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Pennsylvania's Constitutional Right to Privacy: A Survey of Its Interpretation in the Context of Search and Seizure and Electronic Surveillance

As decisions of the federal appellate courts have whittled away a number of rights embodied in the United States Constitution, the protection of rights under state constitutions has begun to grow in significance. Accordingly, a number of states have placed new emphasis on protecting individual rights of privacy found either expressly or by implication in their respective organic documents.¹ One such right is that protecting personal privacy from unreasonable governmental intrusions.

What has been termed "the right most valued by civilized men,"² protection for personal privacy exists implicitly in the Pennsylvania Constitution. As the following comment will reveal, the right, found by various Pennsylvania courts to be rooted in Article I, section 1³ or section 8⁴ of the state constitution, is clearly a malleable one, being shaped by the hammer of appellate jurisprudence against the anvil of contemporary values and social principles.

This annealing process has taken on renewed fervor in the past decade, with a number of privacy-based decisions reaffirming the right's existence and vitality. The recent decisions in Common-

1. For an overview of the growth of privacy considerations in state court decisions, see Louis F. Huebner, Rights of Privacy in Open Courts—Do They Exist?, 2 Emerging Issues St Const L 189 (1989).
3. Article I, section 1 of the Pennsylvania Constitution reads:
   All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.
   Pa Const, Art I, § 1.
4. Article I, section 8 of the Pennsylvania Constitution reads:
   The people shall be secure in their persons, houses, papers, and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any persons or thing shall issue without describing them as nearly as may be, nor without probable case, supported by oath or affirmation subscribed to by the affiant.
   Pa Const, Art I, § 8.
wealth v Edmunds\textsuperscript{5} and Barasch v Pennsylvania Public Utility Comm’n\textsuperscript{6} have underscored the Pennsylvania courts’ willingness to look to the state privacy right as a source of practical protection against intrusions into areas of modern life which would have received ample protection under broader interpretations of the Federal Constitution no longer extant.

It is the purpose of this comment to trace the history and development of the right of privacy as a matter of Pennsylvania constitutional law, primarily as it has been interpreted as a source of protection against unreasonable searches and seizures, and against unwarranted electronic surveillance. Realistic examples of how the right may be invoked will also be provided, highlighting the underlying policies and practical aspects of what may prove to be a growing source of legal protection in the 1990’s.

I. COMMON LAW FOUNDATION OF THE PRIVACY RIGHT AND EARLY CONSTITUTIONAL RECOGNITION

Prior to Warren and Brandeis’ 1890 landmark article on the federal right of privacy,\textsuperscript{7} claims for what today would constitute invasions of the state privacy right were decided based upon a supposed right of property for breach of trust or confidence.\textsuperscript{8} The first reference\textsuperscript{9} to a right of privacy embodied in Pennsylvania law occurred in Waring v WDAS Broadcasting Station, Inc.,\textsuperscript{10} in which

\textsuperscript{5} 526 Pa 374, 586 A2d 887 (1991). Edmunds concerned the search of a building and seizure of marijuana based upon a warrant which was defective due to a magistrate’s erroneous determination of probable cause. Edmunds, 586 A2d at 890. While the fruits of such a search would have been admissible under the Fourth Amendment given the “good faith exception” to the exclusionary rule created by the United States Supreme Court’s ruling in United States v Leon, 468 US 897 (1984), the Pennsylvania Supreme Court looked to the state constitution and found therein a right of privacy sufficient to preclude the application of such an exception as a matter of state law. Leon, 469 US at 901.

\textsuperscript{6} 133 Pa Commw 285, 576 A2d 79 (1990), aff’d on other grounds Pa, 605 A2d 1198 (1992). In Barasch, the commonwealth court found the implementation of technology known as “Caller ID” violative of the right of privacy embodied in the Pennsylvania Constitution. The supreme court affirmed without addressing the constitutional issue.

\textsuperscript{7} Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv L Rev 193 (1890).

\textsuperscript{8} Harlow v Buno Co., Inc., 36 Pa D & C 101, 103 (1939). This case is discussed more fully in note 20.

\textsuperscript{9} One earlier case made reference to a right of privacy rooted in the state constitution. In Re Contested Election in Fifth Ward of Lancaster City, Appeal of Bare, 281 Pa 131, 126 A 199 (1924), involved a right of privacy in elections as being expressed in a 1901 amendment to Pa Const, Art VIII, § 4 (renumbered in 1967 as Pa Const, Art VII, § 4). However the decision does not involve a general privacy right, but rather a specific right to secrecy in voting, and as such is beyond the scope of this comment.

\textsuperscript{10} 327 Pa 433, 194 A 631 (1937).
the Pennsylvania Supreme Court was asked to decide whether the unauthorized radio broadcast of a recording of the plaintiff’s music constituted such an invasion of his rights as to justify injunctive relief as granted by the trial court. The majority opinion affirmed on the grounds, inter alia, that the station’s actions infringed upon the exclusive rights of the plaintiff to the independent work of art represented by its recorded orchestral production, without referring to the privacy right.\textsuperscript{11} In a controversial\textsuperscript{12} concurring opinion, Justice Maxey stated that the right which the defendants invaded was more than an economic one; it was the right to privacy itself.\textsuperscript{13}

The following year the Pennsylvania Supreme Court again considered the right of privacy, this time as protecting against overreaching by a state legislative committee. In \textit{Annenberg v Roberts},\textsuperscript{14} the plaintiffs sought to establish protection against a legislative commission’s subpoenas requesting virtually all of their financial records and related documents, ostensibly in furtherance of an investigation into the need for legislation concerning illegal gambling. Finding that the subpoenas constituted a search and seizure, the court ruled that in order for such a request to comport with the protections afforded one’s privacy under Article I, section 8 of the state constitution, it must be reasonable in scope.\textsuperscript{15} This would be determined by examining whether the materials requested were relevant to and within the limited right of inquiry of the legislature, as is pertinent to the procurement of information upon which proposed legislation is to be based. The court proceeded to quote a lengthy list of United States Supreme Court decisions supporting the contention that the right of privacy is the one most protected against unreasonable and unlimited legislative or other governmental investigations.\textsuperscript{16}

Nevertheless, the court ultimately based its decision that the subpoenas were invalid on their overbreadth, as opposed to their

\begin{enumerate}
\item \textit{Waring}, 194 A at 635.
\item Justice Maxey’s reasoning in \textit{Waring} was criticized as a misapplication of the privacy doctrine in a widely read article by Wilfred Feinberg, \textit{Recent Developments in The Law of Privacy}, 48 Colum L Rev 713, 714 (1948).
\item \textit{Waring}, 194 A at 642 (Maxey concurring).
\item 333 Pa 203, 2 A2d 612 (1938).
\item \textit{Annenberg}, 2 A2d at 617. This view was echoed by the supreme court in its plurality opinion in \textit{Lunderstadt v Penna House of Representatives Select Committee}, 513 Pa 236, 519 A2d 408, 411 (1986). In \textit{Lunderstadt} the court held that under Article I, section 8, no valid subpoena could issue seeking records in which one has a reasonable expectation of privacy, except upon showing of probable cause that the particular records sought contained evidence of civil or criminal wrongdoing. \textit{Lunderstadt}, 519 A2d at 411.
\item \textit{Annenberg}, 2 A2d at 618.
\end{enumerate}
invasive character. The court concluded that instead of requesting that the plaintiffs produce specific items of evidence germane to the legislative inquiry, the commission impermissibly demanded that a mass of books and papers be furnished so that they could examine them in a general search for evidence.\textsuperscript{17} Possibly because the holding was not founded specifically on the privacy issue, it did not immediately encourage interest in the state constitutional right, though later courts did cite \textit{Annenberg} for its privacy component.

Justice Maxey's \textit{Waring} concurrence has been frequently cited in support of the existence of a state right of privacy. One such case which cited the concurrence was \textit{Leverton v Curtis Publishing Co.},\textsuperscript{18} in which the United States Court of Appeals for the Third Circuit decided a tortious invasion of privacy diversity suit arising from defendant's publication of an auto accident victim's photo twenty months after the incident.\textsuperscript{19} In deciding that publication of the photo in a generic article unrelated to the news event violated the plaintiff's right to privacy, the court found it unnecessary to engage in a discussion of the brief evolution of the right due to defendant's admission that such existed under Pennsylvania law.\textsuperscript{20}

Maxey's opinion was again cited in \textit{Schnabel v Meredith},\textsuperscript{21} in which plaintiff sought damages for defamation from a newspaper. The basis of the suit was the publication of an article which reiterated the fact that gambling machines had been found on the plaintiff's property six months earlier.\textsuperscript{22} Noting plaintiff's citation of \textit{Waring} and several trial court decisions recognizing the right to privacy,\textsuperscript{23} the supreme court assumed, without deciding, that a right of privacy existed, but held that based upon the individual facts of the case the plaintiff did not fall within its protection.\textsuperscript{24}

\begin{itemize}
\item \textsuperscript{17} Id.
\item \textsuperscript{18} 192 F2d 974 (3d Cir 1951).
\item \textsuperscript{19} \textit{Leverton}, 192 F2d at 975.
\item \textsuperscript{20} Id. The court in a footnote cited the decisions of the Court of Quarter Sessions of Philadelphia in \textit{Clayman v Bernstein}, 38 Pa D & C 543 (1940), and \textit{Harlow v Buno Co., Inc.}, 36 Pa D & C 101 (1939), which found that a right of privacy existed, relying on Maxey's \textit{Waring} concurrence, despite their observance of the fact that no Pennsylvania appellate court had yet recognized the right. In defining the right to privacy, the court in \textit{Harlow} stated that its true nature "is one which is closely akin to the rights of personal security and personal liberty and is derived from the natural law." \textit{Harlow}, 36 Pa D & C at 103-04.
\item \textsuperscript{21} 378 Pa 609, 107 A2d 860 (1954).
\item \textsuperscript{22} \textit{Schnabel}, 107 A2d at 861.
\item \textsuperscript{23} Id at 863. See note 20.
\item \textsuperscript{24} Id.
\end{itemize}
The common law notion of a privacy right rooted in natural law continued in force as essentially the sole means of privacy protection in Pennsylvania throughout the 1950's. A number of decisions, all in actions for tortious invasion of privacy, were rendered without mentioning the state constitution as their basis, apparently because the challenged conduct was engaged in by private parties instead of government officials. 28

It was not until 1955 that the Pennsylvania Supreme Court was presented with the specific question of whether a privacy right existed under the state constitution. In Commonwealth v Chaitt, 26 the defendant appealed his conviction for illegal gambling upon the ground that evidence obtained as a result of wiretapping by police violated his right against unreasonable search and seizure under both the state and federal constitutions. The supreme court majority ruled that the police actions in intercepting Chaitt's telephone conversations did not violate his rights because the federal and state constitutions only protected one's right against unreasonable searches and seizures in material things. 27 However, the underlying view of the Pennsylvania Constitution as a general source of privacy protection was discussed more fully by the dissent of Justice Musmanno.

Justice Musmanno's dissent eloquently noted that had the telephone been invented prior to the state constitutional convention of 1873, he had little doubt that the drafters would have specifically included wiretapping within the ambit of unreasonable searches prohibited by Article I, section 8. 28 Looking beyond the section's language, Musmanno found the invasive conduct of police in intercepting a personal telephone communication to be covered within the principle, if not the letter, of section 8. 29

This reasoning from the Chaitt dissent was reaffirmed by Justice Musmanno eleven years later in his majority opinion in Commonwealth v Murray. 30 In what was apparently the first recognition by a Pennsylvania appellate court majority of a right to privacy

25. See, for example, Hunter v Hunter, 169 Pa Super 498, 83 A2d 401 (1951), addressing an invasion of privacy occasioned by interspousal electronic surveillance. See also Board of School Directors, etc. v Snyder, 346 Pa 103, 29 A2d 34, 39 (1942) (Maxey dissenting), demonstrating the manner in which the court viewed a claim of invasion of privacy by a teacher based on her termination for lifestyle-related reasons.


27. Chaitt, 112 A2d at 382.

28. Id at 385 (Musmanno dissenting).

29. Id. For the text of Article I, section 8, see note 4.

grounded in a specific section of the state’s organic document, the Murray court noted that Article I, section 1 of the Pennsylvania Constitution protects a number of indefeasible rights against state encroachment, including the right to one’s pursuit of happiness.\(^\text{31}\) Comparing the inviolability of privacy to that of tangible property, the court stated that among the pursuits of happiness is privacy, and that “[e]avesdropping which amounts to trespassing is an invasion of privacy protected by the organic law of the land.”\(^\text{32}\)

Since Chaitt and Murray, litigation regarding the state constitutional right to privacy has developed primarily in five sub-areas: search and seizure, electronic surveillance, mandatory Ethics Act disclosures, medical records and the physician-patient privilege, and abortion funding restrictions. While a complete examination of all these subject areas is beyond the scope of this comment, in addressing those issues primarily impacting the rights of criminal defendants, it is hoped that the evolution of the right to privacy, its differing sources, and the policies underlying its interpretation will converge to produce a sense of the direction Pennsylvania appellate courts may take in the future in protecting this right in its various contexts.

II. SEARCH AND SEIZURE

The area most commonly associated with governmental intrusion into privacy is that of searches and seizures conducted by law enforcement officers. As federal courts have eroded protection of Fourth Amendment\(^\text{33}\) rights, for example, by limiting the situations in which the exclusionary rule is mandated, Pennsylvania’s appellate decisions interpreting Article I, section 8 of the state constitution have begun to expand, providing an alternate remedy for victims of searches conducted by officers of the state and its political subdivisions.

The first case to recognize the state constitutional right of privacy in the area of search and seizure was Commonwealth v

\(^{31}\) Murray, 223 A2d at 109. For the text of Article I, section 1, see note 3.

\(^{32}\) Murray, 223 A2d at 109.

\(^{33}\) The Fourth Amendment to the United States Constitution states:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. US Const, Amend IV.
The defendant in *Platou* sought to exclude from evidence marijuana seized from his suitcase, located in a friend's apartment, discovered when police executed a search warrant on the premises. Prior to entering the apartment, police had no knowledge of the presence of either the defendant or his suitcase. The trial court admitted the evidence and Platou was convicted of marijuana possession.

In reversing the conviction, the Pennsylvania Supreme Court held that the evidence should have been suppressed as being seized in violation of the defendant's right to privacy. The majority decision found this right existing when one seeks to preserve his effects as private, even if they are accessible to the public or to others. In so holding, the court relied solely on federal precedent interpreting the Fourth Amendment. However, in footnotes it pointed out that the text of Article I, section 8 of the state constitution differed slightly from that of the Fourth Amendment, and that the case's rationale concerning the federal amendment was equally applicable to the state constitutional provision. Thus, in *Platou* the supreme court embraced the then-extant federal view of privacy protection as defining the scope of the state constitutional right.

This practice of interpreting the state constitutional right of privacy as coterminous with the Fourth Amendment, remained the norm until the landmark decision in *Commonwealth v DeJohn*. *DeJohn* represented the first expression by a Pennsylvania appellate court interpreting Article I, section 8 as a separate and independent source of the right of privacy apart from the federal constitution. The case concerned the admission at defendant's murder trial of motive evidence in the form of information concerning her checking account activity, which had been obtained by police without a warrant. The procurement of such information had been explicitly approved by the United States Supreme Court in *United States v Miller*, which held that such information had sufficient

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36. Id at 34.
37. Id.
38. Id at 34 n 11.
39. Id at 31 n 2.
41. *DeJohn*, 403 A2d at 1291.
public exposure in the ordinary course of writing checks, etc., to make one's expectation of privacy therein unreasonable.  

In terming the Miller holding a "dangerous precedent," the Pennsylvania Supreme Court went on to independently analyze whether the provisions of the state constitution were sufficiently broad to provide protection for such records. The court noted that its freedom to expand the protection against searches and seizures under the state constitution was subject to broader interpretation than that of the Fourth Amendment.

The court first invoked the Platou rule, providing privacy protection for those possessions which one seeks to preserve as private even though they may be accessible to others. The court next proceeded to analyze the reasonableness of one's expectation of privacy in their bank checking account information, rejecting the Supreme Court's Miller holding, and instead embracing in large part the analysis of the California Supreme Court in Burrows v Superior Court of San Bernardino County. In that case, the California high court had interpreted its state constitution as providing greater coverage for the right of privacy than the Fourth Amendment, thereby prohibiting police access to such information without a search warrant. In concluding that the Pennsylvania Constitution's Article I, section 8 likewise provided protection for such records, the DeJohn court reasoned that while checks are exposed to the public for a limited time in the course of their issuance and negotiation, they become one's private information following their exit from commercial circulation. Thus, the account holder's expectation that his records will be private is a reasonable one.

The DeJohn court expressly rejected the Commonwealth's contention that Burrows was distinguishable because the California Constitution specifically refers to privacy. By referring to what they termed the "adequate state ground" upon which Platou rested, the supreme court reiterated the holding that in Pennsylvania the right to be free from unreasonable searches and seizures in

43. Miller, 425 US at 442.
44. DeJohn, 403 A2d at 1289.
45. Id at 1288.
46. Id at 1289.
47. 118 CalRptr 166, 529 P2d 590 (1974).
49. DeJohn, 403 A2d at 1290-91.
50. Id at 1290.
Article I, section 8 is tied into the implicit right to privacy.\textsuperscript{51} The supreme court further expanded the reach of Article I, section 8 to provide automatic standing to persons charged with possessionary offenses in \textit{Commonwealth v Sell}.\textsuperscript{52} Previously, the United States Supreme Court had refused to grant such standing under the Fourth Amendment in \textit{Rakas v Illinois}.\textsuperscript{53} In making its decision, the court in \textit{Sell} rejected the vague "legitimate expectation of privacy" the federal standard in this area of search and seizure, based on its perception that the standard needlessly detracted from the critical element of protecting individuals against unreasonable governmental intrusion.\textsuperscript{54} The logic in \textit{Rakas} was unpersuasive to the Pennsylvania Supreme Court, which held that, on the independent ground of Article I, section 8, a person charged with a possessionary offense has automatic standing to challenge its admission as evidence.\textsuperscript{55}

The greater significance of \textit{Sell} comes from its language concerning the basic substance of the privacy right as forming the background against which search and seizure challenges are to be judged under the state constitution. The court stated that Article I, section 8 had consistently been interpreted by that body as "mandating greater recognition of the need for protection from illegal government conduct offensive to the right of privacy."\textsuperscript{56} The decision reiterated the holding in \textit{Platou} that a person's right is founded on his act of maintaining the privacy of his possessions in such a fashion that such expectation of freedom from intrusion is recognized as reasonable.\textsuperscript{57} By this statement, the \textit{Sell} court completed the transformation of the \textit{Platou} rationale from one originally appearing coterminous with federal precedent, to a clearly adequate and independent state ground for the heightened protection of privacy in the context of search and seizure under the Pennsylvania Constitution.

The rule of \textit{Sell} received qualified application by the Pennsylvania Superior Court in \textit{Commonwealth v Ferretti}.\textsuperscript{58} The defendant in \textit{Ferretti} was in a friend's apartment when police executed a

\begin{itemize}
\item[51.] Id at 1291.
\item[52.] 504 Pa 46, 470 A2d 457 (1983).
\item[53.] 439 US 128 (1978).
\item[54.] \textit{Sell}, 470 A2d at 468.
\item[55.] Id at 468-9.
\item[56.] Id at 468.
\item[57.] Id at 468-9.
\item[58.] 395 Pa Super 629, 577 A2d 1375 (1990).
\end{itemize}
search warrant for the purpose of securing evidence against the apartment’s lessee, for whom an arrest warrant had been issued in connection with a burglary and assault. After arresting the defendant in his friend’s apartment, police executed a search warrant on the premises which uncovered a sawed-off shotgun allegedly used in the crimes.

In an effort to suppress the weapon as evidence, the defendant attempted to challenge the validity of the search warrant on the grounds that it violated his reasonable expectation of privacy. The trial court, holding that the defendant lacked standing to challenge the warrant, denied the suppression motion. On review, the superior court used the occasion to interpret the supreme court’s Sell decision.

Writing for a majority of the panel, Judge Popovich noted that in Sell, the Pennsylvania Supreme Court had only discarded the “legitimate expectation of privacy” test in connection with inquiries into whether automatic standing existed in situations where one was charged with a possessory offense. Its validity had in no way been diminished in other areas concerning privacy law. The court then proceeded to analyze the defendant’s situation vis-a-vis the weapon, in an effort to determine whether he had such an expectation of privacy in the shotgun located in a friend’s apartment. After noting several facts, including that the defendant lacked a history of residing in the apartment, did not possess a key thereto, and kept none of his clothing there, the court concluded that there was an insufficient connection between the defendant and the apartment premises to justify his expectation of privacy therein.

Judge Wieand’s concurring opinion in Ferretti took a different view of the privacy issue and the relevance of Sell. In examining the basis for the right claimed by the defendant, that being his privacy interest in his possessions, the concurring opinion read Sell as reaffirming the language in Commonwealth v Platou that so long as a person seeks to preserve his effects as private, even if accessible to others, they are accorded protection under Article I, section 8 of the Pennsylvania Constitution. Therefore, since the

59. Ferretti, 577 A2d at 1376-77.
60. Id at 1377.
61. Id at 1379-80.
62. Id at 1379.
63. Id at 1380-81.
64. 455 Pa 258, 312 A2d 29 (1973).
65. Ferretti, 577 A2d at 1383-84.
facts indicated that the defendant had been legitimately on the premises for a number of hours prior to the warrant's issuance, combined with the fact that he had an ongoing close relationship with the apartment's lessee, the concurrence would have found that the defendant had a legitimate expectation of privacy in the premises searched.66

These differing views of the implications of *Sell* demonstrate the division which has existed of late among the various Pennsylvania courts and panels which have attempted to interpret the significance of privacy related decisions and the extent of privacy protection. While there appears to be universal agreement that Pennsylvania search and seizure law provides greater protection for individual privacy than is accorded under the Fourth Amendment, differences arise when attempting to practically apply this protection to unique factual situations.

The federalistic judicial philosophy has been reaffirmed in what is the strongest statement to date by the Pennsylvania Supreme Court concerning the state right of privacy. In *Commonwealth v Edmunds*,67 the court was faced with the question of whether, as a matter of state constitutional law, there should be a good faith exception to the operation of the exclusionary rule. The question arose when police searched a shed on the defendant's property pursuant to a search warrant, the issuance of which was later determined to be based upon an incorrect assessment of probable cause by the magistrate. (Under the United States Supreme Court decision in *United States v Leon*,68 evidence seized under such circumstances would be admissible under the Fourth Amendment.)

In addressing this question, the Pennsylvania Supreme Court engaged in a detailed analysis of the history of the Pennsylvania constitutional provision, Article I, section 8, and its relation to the

66. Id at 1383. However, Judge Wieand found the defendant's challenge to the warrant's validity to be without merit, thus concurring with the majority's affirmation of sentence. Id at 1384.


68. 468 US 897 (1984). The Court in *Leon* rationalized that since such evidence was seized in reasonable reliance on a facially valid warrant, the officers in essence did everything that could be expected of them in order to comply with the Fourth Amendment. *Leon*, 468 US at 920-1. Since the exclusionary rule's primary purpose is to deter police misconduct, the Court, finding none in this context refused to apply the rule as a remedy. Id. This essentially leaves the victim of the search powerless to challenge the admission of evidence which had nonetheless been seized from him through the collective efforts of government officials in admitted contravention of his constitutional rights. Id at 932-33 (Brennan dissenting).
Fourth Amendment. This led the court to the conclusion that Article I, section 8 embodied a strong notion of privacy, "carefully safeguarded in this Commonwealth for the past two centuries." In reaching the conclusion that the strength of this right negated the possibility of the admission of any evidence seized as a result of its violation, the court looked to its previous decisions in Platou and DeJohn, as well as those decisions addressing the issue in the context of electronic surveillance. The Edmunds case thus stands as the clearest expression to date in what has been an unbroken chain of Pennsylvania Supreme Court decisions strongly supporting Article I, section 8 of the Pennsylvania Constitution as a bulwark against the admission of evidence seized in violation of the right against unreasonable search and seizure.

Additions and refinements to these basic rules governing the application of the state right of privacy in regard to searches and seizures have arisen in a series of ancillary cases. A survey of these cases reveals that major emphasis is placed on the reasonableness of the privacy expectation claimed. The decisions collectively reveal several types of factors analyzed by Pennsylvania courts in determining reasonableness in the search and seizure context.

One factor appears to be the extent to which the individual seeks to keep his affairs private. Thus, it has been held that the failure to close louvers on a fan, allowing air circulation but also permitting a limited public view of the room's interior from the roof of a nearby building, did not negate the occupant's reasonable

69. Edmunds, 586 A2d at 897. The court noted, inter alia, the fact that Article I, section 8 predated the Fourth Amendment by more than a decade, and that the text of the Pennsylvania provision remained essentially unchanged since its establishment in 1776. Id at 896-97.

70. For an analysis of case law concerning the right of privacy in the context of electronic surveillance, see Section III.

71. An examination of several cases helps to illustrate the parameters of reasonableness in the search and seizure context. In Commonwealth v Cameron, 385 Pa Super 492, 561 A2d 783 (1989), the court found that the defendant lacked a reasonable expectation of privacy in an abandoned house which contained a television, couch, and platter of food. Without foreclosing the possibility that under different circumstances a vacant structure might be considered to be a "dwelling place" within the purview of Article I, section 8, the court found under the facts of the case that such items were insufficient attributes of a home. Cameron, 561 A2d at 788. More significantly, the defendant had no right to enter house and had no right to exclude others. Nevertheless, the court noted, under the decision in Commonwealth v Sell, 504 Pa 46, 470 A2d 457 (1983), he still possessed the right to challenge the constitutionality of the search and seizure of contraband from the abandoned house. Cameron, 561 A2d at 786.

The unexpressed question of whether "reasonableness" is to be viewed objectively or subjectively, however, remains to be answered in future decisions.
expectation of privacy.\textsuperscript{72} Another Pennsylvania court has indicated that the reasonableness of one’s expectation of privacy in the contents of a closed container may be influenced by the appearance of the container. Under what may be characterized as the “rare single-purpose container” rule, if a container is of such a type that its common purpose would admit of only a single use, one has no expectation of privacy in the contents therein because by the container’s very nature its contents can be inferred from their outward appearance.\textsuperscript{73}

The expectation of privacy is also determined to a certain extent by the degree of control exercised over the object of the search. If one possesses premises or an item in common with another, courts have reasoned that each person’s expectation of privacy is less than if he had sole possession or ownership. The test employed in regard to this factor is less clear, however, being in essence a totality of the circumstances test enunciated in a Pennsylvania Supreme Court plurality.\textsuperscript{74} Another consideration in applying the right of privacy is the balancing of interests between those of the individual in maintaining his privacy, and that of society in preventing crime and maintaining order.\textsuperscript{75}

\textsuperscript{72} Commonwealth v Soychak, 221 Pa Super 458, 289 A2d 119 (1972).

\textsuperscript{73} See Commonwealth v Kendrick, 340 Pa Super 563, 490 A2d 923 (1985), wherein a film vial was found to be such a single-purpose container. The court validated a warrantless opening of the vial by police, which revealed narcotics inside, because the vial’s appearance would give rise to the inference that film was inside; therefore, since anyone would know what was inside, no expectation of privacy therein could exist.

\textsuperscript{74} Commonwealth v Latshaw, 481 Pa 298, 392 A2d 1301 (1978), cert denied 441 US 931 (1979).

The manner in which this test has been applied indicates its elasticity under varying circumstances. The court’s plurality in Commonwealth v Wagner, 486 Pa 548, 406 A2d 1026 (1979), held that a defendant, who spent a good deal of time at his fiancee’s home, including nights and weekends, had a reasonable expectation of privacy as to such premises and had standing to challenge lawfulness of search of such premises which resulted in his arrest.

Similarly, in Commonwealth v Rodriguez, 385 Pa Super 1, 559 A2d 947 (1989), the superior court held that a defendant’s act of discarding a key to an abandoned building from which she fled constituted a relinquishment of her interest in the building’s contents, so that she could no longer assert a reasonable expectation of privacy therein. Thus, the defendant lacked standing to challenge a subsequent warrantless search of the building by police, which revealed a large quantity of cocaine. Rodriguez, 559 A2d at 949.

\textsuperscript{75} For example, the court held in Commonwealth v Robinson, 399 Pa Super 199, 582 A2d 14 (1990), that in viewing one’s expectation of privacy in an automobile, the balance struck between passengers’ privacy rights and the safety of police officers investigating stopped vehicles is no different under the Pennsylvania Constitution than under the Fourth Amendment. Accordingly, the actions of police in requiring occupants to alight from the vehicles during traffic stops was held to pass muster under Article I, section 8. Robinson, 582 A2d at 16.

See also the plurality decision in Commonwealth v Tarbert, 517 Pa 277, 535 A2d 1035
In summary, the right of privacy under Article I, section 8 of the state constitution has been interpreted in the context of searches and seizures as providing broader coverage than that of the federal Fourth Amendment. The only significant prerequisite to a valid invocation of the right is that the claimed expectation of privacy must be reasonable. Once this fact is established, the court will then apply a balancing test, weighing the claimed right against any significant public safety or societal interest involved. Generally, in the search and seizure context, the individual's right of privacy is accorded heavy weight and yields only in those instances where either the societal interest is great, or conversely, where that interest is important and the intrusion into individual privacy is minimal. If the claim emerges successfully from this process, then the right of privacy under Article I, section 8 is generally recognized by the Pennsylvania courts.

The importance of raising the state constitutional privacy issue should not be underestimated by counsel challenging the legality of a search or seizure. It would behoove the practitioner faced with a possibly illegal search and seizure by state or municipal law enforcement officers to raise the challenge simultaneously, yet distinctly, under both the Fourth Amendment and Article I, section 8 of the state constitution. Failure to raise the state grounds will result in a determination only on the federal grounds, invoking precedents which of late have not been conducive to the protection of individual privacy. Indeed, a contemporary example of the detrimental failure to raise state constitutional grounds occurred in

(1987), in which the court employed the balancing of the interests test to uphold the use of DUI checkpoints by police under an Article I, section 8 challenge.

Similarly, in Commonwealth v Blouse, Pa, 611 A2d 1177 (1992), the Pennsylvania Supreme Court in a 4-3 decision upheld the constitutionality of systematic, nondiscriminatory, nonarbitrary roadblocks, for the purpose of ensuring safety on highways by disclosing registration, licensing and equipment violations, against an Article I, section 8 privacy challenge. The court conducted a balancing test, finding that the compelling state interest in protecting citizens from harm (i.e., "the mass carnage that results from unlicensed drivers and unsafe vehicles occupying the road") outweighed the individual's privacy interests. Blouse, 611 A2d at 1179.

76. See, for example, National Treasury Employees Union v Von Raab, 489 US 656 (1989), and Skinner v Railway Labor Executives' Assn., 489 US 602 (1989), which upheld the practice of random drug and alcohol tests as reasonable under the Fourth Amendment, even though there was no requirement of a warrant or a reasonable suspicion that any particular employee might be impaired, due to the compelling government interest served by the regulations, which outweighed employees' privacy concerns. See also Florida v Riley, 488 US 445 (1989), which upheld aerial surveillance of a residential area from an altitude of 400 feet, as not constituting a "search" within the meaning of the Fourth Amendment, and thus not implicating personal privacy interests.
Commonwealth v Green.\(^7\) The defendant in Green was a probationer whose parole officer conducted a warrantless search of his bedroom following an arrest for violations of curfew and drug treatment conditions of his parole. While finding the search constitutional under the Fourth Amendment, the court noted in closing that, given the recent expansion of the state right to privacy in Edmunds, the results in Green may have been different had the search been challenged on state constitutional grounds.\(^8\)

III. ELECTRONIC SURVEILLANCE

Another sub-area of state constitutional privacy law, closely related to search and seizure, concerns the legality of electronic surveillance conducted by law enforcement agents. Rooted in the same foundation case of Commonwealth v Murray,\(^7\) the law surrounding constitutional protection for communications electronically transmitted has taken a course demonstrating both similarities and differences to that of conventional search and seizure law.

While Murray established basic constitutional protection for telephone communications under Article I, section 1's indefeasible rights clause, the extent of the coverage for such communications apart from statutory provisions remained an open question until the Pennsylvania Superior Court decision in Commonwealth v Beauford.\(^8\) The court therein was faced with the question of the

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\(^8\) Green, 591 A2d at 1086. Another example of the consequences which can result from the failure to defensively raise the state constitutional right to privacy is evident in Commonwealth v Peterson, 408 Pa Super 22, 596 A2d 172 (1991), the issues of which counsel necessarily formulated prior to the Edmunds decision.

In Peterson the court held that under the Fourth Amendment, if a house used for the sale of illegal drugs was a defendant's "home" and thus he could possess a legitimate expectation of privacy therein, the necessity to obtain a search warrant before entering following a drug sale conducted through a hole in the door was nevertheless obviated due to the existence of exigent circumstances.

While it is uncertain whether a similar result would have been reached under the state constitution, clearly the decision was much more easily realized using federal precedents. Given the Pennsylvania Supreme Court's rejection of the "amorphous legitimate expectation of privacy" standard for analyzing state privacy claims in Sell, 470 A2d at 468, it is likely that a different result would have been reached in Peterson had the state constitutional issue been properly preserved and raised.

Based on the fact that a defendant can only benefit from counsel's raising of a state constitutional privacy claim in cases involving an arguably improper search and seizure, it appears that such failure could constitute grounds for a motion for post-conviction collateral relief claiming that such failure constituted ineffectiveness of counsel.

\(^7\) 423 Pa 37, 223 A2d 102 (1966). For a more complete discussion of this case, see notes 30-32 and accompanying text.

\(^8\) 327 Pa Super 253, 475 A2d 783 (1984).
legality of the warrantless installation of a pen register and dialed number recorder by police.\(^1\)

In the course of their investigation into gambling activities, officers installed such devices on several defendants' telephone lines in an effort to obtain information as to the destination of calls being placed therefrom. After obtaining this information via the pen register, and determining the duration of such calls using a dialed number recorder, police obtained a search warrant for various locations occupied by the defendants. Execution of the warrant resulted in the discovery of gambling paraphernalia and controlled substances. In their suppression motion, defendants alleged that the warrantless use of the pen register and dialed number recorder violated the state constitutional right to privacy. The trial court denied these motions, and all six defendants were found guilty following non-jury trials.\(^2\)

The superior court approached this issue by applying the reasoning from *Beauford*\(^3\) and extending the coverage given checking account information therein to the information obtainable through a pen register. The basis for this decision was the perceived lack of distinction between the privacy interests involved. The judges, failing to find a meaningful difference between check writing and the dialing of telephone numbers, noted that allowing police to indiscriminately attach pen registers would reveal information regarding the intimate and mundane acts of the innocent, as well as the nefarious acts of the guilty.\(^4\) While this information is routinely gathered by the phone company, an individual has a reasonable expectation that it will not be divulged to law enforcement authorities or others.\(^5\) The court also found independent public policy support in Pennsylvania's long history of legislation protecting the privacy interest inherent in a telephone call, including a complete ban on law enforcement wiretapping for most of the twentieth century.\(^6\)

\(^1\) A pen register is a device which records the numbers dialed on a particular phone line, and the time and date of such activity, but does not intercept the audio portion of the communications; a dialed number recorder (or DNR) of the type involved in this case performs a similar function, and also monitors the length of time the targeted telephone is off the hook on outgoing and incoming calls. *Beauford*, 475 A2d at 786.

\(^2\) Id at 785.

\(^3\) 486 Pa 32, 403 A2d 1283 (1979). For a more complete discussion of this case, see notes 40-51 and accompanying text.

\(^4\) *Beauford*, 475 A2d at 789.

\(^5\) Id at 789-90.

\(^6\) Id at 790.
The *Beauford* decision did not mandate a blanket prohibition on the police use of pen registers. While their use is expressly exempted from the anti-wiretapping statute,\(^\text{87}\) the court nevertheless found an individual's expectation of privacy in the numbers he dials to be reasonable, legitimate, and therefore constitutionally protected against government surveillance in the absence of a warrant issued upon probable cause.\(^\text{88}\)

The support of privacy protection for the spoken word began to diminish, however, in *Commonwealth v Harvey*,\(^\text{89}\) a decision purporting to authorize police to engage in participant monitoring.\(^\text{90}\) In *Harvey*, police recorded an in-person conversation between their informant and the defendant during the course of a cocaine transaction. When they attempted to introduce the recording as evidence, the defendant challenged the constitutionality of the practice which was ostensibly permitted by 18 Pa Cons Stat Ann section 5704(2)(ii).\(^\text{91}\) The Pennsylvania Superior Court panel reasoned that since one has no privacy interest in their words once uttered, there could be no reasonable expectation as to the privacy of such words which would render their recordation by police a violation of the right of privacy embodied in Article I, section 8. The decision, while recognizing that the state constitution may afford

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\(^{87}\) At the time of the *Beauford* case, the anti-wiretapping statute read in pertinent part:

> It shall not be unlawful under this chapter for:

- (5) Any investigative or law enforcement officer, or communication common carrier acting at the direction of an investigative or law enforcement officer on in the normal course of its business, to use a pen register.


\(^{88}\) 18 Pa Cons Stat Ann § 5704(5) (Purdon 1983).


\(^{91}\) At the time of the *Harvey* decision, Chapter 57 (Wiretapping and Electronics Surveillance) of the Crimes Code read in pertinent part:

> It shall not be unlawful under this chapter for:

- (2) Any investigative or law enforcement officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire, electronic or oral communication involving suspected criminal activities where:

  - (ii) one of the parties to the communication has given prior consent to such interception.

greater protection against unreasonable searches and seizures than the Fourth Amendment, held that nothing in contemporary state constitutional thought would offer protection against the recordation by law enforcement authorities of a person’s voluntarily made statements.92

As the holdings in Murray and Beauford indicate, the Harvey decision seemed to go against the flow of established precedent. Due to the incongruity of this holding, and its nonexistent state jurisprudential support, it was inevitable that the issue would resurface for consideration. When this occurred three years later in Commonwealth v Schaeffer,93 the issue was considered by the entire superior court en banc.

The facts in Schaeffer, though similar to those in Harvey, involved an additional privacy component because the monitoring took place in the defendant’s home, where one would be expected to enjoy the highest degree of privacy protection. In an exhaustive and well-reasoned opinion the court expressly reversed Harvey, rejecting the distinction between nonconsensual monitoring of conversations and monitoring with the consent of a government informant.94 Referring to electronic eavesdropping through the use of government informers as “manifestly unreasonable,” the Schaeffer court found explicit protection for the spoken word existing under Article I, section 8, preventing the monitoring or recording of an in-person conversation by law enforcement agents without first procuring a warrant based on probable cause.95

The decision capitalized on the distinction between the government’s utilization of an informant as a witness and the greater intrusion posed by the use of electronics monitoring.96 The court clearly distinguished section 8 as providing a greater level of privacy protection in this area than is accorded by the Fourth Amendment.97 After conducting a thorough analysis of Pennsylvania and federal precedent,98 the superior court concluded that the question of whether the Pennsylvania Constitution forbids warrantless participant monitoring was one of determining what pri-

92. Harvey, 502 A2d at 684. In so holding, the court quoted no state court precedents and relied, insofar as the privacy analysis was concerned, exclusively on federal decisions interpreting the Fourth Amendment.
94. Schaeffer, 536 A2d at 360.
95. Id.
96. Id at 368.
97. Id at 359.
98. Id at 362-67.
vacy expectations society was prepared to recognize as reasonable and legitimate. In making its determination, the superior court found little distinction between the police conduct in sending an informant equipped with a transmitting device into a person's home, and the planting of a bugging device therein. Previously, the Pennsylvania Supreme Court had held that what takes place behind the closed doors of one's home enjoys the highest degree of privacy known to our society. Based upon this rule, the Schaeffer court concluded that the expectation of privacy in what one speaks within the confines of his home is a reasonable one and should be protected as a matter of Pennsylvania constitutional law, even though the United States Supreme Court had not seen fit to provide such protection under the Fourth Amendment.

The Schaeffer decision marked the high point of protection for face-to-face verbal communications. When the issue of participant monitoring by government officers finally reached the Pennsylvania Supreme Court for review in Commonwealth v Blystone, the high court expressly adopted the rationale expressed in Harvey, thus deciding to make the federal view the law of Pennsylvania regarding this aspect of the state privacy right. As a result, pursuant to the supreme court's interpretation of 18 Pa Cons Stat Ann section 5704(2)(ii), police are apparently free under Article I, section 8 to conduct warrantless electronic monitoring and recording of oral conversations so long as they first obtain the permission of one of the parties involved (e.g., an informant or participating police officer).

The issue may not, however, be as firmly settled as it seems for several reasons. First, Blystone was a multi-issue capital case involving a particularly callous and gruesome murder. It involved participant monitoring of the defendant which produced a recording of incriminating statements which proved crucial to the conviction. Secondly, the events took place in 1983, years before such tactics were disapproved in Harvey and thus, the officers involved in the Blystone monitoring had no reason to believe that their con-

99. Id at 368.
100. Id.
102. Id at 371.
104. An example of this rule's application can be found in Commonwealth v Brion, 381 Pa Super 83, 552 A2d 1105 (1989), wherein it formed the cornerstone of the brief opinion upholding the admission of evidence gained via warrantless participant monitoring in a drug case. Brion, 552 A2d at 1108.
duct was illegal. Accordingly, without expressly stating so, the supreme court may have been applying a pragmatic form of good faith exception for the police conduct under the specific circumstances of the case, as opposed to limiting privacy protection for the spoken word under the state constitution.

In this regard, it is interesting to note that the Blystone opinion does not mention Schaeffer, even though the case is clearly related. While the Blystone court took only a few paragraphs in a twenty page opinion to superficially reject reasoning similar to that constructed in the scholarly Schaeffer opinion, the extent of permission for police participant monitoring is not yet fully outlined. This view is bolstered by the fact that the participant monitoring in Blystone is distinguishable from that in Schaeffer, as the former surveillance did not occur in the defendant’s residence. As a result, it is entirely possible that the permissible scope of participant monitoring conducted by police within a subject’s residence remains unsettled.

When the supreme court disallowed the warrantless installation of a pen register by police as violative of the privacy rights inherent in Article I, section 8 in Commonwealth v Melilli,\(^\text{105}\) it provided a glimmer of hope that the privacy right was still a viable concept in their view of interpersonal communications. The Melilli decision grew out of a police investigation which employed pen registers, and later court- approved wiretaps, in an effort to gather evidence on corrupt organizations and illegal gambling.\(^\text{106}\) As a result of the information gained from such devices, police obtained search warrants for numerous locations. When executed, these warrants uncovered gambling paraphernalia and controlled substances.

The trial court granted the defendant’s motion to suppress all items of evidence because they were tainted by the improper warrantless use of the pen register. The superior court reversed the suppression order based on their belief that a good faith exception to the exclusionary rule existed.\(^\text{107}\)

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106. Melilli, 555 A2d at 1256.
107. Id at 1254. The good faith exception to the exclusionary rule under the Fourth Amendment originated in United States v Leon, 468 US 897 (1984), and suspends operation of the exclusionary rule where police act in good faith reliance on a facially valid warrant issued by a neutral and detached magistrate, which warrant later proves defective for lack of probable cause.

In Commonwealth v Melilli, 361 Pa Super 429, 522 A2d 1107 (1987), the superior court extended this logic by analogy to cover the warrantless installation of a pen register by
In reviewing the lower court’s action, the Pennsylvania Supreme Court expressly approved the superior court’s holding in Beauford, which prohibited the warrantless installation of pen registers by police.\textsuperscript{108} Recognizing Beauford as the product of a long line of Pennsylvania appellate cases expanding the state privacy right beyond that federally protected, and the integrated nature of telephone activities, the supreme court refused to treat the dialing of telephone numbers differently from other parts of telephonic communication.\textsuperscript{109} Based upon this and other grounds, the superior court decision was reversed and the trial court’s suppression order reinstated.\textsuperscript{110}

The most expressive decision to date concerning the right of privacy against electronic surveillance came in the offensive use of Article I, section 8 in Barasch v Pennsylvania Public Utility Comm’n.\textsuperscript{111} The case involved a challenge to the proposed offer of a technology known as Caller ID to telephone subscribers by Bell Telephone Company of Pennsylvania. The proposed service would be achieved via a digital readout device which would attach to a subscriber’s telephone line and provide the number of the calling party during the first ringing interval.

When Bell initially filed for tariff approval of the service by the Public Utility Commission (PUC), an administrative law judge (ALJ) determined, after conducting hearings, that Caller ID constituted a trap and trace device, the installation and usage of which violated the wiretap statute.\textsuperscript{112} The PUC, however, disregarded the ALJ’s determination and approved use of the service, with limited blocking to be made available for certain domestic violence centers, law enforcement agencies, employees of such orga-
nizations, and persons certified by law enforcement agencies to have a need for blocking of their number from being made available to Caller ID subscribers. Both parties appealed to commonwealth court.

After initially determining that the service constituted an impermissible trap and trace device in violation of the Wiretap Act, the court proceeded to consider the petitioner's contention that the service violated their right to privacy under the federal and state constitutions. Bell countered that such constitutional protections could not be successfully implicated because the offering of the service did not involve the requisite state action.

After analyzing the aggregate of the factors present in the case, the court noted that the action taken by the PUC in approving Bell's request to offer the service constituted state action sufficient to justify application of constitutional prohibitions. The court then proceeded to review the violation of the state right to privacy allegedly presented by the service.

Beginning by noting the supreme court's recognition of the privacy right under Article I, sections 1 and 8 in Denoncourt v State Ethics Comm'n, the Barasch court examined the expansion of

113. Barasch, 576 A2d at 82.
114. Id.
115. Id at 86.
116. Id.
117. Id at 87.
118. 504 Pa 191, 470 A2d 945 (1983). This case presented the supreme court with the question of the constitutionality of that provision in the Ethics Act (Act of October 4, 1978, 1978 Pa Laws 883, §§ 4, 5, and 9, codified at 65 Pa Stat §§ 404, 405, and 409 (Purdon Supp 1992)), imposing criminal penalties upon a candidate for the failure of certain specified immediate family members to make the required financial disclosures. The petitioner had requested review of this provision based on its failure to comport with the due process clause of the federal and state constitutions. However, in the plurality opinion by Justice Flaherty, the court sua sponte also addressed the issue of the infringement on the privacy rights of a public official's family members.

The privacy right initially found to be implicated was that contained in Article I, section 1, and the court looked to the two-pronged method of analysis adopted in the context of medical records privacy by In Re June 1979 Investigating Grand Jury, 490 Pa 143, 415 A2d 73 (1980). Under this view, the privacy right is brought into question if the regulation involves (1) a freedom from disclosure of personal matters or (2) the freedom to make certain important decisions.

Finding that the regulations in question implicated the first of these interests, the supreme court in Denoncourt then applied a balancing test, weighing the individual's right to be free from personal disclosures against the state interest involved. In light of this test, the court found that the petitioners had a constitutionally cognizable privacy interest in the nondisclosure of their personal matters which was of greater strength than the questionable public interest in financial disclosures of an office holder's family.

The rule which appears to be evident from the Denoncourt plurality appears to be that
the right to cover numbers dialed (in addition to the voice component of calls) in Beauford and Melilli. Based upon this line of cases, the commonwealth court expressed little doubt that the privacy right also covered the unauthorized seizure or distribution of one's telephone number.\textsuperscript{119}

Further persuasion that Caller ID threatened an important privacy interest was found by the commonwealth court in the reasoning of Commonwealth v Murray.\textsuperscript{120} The court cited language therefrom observing the long tradition of a jealous regard for personal privacy and the public fear of technological threats to privacy as being on par with the fear of crime.\textsuperscript{121} Therefore, the commonwealth court concluded that “[i]n the framework of a democratic society, the privacy rights concept is much too fundamental to be compromised or abridged by permitting Caller ID.”\textsuperscript{122}

On appeal, the Pennsylvania Supreme Court affirmed the commonwealth court.\textsuperscript{123} Its decision, however, was based solely on the fact that the proposed Caller ID service constituted a trap and trace device, the installation of which violated the provisions of the wiretapping statute.\textsuperscript{124} Since the court was able to base its decision on this non-constitutional ground, it followed the practice of not addressing a constitutional question unless such was required for resolution of an issue.\textsuperscript{125} Thus, the supreme court Barasch decision does not discuss the state right of privacy.

While the final word on Barasch is that of the supreme court opinion, the significance of the commonwealth court’s decision nevertheless lies in several areas. First, it provides a detailed examination of the privacy concept as it relates to emerging issues in telecommunications. As such, it provides a blueprint for future litigators, furnishing the latest example of the manner in which the state privacy right can be effectively argued in an offensive manner in combatting privacy threats posed by modern technological

\textsuperscript{119} Barasch, 576 A2d at 88.
\textsuperscript{120} 423 Pa 37, 223 A2d 102 (1986). For a more complete discussion of this case, see notes 30-32 and accompanying text.
\textsuperscript{121} Barasch, 576 A2d at 89 citing Murray, 223 A2d at 112 (Roberts concurring).
\textsuperscript{122} Barasch, 576 A2d at 89.
\textsuperscript{124} Barasch, 605 A2d at 1203.
\textsuperscript{125} Id at 1201.
intrusions.

Secondly, the commonwealth court opinion illustrates the fine line of state action which must be crossed before constitutional rights become applicable. In Barasch, the supreme court found the requisite state involvement in the Public Utility Commission's approval process statutorily required before telecommunications providers can implement a new service. It is important to note that were such approval not required for a provider to offer a potentially intrusive service such as Caller ID, the state constitution would be inapplicable. Finally, the commonwealth court opinion in Barasch indicates that court's willingness to apply the state constitutional privacy right without equivocation in appropriate cases.

Today, the amount of state constitutional privacy protection afforded citizens in Pennsylvania against government-conducted or approved electronic surveillance appears to be strong. The decisions reveal a generally stricter protection of the right, evidencing less of a balancing of the interests approach than has been applied in the context of search and seizure. Instead, courts have looked almost exclusively to the legitimacy of the claimant's privacy expectation in deciding whether a particular government action is unreasonable. Where one's privacy expectation is considered legitimate, government intrusion via electronic surveillance may not take place absent authorization in the form of a warrant based on probable cause as outlined in the anti-wiretapping statute and Article I, section 8 of the Pennsylvania Constitution.

The ability to offensively invoke state privacy rights has only recently been exercised in regard to electronic surveillance. This may, however, prove to be an area of increased litigation in instances where either government action threatens privacy interests or state government approval is required prior to private implementation of a service which threatens individual privacy.

126. This highlights the significance of the need for government regulation of new forms of telecommunications, as well as private database services which amass information on citizens and make it available to the public. According to the commonwealth court's logic in Barasch, a litigant may only successfully invoke relevant constitutional protections if state government approval must first be secured before such services are offered.

127. In Commonwealth v Hashem, 526 Pa 199, 584 A2d 1378 (1991), the court noted that the state anti-wiretapping statute, being in the nature of a statute in derogation of the Commonwealth's constitutionality protected right of privacy, must be strictly applied. Hashem, 584 A2d at 1381-82. Therefore, a defendant claiming that evidence was obtained in violation of the statute's provisions need not bear the burden of showing how the failure to comply with the statute prejudiced him. Id at 1381.
IV. Practical Applications

An abstract view of case law, while exposing the reader to general principles therein, does not fully attune one to recognize situations where the pertinent rules can be applied. In order to sharpen this ability, it is helpful to consider potential fact patterns which could give rise to colorable claims under the relevant state constitutional sections.

The following paragraphs present hypothetical situations involving potential threats to the right of privacy. Each is followed by an analysis of how the Pennsylvania constitutional right of privacy, as discerned from the above decisions, could possibly be utilized. They are intended to be thought-provoking, and to serve as examples of the types of situations where counsel could raise the state privacy right, either offensively or defensively, alone or in combination with other legal strategies.

A. To What Extent May Video Surveillance Be Conducted in a Public Building?

In an effort to curb drug dealing and usage by its employees, Blue County has installed concealed cameras in various areas throughout the county office building. Several of such cameras have been installed in restrooms, following reports by confidential informants that drug related activities occur there. While using the restroom facilities, Employee E smokes a marijuana cigarette and his activity is recorded by the concealed video equipment. Upon exiting he is confronted by county police who arrest him on charges of possession of a controlled substance in violation of state law. Non-employee N engages in the same conduct and is likewise arrested and charged.

Counsel for both E and N file a motion to suppress the video’s use as evidence at their trials. They do so on the grounds that it was obtained in violation of their client’s right to privacy under Article I, section 8 of the state constitution. Additionally, E files an action to enjoin further video surveillance of the restroom facilities.

The threshold question for the Pennsylvania court would be the determination of whether E and N had a reasonable expectation of privacy in the location where they smoked the marijuana. As both defendants used the marijuana inside the restroom stalls, it is most likely that the court would find that society would recognize an expectation of privacy in that location as reasonable.
Depending upon the court's disposition, however, they could look to other factors, such as the fact that other persons within the confines of the room could see the smoke and recognize the unique odor of burning marijuana. Under this alternate view, the court would not be condoning the installation of cameras in such locations, but rather, would be ruling that the video would not be suppressed as evidence because the illegal conduct which it depicts could reasonably be detected by persons lawfully in other locations within the restroom. Thus, since the defendants' had not taken all precautions against detection of the illegal conduct by others outside their allegedly "private" space, their expectation of privacy in smoking the marijuana inside a restroom stall may not be recognized as reasonable. Therefore, the video would not be suppressed as evidence.

As to E's action seeking an injunction against further video surveillance, the court would most likely recognize the threatened future invasions of E's privacy represented by the practice. From this point, the court would probably analyze the state's interest to determine if it is compelling. Such could be found in the county's interest in maintaining a drug free workforce. If this were found to be a sufficiently strong state interest, the court would then apply the Denoncourt balancing test.\(^\text{128}\)

Determining whether or not the state interest justifies such an intrusion depends, in part, on whether the intrusion will effect its purpose. Obviously, video cameras in a county office building restroom will reveal illegal drug activity there. However, the second component of the Denoncourt test also requires that the government use the least intrusive method available consistent with protection of the public interest. Accordingly, the court could reasonably conclude that other measures could be implemented which would address the public interest involved, and thus, find grounds for enjoining the use of such video surveillance equipment.

The purpose of this hypothetical scenario is to illustrate a situation where the right of privacy may be raised to provide protection against government conduct which reasonable people would find repugnant. In a deeper sense, however, it highlights the role played by judicial decisionmaking in this area and how the exercise of such discretion could result in nonprotection against what on the surface seems to present a clear cut privacy violation.

\(^{128}\) See note 118 and accompanying text for a discussion of the Denoncourt balancing test.
B. Does the Automatic Number Identification (ANI) Feature of 9-1-1 Telephone Systems Violate the State Privacy Right?

The County of Eastmoreland has recently augmented their countywide emergency 9-1-1 telecommunications system with a feature which displays the number of all incoming calls to the 9-1-1 number. This new feature, known as automatic number identification (ANI), was approved by the PUC prior to its being offered by the phone company, on the grounds that it represented an efficient means of preventing abuse of 9-1-1 telephone service. Before this enhancement, the emergency telephone system protected against false alarms and harassing calls with a system which permitted them to "hold," but not display the number of any suspicious call for later determination of its origin in the event of a false emergency call.

Citizen P, a resident of Eastmoreland County, resides in an area where all emergency services are dispatched by the 9-1-1 center. While he desires the benefit of quick emergency dispatching which the center provides, he does not wish to have his unlisted home telephone number revealed to the center's staff. P brings an action requesting an injunction to prevent the invasion of his privacy rights represented by the seizure and disclosure of his telephone number each time he dials 9-1-1.

In addressing P's action, the court would have a difficult time getting around the privacy interest recognized in *Melilli* and *Barasch* as extending to cover one's telephone number. While, strictly speaking, there is no controlling precedent on this point, the observation in both the commonwealth and supreme court *Barasch* majority opinions that such a practice in the Caller ID format represents an illegal trap and trace device as defined in the anti-wiretapping statute, certainly seems to compel the same conclusion when applied to the automatic number identification component of modern 9-1-1 systems.129

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129. In a concurring and dissenting opinion in the commonwealth court *Barasch* decision, Judge Pellegrini expressed the view that Caller ID technology, in the form known as "Enhanced 9-1-1," was permissible. After agreeing with the majority opinion that Caller ID as proposed by Bell violated the anti-wiretapping statute, he opined that the finding relative to the state constitutional right to privacy was unnecessary under the doctrine of judicial restraint. *Barasch*, 576 A2d at 91 (Pellegrini concurring and dissenting).

Pellegrini proceeded to consider, sua sponte, the question of whether Enhanced 9-1-1 service would violate the state constitution. Pellegrini stated in dicta that 18 Pa Cons Stat Ann § 5704(3) (Purdon 1983 & Supp 1992) provided legislative approval for Caller ID type technology in the form of Enhanced 9-1-1. This rationale lacks credence, however, as section 5704(3) only permits the tape recording, under strictly controlled circumstances, of tele-
As highlighted by the first hypothetical, the courts have applied a mode of analysis to privacy claims which involves the determination of the existence of a compelling state interest, followed by a balancing of the interests and inquiry as to the minimum level of intrusiveness required to protect the public interest. This method has not been followed, however, in the context of electronic surveillance. Instead, as illustrated by Murray, Melilli, and the Barasch commonwealth court decision, courts tend toward strict prohibitions against intrusions into telecommunications privacy. As yet, no decisions involving the privacy of electronic communications has engaged in the balancing of interests found in most other privacy contexts, and it appears doubtful that appellate courts will adopt such a method.

Given the recognition of a privacy interest violated by the seizure and disclosure of one's telephone number by the party called, it is difficult to envision how ANI technology, even when used in the context of an emergency telephone system, can comport with individual privacy interests. The impact technology such as ANI can have on personal privacy interests is illustrated by the supposed anonymity enjoyed by persons who report suspected illegal activity to police, a practice encouraged by contemporary anti-drug programs. Most such information is passed on anonymously via the telephone between the citizen and the police dispatch headquarters. In an area like the fictitious Eastmoreland County, citizens such as P have no alternative except to dial 9-1-1 if they desire to make an anonymous report, as the police are all dispatched by centralized 9-1-1 center. With ANI, these reports can never be truly anonymous, as the caller's number is displayed without their consent or knowledge, thereby forcing them to disclose their phone number, and thus other identifying information, each time they make a report to the government. When one considers such an argument in light of the language in the Barasch commonwealth court decision, expressly rejecting such public safety concerns advanced in support of Caller ID, it appears highly...

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phone calls going into and out of police and county emergency communications centers. The basis for this opinion is probably more deeply rooted in the dissent's statement that "[i]n a fast moving technological era, innovation may have benefits to society that in some instances might outweigh an individual's right to privacy." Id at 95. The error of such reasoning is that it presumes overbroadly that rights are relative to the product of increased technology multiplied by societal benefit realized, with no apparent regard for individual protection.
likely that P's challenge to the use of ANI by Eastmoreland County 9-1-1 would succeed.  

III. Conclusion

The strong statements made by Pennsylvania appellate courts indicate the momentum the state constitutional privacy right presently possesses. The impetus for growth undoubtedly flows from a combination of the federal appellate judiciary's conservatism and the growing threat to individual privacy posed by expanding computer technology and new means of accessing personal electronic communications. Given the background presented above, the state privacy right presents an important tool in the hands of litigators to combat modern threats to the right to be left alone.

The availability of an adequate and independent state constitutional source of protection presents the potential for its expansion to cover intrusions into areas of personal life unheard of even ten years ago. The right's fluid nature, lending to interpretation in light of contemporary social principles and perceptions, makes it an especially suitable vehicle to utilize both offensively and defensively against intrusive state conduct.

The right to privacy embodied in Article I of the Pennsylvania Constitution provides a strong and independent source of individual protection in the expanding information age of the 1990's. Given the present conservative majority on the United States Supreme Court, it is unlikely that civil rights advocates can anticipate expansion of the federal Constitution's coverage of this right. Therefore, the protections implicitly found in Article I, sections 1

130. Barasch, 576 A2d at 88 n 6. The commonwealth court majority agreed with the ALJ's conclusion that other services provided by Bell are equipped to reduce harassing and obscene telephone calls without any of the statutory or constitutional violations inherent in Caller ID. Particularly, the court mentioned call tracing as the appropriate response to harassing, annoying, and obscene telephone calls. Id.

131. Failure to offensively invoke the state privacy right can have a negative effect on litigation. In McCusker v WCAB (Rushton Mining Co) Pa Commw , 603 A2d 238 (1992), the commonwealth court upheld the constitutionality of a workers' compensation statute requiring termination of a widower's death benefits if claimant engages in a meretricious relationship. The court found that the provision was rationally related to the legislature's purpose of encouraging marriage and legally recognized family relationships, and thus did not violate her constitutional rights to privacy, due process, or equal protection. The decision, however, was based only on privacy claims under the federal constitution. It is interesting to ponder whether, had the issues been raised under the Pennsylvania Constitution as well, the privacy component would have been decided differently.
and 8, should become an important tool for use by Pennsylvania litigators throughout the decade to come.

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