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THE RIGHT OF PRIVACY: MISUSE OF HISTORY

DISSERTATION

Presented in Partial Fulfillment of the Requirements for
the Degree Doctor of Philosophy in the Graduate
School of The Ohio State University

By

Richard Carl Gossweiler, B. A., M. A.

* * * * *

The Ohio State University
1978

Reading Committee:                  Approved By

Dr. Bradley Chapin                      Bradley Chapin
Dr. Paul Bowers                         Advisor
Dr. Marvin Zahniser                     Department of History
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VITA

February 24, 1941 . . . . Born--Newark, New Jersey

1963 . . . . . . . . . B.A., Maryville College
Maryville, Tennessee

1965 . . . . . . . . . M.A., University of Tennessee

1965-1967 . . . . . Assistant Professor, Huron College,
Huron, South Dakota

1967-1968 . . . . . National Teaching Fellow,
Maryville College,
Maryville, Tennessee

1968-1972 . . . . . Assistant Professor, Southwest
Virginia Community College,
Richlands, Virginia

1972-1978 . . . . . Associate Professor, Division
Chairman, Piedmont Virginia
Community College, Charlottes-
ville, Virginia

FIELDS OF STUDY

Major Field: Legal History

Studies in Legal History. Professor Bradley Chapin

Studies in Diplomatic History. Professor Marvin
Zahniser

Studies in Twentieth Century American History. Professor
Austin Kerr

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CHAPTER I

PRIVACY: A FUNDAMENTAL RIGHT?

Conspicuous by its absence, nowhere in the United States' Constitution nor in any of the original state constitutions does the phrase "right of privacy" appear. A study of early state and federal statutes and of early nineteenth century court decisions unearths no mention of such a right. Yet the author of a recently published book on the subject, sans footnotes, boldly declared, "It was fear of government intrusion and a determination to guard their privacy that led to the Bill of Rights."\(^1\) Within the last decade, in a notable decision involving privacy as a protected right, Justice William O. Douglas, enunciated in an opinion for a sharply divided Supreme Court: "We deal with a right of privacy older than the Bill of Rights--older than our political parties, older than our school system."\(^2\)

Not all legal scholars agree with such sweeping conclusions. Leonard Levy and Oscar Handlin disputed those


lauding the framers of the first ten amendments as far sighted Americans who "had arrived at clearly defined concepts" of their rights. Rather Handlin ably argued the patriots gave little thought to which rights should be included in the Bill of Rights since "expediency and caprice played a large part in the ultimate decision." ³ Although a number of prominent authors and scholars claim that privacy as a right is a twentieth century phenomenon, many, including Alan F. Westin, Professor of Public Law at Columbia University and a leading authority on privacy, boldly asserted that "the modern claim to privacy derives first from man's animal origins...." ⁴ Discovery as to whether or not privacy did enjoy the protection of the law in colonial American jurisprudence is the major goal of this study.

Defining privacy is no simple task. Congressman S. D. Symms of the First District of Idaho in his attempt to study the right quickly discovered that privacy "as a constitutionally protected right has proven to be especially difficult to accurately define." ⁵ Thomas Cooley, in his famed Treatise on Torts, provided the most oft quoted definition by concisely


⁴Alan F. Westin, Privacy and Freedom, 7.

construing privacy as "the right to be let alone." But Cooley's interpretation proves to be too basic for a number of scholars. Alan Westin complained in the opening sentence of his monograph Privacy and Freedom, "Few values so fundamental to society as privacy have been left so undefined in social theory or have been the subject of such vague and confused writing by social scientists." Westin attempted to solve this problem by declaring privacy to be "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." Westin's broad definition does not go unscathed. Louis Luskey, chided him for producing a meaning which "confuses through oversimplification." Even Oscar Ruebhausen, chairman of the Special Committee on Science and Law for the Bar of the City of New York which sponsored Westin's research, admitted that defining privacy becomes "part philosophy, some semantics, and much pure passion." 

Four years prior to the publication of Westin's treatise the noted Constitutional historian William F. Beaney decried

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7Westin, Privacy and Freedom, 7.


9Westin, Privacy and Freedom, foreward by Oscar M. Reubhausen, x.
the lack of a "comprehensive definition in law of the right of privacy." Arguing that Justice William O. Douglas had over-defined the right by embracing "all rights of conscience among the various protected interests included in the right to privacy...," Beaney further complicated the search by proposing another description for the right. As Caesar did with Gaul Beaney did with privacy, dividing it neatly into three parts by the extent to which a person or a group of people interact with someone to "(a) obtain or make use of his ideas, writings, name, likeness, or other indicia of identity, or (b) obtain or reveal information about him or those for whom he is personally responsible, or (c) intrude physically or in more subtle ways into his life space and his chosen activities."

This definition, criticized Don Pember, author of Privacy and the Press, contributed to an "amorphous concept" of the right. Pember argued that the right, "if such a right does indeed exist," is narrow and "should be seen as a limiting force upon the government rather than controlling action between individuals."

Credit for the most complicated definition belongs to the sociologist Edward Shils, who within a sentence declared

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11 Don R. Pember, Privacy and the Press, vii, ix.
privacy to be "a 'zero-relationship' in the sense that it is
constituted by the absence of interaction or communication
or perception within contexts in which such interaction or
perception is practicable--i.e., within a common ecological
situation, such as that arising from a spatial contiguity or
membership in a single embracing collectivity such as a
family, a working group, and ultimately a whole society."\(^{12}\)
Although complicated this is less preposterous than a 1945
New York court's multi-page and serious ruling upon appeal
that the Constitutional right of privacy did not extend to
a dog.\(^{13}\)

Since most legal treatises accept Cooley's interpretation, "the right to be let alone," it will serve as the
definition for this study.

Numerous authors have erroneously concluded that court
rulings supporting privacy as a right were non-existent until
after Samuel Warren and Louis Brandeis published their famed
treatise "The Right to Privacy" in 1890.\(^{14}\) Even Professor
Beaney complained as late as 1966 about the lack of "compre­
hensive" cases guaranteeing the right of privacy.\(^{15}\) In fact,

\(^{12}\)Edward Shils, "Privacy: Its Constitution and Vicissi­

\(^{13}\)Lawrence v. Yllia, 55 N.Y.S. (2d.) 343 (1945).

\(^{14}\)Samuel D. Warren and Louis D. Brandeis, "The Right to

\(^{15}\)Beaney, "Right to Privacy," 253.
the Supreme Court has rarely vacillated in its stand upholding privacy as a protected right. Although occasionally inconsistent, the state courts had wrestled with the question over a century before Beaney's article and decades prior to the Warren and Brandeis treatise. Whereas the United States Supreme Court confined its nineteenth century rulings on privacy to fourth and fifth amendment questions, the state courts dealt with it in equity.

In 1849 in a British landmark equity case heavily relied upon by Warren and Brandeis, Prince Albert pleaded that surreptitiously obtained etchings designed by Queen Victoria and him should not be published without personal permission. The deciding judge specifically declared "privacy is the right invaded" and issued the first injunction in Anglo-American jurisprudence protecting that right per se. In 1888 the British followed this precedent by issuing an injunction against selling a photograph declaring that if the person pictured objected to having her photograph exhibited or sold, property ownership of the photograph did not matter, i.e., protection of privacy took precedence over property rights.

Admittedly the New York Court of Equity ruled in 1842 and again in 1848 that private letters could be published

\[\text{\footnotesize 16Prince Albert v. Strange, 1 Mac N.+G. 25 (1849), 41 Eng. Reprint 1171.}\]

\[\text{\footnotesize 17Pollard v. Photographic Co., 40 Ch. Div. 345 (1888).}\]
without permission if the plaintiff could not show that they were of literary value. But this argument was quickly overruled by the same court in 1855, as they enjoined publication of letters of no literary value in order to protect the writer "against pain and humiliation." When a husband in Kentucky sought protection from that state court pleading letters he sent to his wife should not be published upon her death but should be returned to him, the court enjoined publication but did not grant possession, his wife having willed them to her daughter. A dissenting judge argued that the letters should even be returned to the husband since "the act of sending them cannot be presumed to be an abandonment... of privacy and secrecy."

In a Massachusetts case referred to by some as an example of privacy not receiving legal protection, the state court refused to enjoin publication of a picture and biography of George Corliss. But the court clearly pointed out that Corliss as an inventor had chosen to become a public figure thus forfeiting rights which a private person would retain.

19Woolsey v. Judd, 4 Duer 379 (1855).
In Georgia prior to the turn of the century the state court scathingly denied any right to privacy in civil law by clearly ordering, "The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries."\(^{22}\)

Utter confusion reigned in New York as the courts there held in 1893 that a man held the right not to have his picture appear in a newspaper popularity contest, while deciding the next year against a damage suit for invasion of privacy for publication of a child's picture without permission. Here the court quoted at length from the aforementioned Georgia case.\(^{23}\) Yet the following year the courts of the Empire State added additional confusion by their decision in Schuyler v. Curtis. The heirs of Schuyler had sought an injunction against the building of a statue dedicated to him. The lower court granted the injunction but the New York Court of Appeals reversed the judgment while admitting that a right of privacy certainly did exist but it was a personal not a property right and thus terminated upon a person's death.\(^{24}\) Soon thereafter the Trial Division of the Supreme Court of New York accepted arguments in behalf of the right of privacy, granting damages to a girl

\(^{22}\)Chapman v. Western Union Telegraph Co. 88 Ga. 773 (1892).


\(^{24}\)Schuyler v. Curtis, 147 N. Y. 434 (1895).
whose picture had been used without permission in advertisements. The Appellate Court sustained the decision but saw it overturned by the Court of Appeals on a 4-3 vote. The majority claimed that Blackstone and Kent had never recognized, nor even mentioned, such a right and expressed concern that carrying the arguments for privacy to their extreme would mean that no news could be printed. The prerogative to prohibit publication of pictures without permission rested within the power of the legislature not that of the court.25

The courts of the State of Michigan had taken an identical stand in 1899. Refusing to award damages when a cigar company used a colonel's picture on their boxes without his permission, they concluded "that the so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence...."26

Ironically the State of Georgia, which had earlier so strongly denounced the right, turned the tide for state equity decisions with the often cited case of Pavesich v. N. E. Life Insurance Company. Here the Georgia court clearly upheld privacy as a right of personality with no dependence upon property rights. Actions within both the Constitutions of Georgia and the United States against deprivation of liberty


without due process of law allowed the plaintiff damages for use of his picture without permission since "the Right of Privacy has its foundation in the instincts of nature...." It is, the court declared "derived from natural law." 27

Other states followed suit. A Louisiana court ordered that the picture of a person indicted but not convicted could not be put into a "rogues' gallery." 28 Missouri decided that privacy "is an old right, with a new name." 29 New Jersey ruled privacy "having its origin in natural law, is immutable and absolute, transcends the power of any authority to change or abolish it." 30 The judges of Indiana found that in the absence of a state law on privacy, it was protected by natural law and the Federal and Indiana Constitutions. 31 Thus by 1951 Loyd Hines could confidently report that "The majority of the states which have decided the question now recognize that such a right existed at common law." 32 Yet in none of these state cases in tort did the judges cite specific American or British tort cases in which privacy was protected prior to the 1840's.

28 Itzkovitch v. Whitaker, 115 La. 479 (1905).
29 Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1078 (1911).
30 McGovern v. Van Riper, 43 A. 2d. 519 (1943).
Occasional reference was made to James Otis' arguments against Writs of Assistance and John Entick's and John Wilkes' cases, but none of these were tort proceedings. It was simply assumed over time that privacy was a protected right, lending credence to the adage--repeat something enough, and it becomes the truth.

A decade before the Brandeis and Warren article the United States Supreme Court had ruled decisively on privacy. A Mr. Kilbourn had refused to answer questions posed to him by a subcommittee of the House of Representatives in return for which he suffered arrest for contempt of Congress and jail for forty-five days. Upon release he sued the Sargeant-at-arms and the Congressional subcommittee. The Court held the Sargeant-at-arms but not the committee liable. The contempt power of Congress is not unlimited the court ruled, posing the rhetorical question "what authority has the House to enter upon this investigation into the private affairs of individuals?...Such an enlargement of jurisdiction would not now be tolerated in England, and it is hoped in this country of written constitutions and laws..." The Court unanimously, firmly and without equivocation ruled that the Congress of the United States did not possess a "general power of making inquiry into the private affairs of the citizen."33

33Kilbourn v. Thompson, 103 U.S. 190, 196 (1881).
A few years later an importer forced to produce an invoice which the government used against him in a smuggling trial, appealed to the high court for redress. This case, Boyd v. United States, would be heavily cited three-quarters of a century later in the infamous decision of Mapp v. Ohio. Four years before Brandeis and Warren issued their plea for privacy, the Court in this case roundly castigated the government for its action in seizing private papers. Referring to James Otis' fight against the Writs of Assistance and quoting arguments used in the John Entick's case of 1765, the court bluntly stated "The principles laid down in this opinion affect the very essence of constitutional liberty and security.... They apply to all invasions on the part of the government and its employes [sic] of the sanctity of a man's home and the privacies of life." In no uncertain terms, the Justices wrote that "compelling the production of his private books and papers, to convict him of crime...is contrary to the principles of a free government. It is, they charged, "abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."34

Having declared that neither the legislative nor the executive branch could violate a citizen's right to privacy,

the court rounded out its opinion in 1894 by chastising the Interstate Commerce Commission for its excesses, reminding it that no agency "possesses or can be invested with, a general power of making inquiry into the private affairs of citizens." Justice Harlan once again reiterated "the essence of constitutional liberty and security forbid all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of his life."35

Twenty years later the court once more spoke out against government invasion of privacy, this time setting an exclusionary rule on search and seizure. Without a search or arrest warrant a marshal had entered plaintiff's home, seizing his private papers and belongings (even his candies) and retaining the papers for use at his trial for illegal sale of lottery tickets through the mail. Citing English developed safeguards protecting "invasions of...privacy of the citizens...," the court reversed the conviction for prejudicial error.36

In 1920, though, the court refused to apply a substantive interpretation to the right through the fourteenth amendment. A Minnesota law which forbade the teaching of pacifism was upheld as Justice Brandeis acting as a lone dissenter cried

in vain against the applicability of the law towards teaching one's children for it "invades the privacy and freedom of the home." The court reiterated this stand two years later upholding a Missouri law mandating corporations to provide written reasons for terminating an employee. "As we have stated," wrote Justice Pitney, "neither the fourteenth amendment nor any other provision of the Constitution of the United States...confer(s) any right of privacy upon either persons or corporations." Ironically this time Justice Brandeis did not dissent.

Privacy seemed revived five years later as the Supreme Court warned Congress "...neither house is invested with 'general' power to inquire into private affairs and compel disclosure." But the resuscitation proved to be limited as the court again addressed the question of privacy in that year in the landmark decision of Olmstead v. United States. Petitioner's argument against a government wiretap relied upon acceptance of privacy as a guaranteed right. After referring to past Anglo-American decisions, the brief for the plaintiff concluded that wiretapping "would deprive the citizenship of our country of the personal security and

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enjoyment of the privacies of life guaranteed by the Constitution, and subject them to an espionage unequalled by the conditions prevailing under the King's officers prior to the Revolution."\(^{40}\)

Chief Justice Taft, speaking for the 5-4 divided court, disagreed with this argument, deciding instead that if privacy were to be protected as a right it should be done through the legislature rather than the courts (an unusual stand by a court known for its lack of self-restraint). The fourth amendment, Taft contended, should not be so broadly interpreted as to apply to telephone messages since telephone "wire are not part of his house or office..." and since the plaintiff could not show "physical invasion of his house...."\(^{41}\) The opinion left no doubt though that intrusion into the plaintiff's home would have evoked a different response from the court.

Brandeis scathingly dissented, "Discovery and invention have made it possible for the Government by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet." Joined by Holmes, Butler and Stone, he set a high standard: "every unjustifiable intrusion by the Government upon the privacy

\(^{40}\)Olmstead v. United States, 277 U.S. 445 (1928).

\(^{41}\)Ibid., 465, 466.
of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." 

While bending an unsympathetic ear to arguments against wiretapping, the Supreme Court reiterated its stand for protection against Congressional probes into private matters by emphasizing in *Sinclair v. United States* that "It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to the happiness and safety than the right to be exempt from all unauthorized or unreasonable inquiries or disclosures in respect of their personal and private affairs." 

The appointment of Justice William O. Douglas to the Supreme Court in 1939 brought a staunch and outspoken advocate of a broad interpretation of the right of privacy to that august body. No jurist including Brandeis has been so adamant in championing the cause for privacy. In numerous dissents and concurring opinions he vociferously argued that the right was fundamental, inherent in British law and protected by the first, third, fourth, fifth and fourteenth amendments. The necessity of search warrants, he pointed out in *McDonald v.*

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42Ibid., 473, 478.

United States, was due to the fact that "the right of privacy was deemed too precious to entrust to the discrimination of those whose job is the detection of crime and the arrest of criminals." 44

When the city of Trenton, New Jersey regulated loudspeakers on sound trucks, Douglas joined the court in upholding a municipality's right to protect a homeowner from "this interference with his privacy." 45 On the other hand when the court held that the District of Columbia could allow radios to be turned on in public carriers, Douglas vigorously dissented: "The case comes down to the meaning of 'liberty' as used in the fifth amendment. Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom." 46 Douglas reiterated this stand in 1961 when he protested "This notion of privacy is not drawn from the blue. It emanates from the totality of the constitutional scheme under which we live." 47

By that time he had found allies in Justices Warren, Frankfurter, Harlan, and Clark in his drive to justify privacy

as an inherent right. Chief Justice Earl Warren warned Congress in the Watkins case that the legislature may not "encroach upon an individual's right to privacy." Congress does not have "a general power to expose where the predominant result can only be an invasion of the private rights of individuals," he chastized.\textsuperscript{48}

When the petitioner in \textit{Sweezy v. New Hampshire} appealed his contempt citation for refusing to answer questions not on grounds of self-incrimination but upon his right to privacy, the high court found in his favor. Frankfurter, joined by Harlan, explained in a concurring opinion: "The inviolability of privacy belonging to a citizen's political loyalties has so overwhelming an importance to the well-being of our kind of society that it cannot be constitutionally encroached upon the basis of so meagre a countervailing interest of the state as may be argumentively found in the remote, shadowy threat to the security of New Hampshire...."\textsuperscript{49}

In 1961 in the famous and often cited criminal case of \textit{Mapp v. Ohio} the Supreme Court turned to the right of privacy to limit the search and seizure powers of law enforcement officers. Noted mainly for its exclusionary rule on evidence

obtained without a proper search warrant, the ruling was in actuality based on the petitioner's right of privacy. Citing Boyd and once again reminding the state of the "sanctity of a man's home and the privacies of life," the court quoted from Lord Camden's decision in John Entick's case of 1765. The fourth amendment, Justice Clark pointed out, provides "limitation upon federal encroachment of individual privacy...." Not only is the exclusion doctrine "an essential part of the right of privacy," but "the right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in a marked contrast to all other rights...."50

The fourteenth amendment restricts state action which would deny due process of law. In the past century the high court has defined due process of law to include fundamental rights--usually those outlined in the first eight amendments to the Constitution. In 1965 the court ruled conclusively in Griswold v. Connecticut that privacy, although not included in those amendments, was a fundamental right. The state of Connecticut had outlawed the sale and use of contraceptives. Upon challenge that the statute violated marital privacy, the court in a 7-2 verdict struck down the law. It

was here that Douglas gave his opinion, joined by Clark, that "we deal with a right of privacy older than the Bill of Rights--older than our political parties, older than our school system."\(^{51}\)

The concurring opinion of Goldberg, Warren and Brennan placed privacy under the protection of the ninth amendment--those rights reserved to the people--"the right of privacy is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.'"\(^{52}\)

Justices Black and Stewart in separate dissents claimed that although the Connecticut law was "uncommonly silly," privacy, "a broad, abstract, and ambiguous concept" had no basis" in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this court."\(^{53}\)

By the mid-sixties, the Supreme Court, in spite of Justices Black and Stewart, had concluded that privacy should be protected as a fundamental inherent right in two major areas: 1) unreasonable search and seizure, especially of one's home or private papers, and 2) as a substantive right limiting government interference in personal matters. Yet in all the cases examined, with the exception of the trials of John


\(^{53}\)Ibid., 509, 530.
Wilkes and John Entick and the plea of James Otis, the court made only vague and nebulous references to early British and American law and history. No other specific examples or citations accompanied the rulings of the high court in their decision that privacy is an "inherent" and "fundamental" right.

One might assume then that the judges reached their conclusions upon studying the history of privacy in legal journals and/or monographs on the subject. An historiographical examination of privacy proves the opposite. Prior to 1959 only one book had been published in America on the subject, a short ninety-two page essay on privacy in New York since 1390. Two-thirds of the journal articles on the topic were written after World War II--demonstrating a woefully small amount of early interest in this "fundamental" and "inherent" right. With few exceptions these scholars took one of three stands: 1) no such right exists, 2) the right has existed for centuries in Anglo-American jurisprudence, or 3) the right emanated from, and as a result of, the Warren and Brandeis 1890 article.

Obviously no single article (or book) has had a greater effect upon the development and acceptance of privacy as a right than that which appeared in the Harvard Law Review.
under the authorship of Louis Brandeis and Samuel Warren.  

Apparently irked by the *Saturday Evening Gazette*’s prying coverage of his wife’s lavish tastes in entertainment, Samuel Warren urged his law partner Louis Brandeis to join him in authoring a treatise extolling the right of privacy in equity.  

Certainly the bias of Warren interfered with any search for truth, but for that matter Brandeis was less enthused, later confessing, "This, like so many of my public activities, I did not volunteer to do."  

Arguing that "the individual shall have full protection in person and in property is a principle as old as the common law...," they admitted that early courts protected only "physical interference" but contended that the right to life eventually broadened to include "the right to enjoy life--the right to be let alone." Now, they complained, "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life...." Protection from this, "numerous mechanical devices," and other "evils under

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54 Warren and Brandeis, "Right to Privacy," 193-220.  
56 Beaney, "The Right to Privacy," 257.  
57 Mason, Brandeis, 70.  
58 Warren and Brandeis, "Right to Privacy," 193.
consideration" can be had not by proving injury as in property cases, but by appealing to the right of privacy.\textsuperscript{59} Relying particularly upon \textit{Prince Albert v. Strange} the authors proclaimed that "the existing law affords a principle which may be invoked to protect the privacy of the individual from invasion."\textsuperscript{60} They concluded that "the common law has for a century and a half protected privacy in certain cases and to grant the further protection now suggested would be merely another application of an existing rule."\textsuperscript{61}

This argument that privacy had roots in common law did not receive ready support; in fact, Herbert Hadley quickly challenged the point. Other than in cases pertaining to secret letters, privacy had no protection in equity, Hadley asserted. Warren and Brandeis misunderstood the authorities they cited for equity protected only property rights, and "the jurisdiction of courts of equity does not on principle recognize the right of privacy..."\textsuperscript{62} Since Hadley's article appeared in an obscure and short-lived journal few authors later cited it.

\textsuperscript{59}Ibid., 195.
\textsuperscript{60}Ibid., 206.
\textsuperscript{61}Ibid., 213.
For four decades very few articles appeared espousing the cause for privacy. Some simply commented on the background and judgments of current cases, others praised Warren's and Brandeis' "originality of conception" and "unique distinction of having initiated and theoretically outlined a new field of jurisprudence." None took the stand that privacy had enjoyed protection at common law or in courts of equity.

It cannot be emphasized too strongly that the major articles which appeared in law journals debating privacy as a right followed, not superceded, the court decisions on privacy. Thus the justices could not have turned to them for support of their arguments that privacy was rooted in common law. Following the controversial and somewhat conflicting decisions of the Taft court in McGrain v. Daugherty (1927), Olmstead v. United States (1927), and Sinclair v. United States (1929), there appeared a rash of articles analyzing the origins of privacy. Surprisingly none of the authors bothered to examine the colonial period of American

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history, and those who searched the British law books did so fleetingly.

Thus Rufus Lisle with a minimum of research boldly penned in 1931: The right of privacy, by this or any other name, was unknown to common law."66 A British publication of that same year with less flair declared "English law is pretty nearly destitute in literature on the topic...," concluding that it "is difficult to predict" if an English court would accept privacy as a right, but the evidence "seems to incline against an affirmative decision...."67 Another British writer spoke more to the point: "...it is, to say the least, very doubtful whether any legal right of this kind is recognized in the English law."68

So much for English law and bluntness. American ingenuity, in the form of the arguments presented by Basil Kacedon, came to rescue the right. Crediting Warren and Brandeis for giving "impetus" to the right in their "able and logical article," Kacedon conceded, "It is true that the right of privacy was unknown at the old common law." But, he stated, that was simply because our ancestors had "no need for the right of

privacy." He unabashedly argued that privacy found protection in man's right to life, liberty and the pursuit of happiness. The right to life included the right to not having to be exposed to the public; the right to liberty guaranteed the right to remain a private person, and pursuing happiness meant one would be "free from any disturbances." Thus he proposed that the courts use "flexibility" to recognize privacy as being within the domain of common law.

James Bell confessed in 1938 that his research unearthed no references by "any of the great commentators on the Common Law." Louis Nizer, three years later, also noted the absence of such a right in the works of the eighteenth century philosophers Montesquieu, Locke and Paine. Nizer cited a few early English cases in which privacy seemed to be protected as a tort, but concluded that prior to the American Civil War "Society had not yet become so complex that the individual's privacy was in danger of encroachment." Such a judgment obviously excluded any interpretation that privacy is a "fundamental" or "inherent" right and would, of course, be

70 Ibid., 646.
strongly attacked by most writers of the sixties and seventies. Nizer postulated that the right originated with the "wave of excess" which engulfed late nineteenth century America, "its creation at the time historically inevitable."72

Until the sixties professors, lawyers, and students continued to issue judgments about the legal origins of privacy without adequate research. One lawyer managed to contradict himself within the space of seven pages, first asserting "in substance the right had been recognized in the tribunals of ancient Greece and Rome, and in English decisions," and then concluding "today the courts fully recognize the right of privacy.... This is the final stage in the acceptance of any new legal doctrine."73 Interestingly fifteen years later another lawyer wrote, "the courts that have considered the question have been absorbed in deciding whether such a right exists."74

Joseph Shaheen, a member of the editorial board of the University of Detroit Law Journal, without cases, examples, or footnotes unashamedly opined, "as far back as the early


Roman law, we find rights that were essentially of the same nature as the right of privacy given recognition and effect.... The natural development of the law followed into the European countries, into England and finally to the early American colonies. "75

While some students continued to applaud Brandeis and Warren for their foresight and originality,76 Alpheus Mason failed to even list privacy in the index of his 713 page biography of Louis Brandeis and devoted only two paragraphs to the 1890 treatise.77 It was the Watkins and Sweezy cases of 1957 which revived interest in the origins of privacy. Justice Douglas had lectured to the students of Franklin and Marshall College in the Spring of that year on "The Right to be Let Alone" (the Watkins decision was handed down in June). Taking his usual stand, Douglas found the right "explicit and sometimes implicit in the Constitution," protected by the first, fourth and fifth amendments.78 This natural right,


77 Mason, Brandeis, 70.

he informed his audience, "is a sturdy part of our heritage, more Americans than European, more Western than Eastern. It cannot be easily stamped out in this continent, for it is a part of all of us."78

Douglas had a partial supporter in William Zelmermyer, Professor of Business Law at Syracuse University and one of the first to author a monograph on the right of privacy. While Zelmermyer claimed privacy "lies at the heart of all human rights" and is the "first of the attributes claimed by man...," he gave credit to Brandeis and Warren for its "inception."80 Attorney Paul Ashley, speaking for journalists likewise credited Warren and Brandeis, but concluded differently than Douglas and Zelmermyer, warning "this newborn right could become a Frankenstein."81 Meanwhile, as late as 1959, an assistant professor of law at the State University of South Dakota wrote "Prior to publication no English or American court had ever recognized such a right."82

79Ibid., 165.
80William Zelmermyer, Invasion of Privacy, V: 24, 25.
81Paul Pritchard Ashley, Say It Safely, Legal Limits in Journalism and Broadcasting, 109.
82Frederick Davis, "What Do We Mean By Right of Privacy," South Dakota Law Review, I (Spring, 1959), 3.
year the Dean of Harvard Law School retorted "'the right to be let alone' is the underlying theme of the Bill of Rights," and the Dean of the University of California School of Law divided just the equity question of privacy into four major divisions of tort action. Chaos reigned.

Then came Mapp. A flood of articles and books resulted. Still none examined American colonial history or searched the British cases in depth. Roscoe Pound, beginning with Brandeis and ending with Mapp, accepted privacy as a "modern demand." Morris Ernst and Alan Schwartz prepared a book painfully replete with similes and metaphores. Without footnotes or sources they discovered "In the early days of our Republic, and earlier still in England, these principles were nurtured by lawyer, judge, and scholar, each in a separate garden without relation to the other.... The seeds of what we now call privacy were sown first in England...." But they also stated,


on the same page, that Warren and Brandeis gave "birth" to the right.86

Searching no further back than 1848, Leon Brittan concluded that the right "is purely an American development,"87 a thought shared by another essayist, a textbook author, and a popular writer.88 In opposition James Weeks chided "to say there is no precedent is to display a total disregard for history...English history in particular." He then failed to examine either British or American seventeenth and eighteenth century history.89 His thoughts were echoed by Myron Brenton.90 Samuel Hofstadter, a New York judge, and George Horowitz, an instructor at the New School for Social Research in New York, added a new theory: privacy as a right had long been accepted in other legal systems beginning with the Mishnah of Jewish law and infiltrating into Greek, Roman and Continental

90Myron Brenton, The Privacy Invaders, 236.
law, but English common law rejected it other than as a "parasite" of property rights. Therefore it did not transfer over into the American system until Warren and Brandeis penned their treatise. 91

Once the court decided Griswold in 1965, the literature became inundated with articles and monographs on the subject. Three major books found their way to market, one finally analyzing privacy in colonial America. Some research showed depth, most did not.

Thomas Emerson, counsel for the appellants in Griswold and Professor of Law at Yale University denied relying on stare decisis confessing that he depended upon the court to "enter uncharted waters" and to make "a bold innovation." Not historically minded, he wrote, "The precise source of the right of privacy is not as important as the fact that six judges found such a right to exist...." 92 Others agreed with him. A Professor of Law at George Washington University depicted the case as "longer on yearning than on substantive content," asserting that the court had found "it necessary to play charades with the Constitution." 93

Finally it appeared that a competent and in depth study would be made of the English origins when the Rockefeller

91 Samuel H. Hofstadter and George Horowitz, The Right of Privacy, 1-16.

Foundation financed a research proposal for T. L. Yang. But his study proved to have more application to current law than to historians. He began by erroneously stating that American courts first recognized the right in the 1890's. Without examining early common law he concluded "up to now the /British/ courts have never granted relief to a violation of privacy as such." 94

Meanwhile William Beaney continued to give credit to Warren and Brandeis, 95 as did Paul Freund, Professor of Law at Harvard University, 96 Adam Breckenridge, author of a book on the subject which cited only one British case and no colonial examples, 97 and Stig Stromholms writing for the International Commission of Jurists Nordic Conference on Privacy. In fact Stromholms claimed "In Anglo-American legal writing, the search for the origins of the notion of privacy as a legal institution causes little difficulty." 98

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95 Beaney, "Right to Privacy," 257.
96 Paul Freund, "Privacy: Once Concept or Many," in Privacy, ed. by J. Rolland Pennock, 183.
97 Adam Breckenridge, The Right to Privacy, 4.
98 Stig Stromholms, Right of Privacy and Rights of the Personality, A Comparative Survey, 25.
Not so for others. Paul Kauper, Professor of Law at the University of Michigan, wrote "In exercising its power in Griswold to protect a fundamental personal liberty, the Court, far from advancing to a new milepost on the high road to judicial supremacy, was treading a worn and familiar path." Edward Long, recognizing privacy as a right existent in Western law since sixth century Rome, continued the metaphor: "the first milestone on the road to independence was the right to be let alone, the right to be free from arbitrary intrusion by the government into the home." For those getting past the "milestones," Milton Konvitz provided "zones of privacy," beginning with Adam and Eve covering their nakedness with fig leaves. Bernard Schwartz classified it as an inalienable right, and Herbert Spiro, matching Stig Stromholm for simplistic conclusions, asserted "It seems safe to assume that, until the American Revolution, English

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100Edward Long, The Intruders, 26.


subjects in the thirteen colonies generally shared attitudes toward privacy with their relatives back home in England."103

Three intensely researched monographs have recently been published, two of which supported the belief that the right of privacy had roots in British-American legal traditions and one of which credited Warren and Brandeis with its conception. Alan Westin, author of *Privacy and Freedom* is recognized as a leading expert on privacy in America. His work primarily dealt with privacy as a current right too often threatened by government and business in this technological and computer oriented age. With little proof and no specific examples Westin used colonial history to justify his arguments in favor of privacy in today's world. He asserted that "...American political thought rested on a series of assumptions--drawn heavily from the philosophy of John Locke--that defined the context for privacy in a republican political system..." with the political ideas of the times having "a common purpose: to free citizens from the unlimited surveillance and control that had been exercised over 'subjects' by the kings, lords, churches, guilds and municipalities of European society."104 Without hesitation, Westin forcefully maintained "the notion

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present—that privacy was somehow a 'modern' legal right which began to take form only in the late nineteenth century—is simply bad history and bad law.105

Westin received assistance in his investigation from David Flaherty, then a student of history at Harvard University and later Assistant Professor of History at the University of Virginia. Flaherty continued research on the topic, publishing in 1972 a well documented monograph entitled Privacy in Colonial New England, 1630-1776. Flaherty's studies led him to believe that protection of privacy so permeated the life style of colonial New England that it was "often taken for granted." He credited English traditions, Massachusetts ecology, and Puritan ideals for leading to and establishing a supportive attitude towards privacy.106

Don Pember publishing simultaneously with Flaherty concluded differently. The early colonists fled to America in hopes of being left alone, but once there discovered that privacy was suppressed. To Pember "privacy as a legal entity did not exist in North America in 1624, and it would not

exist for another 266 years." That obviously adds up to 1890 and credit (or blame) for Warren and Brandeis.

Confusion? In the year of the Bicentennial Clarence M. Kelly, Director of the Federal Bureau of Investigation, wrote, "When considering the issue of the right of privacy, it is particularly important to be reminded that this is not a new idea. In fact, this right lies at the roots of our American heritage." Ariyeh Neier, Executive Director of the New York chapter of the American Civil Liberties Union, celebrated the nation's anniversary with "It is only in the last century that this word has been used as a legal concept to describe the state's duty to let people alone."

This disagreement, the birthright of privacy as a legal entity, is the heart of this study. Did the pre-revolutionary legal systems of England, and the colonial authorities in Massachusetts provide protection through tort action against encroachment by one person or a group of persons into the private lives of another? Were these same governments limited or restrained in their actions vis-a-vis the private lives of their citizens? What if any restraints were placed on these governments in protecting man's home as his castle, in search

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107 Don R. Pember, Privacy and the Press, 5.
109 Ariyeh Neier, Privacy, Society and Dossiers," in The Right to Privacy ed. by Grant S. McClellan, 14.
and seizure, government investigations, examination of communications, and intrusion into marital, religious, moral and other personal and family affairs? Put quite simply, does the right to privacy have roots in the colonial American experience?
An examination of early English law produces a preponderance of evidence that privacy did not enjoy the benefit of governmental protection. In fact the Anglo-Saxon and early Norman kings in their quest for an orderly and controlled society consistently ruled against privacy and purposely organized their systems of government to counteract it. Crime without a system of penalties would result in retribution, private acts of war, and a chaos which could not be tolerated by kings seeking to enlarge their jurisdictions. To counter such private wars, the English rulers found it necessary to develop procedures which would satisfy victims of crime, but these were not synonymous with "the establishment of criminal law, as we understand the term." As outlined in the preceding chapter, in a series of cases the United States Supreme Court set rules concerning the use of evidence in trials on the basis that there existed a

fundamental right of privacy derived from the long standing British and American tradition that a "man's home is his castle."²

To keep peace the earliest of Anglo-Saxon kings did declare prohibitions against acts which wronged or inflamed others and set up compensation to be paid to victims by the perpetrators of unlawful deeds. Yet by no means were the servus and villeins of Anglo-Saxon and Medieval Britian confronted with or protected by police forces or rules of evidence.³ It was in this context of preserving the peace, not privacy, that a man's home became a "castle." The king's peace spread over the burh (borough), a term at times indistinguishable in law from house. Frederic Maitland rhetorically posed the question "has not legal fiction been at work since an early time? Has not the sanctity of the king's house extended itself over a group of houses?" He answered, "The term burh seems to spread outward from the defensible house of the king and with it the sphere of his burh-bryce is amplified. Within the borough there reigns a special peace...."


Citing the law of King Edmund, Maitland concluded that this ruler by "legislating against the bloodfeud makes his burh as sacred as a church; it is a sanctuary where the bloodfeud may not be prosecuted." Finally this eminent legal historian determined, "The Englishman's house is his castle, or to use an older term, his burh; the king's borough is the king's house, for his housepeace prevails in its streets."[^4] A man's home became his castle not to protect privacy but to broaden the enforcement power of the king to prevent bloodfeuds and private wars.

The laws prove Maitland correct. The decrees of the Anglo-Saxon kings provide evidence that in regard to homes it was the king's peace which was being protected, not privacy. Aethelbert, King of Kent, dictated around 602 that the first man to forcibly enter another's house would pay compensation equal to that assessed for cutting off a ring finger in a fight. If a comrade followed, he would pay the owner the same as if he had pierced his cheek with a sword.[^5] An equal sum


would be charged for breaking a fence, and triple damages
would be assessed if a theft resulted. Later kings declared
the use of abusive or insulting words in a third man's house
a violation of the king's peace by levying not only a bot of
six shillings for the insulted person but an additional fine
of double that amount payable to the king. Cnut, King of
England from 1017-1035, claimed the right to fine anyone
guilty of housebreaking ("hamsocne"). Obviously a protection
of the king's peace, this fine would not be levied if the
king granted permission for the break-in. King Harold, and
after him William the Conqueror, set a fine of one hundred
shillings for house-breaking, grouping this crime with breach
of the peace and assault by ambush.

Earlier, Alfred had mandated that no one was to attack an
adversary at home without giving his enemy a chance to pro-
vide "justice." For seven days, the house could be besieged,
and as long as the foe remained inside an attack could not be

7 Laws of Hlothhaere and Eadric, ch. 11, Ibid., 21.
8 Dooms of Cnut, ch. 12-15, trans. Carl Stephenson and
Frederick G. Marcham, Sources of English Constitutional
History, 1:23.
9 Stephenson, Sources, 42.
launched. If at the end of a week, the resident surrendered his weapons, he would remain "unscathed for thirty days." By ordering that if the wronged man does not have sufficient power to besiege the house, he must "ride to the king before having recourse to violence." Alfred made clear that his motive in extending the king's safety from the king's castle to the subject's home was to preserve the peace, not to protect privacy or civil rights.

When the king's peace was broken, Ine recognized no privacy or right of confidentiality between a man and wife. A thief would be assessed a fine of sixty shillings unless "however, he steals with the cognisance of all his household," then "they shall all go into slavery." Ine added that a "ten year old child can be accessory" to such a crime. He kept the search and seizure rules simple: "If a husband steals a beast and carries it into his house, and it is seized therein, he shall forfeit his share of the household property." His wife would forfeit hers also unless "she dare declare, with an


oath, that she has not tasted the stolen meat.\textsuperscript{12} Rules of evidence did not exist in Anglo-Saxon law. Cnut declared "if any man bring a stolen thing home to his cot, and he be detected; it is just that he have what he went after." If the stolen goods were discovered in the wife's chest or lockers, "then she is guilty."\textsuperscript{13}

The serfs, of which there were about 25,000 at the time of the conquest, "in the main had no legal rights." In regard to a serf's cottage Maitland discovered, "there is here no legal limitation of his master's power."\textsuperscript{14} The Anglo-Saxons, along with William the Conquerer, kept order by opposing privacy and establishing frankpledges, groups of ten which "made every one accountable for all his neighbors" including their arrest and the recovery of any stolen goods.\textsuperscript{15}

If a man discovered his ox missing and suspected thievery he sounded the hue and cry and all within hearing followed the

\textsuperscript{12} Laws of Ine, ch. 57, Ibid., 56-57.

\textsuperscript{13} Laws of Cnut, ch. 77, trans. Benjamin Thorpe, Ancient Laws and Institutes of England, 1:419.

\textsuperscript{14} Maitland, Domesday Book and Beyond, 27-28.

trail. Upon finding the ox on a man's land or in his hut no search warrants were issued, no rules of evidence or privacy could be claimed; the possessor faced either immediate punishment or answered questions about how he acquired the animal. The original owner took hold of the ox's ear with one hand, and with his sword or a relic in his right swore that the animal had been stolen from him. Simultaneously the possessor did the same while naming the seller. The original owner then recovered the ox and the possessor became responsible for finding the previous seller. The cycle would continue until the thief was discovered and punished. The accused became an "outlaw" outside the protection of the law ("non habeat legem") and was accorded only summary justice. This method of tracing and recovering stolen goods allowed for no procedural or evidentiary rights. As Palgrave remarked: Perhaps the name of legal procedure can scarcely be given with propriety to these plain and speedy modes of administering justice: they are acts deduced from the mere exercise of the passions natural to man, and the law consists only in the restrictions by which

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the power of self-protection and defense were prevented from degenerating into wanton and unprovoked cruelty."\(^{17}\)

Meanwhile the early English kings constantly meddled in household affairs. Hlothhaere and Eadric forbade entertaining strangers in a house for more than three days; a rule repeated through Henry I.\(^{18}\) Wihtraed ordered that monks could spend no more than one night in the homes of his subjects.\(^{19}\) Both Athelstan and Henry I forbade landless men to remain overnight in anyone's house,\(^{20}\) and a number of kings refused to allow villeins to provide overnight shelter for serfs pledged to another master.\(^{21}\) William the Conqueror certainly did not


\(^{21}\) Laws of Edward, ch. 10; I Athelstan 22; II Athelstan 4, III Athelstan 4; IV Athelstan I; Laws of Edmund, ch. 3; Laws of Cnut, ch. 28: I William 30; I William 48; XLIII Henry II, 2; trans. Thorpe, *Ancient Laws* 1:165, 211, 216, 218, 221, 252, 393, 481, 486, 543.
recognize any right to be let alone when he forbade the serving of meat in homes during fasts. 22

As a legal concept, privacy fared little better between the Conquest and the War of Roses. The greatest source of knowledge of English society at the time of the Conquest, The Domesday Book, was in itself an affront to privacy--the result of a grand inquest ordered by the conqueror. 23 Admittedly Henry II expanded the role and power of the Curia Regis and organized a jury system, but he stipulated that neither of these should encroach upon the powers of the sheriffs and local jurisdictions regarding theft and lesser crimes. Certainly he contemplated no protection of privacy, having set up the jury system for just the opposite reason--to inquire into and report upon the affairs of the people and to charge and witness against criminals. Henry VI, three centuries later continued to view the jury as a body for conducting investigations and, if necessary, going to the residence of the witnesses to gather depositions. 24 Until the middle of the


23Maitland, Domesday Book and Beyond, 1.

sixteenth century witnesses deliberated with the jury volunteering their private knowledge of the matter at hand. As late as the eighteenth century jurors made judgments from "their own private knowledge." Blackstone emphasizes, "As to such evidence as the jury may have in their own consciences, by their private knowledge of facts, it was an ancient doctrine, that this had as much right to sway their judgements as the written or proof evidence...." Jurors were not bound by the evidence presented but could give verdicts with proof which "the law presumed they were privately acquainted." Later, when judgments were overturned for being "contrary to evidence," jurors simply had themselves sworn in as witnesses and then presented their testimony for the record.

The enforcement of justice for common crimes in the medieval period changed little from earlier times. Discovery of a crime caused the hue and cry to be given, often now by the sheriffs or the constables, who were military rather than
"police" officers. If the accused resisted arrest he would be killed; if captured he would be brought to court. There he found no protective rules of evidence, and was disallowed from speaking in his own defense. Upon a finding of guilt he was "promptly hanged, beheaded or precipitated from a cliff, and the owner of the stolen goods would probably act as amateur executioner." 

In most cases the criminal escaped capture and was declared an outlaw. The home in this case did not serve as a haven for either protection or privacy. By law a householder had to turn in anyone in his house or family who had been accused of a felonious act. In one case a husband was fined for not producing his wife for trial after she was accused of arson. Henry II in the Assize of Clarendon clearly placed

29 Pollock and Maitland, History of English Law, 2:577.
the house within the jurisdiction of the king's absolute power by decreeing that if anyone hid a fugitive Albigensian in his home "the house in which they resided shall be taken outside the vill and burned." In the same assize, Henry set up a frankpledge declaring that all men must take an oath to report criminals and "let there be no one, in castle or out of castle, or even in the honor of Wallingford, who forbids the sheriffs to enter upon his jurisdiction or his land for view of frankpledge...."

A most interesting case took place five centuries ago. In circumstances remarkably alike those of Mapp v. Ohio, an officer searching for evidence illegally broke open the outer door of a house, committing an act of trespass. Once in, he continued the search, breaking into a locked trunk and finding the sought after evidence. The court held that breaking into the house was illegal but use of the evidence was not forbidden "for he had a right to break the trunk and take the goods." This case was cited in 1774 as the foremost case involving what constituted a man's "castle." Although the

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32 Assize of Clarendon, ch. 21, trans. by Stephenson, Sources, 1:79.

33 Assize of Clarendon, ch. 4, trans. by Stephenson, Sources, 1:78.
Mapp decision referred to British case law and was based upon the "sanctity of a man's home and the privacies of life," neither of these cases were cited.  

It was during the sixteenth and seventeenth centuries that rules of evidence and the question of competency of witnesses began to develop. With evidence and examination of witnesses growing in importance an act passed by Elizabeth I compelled witnesses to appear upon service of a writ and provided punishment for perjury. This tended to raise questions concerning the competency of witnesses and exceptions to compulsory testimony. Those who could not be witnesses were divided into two classes, those with natural incompacities and those with artificial incompacities. The former included insanity, infancy and in some cases being a woman. The latter included those to be excused on religious or moral grounds and those who had an interest in the case.

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35 Elizabeth c. 9.  
No cases could be found in which witnesses were disqualified in order to protect the privacy of the accused. As in cannon law rules concerning the competency of jurors, witnesses could be disqualified if they were members of the households of the parties involved, but this rule was based on the fear that such a witness would not be trustworthy rather than on any private secrets he might divulge. In the eyes of the law, husbands and wives were one, and in all but a few specific cases in which an offense was "directly against the person of the wife" the husband and wife could not testify on behalf of each other since this would violate the rule that "no one is allowed to be a witness in his own cause." Neither Holdsworth nor Blackstone ever allude to the protection of privacy as a reason for disqualifying witnesses. In fact the courts had ruled that letters between spouses were admissible "to she the terms of affection on which they were living...," and "letters written by the husband to the wife may be read as evidence against him."  

37 Ibid., 9:196-197.

38 Blackstone, Commentaries, 1:363.

39 Ibid., 1:364.
Initially even the rule allowing lawyers not to testify against their clients was adopted to protect the "honour" of the lawyer rather than the privacy of the defendant. Even in the eighteenth century privacy of communication existed only between the litigant and his counsel. Not even doctors had privileged information then. In editing Blackstone's *Commentaries*, Chitty footnotes: "The purposes of public justice supercede the delicacy of every other species of confidential communication." He cites the case of the Duchess of Kingston in which "it was determined that a friend might be bound to disclose, if necessary in a court of justice, secrets of the most sacred nature which one sex would respond in the other. And that a surgeon was bound to communicate any information whatever, which he was possessed of in consequence of his professional attendance." Hearsay evidence was allowed until the end of the sixteenth century, and no right against self-incrimination existed prior to Cromwell's takeover. From then until the eighteenth century


that right applied only in court and at the whim of the judge and not during pre-trial "examinations."\(^\text{42}\)

Unquestionably the most important cases establishing any claim to an English precedent for an American right to privacy occurred in the eighteenth century. By this time the House of Commons has successfully protested the illegal billeting of soldiers in private homes as a costly nuisance,\(^\text{43}\) and the British people had established rights and procedures against unwarranted search and seizure by governmental authorities.\(^\text{44}\) A constable, for instance, could not break through the outer door of a house to serve a warrant or make an arrest without knocking and announcing his mission.\(^\text{45}\)

The signing of the Treaty of Paris in 1763 provoked the wrath of a number of the members of Commons, one of whom, John


\(^{43}\)Petition of Right; 31 Charles II c. 1.


\(^{45}\)Lawrock v. Brown, 2 Barnewall and Alderson 592.
Wilkes, published a journal, the North Briton. In North Briton No. 45 George III was verbally attacked for a speech he had given in favor of the treaty. Considering this to be seditious libel, Lord Halifax, the Secretary of State, issued a general warrant to his messengers to find the author or authors of North Briton No. 45 and arrest them and seize any evidence. Forty nine men were arrested including Dryden Leach, a printer, and John Entick, author of The Monitor, an anti-government publication, as well as Wilkes. Refusing to yield, Wilkes was arrested and taken to the Tower. He swore out a writ of habeas corpus claiming that the warrant under which he was arrested and his papers seized was illegal since it was not specific. The warrant empowered the messengers "to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, intitled, The North Briton, No. 45, Saturday April 23, 1763, printed for G. Kearsley in Lundgate-Street, London, and them, or any of them, having found to apprehend and seize, together with

46 North Briton, No. 45, April 23, 1763.

47 Case of John Wilkes, Esq., on a Habeus Corpus, 19 Howell's State Trials 981 (1765).
their papers, and to bring in safe custody before me...." Wilkes further claimed that, as a member of Parliament, he was immune from arrest. Chief Justice Pratt released him from imprisonment on the grounds that he was a member of Parliament. Wilkes then sued Robert Wood, the Under-Secretary, of State who had executed the warrant, for trespass. Chief Justice Pratt declared that the Secretary of State had no power to issue "a general warrant, where no inventory is made of things thus taken away, and where no offenders' names are specified in the warrant...." The jury found in Wilkes' behalf and awarded him one thousand pounds damage. Wilkes later left the country and refused to return to face trial on the libel charges.

Spurred on by Wilke's success, John Entick sued the messengers who had broken into his house and seized his papers. The opinion in this case, presented by Chief Justice Pratt (Lord Camden), established that general warrants were illegal usurpations of power. The court found for Entick and awarded him 300 damages for the trespass. Later this case would

48 Ibid.
49 Wilkes v. Wood, 12 Howell's State Trials 1166 (1765).
50 Entick v. Carrington 19 Howell's State Trials, 1044 (1765).
be used as the British precedent in arguments for a right of privacy in American evidentiary proceedings. Clearly, the Chief Justice established parameters which had to be followed in search procedures: "there must be a full charge upon oath of a theft committed; the owner must swear that the goods are lodged in such a place; he must attend at the execution of the warrant to show them to the officer, who must see that they answer the description...." This search was illegal, Pratt declared, because these procedures were not carried out. The seizure not being warranted, an "invasion of private property" was committed, and this, he ruled, was a trespass. Most important, no judgment was reached in any of these suits that the evidence illegally seized could not be used in a criminal trial. In none of the cases was a decision given that private papers could not be seized when proper and specific warrants were issued. Clearly these cases provided a remedy when established procedural safeguards were not employed in executing search and seizure. On the other hand, the judgments neither established a substantive right of privacy nor set a rule that illegally obtained evidence could not be used in criminal

\[51\text{Ibid.}, 1074.\]
trials. Even when Blackstone averred that a man's home was "his castle" and should not "be violated with impunity," he conceded that "in criminal causes, the public safety supercedes the private."\textsuperscript{52}

A later case, decided in 1774, expanded on this. A bailiff broke into a rented room in a dwelling to make an arrest for debt. The court held that the arrest was legal as long as the bailiff had not broken the outer door, even if he had gained admission through the outer door by using deception. The rule against breaking down the outer door acted, the court decided, "as a protection to such a person, and not for his own sake."\textsuperscript{53} Again the argument that a man's home is his castle rested on keeping the king's peace, not on protecting privacy.

Samuel Warren's and Louis Brandeis' arguments for a remedy in tort law against those who published reports of

\textsuperscript{52}Blackstone, \textit{Commentaries}, 4:173.

\textsuperscript{53}Lee \textit{v. Gamsel}, 98 Eng. Rep. 937. Similarly, in an earlier case, the court had decided that breaking into an outhouse to make an arrest was legal since an outhouse is not considered part of a man's castle. \textit{Penton v. Brown}, 1 Siderfin King's Bench 186.
private or personal affairs find no precedence in English rulings either. No tort law or rules of equity existed in England prior to the fourteenth century. Throughout the middle ages wrongs against persons fell under actions of trespass and criminal laws. Not until after this period did tort law develop. Remedy for libel or defamation did exist as early as King Cnut who ruled that a false accuser would be "liable in his tongue, unless he redeem himself with his wer," but truth was a defense and this ruling pertained to false accusations rather than the truthful reportings of a man's private affairs. Although there exists "no continuous history" of British court ruling on defamation, written defamation was covered by the Anglo-Saxon Lex Salica, the Twelve Tables and the manorial courts, but then only when it reached scandulum magnatum. Even under those circumstances prior to the sixteenth century defamation was not actionable in the king's court, but only in the manorial court, and the issue was always defamation not privacy.

54 Holdsworth, History of English Law, 8: 422.
Truth had always been a defense and "damage was construed in a narrow proprietary sense."
Frederick Pollock reasoned, in fact, "the law went wrong from the beginning in making the damage and not the insult the cause of the action." For instance under the Lex Salica a man accusing a woman of being a "harlot" could be fined forty-five shillings--unless he proved she was a harlot.

As false accusations began to clutter up the court dockets punishments became stiffer. False charges of murder or even theft in the Norman courts resulted in assessment of damages and a public confession of lying by the accused while he held his nose with his fingers. As late as 1249 false accusation of theft coupled with "vile and insulting words" resulted in a fine of only twelve pennies. By 1295 Edward

56 Holdsworth, History of English Law, 8:335.
57 Sir Frederick Pollock, Law of Torts, 324.
58 Lex Salica, ch. 30.
59 "nasum suum per summitetem tenebit," Pollock and Maitland, History of English Law, 2:536.
60 Pleas of the Manors of Bec, trans. by Stephenson, Sources, 1:189.
I had separated defamation from false accusations of a crime. Defamation still was not actionable in the king's court, but if a person accused of a crime was found not guilty, the accuser would pay damages and receive a year in jail as punishment for bringing the false charges. The first possible case of defamation being actionable in the king's court occurred in 1356, and since contempt of court entered into the matter, it is unsure if defamation was actionable. Obviously if defamation was not actionable, in which truth was a defense, privacy as concerns the reporting of a person's private affairs to others, was not protected by early British courts.

Following the War of the Roses the procedures of adjudication against defamation evolved along with tort law. Due to rulings by the Star Chamber, defamation became punishable both as a crime and a tort. When defamation was committed

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against public persons it was viewed as a seditious act punishable as a crime for inciting a breach of the peace. In these cases the Court of the Star Chamber investigated defamation not to protect the public person's privacy, but to stop rebellion. The Star Chamber was charged by the Privy Council to act in "punishing libellous and scandalous words, conspiracy and false accusation...."\(^{64}\) In their procedures to punish scandalous words the court showed no respect for privacy. The Statute of Liveries, for example, provided that any informers appearing before the Star Chamber would not only be listened to, but would be rewarded as well.\(^{65}\) The venerable legal historian William Holdsworth noted that the "court was deemed to be especially bold to look into matters which might concern the safety of the state," and remarked that another historian had previously observed that the Star Chamber was "the curious eye of the State and the King's Council prying into the inconveniences and mischiefs which abound in the Commonwealth."\(^{66}\) The Star Chamber used torture to wring confessions from the accused and was not above paying


\(^{65}\)19 Henry VII c. 14.

those who informed on their neighbors' affairs. In fact the statute abolishing the Star Chamber reasoned that the court had "assumed unto itself a power to intermeddle in civil causes and matters only of private interest between party and party...." 67

During the sixteenth century, relief for defamation against a private person could be sought through a tort action. If a person were ridiculed or held up to contempt, he could recover providing that damages could be proved. Truth, though, in cases of tort was a defense. 68 Thus, rather than protecting privacy, tort action simply provided restitution for untruthful damaging statements.

In the 1964 case of Griswold v. Connecticut, the United States Supreme Court recognized a substantive right of privacy limiting the intrusions of government in personal matters. In his concurring opinion Justice Harlan called for "respect for the teachings of history, and solid recognition of the basic values that underlie our society." In his separate concurring opinion Justice Goldberg insisted that he was not "turning somersaults with history" and ranked privacy as a basic

67 16 Charles I c. 10.
68 Holdsworth, History of English Law, 8:336.
fundamental right deep-rooted in tradition. David Flaherty, the chief proponent of the argument that privacy is not a recently endowed right, claimed without citation that "Privacy can surely be identified in a general sense as one of the cultural goals of sixteenth and seventeenth century society. The men and women who settled America in the seventeenth century were the heirs of the Western cultural tradition as it had particularly manifested itself in England."70

Such statements cannot stand unchallenged in light of the sumptuary laws and the intervention of the church in the private affairs of the citizens of England during that time. As early as the seventh century financial arrangements of a private nature were forbidden by a decree of King Ine of Wessex: "Let him who is accused of secret composition clear himself of those compositions with CXX hides, or pay CXX shillings."71 Two centuries later Aethelstan ordered that any reeves, bishops or "ealdormen" in all of England who failed to disclose private financial agreements which came to their

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attention were to be fined and the reeve removed from office. 72 Rewarding of informants began as early as 695 when Wihtred, King of Kent provided payments for those who reported any neighbors who worked on the sabbath. 73

Fourteenth and fifteenth century kings saw no reason not to interfere with the personal habits of their subjects. Edward III forbade craftsmen to wear silk or velvet and ordered ploughmen to wear linen girdles. 74 He also set a limit of two courses per meal (except for holidays) and instructed that servants within the realm could partake of fish or meat only once a day. 75 A century later his namesake, Edward IV, directed that servant women were not to wear silver on their girdles for "wearing inordinate and excessive apparel was a displeasure to God, was an impoverishing of the realm and enriching other strange realms and countries, to the final destruction of the husbandry of this realm, and leading to

74 37 Edward III c. 1
75 10 Edward III c. 3; 37 Edward III c. 1.
robberies."\textsuperscript{76} Where the king did not interfere, Pollack and Maitland aptly point out "the relationship between husband and wife, in so far as it was merely personal, was more than sufficiently regulated by the ecclesiastical tribune."\textsuperscript{77}

Within two years of his ascension to the throne, Henry VIII ushered in the sixteenth century with a proclamation forbidding the working classes the privilege of playing at cards, tennis, dice or bowling and ordering the sheriffs to conduct at least one "secret search" each quarter for the purpose of capturing such "misruled persons."\textsuperscript{78} He further ordered the continuation of canon law and required that christenings, weddings and burials be registered.\textsuperscript{79} Quite succinctly he ruled "all things that concern Almighty God and His religion, ordained by the archbishops, and doctors should be fully believed, obeyed, observed and performed...."\textsuperscript{80}

\textsuperscript{76} Edward IV c. 5.
\textsuperscript{77} Pollack and Maitland, \textit{History of English Law}, 2:433.
\textsuperscript{78} P. L. Hughes and J. F. Larkin, eds., \textit{Tudor Royal Proclamations}, I: 85-92; see also I: 177-181.
\textsuperscript{79} 25 Henry VIII c. 19.
\textsuperscript{80} 32 Henry VIII c. 46.
Laws and proclamations enforced the "cultural tradition" of that time mandating to the most minute detail what the people could wear, eat and drink with the rack wringing confessions out of those accused of crimes. Henry VIII even decreed how many courses each class could serve at a meal—an earl being allowed seven and those whose estate came to 500 being limited to three. Any caught disobeying this proclamation would be punished at the King's pleasure as an example to others who might "enterprise any such follies and sensual appetites...." Edward VI commanded local officers to "diligently with all speed inquire, search, and try out" any persons who ate meat on Fridays or Saturdays.

The Court of High Commission set up by Edward VI in 1549 would last until 1641 with a broad base of power vested in it by Queen Elizabeth's decision to charge it with enforcing the Act of Supremacy. This court which had broad powers of inquiry

82 Hughes and Larkin, eds., Tudor Proclamations, I:128-129.
83 Ibid., I:510-512.
and which could summon witnesses to testify under oath, dealt with immorality, heresy and non-conformity—all of which were defined broadly. Professor Usher complained that "the quarreling of two old women in church was schism,... and the failure of the parson to read prayers on a Wednesday because he was reaping his harvest was non-conformity." The court, according to Holdsworth, "stood to the church and to the ordinary ecclesiastical courts somewhat in the same relation as the Council and the Star Chamber stood to the state...;" therefore, it "was able to make its powers felt all over the country. Thus a uniform discipline and a uniform administration of the ecclesiastical law could be secured, and so the policy of Charles and Laud could be more effectually enforced all over the country."\(^{84}\) Carl Bridenbaugh complained of the ecclesiastical courts' "petty interference with men's lives and conduct."\(^{85}\)

Under Elizabeth I laws forbidding silk in nightcaps of those whose income was below 20 or setting a punishment of three months in jail for eating meat or poultry on Saturday

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certainly did not provide a climate in which a right of privacy could flourish, or even, for that matter, be nourished. Elizabeth published no less than ten proclamations an apparatus directing, for instance, "knights' wives to wear cloth of silver in their kirtles only;" and those under the rank of baron to refrain from donning hose laced with satin. She also prohibited the playing of tennis, cards and bowling by yeoman, servants and laborers.

In her well researched article on "Attitudes of Members of the House of Common to the Regulation of 'Personal Conduct' in Lath Elizabethan and Early Stuart England," Joan Kent discovered that the Members of Commons were concerned with the possibility that sumptuary regulations might be enforced against gentlement as well as those of the lower class, but the "majority in the Commons accepted parliamentary regulation of men's 'manners and morals' as both necessary and desirable,

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86 Elizabeth I c. 5; See also Hughes and Larkin, Tudor Proclamations, II: 139-140; 381, 390, 438, 503, 510, 535; III: 36, 134, 143, 188, 204.


88 Ibid., III: 279.
as long as their conduct was unlikely to be affected." Her reading of the pertinent manuscripts and study of the debates of the members of the House of Commons led her to resolve that "only a few of them seem to have questioned the merits of interference by the state with the habits of the individual."89

Thus it is hard, if not impossible, to prove any contention that privacy existed or was even contemplated as a legal right in sixteenth and seventeenth century England. At the time of the American Declaration of Independence British tort law acknowledged no right to privacy, the English government exercised jurisdiction over the material, religious, moral and other personal affairs of its citizens, and no exclusionary rules of evidence existed. In short, privacy as a legal right had no recognition in English jurisprudence prior to the American Revolution.

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CHAPTER III
TORT AND PRIVACY IN COLONIAL MASSACHUSETTS

When Samuel Warren and Louis Brandeis, citizens of the Commonwealth of Massachusetts, expounded upon the right of privacy in the Harvard Law Review of 1890, they vigorously argued that "the more general rules of privacy are furnished by the legal analogies already developed in the law of slander and libel...."\(^1\) Man, they asserted, possessed a weapon to protect himself against the encroachment of others upon his right to be let alone--"the common law provides him with one, forged in the slow fire of the centuries, and today fitly tempered to his hand."\(^2\) Turning to the law of defamation, they discovered the "remedies for an invasion of the right of privacy...; namely: 1. An action of tort for damages in all cases.... 2. An injunction in perhaps a very limited number of cases."\(^3\)

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\(^1\) Warren and Brandeis, "Right to Privacy," 214.

\(^2\) Ibid., 220.

\(^3\) Ibid., 219.
With no apologies to legal history they further stipulated, "The truth of the matter does not afford a defense. Obviously this branch of the law should have no concern with the truth or falsehood of the matters published.... The right of privacy implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all."4

The purpose of this chapter is to discover whether or not the weapon being "forged in the slow fire of the centuries" existed in the colony of Massachusetts in the form of tort law just two centuries before.

It would be surprising to find the Puritans in favor of a remedy at tort against a person who divulged private but truthful matters. Roscoe Pound argued that the Puritans consistently opposed any court of equity since Puritan doctrine provided for people "to act freely and then be held for the consequences of their folly." Equity, he reminded his readers, "coerces the individual free will. It acts preventively instead of permitting free action and imposing after the event

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4 Ibid., 218.
the penalty contracted for in advance."\(^5\) Applying this reasoning the Puritans would act negatively towards any limitations placed on disclosure of private acts since such secrecy would tend to protect people from the deserved consequences of having exercised their free will, albeit in a private act. The colonial courts did accept jurisdiction over defamation and slander, treating them as a strange mixture or combination of tort and criminal action. Joseph Smith, editor of *The Pynchon Court Records* viewed defamation and slander as criminal offenses since they were treated as breaches of the peace,\(^6\) whereas Samuel Morison and Zechariah Chafee, Jr., editors of the *Records of the Suffolk County Court*, refer to slander as "the commonest tort" of the Suffolk Records.\(^7\)

Undoubtedly a perusal of the Massachusetts colonial court records demonstrates the fact that slander and defamation were actionable offenses bearing penalties to be paid both to the government (as in criminal action) and to the person offended.


\(^6\)Joseph H. Smith, ed., *Colonial Justice in Western Massachusetts (1639-1702): The Pynchon Court Record*, 136.

\(^7\)Samuel Morison and Zechariah Chafee, Jr., eds., *Records of the Suffolk County Court, 1671-1680*, I: lvi.
(as in tort action). Giving Warren and Brandeis (and their followers) the benefit of the doubt by accepting the interpretation that there existed at least a quasi-tort system in colonial Massachusetts, the question remains as to whether or not it covered a right of privacy.

The Massachusetts court system which existed between 1642 and 1692 consisted of Inferior Quarter Courts (the county courts), the Court of Assistants and the General Court (which acted more as a legislative body). Through the Massachusetts Bay Charter the General Court was empowered to draw up "wholesome and reasonable" laws and orders as long as they were not "contrarie" to the laws of England. Penalties could be stipulated as long as they were "according to the course of other corporations" in England. Accordingly, although Massachusetts Bay did not make a painstaking effort to follow English tradition in law, the colony early declared it illegal to make or publish lies or "false newes," attaching a fine of ten shillings for the first offense and twenty shillings or up


to ten stripes for the second. Plymouth likewise made lies "tending to the damage or hurt of any pticulare pson or with intent to deceive and abuse the people with falce newes or reports..." an offense punishable with a fine up to ten shillings or two hours in the stocks. Later Massachusetts Bay laws prohibited "Exorbitancy of the Tongue, in Railing and Scolding" and regulated the press for the "preventing of irregularities and abuse to the authority of this country...." There were, though, no laws specifically protecting privacy, and, for that matter, no rules establishing tort procedures.

Nevertheless the records of the county courts are inundated with cases of slander and defamation. Alice Earle did not exaggerate when she posited that the colonists "were vastly touchy and resentful about being called opprobrious or bantering names; often running petulantly to the court about

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11 Nathaniel B. Shurtleff, ed., Records of the Colony of New Plymouth in New England, XI: 63; this was later amended to unlimited time in the stocks; XI: 128.

12 Whitmore, Colonial Laws, 206; Shurtleff, Records of Massachusetts Bay, IV: 141 and V: 4, 32, 323-324.
it and seeking redress by prosecution of the offender."\(^{13}\)

The question here is whether or not in civil cases the courts found for the plaintiff when highly personal matters were published and the defendant proved that the disclosed information was true. Warren and Brandeis had stipulated that "the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual...."\(^{14}\) Had the courts of colonial Massachusetts laid the groundwork for such a right in civil action?

Surely there is no evidence that the lower magisterial courts had established such a precedent. The *Pynchon Court Record* provides insight into magisterial decisions for the Springfield area of Western Massachusetts. John Bennett was sued in 1655 for reporting that Mrs. John Stiles "was a light woman and that he could have a leape on her when he pleased." Admitting to having made the statement, Bennett asked for and received a postponement of the trial "that he might bring in

\(^{13}\)Alice M. Earle, *Curious Punishments of Bygone Days*, 1.

\(^{14}\)Warren and Brandeis, "Right of Privacy," 216.
what he had to prove his said accusation of the woman.\textsuperscript{15} In another case of defamation this court ruled clearly against the protection of privacy in tort stating "the speaking of a mans faylings and infirmityes may be disorderly and yet not a defamation."\textsuperscript{16} When Hezekia Dickenson sued Abraham Temple for calling him, among other things, "a whore master" this court dismissed the suit since Dickenson could not prove any damages.\textsuperscript{17}

As in the lower courts, no evidence can be found in the county courts to give any credence to the theory that privacy was protected through tort proceedings.

In cases tried at the Essex County Quarter Court meeting in Salem, truth served as an adequate defense for charges of slander and defamation. In fact, upon being found guilty the defendant's punishment often included a public confession that he had lied. Such was the case as early as 1640 when Timothy Tomlins sued John Pickering for defamation, and the court ordered Pickering to publicly announce his lie as well as to

\textsuperscript{15}Smith, \textit{Pynchon Court Record}, 236.

\textsuperscript{16}\textit{Ibid.}, 238.

\textsuperscript{17}\textit{Ibid.}, 355.
pay a fine. Usually the court in defamation and slander cases required the defendant "to give public satisfaction," or to "acknowledge his fault," since guilt in these cases presumed that the defendant had lied.

An angered John Bartoll sued Alice Peach for defamation in 1645 on the grounds that Mrs. Peach had spread the word that John's wife, Parnell, had "committed adultery with the boatswain of the ship Sampson in the ship's cabin about four years ago..." Undaunted, Mrs. Peach did not deny reporting such an affair, but claimed that Parnell had indeed committed the act. The Salem Court ruled "The defendant proved the truth of her action," and found for the defendant. The privacy of the affair was not of consequence to the court; as long as Mrs. Peach told the truth she was harmless from defamation action. Warren and Brandeis' complaint in 1890 that "To satisfy a purient taste the details of sexual relations are spread...".

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18 Tomlins v. Pickering, "Salem Quarterly Court Records and Files," The Essex Antiquarian, III (December, 1899), 189.

19 See Story v. Pettford and Garford v. Lambert, Ibid., IV (February, 1900), 24. For lying also see the cases against Jean Whea and Marmaduk Barmston, Ibid., III (June, 1899), 83.

20 Bartol v. Peach, Ibid., V (June, 1890), 88-89.

21 Warren and Brandeis, "Right of Privacy," 196.
might well have expressed the feelings of John and Parnell Bartoll in 1645, but they held no legal right to privacy.

Christopher Avery, a man who favored liquor and women, discovered that James Standish and William Vinsent had reported tales about him and his partying ways. Vinsent claimed that Avery "drank ink for liquor," while Standish had publicly admonished Avery's tendency to smash bottles as he imbibed. Both narrated how Avery "dawdled another man's wife on his knee, as her husband looked on...." Upset at such stories Avery sued Standish for slander and Vinsent for defamation in the Salem Quarter Court. Again the court refused to recognize any right of Avery not to have the details of this private party broadcast by finding against him and for the defendants. The records of the Quarter Court meeting in Salem are void of any cases in which a plaintiff wins a verdict upon the grounds that information of a private nature was divulged; whereas in case after case of slander and defamation truth is accepted as a defense.

Meeting at Ipswich the Essex County Quarter Court found likewise. Henry Greenland sued Henry Lessenby for slander for

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having told the townspeople that Greenland and his friend Dr. Cording had promised five shillings to anyone who would "help them to a couple of women" while they were on a visit to Hampton. Lessenby admitted the charge and then proved that the offer had been made. The court found for the defendant.\(^23\)

Constantly battling each other over debts, a frustrated John Godfrey publicly proclaimed that John Carr "lay with the wife of John Russ upon the bed." Tom Johnson warned Godfrey "that Carr would sue him for such words." Undaunted, Godfrey boasted that he had no fear "for he could prove it." Carr did sue. Godfrey, unequal to his boast, could not prove that Carr had lay with Mrs. Russ, and therefore the court found against him.\(^24\) There can be no doubt that both the plaintiff and defendant recognized that the question before the court was the truth of the action not the privacy of the affair.\(^25\)

Most certainly the court at Ipswich did not encourage privacy

\(^{23}\)Greenland v. Lessenby, Records and Files of the Quarterly Courts of Essex County, Massachusetts, III: 44.

\(^{24}\)Carr v. Godfrey, Ibid., II: 367.

\(^{25}\)See also Woolcott v. Atkinson, Ibid., VIII: 248-249 in which the court at Ipswich held for the defendant when the defendant proved the truth of his statement which otherwise would have been scandalous. In Wiggin v. Barefoot, Ibid., III: 450, the court at Hampton also held that truth was a proper defense in defamation.
when it accepted Goodee Pamore's hearsay deposition: "I heard goodman Archor, as he reckoned with my husband, say that goodee Taylor had fourteen quarts of beer in her sickness."\(^{26}\)

A complicated Essex County case of slander that directly involved privacy particularly demonstrated that privacy was frowned upon and discouraged by the justices in Massachusetts. On a number of occasions John Smith, an aristocrat of Salem, had made "abuses" towards Elizabeth Goodell, a married woman of lower class and status than he. Fearing harm to her children as well as herself and to her relationships with her husband's family, Elizabeth kept his advances a secret hoping "a privet healing might make it up." But as Smith continued the abuses which Elizabeth had kept "private for years," she "told what had happened to her husband and her sister Hannah Killum in private...." Later, she testified, "I foolishly told my pretended friends what before I had told my Sister Killum." As the word spread, Smith, who apparently had made advances at other women too, decided to sue Zachariah and Elizabeth Goodell for slander. Elizabeth pointed out to the

\(^{26}\)"Ipswich Quarterly Court Records," The Essex Antiquarian, X (October, 1960), 170.
court that the suit failed to list specific instances of slander and Smith's reputation was by now so poor that "if common fame may be credited it is not a very easy matter to slander the plaintiff." A non-suit was granted, and Smith was thereupon tried by a jury for his abuses. The depositions of the trial clearly show that the decision of Elizabeth to try to keep the advances secret was unacceptable behavior. She admits she "would never have revealed them but to save herself from damage against her in court." At one point, she confesses, she did go to town to tell Judge Hathorne of the matter, but "being foolish and not acquainted with the law did forbear...."27 Here the court not only recognized the propriety of truth as a defense against slander charges, but clearly discouraged privacy as a reason for not reporting behavior deviant from community norms.

Truth, in the opinion of the Suffolk County judges as well, served as a proper and adequate defense in answer to charges of slander or defamation. Echoing the decisions reached in Essex County, the magistrates of the Boston area

gave no recognition to any legal right of privacy. Normally when defamation or slander was proven the punishment for the defendant included a public confession of lying. On the other hand, the accused would be released without penalty upon demonstrating that he had reported the truth. When Captain Joshua Scottow sued Nicholas Shapleigh, Samuel Wheelwright and others for defamation on the basis that "No mans Honour nor good name shall be stayned....," the accused presented the simple and straight forward defense that they "only gave an account of what came to our hands...." The court found for the defendants. One wonders where Mr. Brandeis and Mr. Warren found the "weapon" or the forge, when this court upheld the right to publish the truth even if it "stayned" a man's honor and good name?


29Scottow v. Shapleigh, Suffolk County Court Records, II: 1108-1116. Although the cases were fewer, the York County Magistrates also coupled slander and defamation with lying and accepted truth as a proper defense. See for instance Charles T. Libby and Robert Moody, eds., Province and Court Records of Maine, I: 225 and Greenland v. Gutteridge, Ibid., I: 280.
In this case as in others appeal to the Court of Assistants proved fruitless. Invariably the Court of Assistants held with the lower courts in appeals of slander. There is no evidence whatsoever that privacy played any role in the decisions of the Court of Assistants. Here again the magistrates equated slander with lying\textsuperscript{30} and included a public confession of lying as part of the punishment for defamers and slanderers.\textsuperscript{31} When Ruben Cuppie reported that Richard Pithold had committed beastiality (certainly a private act), the court did not concern itself with whether or not Pithold's privacy had been infringed, but whether or not he had committed the act. Upon proof that he had not, Cuppie received a whipping for false accusation.\textsuperscript{32} No historian with any credibility could use the records of the Court of Assistants as a basis of legal precedent for privacy.

Surely the ministers of colonial Massachusetts did not fear reprisals in tort action for publicly revealing the private misdeeds of their parishioners. Chapter Five will

\textsuperscript{30} John Noble, ed., Records of the Court of Assistants of the Colony of the Massachusetts Bay, 1630-1692, I: 60-61; III: 137.

\textsuperscript{31} Ibid., III: 137.

\textsuperscript{32} Ibid., III: 66-67.
deal with the police powers of the colony as they affected privacy, but here it is fitting to note the tendency of the ministers to use the churches, which might be likened to the newspapers of two centuries later, to publicly chastise members of the community concerning private affairs. As might be expected no court records could be found in which a minister faced a suit for revealing matters of privacy. Audaciously, David Flaherty argues, "The Puritans operated their churches and practiced their religion with significant concern for personal privacy." Such an interpretation borders on recklessness. To combat wickedness Cotton Mather established spy teams aptly titled "Societies for the Suppression of Disorders." Charged with seeking out and finding "disorders," these men, including justices, had no reverence for privacy. Mather personally proposed that they draw up "a List of the Wicked Houses in the Town...and then proceed unto the assigning of particular Methods and Agents, for the putting of a check upon them." By 1713 Mather had gathered "a catalogue

33 Flaherty, Privacy in Colonial New England, 163.
34 Cotton Mather, The Diary of Cotton Mather, ed. by Worthington C. Ford, I: 418.
Men who visit wicked Houses." His plans included "laying it before the Society for Suppression of Disorders; from whence we will send admonitions to them."\textsuperscript{36} There is, as one would suspect, no record of any court action by any of these young men or others against Mather or members of the Society for infringement of privacy or, for that matter, of defamation or slander.

Flaherty continues, "The institutionalized manifestations for Puritanism did not significantly lessen the availability of personal privacy in colonial society."\textsuperscript{37} The Salem Church records prove the opposite. Caught in fornication Rebecca Bly and Remember Samon listened to the Pastor of the Salem Church preach to the Congregation on the subject "and then he made a personal application of the word unto these...delinquents charging the guilt of their sinnes upon them." Lest others in the congregation might believe like Flaherty in "the availability of personal privacy," concluding this sermon "notice was given unto all other children of the Covenant amongst us that they must expect to be under the watch and discipline of the church...and that for time to come the brethren should

\textsuperscript{36} Ibid., II: 235.

\textsuperscript{37} Flaherty, Privacy in Colonial New England, 163.
bring forth such as are scandalous.\textsuperscript{38} And they did. The church records are replete with admonitions, confessions and warnings pertaining to what Brandeis dubbed: "affairs \underline{about which} the community has no legitimate concern...," and matters "which concern the private life, habits, acts, and relations of an individual."\textsuperscript{39} The church encouraged encroachment upon privacy, not protection. The \textit{Watch Tower} warned "Let every Wise man, have his eyes in his head. Let every Good man, take a due Notice of Evil Customes breaking in; And let no man be afraid of making Remarks upon them, complaints about them, oppositions unto them....\textsuperscript{40}

No protection existed against the publication of private matters in colonial Massachusetts. Tort action offered no remedy to the person whose private life was revealed to others. In all courts truth served as a defense for slander and defamation. However private the information, if true it was publishable. The forging of the "weapon" to which Warren and Brandeis referred had not begun in colonial Massachusetts. In fact the fire had not yet been lit.

\textsuperscript{38}Richard D. Pierce, ed., \textit{The Records of the First Church in Salem Massachusetts, 1629-1736}, 106.

\textsuperscript{39}Warren and Brandeis, "Right to Privacy," 214-215.

\textsuperscript{40}N. Boone, \textit{Advice From the Watch Tower}, 28.
CHAPTER IV

MAN'S HOME IS HIS CASTLE

Without fail, the clichés "Man's home is his castle" or "the sanctity of a man's home" permeate the arguments of those who claim deep historical roots for the legal right of privacy. Since no specific reference to a right of privacy exists in the constitution, this is understandable. For to find, and to spread, privacy as a right it is necessary to tie it to constitutional provisions, and the phrase "Man's home is his castle," does just that by joining the concept first to the fourth amendment prohibition against "unreasonable searches and seizures" and secondly to the fourteenth amendment restriction that no state shall "deprive any person of life, liberty, or property, without due process of law."

In the 1880's the U. S. Supreme Court began to link "the privacies of life" with unreasonable searches and seizures. By the 1960's the court had expanded both the scope and the credited origin of the right of privacy by juxtaposing it with "due process of law." This, it should be noted, is no small

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1Boyd v. United States, 116 U.S. 616 (1886).
step since due process of law confers upon privacy the distinction of being "the law of the land" and an inalienable right. When the plaintiff in the 1885 case of Boyd v. United States had been ordered to produce his private papers to be used as evidence against him, a majority of Justices found that this constituted both illegal self-incrimination and an unreasonable search and seizure. Quoting from James Otis and Entick v. Carrington, the Court argued that "In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England." The Court then jumped to the conclusion that "the sanctity of a man's home and the privacies of life" found protection from principles which had been established during colonial times.

Thirty years later, citing the findings in Boyd and declaring that "a man's house was his castle," the court in Weeks v. U.S. established that private papers obtained without a warrant were inadmissible as evidence in Federal courts. In the eyes of the Justices the fourth amendment would be virtually useless if personal correspondence thus obtained could be retained and held as evidence in spite of the defendant's

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3 116 U.S. 625.
4 Ibid., 630.
efforts to retrieve it. 5 The fourth amendment, however, applied only to federal courts and for almost another half-century state courts permitted the admission of evidence into trials no matter how obtained. In 1961, though, the Warren Court construed that due process of law included the right of privacy and that the exclusionary doctrine of evidence established in the Weeks case was "an essential part of the right of privacy...." Citing the historical evidence referred to in Entick, Boyd and Weeks, and commenting on "the sanctity of a man's home," the court majority accepted the right of privacy as "no less important than any other right...." 6

Certain writers, particularly David Flaherty and Alan Westin, have furthered this proposition that legally as well as socially "the sanctity of a man's home" has historical roots. Flaherty, for instance, concludes that in New England "The conception of the home as a castle formalized the prevailing expectation of privacy for the family in the home. The colonists expected to be left alone by outsiders when they were within their houses." 7 After noting that under the fourth amendment, "privacy in the home was guaranteed," Westin writes that any argument that privacy is "somehow a

'modern' legal right which began to take form only in the late nineteenth century--is simply bad history and bad law."\(^8\)

Discovery of whether or not a legal right of privacy did exist, whether a "man's home was his castle" as viewed by colonial authorities in Massachusetts is the subject of this chapter. In its broad sense this entails as well the questions as to what was an unreasonable search and seizure during the colonial period and whether or not the justices of Massachusetts accepted or even contemplated an exclusionary rule of evidence as part of the law of the land.

A review of Massachusetts colonial law counters any arguments that the "sanctity of a man's home" found protection under law. From the beginning, even the location of houses was established by the magistrates. The Massachusetts General Court legislated that "noe dwelling howse shalbe builte above halfe a myle from the meeteing howse,..."\(^9\) and Plymouth arranged "to keep the people together as much as might be," in order, amongst other reasons, Samuel Morison notes, "to keep a strict watch over sinners."\(^10\) In Plymouth, as well as

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\(^8\)Westin, \textit{Privacy and Freedom}, 333, 337.


Massachusetts Bay, the law limited housebuilding to locations approved by an Assistant, a member of the Governor's Council or the Governor.\textsuperscript{11}

Regulations establishing behavior in these "castles" showed no respect for privacy. As early as 1630 it was "ordered that all persons whatsoever that have cards, dice, or tables in their houses, shall make away with them...."\textsuperscript{12} Four years later, the General Court left no room for doubt as to the breadth of their jurisdiction when they legislated against the use of tobacco, either "publiquely" or "privately, in his owne house,..."\textsuperscript{13} A "privat person" charging money for drinks in his house came under the laws regulating innkeepers, and the General Court did not hesitate to pass legislation that no "private howsekeeper, shall permit any person or persons to sitt drinkng or tipling strong waters, wine, or strong beere, in their howses...."\textsuperscript{14} In Plymouth the punishment for allowing a person to get drunk in a house would "be left to the arbitrary fine and punishment of the Govt...." There, too, the law prohibited card playing or the use of dice in houses.\textsuperscript{15}

\textsuperscript{11}Shurtleff, Records of New Plymouth, XI: 17. See also III: 156.

\textsuperscript{12}Shurtleff, Records of Massachusetts Bay, I: 84.

\textsuperscript{13}Ibid., 126.

\textsuperscript{14}Ibid., III: 204-205; IV: 203.

\textsuperscript{15}Shurtleff, Records of New Plymouth, I: 13; XI: 17; XI: 66.
Not content with regulating the location of and the behavior in the "castle," the General Court of Massachusetts Bay also set occupancy rules. A homeowner could not allow young people to stay or to visit without sending them out "from time to time" to their work, studies or back to their own dwelling, and housing a Quaker could result in a heavy fine, a whipping and disfranchisement.\textsuperscript{16} Witches were also outlawed, and fear of witchcraft caused the General Court to set up a "witch watch" accompanied by careful surveillance of suspects in their homes during the evening hours while a close observation was kept on the husband, segregated in another room.\textsuperscript{17} Living apart from your spouse was disallowed, and the constable had the power to bring any offenders before the court for a full explanation of such behavior.\textsuperscript{18} Furthermore the magistrates, "accounting it their duty by all due meanes to prevent appearance of sinn and wickedness in any kind..." declared it illegal for any single woman or woman whose husband was absent to entertain "any inmate or sojourner with the dislike of the selectmen of the town...."\textsuperscript{19}

\textsuperscript{16}Shurtleff, Records of Massachusetts Bay, III: 242; IV: 1, 59-60.

\textsuperscript{17}Ibid., III: 126.

\textsuperscript{18}Ibid., IV: 326.

\textsuperscript{19}Ibid., V: 4; see also William H. Whitmore, et al, eds., Records Relating to the Early History of Boston, VIII: 102, 103.
In the Body of Liberties of 1641, which open with a preambles on civil privileges, there is no mention of any right of privacy nor any restriction on search procedures. Seizure of property was limited here to that which the law allowed or "in case of the defect of a Law, in any particular case, by the word of God."20 In this case the sanctity of the magistrates clearly outweighed the sanctity of the home. Power was soon granted to the auditor-general to enter any houses or cellars to seize wine.21 Constables could enter homes which housed drunkards or in which it was suspected that alcohol was being sold.22 If a person refused to allow a marshall into his home to collect a fine or a court assessment, the officer had the power "to breake open ye dore of any house or place, or of any chest, or place where he shall have notice yt any goods lyable to such levy or execution shalbe...."23

The magistrates of Massachusetts Bay freely empowered men to search their neighbors. In 1669 then "searchers" were named in various towns to examine any persons who were leaving the colony for any money they might be attempting to smuggle out. These "searchers" could probe pockets and break

20 Whitmore, Colonial Laws, 1.
22 Ibid., II: 171-72.
23 Shurtleff, Records of Massachusetts Bay, II: 204; see also Whitmore, Colonial Laws, 104.
open chests and trunks if they wished.  

A half-dozen years later, in order to bar private houses from serving as unlicensed taverns or places of entertainment, the county courts received authorization to appoint a person in each neighborhood to "diligently inspect" and report on local families, for which the informer would receive one-third of any fines levied.  

Later tythingmen were appointed, one for every ten families, "to inspect" and "to apprehend" anyone in their neighborhood guilty of tippling, gaming, breaking the Sabbath, selling alcoholic beverages or generally being disorderly. These tythingmen had the right to enter anyone's home and search it, including the cellars, without warrant. They could, in fact, seize illegal beverages without a warrant, and for their efforts they would share part of the fine.

In defining the duties of the constables, the General Court surely recognized no right of privacy. To counter the Quaker menace for instance, constables were ordered "to make diligent search...in all suspected places and houses, and where they know or may be informed that any Quakers are mett to celebrate their irregular and prohibited worship, and are


hereby impowered to break open any door where peaceable entrance is denied them, and such persons as shall be found at such meetings shall be apprehended...."27 No mention was made here of warrants, "reasonable searches" or protection of privacy. The same held true for the regulation of game playing in homes. The officers found their instructions in Michael Dalton's handbook for English Justices of the Peace: "Mayors, Sheriffs, Constables, and Head-officers, etc. shall once a Month search places suspected, or forfeit for every Month Forty shillings."28 In cases of disorder their directions were clear: "If the Affrayers is in a House, the Doors Locked or Bolted, the constable may break them open to part the affray...and if they get into another house, the constable, upon fresh pursuit, may break into that House to apprehend them; and so till they shall be taken."29 To search for stolen goods constables did employ warrants but they were not at all specific. Dalton's British manual stipulated "that immediately upon the receipt hereof you make diligent search in all and every such suspected houses and places within your Parish, as you and this Complainant

27Shurtleff, Records of Massachusetts Bay, V: 134.


29Nicholas Boone, The Constable's Pocket Book or a Dialogue Between an Old Constable and a New, 4.
shall think convenient: and if upon your search you find any of the said Goods, or other just cause of suspicion, that you bring all such suspected persons as you shall find, before me, to answer unto the premises."

Nicholas Boone reiterated this in his handbook to the constables of Boston, assuring them that warrants empowered the officers to search "where the Complainant or your self shall see cause to suspect." The magistrates even bestowed power unto themselves to orally authorize on the spot searches and seizure of any "Disorderly Person."

Since the law did not recognize "Man's home as his castle," did the courts? Certainly the lower courts did not if the Pynchon Court serves as a fair example. In 1678 this court directly charged the Tythingmen "to act in their Inspecting of their Neighbors, so as that Sin and Disorder may be prevented and suppressed in their several precincts...," and provided that these informers would share in any fines collected. Accordingly they readily accepted depositions such as that made by Samuel Mighell reporting a party, with musicians no less, which John Andrews and friends had in his

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house with women other than their wives (even though Mrs. Andrews was present). In another case upon testimony to the court from William Brookes that John Henryson had allowed card playing in his home, Henryson confessed to the act but pleaded ignorance to any law against card playing. Besides, he contended, he played in order to entertain his sick wife and "was willing to any thing [sic] when his wife was ill to make her merry." She, too, confessed to card playing in her home. Despite her infirmities, the court fined them both.

No case better shows the attitude of the Pynchon Court towards the questions raised in Mapp v. Ohio than the 1694 judgment in favor of John Kent. John Lawton had sworn out a search warrant against John Kent for stealing Lawton's kettle. The constable carried out the search and discovered the kettle at Kent's house. Kent admitted taking the kettle, but pointed out to the court that Lawton had been fined by the Captain of the local militia for "defects in training" and as Clerk of the Band, the militia officer empowered to collect such fines, Kent had on a number of occasions demanded payment from Lawton. Finally, "on Saturday last going again to his House for it, and finding a kettle within Dores

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33 Smith, The Pynchon Court Record, 130, 136-137.
34 Ibid., 258; see also p. 263 and the report of J. Stewart being fined for playing cards in his home.
and none at Home: Tooke the kettle away." Returning later to the house, he informed Mrs. Lawton that he had seized the kettle and would return it when Lawton paid the fine. Instead Lawton swore out a search warrant claiming the kettle had been seized illegally. On this point of law John Pynchon succinctly and clearly ruled: "I find the Kettle to be taken in way of distress according to Law: and justifiable in John Kent the clerke."\footnote{Ibid., 222-223.} Obviously any legal historian would be hard pressed to argue that this decision supported the concept that "man's home is his castle."

The Quarterly Courts echoed this approach. When Roger Hauscall, a constable, arrived at Zachary Herrick's house to collect a fee owed him and found Herrick not at home, he decided to take a kettle for his troubles. Upon coming home and discovering this, Herrick "took said Hauscall by the shoulder and threatened that he would make him an example to all such knavish constables...." Even after a number of witnesses testified to the Salem Quarterly Court that Hauscall habitually attempted to collected his fees twice, the Court ruled in favor of Hauscall and fined Herrick for abusing the constable.\footnote{Records and Files of the Quarterly Courts of Essex County Massachusetts, II: 218-219.} Moreover this court freely interfered in household matters. They fined people for allowing
neighbors to get drunk in their home, for permitting Quakers to visit, and for marital disagreements.\textsuperscript{37} When a neighbor charged that Thomas Oliver and his wife fought in their house, the court responded with a fine against them.\textsuperscript{38} Upon testimony from a fellow citizen that Daniel Owls had been "Leaping and dancing at his house and had like to sale into fire," the court offered him a choice--a fine or the stocks.\textsuperscript{39} The court at Salem also harbored no predilections against rulings on who could visit in homes. After hearsay testimony that Tobias Hill had bragged "he had enough of his wife now, that he could spare his wife to any in the Towne now for 3 or 4 days," and "that one Philip Beare doth usually frequent the house of this Tobias Hill..." the court ordered Beare "to keep away from Hill's house and wife."\textsuperscript{40} Mrs. John Brown, and Mrs. Miles Ward along with her servant tattled to the court that Phillip Cromwell had spent most of a night and the "greater part of one day" at Thomas Downing's house with Mrs. Downing, Mrs. William James, Mrs. Thomas Smith and Mrs.

\textsuperscript{37}"Salem Quarterly Court Records and Files," The Essex Antiquarian VII (July, 1903), 133; VIII (July, 1904), 63-64; Essex Court Records, III: 90. William Keney had charges for fighting in his house dropped after he proved that it was not his house. "Salem Quarterly Records," IV (August, 1900), 124.

\textsuperscript{38}Essex Quarterly Court Records, III: 90. Years earlier John Russel and his wife were ordered "severely whipped" for fighting. "Salem Quarterly Records," IV (December, 1900), 186.

\textsuperscript{39}"Salem Quarterly Records," IV (April, 1900), 62.

\textsuperscript{40}\textit{Ibid.}, III (October, 1899), 157.
Mathew Nixson (with whom he had been "frequently keeping company")—all while Thomas Downing was away. This, the court decided, gave "grounds for jealously," prompting them to admonish Cromwell and to order him "not to keep company with" Mrs. Nixson or Mrs. James. A week later the court issued an arrest warrant for Mrs. Nixson, Mrs. James and Mrs. Downing.41

Privacy received no better treatment in the hands of the Suffolk Quarterly Court. There, too, activities in the home such as card playing, partying and entertaining members of the opposite sex in a suspicious manner prompted court punishment.42 In contrast to Flaherty, Samuel Eliot Morison in his study of Suffolk County discovered that "Prying neighbors and active magistrates ferreted out these sexual offenses and prosecuted them. Wrongdoers had much less chance than nowadays of escaping public attention."43 Thus Mary Plum was caught in Timothy Connell's chamber one evening "in a Suspicious manner." The court sentenced her to a whipping after

41Ibid., VI (April, 1902), 26. Surprisingly the only Salem Court case which provides a thread of evidence supporting for privacy was not cited by Flaherty. William Clark, a servant, was ordered whipped "for spying into the chamber of his master and mistress, and for reporting what he saw." "Salem Records," IV (December, 1900), 186.

42Morison, Records of the Suffolk County Court, I: 184, 232, 337.

43Ibid., I: lxxxvii.
wresting a confession from her that "she was there naked to her Shift where were two men in Bed." Timothy posted bond for good behavior upon his conviction "for giving Entertainment in his house to men and women in the night in a Suspicious manner." Five months later Mary again suffered the scrutiny of her neighbors and the punishment of the court for "Lascivious carriage by being seen in bed with a man." She finally learned that her personal affairs accorded her no right to be let alone, for a year later upon her presentation for having a child out of wedlock, the "constable made return he could not find her."\(^4^4\)

Conducting a search without a warrant could not violate a person's privacy any more than that ordered against Sarah Carpenter by the Suffolk Quarter Court. Her neighbors attested to the court that they had "strong suspicion" that Sarah was pregnant. The court thereupon ordered that "she should be searched by Mrs. Parker, Mrs. Williams and Mrs. Sands who made return with Goodwife Tailor a midwife that she was not with childe."\(^4^5\)

Captain James Johnson quickly found that the Suffolk Quarter Court did not recognize that a "man's home is his castle." Charged with "giving entertainment to persons at

\(^4^4\)Ibid., I: 125, 185, 340.

\(^4^5\)Ibid., II: 30.
unreasonable houres of the night" the court ordered him "to breake up housekeeping and to dispose of himselfe into some good orderly Family...."46 If he had lived in Ipswich, he would have found conditions no better. There Andrew Creeke received a court order "not to frequent the house of Will Symons...."47 In Hampton the Quarter Court warned Nicholas Leeson to "keep away from the house of Mary Cornish."48 Further north in York, the Court fined Robert Mendham for allowing fishermen to get drunk in his house, and John Cosson's neighbor turned him in for playing cards in his house.49

Appeals to the Court of Assistants proved fruitless. These judges, "characterized not so much by profound legal learning or judicial distinction, as by plain sense, a rugged idea of justice, integrity, and a standing derived from eminent public service in various capacities,"50 were not prone to protecting the "sanctity of a man's home," or promoting a right of privacy. As early as September, 1631

46Ibid., II: 647.
47"Ipswich Quarterly Court Records," The Essex Antiquarian XI (January, 1907), 27.
48Essex Quarterly Court Records, I, 372.
49Libby and Moody, Court Records of Maine, I: 134, 333.
50Noble, Records of Court of Assistants, I: x.
they ordered Alexander Wigall, due to his drunkeness, "to remove his dwelling to some settled, plantation."\textsuperscript{51} That same month again not recognizing a man's home as his castle they declared "Thomas Grayes house att Marble Harbor shalbe puld down, and that noe Englishe man shall hereafter give howseroom to him or intertaine him under such panalty as the Courte shall thinke meete to inflict."\textsuperscript{52}

Conduct within the home came under their watchful eye. The colony had barely been settled when they decreed "that all persons whatsoever that have cards dice or tables in their houses shall make away with them before the nexte Court, under paine of punishment."\textsuperscript{53} They ordered a woman whipped for drunkenness and "light behavior" in her house. William Filipot suffered their admonishment for permitting drinking in his home.\textsuperscript{54} Owners who allowed Indians to get drunk in their homes were punished and held responsible for the actions of the Indians as well.\textsuperscript{55} In fact merely "intertaineing an

\textsuperscript{51}\textit{Ibid.}, II: 19; see also Shurtleff, \textit{Records of Massachusetts Bay}, I: 91.

\textsuperscript{52}\textit{Noble, Records of Court of Assistants}, II: 20.

\textsuperscript{53}\textit{Ibid.}, II: 12.

\textsuperscript{54}\textit{Ibid.}, II: 2, 89, 131.

\textsuperscript{55}\textit{Shurtleff, Records of Massachusetts Bay}, III: 290.
Indian without leave" was judged unacceptable. So, too, was arguing with your spouse as John David discovered upon being admonished for "unquietness with his wife." The jurisdiction of the court extended to house guests as Walter Barefoot found when he was ordered to "Abstaine from [Mrs.] Hilton's House at Exeter especially her company." The Court of Assistants freely accepted evidence from prying neighbors as demonstrated in the depositions in the divorce case of Edward and Catherine Naylor. John Anibol testified that a friend entreated him to spy into Widow Thomases' window, but he said "I thought it best to keepe to my worke, then he went to Wilm Godfrey and tould him and he went and fetcht a candle and he [and] the neger woman went and looked in and see who it was and I asked Godfrey who they were and he said he was loth to tell me but bed me ges and I gestmr. Nailer and Mary More and he said I gest right." The court accepted Anibol's further testimony that he had "often sene Mary More and Mr. Nailer at the Widoe Thomases hourse to-gether," and granted Catherine Nailer her divorce.

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56 Noble, Records of Courts of Assistants, II: 49.
57 Shurtleff, Records of Massachusetts Bay, I: 296.
58 Noble, Records of Courts of Assistants, III: 212.
59 Ibid., III: 226.
The General Court of Massachusetts Bay showed little regard for privacy even before it left London. Joseph and Samuel Browne had written letters home to "their private friends," and the question arose in the General Court on September 29, 1629 "whether the same should be delivered or detained, and whether they should be opened and read, or not; and...it was thought fitt that some of the said letters should bee opened and publiquely read...." The court certainly recognized no exclusionary rule of evidence based on privacy when it further decided "that none of the letters from Mr. Sam: Browne shalbe delivered, but kept to bee made use of against him as occasion shalbe offred."^ ^

Plymouth offered no haven for any seeking privacy. Upset with Governor Bradford's management of the colony, Reverend John Lyford and John Oldham wrote a number of complainting letters to their "private friends" in England. Bradford, "knowing how things stood in England and what hurt these things might do," intercepted the ship carrying the letters, broke their seals (all without a warrant of course), and "tooke copies of them; but some of the most material they sent true copies of them and kept the originals...." After waiting a while in order to catch them off guard, "the Governor called a court and summoned the whole company to

[^]: Shurtleff, Records of Massachusetts Bay, I: 52-53.
appear. And then charged Lyford and Oldham with such things as they were guilty of;..." The letters were publicly read and then the court, with Bradford at the helm, convicted, censured and expelled them. Obviously a right of privacy, exclusionary rules of evidence or the question of unreasonable search and seizure never entered Bradford's mind nor retarded his actions.

As in Massachusetts Bay, the court regulated conduct in the home. Having been found guilty of "disorderly living" three men in the Plymouth colony were sentenced in 1637 "to give an account of how they lived." Who could occupy or visit homes also came under their jurisdiction, and fines for entertaining or housing Quakers were readily handed down. Where one could build a "castle," came under the court's purview as Joseph Ramsden discovered when living "in an uncivil way, in the woods, with his wife alone, whereby great inconveniences have followed, the Court have ordered, that hee repaier down to sum neighborhood betwixt this and October next, or that then his house bee pulled downe." So much for the sanctity of his home. On the other hand Joseph

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61 Bradford, Of Plymouth Plantation, 149-163.
63 Ibid., III: 102.
Roberts gave the court cause "at least to suspect" that he and Mercye Tubbs were having an affair, and was ordered to move away from Namassakeesett and never to enter her house again.64

A celebrated case in 1761 confirmed the principles that all Massachusetts courts had acted upon during the whole colonial period. To aid customs officials the courts had regularly issued writs of assistance. Passed by Parliament in 1664 and extended to the colonies in 1697 these writs, which were not search warrants, called for the assistance of the local peace officers when customs collectors searched houses or shops for smuggled goods.65 The law empowered the customs officers to enter in the daytime "any house, shop, cellar, warehouse, room, or other place and in case of resistance to break open doors, chests, trunks, and other packages, there to seize, and from thence to bring, any kind of goods or merchandise, whatever, prohibited and uncustomed and to put and secure the same in His Majesty's storehouse..."66 A writ of assistance had been granted to Charles Paxton in 1755 in the name of George II. The court also granted writs to Richard Lechmere for the port of Salem and

64Ibid., IV: 42.

6512 Charles II, c. 19; 8 and 9 William III, c. 22. See also 7 George III, c. 46.

6613 and 14 Charles II, c. 11.
Francis Waldo for Falmouth in 1758. The following years writs were issued to James Nevin for Newbury, Thomas Lechmere, the Surveyor-General, and William Sheaf for Boston. In 1760 the court granted the warrants to George Cradock for Boston and William Walter for Salem and Marblehead. Upon the king's death in 1760 Paxton applied for a new writ. James Otis led the opposition against the issuing of the writ on the basis, amongst others, that a "man's home is his castle."

Citing English law, Jeremy Gridley argued in favor of the writ and countered Otis with "Everybody knows that the Subject has the Priviledge of House only against his fellow Subjects, not vs. the King either in matters of Crime or fine." The court unanimously held in favor of the legality of the writ of assistance and so issued it. Otis's argument obviously had little effect upon the court as they continued to issue the writs for officers in all the major ports of the province.  

67 Samuel M. Quincy, ed., Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772, 404-406.


69 Ibid., 414, 422-434. Writs were issued to James Cockle, December 8, 1761, Francis Waldo, March 18, 1761, Nathaniel Hatch, January 4, 1762, John Temple, May 27, 1763, Thomas Bishop, November 1763, Timothy Folger, February 2, 1765, Benjamin Hallowell, March 22, 1765, John Fisher, April 1, 1768, John Mascarene, April 1, 1768, Edward Winslow, February 8, 1769, and William Reid, February 10, 1769.
In the 1960's the right of privacy became due process of law by order of the Supreme Court of the United States. By their decision due process conveyed both substantive and procedural rights. The substantive right holds that without a specific and proper warrant officers of the government may not intrude into a man's home for the gathering of evidence; the procedural right guarantees that any evidence obtained otherwise must be excluded from trial consideration. The court in their obiter dictum based these decisions, at least in part, on historical arguments that man's home was his castle since colonial times and that the sanctity of the man's home found recognition and protection since the colonial era. As regards colonial Massachusetts the evidence is clear that such an interpretation was inaccurate.
"We deal," Justice Douglas declared in the case of Griswold v. Connecticut, "with a right of privacy older than the Bill of Rights--older than our political parties, older than our school system." Using history as the supporting rationale in giving the opinion of the court Douglas declared in 1965 that there existed a "zone of privacy created by several fundamental constitutional guarantees."¹ Chief Justice Warren, along with Justices Goldberg and Brennan concurred, finding that privacy fell within a "concept of liberty" which "protects those personal rights that are fundamental...." Striking down a Connecticut statute forbidding the use of contraceptives, these three Justices decreed that marital privacy could not be infringed being "a right so basic and fundamental and so deep-rooted in our society...." Relying upon history as justification for their opinion they stipulated, "In determining which rights are fundamental, judges...must look to the 'traditions and collective conscience of our people' to determine whether

A principle is 'so rooted [there]...as to be ranked as fundamental,'" and concluded, "applying these tests, the right of privacy is a fundamental personal right."\(^2\) Joining with a separate concurring opinion Justice Harlan found the right of privacy "implicit in the concept of ordered liberty," and called for "continued insistence upon respect for the teachings of history, [and] solid recognition of the basic values that underlie our society...."\(^3\)

With such dependence on history none of the Justices provided specific examples which would root their arguments in history other than the British case of *Entick v. Carring-
ton*. Later writers agreed with them, but continued to supply their readers with no specific examples. For instance, the "major force for privacy in the United States" according to Alan Westin, "is derived from such factors in American national experience as frontier life, freedom from the feudal heritage of fixed class lines, the Protestant religious base of the nation, its private-property system, and the English legal heritage."\(^4\) For this sweeping and


\(^3\)Griswold v. Connecticut, concurring opinion, 381 U.S. 500, 501.

conclusive statement Westin provides no illustrations or supporting documentation. David Flaherty, the only historian to study the "right to be let alone" in depth, maintained that "a right of privacy existed in colonial America that was both traditional and customary." In the epilogue to his monograph, Flaherty concluded "This study basically supports Justice Douglas's majority opinion in its major contention that a constitutional right of privacy exists.... The Supreme Court sensed the true dimensions of the colonial and revolutionary situation with respect to privacy, even though the existing scholarly literature did not shed much light on the matter. The colonists believed they had a general right to privacy and has asserted it long before the writing of the Bill of Rights;..."^5

In light of these premises this final chapter examines the "right to be let alone" in colonial Massachusetts relative to the declared and accepted police power of the government. Did the magistrates use the arm of the law to interfere in private matters? Were personal manners and morals dictated by the government? Did the courts of colonial Massachusetts provide protection for privacy in the realms of sexuality, personal appearance, the right of association, and personal activities? In short to what extent did the colonists enjoy

^5 Flaherty, Privacy In Colonial New England, 249.
the "right to be let alone" from surveillance and regulation in their own affairs.

To begin with Samuel Eliot Morison's study of court cases in the Boston area led him to determine that "Probably private citizens were more active than now in the apprehension of offenders, because everyone knew his neighbor; and crime was more a matter of general concern."\(^6\) Edmund Morgan in his study of the Puritan family established that the Puritans of Massachusetts Bay fearfully believed the unpunished sins of any one member of the community would bring the wrath of God down upon the rest. "Incessant vigilance," Morgan wrote, "was essential in order to prevent any sin from going unpunished. It was as if a district occupied by a military force were given notice that for any disorder the whole community would be penalized, innocent and guilty alike.... Its effect upon the godly members of such bodies was an extraordinary zeal for enforcement of the laws of God."\(^7\) George Haskins also recognized the will of the Puritans to subjugate their individual desires to the needs of the community in their legal structure. The Massachusetts Code of 1648,

\(^6\)Morison, Records of the Suffolk County Court, I: lxxxiii.

Hasking concluded seven years prior to the Griswold decision, "was viewed as a restraint on individual action in the interest of the order of the whole group to which it applied; and again, since an individual was only a member of the community, there was no aspect of his life—even his private conduct—which was free of the control of the law insofar as the law was designed to further effective organization and good order in the community." In his study of Plymouth, Haskins reiterated his stand that community interest took precedence over private conduct and opined "To us today, such intrusions upon privacy may appear as unwarranted invasions of personal liberty, but to the Puritans such regulation seemed both proper and necessary."

In recognition of the community interest in personal sins the franchise extended only to church members, to

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become which required participation in a public confession of sins. This included questions by the congregation "of a most embarrassing character relating to all sorts of incidents in the past life of the candidate."\(^\text{11}\) After 1662 this requirement could be substituted by a certificate from the minister that the member-to-be "was not 'vicious' in his life,"\(^\text{12}\) but those who wished to vote continued to subject themselves to "a church discipline and oversight, severe and well-nigh all-pervading...."\(^\text{13}\)

The law and the courts as well as the church intruded in the personal, private and minute details of sexual conduct. William Allen testified to the Salem Quarterly Court that "he herd Richard Graves kissed Goody Gent twice," for which Graves received a sentence of a whipping or a fine.\(^\text{14}\) The Hampton Court fined Nicholas Lesson after two of his neighbors testified against him for "attempting the chastity of Mary Cornish."\(^\text{15}\) The Salem Court chastized Mary Leonard

\(^{11}\)Charles Francis Adams, History of Braintree, Massachusetts 1639-1708, 148.

\(^{12}\)Cortlandt F. Bishop, History of Elections in the American Colonies, 54-57.

\(^{13}\)C. F. Adams, History of Braintree, 183.

\(^{14}\)"Salem Quarterly Court Records and Files," The Essex Antiquarian, IV (April, 1900), 61.

\(^{15}\)Essex Quarterly Court Records, I: 312.
for singing "indecent songs," and at Ipswich Elizabeth Smith was "admonished for light carriages." It cost Theophilus Salter five pounds "for making love to Mary Smith and seeking to marry her without consent of her friends." Daniel Blake paid a fine in Essex County for making love "with his girlfriend without consent of her parents" as did John Lorin in Suffolk County. Private marriages were illegal in Massachusetts Bay--the law required the betrothed to announce their intentions at three public meetings in the towns in which the couple lived or, in the absence of town meetings, to post fourteen days notice of the marriage, failure to do which would result in a fine. Thorpe Wolford correctly notes that "Domestic relations were subject to strict Puritan surveillance." The temptations of sex before marriage brought many a couple before the court, and if lucky they escaped with an admonition or a fine. In fact Ephraim

16 Ibid., V: 355; I: 113.
17 Ibid., I: 287.
18 Ibid., II: 242; Suffolk County Court Records, I: 559.
19 Shurtleff, Records of Massachusetts Bay, I: 275; "Ipswich Quarterly Court Records," VIII (April, 1904), 13.
21 "Salem Quarterly Records," III (June, 1899), 82; IV (December, 1900), 185; VII (January, 1903), 25; cf. Shurtleff, Records of Massachusetts Bay, I: 105.
Marston and his wife Abigail, convicted of this offense in Hampton were allowed to pay their fine in corn. More than likely, though, this sin of fornication brought public and strict punishment. Poor John Hobell and Abigail Burt were sentenced by the Pynchon Court "to be well whipt" for John's "offeringe and attemptinge to doe the act of fornication with her" even though the judge confessed "as far as we can dis- cerne by any profe of Justice the act was not don." On the other hand, Mrs. Bishop gave birth in Ipswich only twenty weeks after marriage, making it obvious that the act had been done, and her husband Job had his choice of being whipped or fined. The discovery of Mathew Stanley and Ruth Andrewes' involvement in premarital sexual relations prompted the Salem Court to offer remittance of the customary fine of whipping "if they marry together." The same court finding that Nathaniel Masters had impregnated his wife before marriage, "the act having been committed in Pequoit harbor,"

22 Essex Quarterly Court Records, V, 342.
23 Smith, The Pynchon Court Record, 209.
24 "Ipswich Quarterly Court Records," IX (July, 1905), 129.
25 "Salem Quarterly Records," VI (October, 1902), 161. Yet when John Croxton confessed to having sexual relations with a maid he received a fine of only forth shillings. "Salem Quarterly Records," V (June, 1901), 89.
ordered a "certificate of the fact to be sent to that town." The Court of Assistants mandated that Mr. and Mrs. Thomas Scot stand in the market place for an hour with signs on their heads informing their neighbors that they had fornicated before marriage. John and Jane Hews who were engaged but not married when she conceived in Plymouth, found themselves sentenced to the stocks, while on the same day in the same court, John and Alice Thorpe, not betrothed at the time of her conception, received an identical sentence with an additional fine of forty shillings.

The overwhelming interest of the courts in matters of sexual conduct clearly demonstrates that no "right to be let alone" existed in this realm of behavior. The records abound with punishments administered for acts of fornication many, if not most, of which were committed between husband and wife prior to marriage. Fornication is cited on over two hundred pages in the Essex County Records alone. The courts willingly accepted and encouraged testimony from neighbors concerning sexual relations. In the first session of the Ipswich Court William Palmer testified that Robert Coaker fornicated with Miryam King and eight years later

26"Salem Quarterly Records," VIII (April, 1904), 85.
27Noble, Records of the Court of Assistants, II: 124.
28Shurtleff, Records of New Plymouth, I: 12.
another Palmer turned in Thomas Wardell and Sarah Averill for the same offense. If there were no confessions or witnesses to the actual act, a couple would be admonished or punished for suspicious carriages, uncivil carriages, unseemly behavior, lust, lascivious carriage, too much familiarity, and wanton daliance. The community surveillance system and the lack of any right to be let alone is substantiated in the court records of the case against Mary Sears and William Blunt. Nicholas Manning (who would later flee the colony to escape an incest charge) testified that he saw William Blunt coming out of Mary Sears' cellar, having been down there alone with her. John Horn told the court that he twice heard Mary call William "Honey," and Nicholas Beadle deposed that he had caught them holding hands and calling each other "Honey" and "dear." The court responded by finding them guilty of "too much familiarity" and enjoined them from being alone together anymore.

29"Ipswich Quarterly Records," VIII (April, 1904), 4; VIII (July, 1904), 112.


31Essex Quarterly Court Records, IV: 274; V: 375.
Punishments for sexual misconduct were purposefully antithetical to privacy. This, Judge Pynchon wrote, was done in order that the court could "shew their destation of such forbidden and dangerous carnal Lusts and if possible to prevent such like God provoking wayes," for the court was "desirous to beare due Testimony against the Growing and provoking sin of whoredom and to restrain the like abhorend practices." Thus confinement in the public stocks, public whipping (sometimes with the woman being stripped half-naked and whipped while pulled through town tied to the back of a cart), standing in the gallows with a noose around the neck, wearing a placard declaring the offense committed, branding, and disfranchisement all served as punishments for sexual misconduct. For instance John Severans of Hampton, guilty only of bragging to his friends, paid a fine and donned a sign declaring in capital letters: "THIS PERSON IS CONVICTED FOR SPEAKING WORDS IN A BOASTING MANNER OF HIS LASCIVIOUS & UNCLEANE PRACTICES." Interposing in the sexual problems of the married fell within the jurisdiction of the magistrates. The General Court ordered Mrs. William Tilly to move back to her husband.

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32Smith, Pynchon Court Records, 105; the only case of private punishment in the Pynchon records occurred when the witnesses who caught Samuel Terry outside the meeting house "chafing his yard to provoak lust" during the sermon testified that they had kept the matter "private" and the judge decided to give "private correction" of six lashes, 224.

33Essex Quarterly Court Records, V: 239.
and "that shee submitt hirselle to him as she ought...." If she did not "submitt" she would be imprisoned. Margaret Bennet complained to the Court of Assistants that Elias White, who had married her daughter Mary, had a problem of "insufficiency." William Charles and John Codner, obviously unaware of any right to privacy, deposed that they had questioned Elias on his ability and "whither when he lay with his wife; if there was any motion in him or no." Elias "answered yea Fowler or five howers together but when he turned to hir it was gonn againe." Elias confessed, "When first I married I thought myself sufficient....I find myself Infirmous not able to performe that office of marriage. What the cause of it I know not." The magistrates determined that the couple should keep trying and "advised them to a more loving and suitable Cohabitation one with the other and that all phisicall meanes may be used." When Anna Laine lamented that her husband had been "deficient in performing the duty of a husband," the court questioned him, and "After a considerable pause...he could not say he had performed the office of a husband." With that, the court ordered an annulment.

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34 Shurtleff, Records of Massachusetts Bay, IV: 2.

35 Noble, Records of Court of Assistants, III: 131-132.

36 Ibid., III: 68.
Besides the crimes already listed, homosexuality, bestiality, incest, extramarital sex, lascivious conduct, uncleanness, incontinency, wantonness and lewdness all came under the control of the government with no protective right of privacy for those caught. For bestiality both the man (or woman) and the animal were subject to death.\(^\text{37}\) Homosexuality and "unnatural intercourse" violated the law: "carnalis copula contra naturam...home ov feme, ov'e brute beast...home ove home, feme ove feme...."\(^\text{38}\) The servant of Nicholas Manning reported to the court at Ipswich that his master delved in incest with his sisters. Manning fled; the sisters were sentenced to be "whipped upon the naked body" (remitted upon payment of five pounds) and to "stand or sit upon a high stool during the whole time of the exercise in the open middle alley of the meeting house, with a paper upon each of their heads with their crime written in capital letters."\(^\text{39}\) The crime of adultery with its stiff penalty "that if any man shall have carnall copulacon with another mans wife, they shalbe punished by death,"\(^\text{40}\) rarely was

\(^{37}\) Essex Quarterly Court Records, II: 60; Wolford, "Laws and Liberties of 1648," 183.

\(^{38}\) Wolford, "Laws and Liberties of 1648," 183fn.

\(^{39}\) Essex Quarterly Court Records, VIII: 87-88.

\(^{40}\) Shurtleff, Records of Massachusetts Bay, 92; see also Andrew M. Davis, "Law of Adultery," American Antiquarian Society XVIII (April, 1896), 97-126.
charged, but, ironically it served as the excuse for constant surveillance and regulation of the companionship between married persons. One of the first judgments of the Court of Assistants prohibited a Mr. Claerke from the "cohabitation and frequent keepeing company with Mrs. Freeman," requiring him to post a bond ensuring his good behavior "espetially towards Mrs. Freeman, concerning whome there is stronge suspicion of incontinency."\(^{41}\) John Dawes, married, escaped the punishment for adultery but not that of being "severely whipped for intiseing an Indian women to lye with him."\(^{42}\) In Boston Robert Coles carried a pl¬card for all to know of his "abuseing himselfe shamefully with drink, intiseing John Shotswell wife to incontinency and other misdemeanors."\(^{43}\) Gervase Garford and Elizabeth Symonds, both married, had charges brought against them in the Salem Quarter Court for her "frequen tin his company in their several houses, and being together alone abroad, knowing his purpose...." She pleaded that "she had no evil intent, but did so through weakness," and charges against her were dropped. Not as glib as she, Mr. Garford found himself spending a day in the stocks.\(^{44}\)

\(^{41}\)Noble, Records of Court of Assistants, II: 8; Shurtleff, Records of Massachusetts Bay, I: 81.

\(^{42}\)Shurtleff, Records of Massachusetts Bay, I: 91.

\(^{43}\)Ibid., I: 107.

\(^{44}\)"Salem Quarterly Records," VI (July, 1902), 110.
The courts expected, and in fact mandated, the colonists to be harbingers of any untoward behavior which came to their attention. A minister of Essex County, diligent but naive, went about his duties leaving his wife alone with a number of men, one of whom, Samuel Weed, ascended to her bedchamber "waking her out of her sleep and kissing her and then returning to his company below...." Learning of this, the court not only fined Weed, but the other men as well, for they "had opportunity given them to clear themselves by giving evidence against any disorder in the house, but none of them taking advantage of it, they were judged to be abettors." The depositions taken during the 1663 case against Henry Greenland clearly demonstrate the colonists' awareness that personal concerns were not to be kept private from the magistrates. Mr. Greenland had made a number of uncivil, lascivious, and often rather violent advances toward Mary Roffe, culminating one evening in his removing his clothes and sneaking into her bed while she tended the fire. This "so afraid /Her/ that she fell into a greevious fitt." Her mother, Rebecca Bishop, exhorted her to make these advances public, but Mary feared no one would believe her, since Mr. Greenland possessed "creditt in the Towne some take him to be godly and say hee hath grace in his face." Her mother "being much troubled said; These things

45Essex Quarterly Court Records, VI: 428.
are not to bee kept private, wee may Justly Provoke God, that further mischeife may follow and then we shall come under Great Blame." Mrs. Bishop further entreated Mary's sister, Sarah, to convince her daughter that "these things were not be kept private, that Goodman Emery being grand Jurymen must present them." Emery, though, advised her "to keep it Close..." But finally Mrs. Bishop "told Good Emery I dare not keep such things as these private upon my owne head.... I desyring God to direct mee, That night I revealed all to a wise man in the Towne desyring his Advice, who did set mee in a way to bring it where not it is." The court agreed and punished Greenland for his actions. 46

Within five years after settlement the general court began their interference in personal appearance as well as personal conduct. The "newe and immodest fashions" concerned the magistrates enough to cause them to legislate against wearing silk, gold, silver or thread lace. More than one slash in each sleeve and along the back of garments (which showed off colored underwear) was forbidden. Gold and silver girdles were outlawed, as well as beaver hats. Caps could not be embroidered and the law prohibited buying or wearing hatbands of gold or silver. Long hair did not escape their attention and it too became unfashionable by decree. Not providing any "right to be let alone," the

46 Ibid.
magistrates duly ordered that "if any man shall judge the weareing of any the forenamed pticulars, newe fashions or long haire, or any thing of the like nature, to be uncomely, or piudiciaill to the comon good & the pty offending reforme not the same upon notice given him, that then the nexte Assistant, being informed thereof, shall have power to bind the pty so offending to answer it att the nexte Court...." 47

Two years later fines were set for wearing any type of lace, 48 and three years after that the General Court mandated that "hereafter no garment shalbee made with short sleeves, whereby the nakedness of the arms may bee discovered in the wearing thereof...." To enforce this edict the magistrates called upon the church members to "procede against all offenders..." and to "keepe the more strict watch over all sorts...." The General Court warned that those who persisted to wear such clothes "shalbee looket at as contemmers of authority...and must expect to bee prceded against by the strictestcourse of justice." 49 Repealed in 1644 and then reinstated in 1651 the sumptuary laws of the last half of the seventeenth century exempted those persons possessing an estate valued at greater than two hundred pounds. The lawmakers felt it necessary "to declare our

47Shurtleff, Records of Massachusetts Bay, I: 124-126.
48Ibid., I: 182.
49Ibid., I: 261.
utter detestation and dislike that men or women of meane condition, education, & callinges should take upon them the garbe of gentlemen, by wearing gold or silver lace, or buttons, or points at their knees, to walke in great bootes, or women of the same ranke to weare silke or tiffany hoodes or scarfes...." Thereupon those of the lower class could no longer place silk hoods or scarfs upon their heads, affix gold or silver buttons upon their personal garments, wear ribbons in their hair or on their clothes, or walk in leather boots. Ordered to enforce this measure, the selectmen were "to have regard and take notice of apparrel in any of the inhabitants...," and take action against "whosoever they shall judge to exceed their rankes and abillitie in the costlynness of fashion of their apparrell...."\(^50\)

The prosecutors inundated the court dockets with sumptuary cases. In a typical day in the Salem Court, seven colonists paid fines for wearing silver lace, three for donning silk hoods and one for showing broad lace on her dress.\(^51\) Neighbors turned each other in, and citizens successfully pleaded for the discharge of their cases on

\(^{50}\)Ibid., III: 243-244; By 1675 the magistrates found it necessary to regulate against another trend of "new, strange fashions," that of "naked breasts," V: 59-60.

\(^{51}\)"Salem Quarterly Records," VII (July, 1903), 132-134.
grounds of wealth and consideration of employment. The courts warned Susan West for her "immodesty" and fined William Woods for "wearing his hair long as women's hair." At Ipswich a woman was charged for "excess in the matter of her attire and hair" and others were presented for dressing in "strong fashion." In Essex County a father turned his daughter over to the court for wearing men's clothes, and in Suffolk County a woman was convicted of the same offense. Dozens of other indictments for wearing gold and silver lace, ribbons, silk scarfs, silk hoods, silk lace, for "dressing fashionable," and for "folding and frizzling hair" attest to the fact that the colonists enjoyed no "right to be let alone" in their selection of personal attire and choice of personal appearance.

53 "Salem Quarterly Records," V (April, 1901), 55.  
54 Essex County Court Records, VI: 341; Suffolk County Court Records, II: 1063.  
55 Ibid., V: 73, 135, 206.  
56 Essex County Court Records, VI: 341; Suffolk County Court Records, II: 1063.  
57 See examples in Essex County Court Records, I: 73, 83, 257, 266, 270-276, 279, 303-304, 306; III: 2; VI: 73, 137, 206; VIII: 291.
The right of privacy fared no better in the area of personal activities. Soon after settlement Massachusetts Bay forbid anyone to "spend his time idly or unpfititably...," instructing the constable to "use spetiall care and deligence to take knowledge of offenders in this kinde, espetially of comon coasters, unpfittable fowlers, and tobacco takers...."\textsuperscript{58} Plymouth followed suit granting power to the Grand Jury to inquire into the affairs of anyone who seemed to be idle or living with little means and "to require an account of them how they live."\textsuperscript{59} A number of cases of idleness were successfully prosecuted in the lower courts and the Court of Assistants concurred in the investigations ordering one man "to give an account to the Constable weekly how he doth improve his time...."\textsuperscript{60}

Presentments for breaking the sabbath were numerous. Neighbors would not hesitate to report each other for working, playing, conversing or even walking too fast on this day set

\textsuperscript{58}Shurtleff, Records of Massachusetts Bay, I: 109.

\textsuperscript{59}Shurtleff, Records of the Colony of New Plymouth, XI: 32.

\textsuperscript{60}Noble, Records of the Court of Assistants, II: 67.
aside for meditation and worship. Drinking on the sabbath, was, of course, forbidden. Tippling too often or too much, taking or drinking tobacco at all prior to 1637 (and under certain circumstances after that date) promoted public punishment. Various and sundry other activities reached the scrutiny of the court including dancing, playing cards, and living a solitary life.

Conviction of an Irishman for stubbornness resulted in sentencing to the House of Correction while others guilty of the same crime suffered a whipping. Ralph Earle found his personal freedom of expression limited as he paid his fine

61 See Alice M. Earle, The Sabbath in Puritan New England, 245-258; and Essex County Court Records, I: 110 where two neighbors reported Aquila Chase and wife for "gathering pease on the Sabbath."

62 Shurtleff, Records of Massachusetts Bay, I: 90, 101, 204, 206; Essex County Court Records, I: 37, 286; the flyleaf of Alice Earle's Curious Punishments depicts a drunkard's cloak, an ale barrel wrapped around a tippler subjected to the gaze and approbation of his neighbors.

63 Essex County Court Records, I: 37, 286.

64 Suffolk County Court Records, I: 184; Essex County Court Records, III: 70, 152.

65 Essex County Court Records, V: 104.

66 Ibid., I: 19, 44, 68; II: 197.
of twenty shillings "for drawing his wife in an uncivell
manor on the snow." A distraught Frances Vesselton
discovered the court held jurisdiction over her speech when
they fined her for yelling at a pig: "A pox a god upon her
and the divill take her." The court played a heavy role
in regulating personal expression handing down punishments
for "nawty speeches," unchaste words, swearing, cursing,
boasting, "wicked speaking," quarreling, railing, and
scolding. Scolding women of Boston, according to Alice
Earle, would be gagged and set in front of their door "for
all comers and goers to gaze at." In the opinion of the court as handed down by Justice
Douglas in Griswold v. Connecticut much was made of "freedom to associate and privacy in one's association." Douglas
ruled that freedom of association fell within a "zone of
privacy," for "the First Amendment has a penumbra where
privacy is protected from governmental intrusion." The foundation for such a right can not be built from the legal history of colonial Massachusetts. As shown previously, association with Quakers was strictly punished. The law also regulated dealings with strangers directing that all strangers must appear before the governor, the deputy governor or two magistrates and state their business for being in Massachusetts Bay. The law provided that a record of their names "and their qualities" be kept. In most cases the courts more than the laws regulated personal associations. Meeting at Hampton, the Quarter Court ordered John Littleale of Haverhill to move to town within six weeks "and settle himself in some orderly family in the town, and be subject to the orderly rules of family government...." If he refused, the selectmen were "to place him in some family...." Timothy Allen and Mary Hill were bound by the Salem Court "not to be together privately." At York John


73Essex County Court Records, V: 104.

74"Salem Quarterly Records," V (July, 1901), 121.
Dyamond was "not to keep Company" with June Andrews, while at Ipswich the Court ordered John Remington not to associate with Elizabeth Osgood. The judges declared that Henry Phelps was "not to accompany his brother's wife" even though "no one appearing to testify against him...." On the other hand the same court presented Richard Rider for "spurning" Mathew Woodwell. The Suffolk Court fined George Pike and Mary Barber for "suspiciously accompanying" each other. Upon report to that court that Simeon Messenger and Joshua Hews had been seen "in a suspicious manner in the company of two women," the judges ordered that the names of the women be divulged and upon refusal fined the two five pounds each "unless they declare who the women kinde were at that time in theire company." An analysis of the legal records of Massachusetts Bay does not support the argument that the colonists enjoyed a "right to be let alone." The magistrates constantly, and

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76Essex County Court Records, II: 191, 310.
77Suffolk County Court Records, II: 785.
78Ibid., II: 913.
rather consistently, interfered in the settlers personal conduct, particularly regarding sex, their apparel and appearance, their personal activities and their freedom of association. David Flaherty argues that "Puritanism in actual practice did not usually lessen the availability of personal privacy to any great extent." This study does not substantiate such a finding; in fact it rebukes it.

79 Flaherty, Privacy in Colonial New England, 16.
CHAPTER VI
CONCLUSION

With the rapid growth of technology and the rise of cities the right of privacy has become an especially cherished concept in twentieth century America. One might effectively argue that the protection of privacy as a right is essential to retaining other rights in a technologically advanced urban oriented nation. The purpose of this study is not to argue whether or not such a right of privacy now exists. Undoubtedly it does. The Supreme Court of the United States beginning with the obiter dictum of Kilbourn v. Thompson in 1881 has provided the nation with a stream of decisions establishing legal protection against invasion of privacy especially when such an invasion is attempted by agents cloaked with the power of government. The cases of Boyd, Weeks and Mapp argued well that allowing the presentation of illegally obtained evidence at trial made a mockery of the right against unreasonable searches and seizures, and the Court in Griswold limited the power of state governments
to interfere with the people's "right to be let alone." In all of these cases the Courts followed a predilection towards activism. Seeing the need for a right of privacy, the Justices looked to history to provide a rationale for a line of law needed to correct what they perceived to be obvious injustices. The Courts' indulgence in such rhetoric may be accepted—even expected. Not so for historians.

The legal historian, no matter how much he cherishes a right, is not empowered to mold history to suit personal value judgments. Appeals to colonial legal history as justification for a right of privacy fail. Not only are the precedents for protecting such a right absent, but examples abound in which the governments of England and colonial Massachusetts purposefully instituted attacks against privacy. The dooms of the Anglo-Saxon kings, the frankpledges, the development in English law of tort and of search, the promulgations of the kings and of Parliament clearly manifest antipathy towards the protection of privacy. The maxim "a man's home is his castle" originated not to protect privacy but to spread the king's peace, as constrictions were placed by the king, not upon the king. As demonstrated by the sumptuary laws, the government of England accepted as its duty the necessity of passing restrictive acts governing
citizens' private morality and habits. Moreover, the British government made no effort to provide civil remedy to enjoin publication of private matters.

The trans-Atlantic voyage to Massachusetts Bay, despite the arguments of David Flaherty and Alan Westin, brought no new found respect for a right of privacy. The historical evidence contradicts Westin's charges of "bad history and bad law" towards those who disagree with his thesis that privacy has historical roots in colonial America. No longer can David Flaherty's thesis that a "right of privacy existed in colonial America that was both traditional and customary" stand unchallenged. The community spirit and the missionary zeal of the founders of the Bay Colony created an environment antithetical to privacy. Consistently, constantly and purposefully, the legal machinery of the colony through law and adjudication interfered in the personal conduct of the settlers. The "sanctity of a man's home" rarely restricted the government; the courts recognized no exclusionary rule of evidence; and the magistrates regularly controlled the colonists' activities within and without the home. Further the claim of Brandeis and Warren that privacy was "forged in the slow fire of the centuries," finds no support in colonial Massachusetts, since, in fact, the mores of the Puritan
society encouraged and promoted the revelation of private information, however sordid.

The laws and court rulings of Massachusetts Bay reflect the aims, ideals, design and purpose of the settlers. The importance of the integrity of the community overrode any individual right to privacy. To state that the colonists of Massachusetts enjoyed a right of privacy--a legal "right to be let alone"--is misleading, inaccurate and a misuse of history.
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