

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formation private with the defendant's need for the information. E.g., Van Horn, 789 F.2d at 1508 (stressing "that the necessity determination requires a case by case balancing process" and that there are no established "fixed rules about the discoverability of electronic surveillance techniques in criminal cases").

Courts have noted that to "assess both the applicability of the privilege and the need for the documents, the district court must ordinarily review the documents in question." In re The City of New York, 607 F.3d at 948. If filing the documents under seal remains insufficient to protect the privileged information, the court may review them *ex parte and in camera*. Id. at 948–49.

B. Analysis

i. Disclosure

[6] The parties agree that the information requested is within the Government's control, that the Government does not plan to use the actual code during its case in chief, and that the code was not obtained from and does not belong to Defendant. The parties dispute, however, whether the defense has shown materiality under Fed. R. Crim. P. 16(a)(1)(E)(i).

Defendant asserts two main arguments to support his claim of materiality. First, Defendant explains that "Mr. Matish expects to challenge the government's chain of custody regarding the supposed linkage between his computer and [Playpen]." Doc. 60 at 4. In order to do so, "the defense intends to challenge the accuracy of the identifying data that the government claims connects Mr. Matish to both 'Broden' and specific activity on the Website," focusing on "the government's recent assertion that some of the information that was used to link 'Broden' to Mr. Matish's computer was not in fact gathered from Mr. Matish's computer and securely transferred in encrypted form to the FBI, but rather was sent unencrypted over the traditional [I]nternet." Id. at 4-5. The defense also expects to "challenge the government's case by arguing to the jury that child pornography found in the unallocated space of Mr. Matish's computer came from somewhere or someone else, or at least that the government cannot prove beyond a reasonable doubt that Mr. Matish intentionally downloaded illegal pictures." Id. at 5. To support this argument, Defendant relies on the supposition that "the security settings on Mr. Matish's computer had been compromised by the government's NIT," leaving his computer vulnerable to hackers and malware. Id.

The Court considers the declarations submitted by Defendant less persuasive than SA Alfin's declaration and testimony, because SA Alfin testified and was subjected to cross-examination. Although Defendant's declarants did not testify and were not subject to cross-examination in this case, the Court is aware that Dr. Soghoian testified for the defense at a hearing in Michaud, 3:15-cr-05351. Defendant's declarations left a number of important questions unanswered. For example, Mr. Tsyrklevich's declaration and Dr. Miller's declaration are parallel, and Dr. Miller's declaration largely adopts Mr. Tsyrklevich's declaration with little substance added. See Doc. 78; Doc. 60, Ex. C.

Notably, the purposes for which Defendant asks for access to the missing source code are based upon speculation as to what the declarants might find. The defense lacks any evidence to support the hypotheses and instead relies upon the *ipse dixit* that the source code is needed because its declarants opine that it is needed. Such speculation remains insufficient to serve as a basis to compel discovery. Cf. Caro, 597 F.3d at 621.

For example, the defense aims to discover whether the NIT's deployment compro-

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mised Defendant's computer's security. In response to the defense's declarations—and his own admission—that an exploit potentially could make fundamental changes or alterations to a computer system, SA Alfin explained that he executed the NIT in question on a computer under his control. This NIT's deployment, testified SA Alfin, did not affect any security program or device on the computer. On the other hand, none of the three declarants presented by Defendant tested the NIT on Defendant's computer, which is available to them, or on their own computers to determine if it affected their security systems.

Defendant also questions the data's chain of custody, due in part to the NIT program's failure to encrypt its return message from Defendant's computer. The defense's declarants hypothesize that the return message became vulnerable to tampering while in transit on the Internet. As defense counsel argued, during such transmission, the information "was susceptible to being tampered with." Doc. 86 at 37. Indeed, defense counsel agreed that during unencrypted transmission, "anybody can tamper with it." Id. at 38. In his testimony, SA Alfin stated that it only took one (1) second for the NIT data stream to transfer the information to the FBI. Thus, anyone seeking to tamper with the data stream during that timeframe must have known in depth the FBI's activity so as to complete their "hacking operation" within one second. Rather than encrypting and decrypting the information sent to the FBI, the Government produced the data in literal form. Again, the defense has not searched Defendant's computer to decipher whether there is any evidence of tampering with this message. Defendant's declarants likewise have not produced any evidential basis supporting an interruption in the chain of custody.

Defendant expresses doubt concerning the credibility of the Government's evidence, specifically SA Alfin's declaration and testimony. However, SA Alfin twice was subjected to cross-examination by Defendant's attorney, whereas the declarations presented by the defense were immune from cross-examination, and, the Court **FINDS**, left many questions unanswered. Another example is that an examination of Defendant's computer may have uncovered evidence either of hacking or an alternate source of the child pornography, but, as it stands, the declarants' inaction leaves their hypotheses with no evidence to support them. At least two of Defendant's declarants are familiar with a similar case in Washington State, see Michaud, 3:15-cr-05351, and have been involved with these issues for many months. See Doc. 78; Doc. 60, Ex. C. Therefore, they have had ample opportunity to examine Defendant's computer or other computers as did SA Alfin.

Defense counsel makes much of SA Alfin's testimony that he did not know, nor had he examined, the exploit code. SA Alfin explained that the exploit represents "a defect in a lock that would allow someone with the proper tool to unlock it without possessing the key." See Doc. 74, Ex. 1 ¶ 11. Thus, through the exploit, the FBI could deploy the NIT onto Defendant's computer. Yet, the Government now has furnished the NIT's operating instructions, which the defense's declarants could apply to Defendant's computer or to other computers ultimately to determine how—if at all—the NIT affected Defendant's computer.

The Court **FINDS** *ex parte* and *in camera* inspection of the exploit unnecessary. Such examination would not have assisted the Court in dealing with the issues before it. The technicalities of such an examination are better left to computer experts.

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The Court places its reliance on the declaration and testimony of SA Alfin. SA Alfin explained that the exploit code did not produce any additional information but merely opened the lock to Playpen. Indeed, SA Alfin did not believe it was necessary to examine the exploit code since it would not furnish him with any additional information. Defendant's declarants did not furnish any evidence to dispute SA Alfin's testimony that there was nothing to be gained by examining the exploit code, nor have the declarants offered a specific reason for any such exam.

The Government declined to furnish the source code of the exploit due to its immateriality and for reasons of security. The Government argues that reviewing the exploit, which takes advantage of a weakness in the Tor network, would expose the entire NIT program and render it useless as a tool to track the transmission of contraband via the Internet. SA Alfin testified that he had no need to learn or study the exploit, as the exploit does not produce any information but rather unlocks the door to the information secured via the NIT. The defense claims it needs the exploit to determine whether the FBI closed and relocked the door after obtaining Defendant's information via the NIT. Yet, the defense lacks evidentiary support for such a need. The lack of any evidence to support the hypotheses of Defendant's declarants, coupled with their failure to examine Defendant's computer and the fact that the Government knew of the "Broden" account prior to the NIT's deployment,[1] further coupled with the miniscule timeframe in which the unencrypted reply was subject to tampering, all suggest that the defense has failed to advance the speculative hypotheses of its declarants to the realm of significantly altering the quantum of proof or of strongly indicating that the exploit "will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." Caro, 597 F.3d at 621 (quoting Lloyd, 992 F.2d at 351) (internal quotations omitted).

Accordingly, the Court **FINDS** that the defense has failed to meet the test under Caro, 597 F.3d at 621, for requiring the Government to produce the exploit source code.

ii. Qualified Law Enforcement Privilege

[7] The Government asserts that the law enforcement privilege applies to the full source code, excluding the already-provided NIT instructions and the corresponding data stream. See Doc. 56 at 22; Doc. 74 at 13. Although the Court technically does not reach the issue of Government privilege, assuming *arguendo* that it did, the Court believes that the scales tip substantially in favor of the Government. In considering this issue, the Court examined—in addition to the parties' briefs—a classified brief submitted by the Government.

The Government alleges that disclosure of the code "would be harmful to the public interest" because it "could diminish the future value of important investigative techniques, allow individuals to devise measures to counteract these techniques in order to evade detection, [and] discourage cooperation from third parties and other governmental agencies who rely on these techniques in critical situations." Doc. 56 at 22.

Courts have held similar law enforcement techniques subject to the qualified privilege. See In re The City of New York, 607 F.3d at 944 (finding that the privilege clearly applies to Field Reports that "contain detailed information about the under-

1. SA Alfin testified without contradiction that the FBI uncovered the user "Broden," which it later linked to Defendant's computer, before it deployed the NIT.

cover operations of the NYPD"); see also Van Horn, 789 F.2d at 1508 (finding a qualified privilege in the nature and location of electronic surveillance equipment); Green, 670 F.2d at 1150 (finding that "the Government has a qualified privilege during a suppression hearing not to disclose its surveillance locations"). Like police Field Reports, In re The City of New York, 607 F.3d at 944, police surveillance locations, Green, 670 F.2d at 1150, and electronic surveillance equipment locations, Van Horn, 789 F.2d at 1508, the full NIT source code includes information pertaining to law enforcement techniques, procedures, and information that could endanger the public if released. Thus, the Government has shown that the privilege applies.

[8, 9] However, the recognition of the privilege cannot end the Court's consideration. E.g., Green, 670 F.2d at 1155. Indeed, after finding that the privilege applies to the exploit, the Court must balance the Government's right to keep the information private with Defendant's right to inspect the information. E.g., id. This particular issue concerns the public interest in nondisclosure and Defendant's rights to put on a defense and to confront witnesses against him under the Sixth and Fourteenth Amendments. At its core, this case embodies the fundamental collision between the duty of our Government to protect its citizens from the dangers caused by child pornography with the implied right of privacy under the Fourth Amendment. Notably, the Government already has found that protecting its citizens outweighs the First Amendment's right of freedom of speech, for it applies prior restraint to child pornography. E.g., Osborne v. Ohio, 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990); see also New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). The Government further has recognized the dangers caused by child pornography in enacting severe punishment, including mandatory minimum sentences, for the possession of child pornography. See 18 U.S.C. § 2252A(b)(1).

Defendant already has received the NIT instructions and the two-way data stream, and the Government's disclosure of this information, coupled with its assurance to the Court that none of the images recovered from Defendant's computer serve as a basis for any charge filed in this case, see Doc. 86 at 56, further lessens the defense's need for the additional information it seeks. Hence, even if the Court were to find the exploit code material under Rule 16(a)(1)(E), the Court **FINDS** that the Government's need to protect the code outweighs Defendant's need for it.

Therefore, the Court **FINDS** that Defendant has failed to show that the full NIT code—specifically, the exploit—is material under Rule 16(a)(1)(E). Thus, the Court **DENIES** Defendant's Motion to Compel Discovery, Doc. 37. Additionally, even if the Court were to find that Defendant made a sufficient showing of materiality, the Court would not require the Government to disclose the full source code due to the law enforcement privilege.

iii. Malware

The parties debate whether the NIT constitutes malware. See Doc. 74 at 12; Doc. 83. Black's Law Dictionary defines malicious technology, or malware, as "any electronic or mechanical means, esp. software, used to monitor or gain access to another's computer system without authorization for the purpose of impairing or disabling the system." *Malicious Technology*, Black's Law Dictionary (10th ed. 2014), available at Westlaw BLACKS. Whether the NIT constitutes malware is immaterial to this Court's decisions concerning the Motions to Suppress and the Motion to Compel Discovery. The Court notes, however, that perhaps malware is a better description for the program through

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which the provider of the pornography attempted to conceal its distribution of contraband over the Internet than for the efforts of the Government to uncover the pornography. Due to the negative connotations associated with the word "malware," the defense's declarations and tweets criticizing the NIT and their insistence on describing it as malware suggest that they simply do not believe that the Government should be permitted to possess this tool. See Doc. 83; Doc. 89, Exs. 2, 3, 4, 6, 7. Yet, "[l]aw enforcement tactics must be allowed to advance with technological changes, in order to prevent criminals from circumventing the justice system." United States v. Skinner, 690 F.3d 772, 778 (6th Cir. 2012).

III. Probable Cause Supported the Issuance of the NIT Warrant

A. Legal Standards

[10, 11] The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. As the Supreme Court of the United States noted in Illinois v. Gates, "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." 462 U.S. 213, 232, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Therefore, a magistrate considering whether probable cause supports the issuance of a search warrant simply must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Id. at 238, 103 S.Ct. 2317. In order for a magistrate to conclude that probable cause exists, a warrant application's supporting affidavit must be more than conclusory and bare bones; indeed, the affidavit "must provide the magistrate with a substantial basis for determining the existence of probable cause." Id. at 239, 103 S.Ct. 2317. Probable cause is not subject to a precise definition, and it is a relaxed standard. See United States v. Allen, 631 F.3d 164, 172 (4th Cir.2011); see also United States v. Martin, 426 F.3d 68, 76 (2d Cir.2005). When examining an affidavit, a magistrate may rely on law enforcement officers, who may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person," as long as the affidavit contains facts to support the law enforcement officer's conclusions. United States v. Johnson, 599 F.3d 339, 343 (4th Cir.2010) (quoting United States v. Arvizu, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002)) (internal quotations omitted); see also United States v. Brown, 958 F.2d 369, at *5 (4th Cir.1992) (noting that "magistrates, in making probable cause determinations, may rely upon an experienced police officer's conclusions as to the likelihood that evidence exists and where it is located").

[12] A court reviewing whether a magistrate correctly determined that probable cause exists should afford the magistrate's determination of probable cause great deference. See Gates, 462 U.S. at 236, 103 S.Ct. 2317. Therefore, "the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing] that' probable cause existed." Id. at 238–39, 103 S.Ct. 2317 (quoting

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Jones v. United States, 362 U.S. 257, 271, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)); see also United States v. Blackwood, 913 F.2d 139, 142 (4th Cir.1990). A reviewing court should "resist the temptation to 'invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a common-sense, manner.'" Blackwood, 913 F.2d at 142 (quoting Gates, 462 U.S. at 236, 103 S.Ct. 2317).

B. Analysis

[13] Defendant first challenges the NIT Warrant on its face, arguing that it is not based on probable cause, even if the Court were to ignore the warrant application's inaccuracies. See Doc. 18 at 11-12; Doc. 33 at 3. The Government, in contrast, argues that the facts contained in the 31-page affidavit written by a 19-year FBI veteran with specialized training and experience in this field, "along with the reasonable inferences to be drawn therefrom, support probable cause to believe that registered users of Playpen intended to view and trade child pornography." Doc. 24 at 17.

The Court **FINDS** that the magistrate possessed a substantial basis for determining that probable cause existed to support the issuance of the NIT Warrant. Taking the affidavit at face value, it outlines numerous affirmative steps that one must take to find Playpen on the Tor network, it fully describes Playpen's home page and registration terms, and it details Playpen's content. See Def. Ex. 1B. Examining the totality of these circumstances leads to the conclusion that a fair probability existed that those accessing Playpen intended to view and trade child pornography and that the NIT would help uncover evidence of these crimes.

The affidavit describes the Tor network and its emphasis on anonymity. See Def. Ex. 1B at 10-11. It states that "the TARGET WEBSITE is a Tor hidden service." Id. ¶ 10. It explains that a user cannot access a hidden service unless he or she knows the particular website address. Id. The affidavit, therefore, describes numerous affirmative steps that one must take even to find Playpen on the Tor network. The Court credits SA Alfin's testimony that it would be extremely unlikely for someone to stumble innocently upon Playpen. The magistrate thus justifiably concluded that the chances of someone innocently discovering, registering for, and entering Playpen were slim.

Additionally, the affidavit illustrates Playpen's home page, detailing the picture of the two prepubescent females as well as the text. Id. ¶ 12. The affiant explained that based on his training and experience, he knew that "'no cross-board reposts' refers to a prohibition against material that is posted on other websites from being 're-posted' to the TARGET WEBSITE; and '.7z' refers to a preferred method of compressing large files or sets of files for distribution." Id. ¶ 12. The affidavit also explained that users viewed a warning message upon accessing the "register an account" hyperlink, informing them not to enter a real email address or to post identifying information. Id. ¶ 13. It also warned that the website "is not able to see your IP . . ." Id. ¶ 13.

In addition, the affidavit described Playpen's contents. It noted that "the entirety of the TARGET WEBSITE is dedicated to child pornography."[2] Id. ¶ 27. While Defendant disputes this characterization, it was not unreasonable for the affiant to

2. "Dedicated" to child pornography does not mean that every section actually consisted of child pornography—some forums apparently discussed how to prepare a child and examples of child abuse. This distinction may explain the seeming conflict between SA Alfin's testimony and the Government's brief.

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conclude, or for the magistrate to accept, that the site indeed was dedicated to child pornography. The affidavit also detailed sections, forums, and sub-forums visible upon logging into the site, most of which referenced children. SA Alfin testified that even the topics listed on the home page that could refer to adult pornography actually referenced child pornography in the context of Playpen. The affiant also noted that he believed users employed Playpen's private message system to disseminate child pornography. Id. ¶ 22. Finally, the affidavit described sub-forums that contained "the most egregious examples of child pornography and/or [were] dedicated to retellings of real world hands on sexual abuse of children." Id. ¶ 27.

Therefore, it was not unreasonable for the magistrate judge to find that Playpen's focus on anonymity, coupled with Playpen's suggestive name, the logo of two prepubescent females partially clothed with their legs spread apart (or, as discussed below, the one scantily clad minor), and the affidavit's description of Playpen's content, endowed the NIT Warrant with probable cause. In fact, other courts have found that probable cause supported this exact NIT Warrant. In Epich, for example, the Eastern District of Wisconsin adopted a magistrate judge's report and recommendation, which "pointed to the complicated machinations through which users had to go to access the web site (meaning that unintentional users were unlikely to stumble onto it); the fact that the web site's landing page contained images of partially clothe[d] prepubescent females with their legs spread apart; the existence of statements on the landing page that made it clear that users were not to repost materials from other web sites, and provided information for compressing large files (such as video files) for distribution; the fact that the site required people to register to use it, and advised registrants to use fake e-mail addresses and emphasized that the site was anonymous; and the fact that once a user went through all of *those* steps to become a registered user, the user had access to the entire site, which contained images and/or videos that depicted child pornography." 2016 WL 953269, at *1–2. The court thus concluded that "anyone who ended up a registered user on the web site was aware that the site contained, among other things, pornographic images of children." Id. at *1. The magistrate judge in Epich additionally found that "the fact that one could become a registered user to the web site, and then view only information that did not contain illegal material, did not affect the probable cause determination that the Virginia magistrate judge made in issuing the warrant." Id. at *1–2. Similarly, in Michaud, the Western District of Washington stated that "it would be highly unlikely that [Playpen] would be stumbled upon accidentally, given the nature of the Tor network." 2016 WL 337263, at *5. Thus, taking the NIT Warrant on its face, the Court **CONCLUDES** that the magistrate judge possessed ample probable cause to issue the NIT Warrant.

IV. A Franks Hearing Is Not Warranted

A. Legal Standards

In Franks v. Delaware, the Supreme Court held that if a "defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." 438 U.S. 154, 155–56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). If, at the hearing, "the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence,

and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Id. at 156, 98 S.Ct. 2674. However, no hearing is required if after "material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause." Id. at 172, 98 S.Ct. 2674.

[14–16] Because affidavits supporting search warrants are presumed valid, in order to "mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine." Id. at 171–72, 98 S.Ct. 2674. Therefore, "[t]here must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." Id. at 171, 98 S.Ct. 2674. The defendant can challenge an affidavit on the ground that the affiant intentionally or recklessly included false statements or on the ground that the affiant omitted material facts with the intent to make, or in reckless disregard of whether the omission made, the affidavit misleading. E.g., United States v. Colkley, 899 F.2d 297, 300 (4th Cir.1990); see also United States v. Chandia, 514 F.3d 365, 373 (4th Cir.2008). It is insufficient for the defendant to allege mere negligence on the part of the affiant. Colkley, 899 F.2d at 300. To make the necessary substantial preliminary showing, the defendant seeking a Franks hearing should furnish to the Court affidavits or sworn or otherwise reliable statements or satisfactorily explain their absence. Id. A defendant can make a substantial preliminary showing that a false statement was included in the affidavit with reckless disregard for its truth by showing "that an officer acted with a high degree of awareness of [a statement's] probable falsity, that is, when viewing all the evidence the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported." Miller v. Prince George's County, MD, 475 F.3d 621, 627 (4th Cir.2007) (quoting Wilson v. Russo, 212 F.3d 781, 788 (3d Cir.2000)) (internal quotations omitted).

[17, 18] In order to be material, the falsity or the omission in the affidavit "must do more than potentially affect the probable cause determination: it must be 'necessary to the finding of probable cause.'" Colkley, 899 F.2d at 301 (citing Franks, 438 U.S. at 156, 98 S.Ct. 2674). In Colkley, the Fourth Circuit noted that "the district court need not have held a Franks hearing ... because inclusion of the omitted information would not have defeated probable cause." Id. at 299–300. The Fourth Circuit stressed that the district court misstated the type of materiality Franks required when it held that "the affiant's omission 'may have affected the outcome' of the probable cause determination." Id. at 301. To determine whether the inaccuracies were necessary to find probable cause, a district court must "excise the offending inaccuracies and insert the facts recklessly omitted, and then determine whether or not the 'corrected' warrant affidavit would establish probable cause." Miller, 475 F.3d at 628; see also Martin, 426 F.3d at 75. To make this determination, courts apply the commonsense, totality-of-the-circumstances analysis articulated in Gates. See Colkley, 899 F.2d at 301–02.

B. Analysis

[19] Defendant alleges that the NIT affidavit contains, at a minimum, recklessly misleading statements and omissions that are material to the probable cause deter-

mination, and that, therefore, a Franks hearing is warranted. Doc. 18 at 19. Defendant specifically focuses on "the application's false description of Playpen's home page, compounded by highly inaccurate statements about how the Tor network functions and a cloud of misleading technical jargon." Id. at 23. Defendant further argues that the home page's false description was highly material to the magistrate's finding of probable cause. Id. at 20. He claims that the affidavit—if it did so at all—persuaded the magistrate judge that the site's dedication to child pornography would be apparent to anyone viewing the home page "by including a patently inaccurate description of the homepage." Id. Importantly, Defendant asserts that the inaccurate home page description was clearly relevant to a finding of probable cause, as evidenced by the allegedly dramatic increase in visitors to Playpen after the home page changed. See Doc. 33 at 12-13. Defendant alleges that the increase in visitors "strongly suggests that many new visitors viewed the revised Playpen homepage as a typical adult site (and had no trouble finding it by Tor search engine or otherwise)" and that "it seems quite plausible that the different content of the Playpen homepage—the misrepresentation at issue here—significantly affected a potential user's expectations as to the site's contents." Id. The Government admits that there was an increase in usage, but it challenges Defendant's numbers.

The Court **FINDS** that Defendant has not made a substantial showing to justify a Franks hearing. Although SA Alfin admitted that he saw Playpen as it appeared with the new logo on February 19, 2015, there is no evidence before the Court that SA Alfin ever informed SA Macfarlane of the change in the few hours between the conclusion of the residential search in Florida and SA Macfarlane's seeking the magistrate's authorization to use the NIT. The Court also finds that it was not reckless for the affiant not to examine the website one more time on the day he sought the warrant's authorization, as he had recently examined the website and confirmed that nothing had changed. Therefore, the Court **FINDS** that SA Macfarlane did not act intentionally or with any doubt as to the validity of his affidavit when he brought the warrant to the magistrate judge.

Additionally, the Court **FINDS** that the logo change was not material to the probable cause determination. Although the Court questions what caused the increase in visitors after February 20, 2015, even if the warrant had included the description of the new logo instead of the description of the old logo, probable cause still would have existed. Indeed, SA Alfin described the new logo as depicting "a single prepubescent female wearing fishnet stockings and posed in a sexually suggestive manner." Doc. 59 at 33. Had SA Alfin or Macfarlane described the new image differently, then perhaps the logo change would have been material. However, the Court posits that replacing "two images depicting partially clothed prepubescent females with their legs spread apart," Def. Ex. 1B ¶ 12, with an image of "a single prepubescent female wearing fishnet stockings and posed in a sexually suggestive manner," Doc. 59 at 33, is not significant. Additionally, the logo change lacks significance because the probable cause rested not solely on the site's logo but also on the affiant's description that the entire site was dedicated to child pornography, Playpen's suggestive name, the affirmative steps a user must take to locate Playpen, the site's repeated warnings and focus on anonymity, and the actual contents of the site.

The Western District of Washington, in considering similar challenges to the same NIT Warrant, orally denied the defen-

dant's request for a Franks hearing at a motions hearing. Michaud, 2016 WL 337263, at *1. In a subsequent opinion denying the defendant's motion to suppress, the court noted that although SA Alfin saw the newer version of Playpen's home page, he did not notice the picture changes. Id. at *3. The court stated that the balance of Playpen's "focus on child pornography apparently remained unchanged, in SA Alfin's opinion." Id. Additionally, the court found that the "new picture also appears suggestive of child pornography, especially when considering its placement next to the site's suggestive name, Play Pen." Id.

Therefore, Defendant has not made a substantial preliminary showing that the affiant included the inaccurate description of Playpen's home page either intentionally or recklessly. Furthermore, even if Defendant had made such a showing, a Franks hearing is not warranted because the logo change was immaterial to the probable cause determination. Thus, the Court **DENIES** Defendant's request for a Franks hearing.

V. The NIT Warrant Did Not Lack Specificity

A. Legal Standards

[20, 21] The Fourth Amendment to the United States Constitution requires that search warrants particularly describe the place to be searched and the persons or things to be seized. U.S. Const. amend. IV. This requirement of particularity "applies to the warrant, as opposed to the application or the supporting affidavit submitted by the applicant." E.g., United States v. Hurwitz, 459 F.3d 463, 470 (4th Cir.2006). By requiring warrants to state the scope of the proposed search with particularity, the Fourth Amendment "ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." United States v. Talley, 449 Fed.Appx. 301, 302 (4th Cir.2011). Additionally, the "Fourth Amendment requires that a warrant be no broader than the probable cause on which it is based." Hurwitz, 459 F.3d at 473 (quoting United States v. Zimmerman, 277 F.3d 426, 432 (3d Cir.2002)) (internal quotations omitted).

B. Analysis

[22] Defendant argues that the NIT Warrant is overbroad. Doc. 18 at 23. Defendant bases this argument on the fact that the NIT Warrant authorized the FBI to search any of the tens of thousands of computers that accessed Playpen, regardless of the user's activities on Playpen. Id. at 23-26. Indeed, the warrant "authorized the FBI to execute searches on a population of potential targets so large that it exceeds the population of Charlottesville, Virginia, and many other small cities." Id. at 26. Defendant claims that the NIT Warrant did not establish probable cause to search a particular location, because it "purportedly gave the FBI broad discretion in deciding when and against whom to deploy its malware technology." Id. at 23. Thus, Defendant likens the NIT Warrant to a general warrant. Id. at 24. Defendant analogizes to a case from the Eastern District of Arkansas, in which the court held that:

> [W]hen, as in this case, a warrant's scope is so broad as to encompass "any and all vehicles" at a scene, without naming any vehicle in particular, the probable cause on which it stands must be equally broad. Specifically, the Fourth Amendment requires that the probable cause showing in support of an "any and all vehicles" warrant must demonstrate that, at the time of the search, a vehicle's mere presence at the target location is sufficient to suggest that it contains contraband or evidence of a crime.

United States v. Swift, 720 F.Supp.2d 1048, 1055–56 (E.D.Ark.2010). According to Defendant, "[h]ere—like the mere presence of a car at the scene of a crime—the Government sought to search users' computers based on mere entry to the Playpen site, even though it was not clear from the homepage that someone merely entering the Playpen site—perhaps for the first time—intended to access child pornography." Doc. 18 at 25.

The Government contends that the "NIT warrant described the places to be searched—activating computers of users or administrators that logged into Playpen—and the things to be seized—the seven pieces of information obtained from those activating computers—with particularity." Doc. 24 at 29. The Government asks the Court to "decline the defendant's invitation to read into the Fourth Amendment a heretofore undiscovered upper bound on the number of searches permitted by a showing of probable cause." Id. In the Government's view, the fact that "a warrant authorizes the search of a potentially large number of suspects is an indication, not of constitutional infirmity, but a large number of criminal suspects." Id. at 35.

As noted in Levin, "NITs, while raising serious concerns, are legitimate law enforcement tools." 186 F.Supp.3d at 36, 2016 WL 2596010, at *8. Without deciding the particularity issue presented by the NIT Warrant, the District of Massachusetts noted that of "special concern here is the particularity requirement, since, as the government points out, 'the defendant's use of the Tor hidden service made it impossible for investigators to know what other districts, if any, the execution of the warrant would take place in.'" Id. at 44, 2016 WL 2596010 at *15. The court noted, however, that despite this difficulty, "at least two other courts have determined that this precise warrant was sufficiently particular to pass constitutional muster." Id. (emphasis in original) (citing Epich, 2016 WL 953269, at *2; Michaud, 2016 WL 337263, at *4–5).

First, in Michaud, the Western District of Washington considered this very issue. 2016 WL 337263, at *5. In Michaud, the defendant argued that the NIT Warrant amounted to a general warrant and lacked sufficient specificity; however, the court found that "both the particularity and breadth of the NIT Warrant support the conclusion that the NIT Warrant did not lack specificity and was not a general warrant." Id. Indeed, the court noted that the NIT Warrant "states with particularity exactly what is to be searched, namely, computers accessing" Playpen. Id. Additionally, the fact that the warrant authorized the FBI to search tens of thousands of potential targets "does not negate particularity, because it would be highly unlikely that [Playpen] would be stumbled upon accidentally, given the nature of the Tor network." Id. The court further held that the NIT Warrant did not exceed the probable cause on which it was issued. Id.

Similarly, in Epich, the Eastern District of Wisconsin, adopting a magistrate judge's report and recommendation, rejected the defendant's particularity challenge to the NIT Warrant. 2016 WL 953269, at *2 (noting that the warrant "explained who was subject to the search, what information the NIT would obtain, the time period during which the NIT would be used, and how it would be used, as well as bearing attachments describing the place to be searched and the information to be seized").

The Court **FINDS** that the NIT Warrant did not violate the Fourth Amendment's particularity requirement. The Court also **FINDS** that the warrant was not broader than the probable cause upon which it was based. As discussed above—putting aside the admitted inaccuracies

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and the Franks issue—there existed a fair probability that anyone accessing Playpen possessed the intent to view and trade child pornography. Therefore, the fact that the FBI could have and did narrow its search in this case is immaterial, since the warrant was based on probable cause to search any computer logging into the site. While Defendant claims Playpen includes sections and forums which do not actually contain child pornography, the only examples in the record concern ways to approach a child who will be the subject of the pornography and relations between adults and children, thus SA Alfin's description of the site as "entirely dedicated to child porn." Additionally, the warrant explicitly outlined the place to be searched—the computers of any user or administrator who logs into Playpen. Def. Ex. 1A. The warrant also detailed the seven items to be seized. Id. Therefore, the NIT Warrant met the Fourth Amendment's particularity requirements.

VI. The Triggering Event Occurred

A. Legal Standards

[23, 24] Anticipatory warrants are "based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of a crime will be located at a specified place." United States v. Grubbs, 547 U.S. 90, 94, 126 S.Ct. 1494, 164 L.Ed.2d 195 (2006). Generally, these warrants "subject their execution to some condition precedent other than the mere passage of time—a so-called 'triggering condition.'" Id. If a warrant is subject to a triggering condition and "the government were to execute an anticipatory warrant before the triggering condition occurred, there would be no reason to believe the item described in the warrant could be found at the searched location; by definition, the triggering condition which establishes probable cause has not yet been satisfied when the warrant is issued." Id. Thus, it "must be true not only that *if* the triggering condition occurs 'there is a fair probability that contraband or evidence of a crime will be found in a particular place,' but also that there is probable cause to believe the triggering condition *will occur*" Id. at 96–97, 126 S.Ct. 1494 (citing Gates, 462 U.S. at 238, 103 S.Ct. 2317). However, "the Fourth Amendment does not require that the triggering condition for an anticipatory search warrant be set forth in the warrant itself." Id. at 99, 126 S.Ct. 1494.

B. Analysis

[25] Defendant contends that the NIT Warrant represents an anticipatory warrant "because it prospectively authorized searches whenever unidentified Playpen visitors signed on to the site, with the 'triggering event' for those searches being the act of accessing the site." Doc. 18 at 26. Defendant argues that merely logging into Playpen did not constitute the triggering event; rather "navigating through the internet homepage *described in the warrant application*" represented the triggering condition. Doc. 33 at 2. Since the warrant application incorrectly described Playpen's home page logo, Defendant could not log into Playpen via the home page described in the warrant application because that home page no longer existed. Id. at 3. Thus, Defendant argues, "the search conducted here was not authorized by the NIT Warrant." Id.

The Government notes that Defendant's "claim that the NIT warrant was void because, as an anticipatory warrant, the 'triggering event' never occurred is little more than a rehash of the same probable cause and Franks challenges that have already been addressed." Doc. 24 at 35-36. The Government contends that the relevant triggering event was "the defendant's decision to enter his username and password into Playpen and enter the site." Id. The

Government emphasizes that Defendant is not claiming that he never logged into Playpen. Id. at 36. Therefore, the Government contends that the triggering event did, in fact, occur. Id.

Defendant's argument that the triggering event never occurred is novel, but the Court **FINDS** that logging into Playpen—which the warrant application identified by its URL—represents the relevant triggering event. See Def. Ex. 1A. Thus, the triggering event was not conditional upon the website's home page logo but upon whether a user or administrator of Playpen logged into the site, which the warrant identified by its URL. The FBI deployed the NIT here after someone with the username "Broden" logged into Playpen. Thus, the Court **FINDS** that the triggering event did occur.

The Court notes that if it were to rule that logging into Playpen through the home page—exactly as it was described in the application—represented the triggering event, as opposed to ruling that simply logging into the website represented the triggering event, such a ruling would provide operators of websites such as Playpen with incentive to frequently change their home pages' appearances. While this consideration would not be an issue if the FBI had assumed control over the website prior to obtaining the search warrant—as it had in this case—if the FBI obtained a warrant to search computers logging into a site that the FBI had not yet taken over, the website operator's ability to change his or her website's home page at will would always defeat probable cause for this type of anticipatory warrant. Again it should be noted that the Government did not employ the NIT until Defendant took the additional step of clicking on an actual child pornography forum or section within Playpen.

VII. Rule 41(b)(4) Authorized the Issuance of the NIT Warrant

A. Legal Standards

Both Federal Rule of Criminal Procedure 41(b) ("Rule 41(b)") and Section 636 of the Federal Magistrates Act ("Section 636") concern the scope of a magistrate judge's authority. Rule 41(b) details a magistrate judge's authority to issue a search warrant. See Fed. R. Crim. P. 41(b). It provides that:

> (1) a magistrate judge with authority in the district—or if none is reasonably available, a judge of a state court of record in the district—has authority to issue a warrant to search for and seize a person or property located within the district;
>
> (2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed;
>
> (3) a magistrate judge—in an investigation of domestic terrorism or international terrorism—with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district;
>
> (4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both; and
>
> (5) a magistrate judge having authority in any district where activities related to the crime may have occurred, or in the

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District of Columbia, may issue a warrant for property that is located outside the jurisdiction of any state or district, but within any of the following:

(A) a United States territory, possession, or commonwealth;

(B) the premises—no matter who owns them—of a United States diplomatic or consular mission in a foreign state, including any appurtenant building, part of a building, or land used for the mission's purposes; or

(C) a residence and any appurtenant land owned or leased by the United States and used by United States personnel assigned to a United States diplomatic or consular mission in a foreign state.

Fed. R. Crim. P. 41(b). Section 636(a) of the Federal Magistrates Act addresses a magistrate judge's jurisdiction and provides, in relevant part:

(a) Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts . . .

28 U.S.C. § 636. As the District of Massachusetts noted in Levin, "the Court's analyses of whether the NIT Warrant was statutorily permissible and whether it was allowed under Rule 41(b) are necessarily intertwined." 186 F.Supp.3d at 31, 2016 WL 2596010, at *3. Indeed, "[f]or the magistrate judge to have had jurisdiction to issue the warrant under Section 636(a), she must have had authority to do so under Rule 41 (b)." Id. at 36 n. 11, 2016 WL 2596010, at *8 n. 11.

B. Analysis

i. Defendant Has Standing to Challenge the Magistrate Judge's Authority and Jurisdiction

[26] In Rakas v. Illinois, the Supreme Court of the United States stressed that "'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.'" 439 U.S. 128, 133–34, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) (quoting Brown v. United States, 411 U.S. 223, 230, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973)). Therefore, a "person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed" and thus cannot vicariously assert the third party's Fourth Amendment rights. Id. at 134, 99 S.Ct. 421. In Rakas, the Supreme Court held that passengers of a car who "asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized" could not vicariously assert the owner and driver's potential claims that the search of the car violated the Fourth Amendment. Id. at 130, 148, 99 S.Ct. 421.

[27] The Government argues that Defendant does not have standing to assert these challenges to the NIT Warrant, characterizing his Third Motion as one "regarding how the issuance of the NIT warrant would apply to a third party found outside of the Eastern District of Virginia." See Doc. 53 at 6.

However, the Government deployed the NIT onto Defendant's own computer, and Defendant is challenging the warrant that purportedly authorized the Government to search that computer. Thus, Defendant possesses standing to challenge the warrant upon which the Government relied. Cf. United States v. Castellanos, 716 F.3d

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828, 846 (4th Cir.2013) (detailing ways in which defendants can and cannot establish standing to assert Fourth Amendment claims). This case is readily distinguishable from those holding that defendants cannot assert third parties' Fourth Amendment rights. Unlike the passengers in the car in Rakas, 439 U.S. at 134, 99 S.Ct. 421, Defendant obviously possesses an interest in his own computer, and he thus has standing to contest the NIT Warrant on any grounds he sees fit. As Defendant notes, he challenges the warrant "by demonstrating the invalidity of the warrant that purported to authorize this search." Doc. 55 at 2. Hence, the Court **FINDS** that Defendant possesses standing to challenge the NIT Warrant under Rule 41(b) and Section 636.

ii. The Magistrate's Authority and Jurisdiction

Defendant argues that the magistrate judge "ignored the clearly established jurisdictional limits set forth in Federal Rule of Criminal Procedure 41" in authorizing the search of computers located anywhere in the world. Doc. 24 at 5-6. Defendant alleges that a warrant issued without authority under Rule 41 necessarily leads to a constitutional violation of Section 636. Doc. 34 at 10; Doc. 55 at 3. The Government contends that Rule 41(b)(1), (2), and (4) support the issuance of the warrant and that a violation of Rule 41 does not automatically result in a constitutional violation. Doc. 53 at 12-16

Several courts have held that the magistrate judge lacked authority and jurisdiction to issue the NIT Warrant used in this case. E.g., Werdene, No. 2:15-cr-00434, ECF No. 33; Levin, 186 F.Supp.3d at 35, 2016 WL 2596010, at *7; Arterbury, No. 15-182, ECF No. 47; Stamper, No. 1:15-cr-109, ECF No. 48; Michaud, 2016 WL 337263, at *6. As the Eastern District of Pennsylvania noted in Werdene, "the courts generally agree that the magistrate judge in Virginia lacked authority under Rule 41 to issue the warrant, [but] they do not all agree that suppression is required or even appropriate." No. 2:15-cr-00434, ECF No. 33 (collecting cases). The Court disagrees with the other courts that have considered this issue and **FINDS** that the magistrate judge did not exceed her authority under Rule 41(b).

[28] The Court **FINDS** that Rule 41(b)(4) authorized the magistrate judge to issue this warrant. Rule 41(b)(4) endows a magistrate with authority to issue a warrant authorizing the use of a tracking device. Fed. R. Crim. P. 41(b)(4). The tracking device must be installed within the magistrate judge's district, but the warrant "may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both." Id.

The Court recognizes that other courts have held this provision inapplicable to the NIT Warrant. See, e.g, Levin, 186 F.Supp.3d at 34, 2016 WL 2596010, at *6; see also Michaud, 2016 WL 337263, at *6 (noting that "If the 'installation' occurred on the government-controlled computer, located in the Eastern District of Virginia, applying the tracking device exception breaks down, because [the defendant] never controlled the government-controlled computer, unlike a car with a tracking device leaving a particular district. If the installation occurred on [the defendant's] computer, applying the tracking device exception again fails, because [the defendant's] computer was never physically located within the Eastern District of Virginia."). However, whenever someone entered Playpen, he or she made, in computer language, "a virtual trip" via the Internet to Virginia, just as a person logging into a foreign website containing child pornography makes "a virtual trip" overseas. Indeed, in Kyllo v. Unit-

ed States, the Supreme Court held that where "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." 533 U.S. 27, 40, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). The majority expressly rejected the dissent's attempts to distinguish "off-the-wall" home surveillance and "through-the-wall" observation. Id. at 35–36, 121 S.Ct. 2038. Thus, in Kyllo, the Supreme Court likened the Government's electronic surveillance of a home via thermal imaging devices to the Government's physical entrance of the surveilled home. Id. at 40, 121 S.Ct. 2038. Accordingly, when users entered Playpen, they came into Virginia in an electronic manner, just as the police in Kyllo entered a home in an electronic manner. Id.

Because the NIT enabled the Government to determine Playpen users' locations, it resembles a tracking device. Thus, the NIT Warrant authorized the FBI to install a tracking device on each user's computer when that computer entered the Eastern District of Virginia—the magistrate judge's district. Contrary to the opinion conveyed in Michaud, 2016 WL 337263, at *6, the installation did not occur on the government-controlled computer but on each individual computer that entered the Eastern District of Virginia when its user logged into Playpen via the Tor network. When that computer left Virginia—when the user logged out of Playpen—the NIT worked to determine its location, just as traditional tracking devices inform law enforcement of a target's location. Furthermore, as far as this case is concerned, all relevant events occurred in Virginia. The magistrate judge who issued the warrant thus did so with authority under Rule 41(b)(1)(4).

Because the Court **FINDS** that the magistrate judge complied with Rule 41(b) in issuing this warrant, her actions did not contravene Section 636, because she exercised authority that was "conferred or imposed . . . by the Rules of Criminal Procedure for the United States District Courts." 28 U.S.C. § 636(a)(1).

VIII. Even If the Magistrate Judge Issued the NIT Warrant Without Authority or Jurisdiction, Suppression Is Not Warranted

A. The Government Did Not Need a Warrant to Deploy the NIT

The Court **FINDS** that no Fourth Amendment violation occurred here because the Government did not need a warrant to capture Defendant's IP address. Therefore, even if the warrant were invalid or void, it was unnecessary, so no constitutional violation resulted from the Government's conduct in this case.

i. Legal Standards

The Fourth Amendment provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Although holding that the Fourth Amendment protects a person's "reasonable expectation of privacy," the Supreme Court cautioned in Katz v. United States that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'" 389 U.S. 347, 349, 360, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

[29] Traditionally, the privacy concerns embedded in the Fourth Amendment only applied to government actors' physical trespasses. See, e.g., United

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States v. Jones, 565 U.S. 400, 132 S.Ct. 945, 949–50, 181 L.Ed.2d 911 (2012). The Supreme Court, however, expanded the notion of privacy in Katz, and Justice Harlan in concurrence developed a two-part test, which courts now regularly use to determine whether an action violates the Fourth Amendment: (1) the person must have exhibited an actual (subjective) expectation of privacy, and (2) that expectation must be (objectively) reasonable. 389 U.S. at 361, 88 S.Ct. 507 (Harlan, J., concurring). Hence, to establish a violation of one's rights under the Fourth Amendment, a defendant "must first prove that he had a legitimate expectation of privacy in the place searched or the item seized." United States v. Simons, 206 F.3d 392, 398 (4th Cir.2000). In order to so prove, the defendant "must show that his subjective expectation of privacy is one that society is prepared to accept as objectively reasonable." Id. (citing California v. Greenwood, 486 U.S. 35, 39, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988)).

In Katz, the Supreme Court considered whether a reasonable expectation of privacy exists within an enclosed telephone booth. 389 U.S. at 349, 88 S.Ct. 507. Noting that "the Fourth Amendment protects people, not places," the Court held that the defendant possessed a reasonable expectation of privacy in the words he uttered while in the telephone booth. Id. at 351, 359, 88 S.Ct. 507. In Smith v. Maryland, however, the Supreme Court distinguished Katz, stressing that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Smith v. Maryland, 442 U.S. 735, 744, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). In Smith, the Supreme Court held that a defendant possessed no expectation of privacy in the phone numbers he dialed, and that, therefore, the installation and use of a pen register to capture the dialed phone numbers did not constitute a search. Id. at 745, 99 S.Ct. 2577. The Court noted that "[a]ll telephone users realize that they must 'convey' phone numbers to the telephone company ..." Id. at 742, 99 S.Ct. 2577. Indeed, regardless of the defendant's location or of the steps he took to maintain privacy, he "had to convey that number to the telephone company ..." Id. at 743, 99 S.Ct. 2577. Thus, the Government did not need a warrant to use the pen register to capture the phone numbers the defendant dialed. Id. at 745, 99 S.Ct. 2577. The Ninth Circuit in United States v. Forrester described the dichotomy between Katz and Smith as "a clear line between unprotected addressing information and protected content information." 512 F.3d 500, 510 (9th Cir.2007).

[30] Like information revealed to a third party, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz, 389 U.S. at 351, 88 S.Ct. 507. In California v. Ciraolo, the Supreme Court wrote that the "Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986). The Court continued, "[n]or does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point ..." Id. at 213, 106 S.Ct. 1809. Even 1,000 feet above a home represents a "public vantage point" "[i]n an age where private and commercial flight in the public airways is routine." Id. at 215, 106 S.Ct. 1809. The defendant in Ciraolo could not reasonably "expect that his marijuana plants," which he grew in his fenced-in backyard, "were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet." Id. at 215, 106 S.Ct. 1809. The Court thus held that

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police officers who used a plane flown above the defendant's backyard to observe his illegal marijuana plants did not conduct a search in violation of the Fourth Amendment. Id.

Similarly, in Minnesota v. Carter, the Supreme Court considered whether a police officer who peered through a gap in a home's closed blinds conducted a search in violation of the Fourth Amendment. 525 U.S. 83, 85, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998). Although the Court did not reach this question, id. at 91, 119 S.Ct. 469, Justice Breyer in concurrence determined that the officer's observation did not violate the respondents' Fourth Amendment rights. Id. at 103, 119 S.Ct. 469 (Breyer, J., concurring). Justice Breyer noted that the "precautions that the apartment's dwellers took to maintain their privacy would have failed in respect to an ordinary passerby standing" where the police officer stood. Id. at 104, 119 S.Ct. 469. He specified that whether the officer conducted an illegal search cannot turn "upon 'gaps' in drawn blinds. Whether there were holes in the blinds or they were simply pulled the 'wrong way' makes no difference." Id. at 105, 119 S.Ct. 469. "One who lives in a basement apartment that fronts a publicly traveled street, or similar space, ordinarily understands the need for care lest a member of the public simply direct his gaze downward," he continued. Id. Thus, Justice Breyer opined that peering into a gap in closed blinds is a permissible act under the Fourth Amendment. Id. at 103, 119 S.Ct. 469.

ii. Analysis

a. Defendant Has No Expectation of Privacy in His IP Address

[31] The Court first focuses on the Government's discovery of Defendant's IP address, as the IP address ultimately led the Government to Defendant. Without the IP address, the Government presumably would have been unable to locate Defendant, even if the NIT had provided the FBI with the six other pieces of information seized. Here, the Court **FINDS** that Defendant possessed no reasonable expectation of privacy in his computer's IP address, so the Government's acquisition of the IP address did not represent a prohibited Fourth Amendment search.

[32] Generally, one has no reasonable expectation of privacy in an IP address when using the Internet. See, e.g., Forrester, 512 F.3d at 509–11. This lack of a reasonable expectation of privacy stems from the fact that Internet users "should know that this information is provided to and used by Internet service providers for the specific purpose of directing the routing of information." Id. at 510. The Ninth Circuit noted that "IP addresses are not merely passively conveyed through third party equipment, but rather are voluntarily turned over in order to direct the third party's servers." Id.

[33] Even an Internet user who employs the Tor network in an attempt to mask his or her IP address lacks a reasonable expectation of privacy in his or her IP address. Presumably, one using the Tor network hopes for, if not possesses, a subjective expectation of privacy in his or her identifying information. Indeed, Tor markets itself as a tool to "prevent[ ] people from learning your location ..." See Tor Project: Anonymity Online, https://www.torproject.org (last visited May 24, 2016). However, such an expectation is not objectively reasonable in light of the way the Tor network operates. In United States v. Farrell, researchers operating the Tor nodes observed the IP address of the alleged operator of Silk Road 2.0, a Tor hidden service. No. CR15–029, 2016 WL 705197, at *1 (W.D.Wash. Feb. 23, 2016). Pursuant to a subpoena, the researchers turned over the information to law enforcement. Id. In finding no Fourth

Amendment violation, the Western District of Washington noted that "in order for [ ] prospective user[s] to use the Tor network they must disclose information, including their IP addresses, to unknown individuals running Tor nodes, so that their communications can be directed toward their destinations." Id. at *2. The Western District of Washington noted that under "such a system, an individual would necessarily be disclosing his identifying information to complete strangers." Id. Indeed, the Tor Project itself even warns visitors "that the Tor network has vulnerabilities and that users might not remain anonymous." Id. The court concluded that "Tor users clearly lack a reasonable expectation of privacy in their IP addresses while using the Tor network." Id. The court cautioned, however, that its decision was limited to the fact that the researchers "obtained the defendant's IP address while he was using the Tor network and [the researchers were] operating nodes on that network, and not by any access to his computer." Id. Accordingly, a magistrate judge's report and recommendation in the Northern District of Oklahoma that considered whether Playpen users possessed reasonable expectations of privacy in their IP addresses stated that "[w]ere the IP address obtained from a third-party, the [c]ourt might have sympathy for" the position that the defendant did not possess a reasonable expectation of privacy in it; however, "here the IP address was obtained through use of computer malware that entered Defendant's home, seized his computer and directed it to provide information that the Macfarlane affidavit states was unobtainable in any other way." Arterbury, No. 15-cr-182, ECF No. 42.

Other courts, however, have not limited the reasonable expectation of privacy inquiry to whether the FBI acquired a defendant's IP address by accessing his computer or by obtaining the information from a cooperative third party. E.g., Werdene, No. 2:15-cr-00434, ECF No. 33. For example, in another case involving Playpen, the Eastern District of Pennsylvania found that the defendant "had no reasonable expectation of privacy in his IP address," because "[a]side from providing the address to Comcast, his internet service provider, a necessary aspect of Tor is the initial transmission of a user's IP address to a third-party." Id. The court noted in Werdene that "the type of third-party to which [the defendant] disclosed his IP address—whether a person or an 'entry node' on the Tor network—does not affect the [c]ourt's evaluation of his reasonable expectation of privacy." Id. Because the defendant "was aware that his IP address had been conveyed to a third party, [ ] he accordingly lost any subjective expectation of privacy in that information." Id. Thus, the Eastern District of Pennsylvania found that since the defendant "did not have a reasonable expectation of privacy in his IP address, the NIT cannot be considered a 'search' within the meaning of the Fourth Amendment." Id. Similarly, the Western District of Washington in Michaud stated that the defendant "ha[d] no reasonable expectation of privacy of the most significant information gathered by deployment of the NIT, [his] assigned IP address, which ultimately led to [his] geographic location." 2016 WL 337263, at *7. The Western District of Washington likened the defendant's IP address to an unlisted telephone number that "eventually could have been discovered." Id.

It is clear to the Court that Defendant took great strides to hide his IP address via his use of the Tor network. However, the Court **FINDS** that any such subjective expectation of privacy—if one even existed in this case—is not objectively reasonable. SA Alfin testified that when a user connects to the Tor network, he or she must disclose his or her real IP address to the first Tor node with which he or she con-

nects. This fact, coupled with the Tor Project's own warning that the first server can see "[t]his IP address is using Tor," destroys any expectation of privacy in a Tor user's IP address. See Tor Project: FAQ, https://www.torproject.org/docs/faq.html.en (last visited May 24, 2016); see also Farrell, 2016 WL 705197, at *2. And, as the Eastern District of Pennsylvania noted, the fact that the Tor network subsequently bounces users' IP addresses "from node to node within the Tor network to mask [users'] identit[es] does not alter the analysis of whether" an expectation of privacy in the IP addresses exists. Werdene, No. 2:15-cr-00434, ECF No. 33.

The Court recognizes that the NIT used in this case poses questions unique from the conduct at issue in Farrell, 2016 WL 705197. In Farrell, the Government never accessed the suspect's computer in order to discover his IP address, whereas here, the Government deployed a set of computer code to Defendant's computer, which in turn instructed Defendant's computer to reveal certain identifying information. The Court, however, disagrees with the magistrate judge in Arterbury, who focused on this distinction, see No. 15-cr-182, ECF No. 42. As the Court understands it, Defendant's IP address was not located on his computer; indeed, it appears that computers can have various IP addresses depending on the networks to which they connect. Rather, Defendant's IP address was revealed in transit when the NIT instructed his computer to send other information to the FBI. The fact that the Government needed to deploy the NIT to a computer does not change the fact that Defendant has no reasonable expectation of privacy in his IP address. See Werdene, No. 2:15-cr-00434, ECF No. 33. Thus, the Government's use of a technique that causes a computer to regurgitate certain information, thereby revealing additional information that the suspect already exposed to a third party---here, the IP address---does not represent a search under these circumstances. Therefore, the Government did not need to obtain a warrant before deploying the NIT and obtaining Defendant's IP address in this case, so any potential defects in the warrant or in the issuance of the warrant are immaterial.

b. Defendant Has No Reasonable Expectation of Privacy in His Computer

[34] While the Court holds that the use of the NIT, which resulted in the Government's ultimate capture of Defendant's IP address, does not represent a prohibited search under the Fourth Amendment, the Court acknowledges that the warrant purported to authorize searches of "activating computers." See Def. Ex. 1A. Without deploying the NIT to a user's computer, the Government would not have been able to observe any Playpen user's IP address. Additionally, the Government obtained the six other pieces of identifying data from users' computers; unlike its acquisition of the IP addresses, which the FBI observed and captured during transmission of the data, the FBI gathered this additional data directly from suspects' computers. To be sure, "the appropriate [Fourth Amendment] inquiry [is] whether the individual had a reasonable expectation of privacy in the area searched, not merely in the items found." E.g., United States v. Horowitz, 806 F.2d 1222, 1224 (4th Cir.1986). Thus, the Court will address whether Defendant possessed a reasonable expectation of privacy not only in his IP address but also in his computer, the "place to be searched." Def. Ex. 1A. The Court **FINDS** that Defendant did not possess a reasonable expectation of privacy in his computer.

Examining the search of computers in the Fourth Amendment context, in 2007, the Ninth Circuit held that a defendant had both a subjective expectation of priva-

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cy and an objectively reasonable expectation of privacy in his personal computer, even though the defendant had connected that computer to a network. See United States v. Heckenkamp, 482 F.3d 1142, 1146 (9th Cir.2007). The Ninth Circuit noted that a "person's reasonable expectation of privacy may be diminished in 'transmissions over the Internet or email that have already arrived at the recipient.'" Id. (quoting United States v. Lifshitz, 369 F.3d 173, 190 (2d Cir.2004)). "However, the mere act of accessing a network does not in itself extinguish privacy expectations, nor does the fact that others may have occasional access to the computer." Id. (citing Leventhal v. Knapek, 266 F.3d 64, 74 (2d Cir.2001)). The Ninth Circuit stressed that "privacy expectations may be reduced if the user is advised that information transmitted through the network is not confidential and that the systems administrators may monitor communications transmitted by the user." Id. at 1147 (citing Simons, 206 F.3d at 398). Similarly, in United States v. Buckner, the Fourth Circuit noted that one has a reasonable expectation of privacy in his password-protected home computer. 473 F.3d 551, 555 (4th Cir.2007). In Trulock v. Freeh, the Fourth Circuit held that "password-protected files [on a computer] are analogous to [a] locked footlocker inside the bedroom;" thus, the defendant "had a reasonable expectation of privacy in the password-protected computer files." 275 F.3d 391, 403 (4th Cir.2001). Conversely, in Simons, the Fourth Circuit found that a government employer's remote searches of an employee's computer did not violate the Fourth Amendment, because, in light of the employer's Internet policy—which stated that the employer would monitor employees' use of the Internet—the remote searches did not constitute prohibited searches under the Fourth Amendment. 206 F.3d at 398. The Fourth Circuit further noted that because the employee "lacked a legitimate expectation of privacy in his Internet use," he also lacked a reasonable expectation of privacy in his computer's hard drive. Id. at 399.

[35] Here, the NIT was programmed to collect very limited information. Like the pen register in Smith that only captured the numbers dialed, 442 U.S. at 742, 99 S.Ct. 2577, the NIT only obtained identifying information; it did not cross the line between collecting addressing information and gathering the contents of any suspect's computer. Cf. Forrester, 512 F.3d at 510. Indeed, the Government obtained a traditional residential search warrant before searching the computer's contents in this case. Plus, Defendant lacked any expectation of privacy in the main piece of information the NIT allowed the FBI to gather—his IP address. E.g., Michaud, 2016 WL 337263, at *7. Additionally, while the Government could have deployed the NIT as soon as a user logged into Playpen, SA Alfin testified that in this particular case, the FBI took the extra step of not deploying the NIT until after the suspect actually accessed child pornography. These facts support the conclusion that the NIT's deployment does not represent a prohibited search under the Fourth Amendment. Cf. Forrester, 512 F.3d at 511.

Additionally, like the employee in Simons who was put on notice that his computer was not entirely private, 206 F.3d at 398, Defendant here should have been aware that by going on Tor to access Playpen, he diminished his expectation of privacy. The Ninth Circuit found in 2007 that connecting to a network did not eliminate the reasonable expectation of privacy in one's computer, Heckenkamp, 482 F.3d at 1146–47; however, society's view of the Internet—and our corresponding expectation of privacy not only in the information we post online but also in our physical computers and the data they contain—recently has undergone a drastic shift.

For example, hacking is much more prevalent now than it was even nine years ago, and the rise of computer hacking via the Internet has changed the public's reasonable expectations of privacy. Cf. Lee Raine, *How Americans balance privacy concerns with sharing personal information: 5 key findings*, PEWRESEARCHCENTER (January 14,2016), http://www.pewresearch.org/fact-tank/2016/01/14/key-findings-privacy-information-sharing/ (reporting that members of a focus group "worried about hackers," though "some accept that [privacy tradeoffs are] a part of modern life"). Now, it seems unreasonable to think that a computer connected to the Web is immune from invasion. Indeed, the opposite holds true: in today's digital world, it appears to be a virtual certainty that computers accessing the Internet can—and eventually will—be hacked.

In the recent past, the world has experienced unparalleled hacks. For example, terrorists no longer can rely on Apple to protect their electronically stored private data, as it has been publicly reported that the Government can find alternative ways to unlock Apple users' iPhones. See Katie Benner & Eric Lichtblau, *U.S. Says It Has Unlocked iPhone Without Apple*, THE NEW YORK TIMES (March 28, 2016), http://www.nytimes.com/2016/03/29/technology/apple-iphone-fbi-justice-department-case.html?_r=0. In addition to politicians being targets of hacking, see Nicole Gaouette, *Intel chief: Presidential campaigns under cyber attack*, CNN (May 18, 2016), http://www.cnn.com/2016/05/18/politics/presidential-campaigns-cyber-attack/index.html, Ashley Madison, see Alex Hern, *Ashley Madison hack: your questions answered*, THE GUARDIAN (August 20, 2015), https://www.theguardian.com/technology/2015/aug/20/ashley-madison-hack-your-questions answered; Sony, see Peter Elkind, *Sony Pictures: Inside the Hack of the Century*, FORTUNE (July 1, 2015), http://fortune.com/sony-hack-part-1/; Home Depot, see Robin Sidel, *Home Depot's 56 Million Card Breach Bigger Than Target's*, THE WALL STREET JOURNAL (Sept. 18,2014), http://www.wsj.com/articles/home-depot-breach-bigger-than-targets-1411073571; Target, see id.; the New York Times, see Nicole Perlroth, *Hackers in China Attacked The Times for Last 4 Months*, THE NEW YORK TIMES (Jan. 30, 2013), http://www.nytimes.com/2013/01131/technology/chinese-hackers-infiltrate-new-york-times-computers.html; a Panamanian law firm, see *Panama Papers: Leak firm Mossack Fonseca 'victim of hack'*, BBC NEWS (April 6, 2016), http://www.bbc.com/news/world-latin-america-35975503; and even the United States Government, Associated Press in Washington, *US government hack stole fingerprints of 5.6 million federal employees*, THE GUARDIAN (September 23, 2015), https://www.theguardian.com/technology/2015/sep/23/us-government-hack-stole-fingerprints, all have experienced hacks that resulted in the compromise of unprecedented amounts of data previously thought to be private. In arguing that Defendant needs the exploit source code to determine whether Defendant's computer experienced a hack or whether an outside source tampered with the information the NIT sent to the FBI, defense counsel even admitted that such hacks could occur by agreeing that when information travels via the Internet in unencrypted form, "anybody can tamper with it." Doc. 86 at 38. Cases identifying a reasonable expectation of privacy in personal computer files protected with only a password, see Buckner, 473 F.3d at 554; see also Trulock, 275 F.3d at 403, can be distinguished, because in 2016 it now appears unreasonable to expect that simply utilizing a password provides any practical protection. E.g., Caitlin Dewey, *It's been six months since the Ashley Madison hack. Has anything changed?*, THE WASHINGTON POST (January 15, 2016), https://www.washingtonpost.com/news/the-

intersect/wp/2016/01/15/its-been-six-months-since-the-ashley-madison-hack-has-anything-changed/ ("There was always a chance that the Ashley Madison hack, far from waking people up to the dangers of data breaches, would further normalize them."). Indeed, it is "doubtlessly easier to dismiss hacks this way, as external inevitabilities that no one can really help, than to go through the trauma and unease of reassessing the way we collectively use the Web." Id.

Tor users likewise cannot reasonably expect to be safe from hackers. Even if Tor users hope that the Tor network will keep certain information private—just as terrorists seem to expect Apple to keep their data private—it is unreasonable not to expect that someone will be able to gain access. See John W. Little, *Tor and the Illusion of Anonymity*, BLOGS OF WAR (August 6, 2013), http://blogsofwar.com/tor-and-the-illusion-of-anonymity/ (describing that the Federal Government discovered a way "to identify the true IP addresses [of] an unknown number to Tor users" and noting that this development "should serve as a huge wake-up call" to people who believe that using Tor endows them with unassailable privacy protections). Notwithstanding the identification difficulties posed by Tor and the machinations one must undergo to access a Tor hidden service, advances in technology continue to thwart Tor's measures.

[36] Thus, hacking resembles the broken blinds in Carter, 525 U.S. at 85, 119 S.Ct. 469. Just as Justice Breyer wrote in concurrence that a police officer who peers through broken blinds does not violate anyone's Fourth Amendment rights, id. at 103, 119 S.Ct. 469 (Breyer, J., concurring), FBI agents who exploit a vulnerability in an online network do not violate the Fourth Amendment. Just as the area into which the officer in Carter peered—an apartment—usually is afforded Fourth Amendment protection, a computer afforded Fourth Amendment protection in other circumstances is not protected from Government actors who take advantage of an easily broken system to peer into a user's computer. People who traverse the Internet ordinarily understand the risk associated with doing so. Thus, the deployment of the NIT to capture identifying information found on Defendant's computer does not represent a search under the Fourth Amendment, and no warrant was needed.

Although this Court recently noted in dicta that the possibility of hacking "is not enough to defeat an individual's reasonable expectation of privacy" because it is illegal, see United States v. Darby, No. 2:16-cr-36, ECF No. 31 at 10-11 (E.D. Va. June 3, 2016), this Court stresses that child pornography often resembles an international crime. Similarly, much hacking occurs by foreign nations where the governments condone or participate in hacking. Child pornography is not just a national issue; it is an international issue, and at least a portion of the pornography in this case arrived from foreign sources through the World Wide Web.

The Fourth Circuit issued its *en banc* decision in United States v. Graham, No. 12–4659, 824 F.3d 421, 2016 WL 3068018 (4th Cir. May 31, 2016), almost simultaneously with this Court's initial Opinion and Order, which it filed under seal on June 1, 2016. Doc. 75. Therefore, this Court did not have the opportunity to incorporate Graham, No. 12–4659, in its initial order. In Graham, the Fourth Circuit held that the Government's warrantless acquisition of historical cell-site location information ("CSLI") from the defendants' cell phone providers fell within the third-party doctrine. Id. Therefore, the Government's conduct did not constitute a search in violation of the Fourth Amendment. Id.

Although the Fourth Circuit in Graham stressed that the Government obtained the

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data from a third party and did not collect it through direct surveillance of the defendants, the opinion does illustrate the Fourth Circuit's understanding that the right of privacy in electronic data is not absolute, and it further recognizes that the Government's use of technology must not be frozen in time but instead keep pace with rapidly developing technology. See id. n. 16 (citing Skinner, 690 F.3d at 778 ("Law enforcement tactics must be allowed to advance with technological changes, in order to prevent criminals from circumventing the justice system.")). Though Graham does not constitute binding precedent for this Court's current decision, it certainly supports the concept that the privacy of an IP address diminishes when revealed to third parties and that the Government has a right to advance beside technology. Thus, in today's world, the locked footlocker referenced in Trulock, 275 F.3d at 403, would be more akin to a bag carried on an airplane as the owner travels the world with his private information on display.

Additionally, while the Court **FINDS** that the Government did not need a warrant before deploying the NIT, the Court recognizes the need to balance an individual's privacy in any case involving electronic surveillance with the Government's duty of protecting its citizens. Here, the balance weighs heavily in favor of surveillance.[3] The Government should be able to use the most advanced technological means to overcome criminal activity that is conducted in secret, and Defendant should not be rewarded for allegedly obtaining contraband through his virtual travel through interstate and foreign commerce on a Tor hidden service. E.g., Werdene, No. 2:15-cr-00434, ECF No. 33 (noting that the defendant "seeks to 'serendipitously receive Fourth Amendment protection' because he used Tor in an effort to evade detection, even though an individual who does not conceal his IP address does not receive those same constitutional safeguards") (citing United States v. Stanley, 753 F.3d 114, 121 (3d Cir.2014)). Society thus is unprepared to recognize any privacy interests Defendant attempts to claim as reasonable in his search for pornographic material; indeed, even businesses dealing with heavily regulated products such as liquor and firearms do not possess reasonable expectations of privacy in their interstate commerce activities. See United States v. Biswell, 406 U.S. 311, 316, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972); see also Colonnade Catering Corp. v. United States, 397 U.S. 72, 74, 77, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970). The Court **FINDS** that due to the especially pernicious nature of child pornography and the continuing harm to the victims,[4]

3. In Riley v. California, the Supreme Court held that "a warrant is generally required before" searching information on a cell phone, "even when a cell phone is seized incident to arrest." — U.S. —, 134 S.Ct. 2473, 2493, 189 L.Ed.2d 430 (2014). Importantly, the Government had searched the contents of an arrestee's cell phone in Riley, including photographs and videos. Id. at 2481. Here, however, the Government did not use the NIT to view anything beyond limited identifying information. Additionally, as the Eastern District of Michigan noted, Riley "did not generate a blanket rule applicable to any data search of any electronic device in any context." United States v. Feiten, No. 15-20631, 2016 WL 894452, at *4 (E.D.Mich. Mar. 9, 2016). Instead, the Supreme Court "simply held that application of the search incident to arrest doctrine to [searches of digital data] would untether the rule from the justifications underlying it historically." Id. (internal quotations omitted). Therefore, Riley does not control the Court's decision in this case.

4. The Court does note, however, that it appears some of the continuing harm in this case occurred because the Government continued operating Playpen, rather than immediately shutting it down. The Court has no role in deciding what methods the executive branch utilizes in fulfilling its duty to protect

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the balance between any Tor user's alleged privacy interests and the Government's deployment of the NIT to access very limited identifying information weighs in favor of the Government's use of technology to counteract the measures taken by people who access child pornography online. The Government's efforts to contain child pornographers, terrorists and the like cannot remain frozen in time; the Government must be allowed to utilize its own advanced technology to keep pace with our world's ever-advancing technology and novel criminal methods.

B. Even If the Issuance of the Warrant Represented a Nonconstitutional Violation of Rule 41(b), Suppression Is Still Unwarranted

[37, 38] The parties agree that two categories of Rule 41 violations exist: "those involving constitutional violations and all others." Doc. 34 at 10; Doc. 53 at 23; Simons, 206 F.3d at 403. Without a constitutional violation, suppression is warranted "only when the defendant is prejudiced by the violation . . . or when there is evidence of intentional and deliberate disregard of a provision in the Rule." Simons, 206 F.3d at 403.

As discussed above, any potential Rule 41 violation did not result in a violation of Defendant's constitutional rights, for no warrant was needed. Thus, the Government's use of the NIT did not deprive Defendant of his Fourth Amendment rights. The Court here **FINDS** that suppression is not appropriate for any potential nonconstitutional violation of Rule 41(b) either, because Defendant was not prejudiced and there is no evidence of intentional or deliberate disregard of the rule.

Defendant argues that the search conducted pursuant to the warrant would not have occurred had the magistrate judge not issued the warrant, and that, therefore, he has suffered prejudice. Doc. 34 at 14. However, as detailed above, the FBI did not need a warrant to deploy the NIT, so Defendant has not shown prejudice.

Additionally, Defendant has failed to show an intentional or deliberate disregard of Rule 41(b). As the Eastern District of Pennsylvania noted in Werdene, the "warrant was candid about the challenge that the Tor network poses, specifically its ability to mask a user's physical location." No. 2:15-cr-00434, ECF No. 33. The affidavit also specifically stated that the NIT may be deployed against an "activating computer—wherever located." Def. Ex. 1B ¶ 46. Thus, the Court **FINDS** that the FBI did not attempt to mislead the magistrate judge in any way as to the locations of the activating computers. Therefore, Defendant has shown neither prejudice nor an intentional violation of Rule 41(b), so even if there were a nonconstitutional violation of Rule 41(b), suppression would be inappropriate.

C. The Good Faith Exception

[39] Finally, even if the Government did need to obtain a warrant in order to deploy the NIT, and even if there existed defects in the warrant or in its issuance, the Court **FINDS** that suppression still would be inappropriate under the good faith exception to the exclusionary rule.

[40, 41] Generally, if a search violates the Fourth Amendment, "the fruits thereof are inadmissible under the exclusionary rule, a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." United States v. Doyle, 650 F.3d 460, 466 (4th Cir.2011) (quoting United States v. Calandra, 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974)) (internal quotations

our citizens so long as its methods are constitutional

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omitted). However, because exclusion is so drastic a remedy, it represents a "last resort." United States v. Stephens, 764 F.3d 327, 335 (4th Cir.2014). Hence, in United States v. Leon, the Supreme Court established a good faith exception to the exclusionary rule. See 468 U.S. 897, 922, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Under this exception, a court need not exclude evidence obtained pursuant to a later-invalidated search warrant if law enforcement's reliance on the warrant was objectively reasonable. Doyle, 650 F.3d at 467.

The Leon good faith exception applies in this case. The agents' reliance on the NIT Warrant was objectively reasonable, and it appears to the Court that the agents acted in good faith. An experienced and neutral magistrate judge reviewed the warrant application and concluded that there existed probable cause to issue the NIT Warrant. As noted above, the FBI did not intentionally or recklessly mislead the magistrate judge in its quest to obtain the NIT Warrant, either on the scope of the warrant or on the information concerning the logo change. The warrant application detailed ample probable cause to support the issuance of the warrant. The affidavit also adequately described the items to be seized and the places to be searched. The FBI agents showed no improper conduct or misjudgment in relying upon the NIT Warrant. Therefore, the Leon good faith exception would apply, even if the NIT's deployment constituted a search and even if the warrant were deficient in some respect.

IX. CONCLUSION

For the reasons listed above, the Court **DENIES** Defendant's First and Third Motions to Suppress, Docs. 18, 34, and Defendant's Motion to Compel Discovery, Doc. 37. The Court **GRANTS** Defendant's Consent Motion for Leave to File an Expert Declaration Relevant to the Motion to Compel Discovery, Doc. 83, and the Government's Motion to Unseal the Court's Opinion and Order denying Defendant's First and Third Motions to Suppress, Doc. 89.

The Clerk is **DIRECTED** to deliver a copy of this Order to all counsel of record.

It is so **ORDERED**.

Kelvin M. THOMAS, et al., Plaintiffs,

v.

FTS USA, LLC, et al., Defendants.

Civil Case No. 3:13-cv-825

United States District Court,
E.D. Virginia,
Richmond Division.

Signed June 30, 2016

Background: Applicant for employment brought putative class action against prospective employer, alleging that employer violated the Fair Credit Reporting Act (FCRA) by not providing disclosure and written consent before obtaining applicant's consumer report for employment purposes, and by taking adverse employment action based on his consumer report before applicant received a copy of the consumer report and summary of rights under FCRA. Employer moved for summary judgment.

Holdings: The District Court, Robert E. Payne, Senior District Judge, held that:

(1) applicant alleged concrete and particularized injury for FCRA impermissible use claim;

(2) applicant alleged concrete and particularized injury for FCRA adverse action claim; and

ANNEXURE R-18

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THE WORLD BANK
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INFOGRAPHIC

India's Poverty Profile

May 27, 2016

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India's Poverty Profile

SNAPSHOT 2012

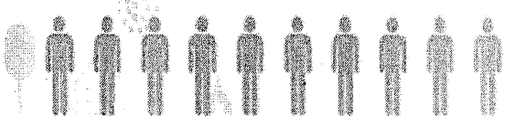
270,000,000 Indians are poor

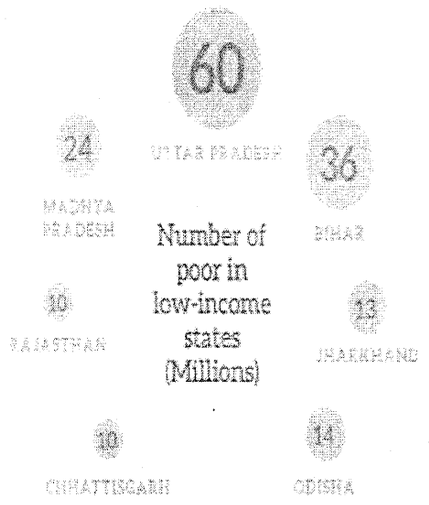
= 1 in 5 Indians is poor

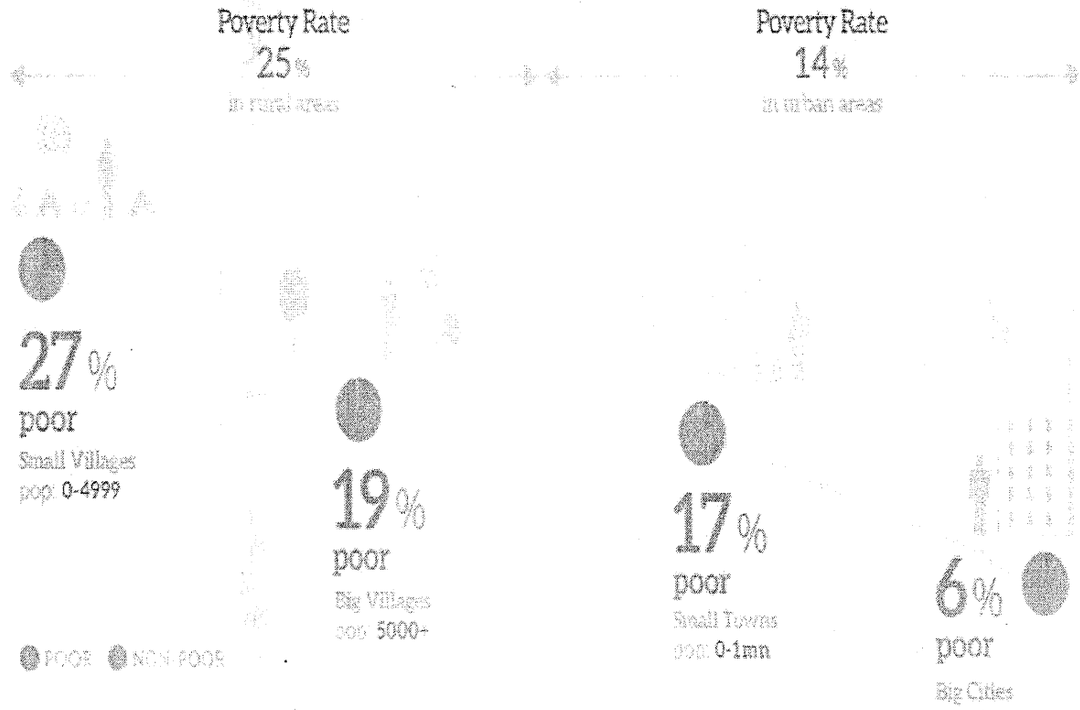
THE 7 LOW-INCOME STATES HOUSE **62%** OF INDIA'S POOR

THE LOW-INCOME STATES ARE HOME TO **45%** OF INDIA'S POPULATION

80% of India's poor live in rural areas







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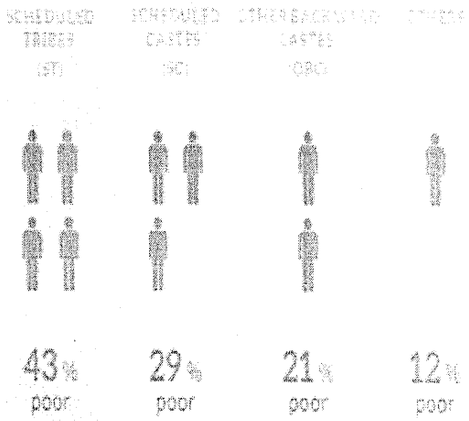
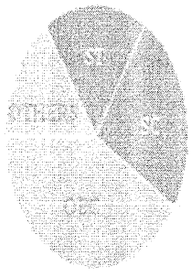
Poverty is highest among scheduled tribes



Only 28% of Indians are SC and ST



But 43% of the poor are SC and ST

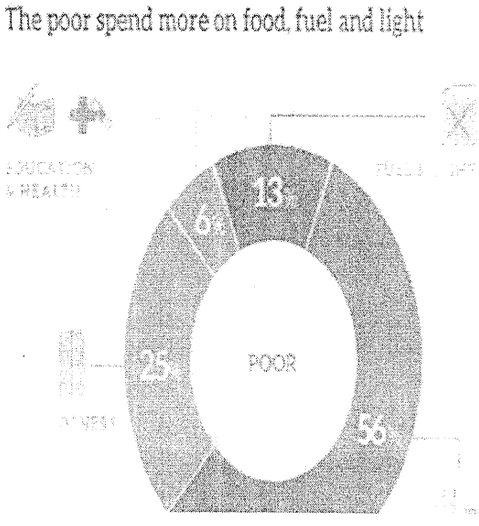
Casual labor is the main source of income for the rural poor

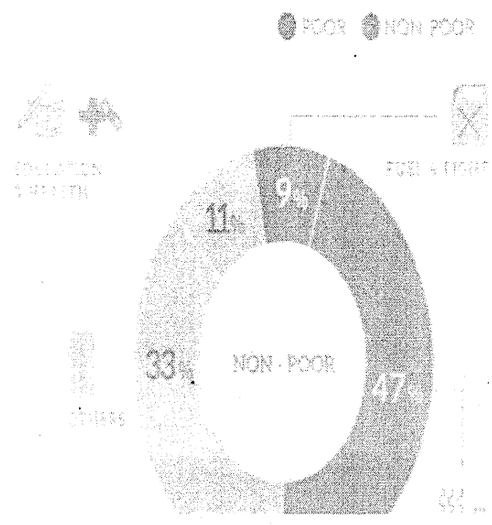
CASUAL LABOR NON-FARM	17%	12%
CASUAL LABOR FARM	34%	18%
SELF-EMPLOYED NON-FARM	12%	17%
SELF EMPLOYED FARM	30%	36%
SALARIED	4%	10%
OTHERS	5%	6%

Self employment and casual labor is the main source of income for the urban poor

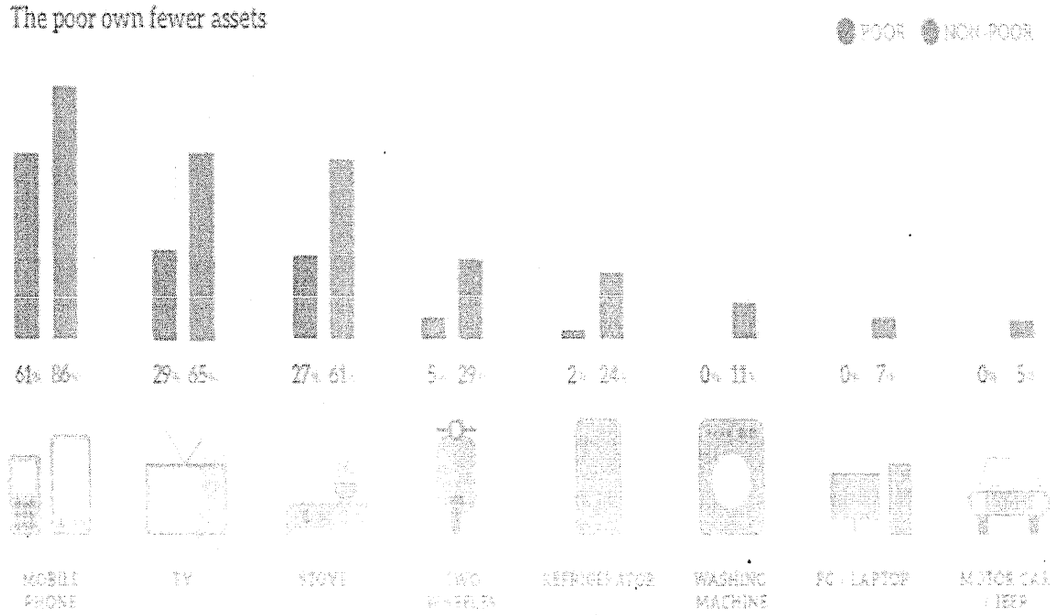
CASUAL LABOR NON-FARM	34%	10%
SELF EMPLOYED NON-FARM	40%	34%
SALARIED	20%	44%
OTHERS	7%	12%

The poor spend more on food, fuel and light

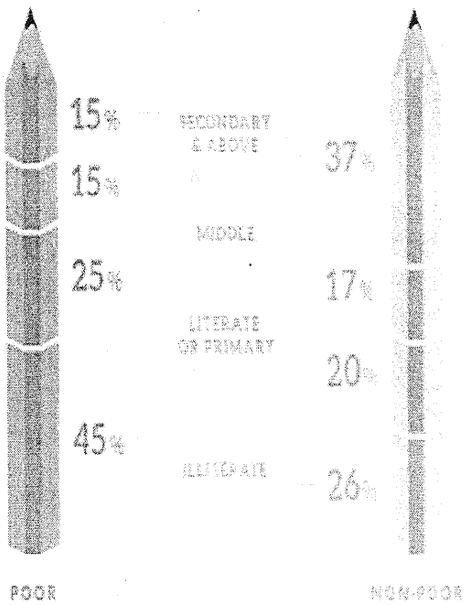




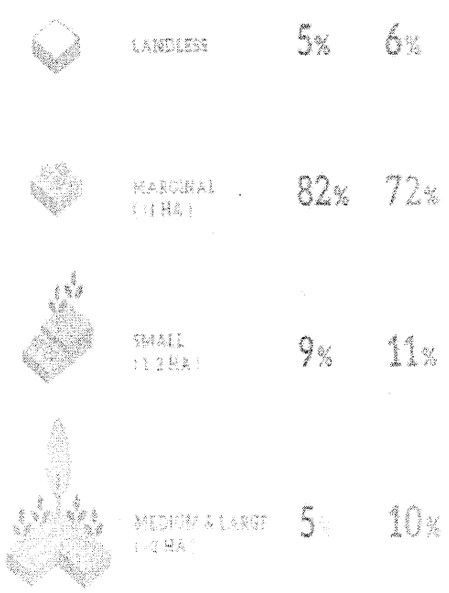
The poor own fewer assets



Secondary school completion is low among the poor



In rural areas, more marginal land owners among the poor



The poor have lower access to basic services

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UNITED NATIONS DEVELOPMENT PROGRAMME

(/en) Human Development Reports (/en)

Download Data (/sites/default/files/composite_tables/2016_Statistical_Annex_Table_1.xls)

Table 1: Human Development Index and its components

Read the full explanation of the Human Development Index (HDI) (/content/human-development-index-hdi)

View the HDI Frequently asked questions (/faq-page/human-development-index-hdi)

HDI rank	Country	Human Development Index (HDI) Value 2015	Life expectancy at birth (years) 2015	Expected years of schooling (years) 2015		Mean years of schooling (years) 2015		Gross national income (GNI) per capita (2011 PPP $) 2015		GNI per capita rank minus HDI rank 2015	HDI rank 2014
	VERY HIGH HUMAN DEVELOPMENT										
1	Norway	0.949	81.7	17.7		12.7		67,614		5	1
2	Australia	0.939	82.5	20.4	b	13.2		42,822		19	3
2	Switzerland	0.939	83.1	16.0		13.4		56,364		7	2
4	Germany	0.926	81.1	17.1		13.2	c	45,000		13	4
5	Denmark	0.925	80.4	19.2	b	12.7		44,519		13	6
5	Singapore	0.925	83.2	15.4	d	11.6		78,162	e	-3	4
7	Netherlands	0.924	81.7	18.1	b	11.9		46,326		8	6
8	Ireland	0.923	81.1	18.6	b	12.3		43,798		11	8
9	Iceland	0.921	82.7	19.0	b	12.2	c	37,065		20	9

HDI rank	Country	Human Development Index (HDI) Value 2015		Life expectancy at birth (years) 2015		Expected years of schooling (years) 2015		Mean years of schooling (years) 2015		Gross national income (GNI) per capita (2011 PPP $) 2015		GNI per capita rank minus HDI rank 2015	HDI rank 2014
10	Canada	0.920		82.2		16.3		13.1	f	42,582		12	9
10	United States	0.920		79.2		16.5		13.2		53,245		1	11
12	Hong Kong, China (SAR)	0.917		84.2		15.7		11.6		54,265		-2	12
13	New Zealand	0.915		82.0		19.2	b	12.5		32,870		20	13
14	Sweden	0.913		82.3		16.1		12.3		46,251		2	15
15	Liechtenstein	0.912		80.2	g	14.6		12.4	h	75,065	e,i	-11	14
16	United Kingdom	0.909		80.8		16.3		13.3		37,931		10	16
17	Japan	0.903		83.7		15.3		12.5	c	37,268		10	17
18	Korea (Republic of)	0.901		82.1		16.6		12.2		34,541		12	18
19	Israel	0.899		82.6		16.0		12.8		31,215		16	19
20	Luxembourg	0.898		81.9		13.9		12.0		62,471		-12	20
21	France	0.897		82.4		16.3		11.6		38,085		4	22
22	Belgium	0.896		81.0		16.6		11.4		41,243		1	21
23	Finland	0.895		81.0		17.0		11.2	f	38,868		1	23
24	Austria	0.893		81.6		15.9		11.3	c	43,609		-4	24
25	Slovenia	0.890		80.6		17.3		12.1		28,664		13	25
26	Italy	0.887		83.3		16.3		10.9		33,573		6	27
27	Spain	0.884		82.8		17.7		9.8		32,779		7	26
28	Czech Republic	0.878		78.8		16.8		12.3		28,144		11	28
29	Greece	0.866		81.1		17.2		10.5		24,808		16	29
30	Brunei Darussalam	0.865		79.0		14.9		9.0	f	72,843		-25	30
30	Estonia	0.865		77.0		16.5		12.5	c	26,362		12	31
32	Andorra	0.858		81.5	g	13.5	d	10.3		47,979	j	-18	32
33	Cyprus	0.856		80.3		14.3		11.7		29,459		4	34
33	Malta	0.856		80.7		14.6		11.3		29,500		3	35
33	Qatar	0.856		78.3		13.4		9.8		129,916	e	-32	33
36	Poland	0.855		77.6		16.4		11.9		24,117		11	36

HDI rank	Country	Human Development Index (HDI) Value	Life expectancy at birth (years)	Expected years of schooling (years)	Mean years of schooling (years)	Gross national income (GNI) per capita (2011 PPP $)	GNI per capita rank minus HDI rank	HDI rank
		2015	2015	2015	2015	2015	2015	2014
37	Lithuania	0.848	73.5	16.5	12.7	26,006	7	37
38	Chile	0.847	82.0	16.3	9.9	21,665	16	38
38	Saudi Arabia	0.847	74.4	16.1	9.6	51,320	-26	38
40	Slovakia	0.845	76.4	15.0	12.2	26,764	1	40
41	Portugal	0.843	81.2	16.6	8.9	26,104	2	41
42	United Arab Emirates	0.840	77.1	13.3 k	9.5 c	66,203	-35	42
43	Hungary	0.836	75.3	15.6	12.0	23,394	6	43
44	Latvia	0.830	74.3	16.0	11.7 f	22,589	7	44
45	Argentina	0.827	76.5	17.3	9.9 f	20,945 f	12	45
45	Croatia	0.827	77.5	15.3	11.2	20,291	14	46
47	Bahrain	0.824	76.7	14.5 k	9.4 m	37,236	-19	46
48	Montenegro	0.807	76.4	15.1	11.3 n	15,410	24	49
49	Russian Federation	0.804	70.3	15.0	12.0	23,286	1	48
50	Romania	0.802	74.8	14.7	10.8	19,428	11	51
51	Kuwait	0.800	74.5	13.3	7.3	76,075 e	-48	50
	HIGH HUMAN DEVELOPMENT							
52	Belarus	0.796	71.5	15.7	12.0	15,629	19	51
52	Oman	0.796	77.0	13.7	8.1 m	34,402	-21	53
54	Barbados	0.795	75.8	15.3	10.5 n	14,952	20	54
54	Uruguay	0.795	77.4	15.5	8.6	19,148	8	54
56	Bulgaria	0.794	74.3	15.0	10.8 c	16,261	13	57
56	Kazakhstan	0.794	69.6	15.0	11.7 f	22,093	-3	56
58	Bahamas	0.792	75.6	12.7 k	10.9	21,565	-3	58
59	Malaysia	0.789	74.9	13.1	10.1	24,620	-13	59
60	Palau	0.788	72.9 g	14.3	12.3 k	13,771	21	62
60	Panama	0.788	77.8	13.0	9.9	19,470	0	60
62	Antigua and Barbuda	0.786	76.2	13.9	9.2 k	20,907	-4	61

HDI rank	Country	Human Development Index (HDI) Value 2015	Life expectancy at birth (years) 2015	Expected years of schooling (years) 2015	Mean years of schooling (years) 2015	Gross national income (GNI) per capita (2011 PPP $) 2015	GNI per capita rank minus HDI rank 2015	HDI rank 2014
63	Seychelles	0.782	73.3	14.1	9.4 k	23,886	-15	63
64	Mauritius	0.781	74.6	15.2	9.1	17,948	1	64
65	Trinidad and Tobago	0.780	70.5	12.7 o	10.9	28,049	-25	64
66	Costa Rica	0.776	79.6	14.2	8.7	14,006	14	66
66	Serbia	0.776	75.0	14.4	10.8	12,202	22	66
68	Cuba	0.775	79.6	13.9	11.8 m	7,455 p	48	69
69	Iran (Islamic Republic of)	0.774	75.6	14.8	8.8 f	16,395	-2	68
70	Georgia	0.769	75.0	13.9	12.2	8,856	38	71
71	Turkey	0.767	75.5	14.6	7.9	18,705	-7	72
71	Venezuela (Bolivarian Republic of)	0.767	74.4	14.3	9.4	15,129	2	70
73	Sri Lanka	0.766	75.0	14.0	10.9 f	10,789	21	72
74	Saint Kitts and Nevis	0.765	74.0 g	13.7	8.4 k	22,436	-22	75
75	Albania	0.764	78.0	14.2	9.6	10,252	24	75
76	Lebanon	0.763	79.5	13.3	8.6 m	13,312	8	74
77	Mexico	0.762	77.0	13.3	8.6	16,383	-9	77
78	Azerbaijan	0.759	70.9	12.7	11.2	16,413	-12	77
79	Brazil	0.754	74.7	15.2	7.8	14,145	-1	79
79	Grenada	0.754	73.6	15.8	8.6 k	11,502	13	80
81	Bosnia and Herzegovina	0.750	76.6	14.2	9.0	10,091	22	82
82	The former Yugoslav Republic of Macedonia	0.748	75.5	12.9	9.4 n	12,405	5	83
83	Algeria	0.745	75.0	14.4	7.8 c	13,533	-1	84
84	Armenia	0.743	74.9	12.7	11.3	8,189	28	85
84	Ukraine	0.743	71.1	15.3	11.3 f	7,361	34	81
86	Jordan	0.741	74.2	13.1	10.1	10,111	15	85
87	Peru	0.740	74.8	13.4	9.0	11,295	6	89
87	Thailand	0.740	74.6	13.6	7.9	14,519	-11	88
89	Ecuador	0.739	76.1	14.0	8.3	10,536	6	87

HDI rank	Country	Human Development Index (HDI)		Life expectancy at birth		Expected years of schooling		Mean years of schooling		Gross national income (GNI) per capita		GNI per capita rank minus HDI rank	HDI rank
		Value		(years)		(years)		(years)		(2011 PPP $)			
		2015		2015		2015		2015		2015		2015	2014
90	China	0.738		76.0		13.5		7.6	c	13,345		-7	91
91	Fiji	0.736		70.2		15.3	k	10.5	f	8,245		20	91
92	Mongolia	0.735		69.8		14.8		9.8	m	10,449		4	93
92	Saint Lucia	0.735		75.2		13.1		9.3	m	9,791		14	90
94	Jamaica	0.730		75.8		12.8		9.6	f	8,350		16	94
95	Colombia	0.727		74.2		13.6		7.6	c	12,762		-10	95
96	Dominica	0.726		77.9	g	12.8	k	7.9	m	10,096		6	95
97	Suriname	0.725		71.3		12.7		8.3	m	16,018		-27	97
97	Tunisia	0.725		75.0		14.6		7.1	c	10,249		3	97
99	Dominican Republic	0.722		73.7		13.2		7.7		12,756		-13	101
99	Saint Vincent and the Grenadines	0.722		73.0		13.3	m	8.6	k	10,372		-1	99
101	Tonga	0.721		73.0		14.3	m	11.1		5,284		33	101
102	Libya	0.716		71.8		13.4	k	7.3	c	14,303		-25	100
103	Belize	0.706		70.1		12.8		10.5		7,375		14	103
104	Samoa	0.704		73.7		12.9	d	10.3	d	5,372		27	104
105	Maldives	0.701		77.0		12.7	o	6.2	q	10,383		-8	105
105	Uzbekistan	0.701		69.4	r	12.2		12.0	m	5,748		21	108
	MEDIUM HUMAN DEVELOPMENT												
107	Moldova (Republic of)	0.699		71.7		11.8		11.9		5,026		31	105
108	Botswana	0.698		64.5		12.6		9.2	c	14,663		-33	107
109	Gabon	0.697		64.9		12.6		8.1	q	19,044		-46	109
110	Paraguay	0.693		73.0		12.3		8.1		8,182		3	110
111	Egypt	0.691		71.3		13.1		7.1	f	10,064		-7	111
111	Turkmenistan	0.691		65.7		10.8		9.9	k	14,026		-32	111
113	Indonesia	0.689		69.1		12.9		7.9		10,053		-8	113
114	Palestine, State of	0.684		73.1		12.8		8.9		5,256		21	115
115	Viet Nam	0.683		75.9		12.6		8.0	c	5,335		18	115

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HDI rank	Country	Human Development Index (HDI)	Life expectancy at birth	Expected years of schooling	Mean years of schooling	Gross national income (GNI) per capita	GNI per capita rank minus HDI rank	HDI rank
		Value	(years)	(years)	(years)	(2011 PPP $)		
		2015	2015	2015	2015	2015	2015	2014
116	Philippines	0.682	68.3	11.7	9.3	8,395	-7	114
117	El Salvador	0.680	73.3	13.2	6.5	7,732	-3	115
118	Bolivia (Plurinational State of)	0.674	68.7	13.8	8.2	6,155	6	118
119	South Africa	0.666	57.7	13.0	10.3	12,087	-30	119
120	Kyrgyzstan	0.664	70.8	13.0	10.8 [c]	3,097	32	120
121	Iraq	0.649	69.6	10.1 [k]	6.6 [n]	11,608	-30	121
122	Cabo Verde	0.648	73.5	13.5	4.8 [k]	6,049	3	122
123	Morocco	0.647	74.3	12.1	5.0 [f]	7,195	-4	123
124	Nicaragua	0.645	75.2	11.7	6.5 [f]	4,747	16	124
125	Guatemala	0.640	72.1	10.7	6.3	7,063	-4	126
125	Namibia	0.640	65.1	11.7	6.7 [f]	9,770	-18	126
127	Guyana	0.638	66.5	10.3	8.4 [c]	6,884	-5	125
127	Micronesia (Federated States of)	0.638	69.3	11.7 [k]	9.7 [d]	3,291	22	126
129	Tajikistan	0.627	69.6	11.3	10.4 [q]	2,601	30	129
130	Honduras	0.625	73.3	11.2	6.2	4,466	11	130
131	India	0.624	68.3	11.7	6.3 [c]	5,663	-4	131
132	Bhutan	0.607	69.9	12.5	3.1 [n]	7,081	-12	132
133	Timor-Leste	0.605	68.5	12.5	4.4 [q]	5,371 [l]	-1	133
134	Vanuatu	0.597	72.1	10.8 [o]	6.8 [n]	2,805	23	134
135	Congo	0.592	62.9	11.1	6.3 [c]	5,503	-7	135
135	Equatorial Guinea	0.592	57.9	9.2 [k]	5.5 [q]	21,517	-79	137
137	Kiribati	0.588	66.2	11.9	7.8 [k]	2,475	23	136
138	Lao People's Democratic Republic	0.586	66.6	10.8	5.2 [n]	5,049	-2	137
139	Bangladesh	0.579	72.0	10.2	5.2 [c]	3,341	8	140
139	Ghana	0.579	61.5	11.5	6.9 [f]	3,839	5	140
139	Zambia	0.579	60.8	12.5	6.9 [f]	3,464	7	139
142	Sao Tome and Principe	0.574	66.6	12.0	5.3	3,070	12	142

HDI rank	Country	Human Development Index (HDI) Value 2015	Life expectancy at birth (years) 2015	Expected years of schooling (years) 2015	Mean years of schooling (years) 2015	Gross national income (GNI) per capita (2011 PPP $) 2015	GNI per capita rank minus HDI rank 2015	HDI rank 2014
143	Cambodia	0.563	68.8	10.9	4.7 q	3,095	10	143
144	Nepal	0.558	70.0	12.2	4.1 n	2,337	19	144
145	Myanmar	0.556	66.1	9.1 m	4.7 f	4,943	-6	146
146	Kenya	0.555	62.2	11.1	6.3 f	2,881	10	147
147	Pakistan	0.550	66.4	8.1	5.1	5,031	-10	148
	LOW HUMAN DEVELOPMENT							
148	Swaziland	0.541	48.9	11.4	6.8 n	7,522	-33	149
149	Syrian Arab Republic	0.536	69.7	9.0	5.1 s	2,441 t	13	145
150	Angola	0.533	52.7	11.4	5.0 q	6,291	-27	150
151	Tanzania (United Republic of)	0.531	65.5	8.9	5.8	2,467	10	152
152	Nigeria	0.527	53.1	10.0	6.0 q	5,443	-23	151
153	Cameroon	0.518	56.0	10.4	6.1 c	2,894	2	154
154	Papua New Guinea	0.516	62.8	9.9 k	4.3 f	2,712	4	153
154	Zimbabwe	0.516	59.2	10.3	7.7	1,588	20	158
156	Solomon Islands	0.515	68.1	9.6 m	5.3 d	1,561	19	155
157	Mauritania	0.513	63.2	8.5	4.3 f	3,527	-12	155
158	Madagascar	0.512	65.5	10.3	6.1 n	1,320	25	157
159	Rwanda	0.498	64.7	10.8	3.8	1,617	14	162
160	Comoros	0.497	63.6	11.1	4.8 q	1,335	22	160
160	Lesotho	0.497	50.1	10.7	6.1 f	3,319	-12	161
162	Senegal	0.494	66.9	9.5	2.8 m	2,250	3	163
163	Haiti	0.493	63.1	9.1 k	5.2 c	1,657	9	164
163	Uganda	0.493	59.2	10.0	5.7 m	1,670	8	165
165	Sudan	0.490	63.7	7.2	3.5	3,846	-22	165
166	Togo	0.487	60.2	12.0	4.7 q	1,262	18	167
167	Benin	0.485	59.8	10.7	3.5 c	1,979	1	168
168	Yemen	0.482	64.1	9.0	3.0 c	2,300	-4	159

HDI rank	Country	Human Development Index (HDI)	Life expectancy at birth	Expected years of schooling		Mean years of schooling		Gross national income (GNI) per capita	GNI per capita rank minus HDI rank	HDI rank
		Value	(years)	(years)		(years)		(2011 PPP $)		
		2015	2015	2015		2015		2015	2015	2014
169	Afghanistan	0.479	60.7	10.1		3.6	f	1,871	1	169
170	Malawi	0.476	63.9	10.8		4.4	f	1,073	16	170
171	Côte d'Ivoire	0.474	51.9	8.9		5.0	f	3,163	-20	172
172	Djibouti	0.473	62.3	6.3		4.1	k	3,216	-22	171
173	Gambia	0.452	60.5	8.9		3.3	f	1,541	3	173
174	Ethiopia	0.448	64.6	8.4		2.6	q	1,523	5	174
175	Mali	0.442	58.5	8.4		2.3		2,218	-9	175
176	Congo (Democratic Republic of the)	0.435	59.1	9.8		6.1		680	15	178
177	Liberia	0.427	61.2	9.9		4.4	f	683	13	177
178	Guinea-Bissau	0.424	55.5	9.2	m	2.9	k	1,369	3	179
179	Eritrea	0.420	64.2	5.0		3.9	k	1,490	1	181
179	Sierra Leone	0.420	51.3	9.5		3.3	f	1,529	-1	176
181	Mozambique	0.418	55.5	9.1		3.5	q	1,098	4	182
181	South Sudan	0.418	56.1	4.9		4.8	n	1,882	-12	179
183	Guinea	0.414	59.2	8.8		2.6	q	1,058	4	182
184	Burundi	0.404	57.1	10.6		3.0	c	691	5	184
185	Burkina Faso	0.402	59.0	7.7		1.4	q	1,537	-8	185
186	Chad	0.396	51.9	7.3		2.3	u	1,991	-19	186
187	Niger	0.353	61.9	5.4		1.7	f	889	1	187
188	Central African Republic	0.352	51.5	7.1		4.2	n	587	4	188
	OTHER COUNTRIES OR TERRITORIES									
	Korea (Democratic People's Rep. of)	..	70.5	12.0		..		..	..	..
	Marshall Islands	..	..	..		..		4,412	..	..
	Monaco	..	..	..		..		..	..	..
	Nauru	..	..	9.7	k	..		12,058	..	..
	San Marino	..	..	15.1		..		50,063	..	..
	Somalia	..	55.7	..		..		294	..	..

HDI rank	Country	Human Development Index (HDI)	Life expectancy at birth	Expected years of schooling	Mean years of schooling	Gross national income (GNI) per capita	GNI per capita rank minus HDI rank	HDI rank
		Value	(years)	(years)	(years)	(2011 PPP $)		
		2015	2015	2015	2015	2015	2015	2014
	Tuvalu	..	..	..	..	5,395	..	..
	Human development groups							
	Very high human development	0.892	79.4	16.4	12.2	39,605	—	—
	High human development	0.746	75.5	13.8	8.1	13,844	—	—
	Medium human development	0.631	68.6	11.5	6.6	6,281	—	—
	Low human development	0.497	59.3	9.3	4.6	2,649	—	—
	Developing countries	0.668	70.0	11.8	7.2	9,257	—	—
	Regions							
	Arab States	0.687	70.8	11.7	6.8	14,958	—	—
	East Asia and the Pacific	0.720	74.2	13.0	7.7	12,125	—	—
	Europe and Central Asia	0.756	72.6	13.9	10.3	12,862	—	—
	Latin America and the Caribbean	0.751	75.2	14.1	8.3	14,028	—	—
	South Asia	0.621	68.7	11.3	6.2	5,799	—	—
	Sub-Saharan Africa	0.523	58.9	9.7	5.4	3,383	—	—
	Least developed countries	0.508	63.6	9.4	4.4	2,385	—	—
	Small island developing states	0.667	70.3	11.5	8.1	7,303	—	—
	Organisation for Economic Co-operation and Development	0.887	80.3	15.9	11.9	37,916	—	—
	World	0.717	71.6	12.3	8.3	14,447	—	—

Notes

a. Data refer to 2015 or the most recent year available.
b. In calculating the HDI value, expected years of schooling is capped at 18 years.
c. Updated by HDRO using Barro and Lee (2016) estimates.

d. Based on data from the national statistical office.
e. In calculating the HDI value, GNI per capita is capped at $75,000.
f. Based on Barro and Lee (2016).
g. Value from UNDESA (2011).
h. Calculated as the average of mean years of schooling for Austria and Switzerland.
i. Estimated using the purchasing power parity (PPP) rate and projected growth rate of Switzerland.
j. Estimated using the PPP rate and projected growth rate of Spain.
k. Based on cross-country regression.
l. HDRO estimate based on data from World Bank (2016a) and United Nations Statistics Division (2016a).
m. Updated by HDRO based on data from UNESCO Institute for Statistics (2016).
n. Based on data from United Nations Children's Fund (UNICEF) Multiple Indicator Cluster Surveys for 2006–2015.
o. Updated by HDRO based on data from ICF Macro Demographic and Health Surveys for 2006-2015.
p. Based on a cross-country regression and the projected growth rate from UNECLAC (2016).
q. Based on data from ICF Macro Demographic and Health Surveys for 2006-2015.
r. Value from WHO (2016).
s. Updated by HDRO based on Syrian Center for Policy Research (2016).
t. Based on projected growth rates from UNESCWA (2016) and World Bank (2016a).

Definitions

Human Development Index (HDI): A composite index measuring average achievement in three basic dimensions of human development—a long and healthy life, knowledge and a decent standard of living. See Technical note 1 at http://hdr.undp.org/sites/default/files/hdr2016_technical_notes.pdf (/sites/default/files/hdr2016_technical_notes.pdf) for details on how the HDI is calculated.
Life expectancy at birth: Number of years a newborn infant could expect to live if prevailing patterns of age-specific mortality rates at the time of birth stay the same throughout the infant's life.
Expected years of schooling: Number of years of schooling that a child of school entrance age can expect to receive if prevailing patterns of age-specific enrolment rates persist throughout the child's life.
Mean years of schooling: Average number of years of education received by people ages 25 and older, converted from education attainment levels using official durations of each level.
Gross national income (GNI) per capita: Aggregate income of an economy generated by its production and its ownership of factors of production, less the incomes paid for the use of factors of production owned by the rest of the world, converted to international dollars using PPP rates, divided by midyear population.
GNI per capita rank minus HDI rank: Difference in ranking by GNI per capita and by HDI value. A negative value means that the country is better ranked by GNI than by HDI value.
HDI rank for 2014: Ranking by HDI value for 2014, which was calculated using the same most recently revised data available in 2016 that were used to calculate HDI values for 2015.

Main data sources

Columns 1 and 7: HDRO calculations based on data from UNDESA (2015a), UNESCO Institute for Statistics (2016), United Nations Statistica Division (2016a), World Bank (2016a), Barro and Lee (2016) and IMF (2016).
Column 2: UNDESA (2015a).
Column 3: UNESCO Institute for Statistics (2016), ICF Macro Demographic and Health Surveys and UNICEF Multple Indicator Cluster Surveys.
Column 4: UNESCO Institute for Statistics (2016), Barro and Lee (2016), ICF Macro Demographic and Health Surveys and UNICEF's Multple Indicator Cluster Surveys.
Column 5: World Bank (2016a), IMF (2016) and United Nations Statistica Division (2016a).
Column 6: Calculated based on data in columns 1 and 5.

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(2) Where it is intended to slaughter a cow for the reasons specified in clause (*a*) or clause (*b*) of sub-section (1) it shall be incumbent for a person doing so to obtain a prior permission in writing of the Veterinary Officer of the area or such other Officer of the Animal Husbandry Department as may be prescribed."

23. The expression "slaughter" is defined in Section 2(*e*) of the Act, which is as follows:

"**2.** (*e*) 'slaughter' means killing by any method whatsoever and includes maiming and inflicting of physical injury which in the ordinary course will cause death;"

24. If we read Section 3 and Section 4 together, it is clear that the person contravening Section 3 cannot put up a defence that the act of slaughter was being done in a place, of which he is not the owner or in respect of which he does not have the conscious possession. Slaughter of cows, subject to exceptions under Section 4, *in any place*, is prohibited under Section 3 and penalty for doing so is provided under Section 8.

25. The High Court's finding that the guilt of the accused persons has not been proved in the absence of proof of their ownership or conscious possession of the house where slaughter took place, is a finding which is dehors the said Act and is clearly not legally sustainable. Slaughter of the cows is clearly prohibited under Section 3, subject to the exceptions in Section 4. The case of the accused persons is not covered under the exceptions in Section 4. No such defence was ever taken.

26. Therefore the impugned order of the High Court is, with respect, legally not sustainable. We, therefore, are unable to accept the reasons of the High Court. The appeal is allowed. The order of the High Court is set aside and that of the learned Sessions Judge is affirmed.

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(Record of Proceedings)

(BEFORE DR DALVEER BHANDARI AND DEEPAK VERMA, JJ.)

PEOPLE'S UNION FOR CIVIL LIBERTIES
(PDS MATTERS) .. Petitioner;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petition (C) No. 196 of 2001 with IAs Nos. 90, 93, 98, 102-08, 110-12 in WP (C) No. 196 of 2001, Contempt Petition (C) No. 99 of 2009 with WP (C) No. 277 of 2010, decided on September 14, 2011

Constitution of India — Arts. 21 and 32 — Public Distribution System (PDS) — Transparency of delivery and management system — Recommendations of High-Powered Committee (HPC) on computerisation of PDS — Time-bound action plan to be prepared by State Governments for complete computerisation of PDS system within three months' time — Central and State Governments directed to file replies — Other directions issued — Significant recommendations of HPC being the following:

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(i) dissemination of information about availability of foodgrains through SMS to be made to pre-identified individuals in local community; (ii) necessity of citizen participation for social audit in ensuring effectiveness of system; (iii) single unified information system be developed to meet abovementioned requirements; (iv) Government of India to ensure necessary infrastructure and financial support; (v) State Governments to link process of computerisation with Aadhar/Unique Identification Number (UID) registration; (vi) an effective grievance redressal mechanism to be strictly enforced based on SMS/email and other suitable technology; (vii) a four digit toll free number to be established for grievance registration and redressal thereof; (viii) digitised database of ration cards be put up in public domain including on websites — Central Government agreeing to all recommendations in principle

J-D/48993/S

Advocates who appeared in this case :

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H.P. Raval, Additional Solicitor General; Dr Manish Singhvi, Additional Advocate General (Rajasthan); A. Mariarputham, Advocate General, R. Sundaravardhan and Pramod Swaroop, Senior Advocates [Vishnu B. Saharya (for M/s Saharya & Co.), Jana Kalyan Das, Ranjan Mukherjee, S.C. Ghosh, Ms Hemantika Wahi, Ms Suveni Banerjee, D.K. Goswami, Shirish Kr. Mishra, Pragyan P. Sharma, Siddhartha Lodha, (for P.V. Yogeswaran), Ms Indra Sawhney, Devanshu Kr. Devesh, Irshad Ahmad, Milind Kumar, Ms Aruna Mathur, Avneesh Arputham, Yusuf Khan (for M/s Arputham Aruna & Co.), Riku Sarma, Navnit Kumar (for M/s Corporate Law Group), Ms Rachana Srivastava, Ranchi Daga, Krutin Joshi, Manoj Saxena, Mayank Nigam, T.V. George, Ms Kamini Jaiswal, Shish Pal Laler, Kh. Nobin Singh, Sapam Biswajit Meitei, Ranjan Mukherjee, Jatinder Kr. Bhatia, V.G. Pragasam, S.J. Aristotle, Prabu Ramasubramanian, G.V. Rao, Ravi Prakash Mehrotra, Gopal Singh, Manish Kumar, Chandan Kumar, Bikas Kar Gupta, Abhijit Sengupta, Rituraj Biswas, Manish Pitale, Wasi Haider (for C.S. Ashri), Soumitra G. Chaudhuri, Tara Chandra Sharma, Anil Shrivastav, Edward Belho, P. Athuimei R. Naga, K. Enatoli Sema, Nimshim Vashum, T. Harish Kumar, V. Vasudevan, Sanjiv Sen, Prashant Kumar, P. Parameswaran, Ujjal Banerjee, Atul Jha, D.K. Sinha, G.V. Chandrashekhar, N.K. Verma, Ms Anjana Chandrashekar, Gopal Prasad, Sarbojit Dutta, D. Mahesh Babu, Ramesh Allanki, Savita Dhande, V. Pattabhi, Sunil Fernandes, Suhaas Joshi, Ms Astha Sharma, Ramesh Babu M.R., Ms Anuradha Rustagi, Ms D. Bharati Reddy, Sanjay R. Hegde, Ramesh Kr. Mishra, Ms Sumita Hazarika, K.K. Mahalik, Ajay Pal, Manjit Singh, Kamal Mohan Gupta, Ms A. Subhashini, Gopal Singh, Kuldip Singh, R.K. Pandey, H.S. Sandhu, K.K. Pandey, Mohit Mudgil, Ravindra Keshavrao Adsure, Ms Bina Madhavan, Vishwajit Singh, Sanjay V. Kharde, Ms Asha G. Nair, K.V. Mohan, Rajesh Srivastava, Ms Promila, S. Thananjayan, Anuvrat Sharma, K.N. Madhusoodhanan, R. Sathish, Naushad Ahmad Khan, Rajesh Kr. Verma (for R.C. Kaushik), Pradeep Misra, Venkateswara Rao Anumolu, Bikas Upadhyay, B.S. Banthia, Dr Aman Hingorani, Ms Priya Hingorani, G. Prakash, Ms Beena Prakash, V. Senthil, Navneet Kumar, Anil Kr. Jha, Vikas Mehta, Raj Kr. Gupta, Rajiv Dubey, Kamlendra Mishra, Naresh K. Sharma, Anis Suhrawardy, Shivaji M. Jadhav, Suresh Chandra Tripathy and Navin R. Nath, Advocates] for the DDA.

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ORDER

1. The High-Powered Committee headed by Justice D.P. Wadhwa, Retired Judge of this Court, has submitted a preliminary report on the computerisation of public distribution system. In the recommendations of the report it is mentioned that computerisation of PDS consists of primarily three components i.e. creating an updating beneficiary database, stock management from FCI till FPS and sale of commodities at fair price shops. In order to make PDS effective it is important that the delivery and management system is transparent. The citizen participation for social audit can play a crucial role in ensuring effectiveness of the system.

2. In order to implement this system across the country, the following actions are suggested by the Committee:

1. End-to-end computerisation of PDS may be considered in two parts and following prioritisation of the implementation strategy may be followed:

Component I: Diversions, leakages, delays in allocation and transportation, inappropriate distribution of foodgrains to fair price shops go unchecked because of lack of visibility of this information in the public domain.

Computerisation of complete supply chain management up to the shop level and availability of this information on a transparency portal in public domain is to be accorded the highest priority. The portal should have different dashboards catering to the information needs of all the stakeholders.

Component II: Electronic authentication of delivery and payments at the fair price shop level. In order to ensure that each card-holder is getting his due entitlement, computerisation has to reach literally every doorstep and this could take long. Moreover, several States have already started implementing smart cards, food coupons, etc. which have not been entirely successful. Reengineering these legacy systems and replacing it with the online Aadhaar authentication at the time of foodgrain delivery will take time. This is therefore proposed as Component II.

2. The Department of Food and Public Distribution is directed to immediately issue guidelines to all the States for end-to-end computerisation of TPDS.

3. The Government of India shall ensure that the State Governments prepare a time-bound action plan for completing the process of computerisation. This action plan will be implemented keeping the timelines in mind and will be regularly submitted before the Hon'ble Supreme Court.

4. The States/UTs should take up end-to-end computerisation of TPDS as a top priority and should appoint a dedicated nodal officer to monitor the projects related to TPDS computerisation.

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5. The States/UTs may be encouraged to include the PDS related KYR+ field in the data collection exercise being undertaken by various Registrars across the country as part of the UID (Aadhaar) enrolment.

6. Digitisation of beneficiary data and a centralised database with clear process of data updation to be put in place by the States in a time-bound manner.

7. Dissemination of information about availability of foodgrains through SMS to the pre-identified individuals in the local community to enable social audit. The system could also provide stock position at a specific location on demand. The information related to stock availability using latest technological interface should be made available in a public domain.

8. Single unified information system should be developed to meet the abovementioned requirements that would help to achieve certain basic level of transparency in PDS. For this the States should arrange training programs for field functionaries and FP dealers.

9. Chhattisgarh model of computerisation for PDS system (a note on the computerisation of PDS in the State of Chhattisgarh is annexed hereto as Annexure II) which primarily caters to the computerisation up to the shop level was also deliberated upon and discussed by the HPC. It was decided that the Chhattisgarh model may be adopted for Component 1 and Component 2 may be done on the similar lines of the Gujarat model of computerisation. The Chhattisgarh model may be implemented in all the States within a maximum period of three months. However, some State Governments like the Government of Gujarat which is following Component 2, or other States which may be at the advanced stage of following some other model, such States may continue to follow the same so long as it is fulfilling the end objectives of completing the computerisation. (A note on the computerisation of PDS in the State of Gujarat is annexed hereto as Annexure III.)

10. As the process of end-to-end computerisation is expected to be a sizable exercise, to complete it in a mission mode, a separate and dedicated institutional mechanism is to be incorporated to look after the progress of computerisation of PDS. This institution must have active participation of all stake-holders including the State Governments. As PDS is implemented by the State by the State Governments and supported by the Government of India, role of the State Government in this body will be helpful in getting required support from the State Governments.

11. Information related to stock availability, movement and date (*sic* datewise) quantity of stocks supplied to FPS should be made available in public domain by using latest technological interface like SMSs/website or other means.

12. As far as possible, the State Governments should be directed to link the process of computerisation of Component 2 with Aadhar

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registration. This will help in streamlining the process of biometric collection as well as authentication. The States/UTs may be encouraged to include the PDS related KYR+ field in the data collection exercise being undertaken by various Registrars across the country as part of the UID (Aadhar) enrolment.

13. An effective grievance redressal mechanism should be strictly enforced based on SMS/email and other suitable technology. The Government of India should ensure that this mechanism is put in place in all the States. The States/UTs should create effective grievance redressal mechanism where use of mobile based SMS/email can be used for timely resolution of the citizen/beneficiary grievance. A four digit toll free number may be established in all the States for grievances registration and redressal thereof.

14. The Government of India will ensure that the computerisation operation is provided necessary infrastructure and financial support. This needs to be completed in a time-bound manner and the institution mechanism so created shall be completely responsible for meeting the timelines. The Government of India with the help of the State Government will ensure that the institution has sufficient infrastructure and finances to complete the computerisation in a time-bound manner.

15. While this complete process is expected to take some time, in the meantime, following action may immediately be taken:

(*a*) The State Governments will ensure doorstep delivery of foodgrain for the ration shops in a time-bound manner and shall ensure that information related to movement and availability of foodgrain is available in public domain.

(*b*) A PDS public information portal may be made which will have information related to complete public distribution system. In addition to other information, it should also have the information of date and quantity of foodgrain supplied to the fair price shop every month for all the shops.

(*c*) The digitised database of ration cards will be put up in the public domain including on the websites.

(*d*) The State should make necessary amendments to make the fair price shop financially viable.

(*e*) A four digit toll free number may be established in all the States for grievances registration and redressal thereof.

(*f*) All the State Governments will ensure that required allocation reaches the fair price shop before the 1st day of the month and this information should be available on the transparency portal.

(*g*) A drive can be started to eliminate the fake and ghost ration cards. A comparison with data available with other departments like election, census, etc. gives the quick estimates about the bogus cards. It was seen that at some places, units in the ration cards exceed even the population of the area. These practices should be checked

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immediately. This can also be linked up with the socio-economic census in rural areas which is expected to be completed shortly within this year itself.

(*h*) The Government of India shall ensure that all the State Governments prepare a time-bound action plan for complete computerisation of PDS system within three months' time. Strict deadlines may be fixed in the action plan and these will be submitted before the Hon'ble Supreme Court within three months' period.

(*i*) All above steps may be completed within three months' time.

3. We have discussed the recommendations of the High-Powered Committee on computerisation with the learned counsel for the petitioner and the learned Additional Solicitor General of India. The Government of India has agreed in principle to implement these recommendations as expeditiously as possible. We request Mr Parasaran, learned Additional Solicitor General to ensure that the process of computerisation is completed as expeditiously as possible. He may help in coordinating with the High-Powered Committee and other authorities concerned and individuals.

4. We direct the Chief Secretaries of various States to indicate, within two weeks, as to how much additional foodgrains are required for the poorest districts in their States and allocation of foodgrains would be made within two weeks thereafter. We further direct the Chief Secretaries to ensure that whatever foodgrains are allocated, the same be lifted by them within two weeks thereafter. The allocation of foodgrains to be made out of five million tonnes additionally allocated.

5. We request the High-Powered Committee to hear all the parties and decide whether the foodgrains are required to be distributed at AAY rates or BPL rates and the decision of the High-Powered Committee would be binding on all concerned and would be implemented forthwith.

6. We request the High-Powered Committee to decide this issue as expeditiously as possible and we direct the parties to appear before the High-Powered Committee on 20-9-2011. In case the Chief Secretaries of various States do not respond within two weeks, as directed above, it would be presumed that, that particular State does not require additional foodgrains at AAY or BPL rates.

7. The learned counsel appearing on behalf of the Planning Commission submits that the affidavit to be filed in pursuance of the directions of this Court, has gone to the office of the Prime Minister for vetting and the same would be filed within a week. Reply to that affidavit, if any, be filed within one week thereafter.

8. All those States who have not filed their affidavits may file the same within two weeks from today.

9. List this matter for further directions on 11-10-2011.

Court Masters

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ANNEXURE R-20

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MANU/SC/0110/2013

Equivalent Citation: 2013II AD (S.C.) 658, AIR2013SC1254, 2013(1)J.L.J.R.392, JT2013(3)SC451, 2013 (1) KHC 508, 2013(1)KLT544, 2013LabIC1637, 2013(2)PLJR100, 2013(2)SCALE265, (2013)2SCC705, (2013)2SCC(LS)444, [2013]4SCR66, 2013(2)SCT228(SC)

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 958 of 2013 (Arising out of SLP (C) No. 9162 of 2011)

Decided On: 06.02.2013

Appellants: **State of Kerala and Ors.**
Vs.
Respondent: **President, Parent Teacher Assn. SNVUP and Ors.**

Hon'ble Judges/Coram:
K. Panicker Radhakrishnan and Dipak Misra, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Sana Hashmi, Philip Mathew and Liz Mathew, Advs.

For Respondents/Defendant: P.A. Noor Muhamed and Giffara S., Advs.

JUDGMENT

K.S. Panicker Radhakrishnan, J.

1. Leave granted.

2. We are in this appeal concerned with the question whether the High Court was justified in directing the Secretary, General Education Department of the State of Kerala to get the verification of the actual students' strength in all the aided schools in the State with the assistance of the police and to take appropriate action.

3. The Assistant Educational Officer (AEO), Valappad had fixed the staff strength of S.N.V.U.P. School, Thalikulam for the year 2008-09 based on the visit report of High School Association (SS), GHS Kodakara as per Rule 12 of Chapter XXIII of Kerala Education Rules (KER). Later, based on a complaint regarding bogus admissions and irregular fixation of staff for the year 2008-09 by the AEO, the Super Check Cell, Malabar Region, Kozhikode made a surprise visit in the school on 17.09.2008 and physically verified the strength of the students and noticed undue shortage of attendance on that day. The strength verified by the Super Check Cell was not sufficient for allowing the divisions and posts sanctioned by the AEO. The Head Master of the School, however, stated in writing that the shortfall of attendance on the day of inspection was due to "Badar Day" of Muslim community and due to distribution of rice consequent to that. In order to confirm the genuineness of the facts stated by the Head Master, the Cell again visited the school on 16.12.2008. Verification could not be done on that day, hence the Cell again visited the school on 02.02.2009 and physically verified the students' strength. On that day also, there were large number of absentees as noticed on 17.09.2008. On verification of attendance register, it was found that the class teachers of respective classes had given bogus presence to all students on almost all the days. Enquiry revealed that the school authorities had obtained the staff fixation order for the year 2008-09 through bogus recordical admissions.

4. The Director of Public Instructions (DPI), Thiruvananthapuram consequently issued a notice dated 07.05.2009 to the Manager of the School of his proposal to revise roll strength and revision of staff strength by reducing one division each in Std. I, II, IV to VII and 2 divisions in Std. III and consequent posts of 5 LPSAs, 3 UPSAs in the school during the year 2008-09. The Manager of the school responded to the notice vide representation dated 27.05.2009 stating that Super Check Officials did not record the attendance particulars of the students in the visit record and had tampered with the attendance register. The Manager had also pointed out that the Headmaster was not responsible to compensate the loss suffered by the Department by way of paying salary to the teachers who had worked in the sanctioned posts. Further, it was also pointed out that the staff fixation should not be done within the academic year and re-fixation was not permissible as per Rule 12E(3) read with Rule 16 of Chapter XXIII, KER and requested not to reduce the class divisions.

5. The DPI elaborately heard the lawyers appearing for the Headmaster and the Manager of the school, affected teachers as well as the officials of the Super Check Cell. Having heard the submissions made and perusing the records made available, the DPI found that the staff fixation of the school for the year 2008-09 was obtained through bogus admissions and misrepresentation of facts. DPI noticed that the roll strength during the year 2008-09 was 1196. There were 404 absentees on the first visit of the Cell on 17.09.2008. The Super Check Cell again visited the school on 16.12.2008 and 02.02.2009 and it was found that among 404 students absent on the first day, 179 names were bogus and irregular retentions. The physical presence

of 179 students could not be verified on all the three occasions. DPI, therefore, passed an order revising the staff fixation of the school for the year 2008-09 as per Rule 12(3) read with Rule 16 of Chapter XXIII of KER. Consequently, the total number of divisions in the school was reduced to 23 from 31. In the Order dated 08.09.2009, the DIP had stated as follows:

> The Headmaster is responsible for the admission, removals, and maintenance of records and for the supervision of work of subordinates. It is the duty of the verification officer to verify the strength correctly and to unearth the irregularities. Due to the irregular fixation of staff, the State exchequer has incurred additional and unnecessary expenditure by way of pay and allowances for 8 teachers and expenditure incurred in connection with payment of various scholarships, lump-sum grant, noon-feeding, free books etc to the bogus students. These loss sustained to the Government will be recovered from the Headmaster of the school who alone is responsible for all the above irregularities.

6. The DPI also directed to take further action to fix the liabilities and recover the amount from the Headmaster under intimation to DPI and the Super Check Officer, Kozhikode. The Headmaster and Manager of the school, aggrieved by the above-mentioned order, filed a revision petition before the State Government. The High Court vide its judgment dated 7.12.2009 in Writ Petition (C) No. 35135 of 2009 directed the State Government to dispose of the revision petition.

7. The higher level verification was also conducted in the school with regard to the staff fixation for the year 2009-10 and on verification, it was found that many of the students in the school records were only bogus recordical admissions. Following that, the AEO issued staff fixation order for the year 2009-10 vide proceedings dated 27.03.2010.

8. Meanwhile, the President of the Parent Teachers Association (Respondent No. 1 herein) filed WP (C) No. 12285 of 2010 before the High Court seeking a direction to the AEO to reckon the entire students present in the school on the 6th working day and higher level verification of District Education Officer (DEO) on 13.01.2010 for the purpose of staff fixation for the year 2009-10 and also for a declaration that the exclusion of the students who were present on the day of higher level verification on 13.01.2010 from the staff fixation order 2009-10 was illegal and also for other consequential reliefs.

9. Learned Single Judge of the High Court dismissed the Writ Petition on 07.04.2010 stating that the Parent Teachers Association have no locus standi in challenging the staff fixation order. The judgment was challenged in W.A. No. 1195 of 2010 by the President, Parent Teachers Association before the Division Bench of the High Court and the Bench passed an interim order on 14.07.2010. The operative portion of the same reads as follows:

> The inspection team has recorded that as many as 179 students whose names and particulars are furnished, represent bogus admissions for record purposes. If admission register is manipulated by recording bogus admissions in the name of non-existing students or students of other institutions, we fell criminal action also is called for against the school authorities. Since Appellant has denied the findings in the inspection report, we fell a police enquiry is called for the in the matter. We, therefore, direct the Superintendent of Police, Thrissur to constitute a team of Police Officers to go through Ext.P1, verify the registered maintained by the school authorities, take the addresses as shown in the school records and conduct field enquiry as to whether the students are real persons and if so, whether they are really studying in this school or elsewhere. In other words, the result of the enquiry is to confirm to this Court whether the students whose names are in the record of the school are real and if so, whether they are students in this school or any other school.

The Bench also directed to the Superintendent of Police to submit his report within one month.

10. The Superintendent of Police, following the direction given by the High Court, constituted a team under the leadership of the Circle Inspector of Police, Valappad and the team conducted detailed enquiry in respect of all the matters directed to be examined by the police. The Superintendent of Police submitted the report dated 20.09.2010 which reads as follows:

> On the enquiry about the 187 students (179+8) which were alleged as bogus admissions as per Ext.P1, it is revealed that only 72 students were studied in S.N.V.U.P. School during the period 2008-09 and 80 students were studied in some other schools. The addresses of 23 students have not been traced out even with the help of postman of the concerned area. On the enquiry it is also revealed that 4 students vide the admission Nos. 13008, 11875, 12883 and 13876 mentioned in Ext.P1, have not been studied anywhere during that period.
>
> The details of the 187 students, revealed in the enquiry are mentioned below:

1. Actual No. of students studied in SNVUP School, Thalikulam during 2008-2009	
2. No. of Students studied in some other schools	80
3. No. of students whose address have not been trace out	23
4. No. of students have not been studied anywhere	04
5. No. of students removed from the rolls. Immediately after strength inspection	08
Total	187

The report of the enquiry, submitted by the Circle Inspector of Police, Valappad showing the details of each students is also produced herewith.

11. The Division Bench of the High Court after perusing the report submitted by the Superintendent of Police found that neither the finding of the DPI based on inspections by Super Check Cell nor the claim of the Parent Teachers Association was correct since the police had found that at least 72 out of 187 students declared bogus by the DPI were real students of the school. The High Court, therefore, concluded manipulation by the school management was obvious, though not to the extent found by the Super Check Cell based on which DPI had passed the impugned order. The Division Bench expressed anguish that the management had included 80 students studying in other schools as students of the present school. It was also noticed that as many as 23 students could not be traced by the police with the help of the postman, were also included in the register.

12. The Division Bench concluded that since the Super Check Cell, the Education Department lacked the investigating skill or the authority to collect information from the field, it would be appropriate that the verification of actual students in all the aided schools in the State would be done through the police. Holding so, the High Court gave the following direction:

> We, therefore, feel as in this case Police should be entrusted to assist the Education Department by conducting enquiry about the actual and real students studying in every aided school in the State and pass on the same to the Education Department for them to fix or re-fix the staff strength based on the data furnished by the Police. We, therefore, direct the Secretary, Department of Education, to get verification of the actual students studying in all the aided schools in the State done through the police authorities and take appropriate action. It would be open to the Government to consider photo or finger identification of the students for avoiding manipulation in the school registers. The Government is directed to complete the process by the end of this academic year and file a report in this Court.

13. The State of Kerala, aggrieved by the various directions given by the Division Bench, has preferred this appeal. Ms. Liz Mathew, Learned Counsel appearing for the State of Kerala submitted that the High Court was not justified in giving a direction to the Secretary, Education Department in entrusting the task to State Police for verification of actual students' strength in all the aided schools, while the enquiry is being conducted by the Education Department. Learned Counsel submitted that Kerala Education Act and Rules did not prescribe any mechanism for conducting enquiries by the police at the time of staff fixation. The method to be adopted in the fixation of staff in various schools is prescribed under Chapter XXIII of KER and police have no role. The Rules empower the AEO, the DEO and the Super Check Cell etc. to conduct enquiries but not by the police. Learned Counsel also pointed out that the presence of the police personnel in the aided schools in the States would not only cause embarrassment to the students studying in the school but would also cast wrong impression on the minds of the students about the conduct of their Headmaster, teachers and staff of the school.

14. We notice that the State itself had admitted in the petition that there should be a better mechanism to ascertain the number of students in the aided schools which could be done by finger printing or any other modern system so that the students could be properly identified and staff fixation could be done on the basis of relevant data. We, therefore, directed the State to evolve a better mechanism to overcome situations like the one which has occurred in the school. Fact finding authorities have categorically found that the school authorities had made bogus admissions and made wrong recording of attendance which led to the irregular and illegal fixation of staff strength of the school for the years 2008-09 and 2009-10.

15. An additional affidavit has been filed by the State of Kerala stating that the Government after much thought and deliberations formulated a scientific method to resolve the issue emanating from staff fixation orders every year. The affidavit says that the number of students in the school can be determined through Unique Identification Card (UID) technology and the number of divisions could be arrived at on the basis of revised pupil teacher ratio. Further, it is also pointed out that after implementation of UID as a part of scientific package, the government will remand the matter of identification of bogus admission to the DPI for considering issues afresh after corroborating the findings of Super Check Cell with UID details of the students. The State has issued a circular No. NEP (3) 66183/2011 dated 12.10.2011 which, according to the State, would take care of such situations happening in various aided schools in the State.

16. We are of the view even though the Division Bench was not justified in directing police intervention, the situation that has unfolded in this case is the one that we get in many aided schools in the State. Many of the aided schools in the State, though not all, obtain staff fixation order through bogus admissions and misrepresentation of facts. Due to the irregular fixation of staff, the State exchequer incurs heavy financial burden by way of pay and allowances. The State has also to expend public money in connection with the payment of various scholarships, lump-sum grant, noon-feeding, free books etc. to the bogus students.

17. A great responsibility is, therefore, cast on the General Education Department to curb such menace which not only burden the State exchequer but also will give a wrong signal to the society at large. The Management and the Headmaster of the school should be a role model to the young students studying in their schools and if themselves indulge in such bogus admissions and record wrong attendance of students for unlawful gain, how they can imbibe the guidelines of honesty, truth and values in life to the students. We are, however, of the view that the investigation by the police with regard to the verification of the school admission, register etc., particularly with regard to the admissions of the students in the aided schools will give a wrong signal even to the students studying in the school and the presence of the police itself is not conducive to the academic atmosphere of the schools. In such circumstances, we are inclined to set aside the directions given by the Division Bench for police intervention for verification of the students' strength in all the aided schools.

18. We are, however, inclined to give a direction to the Education Department, State of Kerala to forthwith give effect to a circular dated 12.10.2011 to issue UID Card to all the school children and follow the guidelines and directions contained in their circular. Needless to say, the Government can always adopt, in future, better scientific methods to curb such types of bogus admissions in various aided schools.

19. We, however, find no reason to interfere with the direction given by the DPI to take further action to fix the liabilities for the irregularity committed in the school for the years 2008-09 and 2009-10, for which the appeal is pending before the State Government. The State Government will consider the appeal and take appropriate decision in accordance with law, if it is still pending. Appeal is allowed as above without any order as to costs.

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ANNEXURE R-21

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the Income Tax Act, 1961, on foreign salary payment as a component of the total salary paid to an expatriate working in India. This controversy came to an end vide judgment of this Court in *CIT* v. *Eli Lilly & Co. (India) (P) Ltd.*[1] The question on limitation has become academic in these cases because, even assuming that the Department is right on the issue of limitation still the question would arise whether on such debatable points, the assessee(s) could be declared as assessee(s) in default under Section 192 read with Section 201 of the Income Tax Act, 1961.

4. Further, we are informed that the assessee(s) have paid the differential tax. They have paid the interest and they further undertake not to claim refund for the amounts paid. Before concluding, we may also state that, in *Eli Lilly & Co. (India) (P) Ltd.*[1] vide para 21, this Court has clarified that the law laid down in the said case was only applicable to the provisions of Section 192 of the Income Tax Act, 1961.

5. Leaving the question of law open on limitation, these civil appeals filed by the Department are disposed of with no order as to costs.

(2010) 13 Supreme Court Cases 45

(Record of Proceedings)

(BEFORE DALVEER BHANDARI AND MRS GYAN SUDHA MISRA, JJ.)

PEOPLE'S UNION FOR CIVIL LIBERTIES .. Petitioner;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petition (C) No. 196 of 2001 with IAs Nos. 27-30, 33, 41-43, 45 (in IA No. 41), 46-47, 51-52, 55-57, 63-74, 76, 78-90, 92-94, 96, 98-99 in WP (C) No. 196 of 2001, Contempt Petition (C) No. 99 of 2009 in WP (C) No. 196 of 2001, decided on May 5, 2010

A. Constitution of India — Arts. 21 and 32 — Shelter, Right to — Right to food, shelter and basic amenities — States of Gujarat, Tamil Nadu, Bihar and West Bengal not focusing on relevant issues or filing unsatisfactory affidavits, directed to file additional proper/satisfactory affidavits

(Paras 15, 16, 43, 44, 54 and 61)

B. Constitution of India — Arts. 21 and 32 — Problem of night shelter not being serious or not existing in States of Arunachal Pradesh, Andaman and Nicobar Islands, Manipur and Tripura, except in cities of Itanagar and Agartala — States of Arunachal Pradesh and Tripura directed to file affidavit regarding their cities Itanagar and Agartala, respectively

(Paras, 13, 14, 41, 42, 64 and 65)

C. Constitution of India — Arts. 21 and 32 — States of Rajasthan, Karnataka, Punjab and Meghalaya proposing to conduct comprehensive survey to identify homeless and/or provide night shelters to them — Progress report regarding provision of shelters directed to be filed within

1 (2009) 15 SCC 1 : (2009) 312 ITR 225

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stipulated time periods — State of Maharashtra directed to file a comprehensive report regarding problems of urban homeless within two months (Paras 11, 12, 34 to 40 and 66 and 67)

D. Constitution of India — Arts. 21 and 32 — In view of satisfactory affidavits/steps taken/proposed to be taken by States of Mizoram, Uttarakhand, Kerala, Himachal Pradesh, Jharkhand, Sikkim, Puducherry and Chhattisgarh, no further directions given and/or no further affidavits required to be filed (Paras 10, 17 to 21, 24 to 29, 32, 33, 62 and 63)

E. Constitution of India — Arts. 21 and 32 — States of Assam, Nagaland, Uttar Pradesh, NCT of Delhi, Andhra Pradesh and Madhya Pradesh directed to file progress/status report/affidavits within stipulated time in view of proposed undertakings/proposals — Efforts of Delhi Government to minutely and carefully analyse problem of homeless people living in shelters and to provide them with a comprehensive programme for rehabilitation, appreciated — Efforts of State of Andhra Pradesh for filing comprehensive affidavit and demonstrating great sensitivity in dealing with the grave human problem and identifying a large number of areas to solve problems of urban families and others, appreciated — Other States directed to emulate sensitivity shown by State of Andhra Pradesh — Positive attitude of State of Madhya Pradesh, noticed (Paras 6 to 9, 22, 23, 30, 31, 45 to 51 and 55 to 58)

F. Constitution of India — Arts. 21 and 32 — Six months' extension of term of Central Vigilance Committee appointed on Public Distribution System, directed (Paras 66 to 70)

SS-D/46625/S

ORDER

1. In this writ petition, a report has been filed by the Commissioners in which it has been prayed that there is urgent need of night shelters in urban areas. In the report, it is prayed that the Centre and the State Governments be directed to provide permanent 24 hrs homeless shelters in the areas beginning with 62 cities and towns across India. In the report it is also mentioned that these homeless shelters need to be opened 24 hrs in all seasons, and should have basic amenities to enable a life with dignity.

2. It is further incorporated in the report that winter is a period of severest crises for homeless people and it is directly life threatening, though all seasons pose threats to homeless people. Homeless people are subject to continuous violence and abuse. Living in the open with no privacy or protection even for women and children, is a gross denial of the right to live with dignity. For this reason the Commissioners are convinced that unless directions are given by this Court, the problems would not be solved.

3. It is further stated in the report that the shelters should have the basic facilities, such as, beds and bedding, toilets, potable drinking water, lockers, first aid, primary health, de-addiction and recreation facilities. It is also mentioned that shelters must be in adequate numbers and in the ratio of at

least one per lakh of population for every urban centres according to the Delhi Master Plan.

4. The matter was discussed and the learned Additional Solicitor General appearing for the Union of India submitted that all major cities, which have population of more than five lakhs, will be provided with night shelters in the ratio of at least one per lakh of population.

5. This Court issued notice to all the States and the Union Territories. In response to the notice, most of the States and the Union Territories have filed affidavits and their responses are as under.

State of Madhya Pradesh

6. The State of Madhya Pradesh has agreed to construct one night shelter for a population of one lakh in all urban centres. Further it has been directed that:

(*i*) All local bodies within their territorial limits will construct night shelters for homeless people;

(*ii*) Normally at least one night shelter in population of one lakh must be constructed and the homeless persons residing in the night shelters should be provided clean drinking water, light, toilet and provisions for their security;

(*iii*) During winter season proper arrangements may be made for fire with the funds of the local bodies and with the cooperation of the working social organisations blankets be also arranged for the persons staying in night shelters;

(*iv*) In coordination with the local health officer, urban bodies should make arrangements for investigation of health of all those poor persons staying in night shelters and will make arrangements for giving treatment in the government hospitals;

(*v*) As per the requirement of security of the goods of the poor persons residing in the night shelters, locker facility should also be provided;

(*vi*) Separate place be provided for men and women in night shelters;

(*vii*) At the local level all the urban bodies with the cooperation of the working social organisations should also make arrangements for the supply of food on reasonable rates to the poor persons residing in the night shelter;

(*viii*) The above arrangements may be immediately made in the night shelters which have been constructed earlier by the local bodies;

(*ix*) The State Government has directed that within six months, the Commissioners of Municipal Corporations and the Chief Municipal Officer, Municipality should make a survey of the homeless.

7. This affidavit filed by the State of Madhya Pradesh is very positive. We direct the State Government to start constructing night shelters for the homeless in a phased manner according to their affidavit and may submit the report in this Court within two months from today.

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State of Nagaland

8. In the affidavit, which has been filed on behalf of the State of Nagaland, it is mentioned that the State Government proposes to conduct a detailed survey through its own department or by engaging reputed organisations/institutions within a period of six months for all urban areas within the State. It is also mentioned that depending upon the results of the detailed survey, shelter homes would be constructed in a phased manner as may be necessary. The shelter homes will have basic requirements necessary for providing safe, secure and comfortable shelter for the homeless.

9. We expect the State of Nagaland to file an affidavit within a period of two months to ensure that entire programme is implemented.

State of Mizoram

10. The State of Mizoram has stated in the affidavit that identification of urban homeless will be conducted in a comprehensive manner within six months and necessary facilities would be provided to the homeless in the shelters. In view of this affidavit, no further directions are warranted at this stage.

State of Rajasthan

11. The learned Additional Advocate General appearing for the State of Rajasthan submits that formulation of the comprehensive policies would take about two months.

12. We direct the Chief Secretary of the State of Rajasthan to file an affidavit within two months indicating the progress made by the State in respect of providing shelters to the homeless in accordance with the standard norms.

State of Arunachal Pradesh

13. An affidavit has been filed by the State of Arunachal Pradesh indicating that the problem does not exist in the State except in Itanagar where the population is more than one lakh. It is mentioned in the affidavit that

> "there is nobody who is homeless or orphan. In the event of death and demise of parents, village community takes over the responsibilities for the children leaving little or no scope for the destitution."

14. It is indeed a very happy situation in the State of Arunachal Pradesh but as regards Itanagar, an affidavit be filed within two months.

State of Gujarat

15. In the affidavit filed by the State of Gujarat, it is mentioned that in the State there are four cities with a population of more than five lakhs i.e. Ahmedabad, Vadodara, Rajkot and Surat. The affidavit is not clear about the issue, which this Court is dealing with.

16. We direct the State of Gujarat to file an additional affidavit indicating within what period the State would be able to provide the shelters for homeless in the urban cities of Gujarat.

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State of Himachal Pradesh

17. In the affidavit filed on behalf of the State of Himachal Pradesh, it is mentioned that only Shimla has a population of more than one lakh in the State. One night shelter, which is already in existence, is being renovated and necessary facilities would be provided in the night shelter.

18. Therefore, in view of this affidavit, at this stage no further directions are warranted so far as this State is concerned.

State of Uttarakhand

19. It is mentioned in the affidavit that Dehradun, Haridwar and Haldwani have a population of more than one lakh. One night shelter is already in existence in Dehradun and two night shelters are there in Haridwar. Haldwani also has one night shelter. The State Government has issued directions to all the urban bodies to provide land free of cost for the establishment of additional night shelters in order to construct shelter for the entire shelterless people.

20. In the affidavit it is also mentioned that the urban local bodies are also directed to submit proposal for the upgradation of existing night shelters basically for enhancing their accommodation capacities and to provide basic amenities, such as, blankets, potable drinking water, toilets, electricity connections, and regular health check-ups.

21. In view of this affidavit, in our considered view, no further directions need to be issued as far as the State of Uttarakhand is concerned at this stage.

State of Assam

22. In an additional affidavit filed on behalf of the State of Assam, it is mentioned that they will undertake the survey and engage reputed organisations/institutions for this purpose and on the basis of the survey, additional shelters would be created or the existing shelters will be upgraded in the phased manner, as may be necessary. The shelters will have the basic requirements necessary for providing safe, secure and comfortable shelter for the homeless.

23. We direct that an affidavit be filed by the State of Assam within a period of two months indicating whether the process has started or not.

State of Kerala

24. In the affidavit filed on behalf of the State of Kerala, it is mentioned that nine shelters for the homeless have been established in the nine districts of Kerala.

25. In view of this affidavit, no further affidavit for the time being is required to be filed by this State.

State of Jharkhand

26. In the affidavit filed by the State of Jharkhand, it is mentioned that the Government of Jharkhand is committed to provide all required amenities, including night shelters for urban shelterless people. It is further mentioned that out of 26 urban local bodies, shelters have been constructed in five cities, namely, Ranchi, Dhanbad, Chaibasa, Deogarh and Jasidih.

27. In view of this affidavit, no further affidavit for the time being is required to be filed by this State.

State of Sikkim

28. It is mentioned that the problem of homeless does not exist in the entire State, but it is also incorporated in the affidavit that in case such need arises, other facilities like mattresses, quilts/blankets, drinking water and toilets, etc. would be provided.

29. In view of this affidavit, no further affidavit is required to be filed by the State of Sikkim.

State of Uttar Pradesh

30. In the affidavit, it is mentioned that there are seven permanent night shelters and one temporary night shelter in the State. It is also mentioned in the affidavit that it proposes to construct permanent shelter homes in six metropolitan cities, such as, Lucknow, Kanpur, Agra, Allahabad, Varanasi and Meerut. The land required for construction of these shelter homes shall be provided free of cost either by the Nagar Nigam or the Development Authority in each of the aforesaid six towns. The construction of such shelter homes shall be monitored at the local level by the Divisional Commissioner concerned. The financial requirement for implementing the aforesaid proposal shall be met by the State Urban Development agency.

31. In principle, the State has agreed to provide night shelters according to the norms only to evaluate the progress made in the matter. We would like the State to file an affidavit within a period of two months.

Union Territory of Puducherry

32. It is mentioned in the affidavit that so far 1102 tenements have been constructed in eight places in Puducherry. In these tenements 1102 homeless families have been provided with permanent shelters. Another 124 homeless families will be rehabilitated in 124 tenements, which are under construction.

33. In view of this affidavit, no further directions are necessary so far as the Union Territory of Puducherry is concerned.

State of Karnataka

34. The State of Karnataka has indicated in the affidavit that the State undertakes to conduct a comprehensive survey to identify the urban homeless within a period of six months. Based on the result of survey, necessary action will be taken to provide basic facilities so that people can enjoy the fundamental right of life with dignity.

35. We direct the State of Karnataka to file an affidavit about the progress of their survey within a period of two months from today.

State of Punjab

36. In the affidavit filed on behalf of the State of Punjab, it is mentioned that as regards the survey for identification of urban homeless, the Department of Urban Local Bodies and the Department of Rural Development and Panchayats have been directed to carry out the survey within two months. The Department of Urban Local Bodies will take action

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to provide night shelters and other services after the identification of homeless persons.

37. The Department of Social Security and Women and Child Development will provide community kitchen at an appropriate scale as per the directions of this Court.

38. The Department of Food, Civil Supplies and Consumer Affairs shall take action to issue AAY ration cards to the homeless population within one month after the completion of the identification subject to direction of this Court. The beneficiaries would be entitled to rations at the scale fixed by the Union Government by AAY families.

State of Meghalaya

39. In the affidavit filed on behalf of the State of Meghalaya, it is mentioned that the State requires time to make survey of the shelterless population, including street children in the cities and two months' time has been prayed for this purpose by the learned counsel.

40. We direct the State of Meghalaya to file an affidavit within a period of two months indicating the progress in the matter.

Union Territory of Andaman and Nicobar Islands

41. The problem of homeless and destitution is not a serious problem in the Islands. Therefore, no directions are necessary to be passed so far as the Union Territory of Andaman and Nicobar Islands is concerned.

State of Manipur

42. Similarly, there is no existence of urban homeless people in this State. Therefore, no directions are necessary to be passed so far as this State is concerned.

State of Tamil Nadu

43. An affidavit, which has been filed by the State of Tamil Nadu, does not focus on the problems of the shelter for homeless people.

44. We direct the State of Tamil Nadu to file an additional affidavit within a period of two months indicating as to what progress has been made in this regard by the State.

National Capital Territory of Delhi

45. Mr Hansraj, Additional Secretary, Department of Urban Development, Government of National Capital Territory of Delhi, has filed a very comprehensive affidavit. In the affidavit it is mentioned that Government of National Capital Territory of Delhi is in the process of formulating a policy framework and plan for caring and protecting the rights of homeless citizens of Delhi.

46. The Government of NCT of Delhi has established an autonomous body called "Samajik Suvidha Sangam" or "Mission Convergence" — a society registered under the Societies Registration Act to provide an institutional mechanism for unifying social policies impacting the poor and to integrate, establish, manage, operate, maintain and facilitate the integrated

delivery of welfare entitlements to the underprivileged in an efficient and transparent manner. All the details have been given on behalf of the autonomous organisation. It has also mentioned that St Stephen Hospital is the "Mother NGO" for homeless. This project is being run by the Community Health Department of St Stephen's Hospital. The "Mother NGO" in consultation with various stakeholders has submitted a report titled "Policy Framework and Plan for Caring and Protecting the Rights of Homeless Citizens of Delhi". A comprehensive annexure has also been filed giving details of these plans.

47. It is also mentioned in the affidavit that "Mission Convergence" has initiated a survey of homeless and that the survey is currently in progress and the same is to be completed by 31-5-2010. Since the survey of homeless is a specialised work, interactive meetings are being held with an international group, namely, UNDP, Bangladesh to determine the methodologies of the homeless survey and to finalise the same.

48. In the affidavit, it is mentioned that NGO, Samya had conducted survey and identified 15,000 homeless beneficiaries of which 14,850 which have been approved for giving "homeless cards". These cards are being prepared zonewise and the list is displayed at the office of the Assistant Commissioners/Circle Office for distribution of the special homeless cards to the beneficiaries after obtaining their biometric impressions. The NGO, Samya has also been informed to facilitate delivery of these cards to the beneficiaries and enable them to lift the specified food articles and kerosene oil allocated from the linked fair price shop/kerosene oil depot. The details have been mentioned in the AAY programme.

49. It is mentioned in the affidavit that under the Central Scheme of Food and Supplies Department, Government of NCT of Delhi is carrying out review of BPL/AAY household cards which were issued before 15-1-2009. It is simultaneously carrying out biometric identification of head of family of each household to eliminate fictitious, bogus and ineligible cards and those who have left Delhi.

50. The Government of NCT of Delhi has started "Hunger Free Delhi Campaign — Aap Ki Rasoi" with the active participation of corporate and willing organisation. This programme is to provide food to the destitute people. The affidavit also mentioned about the Mid-Day Meal programme.

51. It is also mentioned in the affidavit that there is Sarva Shiksha Abhiyan for out of school children.

52. Regarding the shelter for homeless, it is mentioned that currently Delhi has 88 night shelters. Most of these shelters are temporary and running in tents. The conditions of shelters need radical improvement. Looking to the population of Delhi, 130 permanent shelters are going to be set up. In addition to these, the Delhi Government proposes to set up 50 temporary shelters during winter months. In total, Delhi will have 186 shelters during winters and 130 shelters all through the year and all kinds of basic facilities

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would be provided in these shelters. They have made provisions for de-addiction centres and recovery shelters also.

53. The Delhi Government has very minutely and carefully analysed the problems of homeless people living in these shelters and is trying to provide a comprehensive programme for the homeless. We must compliment the Government of NCT of Delhi for this effort. We would like the Government of NCT of Delhi to file a further affidavit indicating what progress has been made on different fronts.

State of Bihar

54. We are totally unsatisfied with the affidavit which has been filed by the Chief Secretary of the State of Bihar. The learned counsel appearing for the State prays for and is granted four weeks' time to file a proper affidavit. We would like an additional affidavit to be filed with concurrence of the Chief Minister of the State.

State of Andhra Pradesh

55. An affidavit has also been filed by the State of Andhra Pradesh. The Chief Secretary, in the affidavit, has mentioned that the State of Andhra Pradesh has been one of the first States in the country to start a separate department for sustained effort for eradication of rural poverty called "Society for Elimination of Rural Poverty" which has formulated the Andhra Pradesh Rural Poverty Reduction Project for a focused approach for elimination of rural poverty. It is also mentioned that situation of urban poor living in slums requires special attention. Provision of pucca house for every homeless poor has been a pious purpose of the State Government.

56. Regarding night shelters, it is mentioned that there are 124 municipalities and municipal corporations in the State. Out of these, Hyderabad Urban Agglomeration is metro city with a population of more than 57 lakhs. A special action plan has been formulated for providing shelters to the homeless. Under this, more than one lakh houses are under construction. Apart from this, it has plan to start 60 night shelters at the rate of one for every one lakh population in the city of Hyderabad before 31-12-2010. These shelters would be fully occupied (*sic* equipped) with beds and boarding, drinking water, lockers, first aid, etc.

57. The following measures are taken for effective implementation of this initiative:

(*i*) Survey for identification of the shelterless people in the Greater Hyderabad is programmed to be taken up and completed by 31-5-2010.

(*ii*) Sixty buildings and converting them for use as night shelters to the shelterless people will be done by 30-6-2010. If required, additional floors will be constructed to accommodate all the homeless.

(*iii*) Necessary facilities like arrangement of beds, blankets, clothing, etc. periodical medical health check-up and psychiatric care, provision of physical amenities and cooking facilities to be created in the identified night shelters by 30-6-2010.

(*iv*) With a view to promote self-sustenance and empowerment of the shelterless people, it is contemplated to provide suitable skill development trainings to them as a result of which they may get expected livelihood opportunities by October 2010.

(*v*) The children of the shelterless, after their admission into the night shelter, will be referred for admission in the nearby schools for imparting elementary education by 30-6-2010.

(*vi*) The inmates of the night shelters, both men and women will be separately accommodated with a provision of privacy and amenities. The food arrangements as per the recommendations of the dietist will be provided for maintaining the nutritional balance of particularly the pregnant women and lactating mothers in the shelters.

(*vii*) Sensitisation through publicity about existence of night shelters in electronic media and print media for information to the homeless people in the city is also taken up on priority.

(*viii*) Corporate institutions and philanthropic agencies to be included in this activity for development of night shelters and services as part of their corporate social responsibility.

(*ix*) Launching of the enforcement drive so as to pick up the shelterless people from the highly concentrated areas i.e. railway terminals, bus terminals, busy commercial centres/markets, traffic junctions, traffic islands, footpaths, public parks, below flyovers, along nalas, freight complexes and workstations, etc. The GHMC staff and reputed NGOs for this purpose will be involved in the process.

(*x*) A periodical vigilance and supervision of the maintenance and function of night shelters is much important with a view to secure the decency, maintenance of discipline. For this purpose an officer will be made incharge with the responsibility to alert the administration for taking the suitable steps for up keeping the shelters.

(*xi*) Round the clock security to be provided along with necessary watch and ward staff.

(*xii*) The role of NGOs is vital with respect to identification, location and maintenance of night shelters. The reputed NGOs of the city which involve in the programmes of social commitment will be identified for counselling the shelterless.

58. We would like to compliment the State of Andhra Pradesh for filing comprehensive affidavit and demonstrating great sensitivity in dealing with the grave human problem.

59. The State has identified a large number of areas to solve the problems of urban families and others. The sensitivity which has been shown by the State of Andhra Pradesh requires to be emulated by other States and the Union Territories.

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60. We direct the State of Andhra Pradesh to file an additional affidavit within two months to indicate the progress made in various fronts.

State of West Bengal

61. We have perused the affidavit filed by the Principal Secretary to the Government of West Bengal. The affidavit has covered various aspects but we would like the Principal Secretary to file an additional affidavit dealing with the problems of urban homeless people in the State of West Bengal. Let the same be filed within a period of two months.

State of Chhattisgarh

62. The Joint Director, Urban Administration and Development, Government of Chhattisgarh, has filed an affidavit in which it is mentioned that there are ten cities in the States where the population is more than one lakh and in those cities night shelters have been provided.

63. In view of the above, no further affidavit is required to be filed by the State of Chhattisgarh.

State of Tripura

64. The Additional Resident Commissioner has filed an affidavit. In the affidavit, it is mentioned that only Agartala has more than one lakh of population and after proper survey, night shelters would be provided.

65. Let an affidavit in compliance be filed within a period of two months.

State of Maharashtra

66. We direct the Chief Secretary of the State of Maharashtra to file a comprehensive report regarding problems of the urban homeless in the State of Maharashtra.

67. Let the same be done within a period of two months. Place these matters on 21-7-2010.

IA No. 90

68. Place this application on 10-5-2010.

69. The term of the Central Vigilance Committee appointed on Public Distribution System, which is due to expire on 30-6-2010, is further extended for another period of six months i.e. up to 31-12-2010.

70. Place the matters relating to the Hon'ble Justice D.P. Wadhwa's Committee Report on 22-7-2010.

Court Masters

True Copy—

ANNEXURE R-22

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framed but not decided — Hence, matter remanded to High Court to decide the same in accordance with law after giving opportunity of hearing to parties (Paras 2 and 3) a

Appeal allowed by the Supreme Court held as above. AD-M/46269/SV

ORDER

1. Leave granted. Heard learned counsel for the parties.

2. By the impugned order, the High Court, though framed substantial question of law involved in second appeals but without deciding the same, allowed the appeals and remitted the matter to the first appellate court. In our view, on this ground alone, the impugned order is fit to be set aside. b

3. Accordingly, the appeals are allowed, the impugned order rendered by the High Court is set aside and the matter is remanded to it to decide second appeals in accordance with law after giving opportunity of hearing to the parties. c

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(2013) 14 Supreme Court Cases 368

(Record of Proceedings) d

(BEFORE DR DALVEER BHANDARI AND DIPAK MISRA, JJ.)

PEOPLE'S UNION FOR CIVIL LIBERTIES
(PDS MATTERS) .. Petitioner;

Versus

UNION OF INDIA AND OTHERS .. Respondents. e

Writ Petition (C) No. 196 of 2001 with IAs Nos. 90, 93, 98, 102-108, 110-112 in WP (C) No. 196 of 2001, Contempt Petition (C) No. 99 of 2009 and WP (C) No. 277 of 2010, decided on March 16, 2012

Constitution of India — Art. 21 — Public distribution system (PDS) — Corruption and pilferage in PDS — Computerisation as a remedy — General consensus noted — Taking note of Affidavit of Secretary, GoI, Department of Food and Public Distribution, special drive made to eliminate bogus/duplicate ration cards — 209.55 lakh ration cards eliminated since 2006 saving subsidy of about Rs 8200 crores annually — Creation and management of digitised beneficiary database including biometric identification supply chain management of TPDS commodities till the fair price shops — Illustration of Gujarat — E advanced stage computerisation and bar coded ration cards reduced 16 lakhs ration cards yielding annual saving of Rs 600 crores — GoI task force under Mr Nandan Nilekani, Chairman, UIDAI, directed to recommend an IT strategy for PDS within four weeks — Copy of order sent to him through special messenger — IAs listed for further directions fixing time frame — Human and Civil Rights — Right to food — Freedom from malnutrition and hunger (Paras 1 to 6) f g h

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People's Union for Civil Liberties v. *Union of India*, (2012) 12 SCC 357, *referred to*

SB-M/50756/S

Chronological list of cases cited *on page(s)*

1. (2012) 12 SCC 357, *People's Union for Civil Liberties* v. *Union of India* 369*b-c*

ORDER

1. In pursuance of the directions of this Court[1], Dr B.C. Gupta, Secretary to the Government of India, Department of Food and Public Distribution, New Delhi has filed an affidavit. Copies of the said affidavit have been given to the learned counsel for the petitioner and the counsel appearing for other parties.

2. There seems to be a general consensus that computerisation is going to help the public distribution system in the country in a big way. In the affidavit it is stated that the Department of Food and Public Distribution has been pursuing the States to undertake special drive to eliminate bogus/duplicate ration cards and as a result, 209.55 lakh ration cards have been eliminated since 2006 and the annual saving of foodgrain subsidy has worked out to about Rs 8200 crores per annum. It is further mentioned in the affidavit that end-to-end computerisation of public distribution system comprises creation and management of digitised beneficiary database including biometric identification of the beneficiaries, supply chain management of TPDS commodities till fair price shops.

3. It is further stated in the affidavit that in the State of Gujarat, the process of computerisation is at an advanced stage where issue of bar coded ration cards has led to a reduction of 16 lakh ration cards. It is expected that once the biometric details are collected, this number would increase further. For the present, a reduction of 16 lakh ration cards would translate into an annual saving of over Rs 600 crores. This is just to illustrate that computerisation would go in a big way to help the targeted population of the public distribution system in the country.

4. In the affidavit it is further mentioned that the Government of India has set up a task force under the Chairmanship of Mr Nandan Nilekani, Chairman, UIDAI, to recommend, amongst others, an IT strategy for the public distribution system. We request Mr Nandan Nilekani to suggest us ways and means by which computerisation process of the public distribution system can be expedited. Let a brief report/affidavit be filed by Mr Nandan Nilekani within four weeks from today.

1 *People's Union for Civil Liberties* v. *Union of India*, (2012) 12 SCC 357

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IA No. 110 of 2010

5. Notice has already been issued in this application. Mr Gonsalves, learned Senior Counsel for the petitioner submits that a copy of this application has not been served upon him. Without getting into the controversy, we request the applicant to serve a copy of this application to the learned counsel for the petitioner within a week. Reply to the application be filed within one week thereafter.

6. List this matter on 9-4-2012 for further directions. IA No. 82 also be listed on that date.

7. A copy of this order be sent to Mr Nilekani through a special messenger.

Court Masters

(2013) 14 Supreme Court Cases 370

(BEFORE P. SATHASIVAM AND RANJAN GOGOI, JJ.)

STATE OF KARNATAKA AND OTHERS .. Appellants;

Versus

VIVEKANANDA M. HALLUR AND OTHERS .. Respondents.

Civil Appeals Nos. 8803-805 of 2012†, decided on December 7, 2012

A. Constitution of India — Arts. 226 and 136 — Condonation of delay — Delay of 449 days in filing writ appeal — Held, after going through the reasons stated therein and in the light of the issues to be considered by the Division Bench as well as the financial implication on the State Exchequer, reasons stated for the delay cannot be rejected as unacceptable — Considering the issues raised and the positive direction given by the Single Judge, Division Bench ought to have condoned the delay and gone into the merits of the matter in the light of the provisions of the Karnataka Stamp Act, 1957 — Delay condoned — Matter remitted to High Court for fresh consideration (Para 8)

B. Constitution of India — Art. 226 — Writ appeal — Issues in question not determined — Matter remanded for decision afresh — Held, without expressing anything on merits of the claim of either party, as Division Bench has not adverted to any substantial grounds urged by the State, particularly with reference to the provisions of Art. 5(e)(i) and Expln. (II) of the Karnataka Stamp Act, 1957, impugned order set aside and case remitted to High Court for fresh consideration — High Court to restore writ appeals and dispose of on merits in accordance with law, affording opportunity to all parties including newly impleaded Respondents 4 to 32 along with connected pending writ petitions, preferably within a period of six months

† Arising out of SLPs (C) Nos. 14177-79 of 2010. From the Judgment and Order dated 19-6-2009 of the High Court of Karnataka at Bangalore in WAs Nos. 1023 and 1324-25 of 2009

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ANNEXURE R-23

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(2010) 5 Supreme Court Cases 318

(Record of Proceedings)

(BEFORE DALVEER BHANDARI AND K.S.P. RADHAKRISHNAN, JJ.)

PEOPLE'S UNION FOR CIVIL LIBERTIES .. Petitioner;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

IA No. 94 with IA No. 196 in WP (C) No. 196 of 2001,
decided on February 10, 2010

Human and Civil Rights — Homeless and destitute persons — Night-shelters — For shelterless persons in Delhi — Pursuant to Supreme Court's directions dt. 20-1-2010, status report submitted by Additional Solicitor General appearing for NCT of Delhi — Affidavit also filed on behalf of DDA stating that they had extended their support in this project and making suggestions in the matter — States also directed to file affidavits — Government undertook to provide guidelines for monitoring night-shelters — Homeless eligible persons to get renewable ration cards but that cannot be used as a document of identification — Households of Delhi to be identified under vulnerable and most vulnerable categories for this purpose — Surveys conducted by NGOs — Government of Delhi initiated community kitchens (Aapki Rasoi) for homeless people at 13 distribution centres — Street children also need shelters and rehabilitation — Constitution of India — Art. 21

People's Union for Civil Liberties v. *Union of India*, (2010) 5 SCC 423, *referred to*

R-D/46109/C

Advocates who appeared in this case :

Colin Gonsalves, Senior Advocate (Ms Divya Jyoti and Ms Jyoti Mendiratta, Advocates) for the Petitioner;

P.P. Tripathi, Mohan Parasaran and Vivek Tankha, Additional Solicitor Generals, S.K. Dwivedi and Manjit Singh, Additional Advocate Generals, Dr. Manish Singhvi, Pramod Swarup and T.S. Doabia, Senior Advocates [Jana Kalyan Das, Ms Hemantika Wahi, Somnath Padhan, B.V. Balaram Das, Ms Indra Sawhney, Devanshu Kr. Devesh, Milind Kumar, Riku Sarma (for M/s Corporate Law Group), Ms Rachana Srivastava, T.V. George, Ms Kamini Jaiswal, Khwairakpam Nobin Singh, Girish Agrawal, Ranjan Mukherjee, V.G. Pragasam, S.J. Aristotle, Prabu Rama Subramanian, Jatinder Kr. Bhatia, R.K. Gupta, Rajeev Dubey, Ms Vandana Mishra, Anil Kr. Jha, Kamlendra Mishra, Ravi Prakash Mehrotra, Gopal Singh, Manish Kumar, Rituraj Biswas, Tara Chandra Sharma, Ms Neelam Sharma, Kumar Rajesh Singh, Ms Prema Kumari Singh, B.B. Singh, Anil Shrivastav, Gopal Prasad, G.V. Chandrashekhar, N.K. Verma, Ms Anjana Chandrashekhar, Ramesh Babu M.R., Ms D. Bharati Reddy, Sanjay R. Hegde, Ms Sumita Hazarika, Kamal Mohan Gupta, Abhinav Mukerji, Ajay Pal (for Kuldip Singh), Ms A. Subhashini, Ravindra Keshavrao Adsure, Prashant Kumar, Vishwajit Singh, Sanjay U. Kharde, Ms Asha G. Nair, D.L. Chidananda, S. Wasim A. Qadri, Ms Sunita Sharma, Ms Saima Bakshi, Ron Bastian, D.S. Mahra, Ms Varuna Bhandari-Gugnani, Ms Sushma Suri, Ms Anil Katiyar, K.V. Mohan, Rajesh Srivastava, Anuvrat Sharma, Pragyan P. Sharma, P.V. Yogeshwaran, K.N. Madhusoodhanan, R. Sathish, R.C. Kaushik, Pradeep Misra, Venkateswara Rao Anumolu, B.S. Banthia, G. Prakash, D.K. Sinha, Vikas Mehta, Naresh K. Sharma, Anis Suhrawardy, S.M. Jadhav, Balaji Srinivasan, B.D. Vivek, Ms Madhusmita Bora, Edward Belho, Enatoli Sema, C.M.K. Kennedy, T. Harish Kumar,

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Prasanth P., V. Vasudevan, Sanjib Sen, Ms Anuja Chopra, P. Parameswaran, V.B. Saharya (for M/s Saharya and Co.), Ms Aruna Mathur, Viman Dubey and Amarjeet Singh Girsa, Advocates] for the Respondents.

Chronological list of cases cited *on page(s)*

1. (2010) 5 SCC 423, *People's Union for Civil Liberties* v. *Union of India* 319*b-c*

ORDER

1. In pursuance of the directions of this Court for providing shelter to shelterless people in Delhi, Mr Mohan Parasaran, learned Additional Solicitor General appearing for NCT of Delhi has submitted a status report. In the status report it is mentioned that pursuant to the directions of this Court passed on 20-1-2010[1], an urgent meeting was called by the Chief Secretary, Government of NCT of Delhi to examine the problem of providing adequate shelter in the light of the prevailing cold weather conditions in the capital. The significant decisions taken in the meeting convened by the Chief Secretary, NCT of Delhi are as follows:

(*1*) It was decided to double the existing number of accommodations in the night-shelters through the Municipal Corporation of Delhi from the existing 5000 persons to a capacity of 10,000 persons.

(2) In the case of Revenue Department of Delhi Government, the increase was by 500 persons.

2. It is also mentioned in the status report that subsequent to the directions passed by this Court, the Revenue Department of Delhi Government pitched in 7 more night-shelters taking the total number of night-shelters to 24. Prior to that, 17 night-shelters in temporary tents were operational at 17 places in Delhi since December 2009. Those night-shelters are at: Fountain, Mori Gate, Pul Mithai, Jamuna Bazar, Kudaisea Ghat, Shahdara, Nizamuddin, Jhandewalan, Idgah, Meena Bazar, Jama Masjid, Delhi Gate, Anand Parvat near Rachna Cinema (Ratanpuri Chowk), Rajinder Nagar, Himmat Garh Chowk (Asaf Ali Road), Kalkaji Flyover, Okhla Flyover, Sarita Vihar.

3. Seven new additional night-shelters pursuant to the direction of this Court were located at: Raghuvir Nagar, Sarai Kale Khan, Azadpur Fruit Mandi, Kamla Market, Mata Sundari Road, Nigambodh Ghat and Shahdara.

4. In the status report, it is also mentioned that identification of sites as well as the determination of capacity in each shelter was done in active consultation with the NGOs, namely, Ashrey Adhikar Abhiyan and Indo Global Social Service Society (IGSSS). They were closely associated in the entire process of site selection, capacity determination and day-to-day management of the night-shelters. Necessary facilities were provided in these night-shelters to the homeless. Basic amenities such as blankets, drinking water and mobile toilets were provided.

5. Delhi Jal Board has taken the responsibility of providing potable water. Slum and JJ Department, MCD has taken the responsibility of providing mobile toilets and police has provided the security to the inmates

1 *People's Union for Civil Liberties* v. *Union of India*, (2010) 5 SCC 423

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of these temporary night-shelters. The Directorate of Health Services has taken the responsibility of providing facilities for regular health check-up of the inmates of temporary night-shelters. BSES/NDPL has taken the responsibility of providing electricity connections in the temporary night-shelters. The Government is also giving instructions to all the Revenue Deputy Commissioners concerned to associate themselves for coordinating the entire exercise with various Departments/agencies so as to effectively monitor the functioning of these tents. The Revenue Headquarters bears the expenditure for blankets, electricity connections, etc.

6. In pursuance of the directions of this Court, adequate publicity was made in the electronic media and print media so that the homeless people can get information about the shelter homes.

7. In addition to the Delhi Government, Municipal Corporation of Delhi is providing night-shelters in permanent buildings and the same is managed through its Slum and JJ Department in coordination with the NGOs. Before the directions of this Court, the number of night-shelters in permanent buildings was 27. After the directions of this Court, the capacity has increased by 37 w.e.f. 21-1-2010, taking the total number of night-shelters to 64. This has resulted an increase in the capacity from 4165 persons to 8575 persons.

8. It is also mentioned in the report that the facilities that are being provided in the site of night-shelters include electricity, water arrangements, toilet facilities, sanitation arrangement, bedding arrangement in the form of blankets, mattresses and jute mats have been provided and in respect of new night-shelters, procurement has been made by receipt of 2000 blankets, 2000 mattresses and 1000 jute mats.

9. The status report also indicates that for long-term perspective, the Master Plan of Delhi, 2021 provides for one night-shelter for a population of one lakh. The Delhi Development Authority has undertaken to identify and allot sites free of cost or on concessional rates to the Government of NCT of Delhi in view of this being a humanitarian work.

10. Mr Vishnu B. Saharya, learned counsel for the Delhi Development Authority has filed an affidavit today which is sworn to by Mr Ashok Kumar, Commissioner, Planning, Delhi Development Authority, stating that they have extended their support in this project. The provision of night-shelters is envisaged to cater to the shelterless, which are proposed to be provided near the railway terminals, bus terminals, wholesale/retail markets, freight complexes, etc. as per requirements and should be identified keeping in view the major work centres. It is also mentioned therein that special provisions should be made for the homeless women and children including disabled and orphans and old people. In addition, multi-purpose use of the existing facility buildings may be allowed for night-shelter purpose. Provision should also be made for converting existing buildings, wherever available, with suitable modifications into night-shelters.

11. On the basis of 2001 census of houseless population, at least 25 sites were to be earmarked in Delhi for night-shelters. In order to make provision

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of this facility financially sustainable for the local body, innovative concepts such as integrated complex with commercial space on the ground floor and night-shelter on the first floor should be explored. The guidelines and incentive package should be designed by the local agency concerned in collaboration with the Government of NCT of Delhi with a view to develop self-sustaining night-shelters. The houseless population of the year 2001 was 24,966 persons out of a total population of 138 lakhs. As per development norms of MPD-2021, at least 550 to 600 shelterless can be accommodated on a 1000 sq m plot size on long-term basis. Therefore, on every 5 lakh of total population one plot for night-shelter will be required.

12. In the said affidavit it is also mentioned that the Delhi Development Authority being a statutory planning body for long-term perspective is duty-bound to plan and cater to the public needs for providing night-shelter and identifying available places for providing night-shelter for the benefit of affected people.

13. Notices were issued to all the States for providing similar facilities of one night shelter for a population of one lakh in the metropolitan towns. The State of M.P. has filed its affidavit whereas the State of Tamil Nadu and Manipur undertake to file their affidavits during the course of the day. All other States may file their affidavits within two weeks from today, by serving an advance copy thereof upon the Union of India and the petitioner herein.

14. We appreciate the positive response both from NCT of Delhi and the Delhi Development Authority in solving this human problem.

15. Learned Additional Solicitor General submits that the Government undertakes to provide proper guidelines to monitor these night-shelters and these guidelines would be prepared within a period of four weeks from today. While preparing the said guidelines, the NGOs may also be consulted.

16. Mrs Jayshree Raghuraman, Secretary-cum-Commissioner of the Food, Supplies and Consumer Affairs Department, Government of National Capital Territory of Delhi has filed an affidavit in response to the demand of AAY to the desiring people has not been issued. In this affidavit it is stated that Food and Supplies Department issued an order on 9-11-2009 to the Director of SAMYA with a copy to all Assistant Commissioners and FSOs for compliance. By this order, 14,850 persons out of total number of 15,000 presently identified homeless who are eligible to get the cards, were entitled to 10 litres of kerosene oil and 15 kg of specified food articles at below poverty line (for short "BPL") rates i.e. 10 kg wheat and 5 kg rice or vice-à-versa as per their food habits.

17. The cards are issued temporarily for a period of three months and meant only for the purchase of ration and shall not be used as a document of identification. These cards would be issued to 14,850 eligible persons subject to biometric identification. It is further mentioned in the affidavit that the period of validity of homeless cards identified by NGO, SAMYA has now been extended to six months in place of three months' validity to avoid expenses and inconvenience. The homeless card would be extended automatically after six months by a simple procedure of obtaining the

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biometric identification again of the homeless person at the circle office. No further survey would be required.

18. The provisions of the Control Order, 1981 provide for continuous issue/renewal of the card. The Cabinet decision was taken in March 2008, and accordingly the Government of NCT of Delhi launched a new programme facilitating the delivery of welfare entitlements by a single window system under the name of "Samajik Suvidha Sangam" (for short "SSS") or Mission Convergence. The Mission Convergence or SSS is working through Samajik Suvidha Kendras by which the facilities provided by nine Departments of the Government will be delivered through a single window scheme. Fresh applications for BPL and AAY cards will be received, processed and delivered from these kendras.

19. The Deputy Commissioners of the nine districts have been appointed as statutory authorities and have been declared as Additional Commissioners (Food and Supplies) under the Delhi Specified Food Articles (Regulations and Distributions) Order, 1981. Further, financial powers are being given to the Deputy Commissioners of the nine districts to function independently and issue ration cards to all vulnerable and most vulnerable categories. The Mission Convergence database of 3.5 lakh vulnerable households and 2.5 lakh most vulnerable households will be used for issue of fresh BPL/AAY cards as per eligibility norms. In this regard, Mission Convergence/SSS has made work flow chart under which the Samajik Suvidha Kendras will process the application. NGOs will carry out verification.

20. Statutory and administrative powers have been delegated to the Deputy Commissioners of the nine districts, who will carry out checks as deemed necessary and issue ration cards. They will supervise the functioning of the district kendras and then issue necessary orders for providing ration cards in their respective districts.

21. The Samajik Suvidha Sangam had taken a decision to identify all households of Delhi under two categories; one, vulnerable households, and second, most vulnerable households. The SSS has categorised the vulnerable households to include construction labour, rag-pickers, porters and hamaals, casual daily labour, wage labour, street vendor/hawkers, cycle rickshaw drivers, casual domestic workers, workers in small household enterprises and workers in households industries. The most vulnerable households include old people, disabled people, single women, women-headed households, single unprotected children, child-headed households, people with debilitating illness.

22. The SSS has already conducted two surveys in resettlement and rural pockets for identifying vulnerable households and the most vulnerable households. It has covered 5.39 lakh families of which 2.05 lakh households are already covered under the PDS system and are having ration cards. 3.34 lakh households of the surveyed families appear to be without ration cards. The survey of entire Delhi is still on.

23. It is stated that on the instruction of the Government of India the issue of ration to the poor is based on income categories whereas the

vulnerability criteria of the Government of NCT of Delhi is based on proxy indicators of poverty. The two have still to be reconciled. Meanwhile, the Mission Convergence has initiated a new survey of the homeless with the view to get biometric (*sic* impressions) captured to get a firm list of homeless people.

24. In the affidavit it is also mentioned that the NGO, SAMYA had conducted survey and identified 15,000 homeless beneficiaries of which 14,850 have been approved for giving of "homeless cards". These cards are being prepared zonewise and a list is displayed at the Office of the Assistant Commissioners/circle office for distribution of the special homeless cards to the beneficiaries after obtaining their biometric impressions. The NGO, SAMYA has also been informed to facilitate delivery of these cards to the beneficiaries and enable them to lift the specified food articles (SFA) and kerosene oil allocated from the linked fair price shop (FPS)/kerosene oil depot (KOD).

25. Mr Gonsalves, learned counsel for the petitioner submitted that the State Government has tried to deal with the problems of the poor homeless in right earnest, but the Government ought to have issued AAY cards in which the quantity of food entitlement is larger and is given at a lower rate.

26. Mr Parasaran, learned Additional Solicitor General appearing for the NCT of Delhi will take instructions.

27. The Commissioner, Shri N.C. Saxena and Special Commissioner of the Supreme Court, Shri Harsh Mander has submitted a report. The learned Additional Solicitor General may take instructions and file reply, if any, within two weeks from today.

28. Mr Gonsalves, learned counsel for the petitioner has also brought to our notice that the Government of Delhi has initiated a programme of community kitchens (Aapki Rasoi) which serves a nutritious balanced meal for the homeless people at about 13 distribution centres across the city. According to Mr Gonsalves, it is a laudable initiative but it caters to the need of only five per cent of the homeless.

29. Mr Parasaran, learned Additional Solicitor General submits that he would take instructions and file an additional affidavit to this effect.

30. Mr Gonsalves, learned counsel for the petitioner also pointed out the problem of street children. According to him, street children suffer from many denials and vulnerabilities. These include, deprivation of responsible adult protection; coercion to work to eat each day; work in unhealthy occupations on streets like rag-picking, begging and sex work; abysmally poor sanitary conditions. They have inadequate nutrition from begging and according to him the number of such children in Delhi alone is over 50,000. He submitted that the Delhi Government has an excellent scheme for providing them shelters and rehabilitation centres but that cover a very small percentage of these children. There is an urgent need for providing residential homes for street children, especially those without any adult protection so that their food, health and education can be taken care of.

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31. Mr Gonsalves has submitted that the Delhi Government has already begun implementing a pilot project, four residential schools in Delhi and this project has been successfully implemented for the last three years. According to him, the requirement is about 300 such residential schools in Delhi. The similar problem exists all over and according to him, there should be one high quality residential school on the lines of Kasturba Gandhi Vidyalayas for every 50,000 of urban population.

32. Mr Parasaran will take instructions and file an affidavit within two weeks from today. Since other States have yet to file affidavits, we also direct them to file affidavits within two weeks regarding the problems of street children in their respective States.

33. Place the matter on 16-3-2010.

Court Masters

(2010) 5 Supreme Court Cases 324

(BEFORE P. SATHASIVAM AND R.M. LODHA, JJ.)

STATE OF JHARKHAND AND OTHERS .. Appellants;

Versus

MISRILALL JAIN AND SONS AND ANOTHER .. Respondents.

Civil Appeals Nos. 3226-71 of 2010† with Nos. 3272 of 2010‡, 3274-75 of 2010††, 3273 of 2010†‡ and 3276-77 of 2010‡†, decided on April 13, 2010

Mines and Minerals — Mining lease — Demand for enhanced surface rent — Validity of Resolution dt. 17-6-2005 issued by State Government — Executive or legislative order — High Court by impugned judgment quashing said resolution examining its validity partly on assumption that it was issued by State Legislature — However, Resolution dt. 17-6-2005 was an executive order — Moreover, aspects germane for consideration of controversy overlooked by the High Court, while certain irrelevant aspects taken into consideration — Hence, matter remitted to High Court for reconsideration — Mines and Minerals (Development and Regulation) Act, 1957 — Ss. 2, 3, 4, 5, 13, 15 and 17 — Mineral Concession Rules, 1960 — Rr. 27(1)(d) and 31 — Jharkhand Minor Mineral Concession Rules, 2004 — R. 29(1)(d) — Administrative Law — Administrative or Executive function — Administrative orders/decisions/Executive instructions/orders — What are (Paras 3, 4, 6 and 16 to 19)

Appeals allowed P-D/45900/C

† Arising out of SLPs (C) Nos. 24489-534 of 2007. From the Judgment and Order dated 7-5-2007 of the High Court of Jharkhand at Ranchi in WPs (C) Nos. 1281 of 2006 with Nos. 596, 1323, 1369, 1398, 2495, 1277, 1253, 398 of 2006, WP (S) No. 2233 of 2006, WPs (C) Nos. 2199, 1750, 1021, 1032, 1439, 1797, 1877, 1884, 1958, 2078, 1581, 1720, 2342, 2358, 2359, 2361, 893, 854, 2052, 2007, 2266, 1498 of 2006, 5831 of 2005, 3168, 2057, 4228, 1297, 1267, 3906, 5014, 4883, 5655, 4169, 2217 of 2006, 362 of 2007 and WP (T) No. 1463 of 2006

‡ Arising out of SLP (C) No. 7199 of 2008

†† Arising out of SLPs (C) Nos. 7200-01 of 2008

†‡ Arising out of SLP (C) No. 7202 of 2008

‡† Arising out of SLPs (C) Nos. 7203-04 of 2008

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ANNEXURE R-24

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IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C)No.607 of 2016

LOKNITI FOUNDATION .....PETITIONER

VERSUS

UNION OF INDIA AND ANR. .....RESPONDENTS

O R D E R

1. The petitioner has approached this Court for a commendable cause. The prayer made in the writ petition is, that there should be a definite mobile phone subscriber verification scheme, to ensure 100% verification of the subscriber. It is the prayer of the petitioner, that the identity of each subscriber, as also, his/her address should be verified, so that no fake or unverified phone subscriber, can misuse a mobile phone. It was the contention of the learned counsel for the petitioner, that the instant prayer is imperative, as mobile phones are, used not only for domestic criminal activity, but also, for known terrorist activity (sometimes with foreign involvement).

Consequent upon notice being issued to the Union of India, a short counter affidavit has been filed on its behalf, wherein, it is averred as under:

"22. That however, the department has launched `Aadhaar based E-KYC for issuing mobile connections' on 16th August, 2016 wherein the customer as well as Point of Sale (PoS) Agent of the TSP will be authenticated from Unique Identification Authority of India (UIDAI) based on their biometrics and their demographic data received from UIDAI is stored in the database of TSP along with time stamps. Copy of letter No.800-29/2010-VAS dated 16.08.2016 is annexed herewith and marked as Annexure R-1/10.

23. As on 31.01.2017, 111.31 Crores aadhaar card has been issued which represent 87.09% of pupulations. However, still there are substantial number of persons who do not have aadhaar card because they may not be interested in having Aadhaar being 75 years or more of age or not availing any benefit of pension or Direct Benefit Transfer (DBT). Currently Aadhaar card or biometric authentication is not mandatory for obtaining a new telephone connection. As a point of information, it is submitted that those who have Aadhaar card/number normally use the same for obtaining a new telephone connection using E-KYC process as mobile connection can be procured within few minutes in comparison to 1-2 days being taken in normal course.

24. That in this process, there will be almost `NIL' chances of delivery of SIM to wrong person and the traceability of customer shall greatly improve. Further, since no separate document for Proof of Address or Proof of Identity will be taken in this process, there will be no chances of forgery of documents."

3. The learned Attorney General, in his endeavour to demonstrate the effectiveness of the procedure, which has been put in place, has invited our attention to the application form, which will be required to be filled up, by new mobile subscribers, using e-KYC process. It was the submission of the learned Attorney General, that the procedure now being adopted, will be sufficient to alleviate the fears, projected in the writ petition.

4. Insofar as the existing subscribers are concerned, it was submitted on behalf of the Union of India, that more than 90% of the subscribers are using pre-paid connections. It was pointed out, that each pre-paid connection holder, has to *per force* renew his connection periodically, by making a deposit for further user. It was submitted, that these 90% existing subscribers, can also be verified by putting in place a mechanism, similar to the one adopted for new subscribers. Learned Attorney General states, that an effective programme for the same, would be devised at the earliest, and the process of identity verification will be completed within one year, as far as possible.

5. In view of the factual position brought to our notice during the course of hearing, we are satisfied, that the prayers made in the writ petition have been substantially dealt with, and an effective process has been evolved to ensure identity verification, as well as, the addresses of all mobile phone subscribers for new subscribers. In the near future, and more particularly, within one year from today, a similar verification will be completed, in the case of existing subscribers. While complimenting the petitioner for filing the instant petition, we dispose of the same with the hope and expectation, that the undertaking given to this Court, will be taken seriously, and will be given effect to, as soon as possible.

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6. The instant petition is disposed of, in the above terms.

.....CJI.
(JAGDISH SINGH KHEHAR)

.....J.
(N.V.RAMANA)

NEW DELHI;
FEBRUARY 6, 2017.

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ITEM NO.9 COURT NO.1 SECTION PIL(W)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Writ Petition(s)(Civil) No(s).607/2016

LOKNITI FOUNDATION Petitioner(s)

VERSUS

UNION OF INDIA AND ANR. Respondent(s)

Date : 06/02/2017 This petition was called on for hearing today.

CORAM :
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE N.V. RAMANA

For Petitioner(s) Dr.Ashok Dhamija, Adv.
Dr. Kailash Chand, AOR

For Respondent(s) Mr.Mukul Rohtagi, AG
Mr.A.N.S.Nadkarni, ASG
Mr.Vijay Prakash, Adv.
Ms.Sadhna Sandhu, Adv.
Mr.Jai Dehadrai, Adv.
Mr.Santosh Salvadore Rebello, Adv.
Ms.Sneha S.Prabhu Tendulkar, Adv.
Mr.Ajit Yadav, Adv.
Mr.G.S.Makker, Adv.

For TRAI Mr.Sanjay Kapur, Adv.
Mr.Anmol Chandan, Adv.
Ms.Priyanka Das, Adv.
Ms.Shubhra Kapur, Adv.

Upon hearing the counsel the Court made the following
O R D E R

The instant petition is disposed of, in terms of the signed order.

(SATISH KUMAR YADAV)
AR-CUM-PS

(RENUKA SADANA)
ASSISTANT REGISTRAR

(Signed order is placed on the file)

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ANNEXURE R-25

(272)

Greater Cleveland Wel. Rights Org. v. Bauer, 462 F. Supp. 1313 (N.D. Ohio 1978)

U.S. District Court for the Northern District of Ohio - 462 F. Supp. 1313 (N.D. Ohio 1978)
December 21, 1978

462 F. Supp. 1313 (1978)

GREATER CLEVELAND WELFARE RIGHTS ORGANIZATION et al., Plaintiffs,

v.

Samuel BAUER et al., Defendants.

Civ. A. No. C78-728.

United States District Court, N. D. Ohio, E. D.

December 21, 1978.

*1314 Lloyd B. Snyder, Jane E. Bielefeld, M. Umar Abdullah, Richard Gurbst, Carolyn C. McTighe, Cleveland, Ohio, for plaintiffs.

David A. Williamson, Cleveland, Ohio, Thomas W. Hess, Asst. Atty. Gen., Geoffrey E. Webster, Dept. of Public Welfare, Columbus, Ohio, for

defendants.

MEMORANDUM, OPINION AND ORDER

CONTIE, District Judge.

Invoking the Court's jurisdiction under 28 U.S.C. § 1343(3) and (4), plaintiff Greater Cleveland Welfare Rights Organization instituted the present action "on behalf of its members and all persons similarly situated." By this action, equitable relief is sought for an alleged violation of the right of privacy as secured by the United States Constitution and Section 7 of the Privacy Act of 1974, Pub.L.No.93-579, 88 Stat. 1846, 1909 (codified at 5 U.S.C. § 552a note).

I. PROCEDURAL HISTORY

The complaint in the instant action was filed upon the granting of plaintiff Greater Cleveland Welfare Rights Organization's motion to proceed in *forma pauperis* on June 23, 1978. Contemporaneously with the filing of its complaint, said plaintiff moved for certification of the present action as a class action and for a temporary restraining order "enjoining defendants Bauer and the Cuyahoga County Welfare Department from using or disclosing to any party social security numbers of plaintiff *1315 class members or any information obtained due to prior use or disclosure of said numbers."

The Court denied plaintiff's motion for a temporary restraining order by its Order of June 26, 1978. Further, by its Order of July 7, 1978, the Court, finding that the named plaintiff was not a member of the class it sought to represent, denied its motion to certify this action as a class action. Subsequently, the Court granted plaintiff's motion for leave to file an amended complaint adding Minnie Player as a named plaintiff. The Court also granted Ms. Player's motion to certify the present action as a class action. The class represented by Ms. Player consists of all present and future Aid to Families with Dependent Children (AFDC) recipients within the State of Ohio.

The defendants in the present action are Kenneth Creasy, individually and in his capacity as Director, Ohio Department of Public Welfare; Samuel Bauer, individually and in his capacity as director of the Cuyahoga County Welfare Department; and the Cuyahoga County Welfare Department.

The hearing of plaintiffs' motion for preliminary injunction was consolidated with the trial on the merits of this action. The Court duly heard testimony and received exhibits on July 23, 1978. At the close of said hearing, the Court denied plaintiffs' motion for a preliminary injunction. The following shall constitute the Court's findings of fact and conclusions of law as required by Rule 52, Federal Rules of Civil Procedure.

II. FACTS

The AFDC program was first established in 1935. Said program provides benefits to families with a needy child:

> (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment; . . .

Social Security Act of 1935 § 406(a), 42 U.S.C. § 606(a). Said benefits are for the benefit of the dependent child and include payments or medical care to meet the needs of said child and also payments or medical care to meet the needs of the relative with whom said child is living. *See* Social Security Act of 1935 § 406(b), 42 U.S.C. § 606(b). The State of Ohio participates in the AFDC program pursuant to Ohio Rev.Code Ann. § 5107.03 (Page Supp.1978).

In order to receive AFDC benefits it is necessary for a person responsible for needy dependent children to complete an "Application For Aid For Dependent Children" (commonly referred to as a "dec" form), both upon initial application and thereafter at six month intervals. Prior to 1975, the dec form in use in Ohio requested the social security number of only the individual completing it. On August 1, 1975, an amendment to the Social Security Act became effective that mandated state welfare departments

obtain social security numbers for all applicants or recipients of AFDC benefits. Thereafter, the dec form was changed to require listing of the social security numbers of all individuals in the "Assistance Group." Below the space provided for said social security numbers, the dec form contains the following:

> Please note: As a condition of eligibility for ADC, you must furnish a Social Security account number for each person in need of ADC regardless of age. Someone from your County Welfare Department will assist you in applying for a number for anyone who does not have one.

The above quoted statement is the only information found on the dec form regarding the social security number requirement.

*1316 Among the information applicants are required to furnish on the dec form is the following:

> (19) (EARNINGS) DO YOU OR YOUR HUSBAND OR WIFE, OR ANY OF THE ADC CHILDREN, HAVE EARNINGS FROM ANY KIND OF WORK?

If the applicant responds in the affirmative to the above question, he then must complete a chart for each person over age 14 having such earnings. Completion of said chart requires the provision of, among other things, the name of the person employed, the name and address of the employer, the number of hours and days worked per week, and the individual's gross earnings.

The Social Security Administration retains computerized wage reports, indexed by social security number, for all individuals for whom social security contributions are made. In approximately 1974, the State of Ohio began making inquiries to the Social Security Administration concerning the possibility of matching the social security numbers of all AFDC recipients in Ohio with the social security numbers of all individuals for whom the Social Security Administration had earnings information. The purpose of such a match would be to verify the information provided by AFDC recipients in response to item (19) of the dec form.

On December 20, 1977, Section 411 of the Social Security Act of 1935, 42 U.S.C. § 611, became effective:

> (a) Notwithstanding any other provision of law, the Secretary shall make available to states and political subdivisions thereof wage information contained in the records of the Social Security Administration which is necessary (as determined by the Secretary in regulations) for purposes of determining an individual's eligibility for aid or services, or the amount of such aid or services, under a state plan for aid and services to needy families with children approved under this part, and which is specifically requested by such state or political subdivision for such purposes.
>
> (b) The Secretary shall establish such safeguards as are necessary (as determined by the Secretary under regulations) to insure that information made available under the

provisions of this section is used only for the purposes authorized by this section.

Thereafter, the Ohio Department of Public Welfare submitted to the Social Security Administration the social security numbers of all individuals over the age of sixteen receiving AFDC benefits during the month of January 1978. These approximately 806,000 social security numbers were then matched with the social security numbers of all individuals for whom the Social Security Administration had earning records for the period of January through June of 1977. The Social Security Administration then returned to the Ohio Department of Public Welfare a list of all the social security numbers for which they had earnings data. For each social security number returned, the Social Security Administration listed the employer's name and address and the gross earnings reported for that number. The Ohio Department of Welfare then pulled from its March 1978 data base the case number, the name, address, date of birth, recipient number, sex, and grant amount for all social security numbers returned by the Social Security Administration.

Thereafter, the Ohio Department of Public Welfare instructed each of the county welfare departments to name one person within its office to serve as "SSA Match List Coordinator." The various match list coordinators were then provided with match list printouts for their counties along with a detailed "Procedure For Working Match Lists."[1]

*1317 The match list coordinators were instructed to check the employment information contained in the files of the matched cases with employment information contained on the match list printouts. If a match list coordinator discovered a discrepancy between the information in the recipient's file and the information on the match list printout, the

next step was to contact the recipient and request permission to seek information from the employer listed on the printout. Such employer would thereafter be contacted regardless of whether the recipient granted permission for such contact.[2] The employer would be asked to confirm that the recipient was an employee and the amount of his gross income.

The ultimate goal of the match program is reference of cases of fraud to county prosecutors. The Ohio Department of Public Welfare's instructions to the match coordinators included the following:

> A determination as to whether there is probable cause to believe that the crime of fraud has been committed will be made by the county welfare director or his designate in each instance where the client has willfully failed to meet his reporting responsibilities. Probable cause will exist when the applicant or recipient has:
>
> . . . .
>
> (A) Knowingly and with intent to deceive or defraud, made a false statement to obtain aid, to obtain a continuance of, an increase in aid or to avoid a reduction in aid; and/or
>
> (B) Knowingly and with intent to deceive or defraud, failed to disclose facts which could have resulted in denial, reduction or discontinuance of aid; and/or

(C) Accepted aid knowing he was not eligible, or accepted aid knowing it was greater than the amount to which he is entitled.

When the CWD determines that there is probable cause to believe that the crime of fraud has been committed, the county welfare department director shall refer the case to the county prosecutor.

A number of cases have now been referred to various county prosecutors. Others are still being "worked" by the match coordinators and future referrals are expected.

By the present action, plaintiffs seek a declaratory judgment as follows:

a. that defendants' action in securing, using and disclosing to third parties social security numbers of ADC recipients and information derived therefrom, without complying with the requirements of § 7 of the Privacy Act, is illegal and unlawful, and in violation of plaintiff class members' constitutional right of privacy;

b. that defendants' use of any and all information gained from the illegal collection and dissemination of ADC recipients' social security numbers violates § 7 of the Privacy Act of 1974 and the United States Constitution.

Further, they seek an order enjoining defendants from:

> a. securing, using and disclosing to third parties, social security numbers of *1318 ADC recipients without complying with the requirements of § 7 of the Privacy Act of 1974;
>
> b. seeking social security numbers from any new applicant for ADC benefits until and unless defendants first provide said persons with all information required by § 7 of the Privacy Act of 1974;
>
> c. using or disseminating any and all information derived from the collection and dissemination of ADC recipients' social security numbers where such collection and dissemination were done without complying with the requirements of § 7 of the Privacy Act.

Finally, they seek an order:

> . . . .
>
> compelling defendants to expunge any and all social security numbers or information derived from the use or disclosure of social security numbers obtained from members of the class.

Plaintiffs do not seek any relief in regard to those cases that have thus far been referred to county prosecutors.

On July 20, 1978, the Ohio Department of Public Welfare notified the various county welfare departments that from that date forth they should have all AFDC recipients, in conjunction with the completion of dec forms, sign a document captioned "Notification/Release Of Information About Social Security Numbers." Said documents recite the fact that furnishing a social security number is a requirement of the AFDC program; list the statutory authority that permits the welfare department to request social security numbers; and contains the following statement regarding how the social security numbers will be used:

> Your social security number will be used as a means of identification in the administration of the ADC or medicaid programs. It will be used to determine your initial or continuing eligibility when contacting other people or agencies in order to obtain or verify information necessary to determine your eligibility and to determine that all public assistance regulations have been met.

III. DISCUSSION

A.

Initially the Court will consider plaintiffs' assertion that the use of their social security numbers in the match program without their prior

permission was violative of their constitutional right to privacy. The Court finds this assertion to be without merit.

The Supreme Court had occasion to discuss the Constitutional right of privacy in *Paul v. Davis,* 424 U.S. 693, 712-13, 96 S. Ct. 1155, 1166, 47 L. Ed. 2d 405 (1976):

> While there is no "right of privacy" found in any specific guarantee of the Constitution, the Court has recognized that "zones of privacy" may be created by more specific constitutional guarantees and thereby impose limits upon government power. See *Roe v. Wade,* 410 U.S. 113, 152-153 [93 S. Ct. 705, 35 L. Ed. 2d 147] (1973). Respondent's case, however, comes within none of these areas. He does not seek to suppress evidence seized in the course of an unreasonable search. See *Katz v. United States,* 389 U.S. 347, 351 [88 S. Ct. 507, 19 L. Ed. 2d 576] (1967); *Terry v. Ohio,* 392 U.S. 1, 8-9 [88 S. Ct. 1868, 20 L. Ed. 2d 889] (1968). And our other "right of privacy" cases, while defying categorical description, deal generally with substantive aspects of the Fourteenth Amendment. In *Roe* the Court pointed out that the personal rights found in this guarantee of personal privacy must be limited to those which are "fundamental" or "implicit in the concept of ordered liberty" as described in *Palko v. Connecticut,* 302 U.S. 319, 325 [58 S. Ct. 149, 82 L. Ed. 288] (1937). The activities detailed as being within this definition were ones very different from that for which respondent claims constitutional protectionmatters relating to marriage, procreation, contraception, family relationships, and child

> rearing and education. In these areas it has been held that there are limitations on the States' power to substantively regulate conduct.

In the present case, plaintiffs assert that the constitution was violated when defendants *1319 used the social security numbers of class members in the match program without having previously informed them of such intended use. As in *Paul,* this is "very different" from the rights which have been recognized as "fundamental" or "implicit in the concept of ordered liberty." It is clear that defendants' activities cannot be viewed as violative of any right to privacy protected by the constitution. *See Jaffess v. HEW,* 393 F. Supp. 626, 629 (S.D.N.Y.1975).

B.

The Court need next turn to plaintiffs' contention that defendants' utilization of the social security numbers of the class members in the match program without prior permission to do so was violative of Section 7 of the Privacy Act of 1974. Further, the Court must determine whether such violation entitles plaintiffs to the relief requested.

Section 7 provides in relevant part as follows:

> (b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

At the outset, it is clear, at least up until July 20, 1978, that defendants were requiring the members of plaintiffs' class to reveal their social security numbers and not providing the information required by Section 7(b). The real issue presented by this case, however, is whether Section 7(b) affords plaintiffs a private cause of action for its violation and, if so, for what relief.

Section 7(b) is silent on the issue of enforcement of the rights afforded by it. If plaintiffs do have a private cause of action, therefore, it must be implicit in the existence of Section 7(b).

There are several factors to be considered on the issue of implied private causes of action: (1) whether the provision asserted creates an especial right in the plaintiff, (2) whether the action of Congress in the field indicates an intent to allow such a remedy or at least an intent not to deny the remedy, (3) whether implication of the remedy would be consistent with the purpose of the right asserted, and (4) whether the cause of action implied would be one appropriate for federal law. *Cort v. Ash,* 422 U.S. 66, 78, 95 S. Ct. 2080, 2088, 45 L. Ed. 2d 26 (1975); *Davis v. Passman,* 571 F.2d 793, 797 (5th Cir. 1978); *Guran Co. v. City of Akron,* 546 F.2d 201, 204 (6th Cir. 1976).

Initially, in regard to the first and fourth above listed factors, Section 7(b) does create an especial right in plaintiffs and the class they represent and a cause of action to enforce said right does not appear to be of a type traditionally relegated to state law. It is clear that in enacting Section 7(b), Congress intended to insure that individuals in the position of plaintiffs and their class could make an informed decision on whether to comply with a request for their social security numbers and to protect such individuals from unauthorized uses of said numbers.[3] Further, it does not appear that state law provides any relief for individuals in the

position of plaintiff class members. Rather, this case presents an instance similar to that feared by the Supreme Court, in a different context, in *J. I. Case Co. v. Borak,* 377 U.S. 426, 434-35, 84 S. Ct. 1555, 1561, 12 L. Ed. 2d 423 (1964): "[If] the law of the State happened to attach no responsibility to the use of misleading proxy statements, the whole purpose of [§ 14(a) of the Securities Exchange Act of 1934] might be frustrated." In the absence of a cause of action to enforce Section 7(b) in the federal courts, said section would provide an empty right with no means of *1320 enforcement. Such would clearly frustrate the intent of Congress.

Although the first and fourth factors to be considered focus, to some degree, on the right involved, the second and third factors appear to require more direct consideration of the type of remedies sought. Plaintiffs in the present case seek two types of remedies; prospective relief in the form of an Order requiring specific disclosure in the future, and relief for defendants' past failure to make such disclosure in the form of an Order preventing further use of information acquired through the match program.

While the legislative history is silent as to any intention to create either a prospective remedy or a remedy for past violations, there is nothing to indicate a disapproval of such actions. See *Ass'n of Data Processing v. Fed. H. Loan Board,* 568 F.2d 478, 484 (6th Cir. 1977).[4]

The final consideration is whether the remedies sought would be consistent with the purpose of the right asserted. The Court is convinced that inferring a right of action for prospective relief is consistent with the purposes of Section 7(b). Such relief will permit individuals in the position of plaintiff class members to make an informed decision on the question of whether to provide defendants with their social security numbers. Further, said relief will discourage defendants from

unnecessarily and improperly using the social security numbers in their possession.

The court, however, does not believe that the relief requested by plaintiffs for the past use of social security numbers is appropriate. Initially, it is clear that the use made of the social security numbers by defendants is not per se impermissible. Rather, the only error committed by defendants was their failure to comply with Section 7(b). Although, as stated previously, Section 7(b) was intended both to afford individuals the opportunity to make an informed decision on whether to reveal their social security number, and to discourage improper use of such numbers, it would appear that the problem of improper use was the prime moving force behind said enactment. In fact, one court has termed the situation in which disclosure of the intended use of social security numbers had not been made but in which the use made of such numbers was otherwise proper, "only a technical violation." *McElrath v. Califano,* Civil Number 77 C 3194 (N.D.Ill. May 23, 1978).

The only purpose that could possibly be served by this Court forbidding defendants from making further use of information gained through the match program is the deterrence of future requests for social security numbers without compliance with Section 7(b).[5] The Court is confident that the granting of prospective relief alone will accomplish the same result without the huge waste of effort and funds that would result from an Order forbidding further use of information gained from the match program.

C.

Having concluded that Section 7(b) affords plaintiffs an implied right of action *1321 for prospective relief, the only issue remaining is whether the present action was rendered moot by the Ohio Department of Public Welfare's notification to the various county welfare departments on July 20, 1978, that in the future all AFDC recipients should sign a "notification/Release of Information About Social Security Numbers." The Court concludes that it was not.

As stated previously, said documents contain the following description of the uses to be made of social security numbers:

> Your social security number will be used as a means of identification in the administration of the ADC or Medicaid programs. It will be used to determine your initial or continuing eligibility when contacting other people or agencies in order to obtain or verify information necessary to determine your eligibility and to determine that all public assistance regulations have been met.

The Court believes that Section 7(b) requires a meaningful disclosure. It does not consider the disclosure now in use meaningful. To comply with Section 7(b), the Court finds, it is necessary to inform recipients that their social security numbers will be used to verify employment information supplied on the dec form with the Social Security Administration. Said disclosure must also include a statement that if the records of the Social Security Administration reveal that the employment information supplied on the dec form is not accurate, the AFDC recipient may be subject to prosecution for fraud.

IV. CONCLUSION

Based on the foregoing, the Court concludes that defendants have in the past violated, and are continuing to violate, Section 7(b) of the Privacy Act of 1974. The Court further concludes that plaintiffs are entitled to relief in the form of an order requiring defendants to, in the future, comply with Section 7(b) of the Privacy Act of 1974. The defendants are hereby ordered to submit, within ten days of the date of this opinion, a proposed disclosure of the intended uses to be made of social security numbers supplied by AFDC recipients. Plaintiffs shall file any objections to said proposed disclosure within five days thereafter.

IT IS SO ORDERED.

NOTES

[1] The match list printouts contained the information provided by the Social Security Administration (the employer's name and address and the gross earnings reported for the matched social security number) and the information from the Ohio Department of Welfare files (case number, name, address, date of birth, recipient number, sex, and grant amount) for all social security numbers matched. As explained by the department in its instructions to the various county welfare departments, the match procedure was not without possibility of erroneous matches:

The accuracy of this SSA wage earnings match is dependent upon the accuracy of the social security numbers which ODPW has in its data base. If ODPW initially gave an incorrect social security number to SSA, the information coming back from the Social Security Administration will be for a wage earner other than the recipient. The other wage earner's

information will be identified as the recipient's because ODPW's data base has the other wage earner's social security number identified as the recipient's. The Social Security Administration gave ODPW social security numbers only; SSA did not give a name associated with the SSN. The name which appears on the computer printout has been supplied from data base to match the social security number returned by the Social Security Administration. Because of the great opportunity for bad matches, the county welfare department emphasizes the necessity for careful verification and casework during this project.

[2] The Court does not consider the fact that some individuals granted defendants permission to contact their alleged employers significant. If any cognizable injury to plaintiffs' rights occurred, it occurred prior to the request for said permission.

[3] As stated in the legislative history, "[t]his provision is intended to permit an individual to make an informed decision whether or not to disclose the social security account number, and it is intended to bring recognition to, and discourage, unnecessary or improper uses of that number." *Analysis of House and Senate Compromise Amendments to the Federal Privacy Act, printed in* 120 Cong.Rec. S21, 817 (daily ed. Dec. 17, 1974) *and in* 120 Cong.Rec. H12, 243 (daily ed. Dec. 18, 1974).

[4] *See Analysis of House and Senate Compromise Amendments to the Federal Privacy Act, printed in* 120 Cong.Rec. S21, 817 (daily ed. Dec. 17, 1974) *and in* 120 Cong.Rec. H12, 243 (daily ed. Dec. 18, 1974).

[5] In this regard, such a remedy would serve a purpose similar to that theoretically served by the "exclusionary rule" in the context of violations of the Fourth Amendment. *But see Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 413, 91 S. Ct. 1999, 2013, 29 L. Ed. 2d 619 (1971) (Burger, C. J., dissenting). There is an important distinction, however,

between violations of the Fourth Amendment and violations of Section 7(b) of the Privacy Act. There is a significant motivation for police officers to violate the Fourth Amendment in their pursuit of individuals guilty of violating the criminal law. There is no such motivation for violations of Section 7(b) by individuals in the position of defendants. In fact, it appears that their positions would be better served by fully informing applicants for AFDC benefits, at the outset, of the possible consequences of fraud and the efforts to be undertaken to detect incidents thereof. By providing such information, defendants would be in a position of preventing fraud before its occurrence rather than trying to discover it afterwards.

ANNEXURE R-26

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Doyle v. Wilson, 529 F. Supp. 1343 (D. Del. 1982)

U.S. District Court for the District of Delaware - 529 F. Supp. 1343 (D. Del. 1982)
January 19, 1982

529 F. Supp. 1343 (1982)

John B. DOYLE, Jr., Plaintiff,

v.

Phyllis S. WILSON, Administrator, Deborah Salter, Chief Clerk, and Officer Conrad of the New Castle County Police Department, Defendants.

Civ. A. No. 81-145.

United States District Court, D. Delaware.

January 19, 1982.

*1344 *1345 *1346 John B. Doyle, Jr., pro se.

Malcolm S. Cobin, Deputy Atty. Gen., Wilmington, Del., for defendants, Phyllis S. Wilson and Deborah Salter.

Jonathan B. Taylor, New Castle County Dept. of Law, Wilmington, Del., for defendant, Officer Kenneth Conrad.

OPINION

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LATCHUM, Chief Judge.

In this § 1983 suit, plaintiff, John B. Doyle, Jr., has filed a two count complaint seeking compensatory and punitive damages from two employees of the Justice of the Peace Court and a New Castle County Police Officer for alleged deprivation of his constitutional rights, arising from two separate incidents. In addition, plaintiff asks this Court to enjoin the police officer and any other employees of the police department from further unspecified harassment and from causing him additional damages. Plaintiff's claims were tried to the Court on December 8, 1981. This opinion represents the Court's findings of fact and conclusions of law pursuant to Rule 52(a), F.R.Civ.P.

I. *Social Security Number Claim*

On October 20, 1980, Doyle was issued a summons by a New Castle County police officer for failure to remain stopped at a stop sign. Doyle contested the ticket, but was found guilty by Judge Johnson in Justice of the Peace Court No. 11 on November 6, 1980 and assessed a fine and costs of *1347 $19.50. Doyle paid the sum, but appealed the conviction to Superior Court. On March 17, 1981, the Deputy Attorney General filed a notice of nolle prosequi with the Superior Court citing insufficient evidence as the basis for the dismissal of the appeal.

Thereafter, Doyle sent his wife to Justice of the Peace Court No. 11 to obtain a refund of the $19.50 which Doyle had previously paid. Mrs. Doyle was advised by Deborah Salter, Chief Clerk of the Court, that because over 30 days had passed since the fine had been paid, a cash refund could not be given and it would be necessary to request the State Treasurer to issue a check to Doyle. For this purpose, the clerk's office would submit a routine voucher to the State Treasurer's office containing Doyle's name, address, phone number and social security number for identification purposes, and information pertinent to the court proceeding and the subsequent nolle prosequi. Salter requested Mrs. Doyle to have her husband contact the clerk's office directly to prepare the necessary papers.

Doyle subsequently telephoned Salter, but refused to reveal his social security number. When Salter asked Doyle the reason for his refusal, Doyle replied that it was "none of her business" and that it was "a private matter." On March 30, 1981, Salter duly

submitted the refund voucher without Doyle's social security number. One day later, Salter received a memorandum from Phyllis Wilson, a secretary in the Administrative Office of the Justice of the Peace Court, through which the voucher had been routed, advising her that the State Treasurer's Office would not accept the voucher without the recipient's social security number. A copy of this memorandum was transmitted to Doyle.

Doyle filed this suit on April 4, 1981, alleging that his right to privacy had been infringed by the Justice of the Peace Court's refusal to refund the $19.50 without disclosure of his social security number. (Docket Item ["D.I."] 1.) The complaint, as originally filed, sought compensatory and punitive damages from, and an award of costs and attorney's fees against, the State of Delaware, and an order enjoining the Police Department of New Castle County from any further harassment of Doyle. On June 22, 1981, this Court dismissed plaintiff's complaint on grounds of sovereign immunity, inadequate factual basis for jurisdiction, lack of personal jurisdiction over New Castle County, and failure to comply with the pleading requirements of the federal rules. (D.I. 11.) The Court subsequently granted relief from judgment and allowed Doyle to amend his complaint to substitute the proper parties. (D.I. 16.) As to that portion of the complaint alleging infringement of his right to privacy, Doyle named Deborah Salter and Phyllis Wilson as defendants. (D.I. 18.) After suit was filed and prior to the amendment of plaintiff's complaint, the State Treasurer refunded the $19.50 to Doyle without first compelling disclosure of his social security number.[1]

Both at trial and in their earlier pretrial motions, defendants Salter and Wilson concentrated their efforts solely on establishing affirmative defenses to this suit, most notably the defense of official immunity. The Court agrees, for the reasons discussed later in this opinion, that these defendants are immune from personal damage liability and, therefore, this portion of plaintiff's suit, which seeks only damages and not declaratory or injunctive relief, is barred. Nonetheless, the Court feels constrained to address at the outset the merits of plaintiff's underlying claim in order to give some guidance to the State Treasurer's Office as to its obligations under federal law and to forestall the filing of similar suits in the future.

. . .

*1348 A. *Right To Privacy*

Generally, the constitutional right to privacy embodies solely "those personal rights that can be deemed fundamental or implicit in the concept of ordered liberty." *McElrath v. Califano,* 615 F.2d 434, 441 (C.A.7, 1980), *quoting Roe v. Wade,* 410 U.S. 113, 152, 93 S. Ct. 705, 726, 35 L. Ed. 2d 147 (1973). The activities ordinarily embraced by this definition relate to the intimate facets of an individual's personal life, namely, marriage, procreation, contraception, family relationships, child rearing or education. *Paul v. Davis,* 434 U.S. 693, 713, 96 S. Ct. 1155, 1166, 47 L. Ed. 2d 405 (1976); *Jaffess v. Secretary, Dept. of Health, Ed. & Welfare,* 393 F. Supp. 626, 629 (S.D.N.Y. 1975). The courts accordingly have held, and this Court concurs in that view, that mandatory disclosure of one's social security number does not so threaten the sanctity of individual privacy as to require constitutional protection. *See McElrath v. Califano, supra,* 615 F.2d at 441; *Greater Cleveland Wel. Rights Org. v. Bauer,* 462 F. Supp. 1313, 1318-19 (N.D.Ohio 1978); *Cantor v. Supreme Court of Pennsylvania,* 353 F. Supp. 1307, 1321-22 (E.D.Pa.), *aff'd without opinion,* 487 F.2d 1394 (C.A.3, 1973); *Conant v. Hill,* 326 F. Supp. 25, 26 (E.D.Va. 1971).

The lack of constitutional support for plaintiff's argument does not end the Court's inquiry, however, because the utilization of social security numbers is regulated to some extent by federal statute. In the factual posture presented by this case, two statutory provisions are pertinent: Section 7 of the Privacy Act of 1974 and a 1976 amendment to the Social Security Act, codified at 42 U.S.C. § 405(c) (2) (C).

Section 7 of the Privacy Act broadly prohibits a state from penalizing an individual in any way because of his failure to reveal his social security number upon request, except in certain narrowly defined circumstances. This provision states in relevant part:

> (a) (1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.
>
> (2) the provisions of paragraph (1) of this subsection shall not apply with respect to

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> (B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.
>
> (b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

5 U.S.C. § 552a note.

In enacting Section 7, Congress sought to curtail the expanding use of social security numbers by federal and local agencies and, by so doing, to eliminate the threat to individual privacy and confidentiality of information posed by common numerical identifiers. *See* S.Rep.No. 1183, 93rd Cong., 2d Sess. *reprinted in* [1974] U.S. Code Cong. & Ad.News 6916, 6944. Underlying this legislative effort was the recognition that widespread use of a standard identification number in collecting information could lead to the establishment of a national data bank or similar informational system, which could store data gathered about individuals from many sources and facilitate government surveillance of its citizens. *Id.* at 6944-45, 6957. It was anticipated that as use of the social security number proliferated, the incentive to consolidate records and to broaden access to them by other agencies of government would in all likelihood correspondingly increase. *Id.* at 6945. Thus, Congress saw a need for federal legislation to restore to the individual the option to refuse to disclose his social security number without repercussion, except in *1349 the specifically delineated circumstances outlined in section 7(a) (2).

The 1976 amendment to the Social Security Act, adopted after the passage of the Privacy Act, furnishes an additional exception to the statutory protection generally accorded to those people who refuse to disclose their social security numbers. That amendment states:

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> (i) It is the policy of the United States that any State (or political subdivision thereof) may, in the administration of any tax, general public assistance, *driver's license, or motor vehicle registration law* within its jurisdiction, utilize the social security account numbers issued by the Secretary for the purpose of establishing the identification of individuals affected by such law, and may require any individual who is or appears to be so affected to furnish to such State (or political subdivision thereof) or any agency thereof having administrative responsibility for the law involved, the social security account number (or numbers, if he has more than one such number) issued to him by the Secretary.
>
> . . . .
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> * * * * * *
>
> (iii) For purposes of clause (i) of this subparagraph, an agency of a State (or political subdivision thereof) charged with the administration of any general public assistance, driver's license, or motor vehicle registration law which did not use the social security account number for identification under a law or regulation adopted before January 1, 1975, may require an individual to disclose his or her social security number to such agency solely for the purpose of administering the laws referred to in clause (i) above ....

42 U.S.C. § 405(c) (2) (C) (i) and (iii) (emphasis added).

Drawing from the language of section 7 and section 405(c) (2) (C), the Court concludes that the State Treasurer's practice of requiring the disclosure of social security numbers, for the purpose of securing a refund of a motor vehicle fine, could pass muster only if the following elements were proved. First, the practice of mandatory disclosure must fall within either of the two pertinent statutory exceptions described above: (1) it must be incident to the administration of a state driver's license or motor vehicle registration law under 42 U.S.C. § 405; or (2) disclosure of the social security number on refund vouchers must be required under a statute or regulation adopted prior to January 1, 1975, under a system of records in existence and operating before that date pursuant to section 7(a) (2) of the Privacy Act. Second, besides proving either of these two elements,

the State Treasurer would have the additional burden of demonstrating compliance with section 7(b) of the Privacy Act, viz., that refund applicants tendering their social security numbers are provided with the following information: whether disclosure is mandatory or voluntary, by what statute or other authority such number is solicited, and what uses will be made of it.

The Court cannot discern on the present record whether mandatory disclosure of Doyle's social security number could qualify as part of the administration of Delaware's driver's license law, although common sense suggests that this interpretation may be logically sound. Similarly, although testimony was presented at trial establishing that disclosure of the social security number on refund vouchers was required under a long-standing practice of the State Treasurer's Office originating before January 1, 1975, defendants could point to no statute or regulation specifically authorizing this practice. Administrative practice alone, however, unsupported by any discrete legal grant of authority, is not enough to satisfy the requirements of section 7(a). *Wolman v. United States Selective Service System,* 501 F. Supp. 310, 311 (D.D.C.1980). Conceivably, the absence of sufficient proof on either of these issues could be attributed to defendants' tactical decision to focus on their affirmative defenses and not to an actual inability to show compliance with these federal statutory provisions, if necessary. Such evidence, accordingly, *1350 might be forthcoming in a more suitable litigation context, in which injunctive or declaratory relief is sought. Without such supporting evidence, however, the State Treasurer's practice of requiring disclosure of social security numbers would be deemed to violate federal law. *See Brookens v. United States,* 627 F.2d 494, 497-98 (C.A.7, 1980); *McElrath v. Califano,* 615 F.2d 434, 440 (C.A.7, 1980); *Green v. Philbrook,* 576 F.2d 440, 445-46 (C.A.2, 1978); *Doe v. Sharp,* 491 F. Supp. 346, 348-49 (D.Mass.1980); *Greater Cleveland Wel. Rights Org. v. Bauer,* 462 F. Supp. 1313 (N.D.Ohio 1978).

In addition, the Court doubts that in requiring the disclosure of social security numbers on vouchers as a matter of course, the State Treasurer has complied with the requirements of section 7(b) of the Privacy Act. As noted previously, this section imposes an affirmative obligation on state agencies to inform individuals who have been requested to disclose their social security numbers of certain information, including the uses to which the number will be put. In enacting this specific measure, Congress intended to "permit an individual to make an informed decision whether or not to disclose the social security account number" and "to bring recognition to, and discourage, unnecessary or improper uses of that number." Analysis of House and

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Senate Compromise Amendments to the Federal Privacy Act, *printed in* 120 Cong.Rec. S21,817 (Dec. 17, 1974) and in 120 Cong.Rec. H12,243 (Dec. 18, 1974), *quoted in Greater Cleveland Wel. Rights Org. v. Bauer, supra,* 462 F. Supp. at 1319 n.3. Thus, adequate explanations of the information required by section 7(b) is critical to the right afforded by section 7(a) to withhold disclosure of the social security number, except in limited circumstances.

The voucher routinely used by the Justice of the Peace Court for refunds of motor vehicle fines, which is submitted to the State Treasurer, nowhere indicates whether disclosure of the social security number is voluntary or mandatory, by what statutory or other authority such number is solicited, or what uses will be made of it. In this case, Doyle himself, after refusing to disclose his number, eventually was informed of the relevant information that disclosure was mandatory pursuant to a practice of the State Treasurer's Office, and that the number would be used merely for identification purposes. The requirements of section 7(b) are not fulfilled, however, when no affirmative effort is made to disclose this information *at* or *before* the time the number is requested and a citizen, like Doyle, must instead pry the pertinent facts from a state agency. *Doe v. Sharp,* 491 F. Supp. 346, 350 (D.Mass.1980). In addition, there is no indication that individuals who fail to question the use of their social security number on the voucher are in any way apprised of the explanations required by section 7(b). Thus, it is apparent that a more "meaningful disclosure" of the information listed in section 7(b) must be provided by the State Treasurer's Office in advance to those individuals required to reveal their social security numbers in order to conform to federal law. *See Greater Cleveland Wel. Rights Org. v. Bauer, supra,* 462 F. Supp. at 1320.

Of course, an assessment of damages against these defendants does not automatically follow from a finding that the State Treasurer and Justice of the Peace Court failed to comply with the requirements of section 7. At least one Court has questioned whether section 7 can support a private right of action for retrospective relief. *See Greater Cleveland Wel. Rights Org. v. Bauer, supra,* 462 F. Supp. at 1320. The Court need not reach this thorny issue, however, because it finds that damages against Salter and Wilson are barred in any event by the doctrine of official immunity.

B. *Official Immunity*

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An action in federal court for damages against a state officer acting in his official capacity is barred by the Eleventh Amendment because such an action, if successful, depletes the state treasury and is tantamount to a suit against the state. *Edelman v. Jordan,* 415 U.S. 651, 663, 94 *1351 S.Ct. 1347, 1355, 39 L. Ed. 2d 662 (1974); *Laskaris v. Thornburgh,* 661 F.2d 23, 25 (C.A.3, 1981). The Eleventh Amendment does not bar an award of damages against a state official sued in his individual capacity, however, *Laskaris v. Thornburgh, supra,* at 26, and Doyle's suit against defendants Salter and Wilson may be maintained on that basis, subject of course to the affirmative defense of official, or good faith, immunity.

Generally, in order to establish the defense of official immunity a state officer must prove by a preponderance of the evidence: (1) that he acted without any malicious intention to violate a constitutional privilege or other legally recognized right held by the plaintiff; and (2) that he did not know and reasonably could not have realized that his actions would cause a deprivation of constitutional rights or other legal injury. *Skehan v. Board of Trustees of Bloomsburg State College,* 538 F.2d 53, 62 (C.A.3), *cert. denied,* 429 U.S. 979, 97 S. Ct. 490, 50 L. Ed. 2d 588 (1976); *Skomorucha v. Wilmington Housing Authority,* 504 F. Supp. 831, 836 (D.Del.1980); *Space Age Products, Inc. v. Gilliam,* 488 F. Supp. 775, 785 (D.Del.1980); *Masjid Muhammad-D.C.C. v. Keve,* 479 F. Supp. 1311, 1320 (D.Del. 1979). The test for determining the existence of good faith immunity necessarily combines a consideration of both subjective and objective factors, including the state of mind of the official, the scope of discretion and responsibilities entrusted to the official, and all the circumstances as they reasonably appeared at the time of the events in question. *Wood v. Strickland,* 420 U.S. 308, 321-22, 95 S. Ct. 992, 1000-01, 43 L. Ed. 2d 214 (1975); *Scheuer v. Rhodes,* 416 U.S. 232, 247, 94 S. Ct. 1683, 1692, 40 L. Ed. 2d 90 (1974); *Masjid Muhammad-D.C.C. v. Keve, supra,* 479 F. Supp. at 1320. After carefully reviewing these various elements, the Court concludes that defendants Salter and Wilson have adequately discharged their burden of proof on this issue and are immune from personal damage liability.

First, it is clear that in implementing the State Treasurer's practice of requiring social security numbers on voucher forms, neither defendant acted with a malicious intention to violate plaintiff's legal rights. Both defendants testified that they had no reason whatsoever to suspect that Doyle's rights were being violated and there is nothing in the record to suggest that this subjective belief was not sincere.

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Second, the evidence firmly establishes that these defendants did not know and reasonably could not have recognized that their actions transgressed federal law. In determining whether this "objective prong" of the official immunity test is satisfied, courts in this district have asked three questions: (1) was the right allegedly violated clearly established at the time of the challenged conduct; (2) would a reasonable person in the defendant's position have known enough about the law to be aware of that right; and (3) would a reasonable person in the defendant's position have known enough about the facts in question to have realized that his conduct violated that right. *Space Age Products, Inc. v. Gilliam, supra,* 488 F. Supp. at 785; *Masjid Muhammad-D. C.C. v. Keve, supra,* 479 F. Supp. at 1321.

Even assuming arguendo that Doyle's refusal to disclose his social security number was a clearly established right, the Court cannot conclude that a reasonable person in Salter's and Wilson's respective positions would have been aware of that right and would have recognized that any effort to compel disclosure of the number or to deny Doyle his refund violated federal law. The use of social security numbers as a means of identification, both in private commercial transactions and in citizen communications with government, is commonplace, despite Congressional efforts to curb expanding compulsory disclosure of the number. The requirements of section 7 of the Privacy Act have not been so widely disseminated, moreover, as to become an integral part of the public consciousness. To the contrary, the average citizen automatically reveals his social security number on a myriad of forms in the course of his daily life, never questioning the propriety of forced disclosure or suspecting that in many situations the number may be withheld at his option.

***1352** In addition, there is no cause to believe that a reasonable individual in Salter's or Wilson's position would be privy to information beyond that available to the average citizen which would lead her to question the practice of mandatory disclosure. At the time that the events upon which liability is predicated occurred, the practice of requiring social security numbers on vouchers had been in force since at least 1966 and had gone unchallenged for that 15-year period. Salter, who had worked in the Justice of the Peace Court for seven years at the time, had routinely processed applications for refunds with the social security number provision, and had no reason to doubt the legality of that requirement. Wilson joined the Administrative Office of the Justice of the Peace Court on March 2, 1981, less than one month before Doyle sought his refund, and was informed at that time by her superiors that the State Treasurer's Office would not accept refund vouchers without the applicant's social security number. Likewise, based on past

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procedure and common experience, Wilson had no cause to question the propriety of compulsory disclosure.

The Court thus concludes that notwithstanding the merits of plaintiff's underlying right to privacy claim, defendants Salter and Wilson have demonstrated by a preponderance of the evidence that they each are entitled to the defense of official immunity. Judgment will be entered for defendants on this portion of plaintiff's complaint.

II. *Search and Seizure Claim*

Doyle's second claim arises from another alleged motor vehicle violation in which he was involved. On February 12, 1981, at approximately 10:00 p. m., New Castle County Police Officer Kenneth Conrad was cruising on Moores Lane near Castle Hills School, an area which had recently been the subject of a rash of burglaries, when he observed a 1971 International Truck. The van was the only vehicle parked on the street directly across from the school and Officer Conrad immediately noticed that the license plate consisted solely of six digits and did not bear the commercial (C) or Pleasure/Commercial (PC) designation normally required for station wagons, vans and trucks. This aroused the officer's suspicion and he parked his patrol car and ran a computer check on the tags. Motor vehicle records indicated that the license plate on the van had been issued for a Ford registered to John Doyle, Jr., of 40 Commonwealth Blvd., and not for an International Truck. Officer Conrad then visually observed the serial number on the van and after running this number through the computer discovered that the van itself was registered to a Mr. Hess of 108 Crawford Street, Middletown.

Without leaving his post by the van, Officer Conrad arranged to have Hess contacted by telephone. Eventually, another patrolman contacted Hess' residence in Middletown and spoke with Hess' wife who advised the officer that she and her husband were separated, but that as far as she knew, Hess still owned the van. A policeman then attempted to call Doyle at 40 Commonwealth Blvd., but was advised by the telephone operator that the phone had been disconnected. This information was conveyed to Officer Conrad.

Officer Conrad then returned to the van and without entering the vehicle noticed a license plate on the floor of the vehicle which bore the same tag number issued to Hess

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for the International Truck. At this point, believing that the van may have been stolen or involved in some other illegal activity, Officer Conrad entered the vehicle, confiscated the plates lying on the floor and conducted a limited search of the glove compartment, ostensibly to locate the vehicle registration or other additional information which would assist him in reaching the rightful owner. He then contacted his Sergeant by radio who instructed him to have the vehicle towed because of the fictitious license plate.

The following day, the police managed to contact Doyle and advised him that the van had been towed. Apparently, Doyle had purchased the van from Hess a few days before it was parked on Moores Lane and had simply removed his own tags from his *1353 Ford and placed them on the recently purchased vehicle. As a result, Doyle received a summons and was arraigned on a charge of fictitious tags. Doyle then apparently elected to remove the case to the Court of Common Pleas for a hearing on probable cause. At the time appointed for the hearing, however, Officer Conrad failed to appear because he had not been notified of the proceeding by the prosecuting attorney. The Court of Common Pleas refused to grant the state a continuance and the matter was nolle prossed.

In his amended complaint, Doyle argues that Officer Conrad lacked probable cause to enter and search his vehicle and to have it towed from Moores Lane. He seeks compensatory damages in the amount of $1,669.50, including reimbursement of his towing charges, storage fees and those attorney's fees apparently incurred in the proceeding in the Court of Common Pleas, as well as costs incident to the prosecution of this § 1983 action. Doyle further seeks an award of punitive damages and requests the Court to enjoin Officer Conrad "from any further harassment involving this case and any further damages which might be caused by employees of the police department at this time." (D.I. 17.)

In response, Officer Conrad contends that he had probable cause to believe that the International Truck was stolen and under well established Supreme Court precedent, he was authorized both to search the van and to take the vehicle into custody. Moreover, under 11 *Del.C.* § 2322, any vehicle "used in, or in connection with the commission of any felony" may be seized by a police officer having knowledge of such use. This statutory provision, defendant argues, provides additional independent grounds for the propriety of his actions.

Generally, the probable cause requirement embodied in the Fourth Amendment is satisfied if under all the facts and circumstances, a reasonably prudent person would

believe that evidence of a crime could be found at the location to be searched. *Brinegar v. United States,* 338 U.S. 160, 175-76, 69 S. Ct. 1302, 1310-11, 93 L. Ed. 1879 (1949). Although more than bare suspicion is required, only a probability and not a prima facie showing of criminal conduct need be demonstrated. *Id.* at 175, 69 S. Ct. at 1310; *United States v. Martinez,* 588 F.2d 1227, 1234 (C.A.9, 1978); *United States v. Scott,* 555 F.2d 522, 527 (C.A.5), *cert. denied sub nom. Ogletree v. United States,* 434 U.S. 985, 98 S. Ct. 610, 54 L. Ed. 2d 478 (1977); *United States v. Trott,* 421 F. Supp. 550, 553 (D.Del.1976). By striking this balance, the rule of probable cause represents a compromise between two competing interests the right of citizens to be free from rash and unreasonable invasions of privacy and the need for enforcement agents to possess some unhampered discretion in investigating criminal activity for the protection of the community. *Brinegar v. United States, supra,* 338 U.S. at 176, 69 S. Ct. at 1311.

The Court agrees that, within this framework, probable cause existed for the search and subsequent seizure of Doyle's van. The van was parked in an area which had been the site of frequent burglaries. The license plate attached to the vehicle was not the proper plate issued by the Motor Vehicle Department and the correct plates were discovered on the floor of the van. The former owner's wife, Mrs. Hess, advised police that to her knowledge Mr. Hess still owned the van. Efforts to locate Doyle, moreover, were unsuccessful because his telephone had been disconnected. Under these circumstances, there was probable cause to believe that the van might be stolen and that a search of the vehicle would produce evidence pertaining to its theft. *Accord United States v. Matthews,* 615 F.2d 1279, 1287 (C.A.10, 1980).

Although a finding of probable cause is a necessary prerequisite to any search, that assessment is only half the battle confronting the defendant in this case. The Fourth Amendment protects the privacy and security of individuals by barring unreasonable searches and seizures. This requirement in turn has been interpreted to encompass two elements: (1) a ***1354** showing of probable cause; *and* (2) a search warrant issued on such a showing by a detached and neutral magistrate. *Arkansas v. Sanders,* 442 U.S. 753, 758, 99 S. Ct. 2586, 2590, 61 L. Ed. 2d 235 (1979). By vesting the probable cause determination in an impartial magistrate instead of in the "officer engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States,* 333 U.S. 10, 14, 68 S. Ct. 367, 369, 92 L. Ed. 436 (1948), the amendment minimizes the risk of unreasonable assertions of authority. *Arkansas v. Sanders, supra,* 442 U.S. at 759, 99 S. Ct. at 2591. Accordingly, the Supreme Court has consistently held that searches conducted without prior approval of a magistrate, no matter how facially reasonable

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they appear, are "per se unreasonable" and violate the Fourth Amendment. *See e.g. Robbins v. California,* ____ U.S. ____, 101 S. Ct. 2841, 69 L. Ed. 2d 744 (1981); *Colorado v. Bannister,* 449 U.S. 1, 2-3, 101 S. Ct. 42, 43, 66 L. Ed. 2d 1 (1980); *Coolidge v. New Hampshire,* 403 U.S. 443, 454-55, 91 S. Ct. 2022, 2031-32, 29 L. Ed. 2d 564 (1971); *Katz v. United States,* 389 U.S. 347, 357, 88 S. Ct. 507, 514, 19 L. Ed. 2d 576 (1967).

Like any judicial interpretation, however, exceptions to the warrant requirement have been created where "it was concluded that the public interest required some flexibility in the general rule." *Arkansas v. Sanders, supra,* 442 U.S. at 759, 99 S. Ct. at 2591. These exceptions have been "jealously and carefully drawn" and there must be a showing by those claiming the exemption that exigent circumstances made the procurement of a warrant impracticable. *Coolidge v. New Hampshire, supra,* 403 U.S. at 455, 91 S. Ct. at 2032. One such exception, claimed by Officer Conrad in this case, is the so-called "automobile exception," which has been the focus of seemingly endless judicial attention with often incompatible or contradictory results.[2]

In a long line of decisions originating with *Carroll v. United States,* 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925), the Supreme Court has held that a search warrant is unnecessary "where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted and the car's contents may never be found again if a warrant must be obtained." *Chambers v. Maroney,* 399 U.S. 42, 51, 90 S. Ct. 1975, 1981, 26 L. Ed. 2d 419 (1970). A recognition of several distinguishing factors contributed to the evolution of the "automobile exception" in these cases. First, the circumstances that furnish probable cause to search a particular vehicle most often are unforeseeable and arise suddenly and unexpectedly. Second, the opportunity to search is often a brief one since the vehicle can easily be moved out of the locality and the alerted occupants may remove relevant evidence from its interior. Finally, where an automobile is stopped on a public road, no practical alternative exists to a warrantless search. For purposes of the Fourth Amendment, there is little constitutional significance between an immediate warrantless search of the vehicle and a seizure of the vehicle until a warrant can be obtained; the immobilization of the automobile for an indefinite period, while approval of a magistrate is sought, is no less an intrusion deserving of constitutional protection than an on-the-spot search. *Chambers v. Maroney, supra,* 399 U.S. at 50-51, 90 S. Ct. at 1980-81.

Although the need to act quickly without the encumbrance of obtaining a warrant appears compelling where an automobile is stopped on the highway, the same cannot be

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said for a search involving an unoccupied parked vehicle, and this situation has produced uneven results in the Supreme Court. *1355 In *Coolidge v. New Hampshire, supra,* a plurality of the Court invalidated the warrantless search and seizure of an unoccupied car parked on private property and strongly indicated that the exigent circumstances requirement could be met only in a *Carroll* type situation, where the vehicle is likely to be moved or the suspected evidence otherwise lost. 403 U.S. at 460-62, 45 S. Ct. at 2034-35. Three years later, however, in another plurality opinion, the Court concluded that the impoundment of an unoccupied car from a public parking lot was constitutionally permissible, even though the owner was in custody and there was no reasonable likelihood that the automobile could be moved out of the grasp of the police. *Cardwell v. Lewis,* 417 U.S. 583, 94 S. Ct. 2464, 41 L. Ed. 2d 325 (1974). In distinguishing this case from *Coolidge,* the plurality chose to emphasize the fact that the *Coolidge* seizure required an entry onto private property, whereas in *Cardwell* the automobile was seized from a public place where access was not meaningfully restricted. *Id.* 417 U.S. at 593, 94 S. Ct. at 2471. Moreover, the Court refused to attach any legal significance to the fact that the car was seized from a public parking lot rather than being stopped on a highway, and noted, without extended comment, that the same "considerations of exigency, immobilization on the spot and posting a guard" while the warrant was secured made the delay impractical in both situations. *Id.* at 594-95, 94 S. Ct. at 2471-72. Finally, the Court introduced a new element into the equation governing the propriety of warrantless automobile searches and seizures the notion that there is a diminished expectation of privacy in an automobile because its function is transportation, it does not serve as a residence or a repository of one's personal effects, and it travels on public thoroughfares where its occupants cannot avoid public scrutiny. *Id.* at 590, 94 S. Ct. at 2469. Apparently, the "lesser expectation of privacy" attached to automobiles implicates a corresponding diminution in the showing of exigent circumstances necessary to validate a warrantless vehicle search or seizure.

Although the Supreme Court has not at this writing eliminated the requirement of a warrant altogether in automobile searches and still pays homage to the necessity of demonstrating exigent circumstances, *see South Dakota v. Opperman,* 428 U.S. 364, 382, 96 S. Ct. 3092, 3103, 49 L. Ed. 2d 1000 (1976) (Powell, J., concurring); *United States v. Matthews,* 615 F.2d 1279, 1286 (C.A.10, 1980); *United States v. Robinson,* 533 F.2d 578, 581 (1976), *Coolidge* apparently represented the high water mark for the warrant requirement. The mobility of automobiles in particular situations remains an important factor in justifying a warrantless search, but, in addition to *Cardwell,* the Court has increasingly sustained warrantless searches of vehicles in instances where the

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possibility of removal of the vehicle or destruction of evidence contained within it was remote, if not nonexistent. *United States v. Chadwick,* 433 U.S. 1, 12, 97 S. Ct. 2476, 2484, 53 L. Ed. 2d 538 (1977); *Cady v. Dombroski,* 413 U.S. 433, 441-43, 93 S. Ct. 2523, 2528-29, 37 L. Ed. 2d 706 (1973); *see South Dakota v. Opperman, supra; Texas v. White,* 423 U.S. 67, 96 S. Ct. 304, 46 L. Ed. 2d 209 (1975). Although none of these decisions addressed the situation presented by the Doyle case, involving an on-the-scene search of an unoccupied, parked vehicle, the increasing tolerance with which warrantless automobile searches have been viewed has not gone unnoticed by the Courts of Appeals. At least five circuits, including the United States Court of Appeals for the Third Circuit, have held searches and seizures of unoccupied, parked vehicles valid in circumstances which posed little or no risk that the car or its contents would be removed while a warrant was obtained. *See United States v. Matthews,* 615 F.2d 1279 (C.A.10, 1980); *United States v. Newbourn,* 600 F.2d 452 (C.A.4, 1979); *United States v. Milhollan,* 599 F.2d 518 (C.A.3), *cert. denied,* 444 U.S. 909, 100 S. Ct. 221, 62 L. Ed. 2d 144 (1979); *United States v. Robinson,* 533 F.2d 578 (C.A.D.C.1976); *Haefeli v. Chernoff,* 526 F.2d 1314 (C.A.1, 1975).

In *United States v. Milhollan, supra,* the defendant attempted to cash fraudulent *1356 money orders in a bank when a suspicious teller alerted police. The defendant ran from the bank in the general direction of a public parking lot a few blocks away, but was apprehended after a brief chase. A search of the defendant at the police station revealed a set of car keys with a dealer's tag marked "Gold Capri." Police then returned to the public parking lot, located the Capri and drove it to the police station, where a search was conducted. The district court denied the defendant's motion to suppress all evidence obtained from the warrantless search and seizure of the car, and, over the vigorous dissent of Judge Gibbons, the Third Circuit affirmed. 599 F.2d at 525.

The court held that the police may conduct a warrantless search of an automobile whenever two factors are present: (1) there is probable cause to believe that the automobile contains articles subject to seizure, including evidence of a crime; and (2) the justification for the search arises suddenly and unexpectedly. *Id.* at 526. After concluding that probable cause existed to search the vehicle, the court observed:

> Nor can [defendant] argue that this probable cause did not arise suddenly and unexpectedly.... [E]vents surrounding the arrest itself triggered the suspicion that the automobile contained evidence. *Coolidge v. New*

> *Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), where the police knew for some time about the role of the automobile in the crime is distinguishable.... *Coolidge* does not control "where the occasion to search the vehicle arises suddenly." ... When such probable cause suddenly crops up, the police need not freeze the situation while they secure a search warrant for the automobile. They may search the car immediately or seize it and search it later.... Applying these standards we conclude that the search of [defendant's] automobile was legitimate.

Id. Thus, even though the defendant was safely in police custody at the time the automobile was located and searched, the police had possession of the car keys, and there was no allegation of any confederates which might have access to the car, *id.* at 533 (Gibbons, J., dissenting), the Third Circuit found the circumstances giving rise to the search sufficiently "exigent" to dispense with the requirement of a warrant.

Based on a review of the foregoing authorities, it is difficult for this Court to envision under what circumstances, if any, appellate courts would require a warrant for the search of an unoccupied automobile parked on a public thoroughfare. As the courts have given a broader reading to the exigent circumstances requirement, the Court suspects that the word "automobile" may well have become the "talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge v. New Hampshire, supra,* 402 U.S. at 461-62, 91 S. Ct. at 2035-36. Nonetheless, if the police in *Milhollan* were not required to secure a warrant, *a fortiori* Officer Conrad in this case was not required to "freeze the situation" while approval of a magistrate was sought to search Doyle's vehicle. Here, not only did the probable cause arise suddenly and unexpectedly, but the van was positioned in a public place where access was not meaningfully restricted and Officer Conrad was aware that the suspected thief was still at large and might return at any moment to claim his newly acquired vehicle. In these circumstances the limited and discrete search of the van could permissibly be made without the requirement of a warrant. Moreover, because probable cause and exigent circumstances existed for the on-the-spot search of the vehicle, Officer Conrad was also authorized to take the vehicle into custody without offending the Fourth Amendment.

III. *Conclusion*

For the reasons stated in this opinion, judgment will be entered in favor of the defendants in this case and against the plaintiff.

NOTES

[1] In plaintiff's brief filed in response to defendants' motion for summary judgment, he claims that Salter and Wilson refused to refund the $19.50 without his social security number because of racial prejudice. (D.I. 29 at 10.) Each defendant testified, however, that she had never met Doyle prior to the trial of this case and it is thus uncertain whether either woman knew that Doyle was black. Moreover, there was absolutely no evidence of racial animus on the part of the defendants introduced at the trial.

[2] For purposes of this discussion, the "automobile exception" refers solely to searches involving the physical parts of the vehicle itself, i.e., the exterior, glove compartment, trunk or passenger compartment, and not to searches of closed containers or other sealed items found within the vehicle. Searches of these latter objects raise constitutional issues separate and distinct from those normally pertinent to the "automobile exception" and implicated in this case. *See e.g. Robbins v. California*, ____ U.S. ____, 101 S. Ct. 2841, 69 L. Ed. 2d 744 (1981); *Arkansas v. Sanders*, 442 U.S. 753, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979).

United States Court of Appeals, Seventh Circuit.

615 F.2d 434 (7th Cir. 1980)

ANNEXURE-R-27

McELRATH v. CALIFANO

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BAUER, Circuit Judge.

Plaintiffs-appellants Doris McElrath, *etc., et al.,* appeal from the order entered by the district court dismissing their complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief could be granted. Appellants' complaint challenged, *inter alia,* the validity of federal and state regulations requiring all members of a family, including unemployed children, to obtain and furnish social security account numbers to the Illinois Department of Public Aid as a condition of eligibility for financial assistance under the federal-state program of Aid to Families with Dependent Children. The district court held that both the federal and state regulations were consistent with and authorized by the Social Security Act, and further determined that the challenged regulations did not violate the Privacy Act of 1974 or the appellants' constitutional rights. We affirm.

I

The Aid to Families with Dependent Children (AFDC) program, Title IV-A of the Social Security Act of 1935, *as amended,* 42 U.S.C. § 601 to 611, is a public assistance program of federal and state cooperation providing financial aid to needy dependent children and the parents or relatives with whom they reside. Pursuant to the Social Security Act and the AFDC program, the Secretary of Health, Education and Welfare is granted authority to approve the federal share of expenditures under state plans to dependent children and their caretaker relatives. Accordingly, states electing to participate in the AFDC program must submit for approval by the Secretary a plan which meets all requirements of the Act as set forth in 42 U.S.C. § 602(a) and the concomitant implementing federal regulations and policies. 42 U.S.C. § 602(b); 45 C.F.R. § 201.2. These requirements encompass Congressional directives as to basic eligibility criteria, including the needs, income and resources of the recipients, as well as certain operational measures designed to assure the effective and efficient

administration of the AFDC program. If the proposed state plan meets all applicable federal requirements, the Secretary must approve it, and the state applicant becomes eligible for substantial federal contributions for state expenditures made under the plan. 42 U.S.C. § 602(b).

In 1974, Congress amended the Social Security Act by adding Section 402(a)(25) to the state plan requirements for the AFDC program. This section provides that:

A State plan for aid and services to needy families with children must . . (25) provide (A) that, as a condition of eligibility under the plan, each applicant for or recipient of aid shall furnish to the State agency his social security account number (or numbers, if he has more than one such number), and (B) that such State agency shall utilize such account numbers, in addition to any other means of identification it may determine to employ in the administration of such plan.

42 U.S.C. § 602(a)(25). In connection with his duties under the Act, the Secretary promulgated a regulation which gave effect to Section 602(a)(25) of the federal statute. This regulation requires that as a condition of eligibility applicants for or recipients of aid must furnish to the appropriate state or local agency a social security account number and apply for such number if one has not been issued. 45 C.F.R. § 232.10. The regulation further defines the terms "applicant" and "recipient" to include "the caretaker relative, the children, and any other individual whose needs are considered in determining the amount of assistance." 45 C.F.R. § 232.10(f). In order to comply with the requirements of the federal statute and regulations, the State of Illinois adopted a similar regulation requiring disclosure of social security account numbers as a condition of eligibility for financial assistance under the Illinois AFDC program. Illinois Department of Public Aid AFDC Man. PO-465. Although the state regulations contain no express definition of the terms "applicant" or "recipient," the state authorities have utilized the definition embodied in the federal regulation. 45 C.F.R. § 232.10(f).

1. 45 C.F.R. 232.10 provides, in pertinent part: The state plan must provide that:

(a) As a condition of eligibility, each applicant for or recipient of aid will be required:

(1) To furnish to the State or local agency a social security account number, hereinafter referred to as the SSN (or numbers, if more than one has been issued); and

(2) If he cannot furnish a SSN (either because such SSN has not been issued or is not known), to apply for such number through procedures adopted by the State or local agency with the Social Security Administration. If such procedures are not in effect, the applicant or recipient shall apply directly for such number, submit verification of such application, and provide the number upon its receipt.

* * * * * *

(e) The State or local agency will use such account numbers, in addition to any other means of identification it may determine to employ, in the administration of the plan.

(f) "Applicant" and "recipient" include the caretaker relative, the children, and any other individual whose needs are considered in determining the amount of assistance.

(g) The State or local agency shall notify the applicant or recipient that the furnishing of the SSN is a condition of eligibility for assistance required by section 402(a)(25) of the Social Security Act and that the SSN will be utilized in the administration of the AFDC program.

2. The Illinois regulation provides:

At the time this action was instituted, appellant Doris McElrath had two minor children and was receiving AFDC benefits in the amount of $261.00 per month. Pursuant to the 1974 amendments to the AFDC program and the applicable federal and state regulations, the Illinois Department of Public Aid (IDPA) requested Mrs. McElrath to obtain social security account numbers for her children and to disclose the numbers to the state agency. Mrs. McElrath refused to comply with this request. The IDPA then notified Mrs. McElrath that her AFDC benefits would be discontinued due to her failure to furnish the agency with social security account numbers for her minor children. Mrs. McElrath was subsequently afforded an administrative hearing by the IDPA, after which the final decision was made to terminate Mrs. McElrath's AFDC grant.

In September 1977, the McElraths filed the present action challenging the federal and state defendants' regulations that made the continued receipt of the AFDC benefits contingent upon supplying social security account numbers for all family

members. The McElraths alleged that these regulations were inconsistent with and not authorized by the AFDC statute, and violated their constitutional rights to privacy and to equal protection of the law. The McElraths further alleged that the defendants violated Section 7 of the Privacy Act of 1974, 5 U.S.C. § 552a note, by requiring disclosure of social security account numbers without informing the AFDC recipients of the purpose for which the numbers were being required and by denying governmental benefits for failure to disclose their social security account numbers. Finally, the McElraths alleged that the defendants had violated 42 U.S.C. § 606(f) and 602(a)(10) by failing to provide protective payments of AFDC benefits to eligible children solely because a parent had refused to furnish the dependent child's social security account number.

On September 28, 1977, the district court denied the McElraths' motion for a preliminary injunction and granted the Secretary's motion for dismissal, or in the alternative, for summary judgment. The court continued the entry of judgment in favor of the Secretary until the disclosure of purpose issue under the Privacy Act was resolved.

In its Memorandum Opinion and Order, the district court recognized that the merits of the case turned on whether the terms "applicant for or recipient of aid," who were required by 42 U.S.C. § 602(a)(25) to furnish social security account numbers, included AFDC-benefitted children. The court noted that in the area of statutory construction great deference was to be accorded the interpretation given a statute by the agency charged with its administration. The court also reviewed numerous other provisions of the AFDC authorizing statute and concluded that the Secretary's determination that the term recipients included AFDC-benefitted children was reasonable. Finally, in its first opinion, the district court held that defendants had not violated Section 7(a) of the Privacy Act because the disclosure was required by federal statute, an exception to the prohibition of conditioning eligibility for governmental benefits on disclosure of social security account numbers.

In its later opinion the district court reconfirmed its holding that the defendants had not violated Section 7(a) of the Privacy Act. In this connection, the court considered plaintiff's contention that the defendants had violated Section 7(b) of the Privacy Act by failing to inform AFDC recipients of the

intended use of their social security account numbers. The court regarded this failure as a mere technical violation which would be rectified by the notice the IDPA proposed to send out. 314

3. The Illinois Department of Public Aid's Statement of Information, which is furnished to each applicant and is to be distributed on a one time basis to all AFDC recipients, provides:

Upon resolving these issues, the district court denied plaintiffs' motion for injunctive relief, and entered judgment granting the Secretary's motion to dismiss the action. From this adverse judgment, the McElraths have appealed to this Court.

II

The appellants' principal contention on appeal is that the federal and state regulations requiring dependent children to acquire and submit social security account numbers as a condition of eligibility for AFDC benefits are statutorily invalid as being inconsistent with and not authorized by the Social Security Act. We find the arguments advanced in support of this contention to be without merit and hold that the challenged regulations constitute a legitimate condition of eligibility mandated by the Congress under the Social Security Act. *Accord, Chambers v. Klein,* 419 F. Supp. 569 (D.N.J. 1976), *aff'd mem.,* 564 F.2d 89 (3d Cir. 1977); *Green v. Philbrook,* 576 F.2d 440 (2d Cir. 1978); *Arthur v. Department of Social and Health Services,* 19 Wn. App. 542, 576 P.2d 921 (1978). We therefore conclude that the district court properly dismissed the appellants' statutory invalidity allegations for failure to state a claim upon which relief could be granted.

The appellants' statutory claim is predicated on the argument that the Congress, in enacting the disclosure requirement embodied in Section 602(a)(25) of the Act, intended to include only the caretaker relative within the scope of the terms "applicant" and "recipient," and that therefore the appellees have erroneously defined these terms in the regulations to include dependent children. Section 1302 of the Social Security Act empowers the Secretary of HEW to promulgate rules and regulations, "not inconsistent with" the Act, as may be necessary to the efficient administration of the duties with which he is charged under the Act. 42 U.S.C. § 1302. Accordingly, to invalidate the regulations as being not authorized by Section 1302, the appellants must demonstrate that the Secretary's definition of "applicant" and "recipient" in

Section 232.10(f) of the regulations is inconsistent with the meaning of these terms as used in Section 602(a)(25) of the statute.

It is elementary that the judicial construction of a statute begin with the language itself, and that the language of a statute be construed according to its plain and ordinary meaning. In this case the statute mandates the disclosure of social security account numbers by "each applicant for and recipient of aid." The plain meaning of the phrase "recipient of aid" would seem to encompass the dependent children for whose benefit the AFDC program was established. 42 U.S.C. § 601; *see, e.g., Dandridge v. Williams,* 397 U.S. 471, 479, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). Thus, the relevant language of Section 602(a)(25) does not support the contention that it would be "inconsistent" for the Secretary to adopt an interpretative regulation that includes dependent children within the definition of recipient of aid. Indeed, it is inconceivable that the Congress purposely intended to exclude children from the scope of the phrase "applicant for or recipient of aid" as used in the AFDC statute. The Congress declared the purpose of the AFDC program to be to enable the states "to furnish financial assistance . . . . to needy dependent children and the parents or relatives with whom they are living . . . .", 42 U.S.C. § 601, and the very title of the program as well as other language in the statute confirm that the Congress clearly intended to include dependent children within the meaning of the statutory term "recipient." That children are at the least "recipients of aid" as that phrase is used in 42 U.S.C. § 602(a)(25) is made clear from an examination of other provisions of the Act. *See, e. g.,* 42 U.S.C. § 602(a)(7), (a)(8), (a)(15)(A), (a)(16), (a)(19)(F); 606(f); and 653(c)(3).

Moreover, it is well-settled that great deference should be accorded the interpretation given the statute by the officers or agency charged with its administration, *Udall v. Tallman,* 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); *Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals,* 523 F.2d 25, 36 (7th Cir. 1975), and that the interpretation should be followed "unless there are compelling indications that it is wrong . . . ." *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371 (1969).

We fail to perceive any such indications in the regulations challenged here, and find the appellants' arguments to the

contrary to be without substance. The appellants rely on 42 U.S.C. § 602(a)(26), enacted at the same time as Section 602(a)(25), to support their contention that the Congress meant to distinguish dependent children from "applicants" and "recipients." Although it is true that certain portions of Section 602(a)(26) may be directed to applicants and recipients who are caretaker relatives rather than children, this distinction does not compel the conclusion that dependent children be excluded from definition as "recipients" under Section 602(a)(25). *See, e. g., Green v. Philbrook,* 576 F.2d 440, 445 (2d Cir. 1978). Section 602(a)(26) mandates state plans to provide that each "applicant or recipient" be required to assign to the state any rights to support from any other person the applicant might have in his own behalf or on behalf of any family member for whom the applicant is applying. 42 U.S.C. § 602(a)(26)(A). Additionally, the applicant or recipient is required to cooperate with the state in establishing the paternity of a child born out of wedlock and in obtaining support payments. *Id.* § 602(a)(26)(B). However, the fact that certain responsibilities of applicants or recipients clearly contemplate action by the caretaker relatives, who are also applicants or recipients, does not make the dependent children any less the recipients of funds under the AFDC program. Indeed, the applicant-recipient responsibilities set forth in Section 602(a)(26) can be fulfilled by AFDC-supported children. Thus, a dependent child might be required to assign any rights to support he may have in his own behalf to the state, as well as to cooperate to the extent possible in establishing paternity and recovering any funds due to him directly.

Finally, we note that the Congress has determined that social security account numbers are useful to the efficient and effective administration of federal programs. *See, e.g.,* S.Rep. No. 93-1356, 93d Cong., 2d Sess., *reprinted in* U.S. Code Cong. Admin.News, pp. 8133, 8152. The utilization of these identification numbers serves numerous functions in the administration of the AFDC program, including the avoidance of administrative errors due to recipients having identical names, the determination of eligibility, the verification of a dependent child's resources and entitlement to certain benefits, and the detection and prevention of fraud. Thus, in the absence of any compelling indications that the Secretary's interpretation of 42 U.S.C. § 602(a)(25) was incorrect, and in view of the fact that the regulation promotes the sound administration and legislative purposes of the AFDC statute,

we conclude that the regulation is not "inconsistent" with the statute, and that it is therefore valid under 42 U.S.C. § 1302. 317

III

Alternatively, the appellants contend that even if Section 602(a)(25) is construed to require AFDC-benefitted children to disclose social security account numbers, the IDPA's termination of the McElraths' AFDC grant violated the provisions of 42 U.S.C. § 606(f), which prohibits the denial of AFDC protective payments to otherwise eligible dependent children where a caretaker relative fails to cooperate with officials in obtaining child support payments for the children in their care. Thus, the appellants argue that Mrs. McElrath's refusal to furnish social security account numbers for her two children constitutes a failure to cooperate which disqualifies her for AFDC benefits, but not her children. The appellants have misconstrued the applicability of this statute to the context of this case, and their reliance on Section 606(f) is accordingly misplaced.

In addition to establishing the disclosure requirement embodied in Section 602(a)(25), the Social Service Amendments of 1974 created a "Child Support Program" requiring the states to implement procedures to identify, locate and secure financial support from missing or absent parents. As a condition of AFDC eligibility, the Congress required the parent who was living with the dependent child to cooperate with the state in accomplishing this objective. *See, e. g.*, 42 U.S.C. § 602(a)(26), (a)(27); 606(f); 651 *et seq.* Thus, Section 606(f) of the statute authorizes the denial of AFDC payments to caretaker relatives who fail to so cooperate, but does not preclude AFDC protective payments to otherwise eligible dependent children. However, the Section 602(a)(25) requirement that applicants for or recipients of aid disclose their social security account numbers applies irrespective of whether there is a missing or nonsupporting parent involved. This disclosure requirement remains a basic condition of AFDC eligibility, and the refusal to furnish an AFDC-benefitted child's social security account number does not constitute a refusal to cooperate in securing child support payments within the meaning of 42 U.S.C. § 606(f), pursuant to which protective payments on behalf of the dependent child are authorized.

IV

The appellants further contend that the regulations challenged in this action violate Section 7(a) of the Privacy Act of 1974, which provides that it shall be unlawful for a governmental agency to deny any right, benefit or privilege because of any individual's refusal to disclose his social security account number, unless such disclosure "is required by Federal statute." 5 U.S.C. § 552a note. Appellants premise this contention on the basis that disclosure of a dependent child's number is not required by Section 602(a)(25) of the AFDC statute, but merely by the Secretary's regulation. Since we have concluded that the statute compels disclosure of a dependent child's social security account number, unless such disclosure "is required by Federal statute." 5 U.S.C. § 552a note. Appellants premise this contention on the basis that disclosure of a dependent child's number is not required by Section 602(a)(25) of the AFDC statute, but merely by the Secretary's regulation. Since we have concluded that the statute compels disclosure of a dependent child's social security account number as a condition of eligibility for AFDC benefits, and that the regulations merely give effect to this requirement, we find that the exception applies, and therefore hold that these regulations are not violative of the Privacy Act.

V

Finally, the appellants maintain that the social security account number disclosure requirement violates their constitutional rights to privacy and to equal protection of the law. We disagree. The constitutional guarantee of the right to privacy embodies only those personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty." *Roe v. Wade,* 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973). It is equally well-settled that "[w]elfare benefits are not a fundamental right . . . ." *Lavine v. Milne,* 424 U.S. 577, 584, n. 9, 96 S.Ct. 1010, 1015, 47 L.Ed.2d 249 (1976). Accordingly, we regard the decision of Mrs. McElrath whether or not to obtain social security account numbers for her two minor children in order to receive welfare benefits as involving neither a fundamental right nor a right implicit in the concept of ordered liberty. *Chambers v. Klein,* 419 F. Supp. 569, 583 (D.N.J. 1976), *aff'd mem.* 564 F.2d 89 (3d Cir. 1977). This case is not concerned with a decision impacting the privacy of the appellants on the magnitude of criminal sanctions or an absolute prohibition on the appellants' conduct. *See, e. g., Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510. (1965); *Eisenstadt v. Baird,* 405

U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972). Rather, it is concerned with a condition of AFDC eligibility and the only sanction for not complying is to forego certain governmental benefits. 319

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Simply stated, the claim of the appellants to receive welfare benefits on their own informational terms does not rise to the level of a constitutional guarantee.

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Moreover, the contention that disclosure of one's social security account number violates the right to privacy has been consistently rejected in other related contexts. *See, e.g., Cantor v. Supreme Court of Pennsylvania,* 353 F. Supp. 1307, 1321-22 (E.D.Pa. 1973); *Conant v. Hill,* 326 F. Supp. 25, 26 (E.D.Va. 1971).

Appellants' equal protection claims are equally without merit.

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Statutory classifications in the area of social welfare have been held to be consistent with the Equal Protection Clause if the classification is neither irrational nor invidious. *Dandridge v. Williams,* 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); *Weinberger v. Salfi,* 422 U.S. 749, 771-772, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975). As the federal and state appellees have demonstrated that the disclosure of AFDC-benefitted children's social security account numbers is both rationally related and essential to the effective administration of the AFDC program, and in the absence of any showing of invidious discrimination attendant to such a requirement, we conclude the district court properly held that the appellants failed to state a constitutional claim upon which relief could be granted.

We have examined the appellants' other arguments and find them to be without merit. The judgment appealed from is affirmed and the Clerk of this Court is directed to enter judgment accordingly.

Affirmed.

ANNEXURE R-28
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Conant v. Hill, 326 F. Supp. 25 (E.D. Va. 1971)

U.S. District Court for the Eastern District of Virginia - 326 F. Supp. 25 (E.D. Va. 1971)
May 3, 1971

326 F. Supp. 25 (1971)

George H. CONANT, Jr., et al.

v.

Vern L. HILL, Comm. D.M.V., et al.

Civ. A. No. 609-70-R.

United States District Court, E. D. Virginia, Richmond Division.

May 3, 1971.

*26 John C. Lowe, Robert P. Dwoskin, F. Guthrie Gordon, III, Charlottesville, Va., for plaintiffs.

Andrew P. Miller, Atty. Gen. of Virginia, Anthony F. Troy, A. R. Woodroof, Asst. Attys. Gen., Richmond, Va., for defendants.

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MEMORANDUM

MERHIGE, District Judge.

The plaintiffs in the above styled action seek relief from that portion of Va. Code Ann. 46.1-368(b) (1970 Cum. Supp.), which requires that an application for a driver's license shall contain, among other things, the applicant's social security number. The defendants are Vern L. Hill, Commissioner of the Division of Motor Vehicles, (D.M.V.), and J. B. Warfield, Director, Bureau of Operators' Licenses, D.M.V. A temporary restraining order was previously denied due to the inability of the plaintiffs to show they were suffering irreparable harm.

The defendants moved to strike certain paragraphs of the complaint and for a more definite statement. A motion to dismiss the action pursuant to Fed.R.Civ.P. 12(b) (6), 28 U.S.C., is also pending.

In that plaintiffs sought injunction of § 46.1-368(b) on constitutional grounds, a motion for convening of a three-judge court was made. 28 U.S.C. § 2281. This Court held, however, that the issue raised was insubstantial, and the motion was denied. This ruling had the effect of granting the defendants' motion to dismiss as to those issues triable only by a three-judge court. Conant v. Hill, Civil Action No. 609-70-R, mem. decis. (E.D.Va., Mar. 17, 1971). At that time, the Court declined to rule on the other phase of defendants' motion to dismiss, which goes to plaintiffs' allegation that the requirement of furnishing social security numbers under § 46.1-368(b) contravenes federal law. The Court therefore addresses itself to the pending motions.

The facts are undisputed. The plaintiffs are all residents of Virginia who either will have to furnish their social security numbers in order to obtain

driver's licenses or to renew their licenses received prior to institution of the requirement, or who wish to have the numbers previously furnished by them removed from their licenses and files. They contend that § 46.1-368(b) is preempted by 42 U.S.C. § 1306 and 20 C.F. R. 401.1 et seq., which, so they allege, prohibit the Social Security Administration and its employees and agents from disclosing any information about a person's social security account, including the number.

The motion to dismiss under § 12(b) (6) is treated as one for summary judgment under Fed.R.Civ.P. 56, 28 U.S.C.

First, even if the federal statutes are to be construed as the plaintiffs contend, § 46.1-368(b) does not violate them. In order for a potential driver to obtain a Virginia driver's license he, the driver, must furnish his social security number to D.M.V. The statutes refer to the Social Security Administration, its employees and agents as being prohibited from disclosing any information about a person's social security account, not the holder of a social security card. Thus the statutes, on their face, are not in conflict, thereby completely eroding the argument that the federal statutes specifically pre-empt § 46.1-368(b). The Court has previously held that § 46.1-368(b) does not bring about a constitutional deprivation of privacy. Conant v. Hill, *supra*.

*27 However, the plaintiffs also argue that the federal interest in Social Security administration is so pervasive as to leave no room for any statutory legislation on the subject, unless by specific authorization by federal law, of which admittedly there is none.

Prior to a holding that a state is pre-empted from passing legislation on a particular subject, three things must be present:

(1) The scheme of federal regulation must be so pervasive as to make reasonable the inference that the Congress left no room for the states to supplement it;

(2) The federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject;

(3) Enforcement of the state act presents a serious danger of conflict with the administration of the federal program. See Pennsylvania v. Nelson, 350 U.S. 497, 76 S. Ct. 477, 100 L. Ed. 640 (1956).

The answer to whether the social security laws are so pervasive as to preclude a request by the Commonwealth of Virginia that a driver furnish his social security number before being licensed to drive is contained in a statement by the Hon. Elliot L. Richardson, Secretary of Health, Education and Welfare, to the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 92nd Cong., 1st Sess., at hearings on Computers, Data Banks and the Bill of Rights, March 15, 1971. Therein he stated that even though the Social Security Administration's general policy is to not encourage non-federal use of social security numbers, "[i]t is not illegal for a non-Federal organization to use the social security number in its record keeping system. Such use in and of itself involves no disclosure of information, and thus does not involve a breach of Federal law or regulation."

When faced with a problem of statutory construction great deference is to be given to the interpretation of a particular statute by the officers or agency charged with its administration. So long as that interpretation is a reasonable one, it must be sustained. Udall v. Tallman, 380 U.S. 1, 85 S. Ct. 792, 13 L. Ed. 2d 616 (1965). Since the federal statutes do not specifically preclude a state from requiring the furnishing of social

security numbers for a purpose such as that required by Virginia, the Secretary's interpretation must be deemed reasonable. Therefore, the Court has no alternative but to hold that federal law is not so pervasive as to preclude the type of state legislation as the Court now has before it.

Hence, the motion for summary judgment by the defendants will be granted. The disposition of that motion makes it unnecessary to consider the other pending motions.

An appropriate order will enter.